COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

June 3-4, 2026

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

AGENDA BOOK
June 3-4, 2026

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TAB 1

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

June 3-4, 2026

AGENDA

1. Opening Business

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

- **ACTION:** The Committee will be asked to approve the minutes of the January 2026 Committee meeting.

- **ACTION:** This agenda item asks the Committee to report on strategic initiatives to implement the *Strategic Plan for the Federal Judiciary.*

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

a. Report to Judicial Conference of the United States – March 2026
b. Submission of Final Amendments to the Supreme Court – April 2026
c. Legislative Update

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

2. Joint Committee Business

- Report of the Joint Subcommittee on Attorney Admission – Professor Catherine T. Struve, Consultant to the Standing Committee

- Report on Project on Self-Represented Litigants' E-Filing and Service – Professor Catherine T. Struve, Consultant to the Standing Committee

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

    - Criminal Rule 49 (Serving and Filing Papers), with conforming amendments to Criminal Rule 45(c) (Computing and Extending Time)

    - Civil Rule 5 (Serving and Filing Pleadings and Other Papers); with conforming amendments to Civil Rule 6(d) (Computing and Extending Time; Time for Motion Papers)

    - Bankruptcy Rule 5005 (Filing Papers and Sending Copies to the United States Trustee); Bankruptcy Rule 8011 (Filing and Service; Signature); with conforming amendments to Bankruptcy Rule 9006(f) (Computing and Extending Time; Motions); Bankruptcy Rule 9036 (Electronic Notice and Service)

- Appellate Rule 25 (Filing and Service)

- Report on Privacy Amendments to Redact Full Social Security Numbers and Use Pseudonyms for Minors – Carolyn A. Dubay, Chief Counsel, Rules Committee Staff

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

    - Criminal Rule 49.1 (Privacy Protections for Filings Made with the Court)

    - Civil Rule 5.2 (Privacy Protections for Filings Made with the Court)

    - Bankruptcy Rule 9037 (Protecting Privacy for Filings)

- Approval of 2026 Privacy Report to Congress

  - **ACTION:** The Committee will be asked to approve the 2026 Report on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002 and recommend that the Judicial Conference of the United States approve it and ask the AO Director to transmit it to Congress in accordance with the law.

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

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

- Rule 15 (Review or Enforcement of an Agency Order—How Obtained; Intervention)
- Rules 29 (Brief of an Amicus Curiae)
- Rule 32 (Form of Briefs, Appendices, and Other Papers)
- Appendix of Length Limits

B. Information Items

- Reopening time to appeal under Rule 4 (Appeal as of Right—When Taken)
- Intervention on appeal and the continued consideration of suggestions regarding a possible new rule on intervention
- Consideration of a suggestion related to the treatment of tribes in the Appellate Rules
- Administrative stays and the continued consideration of possible amendments to Rule 8 (Stay or Injunction Pending Appeal)
- Introduction to briefs and the consideration of a suggestion regarding possible amendments to Rule 28 (Briefs)

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

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

- Rule 2002 (Notices)
- Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy)
- Form 106C (Schedule C: The Property You Claim as Exempt (individuals))

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

- Rule 2003 (Meeting of Creditors or Equity Security Holders)

C. Information Items

- Report on Rule 9031 (Using Masters Not Authorized)
- Report on Rule 4004 (Granting or Denying a Discharge)
- Consideration of new suggestion to amend Form 106C (Schedule C: The Property You Claim as Exempt (individuals))
- Deferral of consideration of amendments to Rule 8017 (Brief of an Amicus Curiae)

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

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

- Rule 7.1 (Disclosure Statement)
- Rule 26(a)(3)(A) (Disclosure of Remote Trial Testimony)
- Rule 41(a) (Dismissal Without Prejudice)
- Rule 45(b)(1) (Manner of Service of Subpoena)
- Rule 45(c) (Subpoena for Remote Trial Testimony)
- Rule 81 (Jury Demand After Removal)

B. Information Items

- Report on Rule 43(a) (Remote Trial Testimony)
- Report on third-party litigation funding suggestions
- Report on Rule 23 (Class Actions)—Superiority; "Service" Awards; Pre-Certification Settlement Approval
- Report on right of representative to attend Rule 35 examinations
- Report on Rule 58 "separate document" requirement

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

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

- Rule 17 (Subpoena)

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

- Rule 11 (Pleas)
- Rule 32 (Sentencing and Judgment)

C. Information Items

- Rule 40 (Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District)
- Rule 15 (Depositions)

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

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

- Rule 609 (Impeachment by Evidence of a Criminal Conviction)

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

- Rule 902(1) (Evidence That Is Self-Authenticating) regarding tribal records
- Rule 104 (Preliminary Questions)

C. Information Items

- New Rule 707 to address evidence that is the product of artificial intelligence
- New subsection (c) in Rule 901 (Authenticating or Identifying Evidence) to address deepfake evidence; results of FJC survey
- Rule 703 (Bases of an Expert's Opinion Testimony) and implications of *Smith v. Arizona*

8. Other Committee Business

A. Next Meeting – January 5, 2027 in Washington, DC

TAB 2

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
(Standing Committee)

Chair	Reporter
Honorable James C. Dever III United States District Court Raleigh, NC	Professor Edward Hartnett Seton Hall University School of Law Newark, NJ

Members

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

Consultants

Professor Daniel R. Coquillette Boston College Law School Newton Centre, MA	Professor Bryan A. Garner LawProse, Inc. Dallas, TX
Professor Joseph Kimble Thomas M. Cooley Law School Lansing, MI	Professor Catherine T. Struve University of Pennsylvania Law School Philadelphia, PA

Secretary to the Standing Committee

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

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Members	Position	District/Circuit	Start Date	End Date
James C. Dever III Chair	D	North Carolina (Eastern)	Member: 2025 Chair: 2025	---- 2028
Paul Barbadoro	D	New Hampshire	2023	2028
Todd Blanche*	DOJ	Washington, DC	----	Open
Elizabeth J. Cabraser	ESQ	California	2021	2027
Louis A. Chaiten	ESQ	Ohio	2023	2026
Colm F. Connolly	D	Delaware	2025	2028
Joan N. Ericksen	D	Minnesota	2024	2027
Stephen A. Higginson	C	Fifth Circuit	2024	2027
Edward M. Mansfield	JUST	Iowa	2023	2026
Troy A. McKenzie	ACAD	New York	2021	2027
Andrew J. Pincus	ESQ	Washington, DC	2022	2028
Allison J. Rushing	C	Fourth Circuit	2025	2028
D. Brooks Smith	C	Third Circuit	2022	2028
Bart H. Williams	ESQ	California	2025	2028
Edward Hartnett Reporter	ACAD	New Jersey	2026	2031

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

* *Ex officio*

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

Advisory Committee on Civil Rules

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

Advisory Committee on Criminal Rules

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

Advisory Committee on Evidence Rules

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

RULES COMMITTEE LIAISON MEMBERS

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

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

Carolyn A. Dubay, Esq.
Chief Counsel

Bridget M. Healy, Esq.
Counsel

Sarah A. Sraders, Esq.
Counsel

Shelly Cox
Management Analyst

Rakita Johnson
Administrative Analyst

FEDERAL JUDICIAL CENTER
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Senior Research Associate

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

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

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

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

TAB 3

MINUTES

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

January 6, 2026

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

Judge James C. Dever III, Chair
Judge Paul J. Barbadoro
Elizabeth J. Cabraser, Esq.
Louis A. Chaiten, Esq.
Judge Colm F. Connolly
Judge Joan N. Ericksen
Judge Stephen Higginson
Justice Edward M. Mansfield
Dean Troy A. McKenzie
Andrew J. Pincus, Esq.
Judge Allison J. Rushing (attended remotely)
Elizabeth J. Shapiro, Esq.[1]
Bart H. Williams, Esq.

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

The following individuals attended on behalf of the Advisory Committees:

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

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

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

Advisory Committee on Criminal Rules:
Judge Michael W. Mosman, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

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

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

Other attendees at the meeting included: Bridget M. Healy, Esq., and Sarah A. Sraders, Esq., Rules Committee Staff Counsel; Shelly Cox and Rakita Johnson, Rules Committee Staff; Laurie Spolidoro, Deputy General Counsel, Administrative Office of the U.S. Courts; Judge Robin L. Rosenberg, Director, and Dr. Tim Reagan, Senior Research Associate, Federal Judicial Center (FJC). Chief Judge Michael A. Chagares, on behalf of the Executive Committee of the Judicial Conference, attended remotely.

1. OPENING BUSINESS

A. Welcome and Opening Remarks

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

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

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

B. Discussion and Approval of the Meeting Minutes

After an opportunity for discussion and hearing no comments, upon motion and a second, with no opposition, the Standing Committee approved the minutes of the June 10, 2025 meeting.

C. Comments on 2025 Strategic Plan for the Judiciary

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

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

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

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

D. Status of Rule Amendments

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

E. Legislative Update

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

F. Federal Judicial Center Update

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

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

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

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

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

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

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

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

2. JOINT COMMITTEE BUSINESS

Judge Dever then turned to Joint Committee Business.

A. Electronic Filing by Self-Represented Litigants

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

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

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

Draft

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.

Draft

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

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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. <u>Rule 25(a)(5)(C) and Privacy Considerations</u>

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. <u>Rule 43 and Remote Trial Testimony</u>

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

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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

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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.

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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.

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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.

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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

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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.

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TAB 4

Agenda Item
June 2026
Action

Judiciary Strategic Planning

Issue

Chief Judge Michael A. Chagares, Judiciary Planning Coordinator, has requested information about strategic initiatives that committees are pursuing to implement the Strategic Plan for the Federal Judiciary (Strategic Plan). These initiatives are critical elements of the judiciary's strategic planning approach, aligning high-level strategies and goals from the Strategic Plan into specific efforts with measurable outcomes.

Background

Strategic planning is among the oversight and policy advisory functions of Judicial Conference committees. The Strategic Plan was first approved by the Judicial Conference in September 2010 and has been updated every five years, identifying strategies and goals to address judiciary trends, issues, challenges, and opportunities (JCUS-SEP 2010, pp. 5-6; JCUS-SEP 2015, pp. 5-6; JCUS-SEP 2020, pp. 13-14; JCUS-SEP 2025, p. 5). The Executive Committee facilitates and coordinates planning efforts through its Judiciary Planning Coordinator, Chief Judge Chagares.

Priority Setting

A new Strategic Plan was approved by the Judicial Conference at its September 2025 session (JCUS-SEP 2025, p. 5). The Conference's approach to strategic planning includes priority setting and the integration of the Strategic Plan into the work of its committees (JCUS-SEP 2010, pp. 5-6). Committees provided recommendations to Chief Judge Chagares after their fall and winter 2025-2026 meetings, and in February 2026 the Executive Committee identified three strategies and two goals from the Strategic Plan that focus on conduct and integrity; public outreach and civics education; the effective use of resources; cyber and physical security; and IT modernization:

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

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

Strategy 3.1 Allocate and manage resources more efficiently and effectively.

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

Goal 5.1(b) Continue to build, maintain, and enhance robust and flexible technology systems and applications that anticipate and respond to the judiciary's requirements for efficient communications, recordkeeping, electronic case filing, public access, case management, and administrative support. Modernize the judiciary IT infrastructure and systems.

Discussion

In a March 2026 memo to committee chairs, Chief Judge Chagares requested that these priority strategies and goals be used when setting agendas for future Judicial Conference committee meetings, determining which actions and initiatives to pursue, and when assessing the impact of potential policy recommendations, resource allocation decisions, and cost-containment measures. While many current and planned committee initiatives may align with these priorities, the Executive Committee wanted to emphasize the importance of Goal 2.6(b) and encouraged all committees to align an initiative related to this goal.

Recommendation: That the Committee authorize the Chair, working with the Secretary of the Committee, to respond directly to the Judiciary Planning Coordinator, Chief Judge Michael A. Chagares, to identify any agenda items of the Rules Committees that align with the Executive Committee's priority strategies and goals or with other strategies and goals in the Strategic Plan.

TAB 5

Agenda E-19 (Summary)
Rules
March 2026

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

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

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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

Effective December 1, 2025, unless otherwise noted

Current Step in REA Process:

- Effective December 1, 2025

REA History:

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

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

Effective December 1, 2025, unless otherwise noted

Current Step in REA Process:

- 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

Effective (no earlier than) December 1, 2026

Current Step in REA Process:

- Transmitted to Congress (Apr 2026)

REA History:

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- Published for public comment (Aug 2024 – Feb 2025 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP Form 4	The proposed amendments to Form 4 would simplify Form 4, with the goal of reducing the burden on individuals seeking in forma pauperis status (IFP) while providing the information that courts of appeals need and find useful when deciding whether to grant IFP status.	
BK 1007	The proposed amendments to Rule 1007(c)(4) eliminate the deadlines for filing certificates of completion of a course in personal financial management. The proposed amendments to Rule 1007(h) clarify that a court may require a debtor to file a supplemental schedule to report postpetition property or income that comes into the estate under § 115, 1207, or 1306 of the Bankruptcy Code.	
BK 3018	The proposed amendments to subdivision (c) would allow for more flexibility in how a creditor or equity security holder may indicate acceptance of a plan in a chapter 9 or chapter 11 case.	
BK 5009	The proposed amendments to Rule 5009(b) would provide an additional reminder notice to the debtors that the case may be closed without a discharge if the debtor's certificate of completion of a personal financial management course has not been filed.	
BK 9006	The proposed amendments conform to the proposed amendments to Rule 1007.	
BK 9014	The proposed amendments to Rule 9014(d) relaxes the standard for allowing remote testimony in contested matters to "cause and with appropriate safeguards." The current standard, imported from the trial standard in Civil Rule 43(a), which is applicable across bankruptcy (in both contested matters and adversary proceedings) is cause "in compelling circumstances and with appropriate safeguards."	
BK 9017	The proposed amendments to Rule 9017 removes the reference to Civil Rule 43 leaving the proposed amendment to Rule 9014(d) to govern the standard for 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.	

Effective (no earlier than) December 1, 2026

Current Step in REA Process:

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REA History:

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- 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
EV 801	The proposed amendments to Rule 801(d)(1)(A) would provide that all prior inconsistent statements admissible for impeachment are also admissible as substantive evidence, subject to Rule 403.	

Effective (no earlier than) December 1, 2027

Current Step in REA Process:

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

REA History:

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

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

Effective (no earlier than) December 1, 2027

Current Step in REA Process:

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

REA History:

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

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

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

Ordered by most recent legislative action; most recent first

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Protecting Our Democracy Act	H.R. 8831 *Sponsor*: Raskin (D-MD) *Cosponsors*: 100 Democratic cosponsors	CV – New Rule(s)	**Most Recent Bill Text:** https://www.congress.gov/bill/119th-congress/house-bill/8831/text **Summary:** Companion to S. 2838. 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.	• 5/14/2026: Introduced in House and referred to the Committee on Oversight and Government Reform, the Judiciary, House Administration, the Budget, Transportation and Infrastructure, Rules, Foreign Affairs, Ways and Means, and Intelligence
Closing Bankruptcy Loopholes for Child Predators Act of 2026	**H.R. 8589** *Sponsor:* Ross (D-NC) *Cosponsors*: Tenney (R-NY) Sykes (D-OH) De La Cruz (R-TX)	BR 2004, 9018	**Most Recent Bill Text**: https://www.congress.gov/119/bills/hr8589/BILLS-119hr8589ih.pdf **Summary**: Would amend Rule 2004 to allow for examination of abuse allegations against the debtor in Chapter 11 cases related to the alleged sexual abuse of a child, and amend Rule 9018 to restrict the court's ability to seal evidence of alleged crimes relating to the sexual abuse of a child (other than to protect the individual alleging abuse).	• 4/29/2026: Introduced in House and referred to the House Committee on the Judiciary
No Free Passes for Cronies Act	**H.R. 8392** *Sponsor*: Scanlon (D-PA)	CR 48	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr8392/BILLS-119hr8392ih.pdf **Summary:** Would amend Criminal Rule 48(a) to clarify that federal judges have the authority to accept or reject the government's motion to dismiss in "the interests of justice."	• 4/20/2026: Introduced in House and referred to the House Committee on the Judiciary
Prohibiting Political Prosecutions Act of 2026	**H.R. 7575** *Sponsor*: Goldman (D-NY) *Cosponsors*: Norton (D-DC) Gomez (D-CA) Larson (D-CT)	CR 6, 16, 48	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr7575/BILLS-119hr7575ih.pdf **Summary:** Would amend Criminal Rules 6 (to require the government to inform the grand jury of exculpatory evidence and things that may impact a witness's credibility), 16 (to require the government to inform the defendant of the grand jury vote) and 48 (to allow dismissal based on politically-motivated prosecution).	• 2/13/2026: Introduced in House and referred to Committee on the Judiciary

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Litigation Funding Transparency Act of 2026	**S. 3826** *Sponsor*: Grassley (R-IA) *Cosponsors*: Tillis (R-NC) Kennedy (R-LA) Cornyn (R-TX)	CV 26	**Most Recent Bill Text:** https://www.congress.gov/119/bills/s3826/BILLS-119s3826is.pdf **Summary:** Would require disclosure of third-party funding in MDL, class action, and other large litigations (100+ consolidated or coordinated cases). Disclosure of the identity of the funder and the agreement must be made to the court and the parties. Would also prohibit funders from exerting control over the litigation or viewing materials produced in discovery, unless ordered otherwise by the court.	• 2/11/2026: Read twice and referred to the Committee on the Judiciary
Protecting TPLF From Abuse Act	**H.R. 7015** *Sponsor:* Issa (R-CA) *Cosponsors*: Fitzgerald (R-WI) Baumgartner (R-WA)	CV 26	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr7015/BILLS-119hr7015ih.pdf **Summary:** Would require a party or record of counsel in a civil action to disclose to the court and other parties the identity of any person that has a right to receive a payment or thing of value that is contingent on the outcome of the action or group of actions and to produce to the court and other parties any such agreement.	• 1/12/2026: Introduced in House; referred to Judiciary Committee
Sunshine for Regulatory Decrees and Settlements Act of 2025	**H.R. 6622** *Sponsor*: Cline (R-VA) *Cosponsor*: Tiffany (R-WI)	CV 24, 41	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr6622/BILLS-119hr6622ih.pdf **Summary:** Would impose additional requirements for consent decrees or dismissals pursuant to settlement agreements in agency actions. Would also create additional considerations for the court for motions to intervene in agency actions.	• 1/8/2026: Ordered to be Reported (Amended) • 1/8/2026: Committee Consideration and Mark-up Session Held • 12/11/2025: Introduced in House; referred to Judiciary Committee
Back the Blue Act of 2025	**S. 3366** *Sponsor*: Cornyn (R-TX) *Cosponsors*: 38 Republican cosponsors	§ 2254 Rule 11	**Most Recent Bill Text:** https://www.congress.gov/119/bills/s3366/BILLS-119s3366is.pdf **Summary:** Would amend Rule 11 of the Rules Governing Section 2254 Cases by adding: "Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code."	• 12/4/2025: Introduced in Senate; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Protecting Our Courts from Foreign Manipulation Act of 2025	**H.R. 2675** *Sponsor:* Cline (R-VA) *Cosponsors:* 25 bipartisan cosponsors	CV 26	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr2675/BILLS-119hr2675ih.pdf **Summary:** Would require additional disclosures under Civil Rule 26(a) for any non-party foreign person, foreign state, or sovereign wealth fund that has a right to receive payment that is contingent on the outcome of a civil action. Would also prohibit third-party ligation funding by foreign states and sovereign wealth funds.	• 11/20/2025: Ordered to be Reported (Amended) • 11/20/2025: Committee consideration and mark-up session held • 11/18/2025: Committee consideration and mark-up session held • 4/7/2025: H.R. 2675 introduced in House; referred to Judiciary Committee
Litigation Transparency Act of 2025	**H.R. 1109** *Sponsor:* Issa (R-CA) *Cosponsors:* 27 Republican cosponsors	CV 5, 26	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr1109/BILLS-119hr1109ih.pdf **Summary:** Would require a party or record of counsel in a civil action to disclose to the court and other parties the identity of any person that has a right to receive a payment or thing of value that is contingent on the outcome of the action or group of actions and to produce to the court and other parties any such agreement.	• 11/19/2025: Committee consideration and mark-up session held • 11/18/2025: Committee consideration and mark-up session held • 2/7/2025: H.R. 1109 introduced in House; referred to Judiciary Committee
Protecting Our Courts from Foreign Manipulation Act of 2025	**S. 3180** *Sponsor*: Kennedy (R-LA)	CV 26	**Most Recent Bill Text:** https://www.congress.gov/119/bills/s3180/BILLS-119s3180is.pdf **Summary:** Would require additional disclosures under Civil Rule 26(a) for any non-party foreign person, foreign state, or sovereign wealth fund that has a right to receive payment that is contingent on the outcome of a civil action. Would also prohibit third-party ligation funding by foreign states and sovereign wealth funds.	• 11/18/2025: Introduced in Senate; referred to Judiciary Committee
Protecting Our Democracy Act	**S. 2838** *Sponsor*: Schiff (D-CA) *Cosponsors*: 9 Democratic and Independent cosponsors	CV – New Rule(s)	**Most Recent Bill Text:** https://www.congress.gov/119/bills/s2838/BILLS-119s2838is.pdf **Summary:** Would require the Judicial Conference to create rules of procedure to ensure expeditious treatment of civil actions brought by Congress to enforce compliance with a subpoena.	• 9/17/2025: S. 2838 introduced in Senate; referred to Committee on Homeland Security and Governmental Affairs

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Lawsuit Abuse Reduction Act of 2025	**H.R. 5258** *Sponsor*: Collins (R-GA) *Cosponsors*: 6 Republican cosponsors	CV 11	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr5258/BILLS-119hr5258ih.pdf **Summary:** Would amend Civil Rule 11 to require the court to issue sanctions for Rule 11 violations, which shall consist of an order to pay the amount of the reasonable expenses incurred as a direct result of the violation.	• 9/10/2025: H.R. 5258 introduced in House; referred to Judiciary Committee
Restoring Artistic Protection Act of 2025	**H.R. 4678** *Sponsor*: Johnson (D-GA) *Cosponsors*: 21 Democratic cosponsors	EV 416	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr4678/BILLS-119hr4678ih.pdf **Summary**: Would create a new Evidence Rule (416, Limitation on Admissibility of Defendant's Creative or Artistic Expression) that would make a defendant's creative or artistic expression inadmissible unless the government proves by clear and convincing evidence that one of several exceptions applies.	• 7/23/2025: H.R. 4678 introduced in House; referred to Judiciary Committee
Rape Shield Enhancement Act of 2025	**H.R. 3596** *Sponsor:* Mace (R-SC)	EV 412; CV 26; CR 16	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr3596/BILLS-119hr3596ih.pdf **Summary:** Would require the Judicial Conference to submit to Congress reports reviewing Evidence Rule 412, Civil Rule 26, and Criminal Rule 16. Would also require the Judicial Conference to identify potential rules amendments that further limit the admissibility of or scope of discovery regarding information of an alleged sexual assault victim and that increase privacy protections for sexual assault victims.	• 5/23/2025: H.R. 3596 introduced in House; referred to Judiciary Committee
Supreme Court Ethics, Recusal, and Transparency Act of 2025	**S. 1814** *Sponsor*: Whitehouse (D-RI) *Cosponsors*: 28 Democratic and Independent cosponsors	AP 29	**Most Recent Bill Text:** https://www.congress.gov/119/bills/s1814/BILLS-119s1814is.pdf **Summary:** Would require the Judicial Conference to prescribe rules of procedure requiring certain amicus disclosures and for prohibiting the filing of or striking an amicus brief that would result in the justice, judge, or magistrate judge's disqualification.	• 5/20/2025: S. 1814 introduced in Senate; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Sunshine in the Courtroom Act of 2025	**S. 1133** *Sponsor:* Grassley (R-IA) *Cosponsors:* Klobuchar (D-MN) Durbin (D-IL) Blumenthal (D-CT) Markey (D-MA) Cornyn (R-TX)	CR 53	**Most Recent Bill Text:** https://www.congress.gov/119/bills/s1133/BILLS-119s1133is.pdf **Summary:** Would permit court cases to be photographed, electronically recorded, broadcast, or televised, notwithstanding any other provision of law, after JCUS promulgates guidelines.	• 3/26/2025: Introduced in Senate; referred to Judiciary Committee
Trafficking Survivors Relief Act of 2025	**H.R. 1379** *Sponsor:* Fry (R-SC) *Cosponsors:* 17 bipartisan cosponsors	CR 29	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr1379/BILLS-119hr1379ih.pdf **Summary:** Would permit a person convicted of certain federal offenses as a result of having been a victim of trafficking to move the convicting court to vacate the judgment of conviction, to enter a judgment of acquittal, and to order that references the arrest and criminal proceedings be expunged from official records.	• 2/14/2025: H.R. 1379 introduced in House; referred to Judiciary Committee
Alexandra's Law Act of 2025	**H.R. 780** *Sponsor:* Issa (R-CA) *Cosponsors:* Kiley (R-CA) Obernolte (R-CA)	EV 410	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr780/BILLS-119hr780ih.pdf **Summary:** Would permit a previous nolo contendere plea in a case involving death resulting from the sale of fentanyl to be used as evidence to prove in an 18 U.S.C. § 1111 or § 1112 case that the defendant had knowledge that the substance provided to the decedent contained fentanyl.	• 1/28/2025: H.R. 780 introduced in House; referred to Judiciary and Energy & Commerce Committees
Protect the Gig Economy Act of 2025	**H.R. 100** *Sponsor:* Biggs (R-AZ)	CV 23	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr100/BILLS-119hr100ih.pdf **Summary:** Would add a requirement to Civil Rule 23(a) that a member of a class may sue or be sued as representative parties only if "the claim does not allege the misclassification of employees as independent contractors."	• 1/3/2025: H.R. 100 introduced in House; referred to Judiciary Committee

TAB 6

Federal Judicial Center

Date: May 6, 2026

To: Standing Committee on Rules of Practice and Procedure

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

Re: Federal Judicial Center Research and Education

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

RESEARCH

Completed Research for a Rules Committee

Deepfakes and Authenticity

The Evidence Rules Committee has been exploring whether the authenticity standard should be made more stringent than it is now for potentially fabricated evidence created by artificial intelligence. The committee asked the Center to survey all federal judges to ascertain their experiences and views. The Center reported fifteen occurrences of a deepfake challenge in a memorandum submitted to the committee in time for its spring 2026 meeting.

Current Research for Rules Committees

Discharge in Bankruptcy Rule 4004(a) and (c)

The Bankruptcy Rules Committee is considering a suggestion that the current wording of Bankruptcy Rule 4004(a) and (c) may lead to debtors receiving discharges to which they are not entitled under the statute. The committee asked the Center to develop a research plan to gather information on current interpretation and implementation of the rule.

Third-Party Litigation Funding

The Civil Rules Committee is considering possible rules amendments addressing disclosure of litigation funding by third parties. The Center is providing the committee with research support on this topic in conjunction with its development of a chapter on the topic for an updated *Manual on Complex Litigation*.

Temporary Administrative Stays in the Courts of Appeals

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

Completed Research for Another Judicial Conference Committee

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 the Administration of the Bankruptcy System. The weights were approved by the Judicial Conference in March.

Current Research for Other Judicial Conference Committees

Pro Se Parties in Bankruptcy Litigation

The Center is providing the Committee on the Administration of the Bankruptcy System with research on pro se participation in bankruptcy litigation.

Case Weights for Mega Chapter 11 Case Weights

Following the Center's completed analyses for updating bankruptcy-court case weights, which are used when assessing the need for judgeships, the Committee on the Administration of the Bankruptcy System asked the Center to conduct a follow-up study to determine whether weights for mega Chapter 11 cases should be modified.

Harm to Cooperators

At the request of the Committees on Court Administration and Case Management, Criminal Law, and Defender Services, the Center is updating its 2016 research on harm 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.

JUDICIAL GUIDES

Completed Judicial Guides

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.

Judicial Guides in Preparation

Manual for Complex Litigation

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

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."

EDUCATION

Specialized Workshops

Search and Surveillance Warrants in the Digital Age

This three-day workshop recruited national experts from the technology industry and the legal community—judges, academics, and practitioners—to provide magistrate judges with instruction on the application of evolving Fourth Amendment law to digital search and surveillance warrants.

Antitrust Judicial Law and Economics Institute for Federal Judges

This two-day workshop provided judges with instruction on various antitrust issues, including market definition, market power, competitive effects, horizontal and vertical restraints, and monopoly power.

Distance Education

Court Web

This periodic webcast included as recent episodes "Commemorating the 75th Anniversary of Judge J. Waties Waring's Visionary Dissent in *Briggs v. Elliott*" (featuring District of South Carolina Judge Richard Gergel), "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. A recent workshop for bankruptcy judges included a session on "How the Federal Judicial Center's Research Division Supports the Bankruptcy Courts."

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 7

MEMORANDUM

DATE: May 8, 2026

TO: Judge James C. Dever III
Standing Committee on Rules of Practice and Procedure

FROM: Judge André Birotte Jr.
Andrew Bradt
Catherine T. Struve

RE: Joint Subcommittee on Attorney Admission Report and Recommendation

The Subcommittee on Attorney Admission[1] respectfully submits this report and unanimously recommends that the Standing Committee end the attorney-admission project and disband the Subcommittee. After nearly three years of study, discussion, and outreach, the Subcommittee has concluded that although the project identified real concerns for some attorneys and clients, those concerns do not justify a national rules amendment governing admission to the bars of the federal district courts. The Subcommittee further concludes that the most substantial proposals considered during the project presented practical, legal, and institutional concerns that outweighed their likely benefits. Moreover, numerous members of the various advisory committees raised meaningful issues with proposals that would interfere with the districts' control of bar membership, suggesting insufficient support for these efforts for eventual adoption and a preference for addressing concerns at the district-court level.

This recommendation is not based on a view that no problem exists. To the contrary, both the materials submitted to the rulemaking committees and the Subcommittee's discussions showed that some lawyers – including some public-interest organizations, and at times military spouses and other mobile practitioners – can face meaningful burdens under the current patchwork of district-by-district admission rules. Those burdens can be especially acute in the districts that require membership in the bar of the state in which the district sits, particularly where that state requires even experienced out-of-state attorneys to take the local bar examination. The Subcommittee has taken those concerns seriously throughout the life of the

1 The members of the Attorney-Admission Subcommittee are Judge André Birotte Jr. (Chair; member, Criminal Rules Committee); Thomas G. Bruton (Clerk Representative, Civil Rules Committee); David J. Burman, Esq. (member, Civil Rules Committee); Judge Michelle M. Harner (member, Bankruptcy Rules Committee); Judge M. Hannah Lauck (member, Civil Rules Committee); Chief Judge Leigh Martin May (member, Bankruptcy Rules Committee); and Shazzie Naseem, Esq. (member, Criminal Rules Committee).

project. But the Subcommittee has ultimately concluded that the concerns identified by proponents do not present a sufficiently widespread or clearly remediable problem to warrant national rulemaking in this area.

The report proceeds in three parts. Part I summarizes the suggestions from members of the public that the Subcommittee considered. Part II summarizes the chronology of the Subcommittee's work and the research undertaken in connection with that work. Part III explains the reasons for the Subcommittee's recommendation that the project be terminated.

I. Suggestions considered by the Subcommittee

The project began with the February 2023 submission by Dean Alan Morrison and others of a "Proposal to Adopt a Rule for Unified Bar Admission to All Federal District Courts" ("the Morrison submission").[2] That submission was the catalyst for the formation of the joint subcommittee. Morrison and the other proponents advanced a preferred proposal and two alternatives. Their preferred proposal would have created a national "Bar of the District Court for the United States," administered by the Administrative Office, with membership available based on admission in good standing to the bar of the highest court of any state, the District of Columbia, or a territory; membership in that national bar would authorize practice in all federal district courts and the Administrative Office would administer a disciplinary system for admitted attorneys. The first alternative would have provided reciprocal practice rights across all district courts for any attorney admitted to practice before any one federal district court. The second alternative would have barred district courts from requiring, as a condition of admission to the district-court bar or pro hac vice admission, membership in the bar of the state in which the district court sits or residence in that state.

The Morrison submission rested on two principal contentions. First, it argued that district-court attorney-admission rules vary substantially across the country and unnecessarily burden lawyers who practice in numerous federal districts and their clients. Second, it argued that many restrictive local requirements are obsolete because modern federal practice is largely governed by federal law and federal procedural rules, and practice in multidistrict litigation has demonstrated that complex federal litigation often proceeds without requiring all participating lawyers to be members of the transferee district's bar. The proponents emphasized the burdens created by state-bar-membership requirements in some districts, where admission to the relevant state bar requires taking the state's bar examination. They also pointed to recurring fees, application burdens, and the costs of pro hac vice admission and local counsel.

In December 2023, after the Subcommittee's initial report had been circulated for the Standing Committee's January 2024 meeting, Dean Morrison and Thomas Alvord submitted a comment clarifying that their principal objective was to remove barriers that prevent lawyers admitted in one district from practicing in others. They indicated that they were not wedded to

2 See Suggestion 23-CV-E, available at https://www.uscourts.gov/forms-rules/records-rules-committees/suggestions/alan-morrison-23-cv-e .

centralizing discipline in the Administrative Office and would accept other approaches that alleviated district-to-district barriers. That clarification reinforced the Subcommittee's emerging view that the project, if it were to proceed at all, should focus on narrower possibilities rather than on the creation of a national district-court bar.

Later public submissions generally supported some form of streamlined federal admission but varied in emphasis. In March 2025, the National Women's Law Center (NWLC) submitted a proposal focused primarily on the federal courts of appeals, urging greater uniformity in appellate attorney-admission and appearance rules.[3] In the course of that submission, NWLC also stated its support for standardization in the district courts and identified a related concern: divergent certificate-of-good-standing requirements for pro hac vice applications. That submission was useful in underscoring the burdens that nonuniform federal-court admission practices may impose on organizations with nationwide litigation practices, though its principal requested relief lay outside the district-court project itself.

In April 2025, Thomas Sykes submitted comments supporting elimination of local-state-bar-membership requirements and contending that many such district-court rules are legally suspect.[4] His submission relied heavily on arguments concerning 28 U.S.C. § 1654, Article III, litigants' choice of counsel, and the Supreme Court's decision in *Frazier v. Heebe*, 482 U.S. 641 (1987). Although the Subcommittee did not adopt Mr. Sykes's legal analysis, his submission helped sharpen the authority questions and the critique of rules that tie federal-court admission to local state-bar membership.

In March 2026, the Brady Center and other public-interest organizations submitted a statement supporting a unified federal approach to district-court admission or, at minimum, a reduction in district-based barriers to practice. That submission focused particularly on access-to-justice concerns.[5] It argued that district courts' admission and local-counsel requirements can obstruct emergency litigation and representation by public-interest organizations of nationwide scope, especially in jurisdictions where experienced local counsel are scarce or unavailable for conflicts or financial reasons. The Brady Center submission added force to one of the project's principal themes: that the current system can burden some litigants and organizations in concrete ways. At the same time, the submission did not dispel the Subcommittee's concern that a national rule would provoke significant institutional resistance, might undercut local standards and procedures, and might not deliver the promised practical gains if districts responded to more open district-bar admission by relying more heavily on local-counsel requirements to better ensure sufficient supervision of attorneys in cases before them.

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3 See Suggestion 25-AP-B, available at https://www.uscourts.gov/forms-rules/records-rules-committees/suggestions/national-womens-law-center-25-ap-b .
4 See Suggestion 25-BK-G, available at https://www.uscourts.gov/forms-rules/records-rules-committees/suggestions/thomas-sykes-25-bk-g .
5 See Suggestion 26-CV-7, available at https://www.uscourts.gov/forms-rules/records-rules-committees/suggestions/brady-center-others-26-cv-7 .

Taken together, the public submissions presented a case for considering change. They demonstrated that the issue was not merely theoretical and that a number of sophisticated federal litigators and organizations regarded the current regime as burdensome. They also engendered a robust national conversation that highlights the issue for further consideration on the local level. But the submissions did not persuade the Subcommittee that a national rule would provide a sufficiently tailored, workable, and broadly supported solution.

II. Chronology of the Subcommittee's work and research

The project began in 2023 after the Morrison proposal was docketed before the relevant committees. In May 2023, the joint subcommittee was formed, drawing members from the Bankruptcy, Civil, and Criminal Rules Committees. At the Subcommittee's first meeting in October 2023, the reporters summarized the Morrison proposal, reviewed earlier historical episodes concerning attorney-admission questions, drew attention to Appellate Rule 46 as a possible model, and identified a 2015 District of Maryland study of district-court admission rules as an important factual foundation. The Subcommittee quickly determined that Morrison's most ambitious proposal – the creation of a national "Bar of the District Court for the United States" administered by the Administrative Office – did not warrant further pursuit. Members questioned both the practicality of creating such an apparatus and the wisdom of centralizing discipline for lawyers practicing in trial courts around the country. Concerns included resource demands, the loss of local knowledge necessary for disciplinary decisions, and the likelihood of strong opposition. Discussion therefore turned to narrower possibilities, especially a rule modeled in some respect on Appellate Rule 46 and a rule prohibiting district courts from conditioning admission on membership in the local state bar.

The project was reported to the Standing Committee in January 2024. The Standing Committee discussion was useful in crystallizing the project's central tensions. Members acknowledged that in-state bar-admission requirements can be burdensome and that state-bar membership is not a close proxy for competence. At the same time, they emphasized concerns about district-court control over the quality of practice, client protection, state-law issues in diversity and supplemental-jurisdiction cases, the interaction with attorney discipline, and the potential revenue effects of changes to admission and pro hac vice fees. That discussion did not foreclose the project, but it made clear that any proposal would face significant scrutiny.

The Subcommittee met again in February 2024. By then, local-counsel requirements had emerged as a central issue. Members recognized that even if a national rule loosened district-court admission standards, the practical benefits might be limited if districts responded by broadening or relying more heavily on local-counsel requirements, especially in districts whose local rules and practices may be somewhat particular, such as the "rocket docket" rules of the Eastern District of Virginia. Attorney discipline also remained a concern, particularly how a district court would monitor discipline imposed in multiple outside jurisdictions. The Subcommittee asked for further research from the Federal Judicial Center on fees and local-counsel requirements.

Throughout spring 2024, the project was discussed at the Bankruptcy, Civil, and Criminal Rules Committee meetings. Reactions by committee members were mixed. Some members were sympathetic to reducing barriers to practice, especially for national public interest organizations and military spouses. But several judge members expressed skepticism or outright opposition, stressing the importance of local legal culture, repeat-player accountability, and district-level control over attorney practice. The Civil Rules Committee discussion in particular revealed strong resistance to national rulemaking in this area.

During 2024, the Subcommittee undertook several research efforts. First, Zachary Hawari, then the Rules Law Clerk, prepared a memorandum on the history of 28 U.S.C. § 1654.[6] That memo traced the statute to section 35 of the Judiciary Act of 1789 and concluded that courts and commentators have treated § 1654 as a source of authority for local attorney-admission rules, often in combination with 28 U.S.C. § 2071 and Rule 83. At the same time, the memo did not establish that § 1654 forecloses national rulemaking, and it noted that the materials reviewed did not reveal direct analysis of § 1654 during the adoption of Appellate Rule 46. The memo thus informed the Subcommittee's view that questions of authority were important and unresolved, but not necessarily insuperable.[7]

Second, Tim Reagan of the Federal Judicial Center prepared a report on fees for admission to federal court bars.[8] That report showed that district-court admission fees ranged from $199 to $350, that twenty-five districts charged dues or renewal fees, and that pro hac vice fees ranged from $0 to $550 (with the most common pro hac vice fee being $100 and five districts charging more than $300). The report also described fee practices in the courts of appeals and the costs of obtaining certificates of good standing from state bars. This research gave the Subcommittee concrete information about the financial burdens identified by proponents and about the variability of district practice.

Third, Tim Reagan prepared a report on local-counsel requirements in the federal district courts.[9] That report showed that local-counsel requirements are widespread and highly variable. Fifty districts required local-counsel participation in bar admission at least sometimes; thirteen required association with local counsel even for some members of the district-court bar; fifty-six

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6 28 U.S.C. § 1654 provides: "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

7 This memorandum was published at pp. 145-148 of the agenda book for the Standing Committee's January 7, 2025 meeting, available at https://www.uscourts.gov/sites/default/files/2024-12/2025-01_standing_committee_agenda_book_final_12-19.pdf.

8 See Tim Reagan, Fees for Admission to Federal Court Bars (FJC March 2024), available at https://www.fjc.gov/content/385023/fees-admission-federal-court-bars .

9 See Tim Reagan, Local-Counsel Requirements for Practice in Federal District Courts (FJC April 2024), available at https://www.fjc.gov/content/385779/local-counsel-requirements-practice-federal-district-courts .

required local-counsel participation for pro hac vice appearances; and more than three-quarters of districts imposed some local-counsel requirement in at least some circumstances. These findings became central to the Subcommittee's analysis because they suggested that admissions reform, standing alone, might not materially reduce burdens on out-of-district practice.

Fourth, the Subcommittee investigated Appellate Rule 46. After identifying Rule 46 as a potentially informative model, one of the Subcommittee reporters interviewed Molly Dwyer, Ninth Circuit Clerk and former Clerk Representative to the Appellate Rules Committee, and obtained responses from circuit clerks in ten circuits. The overall picture was that Rule 46 was functioning well in the courts of appeals. Respondents generally reported that attorney misconduct before the courts of appeals is rare and that reciprocal discipline from other jurisdictions is the principal disciplinary mechanism. The responses did not indicate that out-of-circuit attorneys posed distinctive conduct problems. At the same time, many participants in the attorney-admission project continued to question whether appellate practice is a sound comparator for trial-court practice, where a much larger number of attorneys engage in a much broader range of conduct and much of that conduct occurs outside the court's immediate view.

Fifth, the Subcommittee sought the views of state bar counsel. After consultation with Paula Frederick, General Counsel of the Georgia State Bar, an inquiry was posted on the website of the National Organization of Bar Counsel in October 2024. That inquiry specifically asked whether a national rule easing district-court admission requirements might create unauthorized-practice-of-law concerns or other concerns from the perspective of state regulatory authorities. No responses were received. The absence of responses did not resolve the issue, but it did leave the Subcommittee without affirmative input from state bar counsel supporting or opposing a rule change.

As of January 2025, the Subcommittee had accumulated substantial information but had not coalesced around any proposed amendment. The January 2025 Standing Committee discussion pointed toward a possible next-stage research program focused on outreach to chief district judges in selected districts, judges in districts with different admission regimes, and possibly MDL judges and others. The purpose would have been to determine whether the problem identified by proponents was sufficiently serious and whether a workable rule could be fashioned without provoking countervailing changes or institutional resistance.

Ultimately, that research plan was not carried out. Some preliminary work was begun concerning MDLs, but it was not presented to the Subcommittee; and the contemplated judge-to-judge outreach largely did not occur. As the project was reset in early 2026 with a new Subcommittee chair and two new Subcommittee members, and with the discussions at several Standing and Advisory Committee meetings in mind, the reconstituted Subcommittee reassessed whether any of the proposals considered by the Subcommittee had a realistic chance of adoption and concluded that they did not. In light of that conclusion, the Subcommittee decided not to undertake the contemplated additional outreach.

At its February 2026 meeting, after review of the project's history, research, and

committee feedback, the Subcommittee unanimously voted to recommend termination of the project. The discussion reflected broad agreement that, while some attorneys do experience difficulties under the current regime, the problem had not been shown to be sufficiently widespread to justify national rulemaking, and the likely solutions appeared worse than the problem they aimed to solve. Members also stressed that district courts are capable of accommodating special situations through pro hac vice practice, local rule revisions, waivers, and case-specific flexibility.

III. Reasons for recommending termination of the project

The Subcommittee's reasons for recommending termination of the project can be stated straightforwardly.

First, the Subcommittee concluded that the most ambitious proposal considered in the project – the creation of a national district-court bar administered by the Administrative Office – was not a realistic or desirable path. From the earliest stages of the project, that proposal received no meaningful support within the Subcommittee and none within the Standing Committee. Members viewed it as administratively complex, institutionally disruptive, and politically unlikely to succeed. Of particular concern was the proposal's centralized disciplinary apparatus, which would remove decisions about lawyer discipline from courts with direct knowledge of local practice conditions and replace them with a centralized structure lacking the local ties and information that many believed essential to effective oversight.

Second, the narrower proposals also failed to mature into a sufficiently promising rulemaking path. The Subcommittee seriously explored two such approaches: a reciprocal-admission approach under which admission to one federal district court would entitle a lawyer to practice in others, and a prohibition on district-court rules that require local state-bar membership or local residence. Those ideas had more appeal than the national-bar proposal, and some committee members viewed the third Morrison option in particular as the most plausible candidate for further study. But the project never overcame serious concerns that those proposals would undercut district courts' ability to regulate the quality of practice before them, preserve local accountability, and coordinate with local bars and disciplinary systems. Nor did the Subcommittee ever become confident that those proposals would command broad judicial support. To the contrary, as the project progressed, the reaction from many judges remained mixed at best and often distinctly negative.

Third, the Subcommittee concluded that the problem identified by proponents had not been shown to be sufficiently widespread or sufficiently severe to justify national intervention. The materials submitted by proponents and commenters provided concrete examples of burden, and the Subcommittee does not discount them. But the project did not reveal a broader consensus that district-court admission rules are systematically impeding the fair and effective administration of justice. Many judges and committee members took the view that pro hac vice practice, together with case-specific flexibility and local adjustments, ordinarily suffices to address occasional burdens. The Subcommittee did not find enough evidence of pervasive denial

of access or widespread inability to secure representation to justify overriding the concerns of a substantial number of district judges.

Fourth, the Subcommittee became increasingly concerned that a national rule focused solely on admissions might not materially solve the practical problems identified by proponents. The Federal Judicial Center's research showed that local-counsel requirements are widespread and varied. As the Subcommittee's deliberations progressed, members repeatedly noted that if a national rule required more open admissions, some districts might respond by relying more heavily on local-counsel requirements. Because the costs of local counsel can exceed the costs of admission or pro hac vice practice, the resulting regime might provide little real relief to the lawyers and clients whose burdens motivated the project. Yet broadening the project to regulate local-counsel requirements would raise still more difficult questions of authority, institutional acceptability, and local case-management practice. The Subcommittee was not prepared to recommend such an expansion.

Fifth, unresolved legal and institutional questions counseled against proceeding. The Subcommittee's research into § 1654, the Rules Enabling Act, and unauthorized-practice-of-law issues[10] did not establish that national rulemaking in this area would be unlawful. But neither did it yield assurance that a proposed amendment would rest on stable ground or avoid difficult boundary disputes with state regulatory systems. The Subcommittee was especially reluctant to proceed where any national rule might affect the relationship between federal district courts and state bars without a clear showing of strong need and a clearly workable solution.[11]

Sixth, the appellate analogy, while informative, was not ultimately persuasive as a basis

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10 The Subcommittee identified several unresolved questions at the intersection of any national admission rule and state unauthorized-practice regimes. The materials reviewed by the Subcommittee, including Model Rule of Professional Conduct 5.5, Section 3 of the Restatement of the Law Governing Lawyers, and decisions such as *Sperry v. Florida*, 373 U.S. 379 (1963), do not clearly define the extent to which federal authorization to practice before a district court preempts or displaces state unauthorized-practice restrictions. The available authorities also appear to leave uncertain whether protection, if any, turns on such factors as whether the lawyer's work is only temporary, whether the client relationship originated in a state where the lawyer is admitted, whether the lawyer maintains a local office, and whether the lawyer's activities extend beyond work in cases actually pending in federal court. Because state law in this area is fragmented, sometimes dated, and potentially affected by varying statutes, professional-conduct rules, and enforcement practices, the Subcommittee could not confidently assess either the scope of the risk or how a national rule could be drafted to avoid creating new conflicts with state regulatory systems.

11 Participants in discussions of the project periodically reminded the Subcommittee of the prior unsuccessful effort to generate nationwide rules of professional responsibility to govern practice in the federal courts. For discussion of that effort, see generally 30 Daniel R. Coquillette et al., Moore's Federal Practice - Civil § 802.21 (2026); Judith A. McMorrow, The (F)Utility of Rules: Regulating Attorney Conduct in Federal Court Practice, 58 SMU L. Rev. 3 (2005).

for rulemaking. The Subcommittee learned that Appellate Rule 46 appears to function well in the courts of appeals. But many participants reasonably distinguished appellate practice from district-court practice. Trial courts supervise discovery, hearings, emergency motion practice, settlement-related proceedings, and trials – a much broader range of proceedings and activities than in the courts of appeals. The Subcommittee therefore did not regard the successful functioning of Rule 46 in the appellate context as sufficient reason to transplant a similar regime to the district courts.

Finally, by early 2026 the Subcommittee concluded that further work was not warranted. The Subcommittee had already devoted substantial time to historical research, doctrinal inquiry, empirical research, repeated committee discussions, and outreach to knowledgeable stakeholders. It had identified an additional judge-to-judge outreach program that might have provided more information if the project appeared likely to advance. But after the project's reset in 2026, the reconstituted Subcommittee determined that the project did not have a realistic prospect of resulting in an adopted rule amendment. Under those circumstances, the Subcommittee concluded that it would not be a sound use of committee resources to continue the project or to undertake further outreach in the hope of developing a proposal that was unlikely to gain the necessary support.

IV. Conclusion

For the reasons set forth above, the Subcommittee unanimously recommends that the Standing Committee terminate the attorney-admission project and discharge the Subcommittee. The Subcommittee makes that recommendation with appreciation for the seriousness of the concerns raised by the project's proponents and with gratitude to those who contributed research, submissions, and thoughtful commentary over the course of the project. The Subcommittee's recommendation reflects not indifference to the project's concerns, but a judgment – formed after substantial study – that national rulemaking is not the appropriate response. The Subcommittee encourages local courts to consider the benefits of providing flexibility, for example in pro hac vice admissions and waiver of admission requirements. But at the national rulemaking level, the Subcommittee submits that the better course is to end the project rather than to continue pursuing a rule amendment that lacks sufficient support, presents substantial institutional concerns, and has not been shown likely to produce net benefits in practice.

TAB 8

MEMORANDUM

DATE: May 11, 2026

TO: Standing Committee on Rules of Practice and Procedure

FROM: Catherine T. Struve

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

I write to provide an overview of the package of proposed amendments relating to service and electronic filing by self-represented litigants. This package includes proposed amendments to Appellate Rule 25, Bankruptcy Rules 5005, 8011, 9006, and 9036, Civil Rules 5 and 6, and Criminal Rules 45 and 49. I enclose a chart showing how components of the package compare across the rule sets. I also enclose the proposed amendments.

As the Committee knows, this project focuses on two broad topics: (1) increases to electronic access to court by self-represented litigants (whether via the court's electronic-filing system or alternative means) and (2) service (of papers subsequent to the complaint) by self-represented litigants on those who will receive an electronic notice of filing ("notice of case activity") through the court's electronic-filing system or through a court-based electronic-noticing program.

As to service, the proposed amendments would eliminate the requirement of separate (paper) service (of documents after the complaint) on a litigant who receives a notice of case activity through the court's electronic-filing system or a court-based electronic-noticing program. As to filing, the proposed amendments would: (1) presumptively permit self-represented litigants to file electronically (unless a court order or local rule bars them from doing so) and (2) provide that a local rule or general court order that bars self-represented litigants from using the court's electronic-filing system must include reasonable exceptions or must permit the use of another electronic method for filing documents and receiving electronic notice of activity in the case.

A court could comply with the amended filing rule by doing either of the following: (1) allowing reasonable access for self-represented litigants to the court's electronic-filing system; or (2) not allowing self-represented litigants to access the court's electronic-filing system, but providing them with an alternative electronic means for filing (such as by email or upload) and an alternative electronic means for receiving notice of court filings and orders (such as an electronic noticing program). Under the amended filing rule, a court would need to adopt a local

rule or court order disallowing access to the court's electronic-filing system for self-represented litigants if it wanted to foreclose such access; the default would be access. The rule would permit a court to enter an order barring a particular litigant from using the court's electronic-filing system.

Part I of this memo recounts a brief history of the project, including efforts to coordinate the work across the four sets of rules in order to produce a consistent set of provisions. Part II highlights key features of the proposed amendments. Part III discusses the remaining variances across the four sets of proposed amendments, including (in Part III.C) one aspect of the proposed Note language that the Standing Committee may wish to consider standardizing across the rule sets.

I. Brief history of the project

The proposals discussed here grow out of a multi-year, cross-committee study of electronic court access for self-represented litigants and of the service consequences that flow from increasingly electronic court processes. That study began after Judge Bates, then Chair of the Standing Committee, convened a working group composed of reporters, Rules Office attorneys, and Federal Judicial Center researchers to consider pending suggestions relating to electronic filing by self-represented litigants. (The working group would later expand to include the relevant advisory committees' clerk representatives, who worked closely with us to provide real-world expertise and drafting help.) The group first met in December 2021. It was asked not only to consider possible rule amendments, but also to gather information about actual court practices, especially in light of developments after the 2018 electronic-filing amendments and the experience of courts during the COVID-19 pandemic. The 2018 amendments had adopted a general rule requiring represented parties to file electronically, while treating unrepresented litigants differently. Under the current national rules, self-represented litigants generally must file non-electronically unless authorized to file electronically by court order or local rule. The central policy question for the working group was whether developments since 2018 justified moving away from that default approach.

The suggestions that prompted renewed consideration shared a common concern: that the existing rules often left self-represented litigants with less timely, less convenient, and less equal access to the courts than represented litigants. A number of 2020 submissions urged that self-represented litigants be allowed to file electronically for reasons of fairness, safety, disability accommodation, and equal access. Several of those suggestions were spurred by pandemic conditions and stressed the burdens and health risks of requiring paper filing through the mail or in person, as well as the disadvantages self-represented litigants face when they must wait for paper orders while represented litigants receive immediate electronic notice.[1] John Hawkinson pointed to districts that categorically barred non-attorney pro se litigants from even seeking

1 See, e.g., Suggestion 20-CV-J (Dr. Usha Jain), available at https://www.uscourts.gov/forms-rules/records-rules-committees/suggestions/usha-jain-20-cv-j.

electronic-filing privileges and suggested that the rules should discourage such blanket bans, perhaps by indicating that leave should be freely given.[2] Sai advocated reversing the presumption against access and replacing it with nationwide presumptive permission for pro se use of CM/ECF, including for case-initiating filings; treating pro se status as presumptive good cause for nonelectronic filing; forbidding restrictions based solely on pro se or non-attorney status; permitting individualized prohibitions for good cause, such as vexatious conduct; and providing parity with attorney filers as to training and registration, without fees.[3]

From the beginning, committee discussions suggested that the problem was not unitary. The appellate courts appeared to be more receptive to self-represented electronic filing than district courts, and bankruptcy courts presented distinct concerns because of case-initiation effects, signature issues, and the availability of electronic self-representation systems. Meanwhile, another issue surfaced: when a self-represented litigant filed on paper or by another non-CM/ECF method and the clerk's office then uploaded the filing to CM/ECF, should the rules still require that litigant to make separate traditional service on parties who would receive a notice of electronic filing anyway?

The FJC's 2022 study of federal courts' electronic filing practices for pro se litigants provided the project's first broad empirical baseline.[4] That study showed substantial variation across court types and districts. The courts of appeals were the most receptive to CM/ECF access for non-incarcerated self-represented litigants; district courts were much more mixed; and bankruptcy courts rarely gave self-represented debtors CM/ECF access, though a number used electronic self-representation systems. The study also confirmed that "electronic filing" could mean different things: full CM/ECF access, filing by email, and electronic upload portals.[5]

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2 See Suggestion 20-CV-EE (John A. Hawkinson), available at https://www.uscourts.gov/forms-rules/records-rules-committees/suggestions/john-hawkinson-20-cv-ee.

3 See Suggestion 21-CV-J (Sai), available at https://www.uscourts.gov/forms-rules/records-rules-committees/suggestions/sai-21-cv-j.

4 See Tim Reagan, Carly Giffin, and Roy Germano, Federal Courts' Electronic Filing by Pro Se Litigants (FJC 2022), available at https://www.fjc.gov/content/368499/federal-courts-electronic-filing-pro-se-litigants.

An additional FJC study on filing times underscored one practical consequence of electronic access: because clerk's offices are open only during limited daytime hours, while electronic filing ordinarily remains available until midnight, represented litigants are often able to file after counter hours; indeed, the study found that nearly one third of district-court responses were filed after 5:00 p.m. See Tim Reagan et al., Electronic Filing Times in Federal Courts 4 (FJC 2022), available at https://www.fjc.gov/content/365889/electronic-filing-times-federal-courts.

5 An FJC study of local rules, published in 2025, confirmed that local practice in the district courts remains varied: "more than two thirds of the federal district courts permit self-represented litigants to use the court's electronic filing system at least on a case-by-case basis," while 29

The advisory committees' discussions in fall 2022 and early 2023 brought the project into sharper focus. Across the committees, members raised a number of concerns: the difficulty of case initiation in CM/ECF, the possibility of inappropriate filings, burdens on clerks' offices, training needs, cybersecurity, privacy and sealing issues, and the special problems posed by prisoner and bankruptcy litigation. At the same time, many participants emphasized the benefits of broader electronic access: fewer paper filings, reduced mailing burdens, more timely receipt of court orders and notices, and fewer disputes about what had been filed and when. The Bankruptcy Rules Committee showed substantial sympathy for the project's access-to-courts rationale but also voiced concerns about screening, signatures, and bankruptcy matters that featured multiple unrepresented litigants. In the Civil Rules Committee discussions, some skepticism was voiced about whether some aspects of the matter were better handled through technology and administration rather than rules. The Appellate Rules Committee appeared relatively open to broader access, reflecting existing appellate practice. And the Criminal Rules Committee, while seeing less urgency in expanding filing access because of the small number of nonincarcerated self-represented criminal litigants, showed real interest in the service issue because it could affect incarcerated litigants and § 2255 movants who otherwise would spend time and limited funds sending paper copies to recipients already receiving electronic notice.

To test the service issue and the practical consequences of broader access, Dr. Tim Reagan and I conducted follow-up interviews in spring 2023 with court personnel from districts that had eliminated redundant service requirements (some of which had also broadened electronic access).[6] Interviewees from districts that exempted self-represented paper filers from separately serving CM/ECF participants reported that the practice worked well and imposed no additional burden on clerks' offices. The interviews also suggested that courts providing CM/ECF access or other electronic pathways to self-represented litigants generally viewed those programs positively, citing reduced paper handling, easier service of court orders, and creation of a reliable electronic record. Although questions remained about sealed filings, staffing, training, and the rare case involving multiple self-represented litigants, the interviews materially strengthened the case for a service amendment and narrowed the factual uncertainties surrounding increased access.

By 2023 and 2024, work focused on the two subjects now reflected in the current

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districts "generally prohibit" such use; the study also found continued use in a number of courts of alternatives such as email filing, online portals, and electronic-noticing programs. See Tim Reagan, United States District Courts' Local Rules and Procedures on Electronic Filing by Self-Represented Litigants 1 (FJC 2025), available at https://www.fjc.gov/content/391989/united-states-district-courts-local-rules-and-procedures-electronic-filing-self.

6 See September 18, 2023 memorandum concerning spring 2023 district-court interviews, included starting at page 264 of the Civil Rules Committee's fall 2023 agenda book, available at https://www.uscourts.gov/sites/default/files/2023-10_civil_rules_committee_meeting_agenda_book_11-6_final_0.pdf.

proposals. The first concerns filing: whether the rules should presumptively permit self-represented litigants to file electronically, subject to court order or local rule, and whether courts that generally bar use of the court's electronic-filing system should be required either to make reasonable exceptions or to provide another electronic means for filing and receiving notice. The second concerns service: whether the rules should eliminate the requirement that a self-represented litigant separately serve papers filed after the complaint on persons who will receive a notice of filing through the court's electronic-filing system or a court-based electronic-noticing program. In fall 2024, the committees reviewed a tentative sketch of a possible amendment to Civil Rule 5 that embodied those two policy choices.

The Bankruptcy Rules Committee's position changed significantly over the course of the project. Although bankruptcy participants were initially sympathetic to the project's access-to-courts rationale, by late 2024 and early 2025 the Committee appeared likely to decline participation because of concerns about case initiation, signatures and verification, burdens on clerk's offices, inappropriate filings, and the possibility of multiple self-represented participants who might not know whom they still had to serve by paper. In April 2025, however, rather than definitively opting out, the Committee referred the matter to its Technology, Privacy, and Public Access Subcommittee for further study. In summer 2025, that Subcommittee concluded that the Committee should join the project at least through publication, both to preserve consistency with the other rules sets and to obtain the benefit of public comment. The Committee voted in September 2025 to participate on that basis. At the same time, some Bankruptcy Rules Committee members continued to express reservations and indicated that they viewed publication as a way to gather further information; depending on the comments received, they might oppose final adoption after publication.

By early spring 2026 the working-group participants had fashioned the coordinated set of proposed amendments. Prior to the Advisory Committee meetings, the Style Consultants to the Standing Committee provided a thorough and helpful review of the package of proposed amendments.

II. Key features of the proposals

The proposed amendments address two related topics: electronic filing by self-represented litigants and service of papers after the complaint on persons who receive electronic notice through the court's filing system or a court-based electronic-noticing program. Across the affected rules, the proposals would move the national rules away from a presumption against electronic access for self-represented litigants and toward a presumption in favor of such access, while preserving courts' authority to impose reasonable limits. At the same time, the proposals would eliminate redundant paper service when the court's system will generate a notice of case activity to the recipient.

As to filing, the central change is that self-represented litigants would be presumptively allowed to 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 provides otherwise. Under the current rules, the default runs in the opposite direction: a self-represented litigant may file electronically only if a court order or local rule allows it. The proposed amendments would reverse that presumption in Appellate Rule 25, Bankruptcy Rules 5005 and 8011, Civil Rule 5, and Criminal Rule 49. In the Appellate, Bankruptcy, and Civil Rules, the proposals would retain the existing authority to require electronic filing by an unrepresented litigant by case-specific order or by local rule with reasonable exceptions. The Criminal Rules proposal differs slightly in wording because Criminal Rule 49 currently does not authorize requiring all self-represented parties to file electronically, but the proposal likewise would allow self-represented parties to use the system unless restricted by order or local rule.

The proposals do not create an unlimited right of electronic access. Each set of amendments would expressly authorize courts to impose reasonable conditions and restrictions on access. The Committee Notes give examples such as limiting access to nonincarcerated litigants, requiring training or certifications, restricting certain categories of filings, or denying or revoking access for a particular litigant. But the proposals would also place a new national limit on blanket local bans: a court could not bar all self-represented litigants from using the court's electronic-filing system unless the prohibition either includes reasonable exceptions or is paired with another electronic method for filing papers (such as email filing or an upload portal) and receiving notice (such as a court-based noticing program). In that respect, the proposals seek not only to expand access to CM/ECF itself, but also to ensure that courts maintaining more restrictive CM/ECF regimes still provide some meaningful electronic path for filing and notice.

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As to service, the proposals would eliminate the need for separate paper service of post-complaint filings on persons who will receive a notice of case activity through the court's electronic-filing system. This change applies in Appellate Rule 25, Bankruptcy Rules 8011 and 9036, Civil Rule 5, and Criminal Rule 49. The basic idea is straightforward: when a self-represented litigant files a paper document or uses another non-CM/ECF method, court staff ordinarily upload that filing into the electronic docket. Once that occurs, the court's system generates an electronic notice to registered recipients. The proposals would treat that notice of case activity as service, so the filer need not also serve those same recipients separately on paper. This extends to self-represented non-electronic filers the same practical benefit already enjoyed when a registered user serves another registered user through the electronic-filing system.

The service provisions are also reorganized to reflect the modern primacy of service through the court's electronic system. In each rules set, service by a notice of case activity is addressed first, and the proposals add a common definition of "notice of case activity" broad enough to include "notice of electronic filing," "notice of docket activity," and similar future terminology. The proposals preserve other service methods as alternatives, including (variously) other consented-to electronic means, personal delivery, mail, and commercial carrier. This is important because a filer may still wish to serve by another permissible means before the clerk's office uploads a non-electronic filing and the system generates the notice.

The proposals also address when service by notice of case activity is complete. For purposes of deadlines to make service, service by the notice of case activity would be treated as complete on the date of filing. But for deadlines that run from the date of service, service by the notice of case activity would be treated as complete on the date of the notice of case activity. That distinction is meant to protect the recipient in the event there is a lag between the time the filing is received by the court and the time it is uploaded into the electronic system. The proposals likewise carry forward the current principle that electronic service is not effective if the filer learns that it did not reach the intended recipient. They also allow courts, by order or local rule, to require other means of service for sealed filings; the appellate proposal additionally allows a local requirement of other-means service for certain case-initiating proceedings in the court of appeals.

Finally, the package includes a few conforming amendments. Civil Rule 5 and Criminal Rule 49 are revised so that no certificate of service is required when service occurs through the court's electronic-filing system under the amended provisions. Civil Rule 6, Criminal Rule 45, and Bankruptcy Rule 9006 are amended to conform cross-references governing the extra three days added after certain kinds of service.

III. Remaining variances

The enclosed comparison chart shows the text of the proposed Rules across the different Rule sets. As is customary for joint committee projects, the participants strove to maintain parallel treatment across the four rule sets. As is also not unusual, there do remain some aspects of the proposals as to which the committees' approaches diverge. The remainder of this memo focuses on explaining those divergences.

A. Self-represented litigant ("SRL") provisions generally: "unrepresented" versus "self-represented"

The Bankruptcy, Civil, and Appellate Rules proposals use the term "unrepresented" to describe self-represented litigants, whereas the Criminal Rule uses "self-represented." Though the latter term 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). Notably, the proposed amendments to Criminal Rule 17 presented for final approval in this agenda book use the term "self-represented."

This variance seems justified.

B. SRL e-filing: Self-represented "parties" or self-represented "individuals"

Three of the four rule sets would extend the new e-filing default approach only to self-represented "parties," but the Bankruptcy Rules proposal would extend it to self-represented "individuals." The reason for the difference has to do with concerns that may balance out differently in the bankruptcy context.

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 self-represented litigant e-filing provisions proposed for the Civil, Criminal, and Appellate Rules refer to access for unrepresented "*parties*." This is a shift from the current Civil and Appellate Rules (which refer to an unrepresented "person"), though it carries forward current Criminal Rule 49's reference to a self-represented "party." The reason for the shift is that the amended provision flips the default presumption from one of non-access to one of access to the court's electronic-filing system. Once the presumption is inverted to say that self-represented litigants may e-file *unless* barred by order or local rule, it seems advisable to change "person" to "party" so that lay people who are not parties to the case do not cite the rule as granting *them* access.[7] In the Criminal Rules context, there is an additional reason to use "party" – that is, because that is the term used in current Criminal Rule 49. Criminal Rule 49(b)(3)(B) deals only with electronic filing by a "party not represented by an attorney." Meanwhile, Criminal Rule 49(c) provides: "A nonparty may serve and file a paper only if doing so is required or permitted by law. A nonparty must serve every party as required by Rule 49(a), but may use the court's electronic-filing system only if allowed by court order or local rule."

The self-represented litigant e-filing provisions proposed for Bankruptcy Rules 5005 and 8011 refer to access for unrepresented "*individuals*." Current Rules 5005 and 8011 also use the term "individual." The Bankruptcy Rules Committee 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, the Bankruptcy Rules Committee determined that the Bankruptcy Rules should continue to use "individual," which is the term those rules use to refer to a human being.

As Professor Gibson succinctly put it, the choice between "party" and "individual" depends on a judgment call about "which is more likely (or more harmful): [1] having someone read 'unrepresented party' to mean any party (whether a real person or not) can appear without an attorney, or [2] having someone read 'unrepresented individual' to mean you don't need to be connected to a case to file a paper in it." The Bankruptcy Rules Committee's decision to use

7 We have heard from participants that, from the clerk's perspective, it's important that the rule draw that boundary.

"individual" may be justified by features specific to bankruptcy practice – that is, the number of artificial entities (e.g., small creditors) that may participate in a bankruptcy proceeding and might wish to appear without a lawyer. Meanwhile, 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 Bankruptcy Rules Committee's concern may not be as salient for the other three sets of rules.

Accordingly, this variance seems justifiable.

C. SRL e-filing: Note language on requiring court permission to use e-filing system

As presented in the Advisory Committee agenda books, the Committee Notes to the proposed electronic-filing provisions included a bracketed sentence concerning the permissibility of a local provision requiring unrepresented parties to obtain court permission to use the court's e-filing system. This language was included in the draft based on a suggestion from a member of the Criminal Rules Committee.

The bracketed statement – as shown in the Civil, Bankruptcy, and Criminal agenda books[8] – read: "[For example, local provisions that require unrepresented parties who seek to use the court's electronic-filing system to obtain permission from the judge to whom the case is assigned would count as including reasonable exceptions, so long as such permission is not unreasonably withheld in practice.]"

Although the Civil and Bankruptcy Rules Committees voted to approve the draft for publication with this sentence included in the relevant Committee Notes, the sentence drew attention and a good deal of skeptical comment, particularly in the Civil Rules Committee discussion. On one hand, including this language would recognize existing practices in more than half of the federal courts of appeals and district courts[9] and would give clerks' offices something to point to when applying a requirement that a self-represented litigant seek court permission in order to use the court's electronic-filing system. On the other hand, because it would be challenging for an unrepresented party to demonstrate that a court unreasonably withholds permission in practice, participants expressed concern that this Note language might seem to bless local provisions that effectively deny e-filing to unrepresented parties in general.

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8 The relevant sentence in the Note to Appellate Rule 25 as set out in the Appellate Rules Committee's agenda book was similar but not identical.

9 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").

During the Appellate Rules Committee meeting, a member proposed revised language – which the Appellate Rules Committee adopted – that accounts for the concerns of both participants who favored the original bracketed language and participants who were concerned by that original language. The revised language adopted by the Appellate Rules Committee reads: "A local provision requiring unrepresented parties to obtain the court's permission in order to use the court's electronic-filing system would count as including reasonable exceptions, so long as such permission is granted or withheld in accordance with the reasonable conditions and restrictions on access set by the court." (The concluding phrase refers back to the 'reasonable conditions and restrictions' that are discussed earlier in the Committee Note.) The hope is that with this change, the Note language validates the practices of courts that wish to build in a requirement of court permission, while avoiding the risk that the Note would seem to bless the practice of a court where standardless discretion to withhold permission results in effective denial of access in practice.

Because the Appellate Rules Committee met after the Civil and Bankruptcy Rules Committees, those two committees did not have the opportunity to consider the Appellate Rules Committee's revised language. The Criminal Rules Committee met last. Though some support was voiced for the Note language as set forth in the Criminal Rules Committee's agenda book, the Committee ultimately voted to adopt language paralleling the Appellate Committee Note. As adopted by the Criminal Rules Committee, the relevant sentence in the Criminal Rule 49 Committee Note reads: "For example, local provisions that require self-represented parties who seek to use the court's electronic-filing system to obtain the court's permission would count as including reasonable exceptions, so long as such permission is granted or withheld in accordance with the reasonable conditions and restrictions on access set by the court."

I recommend that the Standing Committee consider adopting similar language for the Committee Notes to Civil Rule 5(d)(2)(B), Bankruptcy Rule 5005(a)(3)(B), and Bankruptcy Rule 8011(a)(2)(C). That proposed language is shown as a bracketed alternative in those Committee Notes, following the bracketed sentence that originally appeared in the Civil and Bankruptcy Rules Committees' agenda books.

D. 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.

This variance seems justified.

E. SRL e-filing: requirements to file electronically

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. As the 2018 Committee Note to Criminal Rule 49 explains,

> [Rule 49](b)(3)(B) requires unrepresented parties to file nonelectronically, unless allowed to file electronically by court order or local rule. This language differs from that of the amended Civil Rule, which provides that an unrepresented party may be "required" to file electronically by a court order or local rule that allows reasonable exceptions. A different approach to electronic filing by unrepresented parties is needed in criminal cases, where electronic filing by pro se prisoners presents significant challenges. Pro se parties filing papers under the criminal rules generally lack the means to e-file or receive electronic confirmations, yet must be provided access to the courts under the Constitution.

This variance has already been determined to be justified.

F. E-filing and signatures

Currently, all five relevant rules contain (with immaterial variations) the following provision, added in 2018: "A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature." See, e.g., Civil Rule 5(d)(3)(C).

The Bankruptcy Rules Committee 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 that it does not make sense to refer to an artificial entity as having its own electronic-filing account and engaging in the act of signing. 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.

Approving the Bankruptcy Rules Committee's proposal to amend their signature provisions to use "individual" does not seem to me to provide a reason to require the other three Advisory Committees to similarly amend their signature provisions.

G. "Documents" versus "papers"

The choice between referring to "documents" or to "papers" is not substantive. But it is a considered choice.

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.

SRL provision comparison chart, April 30, 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
E-filing general rule:	***E-filing general rule:***	***E-filing general rule:***	***E-filing general rule:***	***E-filing general rule:***
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.

E-filing SRL default rule:	*E-filing SRL default rule:*	*E-filing SRL default rule:*	*E-filing SRL default rule:*	*E-filing SRL default rule:*
Bankruptcy Rule 5005(a)(3)(B)(i): **(B) By an Unrepresented Individual—When Allowed or Required.** **(i) In General.** An unrepresented individual may use the court's electronic-filing system to file papers and receive notice of activity in the case, unless a court order or local rule prohibits the individual from doing so. An unrepresented individual may be required to file electronically only by order in a case or by a local rule that includes reasonable exceptions.	Bankruptcy Rule 8011(a)(2)(C)(i): **(C) Electronic Filing By an Unrepresented Individual—When Allowed or Required.** **(i) In General.** An unrepresented individual may use the court's electronic-filing system to file documents and receive notice of activity in the case, unless a court order or local rule prohibits the individual from doing so. An unrepresented individual may be required to file electronically only by order in a case or by a local rule that includes reasonable exceptions.	FRAP 25(a)(2)(C)(i): **(C) Electronic Filing by an Unrepresented Party--When Allowed or Required.** **(i) In General.** An unrepresented party may use the court's electronic-filing system to file papers and receive notice of activity in the party's case, unless a court order or local rule prohibits the party from doing so. An unrepresented person may be required to file electronically only by order in a case or by a local rule that includes reasonable exceptions.	Civil Rule 5(d)(2)(B)(i): **(B) By an Unrepresented Party—When Allowed or Required.** **(i) In General.** An unrepresented party may use the court's electronic-filing system to file papers and receive notice of activity in the party's case, unless a court order or local rule prohibits the party from doing so. An unrepresented person may be required to file electronically only by order in a case or by a local rule that includes reasonable exceptions.	Criminal Rule 49(b)(2)(B)(i): **(B) By a Self-Represented Party – When Allowed.** **(i) In General.** A self-represented party may use the court's electronic-filing system to file papers and receive notice of activity in the party's case, unless a court order or local rule prohibits the party from doing so.

E-filing SRL conditions:	*E-filing SRL conditions:*	*E-filing SRL conditions:*	*E-filing SRL conditions:*	*E-filing SRL conditions:*
Bankruptcy Rule 5005(a)(3)(B)(ii): **(ii) Conditions and Restrictions on Access.** A court may set and enforce reasonable conditions and restrictions on unrepresented individuals' access to the court's electronic-filing system (including by denying or revoking access for a particular unrepresented individual). But the court may not prohibit all unrepresented individuals from using the system unless that prohibition includes reasonable exceptions or the court permits the use of another electronic method for filing papers and receiving electronic notice of activity in the case.	Bankruptcy Rule 8011(a)(2)(C)(ii): **(ii) Conditions and Restrictions on Access.** A court may set and enforce reasonable conditions and restrictions on unrepresented individuals' access to the court's electronic-filing system (including by denying or revoking access for a particular unrepresented individual). But the court may not prohibit all unrepresented individuals from using the system unless that prohibition includes reasonable exceptions or the court permits the use of another electronic method for filing documents and receiving electronic notice of activity in the case.	FRAP 25(a)(2)(C)(ii): **(ii) Conditions and Restrictions on Access.** A court may set and enforce reasonable conditions and restrictions on unrepresented parties' access to the court's electronic-filing system (including by denying or revoking access for a particular unrepresented party). But the court may not prohibit all unrepresented parties from using the system unless that prohibition includes reasonable exceptions or the court permits the use of another electronic method for filing papers and receiving electronic notice of activity in the party's case.	Civil Rule 5(d)(2)(B)(ii): **(ii) Conditions and Restrictions on Access.** A court may set and enforce reasonable conditions and restrictions on unrepresented parties' access to the court's electronic-filing system (including by denying or revoking access for a particular unrepresented party). But the court may not prohibit all unrepresented parties from using the system unless that prohibition includes reasonable exceptions or the court permits the use of another electronic method for filing papers and receiving electronic notice of activity in the party's case.	Criminal Rule 49(b)(2)(B)(ii): **(ii) Conditions and Restrictions on Access.** A court may set and enforce reasonable conditions and restrictions on self-represented parties' access to the court's electronic-filing system (including by denying or revoking access for a particular self-represented party). But the court may not prohibit all self-represented parties from using the system unless that prohibition includes reasonable exceptions or the court permits the use of another electronic method for filing papers and receiving electronic notice of activity in the party's case.

E-filing & signature:	***E-filing & signature:***	***E-filing & signature:***	***E-filing & signature:***	***E-filing & signature:***
Bankruptcy Rule 5005(a)(3)(C): **(C) Signing.** A filing made through an individual's electronic-filing account and authorized by that individual, together with the individual's name on a signature block, constitutes the individual's signature.	Bankruptcy Rule 8011(e): **(e) Signature Always Required.** **(1) Electronic Filing.** Every document filed electronically must include the electronic signature of the individual filing it or, if an entity is represented, the counsel's electronic signature. A filing made through an individual's electronic-filing account and authorized by that individual—together with that individual's name on a signature block—constitutes the individual's signature. **(2) Paper Filing.** Every document filed in paper form must be signed by the individual filing it or, if an entity is represented, by the entity's counsel.	FRAP 25(a)(2)(D): **(D) Signing.** A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.	Civil Rule 5(d)(2)(C): **(C) Signing.** A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.	Criminal Rule 49(b)(2)(D): **(D) Signature.** A filing made through a person's electronic-filing account and authorized by that person, together with the person's name on a signature block, constitutes the person's signature.

Service required:	***Service required:***	***Service required:***	***Service required:***	***Service required:***
[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.]	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.	*[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."]*	*[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."]*

Service by NCA:	***Service by NCA:***	***Service by NCA:***	***Service by NCA:***	***Service by NCA:***
Rule 9036(c)(1): **(c) Notices from and Service by an Entity. (1) Notice of Case Activity Sent Through the Court's Electronic-Filing System.** A notice of case activity sent to an entity registered to receive it through the court's electronic-filing system constitutes notice or service on that entity, with these qualifications: (A) such notice or service is not effective if the filer learns that it did not reach the entity to be notified or served; and (B) a court may provide by order or local rule that if a document is filed under seal, neither service nor notice occurs under this paragraph (c)(1).	Rule 8011(c)(1): **(c) Manner of Service. (1) Service by a Notice of Case Activity Sent Through the Court's Electronic-Filing System.** A notice of case activity sent to an entity registered to receive it through the court's electronic-filing system constitutes service on that entity, with these qualifications: (A) such service is not effective if the filer learns that it did not reach the entity to be served; and (B) a court may provide by order or local rule that if a document is filed under seal, it must be served by other means.	FRAP 25(c)(1): **(c) Manner of Service. (1) Service by a Notice of Case Activity Sent Through the Court's Electronic-Filing System.** A notice of case activity sent to a person registered to receive it through the court's electronic-filing system constitutes service on that person, with these qualifications: (A) such service is not effective if the filer learns that it did not reach the person to be served; and (B) a court may provide by order or local rule that if a paper is filed under seal or initiates a proceeding in the court of appeals under Rule 5, 6(c), 15, or 21, it must be served by other means.	Civil Rule 5(b)(2): **(b) Service: How Made**.... **(2) Service by a Notice of Case Activity Sent Through the Court's Electronic-Filing System.** A notice of case activity sent to a person registered to receive it through the court's electronic-filing system constitutes service on that person. For any service deadlines, service by a notice of case activity is complete as of the date of filing. For any deadlines that run from the date of service, service by a notice of case activity is complete as of the notice's date. But these qualifications apply: (A) such service is not effective if the filer learns that it did not reach the person to be served; and (B) a court may provide by order or local rule that if a paper is filed under seal, it must be served by other means.	Criminal Rule 49(a)(3): **(3) Service by a Notice of Case Activity Sent Through the Court's Electronic-Filing System.** A notice of case activity sent to a person registered to receive it through the court's electronic-filing system constitutes service on that person. For any service deadlines, service by a notice of case activity is complete as of the date of filing. For any deadlines that run from the date of service, service by a notice of case activity is complete as of the notice's date. But these qualifications apply: (A) such service is not effective if the filer learns that it did not reach the person to be served; and (B) a court may provide by order or local rule that if a paper is filed under seal, it must be served by other means.

Service / other electronic means:	***Service / other means:***	***Service / other means:***	***Service / other means:***	***Service / other means:***
[*NB: Rule 9036 focuses on electronic notice & service, so its "other means" provision focuses only on other electronic means.]* Rule 9036(c)(2): **(2) Electronic Means Consented To.** An entity may also send notice or serve a document by electronic means that the recipient consented to in writing, including by designating an electronic address for receiving notices. But such notice or service is not effective if the sender learns that it did not reach the entity to be notified or served.	Rule 8011(c)(2): **(2) Service by Other Means.** A document may also be served under this rule by: (A) personal delivery; (B) mail; (C) third-party commercial carrier for delivery within 3 days; or (D) electronic means that the entity served has consented to in writing, but such electronic service is not effective if the sender learns that it did not reach the entity to be served.	FRAP 25(c)(2): **(2) Service by Other Means.** A paper may also be served under this rule by: (A) personal delivery, including delivery to a responsible person at the office of counsel; (B) mail; (C) third-party commercial carrier for delivery within 3 days; or (D) sending it by electronic means that the person to be served has consented to in writing, but such electronic service is not effective if the sender learns that it did not reach the person to be served.	Civil Rule 5(b)(3): **(3) Service by Other Means.** A paper may also be served under this rule by: (A) handing it to the person; (B) leaving it: (i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or (ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there; (C) mailing it to the person's last known address—in which event service is complete upon mailing; (D) leaving it with the court clerk if the person has no known address;	Criminal Rule 49(a)(4): **(4) Service by Other Means.** A paper may also be served by: (A) handing it to the person; (B) leaving it: (i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or (ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there; (C) mailing it to the person's last known address – in which event service is complete upon mailing; (D) leaving it with the court clerk if the person has no known address;

			(E) sending it by electronic means that the person has consented to in writing—in which event service is complete upon sending, but is not effective if the sender learns that it did not reach the person to be served; or (F) delivering it by any other means that the person has consented to in writing—in which event service is complete when the person making service delivers it to the agency designated to make delivery.	(E) sending it by electronic means that the person has consented to in writing – in which event service is complete upon sending, but is not effective if the sender learns that it did not reach the person to be served; or (F) delivering it by any other means that the person has consented to in writing—in which event service is complete when the person making service delivers it to the agency designated to make delivery.

Service / completeness:	***Service / completeness:***	***Service / completeness:***	***Service / completeness:***	***Service / completeness:***
Rule 9036(d): **(d) When Notice or Service Is Complete; Keeping an Address Current.** **(1) Notice of Case Activity Sent Through the Court's Electronic-Filing System.** For any notice or service deadlines, notice or service by a notice of case activity is complete as of the date of filing. For any deadlines that run from the date of notice or service, notice or service by a notice of case activity is complete as of the date of the notice of case activity. **(2) Other Electronic Means.** Electronic notice or service by other electronic means is complete upon sending.	Rule 8011(c)(3): **(3) When Service Is Complete.** **(A) For Service by a Notice of Case Activity.** For any service deadlines, service by a notice of case activity is complete as of the date of filing. For any deadlines that run from the date of service, service by a notice of case activity is complete as of the notice's date. **(B) For Service by Other Electronic Means.** Service by other electronic means is complete on sending. **(C) For Service by Mail or Commercial Carrier.** Service by mail or by third-party commercial carrier is complete on mailing or delivery to the carrier.	FRAP 25(c)(4): **(4) When Service Is Complete.** **(A) For Service by Mail or Commercial Carrier.** Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. **(B) For Service by a Notice of Case Activity.** For any service deadlines, service by a notice of case activity is complete as of the date of filing. For any deadlines that run from the date of service, service by a notice of case activity is complete as of the notice's date. **(C) For Service by Other Electronic Means.** Service by other electronic means is complete on sending.	*[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).]* 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.	*[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).]* 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.

NCA defined:	***NCA defined:***	***NCA defined:***	***NCA defined:***	***NCA defined:***
Rule 9036(c)(3): **(3) Definition of "Notice of Case Activity."** The term "notice of case activity" includes a notice of docket activity, a notice of electronic filing, and any other similar electronic notice provided to case participants through the court's electronic-filing system to inform them of activity on the docket.	Rule 8011(c)(4): **(4) Definition of "Notice of Case Activity."** The term "notice of case activity" includes a notice of docket activity, a notice of electronic filing, and any other similar electronic notice provided to case participants through the court's electronic-filing system to inform them of activity on the docket.	FRAP 25(c)(5): **(5) Definition of "Notice of Case Activity."** The term "notice of case activity" includes a notice of docket activity, a notice of electronic filing, and any other similar electronic notice provided to case participants through the court's electronic-filing system to inform them of activity on the docket.	Civil Rule 5(b)(4): **(4) Definition of "Notice of Case Activity."** The term "notice of case activity" includes a notice of docket activity, a notice of electronic filing, and any other similar electronic notice provided to case participants through the court's electronic-filing system to inform them of activity on the docket.	Crim Rule 49(a)(5): **(5) Definition of "Notice of Case Activity."** The term "notice of case activity" includes a notice of docket activity, a notice of electronic filing, and any other similar electronic notice provided to case participants through the court's electronic-filing system to inform them of activity on the docket.

Certificate of service:	***Certificate of service:***	***Certificate of service:***	***Certificate of service:***	***Certificate of service:***
[NB: Rule 5005 doesn't discuss service, and while Rule 9036 addresses service, it does not address proof of service.]	*[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."]*	*[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.]*	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.

Proposed amendments to Criminal Rules 45 and 49 as approved by the Criminal Rules Committee for publication:

Rule 49. Serving and Filing Papers

(a) Service on a Party.

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

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

(3) Service by ~~Electronic Means~~ a Notice of Case Activity Sent Through the Court's Electronic-Filing System. A notice of case activity sent to a person registered to receive it through the court's electronic-filing system constitutes service on that person. 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.

~~**(A) Using the Court's Electronic-Filing System.** A party represented by an~~

~~attorney may serve a paper on a registered user by filing it with the court's electronic filing system. A party not represented by an attorney may do so only if allowed by court order or local rule. Service is complete upon filing, but is not effective if the serving party learns that it did not reach the person to be served.~~

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

(4) Service by ~~Nonelectronic~~ 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; ~~or~~

(E) sending it by electronic means that the person has consented to in writing – in which event service is complete upon sending, but is not effective if the

sender learns that it did not reach the person to be served; or

~~(E)~~ (F) delivering it by any other means that the person has consented to in writing—in which event service is complete when the person making service delivers it to the agency designated to make delivery.

(5) 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.

(b) Filing.

(1) When Required; Certificate of Service. Any paper that is required to be served must be filed no later than a reasonable time after service. No certificate of service is required when a paper is served ~~by filing it with the court's electronic-filing system~~ through the court's electronic-filing system under Rule 49(a)(3). When a paper is served by other means, a certificate of service must be filed with it or within a reasonable time after service or filing.

(2) ~~Means of~~ Electronic Filing and Signing.

(A) By a 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.

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

(i) In General. A self-represented party may use the court's electronic-

filing system to file papers and receive notice of activity in the party's case, unless a court order or local rule prohibits the party from doing so.

(ii) Conditions and Restrictions on Access. A court may set and enforce reasonable conditions and restrictions on self-represented parties' access to the court's electronic-filing system (including by denying or revoking access for a particular self-represented party). But the court may not prohibit all self-represented parties from using the system unless that prohibition includes reasonable exceptions or the court permits the use of another electronic method for filing papers and receiving electronic notice of activity in the party's case.

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

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

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

~~**(B)**~~ **(3) Nonelectronically~~** **Filing.** A paper not filed electronically is filed by delivering it:

(i) to the clerk; or

(ii) to a judge who agrees to accept it for filing, and who must then note

the filing date on the paper and promptly send it to the clerk.

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

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

~~**(B) Unrepresented Party.** A party not represented by an attorney must file nonelectronically, unless allowed to file electronically by court order or local rule.~~

(4) Signature. Every written motion and other paper must be signed by at least one attorney of record in the attorney's name—or by a person filing a paper if the person is not represented by an attorney. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or person's attention.

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

(c) Service and Filing by Nonparties. A nonparty may serve and file a paper only if doing so is required or permitted by law. A nonparty must serve every party as required by Rule 49(a), but may use the court's electronic-filing system only if allowed by court order or local rule.

(d) Notice of a Court Order. When the court issues an order on any post-arraignment motion,

the clerk must serve notice of the entry on each party as required by Rule 49(a). A party also may serve notice of the entry by the same means. Except as Federal Rule of Appellate Procedure 4(b) provides otherwise, the clerk's failure to give notice does not affect the time to appeal, or relieve—or authorize the court to relieve—a party's failure to appeal within the allowed time.

Committee Note

Rule 49 is amended to address two topics concerning self-represented parties. (Concurrent amendments are made to Bankruptcy Rules 5005, 8011, and 9036, Civil Rule 5, and Appellate Rule 25.) Rule 49(a) is amended to address service of documents filed by a self-represented litigant in paper form. Because all such paper filings are uploaded by court staff into the court's electronic-filing system, there is no need to require separate paper service by the filer on case participants who receive an electronic notice of the filing from the court's electronic-filing system. Rule 49(b) is amended to expand the availability of electronic modes by which self-represented parties can file documents with the court and receive notice of filings that others make in the case.

Subdivision (a)(3). Rule 49(a)(3) is revised so that it focuses solely on the service of notice by means of the court's electronic-filing system. What had been Rule 49(a)(3)(B) (concerning "other electronic means" of service) is relocated, as revised, to a new Rule 49(a)(4)(E).

Amended Rule 49(a)(3) eliminates the requirement of separate (paper) service on a litigant who is registered to receive a notice of case activity from the court's electronic-filing system. Litigants who are registered to receive a notice of case activity include those litigants who are participating in the court's electronic-filing system with respect to the case in question and also include those litigants who receive the notice because they have registered for a court-based electronic-noticing program. (Former Rule 49(a)(3)(A)'s provision for service by "on a registered user by filing [the paper] with the court's electronic-filing system" had already eliminated the requirement of paper service on registered users of the court's electronic-filing system by other registered users of the system; the amendment extends this exemption from paper service to those who file by a means other than through the court's electronic-filing system.)

Amended Rule 49(a)(3) provides that, for purposes of any deadlines for making service, service by a notice of case activity is complete as of the date of filing. But the amended rule provides that, for purposes of any deadlines that run from the date of service, service is complete as of the date of the notice of case activity. Thus, the amended rule ensures that if there is a delay between the date the court receives a filing not made through the electronic-filing system and the

date the court uploads that filing into the electronic-filing system, that delay will not diminish the time allowed to the party whose deadline runs from the date of service.

Amended Rule 49(a)(3)(A) continues to provide that service by means of the court's electronic-filing system is not effective if the filer learns that it did not reach the person to be served.

New Rule 49(a)(3)(B) states that a court may provide by order or local rule that if a paper is filed under seal, it must be served by other means. This sentence is designed to account for districts in which parties in the case cannot access other participants' sealed filings via the court's electronic-filing system.

Subdivision (a)(4). Rule 49(a)(4) is retitled "Service by Other Means" to reflect the relocation into that subdivision – as new Rule 49(a)(4)(E) – of what was previously Rule 49(a)(3)(B). The subdivision's introductory phrase ("A paper may be served by") is amended to read "A paper may also be served by." This locution ensures that Rule 49(a)(4) remains an option for serving any litigant, even one who receives notices of case activity. This option might be useful to litigants who will be filing non-electronically but who wish to effect service on their opponents before the time when the court will have uploaded the filing into the court's system (thus generating the notice of case activity).

Subdivision (a)(4)(E) carries forward – for service by other electronic means –prior Rule 49(a)(3)(B)'s provision that such service is not effective if the sender "learns that it did not reach the person to be served"; a similar provision is carried forward in subdivision (a)(3)(A) with respect to service via the court's electronic-filing system.

Subdivision (a)(5). New Rule 49(a)(5) defines the term "notice of case activity" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket. There are two equivalent terms currently in use: Notice of Electronic Filing and Notice of Docket Activity. "Notice of case activity" is intended to encompass both of those terms, as well as any equivalent terms that may come into use in future. The word "electronic" is deleted as superfluous now that electronic filing is the default method.

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

Subdivision (b)(2). Amended Rule 49(b)(2) governs electronic filing and signing. New Rules 49(b)(2)(A) and (B) replace what had been Rule 49(b)(3). Under new Rule 49(b)(2)(B)(i), the presumption is the opposite of the presumption set by the prior Rule 49(b)(3)(B). That is, under new Rule 49(b)(2)(B)(i), self-represented parties are presumptively authorized to use the court's electronic-filing system to file documents in their case subsequent to the case's

commencement. If a district wishes to restrict self-represented parties' access to the court's electronic-filing system, it must adopt an order or local rule to impose that restriction. New Rule 49(b)(2)(B)(i) grants this presumptive authorization to a self-represented '*party*,' not to a self-represented '*person*.' There is no change to Rule 49(c), which provides that nonparties may not use the court's e-filing system unless allowed by court order or local rule.

New Rule 49(b)(2)(B)(ii) states that the court may set reasonable conditions and restrictions on access by self-represented parties to the court's electronic-filing system. For example, access to electronic filing could be allowed only to self-represented parties who are not incarcerated (in light of the distinctive logistical considerations that apply in carceral settings), who satisfactorily complete required training and/or certifications, and who comply with any other reasonable conditions on access.

New Rule 49(b)(2)(B)(ii) expressly states that a reasonable restriction would include, where appropriate, orders barring a specific self-represented party from accessing the court's electronic-filing system, or revoking a specific self-represented party's access to the court's electronic-filing system. Another example would be a local provision stating that certain types of filings – for example, notices of appeal – cannot be filed by means of the court's electronic-filing system.

However, new Rule 49(b)(2)(B)(ii) also expressly prohibits a court from barring *all* self-represented parties from using the court's electronic-filing system, unless the court also either (1) includes reasonable exceptions to the prohibition, or (2) permits self-represented parties to use another electronic method for filing documents (such as by email or by upload through an electronic document submission system) and an alternative electronic means for receiving notice of court filings and orders (such as an electronic noticing program). For example, local provisions that require self-represented parties who seek to use the court's electronic-filing system to obtain the court's permission would count as including reasonable exceptions, so long as such permission is granted or withheld in accordance with the reasonable conditions and restrictions on access set by the court.

Subdivision (b)(3). What had been Rule 49(b)(2)(B) (concerning nonelectronic means of filing) is carried forward as new Rule 49(b)(3).

Rule 45. Computing and Extending Time

* * *

(c) Additional Time After Certain Kinds of Service. Whenever a party must or may act within a specified time after being served and service is made under Rule 49(a)(4)(C), (D), and

~~(E)~~ (F), 3 days are added after the period would otherwise expire under subdivision (a).

Committee Note

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

Proposed amendments to Civil Rules 5 and 6 as approved by Civil Rules Committee for publication:

Rule 5. Serving and Filing Pleadings and Other Papers

(a) Service: When Required.

(1) In General. Unless these rules provide otherwise, each of the following papers must be served on every party:

(A) an order stating that service is required;

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

(C) a discovery paper required to be served on a party, unless the court orders otherwise;

(D) a written motion, except one that may be heard ex parte; and

(E) a written notice, appearance, demand, or offer of judgment, or any similar paper.

* * *

(b) Service: How Made.

(1) Serving an Attorney. If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) Service by a Notice of Case Activity Sent Through the Court's Electronic-Filing System. A notice of case activity sent to a person registered to receive it through the court's electronic-filing system constitutes service on that person. For any service deadlines, service by a notice of case activity is complete as of the date of filing. For any deadlines that run from the date of service, service by a notice of

case activity is complete as of the notice's date. But these qualifications apply:

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

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

(3) Service by Other Means ~~in General.~~ A paper ~~is~~ may also be served under this rule by:

(A) handing it to the person;

(B) leaving it:

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

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

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

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

(E) ~~sending it to a registered user by filing it with the court's electronic filing system or~~ sending it by ~~other~~ electronic means that the person has consented to in writing—in ~~either of~~ which event~~s~~ service is complete upon ~~filing or~~ sending, but is not effective if the ~~filer or~~ sender learns that it did not reach the person to be served; or

(F) delivering it by any other means that the person has consented to in writing—in which event service is complete when the person making service delivers it to the agency designated to make delivery.

~~(3) Using Court Facilities.~~ ~~[Abrogated (Apr. 26, 2018, eff. Dec. 1, 2018.]~~ **(4) 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.

* * *

(d) Filing.

(1) Required Filings; Certificate of Service.

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

(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)~~by filing it with the court's electronic-filing system~~. When a paper that is required to be served is served by other means:

(i) if ~~the paper~~ it is filed, a certificate of service must be filed with it or within a reasonable time after service; and

(ii) if ~~the paper~~ it is not filed, a certificate of service need not be filed, unless filing is required by court order or by local rule.

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

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

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

~~(3)~~ Electronic Filing and Signing.

(A) By a ~~Represented~~ Person Represented by Counsel—Generally Required; Exceptions. A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

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

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

(ii) **Conditions and Restrictions on Access.** A court may set and enforce

reasonable conditions and restrictions on unrepresented parties' access to the court's electronic-filing system (including by denying or revoking access for a particular unrepresented party). But the court may not prohibit all unrepresented parties from using the system unless that prohibition includes reasonable exceptions or the court permits the use of another electronic method for filing papers and receiving electronic notice of activity in the party's case.

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

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

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

(A) to the clerk; or

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

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

Committee Note

Rule 5 is amended to address two topics concerning unrepresented parties. (Concurrent amendments are made to Bankruptcy Rules 5005, 8011, and 9036, Criminal Rule 49, and Appellate Rule 25.) Rule 5(b) is amended to address service of documents (subsequent to the complaint) filed by an unrepresented litigant in paper form. Because all such paper filings are

uploaded by court staff into the court's electronic-filing system, there is no need to require separate paper service by the filer on case participants who receive an electronic notice of the filing from the court's electronic-filing system. Rule 5(b)'s treatment of service is also reorganized to reflect the primacy of service by means of the electronic notice. Rule 5(d) is amended to expand the availability of electronic modes by which unrepresented parties can file documents with the court and receive notice of filings that others make in the case. Also, the order of what had been Rules 5(d)(2) ("Nonelectronic Filing") and 5(d)(3) ("Electronic Filing and Signing") is reversed – with (d)(2) becoming (d)(3) and vice versa – to reflect the modern primacy of electronic filing. A few stylistic changes are also made.

Subdivision (b). Rule 5(b) is restructured so that the primary means of service – that is, service by means of the court's electronic-filing system – is addressed first, in subdivision 5(b)(2). Former Rule 5(b)(2) becomes new Rule 5(b)(3), which continues to address alternative means of service. New Rule 5(b)(4) defines the term "notice of case activity" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket.

Subdivision (b)(2). Amended Rule 5(b)(2) eliminates the requirement of separate (paper) service (of documents after the complaint) on a litigant who is registered to receive a notice of case activity from the court's electronic-filing system. Litigants who are registered to receive a notice of case activity include those litigants who are participating in the court's electronic-filing system with respect to the case in question and also include those litigants who receive the notice because they have registered for a court-based electronic-noticing program. (Former Rule 5(b)(2)(E)'s provision for service by "sending [a paper] to a registered user by filing it with the court's electronic-filing system" had already eliminated the requirement of paper service on registered users of the court's electronic-filing system by other registered users of the system; the amendment extends this exemption from paper service to those who file by a means other than through the court's electronic-filing system.)

Amended Rule 5(b)(2) provides that, for purposes of any deadlines for making service, service by a notice of case activity is complete as of the date of filing. But the amended rule provides that, for purposes of any deadlines that run from the date of service, service is complete as of the date of the notice of case activity. Thus, the amended rule ensures that if there is a delay between the date the court receives a filing not made through the electronic-filing system and the date the court uploads that filing into the electronic-filing system, that delay will not diminish the time allowed to the party whose deadline runs from the date of service.

Amended Rule 5(b)(2)(A) carries forward the provision – previously found in former Rule 5(b)(2)(E) – that service by means of the court's electronic-filing system is not effective if the filer learns that it did not reach the person to be served.

Amended Rule 5(b)(2)(B) states that a court may provide by order or local rule that if a paper is filed under seal, it must be served by other means. This sentence is designed to account for districts in which parties in the case cannot access other participants' sealed filings via the

court's electronic-filing system.

Subdivision (b)(3). Subdivision (b)(3) carries forward the contents of former Rule 5(b)(2), with two changes – one to the subdivision's introductory phrase and the other to what becomes Rule 5(b)(3)(E).

The subdivision's introductory phrase ("A paper is served under this rule by") is amended to read "A paper may also be served under this rule by." This locution ensures that what will become Rule 5(b)(3) remains an option for serving any litigant, even one who receives notices of case activity. This option might be useful to litigants who will be filing non-electronically but who wish to effect service on their opponents before the time when the court will have uploaded the filing into the court's system (thus generating the notice of case activity).

Subdivision (b)(3)(E). The prior reference to "sending [a paper] to a registered user by filing it with the court's electronic-filing system" is deleted, because this is now covered by new Rule 5(b)(2).

Subdivision (b)(3)(E) carries forward – for service by other electronic means – the prior rule's provision that such service is not effective if the sender "learns that it did not reach the person to be served"; a similar provision is also included in Rule 5(b)(2)(A) with respect to service via the court's electronic-filing system.

Subdivision (b)(4). New Rule 5(b)(4) defines the term "notice of case activity" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket. There are two equivalent terms currently in use: Notice of Electronic Filing and Notice of Docket Activity. "Notice of case activity" is intended to encompass both of those terms, as well as any equivalent terms that may come into use in future. The word "electronic" is deleted as superfluous now that electronic filing is the default method.

Subdivision (d)(1)(B). Subdivision (d)(1)(B) previously provided that no certificate of service was required when a paper was served "by filing it with the court's electronic-filing system." This phrase is replaced by "through the court's electronic-filing system under Rule 5(b)(2)" in order to conform to the change to subdivision (b)(2).

Subdivision (d)(2)(B). Under new Rule 5(d)(2)(B)(i), the presumption is the opposite of the presumption set by the prior Rule 5(d)(3)(B). That is, under new Rule 5(d)(2)(B)(i), unrepresented parties are presumptively authorized to use the court's electronic-filing system to file documents in their case subsequent to the case's commencement. (The rule grants this presumptive authorization to an unrepresented 'party,' not an unrepresented 'person'; the rule does not grant nonparty nonlawyers any right to use the court's e-filing system.) If a district wishes to restrict unrepresented parties' access to the court's electronic-filing system, it must adopt an order or local rule to impose that restriction.

New Rule 5(d)(2)(B)(ii) states that the court may set reasonable conditions and restrictions on unrepresented parties' access to the court's electronic-filing system. For example, access to electronic filing could be allowed only to unrepresented parties who are not incarcerated (in light of the distinctive logistical considerations that apply in carceral settings), who satisfactorily complete required training and/or certifications, and who comply with any other reasonable conditions on access.

New Rule 5(d)(2)(B)(ii) expressly states that a reasonable restriction would include, where appropriate, orders barring a specific unrepresented party from accessing the court's electronic-filing system, or revoking a specific unrepresented party's access to the court's electronic-filing system. Another example would be a local provision stating that certain types of filings – for example, notices of appeal – cannot be filed by means of the court's electronic-filing system.

However, new Rule 5(d)(2)(B)(ii) also expressly prohibits a court from barring all unrepresented parties from using the court's electronic-filing system, unless the court also either (1) includes reasonable exceptions to the prohibition, or (2) permits unrepresented parties to use another electronic method for filing documents (such as by email or by upload through an electronic document submission system) and an alternative electronic means for receiving notice of court filings and orders (such as an electronic noticing program). [For example, local provisions that require unrepresented parties who seek to use the court's electronic-filing system to obtain permission from the judge to whom the case is assigned would count as including reasonable exceptions, so long as such permission is not unreasonably withheld in practice.] [For example, local provisions that require unrepresented parties who seek to use the court's electronic-filing system to obtain the court's permission would count as including reasonable exceptions, so long as such permission is granted or withheld in accordance with the reasonable conditions and restrictions on access set by the court.][1]

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

* * *

(d) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after being served and service is made under Rule 5(b)(~~2~~3)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to), 3 days are added after the

1 The first bracketed alternative shown here sets out the sentence approved by the Civil Rules Committee. The second bracketed alternative shows a revised sentence that adopts the approach subsequently approved by the Appellate and Criminal Rules Committees. See Part III.C of the accompanying memo.

period would otherwise expire under Rule 6(a).

Committee Note

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

Proposed amendments to Bankruptcy Rules 5005, 8011, 9006, and 9036 as approved by Bankruptcy Rules Committee for publication:

Rule 5005. Filing Papers and Sending Copies to the United States Trustee

(a) Filing Papers.

* * *

(3) Electronic Filing and Signing.

(A) By a Represented Entity--Generally Required; Exceptions. An entity represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for cause or is allowed or required by local rule.

(B) By an Unrepresented Individual—When Allowed or Required.

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

(ii) Conditions and Restrictions on Access. A court may set and enforce reasonable conditions and restrictions on unrepresented 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.

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

(D) Same as a Written Paper. A paper filed electronically is a written paper for purposes of these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107.

(b) Sending Copies to the United States Trustee.

(1) Papers Sent Electronically. All papers required to be sent to the United States trustee may be sent by using the court's electronic-filing system in accordance with Rule 9036, unless a court order or local rule provides otherwise.

(2) Papers Not Sent Electronically. If an entity other than the clerk sends a paper to the United States trustee without using the court's electronic-filing system, the entity must promptly file a statement identifying the

paper and stating the manner by which and the date it was sent. The clerk need not send a copy of a paper to a United States trustee who requests in writing that it not be sent.

(c) When a Paper Is Erroneously Filed or Delivered.

(1) Paper Intended for the Clerk. If a paper intended to be filed with the clerk is erroneously delivered to ~~a person~~ an entity listed below, that ~~person~~ entity must note on it the date of receipt and promptly send it to the clerk:

- the United States trustee;
- the trustee;
- the trustee's attorney;
- a bankruptcy judge;
- a district judge;
- the clerk of the bankruptcy appellate panel; or
- the clerk of the district court.

(2) Paper Intended for the United States Trustee. If a paper intended for the United States trustee is erroneously delivered to the clerk or to another ~~person~~ entity listed in (1), the clerk or that ~~person~~ entity must note on it the date of receipt and promptly send it to the United States trustee.

(3) Applicable Filing Date. In the interests of justice, the court may order that the original receipt date shown on a paper erroneously delivered under (1) or (2) be deemed the date it was filed with the clerk or sent to the United States trustee.

Committee Note

Rule 5005(a)(3)(B) is amended to address electronic filing by unrepresented individuals. (Concurrent amendments are made to Rules 8011 and 9036 and to Civil Rule 5, Criminal Rule 49, and Appellate Rule 25.) The amendments expand the availability of electronic modes by which unrepresented individuals can file documents with the court and receive notice of filings that others make in the case. The amendments also conform to the terminology used elsewhere in the Bankruptcy Rules by replacing "person" with "entity" (when the intent is to encompass the broadest possible range of actors) or with "individual" (when the intent is to refer to a human being).

Under amended Rule 5005(a)(3)(B)(i), the presumption is the opposite of the presumption set by the prior rule. That is, under the amended rule, unrepresented individuals are presumptively authorized to use the court's electronic-filing system to file documents in their case. If a court wishes to restrict unrepresented individuals' access to the court's electronic-filing system, it must adopt an order or local rule to impose that restriction.

Amended Rule 5005(a)(3)(B)(ii) states that the court may set reasonable conditions and restrictions on access by unrepresented individuals to the court's electronic-filing system. For example, access to electronic filing could be allowed only to unrepresented individuals who are not incarcerated (in light of the distinctive logistical considerations that apply in carceral settings), satisfactorily complete required training and certifications, and comply with other reasonable conditions on access.

Amended Rule 5005(a)(3)(B)(ii) expressly states that a reasonable restriction would include, where appropriate, orders barring a specific unrepresented individual from accessing the court's electronic-filing system or revoking a specific unrepresented individual's access to the court's electronic-filing system. Another example would be a local provision stating that certain types of filings cannot be filed by means of the court's electronic-filing system.

However, amended Rule 5005(a)(3)(B)(ii) also expressly prohibits a court from barring all unrepresented individuals from using the court's electronic-filing system, unless the court also either (1) includes reasonable exceptions to the prohibition, or (2) permits unrepresented individuals to use another electronic method for filing documents (such as by email or by upload through an electronic document submission system) and an alternative electronic means for receiving notice of court filings and orders (such as an electronic noticing program). [For example, local provisions that require unrepresented individuals 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.] [For example, local provisions that require unrepresented individuals who seek to use the court's electronic-filing system to obtain the court's permission would count as including reasonable exceptions, so long as such permission is granted or withheld in accordance

with the reasonable conditions and restrictions on access set by the court.][1]

Rule 5005(a)(3)(C) is amended to reflect that courts' electronic-filing accounts are held by individuals and not by persons, as defined by § 101(41) of the Code. References to a "person" in Rules 5005(c)(1) and (2) are replaced by references to an "entity"; under § 101(15) of the Code "entity" is a broader term than "person" and the amendment ensures that the chosen term encompasses all of the listed types of recipients.

Rule 8011. Filing and Service; Signature

(a) Filing.

(1) With the Clerk. A document required or permitted to be filed in a district court or BAP must be filed with the clerk of that court.

(2) Method and Timeliness.

(A) Nonelectronic Filing.

* * *

(B) Electronic Filing.~~(i)~~ By a Represented ~~Person~~ 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.

~~(ii)~~ **(C) Electronic Filing By an Unrepresented Individual—When Allowed or Required.**

(i) In General. An unrepresented individual ~~not represented by an~~

1 The first bracketed alternative shown here sets out the sentence approved by the Bankruptcy Rules Committee. The second bracketed alternative shows a revised sentence that adopts the approach subsequently approved by the Appellate and Criminal Rules Committees. See Part III.C of the accompanying memo.

~~attorney: •~~ may ~~file electronically only if allowed by~~ use the court's electronic-filing system to file documents and receive notice of activity in the case, unless a court order or ~~by~~ local rule prohibits the individual from doing so.~~; and~~ An unrepresented individual ~~•~~ may be required to file electronically only by ~~court~~ order in a case~~,~~ or by a local rule that includes reasonable exceptions.

(ii) Conditions and Restrictions on Access. A court may set and enforce reasonable conditions and restrictions on unrepresented 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.

~~(iii)~~ **(D) Electronically Filed Same as a Written Paper.** A document filed electronically is a written paper for purposes of these rules.

~~(C)~~ **(E) When Paper Copies Are Required.** No paper copies are required when a document is filed electronically. If a document is filed by mail or by delivery to the district court or BAP, no additional copies are required. But the district court or BAP may, by local rule or order in a particular case,

require that a specific number of paper copies be filed or furnished.

(3) Clerk's Refusal of Documents. The court clerk must not refuse to accept for filing any document solely because it is not presented in proper form as required by these rules or by any local rule or practice.

(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.

(c) Manner of Service.

(1) Service by a Notice of Case Activity Sent Through the Court's Electronic-Filing System. A notice of case activity sent to an entity registered to receive it through the court's electronic-filing system constitutes service on that entity, with these qualifications:

(A) such service is not effective if the filer learns that it did not reach the 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.

~~(1) Nonelectronic~~ **(2) Service by Other Means.** ~~Nonelectronic service~~ A document may also be served under this rule by ~~any of the following~~:

(A) personal delivery;

(B) mail; ~~or~~

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

~~(2) Service By Electronic Means. Electronic service may be made by:~~

~~(A) sending a document to a registered user by filing it with the court's electronic-filing system; or~~

~~(B) using other~~ (D) electronic means that the ~~person~~ entity served has consented to in writing, but such electronic service is not effective if the sender learns that it did not reach the entity to be served.

(3) When Service Is Complete.

(A) For Service by a Notice of Case Activity. For any service deadlines, service by a notice of case activity is complete as of the date of filing. For any deadlines that run from the date of service, service by a notice of case activity is complete as of the notice's date.

(B) For Service by Other Electronic Means. Service by other electronic means is complete on sending.

(C) For Service by Mail or Commercial Carrier. Service by mail or by third-party commercial carrier is complete on mailing or delivery to the carrier.

~~Service by electronic means is complete on filing or sending, unless the person making service receives notice that the document was not received by the person served.~~

(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.

(d) Proof of Service.

(1) Requirements. A document presented for filing must contain either of the following if it was served other than through the court's electronic-filing system:

(A) an acknowledgement of service by the ~~person~~ entity served; or

(B) proof of service consisting of a statement by the ~~person~~ individual who made service certifying:

(i) the date and manner of service;

(ii) the names of the ~~persons~~ entities served; and

(iii) the mail or electronic address, the fax number, or the address of the place of delivery--as appropriate for the manner of service--for each ~~person~~ entity served.

(2) Delayed Proof of Service. A district or BAP clerk may accept a document for filing without an acknowledgement or proof of service, but must require the acknowledgment or proof of service to be filed promptly thereafter.

(3) For a Brief or Appendix. When a brief or appendix is filed, the proof of service must also state the date and manner by which it was filed.

(e) Signature Always Required.

(1) Electronic Filing. Every document filed electronically must include the electronic signature of the ~~person~~ individual filing it or, if ~~the person~~ an entity is represented, the counsel's electronic signature. A filing made through ~~a person's~~ an individual's electronic-filing account and authorized by that ~~person~~ individual, together with that ~~person's~~ individual's name on a signature block—constitutes

the ~~person's~~ individual's signature.

(2) Paper Filing. Every document filed in paper form must be signed by the ~~person~~ individual filing it or, if ~~the person~~ an entity is represented, by the ~~person's~~ entity's counsel.

Committee Note

Rule 8011 is amended to address two topics concerning self-represented litigants. (Concurrent amendments are made to Rules 5005 and 9036 and to Civil Rule 5, Criminal Rule 49, and Appellate Rule 25.) Rule 8011(a) is amended to expand the availability of electronic modes by which unrepresented individuals can file documents with the court and receive notice of filings that others make in the case. Rule 8011(c) is amended to address service of documents filed by an unrepresented individual in paper form. Because all such paper filings are uploaded by court staff into the court's electronic-filing system, there is no need to require separate paper service by the filer on case participants who receive an electronic notice of the filing from the court's electronic-filing system. Rule 8011(c)'s treatment of service is also reorganized to reflect the primacy of service by means of the electronic notice. The amendments also conform to the terminology used elsewhere in the Bankruptcy Rules by replacing "person" with "entity" (when the intent is to encompass the broadest possible range of actors) or with "individual" (when the intent is to refer to a human being).

Subdivision (a)(2)(C). Under new Rule 8011(a)(2)(C)(i), the presumption is the opposite of the presumption set by the prior Rule 8011(a)(2)(B)(ii). That is, under new Rule 8011(a)(2)(C)(i), unrepresented individuals are presumptively authorized to use the court's electronic-filing system to file documents in their case. If a district court or BAP wishes to restrict unrepresented individuals' access to the court's electronic-filing system, it must adopt an order or local rule to impose that restriction.

New Rule 8011(a)(2)(C)(ii) states that the court may set reasonable conditions and restrictions on access by unrepresented individuals to the court's electronic-filing system. For example, access to electronic filing could be allowed only to unrepresented individuals who are not incarcerated (in light of the distinctive logistical considerations that apply in carceral settings), satisfactorily complete required training and certifications, and comply with other reasonable conditions on access.

New Rule 8011(a)(2)(C)(ii) expressly states that a reasonable restriction would include, where appropriate, orders barring a specific unrepresented individual from accessing the court's electronic-filing system or revoking a specific unrepresented individual's access to the court's electronic-filing system. Another example would be a local provision stating that certain types of filings cannot be filed by means of the court's electronic-filing system.

However, new Rule 8011(a)(2)(C)(ii) also expressly prohibits a court from barring all unrepresented individuals from using the court's electronic-filing system, unless the court also either (1) includes reasonable exceptions to the prohibition, or (2) permits unrepresented individuals to use another electronic method for filing documents (such as by email or by upload through an electronic document submission system) and an alternative electronic means for receiving notice of court filings and orders (such as an electronic noticing program). [For example, local provisions that require unrepresented individuals 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.] [For example, local provisions that require unrepresented individuals who seek to use the court's electronic-filing system to obtain the court's permission would count as including reasonable exceptions, so long as such permission is granted or withheld in accordance with the reasonable conditions and restrictions on access set by the court.][2]

Subdivision (b). Prior Rule 8011(b) generally required that a party, "at or before the time of filing a document, [must] serve it on the other parties to the appeal." The rule exempted from this requirement instances when "a rule requires service by the clerk." The rule is amended to add a second exemption, for instances when "the document will be served through the court's electronic-filing system under (c)(1)." This amendment reflects that new Rule 8011(c)(1) encompasses service by the notice of case activity that results from the clerk's uploading into the system a paper filing by an unrepresented individual. (As to when such service is complete, see subdivision (c)(3)(A).)

Subdivision (c). Rule 8011(c) is restructured so that the primary means of service—that is, service by means of the court's electronic-filing system—is addressed first, in subdivision (c)(1). Prior Rule 8011(c)(1) is now Rule 8011(c)(2), which continues to address alternative means of service. New Rule 8011(c)(4) defines the term "notice of case activity" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket.

Subdivision (c)(1). Amended Rule 8011(c)(1) eliminates the requirement of separate (paper) service on a litigant who is registered to receive a notice of case activity from the court's electronic-filing system. Litigants who are registered to receive a notice of case activity include those litigants who are participating in the court's electronic-filing system with respect to the case in question and also include those litigants who receive the notice because they have registered for a court-based electronic-noticing program. (Prior Rule 8011(c)(2)(A)'s provision for service by "sending a document to a registered user by filing it with the court's electronic-

2 The first bracketed alternative shown here sets out the sentence approved by the Bankruptcy Rules Committee. The second bracketed alternative shows a revised sentence that adopts the approach subsequently approved by the Appellate and Criminal Rules Committees. See Part III.C of the accompanying memo.

filing system" had already eliminated the requirement of paper service on registered users of the court's electronic-filing system by other registered users of the system; the amendment extends this exemption from paper service to those who file by a means other than through the court's electronic-filing system.)

New Rule 8011(c)(1)(A) provides that service by means of the court's electronic-filing system is not effective if the filer learns that it did not reach the person to be served. This provision carries forward the principle previously contained in prior Rule 8011(c)(3). Prior Rule 8011(c)(3) stated that "Service by electronic means is complete on filing or sending, unless the person making service receives notice that the document was not received by the person served." By contrast, the parallel provisions in current Civil Rule 5 and Criminal Rule 49 use "learns" instead of "receives notice." In drafting the 2018 amendments to Rules 8011 and 9036, the Bankruptcy Rules Committee had chosen "receives notice" in order to prevent litigants from purposely ignoring notice to avoid learning that the document was not received. However, the term "learns" is the broader term and it encompasses "receiving notice." Thus, the amended Rules 8011 and 9036 use "learns" in conformity with the other sets of rules.

New Rule 8011(c)(1)(B) states that a court may provide by order or local rule that if a paper is filed under seal, it must be served by other means. This sentence is designed to account for districts or BAPs in which parties in the case cannot access other participants' sealed filings via the court's electronic-filing system.

Subdivision (c)(2). Subdivision (c)(2) carries forward the contents of prior Rules 8011(c)(1) and (2), with three changes.

The subdivision's introductory phrase ("Nonelectronic service may be by any of the following") is amended to read "A document may also be served under this rule by." This locution ensures that what will become Rule 8011(c)(2) remains an option for serving any litigant, even one who receives notices of filing. This option might be useful to a litigant who will be filing non-electronically but who wishes to effect service on their opponent before the time when the court will have uploaded the filing into the court's system (thus generating the notice of case activity).

Prior Rule 8011(c)(2)(A)'s reference to "sending a document to a registered user by filing it with the court's electronic-filing system" is deleted, because this is now covered by new Rule 8011(c)(1).

The concept that service by other electronic means is not effective if the sender learns that the document was not received by the person served—previously contained in prior Rule 8011(c)(3)—is relocated to what now is Rule 8011(c)(2)(D). As noted above with respect to subdivision (c)(1), the amended rule in subdivision (c)(2)(D) uses "learns" instead of the prior rule's "receives notice."

Subdivision (c)(3). Rule 8011(c)(3) ("When Service is Complete") is amended to distinguish between service under new Rule 8011(c)(1)—that is, service by means of the notice of case activity—and service by "other electronic means."

When a litigant files a paper other than through the court's electronic-filing system, service on a litigant who is registered to receive a notice of case activity through the court's electronic-filing system occurs by means of the notice of case activity. But when the filing is made other than through the court's electronic-filing system, there can be a short time lag between the date the litigant files the document with the court and the date that the clerk's office uploads it into the court's electronic-filing system. Thus, new subdivision (c)(3)(A) provides that, for purposes of any deadlines for making service, service by a notice of case activity is complete as of the date of filing. But the amended rule provides that, for purposes of any deadlines that run from the date of service, service is complete as of the date of the notice of case activity. Thus, the amended rule ensures that if there is a delay between the date the court receives a filing not made through the electronic-filing system and the date the court uploads that filing into the electronic-filing system, that delay will not diminish the time allowed to the party whose deadline runs from the date of service.

Under subdivision (c)(3)(B), service by other electronic means continues to be complete on sending.

In addition to providing when service was complete, old Rule 8011(c)(3) addressed what happened if the person making electronic service received notice that the document was not received by the person to be served. The latter is now addressed by new Rules 8011(c)(1)(A) and (c)(2)(D), which provide that electronic service is not effective if the filer or sender learns that it did not reach the person to be served.

Subdivision (c)(4). New Rule 8011(c)(4) defines the term "notice of case activity" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket. There are two equivalent terms currently in use: Notice of Electronic Filing and Notice of Docket Activity. "Notice of case activity" is intended to encompass both of those terms, as well as any equivalent terms that may come into use in future. The word "electronic" is deleted as superfluous now that electronic filing is the default method.

Rule 9006. Computing and Extending Time; Motions

* * *

(f) Additional Time After Certain Service. When a party may or must act within a specified time after being served and service is made by mail or under Fed. R. Civ. P. 5(b)(~~2~~3)(D)

(leaving with the clerk) or (F) (other means consented to), 3 days are added after the period would otherwise expire under (a).

* * *

Committee Note

Subdivision (f) is amended to conform to the renumbering of Civil Rule 5(b)(2) as Rule 5(b)(3).

Rule 9036. Electronic Notice and Service

(a) In General. This rule applies whenever these rules require or permit sending a notice or serving a document by mail or other means.

(b) Notices from and Service by the Court.

(1) To Registered Users. The clerk may send notice to or serve a registered user by filing the notice or document with the court's electronic-filing system.

(2) To All Recipients. For any recipient, the clerk may 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 these exceptions apply:

(A) if the recipient has registered an electronic address with the Administrative Office of the United States Courts' bankruptcy-noticing program, the clerk must use that address; and

(B) if an entity has been designated by the Director of the Administrative Office of the United States Courts as a high-volume paper-notice recipient, the clerk may send the notice to or serve the document electronically at an

address designated by the Director, unless the entity has designated an address under § 342(e) or (f).

(c) Notices from and Service by an Entity. ~~An entity may send notice or serve a document in the same manner that the clerk does under (b), excluding (b)(2)(A) and (B).~~

(1) Notice of Case Activity Sent Through the Court's Electronic-Filing System. A notice of case activity sent to an entity registered to receive it through the court's electronic-filing system constitutes notice or service on that entity, with these qualifications:

(A) such notice or service is not effective if the filer learns that it did not reach the 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).

(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 that it did not reach the entity to be notified or served.

(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.

(d) When Notice or Service Is Complete; Keeping an Address Current.

(1) Notice of Case Activity Sent Through the Court's Electronic-Filing System. For any notice or service deadlines, notice or service by a notice of case activity is complete as of the date of filing. For any deadlines that run from the date of notice or service, notice or service by a notice of case activity is complete as of the date of the notice of case activity.

(2) Other Electronic Means. Electronic notice or service by other electronic means is complete upon ~~filing or~~ sending ~~but is not effective if the filer or sender receives notice that it did not reach the person to be notified or served~~.

(3) Keeping an Address Current. The recipient must keep its electronic address current with the clerk.

(e) Inapplicability. This rule does not apply to any document required to be served in accordance with Rule 7004.

Committee Note

Rule 9036 is amended to address service by unrepresented individuals. (Concurrent amendments are made to Rules 5005 and 8011 and to Civil Rule 5, Criminal Rule 49, and Appellate Rule 25.) Rule 9036(c) is amended to address service of documents filed by an unrepresented individual in paper form. Because all such paper filings are uploaded by court staff into the court's electronic-filing system, there is no need to require separate paper service by the filer on case participants who receive an electronic notice of the filing from the court's electronic-filing system. Conforming amendments are made to Rule 9036(d).

Subdivision (c). Rule 9036(c) previously stated simply that "[a]n entity may send notice or serve a document in the same manner that the clerk does under (b), excluding (b)(2)(A) and (B)." That provision could be read to exclude instances when an unrepresented individual files a document in paper form and the clerk's office scans the document and uploads it into the court's electronic-filing system. Thus read, the previous rules required separate (paper) service in such instances, even on litigants who were registered to receive a notice of case activity from the court's electronic-filing system. New Rule 9036(c) restates the substance of the service options previously incorporated by reference to Rule 9036(b), but does so in a way that changes the rule concerning service by a litigant who makes a filing other than through the court's electronic-

filing system.

New Rule 9036(c)(1) eliminates the requirement of separate (paper) service on a litigant who is registered to receive a notice of case activity from the court's electronic-filing system. Litigants who are registered to receive a notice of case activity include those litigants who are participating in the court's electronic-filing system with respect to the case in question and also include those litigants who receive the notice because they have registered for a court-based electronic-noticing program. (Prior Rule 9036(c)'s provision for notice or service "in the same manner that the clerk does under" Rule 9036(b)(1) had already eliminated the requirement of paper service on registered users of the court's electronic-filing system by other registered users of the system; the amendment extends this exemption from paper service to those who file a document with the court by a means other than through the court's electronic-filing system.)

New Rule 9036(c)(1)(A) provides that notice or service by means of the court's electronic-filing system is not effective if the filer learns that it did not reach the person to be notified or served. This provision carries forward the principle previously contained in prior Rule 9036(d). Prior Rule 9036(d) stated that "Electronic notice or service is complete upon filing or sending but is not effective if the filer or sender receives notice that it did not reach the person to be notified or served." By contrast, the parallel provisions in current Civil Rule 5 and Criminal Rule 49 use "learns" instead of "receives notice." In drafting the 2018 amendments to Rules 8011 and 9036, the Bankruptcy Rules Committee had chosen "receives notice" in order to prevent litigants from purposely ignoring notice to avoid learning that the document was not received. However, the term "learns" is the broader term and it encompasses "receiving notice." Thus, the amended Rules 8011 and 9036 use "learns" in conformity with the other sets of rules.

New Rule 9036(c)(1)(B) states that a court may provide by order or local rule that if a paper is filed under seal, notice or service must occur by other means. This is designed to account for districts or BAPs in which parties in the case cannot access other participants' sealed filings via the court's electronic-filing system.

What is now Rule 9036(c)(2) carries forward the prior option to effect notice or service by consented-to electronic means. It also provides that such notice or service is not effective if the sender learns that it did not reach the entity to be notified or served. This provision carries forward the principle previously contained in prior Rule 9036(d). As noted above with respect to subdivision (c)(1), the amended rule in subdivision (c)(2) uses "learns" instead of the prior rule's "receives notice."

New Rule 9036(c)(3) defines the term "notice of case activity" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket. There are two equivalent terms currently in use: Notice of Electronic Filing and Notice of Docket Activity. "Notice of case activity" is intended to encompass both of those terms, as well as any equivalent terms that may come into use in future. The word "electronic" is deleted as superfluous now that electronic filing is the default method.

Subdivision (d). New subdivision (d)(2) carries forward the rule's prior treatment of the timing of notice or service by electronic means other than the court's electronic-filing system. New subdivision (d)(1) addresses the timing of notice or service through the court's electronic-filing system.

Previously, Rule 9036(d) provided simply that "Electronic notice or service is complete upon filing or sending but is not effective if the filer or sender receives notice that it did not reach the person to be notified or served." The adoption of new Rule 9036(c)(1) requires a change to Rule 9036(d): Under new subdivision (c)(1), when a litigant files a paper other than through the court's electronic-filing system, service on a litigant who is registered to receive a notice of case activity through the court's electronic-filing system occurs by means of the notice of case activity. But when the filing is made other than through the court's electronic-filing system, there can be a short time lag between the date the litigant files the document with the court and the date that the clerk's office uploads it into the court's electronic-filing system. Thus, new subdivision (d)(1) provides that, for purposes of any deadlines for notifying or making service, notice or service by a notice of case activity is complete as of the date of filing. But the amended rule provides that, for purposes of any deadlines that run from the date of notice or service, notice or service is complete as of the date of the notice of case activity. Thus, the amended rule ensures that if there is a delay between the date the court receives a filing not made through the electronic-filing system and the date the court uploads that filing into the electronic-filing system, that delay will not diminish the time allowed to the party whose deadline runs from the date of notice or service.

New subdivision (d)(2) carries forward—for notice or service by other electronic means—the prior rule's treatment; that is, such notice or service is complete upon sending.

Prior Rule 9036(d)'s provision that electronic notice or service is not effective if the filer or sender receives notice that it did not reach the person to be notified or served is revised and relocated to new Rules 9036(c)(1)(A) and 9036(c)(2).

Proposed amendments to Appellate Rule 25 as approved by Appellate Rules Committee for publication:

Rule 25. Filing and Service

(a) Filing.

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

(2) Filing: Method and Timeliness.

(A) Nonelectronic Filing.

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

(ii) A Brief or Appendix. A brief or appendix not filed electronically is timely filed, however, if on or before the last day for filing, it is:

- mailed to the clerk by first-class mail, or other class of mail that is at least as expeditious, postage prepaid; or
- dispatched to a third-party commercial carrier for delivery to the clerk within 3 days.

(iii) Inmate Filing. If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 25(a)(2)(A)(iii). A paper not filed electronically by an inmate is timely if it is deposited in the

institution's internal mail system on or before the last day for filing and:

- it is accompanied by: a declaration in compliance with 28 U.S.C. § 1746--or a notarized statement--setting out the date of deposit and stating that first-class postage is being prepaid; or evidence (such as a postmark or date stamp) showing that the paper was so deposited and that postage was prepaid; or
- the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 25(a)(2)(A)(iii).

(B) Electronic Filing ~~and Signing. (i) By~~ by a ~~Represented~~ Person Represented by Counsel--Generally Required; Exceptions. A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

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

(i) In General. An unrepresented party ~~person not represented by an attorney: •~~ may ~~file electronically only if allowed by~~ use the court's electronic-filing system to file papers and receive notice of activity in the party's case, unless a court order or ~~by~~ local rule

prohibits the ~~person~~ party from doing so.~~; and •~~ An unrepresented person may be required to file electronically only by ~~court~~ order in a case~~,~~ or by a local rule that includes reasonable exceptions.

(ii) Conditions and Restrictions on Access. A court may set and enforce reasonable conditions and restrictions on unrepresented parties' access to the court's electronic-filing system (including by denying or revoking access for a particular unrepresented party). But the court may not prohibit all unrepresented parties from using the system unless that prohibition includes reasonable exceptions or the court permits the use of another electronic method for filing papers and receiving electronic notice of activity in the party's case.

~~(iii)~~ **(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.

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

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

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

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

(b) Service of All Papers Required. Unless a rule requires service by the clerk or the paper will be served through the court's electronic-filing system under Rule 25(c)(1), a party must,

at or before the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.

(c) Manner of Service.

(1) Service by a Notice of 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.

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

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

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

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

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

(D) ~~. (2) Electronic service of a paper may be made (A) by sending it to a registered user by filing it with the court's electronic filing system or (B) by~~ sending it by ~~other~~ electronic means that the person to be served has consented to in writing~~.~~, but such electronic service is not effective if the

sender learns that it did not reach the person to be served.

(3) Considerations in Choosing Other Means. When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.

(4) When Service Is Complete.

(A) For Service by Mail or Commercial Carrier. Service by mail or by commercial carrier is complete on mailing or delivery to the carrier.

(B) For Service by a Notice of Case Activity. For any service deadlines, service by a notice of case activity is complete as of the date of filing. For any deadlines that run from the date of service, service by a notice of case activity is complete as of the notice's date.

(C) For Service by Other Electronic Means. Service by other electronic means is complete on ~~filing or~~ sending~~, unless the party making service is notified that the paper was not received by the party served~~.

(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.

(d) Proof of Service.

(1) A paper presented for filing must contain either of the following if it was served other than through the court's electronic-filing system:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

(2) When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)(2)(A)(ii), the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

(3) Proof of service may appear on or be affixed to the papers filed.

(e) Number of Copies. *[Not shown in this draft, for brevity.]*

Committee Note

Rule 25 is amended to address two topics concerning unrepresented parties. (Concurrent amendments are made to Bankruptcy Rules 5005, 8011, and 9036, Civil Rule 5, and Criminal Rule 49.) Rule 25(a)(2) is amended to expand the availability of electronic modes by which unrepresented parties can file documents with the court and receive notice of filings that others make in the case. Rule 25(c) is amended to address service of documents filed by an unrepresented litigant in paper form. Because all such paper filings are uploaded by court staff into the court's electronic-filing system, there is no need to require separate paper service by the filer on case participants who receive an electronic notice of the filing from the court's electronic-filing system. Rule 25(c)'s treatment of service is also reorganized to reflect the primacy of service by means of the electronic notice.

Subdivision (a)(2)(C). Under new Rule 25(a)(2)(C)(i), an unrepresented party is presumptively authorized to use the court's electronic-filing system to file documents in the case. If a court of appeals wishes to restrict unrepresented parties' access to the electronic-filing system, it must do so by order or local rule. This presumption in favor of access by

unrepresented parties is the opposite of the presumption set by the prior Rule 25(a)(2)(B)(ii). The reference to an unrepresented 'party,' rather than an unrepresented 'person,' excludes an unrepresented nonparty from its scope; the rule does not grant nonparty nonlawyers any right to use the court's e-filing system. However, the court may not require electronic filing by any unrepresented person, including any unrepresented nonparty, except by order in a particular case or by a local rule that includes reasonable exceptions.

New Rule 25(a)(2)(C)(ii) states that the court may set reasonable conditions and restrictions on access by unrepresented parties to the court's electronic-filing system. Where appropriate, access to the electronic-filing system might be allowed only to a particular type of unrepresented party: for example, one who is not incarcerated (if the distinctive logistical considerations that apply in carceral settings justify such a limitation), one who has satisfactorily completed required training and certifications, one who complies with other reasonable conditions on access, and so on. Reasonable conditions or restrictions might also distinguish between particular types of filings: for example, filings that initiate a case in the court of appeals and those that do not. The subdivision explicitly contemplates that, in appropriate circumstances, a reasonable restriction might also include an order barring a specific unrepresented party from accessing the court's electronic-filing system or revoking that party's access to the system.

However, new Rule 25(a)(2)(C)(ii) also expressly prohibits a court from barring all unrepresented parties from using the electronic-filing system, unless the court also either (1) includes reasonable exceptions to the prohibition, or (2) permits unrepresented parties to use another electronic method for filing documents (such as by email or by upload through an electronic document submission system) and for receiving notice of court filings and orders (such as an electronic noticing program). A local provision requiring unrepresented parties to obtain the court's permission in order to use the court's electronic-filing system would count as including reasonable exceptions, so long as such permission is granted or withheld in accordance with the reasonable conditions and restrictions on access set by the court.

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

Subdivision (b). Former Rule 25(b) generally required that a party, "at or before the time of filing a paper, [must] serve a copy on the other parties to the appeal or review." The former rule exempted from this requirement instances when "a rule requires service by the clerk." The rule is amended to add a second exemption, for instances when "the paper will be served through the court's electronic-filing system under Rule 25(c)(1)." This amendment reflects that new Rule 25(c)(1) encompasses service by the notice of case activity that results from the clerk's uploading into the system a paper filing by an unrepresented litigant. (As to when such service is complete, see subdivision (c)(4)(B).)

Subdivision (c). Rule 25(c) is restructured so that the primary means of service – that is, service by means of the court's electronic-filing system – is addressed first, in Rule 25(c)(1). Former Rule 25(c)(1) becomes new Rule 25(c)(2), which continues to address alternative means

of service. New Rule 25(c)(5) defines the term "notice of case activity" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket.

Subdivision (c)(1). Amended Rule 25(c)(1) eliminates the requirement of separate (paper) service on a litigant who is registered to receive a notice of case activity from the court's electronic-filing system. Litigants who are registered to receive a notice of case activity include those litigants who are participating in the court's electronic-filing system with respect to the case in question and also include those litigants who receive the notice because they have registered for a court-based electronic-noticing program. (Former Rule 25(c)(2)'s provision for service by "sending [a paper] to a registered user by filing it with the court's electronic-filing system" had already eliminated the requirement of paper service on registered users of the court's electronic-filing system by other registered users of the system; the amendment extends this exemption from paper service to those who file by a means other than through the court's electronic-filing system.)

New Rule 25(c)(1)(A) provides that service by means of the court's electronic-filing system is not effective if the filer learns that it did not reach the person to be served. This provision carries forward the principle previously contained in former Rule 25(c)(4).

New Rule 25(c)(1)(B) states that 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. This sentence is designed to account for circuits (if any) in which parties in the case cannot access other participants' sealed filings via the court's electronic-filing system. It also accounts for circuits that permit the use of the court's electronic-filing system to file case-initiating petitions but that do not wish to permit the filer to rely on the court's electronic-filing system for service of such a petition. The rule does not set a national requirement that all case-initiating documents be served other than through the court's electronic-filing system; a court of appeals may decide that, in some instances, service of such documents through the court's electronic-filing system is an appropriate option.

Subdivision (c)(2). Subdivision (c)(2) carries forward the contents of former Rule 25(c)(1), with three changes.

The subdivision's introductory phrase ("Nonelectronic service may be any of the following") is amended to read "A paper may also be served under this rule by." This locution reflects the inclusion of other electronic means (apart from service through the court's electronic-filing system) in new Rule 25(c)(2)(D) and also ensures that new Rule 25(c)(2) remains an option for serving any litigant, even one who receives notices of filing. This option might be useful to litigants who will be filing non-electronically but who wish to effect service on their opponents before the time when the court will have uploaded the filing into the court's system (thus generating the notice of case activity).

The prior reference to "sending [a paper] to a registered user by filing it with the court's

electronic-filing system" is deleted, because this is now covered by new Rule 25(c)(1).

The concept that service by other electronic means is not effective if the sender learns that the document was not received by the person served – previously contained in prior Rule 25(c)(4) – is relocated to what now is Rule 25(c)(2)(D).

Subdivision (c)(4). Amended subdivision (c)(4) carries forward the prior rule's provisions that service by electronic means other than through the court's electronic-filing system is complete on sending and that service by mail or by commercial carrier is complete on mailing or delivery to the carrier.

As to service through the court's electronic-filing system, the amended rule provides that service by a notice of case activity is complete as of the date of filing for purposes of any deadlines for making service. But the amended rule provides that, for purposes of any deadlines that run from the date of service, service is complete as of the date of the notice of case activity. Thus, the amended rule ensures that if there is a delay between the date the court receives a filing not made through the electronic-filing system and the date the court uploads that filing into the electronic-filing system, that delay will not diminish the time allowed to the party whose deadline runs from the date of service.

In addition to providing when service was complete, former Rule 25(c)(4) addressed what happened if the person making electronic service learned that the document was not received by the person to be served. The latter is now addressed by new Rules 25(c)(1)(A) and (c)(2)(D), which provide that electronic service is not effective if the filer or sender learns that it did not reach the person to be served.

Subdivision (c)(5). New Rule 25(c)(5) defines the term "notice of case activity" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket. There are two equivalent terms currently in use: Notice of Electronic Filing and Notice of Docket Activity. "Notice of case activity" is intended to encompass both of those terms, as well as any equivalent terms that may come into use in future. The word "electronic" is deleted as superfluous now that electronic filing is the default method.

TAB 9

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

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SECRETARY

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MICHAEL W. MOSMAN
CRIMINAL RULES

JESSE M. FURMAN
EVIDENCE RULES

MEMORANDUM

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

FROM: Carolyn Dubay, Chief Counsel, Rules Committee Staff
Edward Hartnett, Standing Committee Reporter

RE: Report on Status of Privacy Rule Amendments

DATE: May 11, 2026

The Standing Committee is asked to approve for publication and public comment proposed amendments to the privacy rules found in Civil Rule 5.2, Criminal Rule 49.1, and Bankruptcy Rule 9037. Redlined versions of the proposed amended rules are included following this memorandum. These amendments reflect years of study and coordination, with the Criminal Rules Advisory Committee taking the lead on these issues and the Bankruptcy Rules Advisory Committee considering the special need for at least partially redacted taxpayer identification numbers in bankruptcy proceedings. The proposed changes, which stem from suggestions received from Senator Ron Wyden in 2022 and the Department of Justice in 2024, would do the following:

(1) Require complete redaction of social security numbers (SSNs), individual taxpayer identification numbers (ITINs) and employer identification numbers (EINs) in civil and criminal cases (Civil Rule 5.2 and Criminal Rule 49.1), subject to the existing exceptions in those Rules. These changes would expand the privacy protections in these rules in two

ways. First, the current redaction requirement permits the inclusion of the last four digits of these numbers; the proposed amendments would require complete redaction. Second, EINs are not expressly covered by the existing rules, although redaction of EINs is required in U.S. Tax Court and in the Court of Federal Claims. However, for reasons explained in the Bankruptcy Rules Advisory Committee Report to the Standing Committee in January 2026, Bankruptcy Rule 9037 would not change with respect to social security numbers or taxpayer identification numbers and would not expand to protect employer identification numbers.

(2) Require the use of pseudonyms rather than initials to reference minors in court filings in civil, criminal, and bankruptcy cases (Civil Rule 5.2, Criminal Rule 49.1, Bankruptcy Rule 9037). Note that the proposed amendments do not address the use of a pseudonym for a minor in a court filing once the minor ages out, but public comment may provide insight into whether this is an issue that should be addressed in a rule rather than through protective orders in individual cases.

(3) In all three rule sets, clarify that the redaction/pseudonym requirement applies to all documents in the court filing, including exhibits and attachments.

As an additional matter, the Bankruptcy Rules Advisory Committee at its spring 2026 meeting voted to approve for publication and public amendments to Rule 8011 governing bankruptcy appeals. Those proposed amendments would add an additional layer of privacy protection in appeals from bankruptcy courts to district courts and bankruptcy appellate panels. These proposed amendments were intended to mirror amendments that the Appellate Rules Advisory Committee is considering with respect to Appellate Rule 25(a)(5). At its spring Advisory Committee meeting, however, the Appellate Rules Committee determined that further study was needed regarding those proposed amendments and it is not seeking publication at this time of proposed amendments to Rule 25(a)(5). For this reason, we recommend that the Standing Committee postpone publication and public comment on the proposed amendments to Bankruptcy Rule 8011 to allow for coordination with the Appellate Rules Advisory Committee as it continues to study the issue.

Importantly, the delay in moving forward with the appellate privacy rules (Bankruptcy Rule 8011 and Appellate Rule 25(a)(5)) should not delay publication for public comment of the proposed amendments to Civil Rule 5.2, Criminal Rule 49.1, and Bankruptcy Rule 9037. Existing Appellate Rule 25(a)(5) incorporates those Rules by reference, so any changes to those Rules will apply on appeal without the need to amend Appellate Rule 25(a)(5). For reference, that Rule provides:

> *Privacy Protection.* An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case. The provisions on remote electronic access in Federal Rule of Civil

Procedure 5.2(c)(1) and (2) apply in a petition for review of a benefits decision of the Railroad Retirement Board under the Railroad Retirement Act.

The amendments to Appellate Rule 25(a)(5) that the Advisory Committee on Appellate Rules has been considering would add another layer of privacy protection on appeal, requiring redactions in appellate filings even of material that need not be redacted under the Civil, Criminal, and Bankruptcy Rules. It was poised to ask the Standing Committee to publish a proposal along these lines but, at its April 2026 meeting, new concerns were raised about the breadth and impact of that proposal. In particular, the U.S. Department of Justice (echoed by others) raised concerns about the costs and difficulties involved in redacting the contents of an appendix. The possibility that a party might forfeit this additional layer of protection was also raised. Recognizing that any changes made to the Civil, Criminal, and Bankruptcy Rules will automatically flow through to the courts of appeals, the Advisory Committee on Appellate Rules decided to study these concerns further before seeking to impose another layer of protection, and it formed a subcommittee to do so. Any changes it considers can also be shared with the Bankruptcy Rules Advisory Committee regarding parallel amendments to Bankruptcy Rule 8011.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE[1]

Rule 49.1. Privacy Protection For Filings Made with the Court

(a) Redacted Filings. Unless the court orders otherwise, ~~in~~ a party or nonparty making an electronic or paper filing with the court ~~that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, a financial-account number, or the home address of an individual, a party or nonparty making the filing may include only:~~, including any exhibit or attachment, must:

(1) ~~the last four digits of the~~ omit or completely redact all social-security ~~number and~~ or other taxpayer-identification numbers, including employer-identification numbers; and

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

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

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

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

~~(4)~~ (C) the last four digits of ~~the~~ a financial-account number; and

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

* * * * *

Committee Note

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

file an unredacted copy of a filing under seal.

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

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

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

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

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

Rule 5.2. Privacy Protection for Filings Made with the Court

(a) Redacted Filings. Unless the court orders otherwise, ~~in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number,~~ a party or nonparty making ~~the filing may include only:~~ an electronic or paper filing with the court, including any exhibit or attachment, must:

(1) ~~the last four digits of the~~ omit or completely redact all social-security ~~number and~~ or other taxpayer-identification numbers, including employer-identification numbers; and

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

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

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

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

~~(4)~~(C) the last four digits of ~~the~~ a financial-account number.

* * * * *

Committee Note

In contrast to the current rule, which allows public filings to contain the last four digits of social-security and taxpayer-identification numbers, the amendment requires the omission or redaction of all digits of social-security and taxpayer-identification numbers in public filings. Recent federal policy guidance recommends avoiding the unnecessary display of any part of these numbers on forms, reports, and computers. The Committee concluded that even partial numbers are useful to identity thieves, and that the omission of these numbers from public filings will impose no hardship on either litigants or the courts. In cases in which this information is pertinent, Rule 5.2(f) allows a party to file an unredacted copy of a filing under seal.

Taxpayer-identification numbers (TINs) are identification numbers used in the administration of tax

laws. In addition to Social Security numbers, TINs include individual taxpayer-identification numbers (ITINs), taxpayer-identification numbers for pending U.S. Adoptions (ATINs), and employer-identification numbers (EINs).

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

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

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

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE[1]

Rule 9037. Protecting Privacy for Filings

(a) Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing with the court, including any exhibit or attachment, that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual, other than the debtor, known to be and identified as a minor, or a financial-account number, 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;

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

(3) ~~the minor's initials~~ a pseudonym in place of the name of the individual known to be and identified as a minor; and

(4) the last four digits of the financial-account number.

* * * * *

Committee Note

The changes to Rule 9037(a)(3) are made to conform the treatment of references to minors in filings in bankruptcy court to the changes to Fed. R. Crim. P. 49.1 and Fed. R. Civ. P. 52. Use of pseudonyms is more protective of the privacy and safety of the minors. The other conforming change in Rule 9037(a) makes clear that the redactions covered by the rule include exhibits and attachments.

TAB 10

Agenda Item
June 2026
Action

2026 Privacy Report to Congress

Issue

This item requests that the Standing Committee review the draft 2026 Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002, advise of any further changes, and recommend that the Judicial Conference approve it at its September 2026 session.

Background

Section 205(c)(3)(C) of the E-Government Act directs that, every two years, "the Judicial Conference shall submit to Congress a report on the adequacy of [its rules of procedure] to protect privacy and security." Pub. L. No. 107-347, 116 Stat. 2915, § 205(c)(3)(C). The draft report provided with this agenda item covers the period from July 1, 2024 to June 30, 2026 and does the following: (1) discusses the status of suggested rule amendments identified in the 2024 Report and whether any privacy and security related suggestions for rules changes have been received since that time; (2) discusses ongoing implementation efforts by the Administrative Office (AO), the Federal Judicial Center (FJC), and others to protect privacy in court filings and opinions; and (3) discusses research undertaken by the FJC to assess adherence to the privacy rules.

Discussion

The draft report was prepared in coordination with the Rules Committee Staff, the Committee on Court Administration and Case Management (CACM) staff, the FJC, and other offices within the AO, and was reviewed by the Chairs and Reporters of the Advisory Committees on Civil, Criminal, Bankruptcy, and Appellate Rules.

Feedback was also provided by the CACM Privacy Subcommittee and is incorporated into the draft provided with this agenda item. The draft report will also be reviewed by CACM at its May 27, 2026 meeting, with a recommendation that it be endorsed.

If approved by the Standing Committee, the draft report will be submitted to the Judicial Conference for approval at its September 2026 session, and if so approved, will be transmitted to Congress.

Recommendation: That the Committee recommend that the Judicial Conference approve the proposed 2026 Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002, and ask the Administrative Office Director to transmit it to Congress in accordance with the law.

2026 Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002

DRAFT

PREPARED FOR THE
U.S. SENATE AND HOUSE OF REPRESENTATIVES

JUDICIAL CONFERENCE OF THE UNITED STATES

September 2026
DRAFT DATE: MAY 13, 2026

DRAFT DATE: MAY 13, 2026

2026 REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADEQUACY OF PRIVACY RULES PRESCRIBED UNDER THE E-GOVERNMENT ACT OF 2002

INTRODUCTION

The E-Government Act of 2002 directed the judiciary to promulgate rules, under the Rules Enabling Act, "to protect privacy and security concerns relating to electronic filing of documents and the public availability … of documents filed electronically." Pub. L. No. 107-347, 116 Stat. 2914, § 205(c)(3)(A)(i). Section 205(c)(3)(C) of the E-Government Act further directs that, every two years, "the Judicial Conference shall submit to Congress a report on the adequacy of those rules to protect privacy and security." Pub. L. No. 107-347, 116 Stat. 2915, § 205(c)(3)(C). Pursuant to this directive, the Judicial Conference hereby submits this report for the period from July 1, 2024 to June 30, 2026. It proceeds in four sections:

- Part I discusses the status of suggested rule amendments identified in the 2024 Report and whether any privacy and security related suggestions for rules changes have been received since that time.

- Part II discusses ongoing implementation efforts by the Administrative Office of the United States Courts (the AO), the Federal Judicial Center (the FJC), and others to protect privacy in court filings and opinions.

- Part III discusses research undertaken by the FJC to assess adherence to the privacy rules.

- Part IV concludes with a summary and an overview of anticipated next steps.

PART I: POTENTIAL RULE AMENDMENTS RELATED TO PRIVACY AND SECURITY CONCERNS

This section addresses the status of suggested privacy-related rule amendments discussed in the 2024 Report and identifies any additional rules suggestions pertaining to privacy or security concerns relating to electronically filed documents received since that time. Part I.A. provides an overview of the current privacy rules. Part I.B. discusses proposed rule amendments relating to complete redaction of taxpayer identification numbers in public court filings. Part I.C. discusses proposed rule amendments to require the use of pseudonyms when reference is made to minors in public court filings. Part I.D. addresses the status of amendments identified in the 2024 Report relating to Appellate Form 4, which requires the disclosure of personal financial information in applications to proceed *in forma pauperis* in appeals. Part I.E. provides an update on other suggestions for rule changes identified in the 2024 Report. Part I.F. identifies any suggestions to amend the rules of practice and procedure since the 2024 Report insofar as they relate to privacy concerns in electronically filed documents.

A. Overview of the Privacy Rules

In accordance with the mandate of the E-Government Act of 2002 for the judiciary to promulgate rules of procedure to address privacy and security concerns regarding electronic access to court filings, the rules of practice and procedure were amended, effective December 1, 2007, to include the following rules (the privacy rules) – Civil Rule 5.2, Criminal Rule 49.1, Bankruptcy Rule 9037, and Appellate Rule 25(a)(5). In compliance with Section § 205(c)(3)(A)(ii) of the Act, which provides that "[s]uch rules shall provide to the extent practicable for uniform treatment of privacy and security issues," Pub. L. No. 107-347, 116 Stat. 2914, the privacy rules for trial-level proceedings (civil, criminal, and bankruptcy) follow a generally uniform approach. Subject to specified exemptions,[1] those rules require that unless otherwise ordered by the court, filers must redact from documents filed with the court:

(1) all but the last four digits of an individual's social-security number or taxpayer-identification number (SSNs and ITINs);

(2) the month and day of an individual's birth;

(3) all but the initial letters of a known minor's name;

(4) all but the last four digits of a financial account number; and

(5) in criminal cases, all but the city and state of an individual's home address.

With respect to appeals, Appellate Rule 25(a)(5) applies the redaction standard from the case below, either Civil Rule 5.2, Criminal Rule 49.1, or Bankruptcy Rule 9037. In other cases (for example, direct appeals from agencies), Civil Rule 5.2 generally applies. Bankruptcy Rule 8011, which governs filings in bankruptcy appeals from bankruptcy courts to district courts or bankruptcy appellate panels, does not currently have a privacy provision because Bankruptcy Rule 9037 applies to such appeals.

To further protect private information in Social Security appeals and immigration cases, which include unredacted records from administrative and agency actions, the civil and criminal rules also limit remote electronic access to those case files to the parties and their attorneys. Members of the public who wish to view these files must access them at the courthouse. *See* Civil Rule 5.2(c); Criminal Rule 49.1.(c). Only the docket and any orders or decisions relating to

[1] For example, in civil, criminal, and bankruptcy cases, the redaction requirement does not apply to the record of any administrative or agency proceeding, the official record of a state-court proceeding, filings made under seal, and financial account information related to real property subject to a forfeiture proceeding.

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disposition of these cases are available remotely.[2] Appellate Rule 25(a)(5) also limits remote access to records in Social Security and immigration cases as in Civil Rule 5.2(c), and takes the same approach with respect to petitions for review of a benefits decision of the Railroad Retirement Board under the Railroad Retirement Act.

As additional protection for private information, the privacy rules contain provisions relating to filing under seal without redaction and seeking protective orders to require redaction or limit a nonparty's remote electronic access to a court filing. *See* Civil Rule 5.2(d) & (e); Criminal Rule 49.1(d) & (e); Bankruptcy Rule 9037(c)-(e).

B. Potential Amendments Requiring Complete Redaction of Taxpayer Identification Numbers in Public Court Filings

As detailed in the 2024 Report, Senator Ron Wyden suggested in 2022 that the rules committees reconsider earlier proposals to require complete redaction of SSNs in court filings, rather than redaction of all but the last four numbers. In response to that suggestion, the Committee on the Rules of Practice and Procedure (the Standing Committee) formed a working group to assist with coordinated efforts by the advisory committees to evaluate this proposal. After evaluating the scope of potential amendments, the advisory committees focused on the following:

(1) Whether the goal of uniformity among all rule sets with regard to redaction of taxpayer identification numbers continues to be appropriate in light of the special considerations regarding the use of the debtor's SSN in bankruptcy cases;

(2) Whether other types of taxpayer identification numbers, such as Employer Identification Numbers (EINs) and Adoption Taxpayer Identification Numbers (ATINs),[3] should be completely redacted in addition to SSNs and ITINs; and

[2] As discussed *infra* in Part III of this report, in April 2024, the Federal Judicial Center (FJC) published a study on Redaction of Non-Government Party Names in Social Security and Immigration Case Documents to evaluate the prevalence of unredacted non-government party names in judicial opinions in Social Security and immigration cases and to identify practices adopted by courts to redact this information. At the request of the Judicial Conference Committee on Court Administration and Case Management (CACM), the FJC conducted a supplemental study, published in November 2024.

[3] The privacy rules do not expressly address Employer Identification Numbers (EINs), which the IRS requires for individuals and entities that have employees and need to pay employment or other related taxes. EINs are also required to operate a business entity. An Adoption Taxpayer Identification Number (ATIN) is a temporary taxpayer identification number for a child in a domestic adoption if the adoptive parents do not have and/or are unable to obtain the child's SSN while the final adoption is pending.

(3) Whether any other amendments are appropriate in light of the findings of the Federal Judicial Center's April 2024 study and November 2024 supplemental analysis on the incidence of unredacted SSNs found in public court records in PACER.[4]

These issues were raised and discussed at advisory committee meetings from the fall of 2024 through the spring of 2026. In their April 2026 meetings, the Civil Rules, Criminal Rules, and Bankruptcy Rules Advisory Committees voted to recommend that proposed amendments to the privacy rules be published for public comment in accordance with the Rules Enabling Act process. At its June 2026 meeting, the Standing Committee [approved] those recommendations, and the proposed privacy amendments are slated for publication for public comment in August 2026. These proposed amendments would do the following to address the three issues identified above:

(1) Require complete redaction of SSNs and ITINs in civil and criminal cases (Civil Rule 5.2 and Criminal Rule 49.1) but retain the existing rule (Bankruptcy Rule 9037) requiring redaction of all but the last four digits of an individual's SSN or taxpayer-identification number for proceedings in bankruptcy court in light of the unique needs of bankruptcy cases.[5]

(2) Provide that in civil and criminal cases (Civil Rule 5.2 and Criminal Rule 49.1), complete redaction applies not only to SSNs and ITINs, but also EINs and ATINs.[6]

(3) Clarify that the redaction requirements in civil, criminal and bankruptcy cases (Civil Rule 5.2, Criminal Rule 49.1, and Bankruptcy Rule 9037) apply to all documents in the court filing, including exhibits and attachments. This change responds to the FJC's finding that most unredacted SSNs in public filings appear in those documents.

The Advisory Committee on Appellate Rules has been considering adding another layer of privacy protection on appeal, requiring redactions in appellate filings even of material that need not be redacted under the Civil, Criminal, and Bankruptcy Rules. It was poised to ask the Standing

[4] *See infra* Part III regarding the FJC's studies relating to privacy concerns in court filings.

[5] As noted in the 2024 Report, in connection with Senator Wyden's suggestion, the Bankruptcy Rules Committee, through its privacy subcommittee, worked with the FJC to survey debtor attorneys, chapter 7, 12, and 13 trustees, creditor attorneys, various tax authorities and representatives of the National Association of Attorneys General about whether bankruptcy forms that currently require inclusion of the debtor's redacted SSN must or should continue to do so. As set forth in the Bankruptcy Rules Advisory Committee Report to the Standing Committee in January 2026, the surveys undertaken by the FJC indicated that a significant number of bankruptcy specialists oppose the idea of removing the truncated SSN. *See* Agenda Book, Report of the Bankruptcy Rules Advisory Committee, Committee on the Rules of Practice and Procedure, January 2026, page 166, available at: https://www.uscourts.gov/forms-rules/records-rules-committees/agenda-books.

[6] For example, in bankruptcy cases, disclosure of the full EIN is required on certain forms.

Committee to publish a proposal along these lines but, at its April 2026 meeting, new concerns were raised about the breadth and impact of that proposal. In particular, the U.S. Department of Justice raised concern (echoed by others) about the costs and difficulties involved in redacting the contents of an appendix or the excerpts of record. The possibility that a party might forfeit this additional layer of protection was also raised. Because any changes made to the Civil, Criminal, and Bankruptcy Rules will automatically flow through to the courts of appeals, the Advisory Committee decided to study these concerns further before seeking to impose another layer of protection, and it formed a subcommittee to do so. The Bankruptcy Rules Committee will follow the work of the Appellate Rules Advisory Committee on this issue to consider amendments to Bankruptcy Rule 8011.

The 2024 Report also identified suggestions that would remove the partially redacted SSNs and full EINs from some bankruptcy notices and forms. Specifically, as stated in the 2024 Report, Bankruptcy Rule 2002(n) (now Rule 2002(o)) requires that the caption of every notice given under that rule comply with Bankruptcy Rule 1005. That caption requires, among other things, the debtor's full EIN, the last four digits of the debtor's SSN or debtor's individual taxpayer-identification number, any other federal taxpayer identification number, and all other names used within eight years before filing the petition. The Bankruptcy Rules Advisory Committee considered this suggestion and proposed amendments to Rule 2002 to provide that most Rule 2002 notices may use the caption described in Official Form 416B, which requires only the court's name, the name of the debtor, the case number, the chapter under which the case was filed, and a brief description of the document's character. Those proposed changes were published for public comment in August 2025. After receiving no comments, final amendments to Rule 2002 were approved by the Bankruptcy Rules Advisory Committee at its spring 2026 meeting and [recommended by the Standing Committee at its June 2026 meeting for adoption by the Judicial Conference at its September 2026 session].

C. Potential Amendments Concerning Use of Pseudonyms for Minors

As indicated in the 2024 Report, in March 2024, the U.S. Department of Justice submitted a suggestion to the Criminal Rules Advisory Committee proposing an amendment to Criminal Rule 49.1 to require that all publicly available court filings refer to minors by pseudonyms rather than by their initials. Since the 2024 Report, the Criminal Rules Advisory Committee formed a subcommittee to study this suggestion with reference to amendments to Criminal Rule 49.1. This issue also was incorporated into the scope of the project of the Standing Committee to coordinate consideration of consistent privacy amendments in Civil Rule 5.2, Bankruptcy Rule 9037, and, if needed, Appellate Rule 25 and Bankruptcy Rule 8011. At the spring 2026 meetings of the advisory committees for Civil Rules, Criminal Rules, and Bankruptcy Rules, they reached consensus that the change to require pseudonyms instead of initials was appropriate and voted to recommend publication for public comment on this change to the privacy rules found in Civil Rule 5.2, Criminal Rule 49.1, and Bankruptcy Rule 9037.

As noted above, any changes made to these Rules will automatically flow through to the courts of appeals. The Appellate Rules Advisory Committee is considering extending an

additional layer of protection for minors. At its April 2026 meeting, questions were raised about how extending such an additional layer of protection to the identity of minors might interact with the way in which minors were referred to in a state court record or even in the caption of the case. Those concerns will be considered by the new subcommittee mentioned above. The Bankruptcy Rules Committee will follow the work of the Appellate Rules Advisory Committee on this issue to consider amendments to Bankruptcy Rule 8011.

[At its June 2026 meeting, the Standing Committee approved the recommendations of the Civil, Criminal, and Bankruptcy Rules Advisory Committees, and the proposed privacy amendments to Civil Rule 5.2, Criminal Rule 49.1, and Bankruptcy Rule 9037 on this issue are slated for publication for public comment in August 2026].

D. Amendments Concerning Applications to Proceed *In Forma Pauperis* in Appellate Cases

The 2024 Report indicated that the Appellate Rules Advisory Committee was considering suggestions to revise Appellate Form 4, which is an affidavit a party files to accompanying a motion to proceed in an appeal *in forma pauperis* (IFP). The proposed amendments were intended to substantially simplify the form while still providing the courts of appeals with enough financial information and other details to decide whether to grant IFP status. The 2024 Report further noted that at its April 2024 meeting, the Appellate Rules Advisory Committee recommended that these proposed amendments be published for public comment. Since the 2024 Report, the proposed amendments to Form 4 were published for public comment, and the amendments to Form 4 were then approved by the Standing Committee in June 2025, the Judicial Conference of the United States in September 2025, and the Supreme Court in April 2026. Amended Form 4 was submitted to Congress on April 8, 2026. Absent action by Congress, amended Form 4 will go into effect on December 1, 2026.

E. Status of Other Proposals Identified in the 2024 Report

As set forth in the 2024 Report, the Civil Rules Advisory Committee was considering suggestions relating to the interaction between motions for protective orders filed in response to discovery requests under Civil Rule 26 and motions to file documents under seal. Specifically, the 2024 Report identified a September 2023 suggestion from the Lawyers for Civil Justice (LCJ) for the comprehensive examination of the Civil Rules and to implement a framework for the court and parties to protect privacy rights and prevent cybersecurity problems at various stages of civil litigation, including discovery. Subsequently, LCJ narrowed its proposal in 2025 and suggested amendments only to Civil Rules 26, 34, and 45 relating to documents produced in response to discovery requests or subpoenas. These proposed amendments do not relate to the electronic filing of court documents subject to the E-Government Act of 2002. The Civil Rules Advisory Committee discussed that revised suggestion at its fall 2025 meeting and decided to monitor developments in the area.

F. New Suggestions for Rules Amendments Related to Privacy Concerns

Since the 2024 Report, the Standing Committee has not received any additional suggestions for rules amendments related to privacy or security of information contained in electronically filed public documents.

PART II. ONGOING IMPLEMENTATION EFFORTS TO PROTECT PRIVACY IN COURT FILINGS AND OPINIONS

As mentioned above, the privacy rules require that the filer redact certain personal identifiers from court filings. Additionally, due to the pervasive presence of sensitive personal information in Social Security and immigration cases, the rules exempt filings in those matters from the redaction requirement but also limit remote electronic access to those filings. The judicial opinions in these cases, however, are widely available to the public through the U.S. Government Publishing Office (GPO) United States Courts Opinions document repository on GovInfo and often appear in internet search engine results. In 2020, the Judicial Conference Court Administration and Case Management (CACM) Committee asked the AO to address this privacy concern by developing a way for courts to suppress case name and party names in Social Security and immigration opinions that are transferred to the GPO for inclusion on GovInfo. In response, the AO developed a software tool called EasyFix. When implemented in the case management system, EasyFix automatically replaces the case and party name metadata in Social Security and immigration opinions with the word "Unavailable."

Additionally, in memoranda sent to judges and clerks of court in 2018 and 2023, the CACM Committee recommended that courts consider adopting a practice to protect personal identifiers in Social Security and immigration opinions by using only the first name and last initial of non-government parties.[7] Following the release of the CACM Committee's suggested practice, some judges redact party names in their opinions and specifically cite the CACM Committee's guidance as support for this practice, particularly in Social Security cases. On the other hand, as discussed in Section III, a recent FJC study has concluded that a large number of judicial opinions and related documents do not redact party names, and only a small percentage of documents that redact party names follow the CACM Committee's suggested practice. Additionally, another FJC study has revealed that a relatively small percentage of courts have redaction policies in place for Social Security and immigration opinions.

The CACM Committee is currently reassessing whether it should provide additional or alternative guidance to assist the courts with protecting personal identifiers in Social Security and immigration opinions. As part of this analysis, the CACM Committee has requested that the AO conduct a legal analysis to ensure that its current guidance is consistent with case law regarding public access to court proceedings. The Committee will then determine whether to take additional

[7] The memoranda also urged the courts to continue or to consider initiating outreach efforts to litigants and members of the bar to ensure they are aware of redaction requirements for court filings.

steps, including providing guidance to the courts or referring the issue to the appropriate Rules Committees.

Beyond reassessing its suggested practice in Social Security and immigration opinions, the CACM Committee has also requested that the AO and FJC explore other ways to increase awareness about ways to protect privacy in court filings and opinions. As noted in the 2024 Report, the AO recently updated several sections of the judiciary's internal and public websites to include updated information regarding privacy rule requirements and suggested practices. Furthermore, since the 2024 Report, the FJC has included information describing these requirements and practices in its orientation materials for new chief judges, new court unit executives, and law clerks.

Additionally, in the current case management system before a filer electronically submits a document to the court, the system presents a prominent reminder asking "have you redacted?" Finally, as noted in the 2024 Report, the CACM Committee has urged the AO to implement features in the modernized case management system to automate and facilitate a litigant's review of court filings for compliance with the redaction requirements in the Appellate, Bankruptcy, Civil, and Criminal Rules.

PART III. FEDERAL JUDICIAL CENTER RESEARCH ON UNREDACTED PERSONAL INFORMATION

As noted in prior reports on the adequacy of the privacy rules, between 2010 and 2024, the FJC conducted several studies of compliance with the requirement to redact all but the last four digits of an individual's SSN.[8] Over the past two years, the FJC has conducted numerous additional studies of unredacted personally identifiable information in court documents. These FJC studies will inform the judiciary's understanding of how best to protect sensitive information in court filings and opinions.

In November 2024, the FJC completed supplementary analyses of the 22,391 unredacted SSNs identified in its April 2024 study to determine whether unredacted SSNs were more common in particular types of court filings and proceedings.[9] Unredacted SSNs appeared more often in certain types of cases. In the district courts, 88% of the SSNs appeared in cases on the civil docket.

[8] *See* Memorandum from George Cort & Joe Cecil, Research Division, FJC, to the Privacy Subcommittee of the Judicial Conference Committee on Rules of Practice and Procedure, Social Security Numbers in Federal Court Documents (April 5, 2010); Joe S. Cecil et al., Unredacted Social Security Numbers in Federal Court PACER Documents (October 2015) (finding less than .14 percent of sampled documents included on or more unredacted SSNs); See Kristin A. Garri, et al., Unredacted Social Security Numbers in Federal Court PACER Documents (April 2024); (finding that .10% of sampled documents contained unredacted SSNs, that 22% of the unredacted SSNs appeared to be exempt from redaction requirements and an additional 6% belonged to pro se parties who waived the privacy protections, and that a large percentage of the unredacted SSNs occurred in a relatively small number of documents).

[9] *See* Kristin A. Garri, et al., Supplemental Analysis of Unredacted Social Security Numbers in Federal Court PACER Documents (November 2024).

Nearly a third of civil cases with unredacted SSNs were habeas corpus prisoner petitions and a quarter were civil rights cases. A third of the criminal cases with unredacted SSNs were drug offenses and slightly less than a quarter were property offenses, primarily fraud cases. These same types of cases contained the most unredacted SSNs in civil and criminal appeals. Unredacted SSNs in the bankruptcy case documents appeared most often in Chapter 7 and Chapter 13 filings, and three-quarters of the SSNs in proof of claim registers appeared in Chapter 13 filings. Across all court types, about a third of cases with documents containing unredacted SSNs involved at least one pro se party. However, SSNs found within cases with pro se parties were much more likely to be exempt from the redaction requirement or categorized as protections waived[10] compared to the SSNs found within cases with represented parties. Unredacted SSNs largely appeared within supporting materials that originate outside of the legal process and naturally contain sensitive personal information. Supplementary financial documents, such as tax records, financial records, bank statements, payroll records, and credit checks, accounted for about half of the documents across all courts that contained unredacted SSNs.

In November 2024, the FJC also completed a study on the prevalence of personally identifiable information in Social Security and immigration opinions.[11] The FJC found, based on a survey of district and circuit clerks and a review of court websites, that 27 district courts and one circuit court have redaction policies for Social Security cases, and nine district courts and one circuit court have redaction policies for immigration cases. To assess courts' implementation of the CACM Committee's suggested practice of using only the first name and last initial of any non-government parties, the FJC also analyzed a sample of 17,397 dispositive documents, i.e., opinions, orders, judgments, memoranda, and mandates in Social Security cases and 7,456 documents in immigration cases. For district court Social Security cases, over two-thirds of sampled documents included completely unredacted non-government party names. In the court of appeals, over 95 percent of the sampled documents filed in Social Security cases included completely unredacted non-government party names. For district court civil immigration cases, over 90 percent of the documents included completely unredacted non-government party names. In the court of appeals, over 95 percent of the documents in civil, criminal, and agency-appealed immigration cases included completely unredacted non-government party names.

In March 2025, the FJC completed a report summarizing the local court rules of the district and appellate courts to identify rules requiring redaction of specified private information from court filings.[12] It also developed a report summarizing the local rules of bankruptcy courts that

[10]The privacy rules provide for exemptions from the redaction requirements in certain circumstances, which vary somewhat across the rule sets. *Cf.* Fed. R. Civ. P. 5.2(b); Fed. R. Crim. P. 49.1(b); Fed. R. Bankr. P. 9037(b). In addition, a person may waive the protection of the privacy rules with respect to their own information by filing it without redaction. *See, e.g.,* Fed. R. Civ. P. 5.2(h).

[11] See Jana Laks, et al., Redaction of Non-Government Party Names in Social Security and Immigration Case Documents (November 2024).

[12] See Marie Leary, Review of Local District and Appellate Rules Governing Redaction of Private Information in Federal Court Filings (March 2025).

require redaction of private information from court filings.[13] In January 2026, the FJC finalized studies of unredacted minor names in court documents,[14] unredacted home addresses in criminal filings in court documents,[15] and redaction of party names in reports and recommendations filed in Social Security and immigration cases.[16]

For its analysis of unredacted minor names in federal court documents available on PACER, the FJC searched a subset of the 4.7 million PACER documents used in its earlier studies of unredacted SSNs. It determined that at least 0.13% of civil documents and 0.09% of appeals documents contain the unredacted name of a person identified as a minor in some fashion. Additionally, it found that about half of instances with an unredacted name appear to be noncompliant with the privacy rules and about half appear to be exempt.

For its analysis of the prevalence of unredacted home addresses in criminal and appellate filings, the FJC randomly selected 10,000 documents from its collection of 41,326 criminal appeals court PACER documents and 10,000 documents from its collection of 484,203 criminal district court PACER documents to search for home addresses. In those data sets, it found unredacted home addresses in 2.7% of the district court documents and 2.8% of the appeals court documents. Looking at the small percentage of documents that contained an unredacted home address, the FJC found that 63% of the unredacted home addresses in the district court documents and 78% of the unredacted home addresses in the appeals court documents appeared to be noncompliant with the privacy rules. Of the 32% of unredacted addresses (in district-court filings) that qualified as exempt from the redaction requirement, almost all appeared in charging documents and affidavits, arrest and search warrants, and criminal investigations or other documents prepared prior to filing of a criminal charge. Of the 14% of unredacted addresses (in appellate filings) that were exempt from the redaction requirement, about a third appeared in state court documents and the remainder appeared in charging documents, affidavits, warrants, and investigations.

Finally, for its study of redaction of party names in reports and recommendations (R&R's) in Social Security and immigration cases, the FJC analyzed the 955 publicly available R&Rs in the 8,170 Social Security and 6,244 civil immigration cases which terminated in the district courts between June 1, 2023 and December 31, 2023. It found that approximately two-thirds (65%, 587) of the 908 R&Rs filed in Social Security cases contained the full non-government party name. Of

[13] See Carly Giffin, Review of Local Bankruptcy Rules, Orders, and Procedures Governing Redaction of Private Information in Federal Court Filings (March 2025).

[14] See Roy Germano, et al., Exploratory Analysis of Unredacted Minors' Names in Federal Court PACER Documents (January 2026).

[15] See Roy Germano, et al., Exploratory Analysis of Unredacted Home Addresses in Federal Court PACER Criminal Proceedings Documents (January 2026).

[16] See Kristin A. Garri, et al., Redaction of Non-Government Party Names in Reports and Recommendations Filed in Social Security and Immigration Cases (January 2026).

the 35% that were redacted, nearly all (304, about 95%) included only the first name and last initial of the non-government party, mirroring the CACM Committee's suggested practice. Additionally, over 80% (38) of the R&Rs filed in civil immigration cases contained the full non-government party name. Five of the eight redacted R&Rs (10.6%) were redacted using initials and the other three were redacted to the first name and last initial (6.4%).

PART IV: CONCLUSION

In the two years since the Judicial Conference's 2024 Report to Congress on the adequacy of the privacy rules, the rules committees have considered several proposed rule changes that include privacy-related issues. The Civil and Criminal Rules Advisory Committees are proceeding through the Rules Enabling Act process with proposed amendments to require complete redaction of SSNs, ITINs and other taxpayer identification numbers in criminal and civil case filings. The Civil, Criminal, and Bankruptcy Rules Committees are also proceeding with proposed amendments to require reference to minors by pseudonyms rather than initials. [These proposed amendments to the privacy rules will be published for public comment in August 2026. Additionally, proposed final amendments to Bankruptcy Rule 2002 were also approved at the June 2026 Standing Committee meeting to eliminate reference to debtor SSNs and ITINs in notices provided under this rule. These proposed final amendments will be considered by the Judicial Conference at its September 2026 session].

Regarding additional measures to protect privacy in public court filings, the CACM Committee is currently reassessing whether it should provide additional or alternative guidance to assist the courts with protecting personal identifiers in Social Security and immigration opinions. The CACM Committee has also requested that the AO and FJC explore other ways to increase awareness about ways to protect privacy in court filings and opinions, and the FJC has included information describing these requirements and practices in its orientation materials for new chief judges, new court unit executives, and law clerks.

Finally, the FJC has engaged in numerous studies since the 2024 Report to identify the incident of unredacted SSNs in court filings and opinions, including Social Security and immigration cases, the incidence of unredacted names of minors; and the different approaches in local rules to redaction. The FJC has also conducted a survey in support of the Bankruptcy Rules Committees' consideration of the use of SSNs in bankruptcy filings. These results of these efforts have supported and informed the rule-making process and the work of the CACM Committee to continue to find ways to improve the protection of private information in electronic court filings.

DRAFT

TAB 11

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

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CHAIRS OF ADVISORY COMMITTEES

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CIVIL RULES

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CRIMINAL RULES

JESSE M. FURMAN
EVIDENCE RULES

MEMORANDUM

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

FROM: Hon. Allison H. Eid, Chair
Advisory Committee on Appellate Rules

RE: Report of the Advisory Committee on Appellate Rules

DATE: May 11, 2026

I. Introduction

The Advisory Committee on Appellate Rules met on Thursday, April 16, 2026, in Charlotte, North Carolina. The draft minutes from the meeting accompany this report.

The Advisory Committee has several action items for the June 2026 meeting.

It seeks final approval (per Part II of this report) of:

- amendments to Rule 29 concerning amicus briefs, along with conforming amendments to Rule 32 and the Appendix of Length Limits; and

- amendments to Rule 15, concerning premature petitions for review or enforcement of agency orders.

In addition, the Advisory Committee asks the Standing Committee to publish for public comment (per Part III of this report) proposed amendments to Rule 25, as part of the cross-committee project to address electronic filing by self-represented litigants.

Other matters under active consideration (per Part IV of this report) include:

- amending Rule 25 to provide greater protection for Social Security numbers in court filings;
- creating a rule to address intervention on appeal;
- amending Rule 8 to provide limits on administrative stays;
- revising Rule 4 to codify a recent Supreme Court decision on reopening the time to appeal;
- amending various rules to address the treatment of Indian tribes;
- addressing issues concerning uniformity of bar admission practices across the courts of appeals;
- revising Rule 32 to reduce the need for single-sided printing;
- revising Rule 28 to affirmatively authorize the use of introductions in briefs; and
- revising Rule 13 to correct certain issues concerning incurably premature notices of appeal.

II. Items for Final Approval

A. Amicus Briefs—Rules 29 and 32 and Appendix of Length Limits (21-AP-C)

For several years the Advisory Committee has been considering revisions to Rule 29's amicus disclosure requirements.

In September 2025, the Judicial Conference sent to the Supreme Court a package of proposed amendments to Rule 29, together with conforming amendments to Rule 32 and the Appendix of Length Limits. In response to concerns raised by the Executive Committee of the Judicial Conference, as well as two other ambiguities or errors identified in the proposed amendments, the Advisory Committee and the

Standing Committee voted to withdraw the amendment package, following the course pursued in addressing a similar issue in 2018. *See* Agenda Book 166 (Apr. 2026), *reprinting* Letter from Judge James C. Dever III & Judge Allison H. Eid to Scott S. Harris, Clerk of Court, Supreme Court of the United States (Mar. 10, 2026).

The Court chose not to forward to Congress this spring the relevant portions of the amendment package. The Advisory Committee discussed the proposals again at its April meeting, concentrating on three substantive issues and one issue of procedure.

1. New-Member Disclosures

The Executive Committee's concerns focused on a requirement that an organizational amicus disclose certain members who have contributed to funding its amicus brief. Under the current Rule 29, an amicus must disclose whether "a person—other than the amicus curiae, its members, *or its counsel*—contributed money that was intended to fund preparing or submitting the brief" and, if so, must "identif[y] each such person" (emphasis added). The previously proposed amendments would have recodified this requirement in Rule 29(e)(1), limited it to contributions or pledges over $100, and exempted only "the amicus," "its counsel," or "a member of the amicus who first became a member at least 12 months earlier": in other words, requiring that over-$100 contributions or pledges from members of less than one year's standing be disclosed. Another provision, Rule 29(e)(2), would have required that "[i]f an amicus has existed for less than 12 months, an amicus brief need not disclose contributing members but must disclose the date the amicus was created." (This date-of-creation disclosure would also be required by the proposed Rule 29(a)(4)(F), which states that an amicus brief must include, "if an amicus has existed for less than 12 months, the date the amicus was created.")

The proposed Committee Note had described the provision as an anti-evasion rule, treating new members of an amicus as if they were nonmembers. The cost of such an anti-evasion rule, however, is that an organizational amicus would have to disclose the identities of its contributing new members, which might dissuade either the organization or its new members from participating in filing the brief in the first place. *See NAACP* v. *Alabama*, 357 U.S. 449, 462 (1958) (describing the potential chilling effect of membership disclosures); *Ams. for Prosperity Found.* v. *Bonta*, 594 U.S. 595, 606 (2021) (same); *see also First Choice Women's Res. Ctrs.* v. *Davenport*, — U.S. —, 2026 WL 1153029, at *8 (Apr. 29, 2026) (same).

At its April meeting, the Advisory Committee again considered the new-member disclosure issue, which had previously been the subject of very extensive discussion and public comment. Its consideration included discussion of the extent of the negative reaction to the proposal from the Executive Committee and the public, as well as the unclear extent of the problem it sought to fix. The Advisory Committee

voted 5-1, with one abstention, to remove the requirement of new-member contribution disclosure from the proposal, as shown:

> ~~(1)~~ An amicus brief must disclose whether any person contributed or pledged to contribute more than $100 intended to pay for preparing, drafting, or submitting the brief and, if so, must identify each such person. But disclosure is not required if the person is:
>
> - the amicus;
> - its counsel; or
> - a member of the amicus ~~who first became a member at least 12 months earlier~~.
>
> ~~(2) If an amicus has existed for less than 12 months, an amicus brief need not disclose contributing members but must disclose the date the amicus was created.~~

(A complete copy of the proposed amendments to Rule 29 is attached to this report.)

2. Backup Disclosure Requirements

After the amendment package was submitted to the Court, a potential source of ambiguity was identified with regard to certain backup disclosure requirements. The proposed amendments would have required that an amicus disclose certain types of involvement by a party or its counsel; that "[a]ny such disclosure must name the party or counsel"; and that, "[i]f the party or counsel knows that an amicus has failed to make the required disclosure, the party or counsel must do so."

While the proposed Committee Note anticipated that these references to "such disclosure" or "the required disclosure" only concerned disclosures of a party or counsel's involvement, they might also be thought to be ambiguous. Arguably if a party or counsel knows that an amicus has failed to make a *different* "required disclosure," such as a disclosure of nonmember contributions discussed above, the rule might be read to require the party or counsel to disclose that fact to the court.

After discussing the issue, the Advisory Committee concluded that the narrower interpretation already presupposed by the Committee Note was to be preferred. After considering the advice of the style consultants, the Committee voted without dissent to avoid any ambiguity in "such" by merging the proposed subdivisions (b) and (c) of Rule 29, as well as to avoid any ambiguity in "the required disclosure" by referring more specifically to "the Rule 29(b) disclosure," as shown:

(b) Disclosing a Relationship Between an Amicus and a Party. An amicus brief must:

(1) disclose whether:

~~(1)~~(A) a party or its counsel authored the brief in whole or in part;

~~(2)~~(B) a party or its counsel contributed or pledged to contribute money intended to pay for preparing, drafting, or submitting the brief; and

~~(3)~~(C) a party, its counsel, or any combination of parties, their counsel, or both has a majority ownership interest in or majority control of a legal entity submitting the brief; and

(2) if so, name the party or counsel.

~~**(c) Naming the Party or Counsel.** Any such disclosure must name the party or counsel.~~

~~**(d)**~~**(c) Disclosure by the Party or Counsel.** If the party or counsel knows that an amicus has failed to make the ~~required~~ Rule 29(b) disclosure, the party or counsel must do so.

(Again, a complete copy of the proposal is attached to this report.)

3. Appendix of Length Limits

An erroneous cross-reference to Rule 29(a)(5) had not been removed from the proposed Appendix of Length Limits before the amendment package was submitted to the Court. The Advisory Committee voted without dissent to adopt a new version of the Appendix that removed this erroneous cross-reference, along with an unnecessary ellipsis that had been inserted as well. (These changes are not further detailed here but can be seen in the attachment to this report.)

4. Republication

The Advisory Committee also considered whether to submit these revisions for an additional round of public comment. While two of the issues above are stylistic or technical in nature, the first is not. However, the issue of new-member disclosure had been exhaustively discussed by the Advisory Committee and had already been the subject of many public comments.

After considering the issue, the Advisory Committee voted without dissent to recommend that the Standing Committee give final approval without republication to revised versions of the proposed amendments to Rule 29, Rule 32, and the Appendix of Length Limits.

(In preparing the revised versions for the Standing Committee's review, three additional style corrections were made on the advice of the style consultants. First, a previously proposed alteration of the phrase "by leave of court" to "with leave of court" in the proposed Rule 29(a)(2) was reversed: "by leave of court" is the more common phrase and is also used in the proposed Rule 29(e)(2). Second, the requirement to "identify" contributors in the proposed Rule 29(d) was changed to a requirement to "name" contributors, consistently with the proposed Rule 29(a)(4). Third, two erroneous instances of the word "Rules" in Rule 32(g) were corrected to "Rule." Corrected versions of the proposed amendments accompany this report.)

B. Premature Petitions (24-AP-G)

In June 2025, the Standing Committee approved publication of a proposed amendment to remove a potential trap for the unwary in Rule 15.

The "incurably premature" doctrine holds that if a petition to rehear or reconsider an agency decision makes that decision nonreviewable in a court of appeals, then a petition to review or to enforce that agency decision must be dismissed, and a new petition for review must be filed after the agency disposes of the rehearing petition. Rule 4, concerning appeals from district court judgments, used to operate in a similar way with respect to various postjudgment motions. But in 1993, Rule 4 was amended to provide that such a premature notice of appeal becomes effective when the postjudgment motion is decided. The proposal is to do for Rule 15 what was done for Rule 4.

Three public comments were received, all of them broadly supportive of the changes and conveying no specific concerns.

The Advisory Committee made two changes after publication. First, it renumbered the subdivision created by the proposed amendment from 15(d) to 15(f), in the hopes of avoiding confusion among courts and litigants regarding the proposed rule and the current Rule 15(d), often discussed by courts with regard to intervention in agency review proceedings. Second, to avoid attempts to obtain review of orders that are nonfinal for other reasons (unrelated to any pending petition for rehearing or reconsideration), the Advisory Committee added language reaffirming that the order in question must be "otherwise reviewable," as shown:

> **~~(d)~~(f) Premature Petition or Application.** This subdivision ~~(d)~~(f) applies if a party files a petition for review or an application to enforce after an agency announces or enters ~~its~~ an otherwise reviewable order—but

> before the agency disposes of any petition for rehearing, reopening, or reconsideration that renders the order nonreviewable as to that party. The premature petition or application be-comes effective to seek review or enforcement of the order when the agency disposes of the last such petition for rehearing, reopening, or reconsideration. If a party intends to challenge the disposition of a petition for rehearing, reopening, or reconsideration, the party must file a new or amended petition for review or application to enforce in compliance with this Rule 15.

The Advisory Committee voted without dissent to recommend that the Standing Committee give final approval to the revised version of the proposed amendment to Rule 15 that accompanies this report.

III. Item for Publication

A. Electronic Filing and Service by Self-Represented Parties (21-AP-E)

The Advisory Committee defers to the Consultant to the Standing Committee for the update regarding the joint project on electronic filing and service by self-represented litigants.

IV. Items Under Consideration

A. Privacy (22-AP-E)

The Advisory Committee has been following the cross-committee efforts to improve privacy protections, particularly with regard to the names of minors and to Social Security and other tax ID numbers. In general, the Advisory Committee's approach has been to piggyback on those efforts, incorporating by reference under Rule 25(a)(5) any privacy rules that were applicable in the district court (or else importing the Civil or Criminal Rules as appropriate in other cases). However, the Advisory Committee has also considered implementing additional rules of its own.

At its previous meetings, the Advisory Committee considered a possible amendment to Rule 25(a)(5) that would bar any part of a Social Security or other tax ID number in an appellate filing by a party not under seal—on the theory that, whatever the need for such numbers in other circumstances, there is no need for them in a public appellate filing by the parties. The Advisory Committee decided to wait on the project in order to allow the Standing Committee to consider proposals from all of the advisory committees at the same time. (At the Standing Committee's January 2026 meeting, the question was also raised whether a similar approach should be taken toward the names of minors.)

Due to the lapse in funding, the Solicitor General or his representative did not attend the October 2025 meeting at which this issue was discussed. At the April 2026 meeting, concerns were communicated from the Department of Justice that reviewing record materials in Social Security appeals to remove such numbers, including sequences of the last four digits only, might prove to be a substantial burden. Other members agreed, or noted variations in the ways in which different courts or institutions whose documents can enter an appellate record choose to anonymize minors' names.

Rather than take any action at this time, the Advisory Committee chose at its April meeting to study the topic further. Given the Appellate Rules' piggybacking approach, this delay will not prevent other committees from revising their own rules, nor will it prevent those revisions from having their appropriate follow-on effects in the courts of appeals.

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

The Advisory Committee continues its work on a new rule governing intervention on appeal. There is currently no Appellate Rule governing intervention, other than Rule 15(d), which sets a deadline but no criteria for intervention in agency cases. In the past, the Advisory Committee has decided not to pursue creating a new rule governing intervention on appeal, fearing that such a rule would invite unmeritorious motions to intervene. However, the Advisory Committee believes that it is worth continuing to draft such a rule.

Here is the working draft:

Rule 12.2. Intervention on Appeal from a District Court

(a) Scope. This rule applies to an appeal from a district court in a civil case. [It does not apply to an appeal in a case under 28 U.S.C. § 2254 or § 2255.]

(b) Intervention Disfavored. The preferred method for a nonparty to be heard is by participating as an amicus curiae under Rule 29. Except as provided in (d) and (e)(1)–(3), intervention under this rule is disfavored and is reserved for exceptional cases.

(c) Motion to Intervene. A nonparty who wishes to intervene must file a motion to intervene in accordance with Rule 27. The motion must:

(1) be filed as soon as is practical after the appeal is docketed;

(2) state whether intervention would affect the subject-matter jurisdiction of the court or of the district court; and

(3) state the grounds for intervening.

(d) Grounds for Mandatory Intervention. The court must permit intervention by a movant who is given a right to intervene by federal statute.

(e) Other Grounds for Intervention. The court may permit intervention:

(1) by the United States, or by a state, to defend the validity of its law or of an action that it or its agency or officer has taken;

(2) by one of its agencies or officers, if legally authorized to defend such law or action and intervention is sought for this purpose;

(3) by the United States, to defend its national-security or foreign-relations interests; or

(4) by any movant who shows:

(A) a compelling reason why intervention was not sought previously or, if it was sought previously, a compelling explanation of how circumstances have changed;

(B) a [legally protected] [legally cognizable] interest that may be affected in the appeal, apart from the precedential effect of a decision, so that:

(i) adjudicating the appeal may, as a practical matter, impair or impede the movant's ability to protect that interest;

(ii) existing parties do not adequately protect the interest; and

(iii) participating as an amicus would insufficiently protect the interest; and

(C) that existing parties will not be unfairly prejudiced.

(f) Effect of Deciding the Motion. If the court grants the motion, the movant becomes a party to the action for all purposes, unless the court orders otherwise. If the court denies the motion, the movant is not precluded from seeking to participate as an amicus under Rule 29.

A few things to note:

- The draft is limited to intervention in appeals from district courts in civil cases and would not apply to agency review proceedings governed by Rule 15(d). While it would apply to appeals from bankruptcy proceedings or from cases in the Tax Court, in which intervention is generally available, it would not apply to criminal appeals, nor to appeals involving the collateral review of criminal cases. (The Advisory Committee is considering the proper handling of other forms of habeas under § 2241.) When the rule would not apply, it would not affirmatively forbid intervention either; rather, it merely would leave intervention in such cases to be governed by preexisting law.

- The Advisory Committee is considering different ways of phrasing the timeliness requirement, as well as different measures to make clear that intervention ordinarily must be sought in the district court and should not be available to most litigants (absent very unusual circumstances) for the first time on appeal.

- The phrasing of "Mandatory Intervention" may be revisited.

- The scope of government intervention is substantially narrower than under Civil Rule 24. These provisions focus on the defense of a law or action's validity or of national-security or foreign-relations interests. In other circumstances (*e.g.*, to defend proprietary interests), governments could intervene in the same manner as private litigants.

- A proposed intervenor must have the sort of legal interest at stake—however phrased—that would support its independent presence as a litigant, and not merely one founded on the precedential effect of a judgment against other litigants, as to which amicus participation is the proper response. The Advisory Committee is considering alternative (and narrower) phrases in place of "may be affected."

C. Administrative Stays (24-AP-L)

The Advisory Committee continues to consider a suggestion to amend Rule 8 to provide limits on administrative stays. The FJC is undertaking research on the subject.

D. Reopening Time to Appeal (24-AP-M)

If a litigant files a notice of appeal in a civil case after the time for appeal expires, but before its motion to reopen is granted—that is, too late for the ordinary window, but too early for the reopened window—courts had recently disagreed on whether this notice would be effective or else incurably premature. (Often the question arises after the court has construed a single document to serve both as the notice

of appeal and as the motion to reopen.) Requiring a second notice might create a trap for the unwary litigant, who has already filed one notice of appeal and may not realize the need for another.

The Advisory Committee had been considering a suggestion from Chief Judge Sutton to amend Rule 4 to eliminate this trap. In the interim, the Supreme Court decided *Parrish* v. *United States*, which held that the premature notice could be treated as effective upon the reopening of the window, reaffirming that a single document could be construed to serve as both the notice of appeal and the motion to reopen.

The Advisory Committee has considered proposals to codify the rule in *Parrish*. Here is the working draft:

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

* * * * *

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

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

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

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

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

(B) *Effect on a Party Who Has Filed a Notice.* If the movant has filed a notice of appeal—even if that document also serves other purposes—after the time otherwise allowed by these rules but before the court grants the motion to reopen, the

notice becomes effective when the motion to reopen is granted and need not be refiled.

This version differs from previously discussed drafts in two main respects. First, it seeks to avoid any impression that it governs jurisdictional questions directly, focusing only on the time at which a premature filing becomes effective. Second, it does not attempt to specify what criteria an ambiguous document must meet to be construed as a notice of appeal, leaving that question entirely up to the preexisting requirements of Rule 3.

At the April meeting, a number of members expressed concern with the potential awkwardness of the parenthetical em-dashed phrase. The Advisory Committee continues to consider the matter. (Rules suggestion 26-AP-1, addressing the same topic, has been consolidated with this agenda item.)

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

From 2009 to 2012, the Advisory Committee had considered a proposal to categorize Indian tribes as states for the purpose of the Appellate Rules. This suggestion was tabled until 2017 and then not revived. In response to a more recent suggestion, however, the Advisory Committee has chosen to return to the subject.

Unlike the 2009 proposal, the currently pursued approach does not seek across-the-board uniformity in the treatment of states and Indian tribes, as that might produce inappropriate results in areas such as habeas, in which the law governing each is quite different. Rather, it seeks to identify specific provisions under which Indian tribes ought to receive specific attention in the Appellate Rules.

The Advisory Committee is considering which provisions those might be (*e.g.*, rules regarding amicus participation); which entities ought to receive specific attention (*e.g.*, only entities federally recognized as sovereign, or nonsovereigns such as Alaska Native Corporations as well); and what specific revisions ought to be made.

F. Uniform Bar Admission (25-AP-B)

The Advisory Committee continues to consider a suggestion to provide greater uniformity in the treatment of bar admissions across the courts of appeals. Different courts appear to impose very different requirements on attorneys for different purposes: appearances at oral argument, names on briefs, pro hac vice admissions, and so on. Before determining whether any rulemaking is merited on this topic, it will be necessary to determine the extent of variation in current practices. The Advisory Committee is grateful for the assistance of the Rules Committee Staff in this effort.

G. Double-Sided Printing (25-AP-E)

A recent rules suggestion noted that Rule 28 requires briefs and appendices to be printed only on a single side of the page, increasing costs for litigants as compared to double-sided printing, as well as using up more paper and taking up more space in clerks' offices. The Advisory Committee has begun consideration of proposals that might reduce this burden in appropriate circumstances.

H. Introductions to Briefs (25-AP-F)

A recent rules suggestion encouraged amendments to affirmatively authorize the inclusion of introductions in briefs, a common and usually welcome practice that might nonetheless strike litigants as forbidden by a straightforward reading of Rule 28. The Advisory Committee is considering the matter.

I. Tax Court Premature Notices

At the April meeting, an item of new business was raised concerning premature notices of appeal from judgments of the Tax Court. If that court announces a decision before issuing a judgment, and if a party files a notice of appeal during that window, the notice may prove to be incurably premature. While similar mistakes in the district courts are addressed by a provision of Rule 4, delaying the effectiveness of the notice until after the judgment issues, no similar provision is found in the portions of Rule 13 that govern Tax Court appeals. The Advisory Committee is considering the matter.

TAB 12

Minutes of the Spring Meeting of the
Advisory Committee on Appellate Rules

April 16, 2026
Charlotte, NC

Judge Allison Eid, Chair, Advisory Committee on Appellate Rules, called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, April 16, 2026, at approximately 9:00 a.m. EDT.

In addition to Judge Eid, the following members of the Advisory Committee on Appellate Rules were present in person: Andrew Adler, Linda Coberly, Professor Bert Huang, Justice Leondra Kruger, and Judge Carl J. Nichols. The Solicitor General was represented by Mark Freeman, Director of Appellate Staff, Civil Division, Department of Justice. George Hicks attended via Microsoft Teams, as did Judge Sidney Thomas, who joined the meeting after it began. Judge Richard Wesley could not attend.

Also present in person were: Judge James C. Dever III, Chair, Committee on Rules of Practice and Procedure (Standing Committee); Andrew Pincus, Member, Standing Committee and Liaison to the Advisory Committee on Appellate Rules; Judge Daniel Bress, Member, Advisory Committee on Bankruptcy Rules and Liaison to the Advisory Committee on Appellate Rules; Christopher Wolpert, Clerk of Court Representative; Carolyn Dubay, Secretary to the Standing Committee, Rules Committee Staff (RCS); Bridget M. Healy, Counsel to the Rules Committees, RCS; Sarah Sraders, Counsel to the Rules Committees, RCS; Tim Reagan, Federal Judicial Center (FJC); Judge Robert J. Conrad, Jr., Director, Administrative Office of the U.S. Courts (AOUSC); Professor Edward A. Hartnett, Reporter, Standing Committee; and Professor Stephen E. Sachs, Reporter, Advisory Committee on Appellate Rules.

Professor Catherine T. Struve, Consultant, Standing Committee; Professor Joseph Kimble, Style Consultant, Standing Committee; Shelly Cox, Management Analyst, RCS; and Rakita Johnson, Administrative Analyst, RCS, also attended via Microsoft Teams.

I. Introduction and Preliminary Matters

Judge Eid opened the meeting and welcomed the attendees, including those attending remotely. She thanked the U.S. District Court for the Western District of North Carolina, including Chief Judge Martin Reidinger and Clerk of Court Katie Simon, for hosting the meeting. She also congratulated Professor Sachs, the new Advisory Committee reporter, and Professor Hartnett, the new Standing Committee reporter; wished farewell to Judge Wesley, whose term on the Committee is coming to an end, and thanked him for his work on the Committee's projects; and introduced Judge Conrad.

Ms. Dubay directed attention to the rules tracking chart (Agenda Book 20). She noted that the amendments to Form 4, approved by the Supreme Court, had been transmitted to Congress.

Ms. Sraders referred to the pending legislation chart (Agenda Book 27).

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Judge Eid noted the draft minutes of the Standing Committee (Agenda Book 41), including those portions regarding the work of the Advisory Committee on Appellate Rules (Agenda Book 46), as well as the portions of the Standing Committee's report to the Judicial Conference regarding the work of the Advisory Committee (Agenda Book 79).

II. Approval of the Minutes

A motion was made and seconded to approve the minutes of the Advisory Committee meeting of October 15, 2025 (Agenda Book 86). The minutes were approved without dissent.

III. Discussion of Joint Committee Matters

A. Electronic Filing and Service by Self-Represented Parties (21-AP-E)

Professor Struve provided a detailed report regarding an ongoing cross-committee project on electronic filing and service for self-represented parties (Agenda Book 103). She thanked the Advisory Committee and its reporters, Mr. Wolpert, the Rules Office, and the Federal Judicial Center for their assistance, and she noted the work of the other Advisory Committees.

As Professor Struve described the project, it has two goals: to expand access by self-represented litigants to the courts' electronic-filing systems, and to reduce the need for paper service on other litigants already receiving the filings electronically.

1. Electronic Filing

The current proposal would flip the default rule on electronic filing via Rule 25(a)(2)(C)(i), so that self-represented litigants would have presumptive access to the court's electronic system, unless prohibited by local rule or court order. Subdivision (ii) would then provide flexibility to courts, affirming that a court could set and enforce reasonable conditions and restrictions on that access—including by denying or revoking access for a particular party—but could not prohibit all self-represented parties from using the system without reasonable exceptions or other electronic means for submitting and receiving papers. (Professor Struve emphasized that this flipped presumption was only enjoyed by self-represented *parties*, rather than other persons who might be before the court; this was the approach pursued by the Civil Rules Committee, and was likely to be pursued by Criminal also, though Bankruptcy had chosen otherwise for bankruptcy-specific reasons.) An optional subdivision (iii), in an appeal from a district court, might extend a party's presumption to a nonparty who had already been permitted to file electronically in the district court, by analogy to Rule 24's treatment of *in forma pauperis* status.[1]

Professor Struve also highlighted language in the draft committee note opining that reasonable exceptions under subdivision (ii) would include a local provision requiring self-represented

[1] Per Agenda Book 116, the text of this draft subdivision (iii) read as follows: "[(iii) Unrepresented Person Permitted to File Electronically in the District Court. In an appeal from a district court, [unless a local rule provides otherwise,] this subdivision (C) concerning an unrepresented party also applies to an unrepresented nonparty who has used the district court's electronic-filing system to file papers in the case and who remains permitted to do so.]"

parties to obtain the court's permission in order to file electronically.[2] By comparison, while some district courts generally allow electronic filing by self-represented parties and others generally forbid it, there is also a middle camp that permits such filing only with the court's permission. The sentence might thus limit the scope of the change from present practice for the courts of appeals, but some might wish for a broader change, and others might be reluctant to place in a committee note an opinion as to the meaning and function of the rule's text (albeit a practice with some precedent). Two committees had already included such language, but over objections.

Professor Struve then halted her presentation of the report so that the Committee could discuss the issue of filing.

Professor Hartnett described the discussions of the other committees. He also noted that, if a committee note's interpretation of a rule is later thought to be incorrect, there is no mechanism by which the committee note could be amended without altering the text of the rule itself, which might need no change. He also questioned how often the issue arises of carrying over permission for self-represented nonparties from the district courts to the courts of appeals—other than (rare) amicus participation in district courts.

Professor Sachs noted certain other reasons why a self-represented nonparty might submit a filing in district court, such as to quash a subpoena or to unseal a document of public interest, and he asked what default rule should govern such cases.

Mr. Freeman asked whether a court of appeals would be aware of permission granted by the district court. (Mr. Wolpert confirmed that it would.) He also raised the issue of whether, given that e-filing decisions are not published, a pro se litigant—or even a represented party—would be able to determine whether the court's permission was being unreasonably withheld in practice, or to meet the applicable burden of proof.

A judge member asked how the practice of granting permission operates in practice. Professor Struve stated that the practice varies widely, often including training requirements. Mr. Reagan described the FJC's research and added that typically, before obtaining permission, a litigant must first complete a training module and pass a test.

A liaison member suggested that such a training process made the permission requirement roughly equivalent to the reasonable conditions courts might impose under subdivision (ii). Professor Struve agreed, but added that a permission requirement was broader and allowed for a less systematic approach.

[2] Per Agenda Book 116, the text of this draft subdivision (ii) read as follows: "(ii) Conditions and Restrictions on Access. A court may set and enforce reasonable conditions and restrictions on unrepresented parties' access to the court's electronic-filing system (including by denying or revoking access for a particular unrepresented party). But the court may not prohibit all unrepresented parties from using the system unless that prohibition includes reasonable exceptions or the court permits the use of another electronic method for filing papers and receiving electronic notice of activity in the party's case."

Per Agenda Book 120, the relevant language in the draft committee note read as follows: "[A local provision requiring unrepresented parties to obtain the court's permission in order to use the court's electronic-filing system [could] [would] count as including reasonable exceptions, so long as such permission is not unreasonably withheld in practice.]"

Mr. Wolpert favored striking the provision carrying over permission for nonparties from the district court, noting that many proceedings (such as sealing documents) involve different concerns at the trial or appellate level; that requiring a motion need not be onerous; and that the requirement gives a clerk's office an opportunity to express concerns regarding litigants with histories of vexatious filings. Judge Dever noted that the Bankruptcy and Civil clerk representatives had expressed similar concerns.

With regard to the bracketed committee note language on self-represented parties' obtaining permission before e-filing, Professor Sachs suggested that the rule language concerning reasonable conditions would provide sufficient protection, and that allowing courts to require permission might in practice restore the prior (unflipped) default. With regard to self-represented nonparties allowed to e-file in district court, he asked whether a motion requirement would be necessary if the motions were rarely denied.

Mr. Freeman noted that some courts of appeals use different e-filing software than the district courts in the same circuit, which might require additional training for the filer before any permission carried over. A liaison member seconded Mr. Freeman's concern. Professor Struve and Professor Sachs noted that the proposed carryover provision allowed for deviations by local rule.

A liaison member suggested that the bracketed committee note language would be very unclear if a permission requirement "could," rather than "would," be permissible. He also noted that the carryover provision meant that nonparties who had e-filed in the district court would enjoy a different status than other nonparties filing for the first time in the court of appeals.

Mr. Wolpert stated that, even if 90 percent of e-filing situations are easy and rule-compliant, the rule should be prepared for the 10 percent of more difficult situations that drain the court's resources. The bracketed committee note language was designed for these cases, and the carryover provision might cause problems in them.

A judicial member agreed with concerns that the permission requirement in the bracketed committee note language might produce ad hoc decisions, asking if it would be helpful to include an express reference to the enforcement of reasonable conditions and restrictions. Mr. Wolpert responded that it would be, but he noted that an undefined category of reasonable conditions might produce disputes with pro se litigants, whereas a permission requirement was very clear. He added that the clerk's offices generally favor e-filing to reduce expenses, but that the carryover provision might increase difficulties, and that the bracketed language would give clerks something to point to in explaining the rules.

A motion was made and seconded to strike the carryover provision. The motion was approved without dissent.

A motion was made to strike the bracketed committee note language, but not seconded.

A liaison member asked whether the bracketed committee note language might refer to the reasonable conditions discussed in the rule. Mr. Wolpert stated that some self-represented litigants occasionally challenge the authority of clerk's offices to apply the rules, and that while he

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did not want the exception to swallow the rule, the bracketed committee note language would help clarify this authority.

A judicial member asked whether it would be possible to incorporate the idea of enforcement of reasonable conditions on access into the bracketed committee note language regarding permission, so that such permission could be granted or denied in accordance with those conditions. Professor Sachs suggested the following: "A local provision requiring unrepresented parties to obtain the court's permission in order to use the court's electronic filing system would count as including reasonable exceptions, so long as such permission is granted or withheld in accordance with the reasonable conditions and restrictions on access set by the court."

A liaison member asked whether permission was generally required by the courts of appeals. Mr. Wolpert replied that it was, but that clerk's offices were often authorized to grant such permission, and that they usually did so as a matter of course absent evident concerns. The liaison member endorsed the suggested language.

A motion was made and seconded to adopt the suggested language in place of the bracketed language in the committee note. The motion was adopted by a vote of 6 to 1.

(Responding to a query from Professor Sachs, Judge Eid confirmed that the Committee's deletion of the carryover permission in subdivision (iii) extended to the deletion of the bracketed language in the committee note accompanying that subdivision.)

2. Manner of Service

Professor Struve then turned to the service provisions, as to which she thanked the style consultants for their assistance. She described the major achievement of the draft as dispensing with the requirement of paper service on litigants who would receive copies of paper filings electronically, through a "notice of case activity" (a category encompassing any notice of electronic filing) generated when the clerk's office uploads the paper filing. The draft carried forward a provision that such service would not be effective if the filer learns that it did not reach the person to be served, as well as a provision that a court could retain paper service for certain categories of materials (*e.g.*, sealed papers or case-initiating filings).

Professor Struve also noted a new issue of timing that had arisen: when a delay intervenes between a paper filing's presentation to the court and its uploading to an electronic filing system (thus triggering the notice of case activity), how should the court calculate deadlines relating to service? Language developed in connection with the Criminal Rules Committee's pro se subcommittee—and favored by Civil and Bankruptcy—provided in substance as follows. Deadlines *on* service would be applied with regard to the date on which a paper is filed with the court (meaning that the filer had complied with the required deadline); deadlines running *from* service would be applied with regard to the date on which the electronic notice issues (preserving the full window

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of time promised to its recipients). For clarity, particularly for self-represented litigants, a repeated reference to service "by a notice of case activity" had been suggested in brackets.[3]

Mr. Freeman asked how the proposed language would interact with the deadline calculation provisions of Rule 26(c), which extend deadlines in certain circumstances by three extra days. Professor Struve answered that there would be no interaction, as Rule 26(c)'s three-day rule excludes papers served electronically, as any papers served under the new language would be. As a policy matter, moreover, no extra time would be necessary for a deadline calculated from the date on which the electronic notice issued.

A liaison member asked whether a similar deadline-varying provision would be needed for service by other electronic means. Professor Struve stated that it would not. Only service by notice of case activity involved the potential delay of a paper-to-electronic conversion. Moreover, service by other electronic means would still be ineffective should the sender learn it did not reach the person to be served (*e.g.*, in a PACER outage).

A motion was made and seconded to approve the bracketed language. The motion was approved without dissent.

A liaison member asked if the distinction between a self-represented *party* and a self-represented *person* (that is, including nonparties) were clear enough from the rule. Professor Struve suggested an addition to the committee note on Rule 25(a)(2)(C)(i), underlined here: "The reference to an unrepresented 'party,' rather than an unrepresented 'person,' excludes an unrepresented nonparty from its scope; the rule does not grant nonparty nonlawyers any right to use the court's electronic-filing system." No objections were raised.

A motion was made and seconded to approve the package of amendments to Rule 25, as amended, for publication. The motion was approved without dissent.

B. Privacy (22-AP-E; 24-AP-B; 24-AP-C; 25-AP-C)

Professor Sachs presented a report on a cross-committee project on privacy (Agenda Book 148), designed to shield information such as Social Security and tax ID numbers or the names of minors. In general, this Committee's approach has been to allow the Bankruptcy, Civil, and Criminal Rules Committees to set their own privacy rules and to incorporate those rules by reference. At the October meeting, an amendment was discussed that would require full redaction of Social Security and tax ID numbers in unsealed appellate filings (even when, for example, the information was permitted to appear in a filing in the district court), on the argument that appellate filings would rarely need such information to appear, and could be sealed if they did. The requirement would not apply to a clerk or agency that merely passes on a record to the court.

He also noted two additional issues. First, at the January meeting of the Standing Committee, a question had arisen of whether similar protection, over and above the other committees' rules,

[3] Per Agenda Book 118, the relevant provision read: "(B) For Service by a Notice of Case Activity. For any service deadlines, service by a notice of case activity is complete as of the date of filing. For any deadlines that run from the date of service, service [by a notice of case activity] is complete as of the notice's date."

should be given for the names of minors in appellate filings. Second, among the matters discussed in a recent rules suggestion (26-AP-2), though submitted too recently to be included in the Agenda Book, was the question whether a district court's order providing for public access to certain materials should, by default, carry over to the court of appeals.

Mr. Freeman asked whether this proposal would reflect a new obligation to redact information in an appendix that gathers already-filed documents. He noted that it might be a significant burden, as appendices are often assembled at the last minute; that different parts of an agency record might be submitted, and in different forms (such as an excerpt of record); that courts vary significantly as to the materials that may or must be included in an appendix; and that attorneys would then bear the burden of ensuring on every single page that no prohibited information appears. Professor Sachs confirmed that this would be required by the proposal.

An attorney member noted that different courts redact minors' names differently (*e.g.*, by initials or by pseudonyms), and that requiring a single approach on appeal, including for material drawn from state-court records, could introduce complications. Professor Sachs noted that the other committees were moving toward pseudonyms, and that it might be possible for a previous method of redaction to carry over on appeal. The attorney member added that, when the caption of a case includes a minor's initials, it might be very labor-intensive to replace such references and would provide little privacy benefit, notwithstanding the importance of the issue.

A liaison member noted that minors' names are much more commonly found in appendices—for example, in IDEA or immigration cases—than are Social Security or tax ID numbers. Mr. Wolpert agreed.

A judicial member asked whether a problem had been identified of minors' names commonly appearing in appellate filings. Professor Sachs was uncertain, noting that the issue had been raised at the Standing Committee meeting and was now passed on to the Committee.

Professor Hartnett noted that, because the initial concern regarding Social Security numbers had been limited in scope, no subcommittee process had been undertaken.

Mr. Freeman stated that the Department of Justice often litigates Social Security cases in which a claimant's appeal might include such numbers, which are found throughout the agency record. While there may be a technological fix, the burden appeared substantial. He also noted that the Solicitor General had not attended the October meeting due to the lapse in funding, and that it might be necessary to undertake further review.

Mr. Reagan described an FJC study that found several thousand unredacted Social Security numbers in district-court filings, as well as a few hundred in appellate filings, all of them located in the record on appeal.

An attorney member suggested that different rules might be appropriate for appellate briefs, for appendices, and for excerpts of record, given the degree of preparation usually required for each.

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Mr. Freeman noted that different courts have highly variable requirements with regard to appendices and excerpts of record. He also noted that it may be very difficult to identify which four-number sequences in an administrative record are the last four digits of Social Security numbers requiring redaction.

Professor Sachs asked whether it would pose any difficulties for the Committee to consider the matter at greater length before sending proposed language to the Standing Committee. While the Committee had thought the language acceptable at its last meeting, different rules for briefs or appendices might be necessary. Moreover, Judge Dever had pointed out that under the Civil Rules filers waive privacy protections by including their own information in unsealed filings, but the proposed language made no provision for such waiver.

Professor Hartnett stated that it would not cause a problem, as the Appellate Rule currently piggybacks on other rules, so retaining that current rule would not prevent other committees from revising their own. The Committee had previously delayed its own proposal to allow other committees to catch up and produce their own language, but it would now be holding back. While the Standing Committee tends to prefer to deal with related proposals together, his instinct was that it would prefer a proposal that was fully baked to one that was not.

Ms. Dubay noted that the proposal to use pseudonyms for minors' names had originally been made by the Department of Justice to the Criminal Rules Committee, and that Civil and Bankruptcy were in agreement on that approach. She agreed, however, that the current piggyback rule would not prevent those committees from going forward with their own amendments.

Mr. Freeman reiterated the potential burden of redaction, particularly with regard to Social Security cases, that the Department of Justice had been unable to raise at the October meeting.

Professor Hartnett noted that the Committee had chosen to proceed without a subcommittee, and he suggested that it try to avoid doing so in the future, even for matters that might appear uncontroversial.

Professor Sachs suggested the appointment of a subcommittee.

Judge Eid appointed a subcommittee on the issue, consisting of Mr. Adler, Ms. Coberly, and Mr. Freeman. No further action was taken.

IV. Discussion of Matters Published for Public Comment

A. Amicus Disclosures (21-AP-C)

Professor Sachs presented a report on the amicus disclosure amendments (Agenda Book 153). He identified two issues for the Committee to decide: which changes, if any, it would recommend to be made to the amendments as previously proposed, and whether additional public comment would be necessary on such changes.

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The first possible change concerned organizational amici and the disclosure of new members. The argument in favor of disclosure was that a funder might disguise its involvement in an amicus brief by joining an existing group and then immediately helping it to fund and prepare the brief under the group's name. The argument against disclosure was that new and old members both enjoy privacy rights, and that, per concerns expressed in cases like *NAACP* v. *Alabama*, entities might be chilled from submitting amicus briefs if they were required to disclose their members (even only their new members). Some groups form specifically for the purpose of influencing public debate on an emergent issue, or in response to a pending case, and therefore many names might have to be disclosed. These considerations had been debated extensively, and possible language had been identified to implement them (Agenda Book 155–57).

A second possible change concerned a backup requirement for disclosure. Under the proposed Rule 29(b), an amicus that has a party or counsel help fund or author the brief would have to disclose that fact. The proposed Rule 29(c) requires naming the party and counsel, and the proposed Rule 29(d) requires that, if the amicus fails to make "the required disclosure," the party or counsel must do so. However, "the required disclosure" might be read either to extend only to the participation disclosure under Rule 29(b), or also to the required Rule 29(e) disclosure of a relationship between the amicus and a nonparty. On the one hand, if a party knows that a relationship ought to have been disclosed and had not been, the court should find out. On the other hand, beyond generic duties of candor to the court, the Appellate Rules do not generally require a party or counsel to report on another's failure in its disclosure obligations (*e.g.*, an incomplete Rule 26.1 corporate disclosure statement). The committee note appears to presume that only the Rule 29(b) disclosure was intended.

The third issue was an unnecessary and mistaken cross-reference to Rule 29(a)(5) in the Appendix of Length Limits.

1. New Member Disclosures

Judge Eid began the discussion with the new member provision.

An attorney member asked if any more information were available on the concerns expressed about this provision by the Executive Committee of the Judicial Conference. Judge Eid confirmed that the available information had been put in her letter with Judge Dever to the Clerk of the Supreme Court (Agenda Book 166).

Judge Dever added that the Executive Committee was chaired by Chief Judge Sutton, who had chaired the Standing Committee, and included Chief Judge Chagares, who had chaired this Committee. He also noted the dueling concerns discussed in the report of evasion and of privacy, as reflected by cases such as *NAACP* v. *Alabama* and *Americans for Prosperity Foundation* v. *Bonta*.

Another attorney member, noting that a new rules suggestion by the U.S. Chamber of Commerce (26-AP-3) had commented on the report, asked if the report had become public through its inclusion in the Agenda Book. Professor Sachs confirmed that it had. The rules suggestion had

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been submitted too recently to be included in the Agenda Book and so had been circulated to the Committee.

Ms. Dubay noted that these issues had been discussed at great length, and that the new element was the import of the Executive Committee's views. Judge Eid summarized the discussion in her letter with Judge Dever of the Executive Committee's objections to the new member proposal. Judge Dever added that, in light of these objections and the other concerns discussed in the Agenda Book, the Committee had attempted to follow the same procedure as in 2018, when a proposal already submitted to the Court was withdrawn, revised, and resubmitted to the Standing Committee.

Mr. Freeman asked if the Court had acted on the request to withdraw. Judge Eid and Judge Dever confirmed that it had, and that these amendments had not been in the package submitted to Congress.

A judicial member noted that the Committee had discussed the merits of the proposals a great deal. Given the very negative reaction to the proposal, and given the unclear extent of the problem it sought to fix, he was inclined to adopt the recommended edits. Mr. Freeman agreed.

A motion was made and seconded to adopt the recommended edits to the proposed Rule 29(e). The motion was adopted by a vote of five to one, with one abstention.

2. Backup Requirement for Disclosure

Judge Eid then turned the discussion to the backup requirements for disclosure in the proposed Rule 29(c)–(d).

Professor Sachs noted that the Committee had one substantive and one stylistic issue to consider. He began with the substantive issue: whether, under (d), a party or counsel should be obliged to inform the court only about an amicus's failure to make 29(b) disclosures regarding that party or counsel—as the committee note suggests—or whether it should have a broader obligation to inform the court if 29(e) disclosures are not made.

A judicial member agreed that it seemed to contemplate the 29(b) disclosure only. No objection was heard.

Professor Sachs then turned to the stylistic issue of how to refer to the Rule 29(b) disclosure. He presented a suggestion received from the style consultants to merge (b) and (c) and to renumber accordingly.[4]

[4] The suggestion was as follows (with additions underlined and deleted text struck through), with appropriate renumbering elsewhere in the rule text and committee note:

(b) Disclosing a Relationship Between an Amicus and a Party. An amicus brief must:
(1) disclose whether:
~~(1)~~(A) a party or its counsel authored the brief in whole or in part;
~~(2)~~(B) a party or its counsel contributed or pledged to contribute money intended to pay for preparing, drafting, or submitting the brief; and
~~(3)~~(C) a party, its counsel, or any combination of parties, their counsel, or both has a majority ownership interest in or majority control of a legal entity submitting the brief; and

Professor Kimble thanked the Committee for the opportunity to attend. He stated that unnecessary cross-references are disfavored as an inconvenience to readers; mentioning Rule 29(b) can make it more difficult for the reader to understand that the reference is to the immediately preceding provision. He suggested that "such" created no ambiguity because it could only refer backwards, to an antecedent. He also thought that merging (b) and (c) would also be an effective response to any ambiguity.

A judicial member, approving of the merger of (b) and (c), asked whether a similar cross-reference issue would arise in the next provision (originally (d)). Professor Kimble stated that it would.

An attorney member suggested "the above disclosure." Professor Kimble demurred, stating that the full rule number was more specific, but that in his view it was unnecessary.

The attorney member asked whether the ambiguity concern had come from the Standing Committee. Professor Sachs stated that he had raised the issue with this Committee upon encountering the language for the first time, and that his only concern was that the reference be unambiguous.

An academic member recommended keeping the reference to "Rule 29(b)" in the original (d), as suggested in the memorandum. No objection was made.

A motion was made and seconded to adopt Rule 29 with the suggested amendments, including the merger of 29(b)–(c). The motion was adopted without dissent.

3. Appendix of Length Limits

Professor Hartnett noted that the ellipsis in the proposed amendment, after the heading and before the first sentence (Agenda Book 161, line 4), was unnecessary as nothing was omitted. Professor Sachs concurred.

A motion was made and seconded to eliminate the ellipsis. The motion was adopted without dissent.

4. Public Comment

Professor Sachs suggested that the change to the Appendix of Length Limits was a technical amendment not requiring recirculation for public comment. The same was likely true of the amendments regarding Rule 29(b) and the backup disclosure requirement, as the committee note already envisioned the same substantive scope for the requirement. The real question was whether public comment was necessary for the changes with regard to new members of organizational amici. He suggested that it was not, as the issues had been exhaustively discussed and were already the subject of many public comments.

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(2) if so, name the party or counsel.
~~(c) Naming the Party or Counsel. Any such Rule 29(b) disclosure must name the party or counsel.~~

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A judicial member agreed with the analysis in the memorandum. No objections were heard.

A motion was made and seconded to recommend the proposed amendments to Rule 29, Rule 32, and the Appendix of Length Limits, as revised, to the Standing Committee for adoption without republication. The motion was adopted without dissent.

B. Premature Petitions (24-AP-G)

Professor Huang presented a subcommittee report on the treatment of premature petitions (Agenda Book 208). The proposed amendment, following certain provisions of Rule 4, is designed to remove a trap for the unwary in filing an incurably premature petition for review or application to enforce an agency order.

Professor Huang reported that the public comments were few and positive, and that the subcommittee had suggested a simplified numbering of the amendment, adding it at the end of the existing Rule 15 as 15(f) rather than inserting it as 15(d) and renumbering the remaining subdivisions. The existing Rule 15(d), on intervention in agency review, is often cited and its numbering is familiar to litigants.

Mr. Freeman expressed the Department of Justice's support for the amendment in general. He raised a potential ambiguity concerning the phrase "its order." Some agencies have internal bureaus that enter provisional orders; such an order becomes final if not appealed within the agency, with a statutory exhaustion requirement requiring an internal appeal before judicial review. In such a case a petition for review in a court of appeals might be incurably premature, but in a different sense than the proposed amendment envisioned, because the order was not otherwise reviewable in the absence of a petition for rehearing.

Professor Sachs suggested a revision to the first sentence of the proposed amendment to address this concern, together with revised language for the committee note citing a case in which this concern had arisen.[5] Mr. Freeman described the case as an effective illustration of this concern.

A motion was made and seconded to adopt the suggested revisions. The motion was adopted without dissent.

Professor Kimble raised the issue of renumbering subdivisions. He argued that the Committee should take a long view: while changing the numbering of existing subdivisions may be a temporary inconvenience, committing to preserving their numbering would tie the Committee's hands over time and prevent more logical and consistent ordering of the rules. He suggested that the

[5] The suggested revision to the first sentence of the rule text was as follows (with additions underlined and deleted text struck through): "(f) Premature Petition or Application. This subdivision (f) applies if a party files a petition for review or an application to enforce after an agency announces or enters ~~its~~ an otherwise reviewable order—but before the agency disposes of any petition for rehearing, reopening, or reconsideration that renders the order nonreviewable as to that party."

The suggested addition to the committee note was as follows: "Nor does it encompass circumstances when an agency order may be nonreviewable, or a petition for review may be premature, for any reason other than the pendency of a petition for rehearing, reopening, or reconsideration—for example, when the agency's proceedings have not yet culminated in a judicially reviewable order. *See, e.g.*, *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1366 (11th Cir. 2002)."

Committee's focus should be on the rules as a whole, rather than on the individual subdivision being changed.

Professor Sachs noted that, in the restyling process, certain highly familiar rule numbers (*e.g.*, Civil Rule 12(b)(6)) were preserved. While Rule 15(d) was not on that level, it was already out of order with respect to the filing-fee provisions of Rule 15(e). Fifty appellate cases already discuss Rule 15(d), a high number for a relatively unknown subdivision, and it would take some time for litigants to realize that these discussions referred to something else. The considerations for a general restyling might be different than those applicable to an individual amendment.

Mr. Freeman recognized the benefit of logical consistency, but he argued that a saving provision for a small number of petitions would not be anomalous at the end of a rule. Moreover, the intervention project referred extensively to the existing Rule 15(d).

A liaison member seconded this concern. He added that identifying a renumbered section was a burden on courts, and that this burden did not diminish over time, because the existing precedents would retain their references to the old numbering.

An attorney member distinguished the considerations relevant to a wholesale reorganization from those relevant to an individual amendment.

A motion was made and seconded to forward the subcommittee's proposal, as revised, to the Standing Committee. The motion was adopted without dissent. Judge Eid thanked the subcommittee and Professor Kimble for their work.

V. Discussion of Matters Before Subcommittees

A. Reopening Time to Appeal (24-AP-M)

Judge Nichols presented a subcommittee report on reopening the time to appeal (Agenda Book 239). Another trap for the unwary can be presented when a litigant files a notice of appeal after the time for appeal expires, but before its motion to reopen is granted. A subcommittee had been formed to consider the issue. The Supreme Court then held in *Parrish* v. *United States* that such a notice may be timely, and also that a single document can serve both as the motion to reopen the time to appeal and as the notice of appeal for that reopened window. In response, the subcommittee suggested language at the October meeting to codify *Parrish*.

Since that meeting, the subcommittee had focused on three issues. First, it had chosen not to describe the substance of what makes a document an effective notice of appeal, leaving that question to be settled by Rule 3. Second, it had sought to avoid any impression that its proposal directly governed jurisdiction, rather than merely specifying the time at which a filed notice becomes effective. Third, it sought to accommodate a circumstance in which multiple parties might seek to appeal, clarifying that the timeliness rule applied only to the movant's notice.

Professor Sachs noted that the rule suggestion from Devin N. Wesenberg (26-AP-1), to be discussed later, supported such a proposal.

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A liaison member asked about the structure of the proposal's main sentence, asking whether the parenthetical material between em-dashes—"even if that document also serves other purposes"—should instead be placed at the end of the sentence. Professor Sachs stated that one difficulty courts encounter is that the document that serves as a notice of appeal may not be captioned as such, and so it may be useful to signal that fact early on in the rule text.

A judicial member seconded the concern about the sentence's complexity and asked if it could be divided into two. A liaison member asked if the parenthetical phrase were necessary, or whether the point could be made in the committee note. Professor Sachs stated that the courts of appeals had disagreed on whether a document could be the notice of appeal and a motion to reopen at one and the same time; though *Parrish* answered in the affirmative, a codification might want to address the issue in the rule text.

Judge Nichols noted that the committee note did reiterate the point, and also that a two-sentence approach had been attempted previously.

Mr. Freeman asked whether the focus should be on a document that serves the purpose of a notice of appeal. Professor Sachs suggested that this might not communicate the affirmative codification of *Parrish*'s rule that documents could serve multiple purposes at once.

An academic member suggested that the matter be considered further, as *Parrish* had eliminated any time pressure; wording suggestions could be sent to the subcommittee. Professor Sachs agreed. At Judge Eid's suggestion, no further action was taken.

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

Professor Sachs presented a subcommittee report on intervention on appeal. As the Supreme Court had noted in *Cameron* v. *EMW Women's Surgical Center*, there is no general rule on intervention on appeal from a district court, and the courts of appeals have largely been proceeding by analogy to Rule 24 of the Civil Rules.

Subdivision (a) describes the scope of the rule, determining when intervention would be governed by this rule or by preexisting law. Civil cases are already governed by Rule 24 and should likely be covered. Criminal cases do not generally have intervention, but nonparties sometimes appear in various ways: victims with statutory rights, subpoena targets who move to quash, persons asking for documents of public interest to be unsealed, and so on. The current language would not apply to criminal cases, and there is some question of how to categorize cases under 28 U.S.C. §§ 2254 and 2255. (Agency review proceedings are already addressed in Rule 15(d).) Different sets of the Appellate Rules apply in bankruptcy and Tax Court appeals; intervention at the trial level is possible in each, and the proposal's application to each could be specified through its choice of rule number.

Subdivision (b) describes intervention as disfavored (in cases involving neither mandatory nor government intervention), placing the description early in the text to dissuade unmeritorious requests. Subdivision (c) requires intervention to be by motion, which must be filed early (given the circumstances facing the party), state the grounds for intervention (to avoid a negative inference

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from Civil Rule 24), and describe intervention's effect on subject-matter jurisdiction, both as to the court and the district court (so as to place the question before the court, without attempting to answer it in advance—a putative intervenor might even wish to secure dismissal under Civil Rule 19(b)).

Subdivisions (d)–(e) set out grounds for intervention. Under subdivision (d), intervention would be permitted if a federal statute confers a right to intervene. (Statute-conferred discretion would be exercised on the other grounds supplied.) Subdivision (e)(1)–(3) address intervention by governments (which could also employ the general rules for intervention, discussed below). A U.S. or state government could intervene to defend the validity of a law or action that it or its agency or officer had taken; this is narrower than the equivalent Civil Rules provision, which applies in other cases construing a law or action. A legally authorized agency or officer could do the same, and the United States could intervene to defend its national security and foreign relations interests.

Subdivision (e)(4) sets out the generic rule for permissive intervention. It would require the movant to show a compelling reason why intervention was not sought previously (or how things had changed). It would also require the movant to have an interest—whether "legally protected" or "legally cognizable"—at stake. This interest must be distinct from the precedential effect of a decision (a topic for an amicus) and must satisfy the Civil Rule 24 categories of impairment, inadequate protection by existing parties, absence of prejudice, and so on.

Finally, subdivision (f) makes clear that a granted motion would ordinarily make the movant a party for all purposes, and that a denied motion doesn't preclude amicus participation, to nudge failed intervenors toward that course.

Mr. Freeman stated that the Department of Justice had been working on the issue for a long time. Its traditional concern was that a rule on intervention would only encourage more intervention. But the expansion of intervention practice in the courts had persuaded it that a rule was merited. While the government had never had difficulty intervening to defend the constitutionality of legislation, the courts' analogies to Civil Rule 24 (as described in *Cameron*) had produced widely varying rules in practice, and the Department thought it better at this point to adopt a rule that made clear that intervention on appeal was a different beast from intervention in a district court. With respect to the Tax Court in particular, his tax appellate colleagues could not remember a case involving intervention for the first time on appeal, but they thought the same rules should apply in Tax Court appeals as in tax controversies appealed from a district court or from the Court of Federal Claims. He therefore proposed denominating the proposal as Rule 12.2, so that it would apply as a matter of course (under Rule 14) to Tax Court appeals as well.

A liaison member agreed but asked whether the existence of a rule would indeed invite more motions to intervene—in consumer class action cases, commercial cases, and others. A client might wish to be involved in a case, though the party didn't appear in the district court, and they might not be dissuaded by the language of "disfavored." (Mr. Freeman agreed that rehearing petitions are also disfavored, but everyone files them.) The liaison member added that resolving the motions to intervene might require fact development that could be addressed through discovery in district court but not easily on appeal. He worried that intervention would become a regular

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practice, and that once an intervenor enters, a party might seek remand to assert additional claims or defenses, complicating matters further.

Mr. Freeman noted that he had shared such concerns, but that in his view, the real barriers to appellate intervention were not the language of disfavor but the timeliness constraint and the exclusion of precedential effect as an interest justifying intervention. He added that the end of nationwide injunctions in *Trump* v. *CASA* had reduced demand for appellate intervention: if an injunction in litigation between *A* and *B* might affect a nonparty, it would be more plausible that this party had a right to speak on appeal. He also reiterated that the existing practice, involving analogies to Rule 24, was worth fixing.

An attorney member asked whether the language requiring filing as soon as is practical could be replaced with a more rigid time constraint (*X* days after the notice, etc.), as those who really would have a legitimate interest in appellate intervention might be more likely to have their ducks in a row beforehand. He agreed with Mr. Freeman that all the circuits were currently saying different things.

Mr. Freeman appreciated the suggestion, but he noted that the legitimate basis for intervention might not appear until later in the case.

A liaison member asked whether the FJC had studied intervention on appeal. Mr. Reagan described its research (October 2025 Agenda Book 234). He noted that many attempts at intervention involved new officials who had recently taken office.

Professor Sachs noted that the committee had considered other ways to phrase the time requirement, such as "the earliest practicable time," but did not want to suggest a single date for all parties. While perhaps it could be made party-relative ("the earliest practicable time for the movant"), sometimes a party who ought to have been notified in the district court, as under Civil Rule 12(b)(7), jumps in as soon as possible.

Mr. Freeman pointed out that parties may be able to learn of the case from outside sources, and that the rule requires a compelling reason why intervention was not sought earlier.

An attorney member asked why the nonparty "may," rather than "must," file a motion, and whether the new standards might have an impact on the practice of intervention in agency review under Rule 15(d).

Professor Sachs suggested that Rule 15(d) might be a good topic for future review. He added that subdivision (a) limited the proposal's scope to appeals from district courts, and that Rule 15(d) needed a broader standard for intervention, as it may be the first time that parties on different sides of an agency's decision would appear in an Article III court. He also stated that "may" clarified that nonparties were not required to file motions to intervene.

An attorney member suggested the phrase "a nonparty who wishes to intervene must file"; no objection was raised.

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Mr. Freeman suggested adding language to subdivision (a) that intervention in agency review proceedings was governed by Rule 15(d). Professor Sachs seconded that suggestion.

A motion was made and seconded to redenominate the proposal as Rule 12.2. The motion was adopted without dissent.

An attorney member asked whether the rule would apply in cases arising under 28 U.S.C. § 2241. Mr. Freeman seconded that concern, which arises in immigration and national security habeas cases, and suggested that intervention in such cases would be unusual. Professor Hartnett added that the availability of class actions in habeas cases was also a live issue; Mr. Freeman agreed. Professor Hartnett stated that § 2241 cases typically did not involve a prior judgment, and might be more likely to involve multiple persons' interests. Mr. Freeman added that in at least two circuits, condition-of-confinement claims involving the Bureau of Prisons are litigated under § 2241. The attorney member noted that many good-time credit cases are litigated under that provision also (with which Mr. Freeman agreed), asking whether that fact counseled in favor of their inclusion or exclusion.

Professor Sachs described the issues concerning criminal cases as follows. On the one hand, to the extent that there is no general provision for intervention in a criminal case, it would be odd to provide one on appeal. On the other hand, there may be very few cases in which a criminal case would create a legally cognizable interest for a nonparty (*cf. Gilmore* v. *Utah*)—although, to avoid inviting such motions, perhaps such cases should be carved out of the rule entirely. He noted that the proposal as framed would not apply to § 2241 proceedings initiated in the court of appeals, but rather only those appealed from a district court.

Mr. Freeman described § 2255 cases as functionally criminal cases, involving collateral review of federal criminal convictions, but stated that § 2254 cases are litigated functionally as civil cases, potentially requiring a carveout that would not be needed for § 2255. Professor Sachs asked whether mentioning § 2254 only could create a negative inference; Mr. Freeman expressed ambivalence.

A liaison member stated that, if the rule does permit appellate intervention, it should be tight enough to ensure that intervention occurs only in a limited category of cases. Some cases are easy to adjudicate, either one way or the other (federal requests to defend the constitutionality of a law, random filings by uninvolved litigants). But a middle group of cases, involving sophisticated parties in commercial, bankruptcy, or class action cases, among others, might argue that their interests "may" be affected. An attorney may advise a client that it has the option to file such a motion and might wish to do so as a protective matter. The liaison member worried that it may become a regular part of appellate practice for sophisticated parties who will want to say that they tried, even if the motion failed. Professor Sachs suggested that "may" reflected uncertainty: a litigant's interest might be affected only by an adverse ruling from the court, not by a favorable one; the liaison member suggested that appellate intervention was sufficiently extraordinary that a stronger statement was necessary.

Another liaison member suggested that becoming a party for all purposes would be sufficient to dissuade a sophisticated private party from wishing to intervene, and that only a party with a

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real interest in the case would do so. He also suggested that the rule might require that, if the court decides in a particular manner, it will affect the party's interest.

An attorney member agreed with the latter point, adding that, if an intervenor becomes a party for all purposes, it would be bound by the judgment, and if it wishes to reserve the right not to be bound it should participate as an amicus.

Professor Sachs suggested that the subcommittee work on language to implement this suggestion, as well as to note the exclusion of cases governed by Rule 15(d).

Mr. Freeman asked whether the phrase "mandatory" was appropriate, suggesting that the subcommittee revisit it.

A liaison member asked whether, if intervention had been sought "previously," that could only have occurred in the district court, from which an unsuccessful intervenor could have appealed. Professor Hartnett noted that a new reason for intervention could have arisen since.

An academic member asked about the choice between "legally protected" and "legally cognizable," and whether the intent was to import the standing caselaw surrounding those phrases. (Professor Sachs suggested that this was the intent; an intervenor ought to have the sort of interest that would support its own presence as a party.) The academic member asked whether that was sufficiently clear from the committee note, but was indifferent as to the choice between the terms.

Professor Sachs noted that "protected" often suggests victory on the merits, whereas "cognizable" allows for uncertainty on that point.

Mr. Freeman noted that some cases distinguish "cognizable" from "protected" based on the litigant's presence within the zone of interest protected by a statute: a nanny whose employer was unlawfully fired, and thus loses employment too, has an interest supporting Article III standing but is not within the zone of interest.

An academic member noted that *Cameron* uses the word "protect," drawn from Civil Rule 24, and "legally cognizable" in a different context.

Professor Sachs noted that the subcommittee's difficulty with the "protected"/"cognizable" choice had been the lack of any strong preference one way or the other. Judge Eid suggested that the Committee lacked any strong preference also.

Mr. Freeman suggested that the committee note might wish not to cross-reference Civil Rule 24 as prominently, so as to avoid any inference of importing its substantive standards. An academic member agreed that unnecessary parallelism should be avoided.

A liaison member asked whether parties had a statutory right to intervene in a court of appeals, and whether they should be subject to timeliness requirements. Mr. Freeman suggested that the current draft would so subject them (and Professor Sachs agreed, based on the requirements imposed on a motion), but added that the subcommittee should consider how to make that requirement more clear.

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Another liaison member noted that, however the rules are drafted, it would be necessary to allow for proper examination of the intervenor's legal interest.

Mr. Freeman added that recent litigation in the Supreme Court had focused on disputed questions of timeliness. He also suggested that the committee note clarify the relevance of *Cameron* to the subjects addressed by subdivision (e)(2). No further action was taken.

C. Administrative Stays (24-AP-L)

Professor Sachs presented a report on administrative stays (Agenda Book 237). The subcommittee appointed on the issue had not been asked to meet, awaiting the FJC's research on the question, which continues apace.

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

Professor Huang presented a subcommittee report on the treatment of Indian tribes (Agenda Book 244). The issue had been considered extensively fifteen years earlier, but it had been put on hold in 2012 and revisited but not revived in 2017.

He emphasized two questions: whether the rules should be amended to specifically address the status of tribes, and, if so, which Indian tribes should be included. As he described, some provisions in the rules refer to the federal and state governments. As domestic non-state sovereigns, tribes might be treated analogously to state sovereigns; or they might be analogous to foreign sovereigns. (He noted that Alaska Native Corporations are not sovereign but might raise similar issues of self-determination.)

In addition, he raised the question whether the matter should be addressed on a cross-committee basis, as well as whether tribes should be included wholesale within the definition of "states" or on a more specific basis within appropriate rules.

Mr. Freeman asked why the question had been tabled earlier. Professor Huang stated that the answer was not clear, but that there had been no agreement on the proper treatment. Judge Eid agreed that there had been no consensus, with both strong support and strong opposition.

A liaison member asked whether the prior discussion had centered on the all-or-nothing approach or the provision-by-provision approach. Judge Eid answered that it had been all-or-nothing.

An attorney member suggested that the all-or-nothing approach raised philosophical and political questions that a provision-by-provision approach avoided. (Professor Sachs noted that Judge Wesley, who could not attend, had expressed his view in favor of the latter; some rule provisions regarding states, such as those concerning habeas, might not fit the legal circumstances of tribes.)

Judge Dever noted that the Department of Justice had supported a change to Evidence Rule 902(1) to include tribal documents within the category of domestic public documents, although

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opposition had been expressed in the criminal defense community, and that the issue had been extensively discussed. No further action was taken.

VI. Discussion of Other Rules Suggestions

A. Uniform Bar Admission (25-AP-B)

Professor Sachs presented a report on uniform bar admission (Agenda Book 248), responding to a suggestion from the National Women's Law Center to standardize bar admission across the courts of appeals. The suggestion had been discussed at the October meeting, but no action had been taken, and it had been retained on the agenda.

He suggested that further research might be helpful on the various courts' current practices regarding admission, listing of names on a filing, pro hac vice admission, participation in oral argument, and so on. This research might be an appropriate task for the Rules Law Clerk, once that position were no longer vacant. (Ms. Dubay stated that a law clerk and a general counsel intern might soon be hired.)

Judge Eid agreed that it would be helpful to see how diverse the rules currently are. An attorney member seconded that view.

Professor Hartnett noted that the cross-committee project with regard to the district courts had chosen to take no action on the matter.

Mr. Freeman noted that the Department of Justice had frequently encountered variation among courts of appeals on a number of questions, including whether attorneys appearing ex officio (such as the Attorney General) must file personal appearances. He offered to provide already-compiled information to the researchers.

An attorney member stated that in the Seventh Circuit, multiple separate corporate disclosure statements were required from everyone appearing on the brief.

No further action was taken.

B. Double-Sided Printing (25-AP-E)

Professor Sachs presented a report (Agenda Book 250) on a rules suggestion from Paula Anthony concerning the current requirements of single-sided printing (Agenda Book 252). Single-sided printing doubles the amount of paper used and increases costs for litigants; moreover, many judges read documents electronically. However, printing on both sides of the page might create bleed or raise other issues; in the Supreme Court, where double-sided printing is permitted, the paper must be of sufficiently high weight to make bleed unlikely.

An attorney member argued that, while he had initially considered the issue a minor one, he now saw considerable merit in the proposal, to reduce the cost of printing and the size of briefs.

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Mr. Wolpert stated that, while his office would welcome a fifty percent reduction in the volume of paper, he worried that individual courts and chambers preferences might produce too much variation. He added that the issue of bleed was not from the printer, but from the pens used to comment on filings.

Mr. Freeman stated that the issue was bound up with the larger question of whether courts might use entirely electronic filings. Some circuits vary in this, as well as on whether appendices or briefs might be double-sided. He thought that any rule would be a transitional one, as all-electronic filing would soon be in place.

Mr. Wolpert noted that the Tenth Circuit rarely orders paper copies of records or appendices, but it frequently orders paper copies of briefs.

Professor Sachs noted that the suggestion could be set aside and then returned to after a set period of time. He also noted that there was little argument for single-sided printing of appendices, and a change could save money for litigants and shelf space for clerk's offices.

An attorney member expressed surprise that appendices might be required to be printed single-sided. (Another attorney member concurred.)

A liaison member suggested that it might be worthwhile to informally focus-group the question with judges. A judicial member agreed and expressed comfort with double-sided briefs. Another liaison member described a wide range of practice, with some judges operating entirely with electronic copies.

Professor Sachs conveyed Professor Hartnett's interpretation that Rule 32(b) incorporated for appendices Rule 32(a)(1)(A)'s requirement for briefs of single-sided printing.

Judge Thomas stated that the problem was with pro se materials, which were harder to scan if double-sided.

Judge Eid asked if it were possible to survey judges informally. Professor Sachs suggested that a subcommittee could help in directing inquiries. Judge Eid appointed a subcommittee on the topic, consisting of Mr. Hicks, Mr. Freeman, and Mr. Wolpert. No further action was taken.

C. Introductions to Briefs (25-AP-F)

Professor Sachs presented a report (Agenda Book 255) on a rules suggestion from Judges Newsom and Pryor concerning introductions to briefs (Agenda Book 259). Under Rule 28(a), an appellant's brief must contain, under appropriate headings and in the order indicated, certain elements that do *not* include an introduction. Litigants often do include introductions nonetheless, which Judges Newsom and Pryor described as a helpful practice; but some litigants may be scared off by the absence of a provision in the rule permitting introductions. Professor Sachs noted various ways of addressing this, whether by adding a separate Rule 28(d) on introductions (as proposed by Judges Newsom and Pryor) or by adding an additional but optional element to the

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list. He suggested appointing a subcommittee to discuss the local rules on the question and the proper response.

A liaison member noted that he typically includes an introduction and had never seen a brief bounced for that reason. He did not consider it a major issue, but thought that, if introductions were included, they should be placed before the jurisdictional statement.

An attorney member identified as a passionate supporter of introductions and agreed that inexperienced advocates might hesitate to include them, given their absence from the rule. At least one circuit requires a one-page summary of the case that functions as an introduction.

Mr. Freeman agreed that the Department of Justice included introductions in almost every brief and had never experienced any difficulty. He agreed that it should not come after the jurisdictional statement.

Judge Eid appointed a subcommittee on the topic, consisting of Mr. Adler, Ms. Coberly, and Mr. Pincus. No further action was taken.

D. Reopening Time to Appeal Suggestion (26-AP-1)

Professor Sachs presented a report (Agenda Book 262) on a rules suggestion from Devin N. Wesenberg on reopening the time to appeal (Agenda Book 264). As mentioned above, this suggestion was in the nature of a comment on the Committee's efforts on an earlier agenda item (24-AP-M), and he proposed consolidating this agenda item with that. Judge Eid consolidated the agenda items.

VII. New Business

Mr. Freeman identified an item of new business. In discussing intervention with his Tax Division colleagues, he had learned that certain problems of incurably premature notices of appeal, corrected for appeals from district courts by existing provisions of Rule 4, are not corrected in Tax Court appeals under Rule 13. He stated that this presents a practical problem for the Tax Court, which will often announce a decision before it enters a final opinion, unwittingly creating a trap for the unwary when litigants file the notice of appeal in between.

Professor Sachs suggested appointing a subcommittee on the topic.

Judge Eid appointed a subcommittee on the topic, consisting of Professor Huang, Mr. Freeman, and Mr. Pincus. No further action was taken.

Judge Eid disbanded the Amicus, Bankruptcy Appeals, Costs on Appeal, and IFP Form 4 subcommittees, all currently listed as inactive (Agenda Book 9). She thanked the participants and announced that the next meeting of the Committee would take place in Washington, D.C., on October 6, 2026.

The meeting was adjourned at 2:37 p.m.

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TAB 13

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE[1]

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

* * * * *

(f) Premature Petition or Application. This subdivision (f) applies if a party files a petition for review or an application to enforce after an agency announces or enters an otherwise reviewable order—but before the agency disposes of any petition for rehearing, reopening, or reconsideration that renders the order nonreviewable as to that party. The premature petition or application becomes effective to seek review or enforcement of the order when the agency disposes of the last such petition for rehearing, reopening, or reconsideration. If a party intends to challenge the disposition of a petition for

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

rehearing, reopening, or reconsideration, the party must file a new or amended petition for review or application to enforce in compliance with this Rule 15.

Committee Note

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

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

"nonreviewable as to that party" by a petition for rehearing, reopening, or reconsideration.

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

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

Changes Made After Publication and Comment

In addition to a stylistic change, subdivision (f) was edited to clarify that it does not encompass circumstances when an agency order may be nonreviewable, or a petition for review may be premature, for any reason other than the pendency of a petition for rehearing, reopening, or reconsideration—for example, when the agency's proceedings have not yet culminated in a judicially reviewable order. *See, e.g.*, *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1366 (11th Cir. 2002).

Summary of Public Comment

Cesar Alvan - expressed support for the amendments as preventing the needless dismissal of early petitions and avoiding the need to file duplicative petitions. He particularly appreciated the requirement of a new petition to challenge a rehearing decision as promoting clarity.

Kaitlin Skow - supported the proposed amendments. In her view, they remove a burden on unrepresented petitioners without adding any significant burden on the agency or the courts.

International Attestations, LLC - referenced the amendments only briefly but approved of them as avoiding a potential trap.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE[1]

Rule 29. Brief of an Amicus Curiae

(a) During Initial Consideration of a Case on the Merits.

(1) **Applicability**. This Rule 29(a) governs amicus curiae filings during a court's initial consideration of a case on the merits.

(2) **Purpose; When Permitted.** An amicus brief that brings to the court's attention relevant matter not already brought to its attention by the parties may help the court. An amicus brief that does not serve this purpose burdens the court, and its filing is disfavored. The United States ~~or~~, its officer or agency, or a state may file an amicus brief without the

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

consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing~~, but a court of appeals~~. The court may prohibit ~~the filing of~~ or ~~may~~ strike an amicus brief that would result in a judge's disqualification.

(3) **Motion for Leave to File.** A ~~The~~ motion for leave to file must be accompanied by the proposed brief and state:

(A) the movant's interest; and

(B) the reason ~~why an amicus~~ the brief ~~is desirable and why~~ serves the purpose set forth in Rule 29(a)(2) ~~the matters asserted are relevant to the disposition of the case~~.

(4) **Contents and Form**. An amicus brief must comply with Rule 32. ~~In addition to the~~

~~requirements of Rule 32,~~ T~~t~~he cover must ~~identify~~ name the party or parties supported and indicate whether the brief supports affirmance or reversal. ~~An amicus~~ The brief need not comply with Rule 28, but it must include the following:

(A) if the amicus ~~curiae~~ is a corporation, a disclosure statement like that required of parties by Rule 26.1;

(B) unless the amicus is the United States, its officer or agency, or a state, the disclosure statement required by Rules 29(b), (c), and (e);

~~(B)~~(C) a table of contents, with page references;

~~(C)~~(D) a table of authorities—cases (alphabetically arranged), statutes, and other authorities, ~~with~~

~~references to~~ together with the pages ~~of the brief~~ where they are cited;

~~(D)~~(E) a concise ~~statement~~ description of the identity, history, experience, and interests of the amicus ~~curiae~~, ~~its interest in the case, and the source of its authority to file~~ together with an explanation of how the brief and the perspective of the amicus will help the court;

(F) if an amicus has existed for less than 12 months, the date the amicus was created;

~~(E) unless the amicus is one listed in the first sentence of Rule 29(a)(2), a statement that indicates whether:~~

~~(i) a party's counsel authored the brief in whole or in part;~~

~~(ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and~~

~~(iii) a person other than the amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person;~~

~~(F)~~(G) an argument, which may be preceded by a summary ~~and which~~ but need not include a statement of the applicable standard of review; and

~~(G)~~(H) a certificate of compliance under Rule 32(g)(1)~~, if length is computed using a word or line limit~~.

(5) **Length**. Except ~~by~~ with the court's permission, an amicus brief must not exceed 6,500 words ~~may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief~~.

(6) **Time for Filing**. An amicus ~~curiae~~ must file its brief~~, accompanied by a motion for filing when necessary,~~ no later than 7 days after the principal brief of the party being supported is filed. An amicus ~~curiae~~ that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. The ~~A~~ court may grant leave for later filing, specifying the time within which an opposing party may answer.

(7) **Reply Brief**. An amicus may not file a reply brief except with the court's permission. ~~Except by the court's permission, an amicus curiae may not file a reply brief.~~

(8) **Oral Argument**. An amicus ~~curiae~~ may participate in oral argument only with the court's permission.

(b) Disclosing a Relationship Between an Amicus and a Party. An amicus brief must:

(1) disclose whether:

(A) a party or its counsel authored the brief in whole or in part;

(B) a party or its counsel contributed or pledged to contribute money intended to pay for preparing, drafting, or submitting the brief; and

(C) a party, its counsel, or any combination of parties, their counsel,

or both has a majority ownership interest in or majority control of a legal entity submitting the brief; and

(2) if so, name the party or counsel.

(c) Disclosure by the Party or Counsel. If the party or counsel knows that an amicus has failed to make the Rule 29(b) disclosure, the party or counsel must do so.

(d) Disclosing a Relationship Between an Amicus and a Nonparty. An amicus brief must disclose whether any person contributed or pledged to contribute more than $100 intended to pay for preparing, drafting, or submitting the brief and, if so, must name each such person. But disclosure is not required if the person is:

- the amicus;
- its counsel; or
- a member of the amicus.

~~(b)~~(e) **During Consideration of Whether to Grant Rehearing.**

(1) **Applicability**. ~~This Rule 29(b)~~ Rules 29(a)-(d) governs amicus ~~filings~~ briefs filed during a court's consideration of whether to grant panel rehearing or rehearing en banc, except as provided in this Rule 29(e), and unless a local rule or order in a case provides otherwise.

(2) **When Permitted.** The United States, ~~or~~ its officer or agency, or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court. The motion for leave must comply with Rule 29(a)(3).

(3) ~~**Motion for Leave to File.** Rule 29(a)(3) applies to a motion for leave.~~

~~(4)~~ **~~Contents, Form, and~~ Length**. ~~Rule 29(a)(4) applies to the amicus brief.~~ An amicus ~~The~~ brief must not exceed 2,600 words.

~~(5)~~(4) **Time for Filing**. An amicus ~~curiae~~ supporting ~~the~~ a petition for rehearing or supporting neither party must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the petition is filed. An amicus ~~curiae~~ opposing the petition must file its brief, accompanied by a motion for filing when necessary, no later than the date set by the court for ~~the~~ a response.

Committee Note

The amendments to Rule 29 make changes to the procedure for filing amicus briefs, including to the disclosure requirements.

The amendments seek primarily to provide the courts and the public with more information about an amicus curiae. Throughout its consideration of possible

amendments, the Advisory Committee has carefully considered the relevant First Amendment interests.

Some have suggested that information about an amicus is unnecessary because the only thing that matters about an amicus brief is the merits of the legal arguments in that brief. At times, however, courts do consider the identity and perspective of an amicus to be relevant. For that reason, the Committee thinks that some disclosures about an amicus are important to promote the integrity of court processes and rules.

Careful attention to the various interests and the need to avoid unjustified burdens is reflected throughout these amendments. For example, the amendment treats disclosures about the relationship between a party and an amicus differently than disclosures about the relationship between a nonparty and an amicus. While the public interest in knowing about an amicus—in order to evaluate its arguments and a court's consideration of those arguments—is relevant in both situations, there is an additional interest in disclosing the relationship between a party and an amicus: the court's interest in evaluating whether an amicus is serving as a mouthpiece for a party, thereby evading limits imposed on parties in our adversary system and misleading the court about the independence of an amicus. Moreover, the burden on an amicus of disclosing a relationship with a party is much lower than having to disclose a relationship with nonparties. Disclosing a relationship with a party requires an amicus to check its records (and perhaps make a disclosure) regarding only the limited number of persons who are parties to the case. Disclosing a relationship with a nonparty would, by contrast, require an amicus to check its records (and perhaps make a disclosure) regarding the much larger universe of all persons who are not parties to the case.

To take another example, the amendment treats contributions by a nonparty that are earmarked for a particular brief differently than general contributions by a nonparty to an amicus. People may make contributions to organizations for a host of reasons, including reasons that have nothing to do with filing amicus briefs. Requiring the disclosure of non-earmarked contributions provides less useful information for those who seek to evaluate a brief and imposes far greater burdens on contributors.

Subdivision (a). The amendment to Rule 29(a)(2) adds a statement of the purpose of an amicus brief: to bring to the court's attention relevant matter not already brought to its attention by the parties that may help the court. By contrast, if an amicus curiae brief adds nothing to the parties' briefs, it is a burden rather than a help. Where feasible, avoiding redundancy among amicus briefs can also be helpful.

The amendment to Rule 29(a)(4) expands the required statement regarding the identity of an amicus and its interest in the case and requires "a concise description of the identity, history, experience, and interests of the amicus, together with an explanation of how the brief and the perspective of the amicus will help the court." The amendment calls for this broader disclosure to help the court and the public evaluate the likely reliability and helpfulness of an amicus, particularly those with anodyne or potentially misleading names. It also requires that the amicus explain how the brief and the perspective of the amicus will further the goal of helping the court. Rule 29(a)(4)(F) is new. It requires an amicus that has existed for less than 12 months to state the date of its creation, helping identify amici that may have been created for the purpose of this litigation. Subsequent provisions are re-lettered.

Existing disclosure requirements about the relationship between the amicus and both parties and nonparties are removed from subdivision (a) and placed in separate subdivisions, one dealing with parties (subdivision (b)) and one dealing with nonparties (subdivision (d)).

Rule 29(a)(5) is amended to directly impose a word limit on amicus briefs, replacing the provision that establishes length limits for amicus briefs as a fraction of the length limits for parties. This results in removing the option to rely on a page count rather than a word count. This change enables Rule 29(a)(4)(H) (formerly 29(a)(4)(G)) to be simplified and require a certification of compliance under Rule 32(g)(1) in all amicus briefs.

Subdivision (b). Subdivision (b) dealing with disclosure of the relationship between the amicus and a party is new, but it draws on existing Rule 29(a)(4)(E). Because of the important interest in knowing whether a party has significant influence or control of an amicus, these disclosures are more far reaching than those involving nonparties, which are addressed in (d).

Rule 29(b)(1)(A) carries forward the existing requirement that authorship of an amicus brief by a party or its counsel must be disclosed.

Rule 29(b)(1)(B) carries forward the existing requirement that money contributed by a party or party's counsel that was intended to fund the preparation or submission of the brief must be disclosed. But in an effort to counteract the possibility of an amicus interpreting the existing rule narrowly, the amendment explicitly refers to "preparing, drafting, or submitting the brief," thereby making clear that it applies to every stage of the process.

Subdivision (b)(1)(C) is new. It requires disclosure of whether a party, its counsel, or any combination of parties or counsel either has a majority ownership interest in or majority control of an amicus. If a party has such control over an amicus, it is in a position to control the content of an amicus brief. If undisclosed, the court and the public may be misled about the independence of an amicus from a party, and a party may be able to effectively exceed the limitations otherwise imposed on parties.

Subdivision (b)(2) requires that any disclosure required by subdivision (b)(1) name the party or counsel. This builds upon the requirement in current Rule 29(a)(4)(E)(iii) that certain persons who make earmarked contributions be identified.

Subdivision (c). Subdivision (c) is new. It operates as a backstop to the disclosure requirements of (b): If the amicus fails to make a required disclosure, and the party or counsel knows it, the party or counsel must make the disclosure.

Subdivision (d). Subdivision (d) focuses on the relationship between the amicus and a nonparty. It makes several changes to the existing Rule 29(a)(4)(E)(iii), which currently requires the disclosure of any contribution earmarked for a brief, no matter how small, by anyone other than the amicus itself, its members, or its counsel. Earmarked contributions run the risk that the amicus is being used as a paid mouthpiece by the contributor. Knowing about earmarked contributions helps courts and the public evaluate the arguments and information in the amicus brief by providing information about possible reasons for the filing other than those explained by the amicus itself.

The Committee considered requiring the disclosure of nonparties who make any significant contributions to an

amicus, whether earmarked or not. But it decided against doing so because of the burdens it could impose on amici and their contributors, even when the reason for the contribution had nothing to do with the brief. Instead, it retained the focus of the existing rule on earmarked contributions.

The Committee considered eliminating the member exception because that exception allows for easy evasion: simply become a member at the time of making an earmarked contribution. But it decided against doing so because members speak through an amicus and an amicus generally speaks for its members. In addition, eliminating the member exception threatened to place an unfair burden on amici who do not budget in advance for amicus briefs (and therefore have to "pass the hat" when the need to file an amicus brief arises) compared to other amici who may file amicus briefs more frequently (and therefore can budget in advance and fund them from general revenue). Without a member exception, the latter (generally larger) amici would not have to disclose, but the former (generally smaller) amici would have to disclose.

Rather than eliminate the member exception for organizations, the amendment protects members from disclosure. But Rule 29(a)(4)(F) requires an amicus that has existed for less than 12 months to disclose the date of its creation. This requirement works in conjunction with the expanded disclosure requirement of Rule 29(a)(4)(E) to reveal an amicus that may have been created for purposes of particular litigation or is less established and broadly-based than its name might suggest. Unless adequately explained, a court and the public might choose to discount the views of such an amicus.

The amendment also provides a $100 threshold for the disclosure requirement. Under the existing rule, a non-member of an amicus who contributes any amount, no matter how small, that is earmarked for a particular brief must be disclosed. This can hamper crowdfunding of amicus briefs while providing little useful information to the courts or the public. Contributions of $100 or less are unlikely to run the risk that an amicus is being used as a mouthpiece for others.

Subdivision (e). Subdivision (e) retains most of the content of existing subdivision (b) and governs amicus briefs at the rehearing stage. It is revised to largely incorporate by reference the provision applicable to amicus briefs at the initial consideration of the case. Rule 29(e)(1) makes Rule 29(a) through (d) applicable, except as provided in the rest of Rule 29(e) or if a local rule or order in a particular case provides otherwise. As a result, duplicative provisions are eliminated.

Changes Made Upon Further Consideration. In addition to stylistic changes to the Rule, two changes were made to the text of the proposed Rule 29(d). First, a provision was deleted that would have limited the exemption from disclosure of earmarked contributions by an amicus's members to those who first became members more than 12 months prior to the filing of the brief. The requirement to disclose earmarked contributions to an organization by its new members would have enhanced the understanding of the court, but it also could have interfered with the privacy of that organization and of its members, who might have been chilled from contributing to an organization's amicus brief if they were required to announce their membership to the public. Second, an accompanying provision that would have limited this now-deleted requirement—exempting organizations that themselves had been created within the previous 12 months—was deleted as unnecessary.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE[1]

Rule 32. Form of Briefs, Appendices, and Other Papers

* * * * *

(g) Certificate of Compliance.

(1) **Briefs and Papers That Require a Certificate.** A brief submitted under Rules 28.1(e)(2), 29(a)(5), 29(f)(3) ~~29(b)(4)~~, or 32(a)(7)(B)—and a paper submitted under Rules 5(c)(1), 21(d)(1), 27(d)(2)(A), 27(d)(2)(C), or 40(d)(3)(A)—must include a certificate by the attorney, or an unrepresented party, that the document complies with the type-volume limitation. The person preparing the certificate may rely

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

on the word or line count of the word-processing system used to prepare the document. The certificate must state the number of words—or the number of lines of monospaced type—in the document.

(2) **Acceptable Form.** Form 6 in the Appendix of Forms meets the requirements for a certificate of compliance.

Committee Note

Rule 32(g) is amended for style and to conform to amendments to Rule 29.

Appendix:
Length Limits Stated in the
Federal Rules of Appellate Procedure[1]

This chart summarizes the length limits stated in the Federal Rules of Appellate Procedure. Please refer to the rules for precise requirements, and bear in mind the following:

* * * * *

- For the limits in Rules 28.1~~, 29(a)(5),~~ and 32:
  - You may use the word limit or page limit, regardless of how you produce the document; or
  - You may use the line limit if you type or print your document with a monospaced typeface. A typeface is monospaced when each character occupies the same amount of horizontal space.

	Rule	Document type	Word limit	Page limit	Line limit

* * * * *

Amicus briefs	29(a)(5)	○ Amicus brief during initial consideration ~~of case~~ on merits	~~One-half the length set by the Appellate Rules for a party's principal brief~~ 6,500	~~One-half the length set by the Appellate Rules for a party's principal brief~~ Not applicable	~~One-half the length set by the Appellate Rules for a party's principal brief~~ Not applicable
	29~~(b)(4)~~(f)(3)	○ Amicus brief during consideration of whether to grant rehearing	2,600	Not applicable	Not applicable

* * * * *

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

TAB 14

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

JAMES C. DEVER III
CHAIR

CAROLYN A. DUBAY
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

ALLISON H. EID
APPELLATE RULES

REBECCA B. CONNELLY
BANKRUPTCY RULES

SARAH S. VANCE
CIVIL RULES

MICHAEL W. MOSMAN
CRIMINAL RULES

JESSE M. FURMAN
EVIDENCE RULES

MEMORANDUM

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

FROM: Hon. Rebecca B. Connelly, Chair
Advisory Committee on Bankruptcy Rules

RE: Report of the Advisory Committee on Bankruptcy Rules

DATE: May 7, 2026

I. Introduction

The Advisory Committee on Bankruptcy Rules met in Charlotte, N.C., on April 15, 2026. The draft minutes of that meeting are attached.

At the meeting, the Advisory Committee voted to recommend final approval of amendments to Bankruptcy Rule 2002 (Notices), Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy), and Official Form 106C (Schedule C: The Property You Claim as Exempt).

In addition to the rules discussed in Professor Struve's report on electronic filing and service by self-represented litigants, the Advisory Committee also agreed to seek publication for

comment of proposed amendments to Bankruptcy Rules 2003 (Meeting of Creditors or Equity Security Holders) and 9037 (Privacy Protection for Filings Made With the Court).

Part II of this report presents those action items. They are organized as follows:

A. Items for Final Approval

Rules and Forms published for comment in August 2025—

- Rule 2002;
- Official Form 101; and
- Official Form 106C

B. Items for Publication

- Rule 2003; and
- Rule 9037.

Part III of this report presents five information items. The first concerns suggestions to amend Rule 9031 to allow masters to be used in bankruptcy cases and proceedings under certain circumstances. The second concerns a suggestion to amend Rules 4004(a) and (c) to eliminate wording that suggests that a court must grant a chapter 7 debtor a discharge—even though the debtor is not eligible to receive a discharge because of receipt of a discharge in a prior case—if no motion has been timely filed objecting to discharge on those grounds. The third concerns a suggestion for an amendment to Official Form 106C to revise the questions that provide a basis for objecting to a claimed homestead exemption based on § 522(p)(1) of the Bankruptcy Code. The fourth discusses the Advisory Committee's decision to defer consideration of amendments to Rule 8017 in light of the possible revision of proposed amendments to Appellate Rule 29. And the final information item concerns a suggestion regarding Rules 1007 and 1014 relating to the venue of a bankruptcy case.

II. Action Items

A. Items for Final Approval

The Advisory Committee recommends that the following rule and form amendments be given final approval. Bankruptcy Tab 16 includes the rules and forms that are in this group.

Action Item 1. Rule 2002 (Notices). The Advisory Committee received a suggestion from the Clerk of Court for the Bankruptcy Court for the District of Minnesota—joined by eight other bankruptcy clerks from the Eighth Circuit—that Rule 2002(n) (now Rule 2002(o)) be amended to eliminate the requirement that the caption of every notice given under Rule 2002 comply with Rule 1005. The Bankruptcy Clerks Advisory Group submitted a second suggestion supporting the original one.

Upon the recommendation of the Advisory Committee, the Standing Committee at its meeting in January 2025 approved for publication an amendment to Rule 2002(o) to remove the requirement that notices given under Rule 2002 conform to Rule 1005 and to instead require that such notices "include the information that Form 416B requires." This change would reduce the length, and therefore cost, of a Rule 2002 notice, as well as reducing the number of documents containing the last four digits of the debtor's social security number.

There were no comments on the suggested amendment. The Advisory Committee recommended final approval of the amendment.

Action Item 2. Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy).

Amendments to the prompt to Question 4 of the form to add a new paragraph regarding employer identification numbers ("EINs") were published last August. The amendment is intended to minimize the likelihood that a debtor may provide the EIN of the debtor's employer, rather than the debtor's own number if he or she has one. Because multiple debtors who have the same employer may file and list that employer's EIN, the CM/ECF monitoring for repeat filings triggers a report erroneously suggesting that the debtor is not eligible because of prior filings.

There were no comments in response to the publication of the proposed amendment. The Advisory Committee recommended final approval of the amendment with minor changes to both Question 4 and Question 2 suggested by the style consultants.

Action Item 3. Official Form 106C (Schedule C: The Property You Claim as Exempt)

The Advisory Committee received a suggestion from a chapter 12/chapter 13 trustee to amend Official Form 106C to include a total value of claimed exemptions. Section 589b(d)(3) of title 28 requires the uniform final report submitted by trustees to total the "assets exempted." Without the amount totaled on the form, trustees must manually add up the amounts on each form to prepare the required final report.

Complicating the decision of how to respond to the suggestion was the fact that Form 106C—in response to a statement by the Supreme Court in *Schwab v. Reilly*, 560 U.S. 770 (2010)—provides two options for claiming an exemption. The debtor can either list a specific dollar amount or can claim as exempt "100% of fair market value, up to any applicable statutory limit." If the latter option is chosen, there is no dollar amount that can be added.

The Advisory Committee resolved this problem by proposing an amendment to Form 106C to require the debtor to "[a]dd the dollar value of all entries [in Column C] with a specific amount." It also approved for publication the addition of a space on the form for the total value of the debtor's interest in property for which exemptions are claimed (in Column B).

The form was published last August, and one comment was filed in response. The National Association of Consumer Bankruptcy Attorneys ("NACBA") expressed concern about the

wording of the directive to add the total value of the debtor's interest in property for which exemptions are claimed. NACBA urged the Advisory Committee to revise the form to "add the language 'with a specific amount' to the section calling for the total for Column B." (NACBA also suggested revisiting the approach taken on the form in response to *Schwab v. Reilly*.)

The suggestion that prompted the proposed amendments to Form 106C only sought a total value of the claimed exemptions and not a total of the property values. The addition to the form of space for the latter was really an afterthought—for the sake of symmetry. The Consumer Subcommittee considered whether there is a need for a total of Column B. It decided that there is not because trustees do not include that total in their final report and that figure has no significance in the bankruptcy case. The subcommittee therefore recommended that item 2.1 be deleted from the form as published and that, with that deletion and the renumbering of item 2.2, the amendment to Official Form 106C be given final approval.

The Advisory Committee recommended final approval of the amendments to Form 106C with the deletion of item 2.1 and the renumbering of item 2.2 and agreed with the subcommittee not to revisit *Schwab*.

B. Items for Publication

The Advisory Committee recommends that the following rule amendments be published for public comment in August 2026. Bankruptcy Tab 17 includes Rule 2003, and Rule 9037 is included in Ms. Dubay's report on the privacy rules amendments.

Action Item 4. Rule 2003 (Meeting of Creditors or Equity Security Holders). A chapter 12/chapter 13 trustee submitted a suggestion (Suggestion 24-BK-G), which she later revised (Suggestion 25-BK-B), to amend Rule 2003 as pertains to the timing and location of meetings of creditors. She made this suggestion, which was endorsed by the Association of Chapter 12 Trustees ("ACT12") and the National Association of Chapter 13 Trustees, in response to the current practice of conducting the meetings remotely by means of Zoom. The National Association of Bankruptcy Trustees ("NABT") also submitted a suggestion (25-BK-C) to amend Rule 2003 to take account of remote meetings of creditors.

Because some of the concerns raised by the suggestions relate to policies of the Executive Office for U.S. Trustees ("EOUST"), the Advisory Committee suggested that discussions between that office and trustee representatives might be helpful in determining whether a consensus could be reached about the need for possible amendments to Rule 2003. Those discussions took place, and ACT 12 and NABT submitted new suggestions (26-BK-1 and 26-BK-2) that proposed amendments to Rule 2003(a) that the EOUST and the trustee groups agreed on, plus an additional amendment that the EOUST did not support.

The Advisory Committee approved the proposed amendments for publication, with minor changes suggested by the style consultants, and by a 10-4 vote rejected the language to which the EOUST objected. These proposed amendments would allow more time to convene the meeting of creditors in chapter 12 and 13 cases, extending the deadline in chapter 12 cases from 35 to 60 days,

and in chapter 13 cases, from 50 to 60 days, after the order for relief. They would also expressly authorize meetings of creditors to be "conducted in person or remotely" and would allow the U.S. trustee to designate in which manner a meeting would be conducted. The Advisory Committee declined to add the sentence, "A remote meeting is deemed to take place in the district in which the case was filed."

Action Item 5. Rule 9037 (Protecting Privacy for Filings). All the advisory committees have been considering suggestions that address particular issues relating to the privacy rules, including suggestions regarding redaction of social-security numbers ("SSNs") in federal-court filings and a suggestion relating to initials of known minors in court filings. The Advisory Committee has approved for publication amendments to Rule 9037 that would extend the protection of the rule to exhibits and attachments and would require the use of a pseudonym in place of initials for an individual known to be and identified as a minor. It does not propose amending the rule to require the complete redaction of SSNs. A Federal Judicial Center survey of bankruptcy debtor attorneys; chapter 7, 12, and 13 trustees; creditor attorneys; various tax authorities; and representatives of the National Association of Attorneys General revealed a need for the last 4 SSN digits in order to associate filings with the correct individual. The Advisory Committee also decided not to require the redaction of EINs, which the bankruptcy petition forms currently require an employer-debtor to provide. These numbers are used to monitor repeat filings, and the Advisory Committee was unaware of any demonstrated need for redacting them.

The Advisory Committee has also approved for publication a new Rule 8011(a)(4) that would require full redaction of SSNs or other taxpayer-identification numbers—including EINs—from any filing made in appeals from the bankruptcy court to the district court or bankruptcy appellate panel. These amendments were drafted to parallel amendments to Appellate Rule 25, which the Appellate Rules Advisory Committee has been considering. However, in light of that committee's continuing consideration of those amendments, the Advisory Committee recommends that the Standing Committee postpone publication of the new Rule 8011(a)(4) to allow for coordination with the Appellate Rules Advisory Committee as it continues to study the issue.

III. Information Items

Information Item 1. Amendments to Rule 9031 (Using Masters Not Authorized) to allow masters in bankruptcy cases and proceedings. Two suggestions to amend Rule 9031 have been submitted to the Advisory Committee, one by Bankruptcy Judge Michael B. Kaplan of the District of New Jersey and the other by the American Bar Association. These suggestions propose amendments that would allow masters to be used in bankruptcy cases and proceedings.

The suggestions were submitted in January and February 2024. The Advisory Committee has since discussed whether to propose amendments to Rule 9031 at five meetings. These discussions have been informed in part by the results of a survey of bankruptcy judges conducted by the Federal Judicial Center and a research memorandum on constitutional and statutory issues prepared by the rules law clerk.

At the fall 2025 Advisory Committee meeting, the Business Subcommittee presented a draft of possible amendments to Rule 9031 in order to receive feedback from committee members about how the rule might authorize the use of masters. At the spring 2026 meeting, the subcommittee presented a revised draft to the Advisory Committee that it recommended for publication. After the subcommittee had met and while the spring agenda book was being compiled, the Department of Justice Office of Legal Counsel ("OLC") issued an opinion that questioned whether bankruptcy judges can appoint masters consistent with the requirements of Article III of the U.S. Constitution. The DOJ representative to the Advisory Committee presented the OLC's views at the spring meeting, and Professor Gibson and Dean McKenzie offered some responses. At the suggestion of the chair of the Standing Committee, the matter was remanded to the subcommittee to consider the OLC opinion and to allow the Advisory Committee to do the same if the subcommittee again recommends amendments to Rule 9031 to the Advisory Committee at its September meeting.

Information Item 2. Suggestion regarding Rule 4004(a) and (c) (Granting or Denying a Discharge). Bankruptcy Judges Rebecca Connelly and Ben Kahn have submitted a suggestion to amend Rule 4004(a) and (c) to eliminate the mandate (or implication) that a court must grant a chapter 7 debtor a discharge—even though the debtor received a discharge in a prior case under the circumstances described in § 727(a)(8) or (9)—if no motion has been timely filed objecting to discharge on those grounds. Section 727(a)(8) denies a discharge to a chapter 7 debtor who previously received a discharge in a chapter 7 or 11 case filed within 8 years before the filing of the present case. And § 727(a)(9) denies the discharge if the debtor received a discharge in a chapter 13 case filed within 6 years before the filing of the present case, unless the plan paid 100% of the allowed unsecured claims or paid at least 70% of those claims and was proposed in good faith and was the debtor's best effort. The judges also suggested amending Rule 4004(a) to eliminate the deadline for filing an objection to discharge under § 1328(f), which denies a discharge in a chapter 13 case based on the receipt of a discharge in a prior case that was filed within a specified time prior to the current case.

Judges Connelly and Kahn suggested that Rule 4004(c), as currently written, is inconsistent with §§ 727 and 1328 and thus violates the Bankruptcy Rules Enabling Act, 28 U.S.C. § 2075. Rule 4004(c) seems to require the court to enter a discharge under circumstances that render the debtor ineligible for one simply because a timely motion objecting to discharge was not made.

The reporter explained to the Advisory Committee why she does not believe that Rule 4004 violates the Bankruptcy Rules Enabling Act, and the Advisory Committee agreed. However, the Advisory Committee agreed with the Consumer Subcommittee that the current wording of Rule 4004(c) may be causing confusion about whether a court can act *sua sponte* to withhold a discharge from a debtor. Before deciding what, if any, amendments to propose to Rule 4004, the Advisory Committee decided that it would be helpful to get a better idea of how courts are applying Rule 4004(c) and whether they are entering discharges for debtors who are not eligible for them under § 727(a)(8) or (9) or § 1328(f) because they believe the rule compels them to do so. Dr. Carly Giffin of Federal Judicial Center and Advisory Committee member Nancy Whaley, standing chapter 13 trustee in the N.D. Georgia, agreed to help gather information on this issue.

Information Item 3. Proposed amendment to Official Form 106C (Schedule C: The Property You Claim as Exempt). The Advisory Committee received a suggestion from Judge Laurel Isicoff of the Bankruptcy Court for the S.D. Florida with respect to question 3 of Part 1 of Form 106C. Florida has an unlimited homestead exemption. As a result, whenever a debtor seeks to exempt his or her homestead, the debtor will generally check the box for "100% of fair market value, up to any applicable statutory limit" in Question 2 of Part 1 of the Schedule. However, even if the debtor puts in a dollar figure, under Florida law the debtor is claiming the full homestead as exempt, there being no partial homestead exemptions in Florida. Therefore, there is no basis for the trustee to object to a homestead exemption in Florida based on what is specified in Question 2 of Part 1 of the Form.

Bankruptcy Code § 522(p)(1), however, provides that, if a debtor elects state exemptions, the debtor may not exempt any amount of an interest in the homestead that was acquired by the debtor during the 1,215-day period preceding the filing date that exceeds $214,000. Question 3 of Part 1 of the Schedule is intended to provide information relating to this limitation, which could serve as a basis to object to the homestead exemption.

Question 3 currently asks first whether the debtor is claiming a homestead exemption of more than $214,000, no or yes. Only if the debtor marks the box "yes" does Question 3 ask whether the debtor acquired the property within 1,215 days before filing the case. Judge Isicoff notes that in Florida debtors often skip Question 3 entirely, because all Florida debtors are claiming the entire amount of their homestead as exempt and are reluctant to admit to the value of their equity in the homestead. Because they skip the question, they never answer the second question. She suggested reversing the two questions so that the timing question comes first. That way it is more likely to be answered, and the trustee will be on notice of the need to object to the homestead exemption if § 522(p)(1) is implicated.

After discussing Judge Isicoff's suggestion, the Advisory Committee is considering whether to eliminate the question about the value of the homestead property and modify Question 3 to ask simply whether property claimed as exempt under the homestead exemption was acquired within 1,215 days before filing. But before making any decision on that approach, the Advisory Committee wishes to gather more information from trustees and from the EOUST as to the potential impact of such a change.

Information Item 4. Deferral of consideration of amendments to Rule 8017 (Brief of an Amicus Curiae). The Appeals and Cross Border Insolvency Subcommittee approved language for amendments to Rule 8017 and conforming amendments to Rule 8015(h)(1) and the appendix that would parallel proposed amendments to Appellate Rules 29 and 32 and the appendix. The subcommittee was prepared to present those amendments to the Advisory Committee at the spring meeting for approval for publication.

However, in light of the withdrawal of the proposed amendments to Appellate Rule 29, together with conforming amendments to Appellate Rule 32 and the Appendix of Length Limits, the Advisory Committee decided to defer consideration of conforming amendments to Bankruptcy Rule 8017, 8015 and the appendix until after the Standing Committee takes action on the appellate

rules. The Appeals and Cross Border Insolvency Subcommittee will then consider any changes to the drafts previously approved and make its recommendation to the Advisory Committee.

Information Item 5. Suggestion regarding Rules 1007 and 1014 with respect to venue. The Advisory Committee received a suggestion from The National Bankruptcy Venue Committee regarding venue of a bankruptcy case. The suggestion had two aspects. The first would require additional disclosure on a new Official Form specifying the basis for the choice of venue at the time a bankruptcy case is filed. The second would require the court, either *sua sponte* or on motion by a party in interest, to either transfer the case or dismiss it "if the court determines, based on the evidence, that the venue was chosen for an improper purpose, including forum shopping or improper manipulation of business entity organization." The suggestion would also require an expedited hearing and decision if a party in interest seeks dismissal or transfer.

The decision on whether to transfer a bankruptcy case when venue is proper or improper under 28 U.S.C. § 1408 rests with the bankruptcy judge, who is directed under 28 U.S.C. § 1412 to make the decision "in the interest of justice or for the convenience of the parties." (The same standard applies under Rule 1014 for transferring a case to another district.). The problem with the second aspect of the suggestion made by The National Bankruptcy Venue Reform Committee is that it attempts to provide a different standard for transfer of a bankruptcy case than the one provided by Congress. Any attempt to supersede the statutory standard is impermissible under the Bankruptcy Rules Enabling Act, 28 U.S.C. § 2075, which lacks a provision like the one in 28 U.S.C. § 2072 that states that "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

The first aspect of the suggestion—which is a disclosure requirement and does not run afoul of the Rule Enabling Act—has no proper purpose. The information about why a debtor has selected a particular venue can be obtained from the information contained in the petition. Questions 10 and 11 in Form 201 already ask whether there are any bankruptcy cases pending or being filed by an affiliate of the debtor, and why the case is being filed in this district. Question 11 lists as possible responses that the "Debtor has had its domicile, principal place of business, or principal assets in this district for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other district," or "A bankruptcy case concerning debtor's affiliate, general partner, or partnership is pending in the district." All interested parties have an opportunity to ask for additional information about the answers to those questions in the meeting of creditors under § 341 and can move to transfer the case under the standard of 28 U.S.C. § 1412, implemented by Bankruptcy Rule 1014(a). To the extent that the suggestion is asking debtors to disclose their discussions with counsel about the strategic decision in selecting between districts where venue would be proper, it may infringe on protected attorney-client communications.

The Advisory Committee voted to take no action on this suggestion.

TAB 15

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of April 15, 2026
Charlotte, N.C., and on Microsoft Teams

The following members attended the meeting in person:

Alane A. Becket, Esq.
Circuit Judge Daniel A. Bress
District Judge James O. Browning
Bankruptcy Judge Rebecca Buehler Connelly
Jenny Doling, Esq.
Bankruptcy Judge Michelle M. Harner
District Judge Jeffery P. Hopkins
District Judge Joan H. Lefkow
District Judge Leigh Martin May
Bankruptcy Judge Catherine Peek McEwen
Professor Scott F. Norberg
Damian S. Schaible, Esq.

The following members attended the meeting remotely:

Sean Day, Esq.
Nancy Whaley, Esq.

The following persons also attended the meeting in person:

Professor S. Elizabeth Gibson, Reporter
Professor Laura B. Bartell, Associate Reporter
District Judge James C. Dever III, Chair of the Committee on Rules of Practice and Procedure (the Standing Committee)
Edward Hartnett, Reporter to the Standing Committee
Ramona D. Elliott, Esq., Acting Director, Executive Office for U.S. Trustees
Kenneth S. Gardner, Clerk, U.S. Bankruptcy Court for the District of Colorado
Bankruptcy Judge Deborah Thorne, liaison from the Committee on the Administration of the Bankruptcy System
Carolyn Dubay, Administrative Office
Bridget M. Healy, Administrative Office
Rakita Johnson, Administrative Office
Sarah Sraders, Administrative Office
Carly E. Giffin, Federal Judicial Center
John Bircher, Chapter 7 and 12 Trustee
Andrea Dobin, Chapter 7 and 12 Trustee
Rebecca Garcia, Chapter 12 & 13 Trustee
Jennifer Holman, Standing Chapter 13 Trustee

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The following persons also attended the meeting remotely:

Professor Catherine T. Struve, Consultant to the Standing Committee
Dean Troy McKenzie, liaison from the Standing Committee
Shelly Cox, Administrative Office
Dana Elliott, Administrative Office
Tim Reagan, Federal Judicial Center
John Hawkinson, journalist
Merril Hirsch, Merril Hirsh PLLC
Kaiya Lyons, American Association for Justice
Angie Marshall, U.S. Bankruptcy Court, Indiana
Charles Morrison, Heritage Court Reporting
Lisa Mullen, Trott Law
Sai
Susan Steinman, American Association for Justice
Becky Yerak, Wall Street Journal

Discussion Agenda

1. **Greetings and Introductions**

Judge Rebecca Connelly welcomed the group and thanked the district court for hosting the meeting. She noted that two members of the Advisory Committee were attending remotely—Mr. Day and Ms. Whaley—as was Cathie Struve, consultant to the Standing Committee. Member Bankruptcy Judge Benjamin A. Kahn was unable to attend. She mentioned that this is Judge Browning's last meeting with the Advisory Committee and thanked him for his contributions. This was the first meeting for Judge Leigh Martin May as a member of the Advisory Committee and Ed Hartnett as Reporter to the Standing Committee, and she welcomed them.

Judge Connelly thanked the members of the public attending in person or remotely for their interest, and she noted that the meeting would be recorded. She summarized the schedule for the meeting and reviewed meeting etiquette for in-person and virtual attendees. She also provided information about security and emergency procedures.

She noted that the Agenda Book includes the chart tracking proposed rules amendments and a summary of pending legislation. The package of rules that are scheduled to become effective Dec. 1 were sent to Congress on April 8.

2. **Approval of Minutes of Meeting Held on September 25, 2025**

The minutes were approved with one change—Ramona Elliot is the Acting Director of the Executive Office for U.S. Trustees, not the Director.

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3. Oral Reports on Meetings of Other Committees

(A) *Jan. 6, 2026, Standing Committee Meeting*

Judge Connelly gave the report.

The Standing Committee gave final approval without publication to technical amendments to Official Form 410C13-NR (Response to Trustee's Notice of Disbursements Made). The amendments corrected inadvertent errors, replacing the words "the date of this notice" in two places in Part 2 with "the date of this response." The Standing Committee gave retroactive effect to its approval effective Dec. 1, 2025, and agreed to give notice of its action to the Judicial Conference.

(B) *Meeting of the Advisory Committee on Appellate Rules*

Judge Bress gave the report.

The Advisory Committee on Appellate Rules met on October 15, 2025, and would be meeting again on April 16, 2026.

Privacy Amendments

Based on discussions by the Appellate Rules Committee to date, the Federal Rules of Appellate Procedure (FRAP 25) would continue to track the privacy protection from the Bankruptcy Rules, except that social security numbers and taxpayer ID numbers would be redacted on appeal, because whatever the justification for permitting unredacted or partially redacted social-security numbers in other settings, there is no need for them in the publicly available papers filed by litigants in a court of appeals. Judge Bress noted that this would be discussed later in the meeting in connection with the privacy amendments to the Bankruptcy Rules.

Amicus Disclosures

In September 2025, the Judicial Conference sent to the Supreme Court proposed amendments to FRAP 29 and 32, which concerned disclosures for amicus briefs. These changes would have clarified the rules in several respects and expanded the required disclosures. As relevant here, they would have required the disclosure of certain brief-related contributions not only from nonmembers, as Rule 29 currently requires, but also from new members who had joined the organization within the previous 12 months.

Recently, the Appellate Rules Committee and the Standing Committee voted to withdraw those proposed amendments based on several concerns raised by the Executive Committee, chiefly: whether this provision could interfere with the privacy interests of those organizations and their members, who may be chilled from contributing to their organization's amicus briefs if they were required to announce their membership.

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Judge Bress said that the Appellate Rules Committee would be discussing next steps on this rule change at its meeting the following day, including possible revisions to the 12-month member rule.

Premature Petitions

In August 2025, proposed amendments to FRAP 15 were published for public comment. These amendments are intended to address an issue pertaining to review of administrative agency decisions. Under the current rule, if a party files a petition for review of an agency decision before the agency disposes of any petition for rehearing or reconsideration, the petition for review would be premature, and if the party did not file a second petition for review, the petition could not be considered.

The revision would track FRAP 4(a)'s general approach for premature notices of appeals from civil judgments, which would make a premature petition fully effective with respect to the original order once the agency has disposed of the rehearing petitions. A second petition would still be required if the party wishes to challenge the rehearing petition.

Judge Bress said that the Appellate Rules Committee received supportive public comments and that this would be taken up further at the April 16 meeting.

Matters Before Subcommittees

Judge Bress reviewed several matters being considered by subcommittees:

(1) *Intervention on appeal* -- A subcommittee is considering a possible new rule governing intervention on appeal, which would apply in exceptional cases when being an amicus is not enough. Judge Bress said that the Appellate Rules Committee discussed a draft of this rule in October and would be discussing further revisions on April 16.

(2) *Administrative stays* -- A subcommittee is considering a rule to govern the practice of administrative stays. In October 2025, it was decided to conduct more research in this area. It was remarked that this is an emerging and potentially controversial area, including in immigration cases. The Appellate Advisory Committee was planning to discuss the matter further on April 16.

(3) *Reopening time to appeal* -- A subcommittee is considering revisions to FRAP 4 to address the situation in which a party files a motion to extend the time to appeal and, while that motion is pending, files an untimely notice of appeal. The revision would say that if the district court grants the motion to reopen the time period, a party who has filed a notice of appeal need not file another one. Judge Bress said that this amendment will be discussed by the Appellate Advisory Committee on April 16, with a view to forwarding it to the Standing Committee and recommending that it be published for public comment.

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(4) *Treatment of Tribes* --The Appellate Rules refer to states, but not tribes, even though they are sovereigns and have sovereign interests. A subcommittee is examining places in the Rules where it may make sense to specifically reference Tribes.

(C) ***Meeting of the Advisory Committee on Civil Rules***

Judge McEwen gave the report.

The Advisory Committee on Civil Rules met on October 24, 2025, and on April 14, 2026.

At the October 24 meeting, the Civil Rules Committee voted to recommend that the Standing Committee publish proposed amendments to Rule 55(a) and (b) for comment. On January 6, 2026, the Standing Committee approved the proposed amendments for publication in August 2026.

A proposed amendment to Rule 55(a) governing entry of default by the clerk would change the phrase "must enter the party's default" to "may enter the party's default" and would expressly add that the clerk "may refer the matter to the court for directions." Judge McEwen explained that 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 an FJC study that such consultation with the court on default matters occurs in a number of districts.

The Committee also proposed amending Rule 55(b)(1) governing the clerk's entry of a default judgment similarly. The amendment parallels the changes to Rule 55(a). It would change the wording "must enter judgment" 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.

Bankruptcy Rule 7055 adopts Civil Rule 55 by reference, so, if the amendments are approved, the same flexible standard would apply in bankruptcy adversary proceedings.

Judge McEwen reported that two information items were discussed that might have importance for the Bankruptcy Rules. The Cross-Border Discovery Subcommittee recommended dropping the idea of rulemaking in this area as rulemaking is not warranted. There are sufficient tools, such as in Civil Rule 16, which our Bankruptcy Rule 7016(a) adopts by reference, to manage cross-border discovery needs. The topic will be removed from the agenda. In addition, the Rule 43(a) Subcommittee decided to continue to investigate whether to propose amendment of Rule 43(a) to relax the standard for remote testimony at trial by removing the condition 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, given that it authorizes the use of affidavits, oral testimony, or depositions on motions but does not state whether oral testimony may be provided remotely.

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Judge McEwen said that at its April 14 meeting the Civil Rules Committee gave final approval and forwarded to the Standing Committee five sets of amendments:

(1) *Rule 7.1 on disclosures to permit judges to better determine whether financial issues preclude involvement in the case*. The amendment widens the disclosures by changing "corporation" to "business organization." Judge McEwen noted that Bankruptcy Rule 7007.1 does not adopt Rule 7.1 by reference, but it is "derived" from it and consideration should be given to whether a similar amendment is warranted. Bankruptcy Rule 7007.1 does not apply in contested matters under Bankruptcy Rule 9014.

(2) *Rule 41(a) to permit dismissal of fewer than all counts and fewer than all original parties in a case*. Bankruptcy Rule 7041 adopts Rule 41 by reference, with one condition that is not relevant to the Rule 41(a) amendment.

(3) *Rule 45(c)(1) to permit service of a subpoena nationwide to require a deponent to sit for a remote trial, hearing, or deposition at a location within 100 miles from where the deponent resides* and *Rule 26(a)(3)(A)(i) to require disclosure of whether witnesses expected to appear at trial will participate in person or remotely*. Bankruptcy Rules 7026 and 9016 adopt Rules 26 and 45 by reference.

(4) *Rule 81(c)(3) to establish a deadline for a jury demand post-removal when no jury demand has been made before removal*. Bankruptcy Rule 9015 adopts Rule 81(c) by reference.

(5) *Rule 45(b)(1), clarifying what "delivering" a subpoena means by providing more methods of service, including by U.S. mail or commercial carrier and, when good cause is shown, additional methods "reasonably calculated to give notice."* The amendments would also establish 14-day notice and remove the requirement to tender witness fees at the time of service. The Committee Note says that "[t]he amendment removes that ambiguity by providing that methods authorized under Rule 4(e)(2)(A) and (B) for service of a summons and complaint constitute effective service of a subpoena." Bankruptcy Rule 9016 makes Rule 45 applicable in bankruptcy cases.

The Civil Rules Committee is also recommending to the Standing Committee for publication amendments to three more sets of rules:

(1) Rule 5 permitting e-filing by self-represented litigants (SRLs) with reasonable exceptions, opposite of the current presumption.

(2) Rules 5 and 6 which (a) permit electronic service by an SRL on parties who register to receive service of case activity, even if the SRL files nonelectronically, (b) provide that for purpose of any deadline for making service, service by a notice of case activity is complete as of the date of filing but that for purposes any deadlines that run from the date of service, service is

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complete as of the date of the notice of case activity, and (c) specify that service is completed on filing unless the server learns that the paper served did not reach the person to be served.

(3) Rule 5.2 to require, among other changes, use of a pseudonym for a minor, rather than initials. Bankruptcy Rule 9037 requires use of a minor's initials, and Judge McEwen noted that proposed amendments to that rule would be discussed in the report of the Technology, Privacy and Public Access Subcommittee.

Judge McEwen said that the Civil Rules Committee continues to consider possible amendments to Rule 43(a) regarding remote testimony at trial and remote oral testimony. The proposed amendments would allow the court to permit contemporaneous remote testimony for good cause, without requiring "compelling circumstances." The Bankruptcy Rules were restyled throughout to require "cause" as opposed to the "good cause" standard the Civil Rule would require for trials in district court. Inasmuch as new Bankruptcy Rule 7043, set to become effective on December 1, 2026, adopts Rule 43 for trials in adversary proceedings, the proposed change to the rule would make "good cause" the standard for bankruptcy trials in adversary proceedings. Amended Bankruptcy Rule 9014, also scheduled to become effective on December 1, adopts a "cause" standard for remote testimony in contested matters. If an amended Rule 43 is ultimately adopted, the requirement for "compelling circumstances" will no longer apply in any bankruptcy proceedings.

(D) ***December 11-12, 2025, Meeting of the Committee on the Administration of the Bankruptcy System (the "Bankruptcy Committee")***

Judge Thorne provided the report. She noted that this was her first official report to the Advisory Committee in her capacity as liaison from the Bankruptcy Committee.

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New Bankruptcy Case Weights

Judge Thorne reported that the previous month, on recommendation of the Bankruptcy Committee, the Judicial Conference approved new bankruptcy case weights, which were derived from a 2023-2024 study of bankruptcy judge time usage conducted by the Federal Judicial Center (FJC) at the request of the Bankruptcy Committee. The prior case weights had been in effect for over 15 years. The new case weights became effective immediately and will be used going forward to calculate bankruptcy courts' judicial workloads (weighted caseloads), which are in turn used in evaluating bankruptcy judge resources for districts across the country. Approval of these new case weights is a very important step for the bankruptcy courts and the entire bankruptcy system.

Legislative Proposal Regarding Chapter 7 Debtors' Attorney Fees

As Judge Isicoff reported at previous meetings, in 2022, the Judicial Conference, on recommendation of the Bankruptcy Committee, adopted a legislative proposal related to chapter 7 debtors' attorney fees. The official language of the Judicial Conference's legislative proposal is to amend the Bankruptcy Code to "(1) except from discharge chapter 7 debtors' attorney fees due under any agreement for payment of such fees; (2) add an exception to the automatic stay to allow

for post-petition payment of chapter 7 debtors' attorney fees; and (3) provide for judicial review of fee agreements at the beginning of a chapter 7 case to ensure reasonable chapter 7 debtors' attorney fees." The Administrative Office transmitted the legislative proposal to Congress in 2023, and again in 2025, and Judge Thorne said the Bankruptcy Committee understood that the proposal continues to be reviewed by Congressional staff. Bankruptcy judges and AO staff continue to make themselves available to members of Congress to answer questions raised in connection with this proposal. If Congress were to enact amendments to the Code based on this position, the Bankruptcy Committee anticipates that, at a minimum, conforming changes to the Bankruptcy Rules would be required. The Bankruptcy Committee will update the Advisory Committee on any progress in this area at future meetings.

Remote Testimony

The Bankruptcy Committee received an update at its meeting regarding the proposed amendments to Bankruptcy Rules 9014 and 9017 and creation of new Bankruptcy Rule 7043, which relate to the use of remote testimony in bankruptcy cases and proceedings. These amendments and new rule are on track to go into effect December 1 of this year, if all approvals are met in the ordinary course. The Bankruptcy Committee has been keenly interested in both the Judicial Conference's remote public access policy and these changes to the Bankruptcy Rules related to remote testimony and will continue to monitor both topics.

Proposed Draft Amendments Related to Self-Represented Litigants

Judge Thorne said that she was interested to read the item in the agenda book regarding suggestions to the various rules committees to allow greater access to electronic filing systems for self-represented litigants. She said that she looks forward to hearing this committee's continued discussion at the meeting on whether to join the other rules committees that are proceeding with amendments to their respective sets of rules in this area.

The Bankruptcy Committee is also studying issues related to pro se litigants in bankruptcy courts. The Bankruptcy Committee has for some years been undertaking a systematic inquiry to identify potential issues that could impact the bankruptcy system in the coming years, intended to provide a long-term framework for identifying suggestions to improve the bankruptcy system. At its December 2024 meeting, as part of this "changing needs" study, the Bankruptcy Committee identified for prioritization certain issues related to pro se bankruptcy filers. The FJC is assisting the Bankruptcy Committee's continued work in relation to pro se issues, and the Bankruptcy Committee will receive a report from the FJC at its upcoming June meeting.

Special Masters in Bankruptcy Cases

Judge Thorne was also interested to read the agenda item regarding the suggested rule amendment to permit special masters in bankruptcy cases. This is an area in which the Bankruptcy Committee was historically very engaged. She said that if the Advisory Committee or the Standing Committee is interested in working with the Bankruptcy Committee to evaluate this issue at any stage, the Bankruptcy Committee would be honored and happy to assist.

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Proposal Regarding Venue

Finally, Judge Thorne said that she was interested to read the agenda item regarding a suggestion to amend the Bankruptcy Rules to require additional disclosure of the choice of venue at filing and to require in some circumstances that the court dismiss or transfer the case to a proper venue or hold a hearing on the venue selection. The Bankruptcy Committee has periodically considered venue reform since as early as 1996, but several times has declined to recommend that the Judicial Conference take a position. Leading bankruptcy groups outside the judiciary, including the National Conference of Bankruptcy Judges, the American Bankruptcy Institute, and the National Bankruptcy Conference, have also considered bankruptcy venue reform in the last decade, but none have been able to reach a consensus sufficient to take a formal position for or against reform. Again, if the Advisory Committee is interested in working with the Bankruptcy Committee to evaluate this issue, the Bankruptcy Committee would be able to assist.

4. **Report by the Consumer Subcommittee**

(A) ***Consideration of suggestion 24-BK-G to amend Rule 2003 with respect to the timing and location of § 341 meetings***

Judge Harner and Professor Gibson provided the report.

Rebecca Garcia, a chapter 12 and chapter 13 trustee, submitted a suggestion (Suggestion 24-BK-G), which she later revised (Suggestion 25-BK-B), to amend Rule 2003(a) and (c) as pertains to the timing and location of meetings of creditors in response to the current practice of conducting the meetings remotely by means of Zoom. The suggestion was endorsed by the Association of Chapter 12 Trustees (ACTT) and the National Association of Chapter 13 Trustees (NACTT). The National Association of Bankruptcy Trustees (NABT) also submitted a suggestion (Suggestion 25-BK-C) to amend Rule 2003 to take account of remote meetings of creditors.

Because some of the concerns raised by the suggestions relate to policies of the Executive Office for U.S. Trustees ("EOUST"), the Advisory Committee suggested that discussions between that office and trustee representatives might be helpful in determining whether a consensus could be reached about the need for possible amendments to Rule 2003. Those discussions have taken place, and the Association of Chapter 12 Trustees ("ACT12") and the National Association of Bankruptcy Trustees ("NABT") have submitted new suggestions (Suggestions 26-BK-1 and 26-BK-2) that propose amendments to Rule 2003(a) that the EOUST and the trustee groups have agreed on, plus an additional amendment that the EOUST does not support. The Subcommittee considered those proposed amendments and agreed on a draft for publication.

Professor Gibson presented language of the proposed amendments recommended by the Subcommittee, which appears in the Agenda Book at p. 102. The Subcommittee recommended that the date for the meeting of creditors in a chapter 12 or chapter 13 case be extended to 60 days (from the current 35 and 50 days, respectively). No change to the date for the meeting of creditors in a chapter 7 or chapter 11 case is contemplated by the amendments, and the Subcommittee recommended not adding language proposed by the trustee groups that would allow the U.S.

trustee to convene the meeting at a later date (up to 60 days after the order for relief) "if appropriate."

The draft recommended by the Subcommittee also includes express authorization for meetings of creditors to be "conducted in person or remotely" and would allow the U.S. trustee to designate in which manner a meeting would be conducted. The Subcommittee decided that the value of having the rule expressly allow remote meetings outweighs the risk of challenges to pre-amendment remote meetings that were authorized by the EOUST. The style consultants requested a change to the language in line 28 on p. 103 of the Agenda Book by changing "In-person meetings" to "An in-person meeting."

The final sentence of the draft at lines 32-34 on p. 103 of the Agenda Book is included in brackets because the Subcommittee could not reach a consensus on whether it should be added. ACT12 and NABT believe that, without this provision, someone in later litigation might challenge the introduction of testimony from the meeting of creditors on the ground that the testimony was given or taken by a person outside the district in which the bankruptcy case is pending. In order to eliminate that possibility and for the sake of completeness, the trustees proposed adding a provision paralleling the provision that states where an in-person meeting must be located. They analogized to the provision in Fed. R. Civ. P. 30(b)(4) that states that when depositions are conducted remotely, "For the purpose of this rule …, the deposition takes place where the deponent answers the questions."

On the other hand, as explained by Ramona Elliott, the EOUST opposes this provision as being unnecessary and potentially giving rise to challenges to the conduct of pre-amendment remote meetings. It may be unnecessary because no one has identified any other rule or statutory provision that requires determining where a meeting of creditors takes place (such as the rules cited in Fed. R. Civ. P. 30(b)(4) with respect to the location of depositions).

The Subcommittee invited the views of the Advisory Committee on the last sentence, and asked for approval for publication of the amendments to Rule 2003.

The Advisory Committee approved for publication the amendments to Rule 2003(a)(1), and Rule 2003(a)(3) (with a change from the Style Consultants) with the exception of the bracketed language. The Advisory Committee then discussed the bracketed language.

Ms. Whaley said that the proposed language is an attempt to protect against potential litigation over the issue of where remote testimony takes place. Congress has delegated to the Advisory Committee the time, place, and manner of holding 341 meetings. This bracketed language specifies the place of those remote meetings, just as Civil Rule 30(b)(4) addresses the place of remote depositions (originally in the context of telephonic depositions). Debtors may be all over the country, creditors participating remotely, and even trustees. She said that the rule would be incomplete if it did not address the place of the meeting. The issue of where the trustee is sitting exists whether this language is included or not – that is a matter for the EOUST.

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Ms. Elliot stated that this is a matter for the U.S. trustee, not for the rule. The U.S. Trustee convenes the meeting. Trustees have to ask for permission to conduct a meeting outside of the district, and those procedures are working well. She does not find the deposition analogy relevant because it has a basis in statute. A trustee does not sit as a person before whom a deposition is taken. The place of the 341 meeting is irrelevant. The testimony given is not dependent on state law where it takes place. This is more analogous to Rule 43 than to the rule governing depositions.

Judge Harner expressed her worries about unintended consequences if we include language that is not necessary, which Ms. Elliot says this bracketed language is not. Judge Connelly asked whether there is a problem created by the additional language. Dean McKenzie said he had problem with the sentence before the bracketed language. Does the U.S. Trustee specify the place, or the district? Judge Lefkow asked about the reference to place in the first sentence and then repeated in the third sentence. Ms. Elliot said it was intended to tie the language to the existing rule and thought including the reference to place in that third sentence was important. Professor Norberg said that if there is no statute or rule that turns on location of the 341 meeting, perhaps we should not include that bracketed language and should not include language designating the place for in-person meetings either. Judge Hopkins asked about non-U.S. trustee districts. Ms. Elliot said they generally follow the practices of the EOUST. Ms. Whaley again emphasized that Congress said that the rules are supposed to designate the time, place and manner of these meetings. Leaving it to the EOUST makes the rules ambiguous for the participants. There should be certainty by providing guidance in the rule. Judge Thorne asks what happens when a case is transferred to another district after the 341 meeting. Judge Harner agrees that that could create uncertainty. Prof. Gibson said that it would be strange to eliminate the third sentence, which is in the unamended rule now.

Judge May moved to approve the language without the bracketed language but with the style consultant changes. The motion was seconded. Ms. Becket noted that if it is published without the bracketed language the public may not be able to comment on the bracketed language. The motion carried 10-4.

(B) ***Consideration of Suggestion 25-BK-J regarding Rule 3001***

Judge Harner and Professor Bartell provided the report.

The Advisory Committee received a suggestion from Michael J. McCormick suggesting that Rule 3001(c) (which specifies required supporting information regarding prepetition obligations for a proof of claim) be modified. Rule 3001(c)(2)(C) currently requires the following information with respect to a claim secured by a mortgage on the debtor's principal residence:

> (C) for any claimed security interest in the debtor's principal residence:
> (i) Form 410A; and
> (ii) if there is an escrow account connected with the claim, an escrow-account statement, prepared as of the date the petition was filed, that is consistent in form with applicable nonbankruptcy law.

Mr. McCormick suggested that a new sentence be added to the end of clause (ii) stating:

"In a case converted from chapter 7 to chapter 13, the escrow-account statement may be performed [sic] as of the date the case was converted to chapter 13."

Because postpetition/preconversion escrow-account adjustment amounts are not prepetition claims, and there is no basis in the Bankruptcy Code for treating them as such, the Subcommittee recommended no change in response to this suggestion. The Advisory Committee adopted the Subcommittee's recommendation.

(C) ***Consideration of Suggestion 25-BK-N regarding Rule 4004***

Judge Harner and Professor Gibson provided the report.

Judges Rebecca Connelly and Ben Kahn have submitted a suggestion (25-BK-N) to amend Rule 4004(a) and (c) to eliminate the mandate (or implication) that a court must grant a chapter 7 debtor a discharge—even though the debtor received a discharge in a prior case under the circumstances described in § 727(a)(8) or (9)—if no motion has been timely filed objecting to discharge on those grounds. Section 727(a)(8) denies a discharge to a chapter 7 debtor who previously received a discharge in a chapter 7 or 11 case filed within 8 years before the filing of the present case. And § 727(a)(9) denies the discharge if the debtor received a discharge in a chapter 13 case filed within 6 years before the filing of the present case, unless the plan paid 100% of the allowed unsecured claims or paid at least 70% of those claims and was proposed in good faith and was the debtor's best effort. The judges also suggest amending Rule 4004(a) to eliminate the deadline for filing an objection to discharge under § 1328(f).

Judges Connelly and Kahn suggested that Rule 4004(c), as currently written, is inconsistent with §§ 727 and 1328 and thus violates the Bankruptcy Rules Enabling Act, 28 U.S.C. § 2075. Rule 4004(c) seems to require the court to enter a discharge under circumstances when the debtor is not eligible for one simply because a timely motion objecting to discharge was not made.

The judges' suggestion raises the question whether the Advisory Committee was correct in 2007 in concluding that, despite the rule, a court can raise an objection to discharge under §§ 727(a)(8) and (9) and 1328(f) on its own. As Judges Connelly and Kahn suggest, the current wording of Rule 4004(c) seems inconsistent with the court having authority to withhold a discharge on its own—other than because the debtor is not an individual or the debtor filed a waiver of discharge. With respect to other § 727(a) grounds, the court "must promptly grant the discharge" after time for objecting expires, unless a complaint or motion objecting to discharge remains pending.

Prof. Gibson reviewed the historical background of Rule 4004(a) and noted that the references in the rule to motions under §§ 707(a)(8) and (9) and 1328(f) were added in 2010 to distinguish them from provisions requiring commencement of an adversary proceeding. She said that the problem identified by the judges predates the 2010 amendment to the rule because the prior rule also imposed a deadline for objecting to discharge. She advised the Subcommittee that

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she believes that the time limits of Rule 4004(a) are valid under the Rules Enabling Act. Although §§ 727(a) and 1328(f) provide grounds for denying a debtor a discharge, the rules can specify how those provisions are enforced, including by imposing time limits for objecting. The Supreme Court has held that Civil Rule 60(c)'s requirement that a motion for relief from a judgment be made "within a reasonable time" prevented a defendant from getting a default judgment set aside as void due to improper service. Coney Island Auto Parts Unlimited, Inc. v. Burton, 223 L. Ed. 2d 438 (2026). If waiting too long to challenge a judgment that is void under the Due Process Clause means that the judgment can nevertheless be enforced, then allowing a debtor to be discharged because no one timely objects should not be invalid. The Advisory Committee indicated that it agreed with Professor Gibson's analysis of the Rules Enabling Act issue.

Before deciding what, if any, amendments to propose to Rule 4004, the Subcommittee decided that it would be helpful to get a better idea of how courts are applying Rule 4004(c) and whether they are entering discharges for debtors who are not eligible for them under § 727(a)(8) or (9) or § 1328(f) because they believe the rule compels them to do so. If the Advisory Committee agrees that a study would be useful, Prof. Gibson said that it could ask the FJC to gather information about courts' practices regarding the denial of discharge, including whether they act sua sponte when they are aware that a debtor received a discharge too recently in a prior case.

Judge Connelly commented that Judge Kahn agrees with her that there is a problem. Many courts may simply withhold discharge rather than entering an order denying discharge. While a court may have the power to sua sponte issue an order denying discharge, she thinks that there is a problem even if the court does not enter the order. Does the rule require the court to enter such an order? Judge Harner agrees that there is an inconsistency in the rule. A study may be helpful. Ken Gardner said that the clerk's office looks at whether the requirements listed in Rule 4004 are met, and then a discharge is issued. If the rule were clarified, it would be better for the clerks. He guesses that there may be inconsistency in treatment of the 727(a)(8) and (9) issue when there is no motion. Removing the requirement for a motion may be helpful according to Judge Thorne. Ms. Becket wants to know if courts are denying a discharge without a motion. Mr. Gardner said that the clerks may miss it in any event, even if the rule is amended. Ms. Doling said that she saw a discharge granted to an ineligible debtor when no motion was filed even since this proposal was made. Judge Harner asked Dr. Giffin whether this is something the FJC can help with. Dr. Giffin thought the FJC could be helpful.

The Advisory Committee asked the FJC for this help. Nancy Whaley offered to survey chapter 13 trustees on this issue as well. She wanted to make sure debtors are not receiving discharges for which they are not eligible in chapter 13.

5. Report by the Forms Subcommittee

(A) *Consideration of Form 101 for Final Approval*

Judge Connelly and Professor Bartell provided the report.

Draft

Amendments to the language of the prompt to Form 101, Question 4, to add a new paragraph regarding employer identification numbers were published last year. The amendment, which appears in the Agenda Book on p. 131, is intended to minimize the likelihood that a debtor may provide the employer identification number of the debtor's employer rather than the debtor's own number.

There were no comments in response to the proposed amendment. The Subcommittee recommended the proposed amendment to the Advisory Committee for final approval as published. However, since publication of the agenda book, the style consultants suggested changes to the prompt, and conforming changes to the prompt to Question 2. They suggested inserting the word "a" before "partnership" and "an" before "LLC" in Question 4 and, in both Question 4 and Question 2, inserting a comma after the words "any separate legal entity" and after "LLC." Those changes are purely grammatical.

The Advisory Committee approved the amendment and agreed to submit it to the Standing Committee for final approval.

(B) ***Consideration of Form 106C for Final Approval***

Judge Connelly and Professor Gibson provided the report.

The Advisory Committee received a suggestion from a chapter 12/chapter 13 trustee to amend Official Form 106C to include a total amount of assets being claimed as exempt. Section 589b(d)(3) of title 28 requires the uniform final report submitted by trustees to total the "assets exempted." Without the amount totaled on the form, trustees must manually add up the amounts on each form to prepare the required final report.

Complicating the decision of how to respond to the suggestion was the fact that Form 106C—in response to a statement by the Supreme Court in *Schwab v. Reilly*, 560 U.S. 770 (2010)—provides two options for claiming an exemption. The debtor can either list a specific dollar amount or can claim as exempt "100% of fair market value, up to any applicable statutory limit." If the latter option is chosen, there is no dollar amount that can be added.

The Advisory Committee resolved this problem by proposing an amendment to Form 106C to require the debtor to "[a]dd the dollar value of all entries [in Column C] with a specific amount." It also approved for publication the addition of a space on the form for the total value of the debtor's interest in property for which exemptions are claimed (in Column B).

The form was published last August, and one comment was filed in response. The National Association of Consumer Bankruptcy Attorneys ("NACBA") expressed concern about the wording of the directive to add the total value of the debtor's interest in property for which exemptions are claimed. NACBA urges the Advisory Committee to revise the form to "add the language 'with a specific amount' to the section calling for the total for Column B." (NACBA also suggested revisiting the approach taken on the form in response to *Schwab v. Reilly*.)

Draft

The suggestion that prompted the proposed amendments to Form 106C only sought a total value of the claimed exemptions, and not a total of the property values. The addition to the form of space for the latter was really an afterthought—for the sake of symmetry—with no significant Subcommittee discussion about it. During its meeting on February 26, the Subcommittee considered whether there is a need for a total of Column B. It decided that there is not, because trustees do not include that total in their final report and that figure has no significance in the bankruptcy case. The Subcommittee therefore recommended that item 2.1 be deleted from the form as published and that, with that deletion and the renumbering of item 2.2, the amendment to Official Form 106C be recommended to the Standing Committee for final approval. The Subcommittee does not propose to revisit how to implement the *Schwab* decision.

The Advisory Committee gave final approval to the amendments to Form 106C with the deletion of item 2.1 and the renumbering of item 2.2 and agreed with the Subcommittee not to revisit *Schwab*.

(C) ***Consideration of Suggestion 25-BK-K regarding Form 107***

Judge Connelly and Professor Gibson provided the report.

Bankruptcy attorney Stephen M. Dunne submitted a suggestion (25-BK-K), proposing an amendment to the wording of an instruction for questions 4 and 5 on the Statement of Financial Affairs ("SOFA") for individuals. Currently the form states, "If you are filing a joint case and you have income that you receive together, list it only once under Debtor 1." Mr. Dunne suggested that the instruction be expanded to read:

> If you are filing a joint case, report each debtor's separate income in the appropriate column. For income that is jointly received (such as joint wages, business income, or jointly owned property), you may either (a) allocate it proportionally between Debtor 1 and Debtor 2, or (b) list the full amount under Debtor 1 and indicate in the description column that the income was jointly received. Do not omit joint income entirely.

Mr. Dunne said that the current instruction causes confusion and can lead to incomplete reporting, inconsistent practices, and increased risk of error or objection. It may erroneously appear that debtor 2 has no income or has failed to report it, and some lawyers fail to follow the instruction and list the joint income twice.

This instruction was added to the SOFA in 2015 when Form 107 was revised and renumbered as part of the Forms Modernization Project. It does not appear to have been a controversial addition. There was no discussion of this change at any Advisory Committee meeting or in comments submitted when the form was published. It was likely added to address an issue (how to report joint income) that the former SOFA did not address and to provide a uniform answer.

Draft

The Subcommittee discussed the suggestion at its meeting on February 26 and for several reasons recommended that the change suggested by Mr. Dunne not be proposed. First, the instruction has been on the form for 10 years, and Mr. Dunne is the first to suggest to the Advisory Committee that it is problematic. Second, rather than promoting uniformity, his instruction invites inconsistency in how joint income is reported. Third, if there is any uncertainty with the current form about whether joint filers have any joint income, they can be asked about it at the meeting of creditors. Finally, as a practical matter, there probably is not room on the form to add his lengthy instruction twice.

Prof. Norberg thought that it might be valuable to add the last part of the suggestion, describing that the income is jointly received, but there is no column to do that.

The Advisory Committee accepted the recommendation of the Subcommittee.

(D) ***Consideration of Suggestion 25-BK-O regarding Form 106C***

Judge Connelly and Professor Bartell provided the report.

The Advisory Committee received a suggestion from Judge Laurel Isicoff of the bankruptcy court in the S.D. Fla. with respect to question 3 of Part 1 of Form 106C. Florida has an unlimited homestead exemption. As a result, whenever a debtor seeks to exempt his or her homestead, the debtor will generally check the box for "100% of fair market value, up to any applicable statutory limit" in Question 2 of Part 1 of the Schedule. However, even if the debtor puts in a dollar figure, under Florida law the debtor is claiming the full homestead as exempt (there are no partial homestead exemptions in Florida). Therefore, there is no basis for the trustee to object to a homestead exemption in Florida based on what is specified in Question 2 of Part 1 of the Form.

Section 522(p)(1) provides that if the debtor elects state exemptions the debtor may not exempt any amount of an interest that was acquired by the debtor during the 1,215-day period preceding the filing date that exceeds $214,000. Question 3 of Part 1 of the Schedule is intended to provide information relating to this limitation, which could serve as a basis for the trustee to object to the homestead exemption.

Question 3 currently asks first whether the debtor is claiming a homestead exemption of more than $214,000, no or yes. Only if the debtor marks the box "yes" does Question 3 ask whether the debtor acquired the property within 1,215 days before filing the case. Judge Isicoff notes that in Florida debtors skip Question 3 entirely, because all Florida debtors are claiming the entire amount of their homestead as exempt, and will never admit to the value of their equity in the homestead. Because they skip the question, they never answer the second question. She suggested reversing the two questions so that the timing question comes first. That way it will

always be answered and the trustee will be on notice of the need to object to the homestead exemption if § 522(p)(1) is implicated.

After discussing Judge Isicoff's suggestion, the Subcommittee preliminarily expressed the view that the key information sought by the question is not the dollar amount of the homestead exemption (which would be unlimited in Florida, for example, and actually currently exceeds $214,000 in California) but whether the property was acquired during the period described in § 522(p)(1). Therefore, it might be preferable simply to eliminate the question about the value of the homestead property and modify Question 3 to ask simply about whether property claimed as exempt under the homestead exemption was acquired within 1,215 days before filing, as appears on p. 149 of the Agenda Book. Before making a recommendation to the Advisory Committee, the Subcommittee wishes to gather more information from trustees and from the Executive Office for U.S. Trustees as to the potential impact of such a change. Therefore, the Subcommittee has deferred consideration of the suggestion until its fall meeting.

Prof. Norberg suggested that the language should be changed to "acquired the property or any interest in the property" to pick up improvements to the homestead during the applicable period. The Advisory Committee thought that was a useful suggestion.

6. **Report of the Technology, Privacy, and Public Access Subcommittee**

(A) ***Consider potential rule amendments regarding electronic filing by self-represented litigants***

Judge Lefkow and Professor Struve provided the report.

In response to suggestions to the Bankruptcy, Civil, Criminal, and Appellate Rules Advisory Committees to allow greater access to electronic filing systems for self-represented litigants ("SRLs"), a working group was formed, chaired by Professor Cathie Struve. Professor Struve has described the SRL project, as it has developed, as having two basic goals: one involving service and the other, filing. As to service, the project's goal is to eliminate the requirement of separate paper service of documents after the case's initial filing on a litigant who receives a Notice of Filing through the court's electronic-filing system or a court-based electronic-noticing program. As to filing, the idea is to make two changes compared with current practice: (1) to presumptively permit SRLs to file electronically (unless a court order or local rule bars them from doing so) and (2) to provide that a local rule or general court order that bars SRLs from using the court's electronic-filing system must include reasonable exceptions or must permit the use of another electronic method for filing documents and receiving electronic notice of activity in the case.

At the Civil rules meeting, it recommended for publication its two rules implicated by the project.

The Bankruptcy portion requires amendments to four rules. She presented to the Advisory Committee the issues that needed to be resolved to finalize the draft amendments.

Draft

1. *Individuals, Persons, Parties, and Entities*. For Rules 5005 and 8011, when referring to unrepresented litigants, the Subcommittee decided to use the term "unrepresented individuals" rather than "unrepresented parties." This differs from Civil and Appellate, because those other rule sets never used "individuals" in their current rules. Civil and Appellate wanted to eliminate the implication that persons unconnected to the case could use the electronic filing system. The Subcommittee decided that "unrepresented party" should not be used in the bankruptcy rules because it could suggest that non-individual parties could represent themselves. As a policy matter, the Subcommittee believed it was less likely that individuals with no connection to the case might seek to make electronic filings than that non-individuals might take the proposed new Rule language as suggesting that they could represent themselves. Prof. Struve believes this lack of conformity can be justified to the Standing Committee by the bankruptcy context.

Prof. Norberg asked whether consideration was given to using the conforming language in the rule and putting something else in the note. Prof. Gibson said that unrepresented people are not likely to read the committee notes. Prof. Struve said that using unrepresented individual would avoid the issue. Ken Gardner said that clarity for the clerk's office is important, and using "individual" is clear. Judge Harner said that her clerk of court is very concerned about the proposal. He wants as many guardrails as possible, and he thinks that the proposal as drafted might lead to individuals who are not parties in interest filing on the docket; thus, Judge Harner suggested, the choice to use "individual" rather than "party" is something that we may want to revisit after publication.

Prof. Struve then highlighted the change of prior uses of the term "person" that appeared in the existing rules, probably as a result of carrying over language from other rule sets during prior rounds of coordinated amendments. In a number of places the proposals would replace "person" with "individual" or "entity." In Rule 8011(c)(1) on p. 170 of the Agenda Book, and in Rule 9036(c)(1) on p. 177 of the Agenda Book, there is bracketed language where there was a question which term should be used. Even if currently only individuals may register for electronic filing systems, she asked whether we want to use "entity" in case the electronic filing system changes. Prof. Struve recommended doing so. Prof. Gibson agreed. No objection was raised to the use of "entity" in Rule 8011(c)(1) on lines 47, 49 and 51 and in Rule 9036(c)(1) in lines 22, 24, and 26. The Committee Note will explain these changes.

Next she highlighted that Rule 5005(a)(3)(C) and Rule 8011(e) changed "person" to "individual" because only an individual can have a signature. If an entity is required to sign, the signature of counsel is required under Rule 8011(e). Only individuals may make service, so Rule 8011(d)(1)(B) was changed from "person". In multiple other rules, we propose to change "person" to "entity."

Judge Connelly asked about the impact of the amendments on case initiation. Prof. Struve said that the court can impose reasonable restrictions on use of the e-filing system, and that could include a limitation that prevents bankruptcy case initiation by e-filing. But it requires a decision by the individual court.

Draft

2. *Committee Note*. Prof. Struve then focused on the bracketed language in the committee note to Rule 5005 on lines 98-101 on p. 167 of the Agenda Book, and to rule 8011(a)(2)(C) on lines 145-149 on p. 173-74 of the Agenda Book, suggesting that local provisions requiring permission from the court for unrepresented individuals seeking to file electronically counts as reasonable exceptions, so long as the permission is not unreasonably withheld in practice. The Civil Rules Committee has decided to include the bracketed language. Prof. Gibson said that she supported including the bracketed language. Prof. Bartell expressed concern about how a judge could be asked for permission to file a case-initiating document if there is no judge assigned until after that document is filed. Judge Harner worries about the large number of petitions prepared by bankruptcy petition preparers. Prof. Struve emphasized again that a court could decide that no petitions could be filed by unrepresented litigants through the electronic-filing system. Ken Gardner asked about how the rule will be implemented for joint debtors. Judge May said she supports including the bracketed language. Judge Harner agreed, but wondered if the Advisory Committee should exclude the case initiation document. Prof. Struve said that this is the purpose of publication. Judge McEwen said that there will be many issues that need to be worked out. Ed Hartnett said that the Civil Rules Committee may have thought that having the language in the note may promote public comment.

3. *Notice of Case Activity*. Prof. Struve pointed out the language in brackets in Rule 8011(c)(3)(A) and Rule 9036(c)(d)(1) referring to service by a notice of case activity was adopted by the Civil Rules Committee. No one objected to doing the same in the Bankruptcy Rules.

4. *Learns v. Receives Notice*. Prof. Struve then discussed the bracketed language providing alternatives of "learns" or "receives notice" in the rules that discuss a litigant learning that its filing did not reach an entity that was to be electronically served – that is, Rules 8011(c)(1)(A), 8011(c)(2)(D), 9036(c)(1)((A), and 9036(c)(2). The parallel provisions in current Civil Rule 5 and Criminal Rule 49, as well as the proposed amendments to Civil Rule 5 just approved for publication by the Civil Rules Committee, use "learns" instead of "receives notice." The Bankruptcy Rules Committee at the time the rules were originally drafted made an intentional decision to use "receives notice" to avoid someone intentionally declining to "learn." Ms. Becket suggested "receives notice or otherwise learns". Judge Lefkow said that she thought "receives notice" is more formal. Prof. Gibson suggested that we should conform here. Perhaps the committee note could be expanded to state that receiving notice constitutes learning. Judge Harner supported adding something to the note, but agreed that the language should be consistent with Civil.

The Advisory Committee approved the amendments to Rules 5005, 8011, 9006 and 9036 with the following changes: Retaining the bracketed language in the Committee Notes to Rules 5005 and 8011(a)(2)(C); selecting "entity" rather than "individual" in the bracketed choices in the text of Rule 8011(c)(1) and Rule 9036(c)(1); selecting "learns" rather than "receives notice" in the bracketed choices in the text of Rules 8011(c)(1)(A), 8011(c)(2)(D), and 9036(c)(1)(A) and (2); adding language in the Committee Notes to Rules 8011 and 9036 to say that "learns" is intended to encompass "receives notice"; retaining the bracketed language in Rules 8011(c)(3)(A) and 9036(d)(1); and adding Committee Note language to explain the replacement of "person" with "individual" or "entity." The Advisory Committee directed that these proposed amendments be

forwarded to the Standing Committee for publication along with the comparable rules adopted by the other rules committees.

(B) Consider possible amendments related to privacy issues

Judge Lefkow and Professor Bartell provided the report.

All of the advisory committees have been considering suggestions that address particular issues relating to the privacy rules, including suggestions regarding redaction of social-security numbers (SSNs) in federal-court filings and a suggestion relating to initials of known minors in court filings. The Advisory Committee has previously decided to take no action on the suggestion from Senator Wyden (22-BK-I) concerning complete redaction of social-security numbers in bankruptcy court filings.

Since that time the other rules committees have been considering the same issues. The Rule 49.1 (Privacy Rule) Subcommittee of the Criminal Rules Committee has proposed amendments to Criminal Rule 49.1(a) that would do three things. First, it would apply the rule not only to filings that include information about individuals but to non-individuals as well. Second it would require full redaction of SSNs and other tax-identification numbers (TINs), as well as employer-identification numbers (EINs), in all filings, including all exhibits and attachments. Third, it would require the use of pseudonyms rather than initials for minors' names. Since that time the other rules committees have been considering the same issues.

The proposed language of amended Criminal Rule 49.1(a) appears in the Agenda Book at p. 213. The Civil Rules Committee is proposing similar amendments to Civil Rule 5.2, and the Appellate Rules Committee will likely be receptive to those changes if proposed.

At the Advisory Committee meeting in September 2025, the Advisory Committee made four decisions:

1. It continues to adhere to its position that no modification should be made to Rule 9037 to require complete redaction (rather than redaction to the last four digits) of social-security numbers because they are needed by creditors in bankruptcy cases.

2. It agrees to amend Rule 9037 to conform to the approach adopted by the Criminal Rules with respect to pseudonyms for minors.

3. Rule 9037(a) should treat individual tax-identification numbers the same way as social-security numbers for purposes of redaction, but should not require redaction of employer-identification numbers.

4. In an appeal to the district court or a bankruptcy appellate panel from a bankruptcy court, the same privacy rule that otherwise applies in the district court (for civil and criminal cases) should apply.

No change to Rule 9037(a) is necessary to reflect the decisions described in items 1 and 3. To implement the second item above, the Subcommittee recommended amendments to Rule 9037(a)(3) which appear in the Agenda Book on p. 214. The language requires a pseudonym in place of the name of an individual known to be and identified as a minor in all filings made with the court, including exhibits or attachments.

As to the fourth issue, the Appellate Rules Committee is considering an amendment to Appellate Rule 25(a)(5) that would resolve that issue for the courts of appeals. The proposed revision would require full redaction of SSNs for all appeals, but would not apply to clerks forwarding the record. The Advisory Committee previously agreed that the same redaction rule should apply to all bankruptcy appeals, wherever they are located.

To implement that decision, a new Part VIII privacy rule will be required. The proposed amendment to Rule 8011, conforming to the proposed amendment to Appellate Rule 25(a)(5), is in the Agenda Book on p. 216.

The Subcommittee recommended that the proposed amendments to Rules 8011 and 9037 be recommended to the Standing Committee for publication at the same time as the proposed amendments to the privacy rules of the other committees.

The Advisory Committee approved the proposed amendments and recommended them to the Standing Committee for publication.

(C) ***Consideration of Rule 2002 for Final Approval***

Judge Lefkow and Professor Bartell provided the report.

The Advisory Committee received a suggestion from the Clerk of Court for the Bankruptcy Court for the District of Minnesota, in which clerks of court for eight other bankruptcy courts in the Eighth Circuit joined, suggesting that Rule 2002(n) (now Rule 2002(o)) be amended to eliminate the requirement that the caption of every notice given under Rule 2002 comply with Rule 1005. The Bankruptcy Clerks Advisory Group submitted a second suggestion supporting that of the Clerk of Court for the Minnesota Bankruptcy Court and her colleagues.

Upon the recommendation of the Subcommittee and the Advisory Committee, the Standing Committee at its meeting in January 2024 approved for publication an amendment to Rule 2002(o) to remove the requirement that notices given under Rule 2002 conform to Rule 1005, and instead required that such notices "include the information that Form 416B requires." The amended language appears on p. 219 of the Agenda Book.

There were no comments on the suggested amendment. Therefore, the Subcommittee recommended the amended Rule 2002(o) to the Advisory Committee for final approval and submission to the Standing Committee for final approval.

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Judge Connelly said that she thinks this is a great amendment. It also pursues the privacy issue because the redacted SSN will no longer appear in these notices.

The Advisory Committee approved the amendment and will forward it to the Standing Committee for final approval.

7. **Report of the Business Subcommittee**

(A) ***Consideration of Suggestions 24-BK-A, 24-BK-C, and 25-BK-M to Amend Rule 9031 to Allow Masters in Bankruptcy Cases and Proceedings***

Judge McEwen and Professor Gibson provided the report.

Two suggestions to amend Rule 9031 have been submitted to the Advisory Committee, one by Chief Bankruptcy Judge Michael B. Kaplan of the District of New Jersey (24-BK-A) and the other by the American Bar Association (24-BK-C). These suggestions propose amendments that would allow masters to be used in bankruptcy cases and proceedings.

The suggestions were submitted in January and February 2024. The Advisory Committee has since discussed whether to propose amendments to Rule 9031 at four meetings and has directed the Subcommittee to continue its consideration of the advisability of doing so. These discussions have been informed in part by the results of a survey of bankruptcy judges conducted by Dr. Carly Giffin of the Federal Judicial Center and a research memorandum prepared by the rules law clerk.

At the fall 2025 Advisory Committee meeting, the Subcommittee presented a draft of possible amendments to Rule 9031 in order to receive feedback from committee members about how the rule might authorize the use of masters. The Subcommittee took these comments into account in making some revisions to the draft at its meeting on February 10. It then approved the draft as revised, which it recommends for publication. The draft appears on p. 225 of the Agenda Book. At line 21, the style consultants recommended changing the language to read "to the extent that the master's compensation."

Prof. Gibson then reviewed the key policy decisions made in creating the draft, which are discussed in her memo on p. 228 of the Agenda Book.

Judge McEwen suggested that the master should have the power to hold a hearing on pretrial and posttrial matters, so the language of proposed Rule 9031(a)(1), which appears in the Agenda Book at p. 225, should be amended to read:

> (1) *Scope*. A court may appoint a master only to hold hearings, as needed and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by:
>
> (A) some exceptional condition;

Draft

(B) the need to perform an accounting or resolve a difficult computation of damages; or

(C) the need to address pretrial and posttrial matters that cannot be effectively and timely addressed by an available bankruptcy judge of the district.

Judge Harner asked whether masters could hold trial on evidentiary matters. The Subcommittee took out references to trials, so the master cannot hold a trial. Mr. Schaible asked clarification about whether settlement discussions would be covered by the revised language if it did not involve hearings. He wants the language to be as flexible as possible. Judge Connelly expressed concern that the amendment by Judge McEwen would limit flexibility. It was suggested that the language should not be amended as requested by Judge McEwen, but instead the language "including holding hearings, as needed" should be inserted at the end of (B).

Mr. Day said that the Office of Legal Counsel (OLC) has issued an opinion that stated that the proposal raises serious constitutional issues. He said that the proposal should provide for appointment or removal of masters by district judges, and control over masters by the district court, in order to avoid infringing on the powers of Article III courts. Prof. Gibson suggested that the OLC opinion relates only to non-core proceedings as to which the parties have not consented to jurisdiction. The opinion also does not address the de novo review of the bankruptcy judge, which is a key consideration for constitutional purposes. Dean McKenzie gave his response to the OLC opinion, and suggested that the ability of the Article III court to withdraw the reference in part was sufficient control over the bankruptcy court to pass constitutional muster. Judge Dever asked whether the Subcommittee had considered the OLC opinion, and noted that it was not included in the Agenda Book for the Advisory Committee. He said that the Standing Committee will want to know that the Subcommittee and the Advisory Committee have been deliberative about it.

In light of the comments of Judge Dever, the Advisory Committee decided to remand the proposed rule to the Subcommittee to consider the OLC opinion. The memos from the Rules Committee law clerk and the OLC will be included in the presentation to the Advisory Committee at its next meeting.

(B) ***Consideration of Suggestion 25-BK-L from National Bankruptcy Venue Committee regarding Rules 1007 and 1014***.

Judge McEwen and Professor Bartell provided the report.

The Advisory Committee received a suggestion from The National Bankruptcy Venue Committee regarding venue of a bankruptcy case which had two aspects. The first would require additional disclosure on a new Official Form specifying the basis for the choice of venue at the time a bankruptcy case is filed. The second would require the court, either sua sponte or on motion by a party in interest, to either transfer the case or dismiss it "if the court determines, based on the evidence, that the venue was chosen for an improper purpose, including forum shopping or

improper manipulation of business entity organization." The suggestion would also require an expedited hearing and decision if a party in interest seeks dismissal or transfer.

The decision on whether to transfer a bankruptcy case when venue is appropriate under 28 U.S.C. § 1408 rests with the bankruptcy judge who is directed under 28 U.S.C. § 1412 to make the decision "in the interest of justice or for the convenience of the parties." (The same standard applies under Fed. R. Bank. P. 1014 for transferring a case to another district.) Prof. Bartell said that the problem with the second aspect of the suggestion made by The National Bankruptcy Venue Reform Committee is that it attempts to provide a different standard for transfer of a bankruptcy case than that provided by Congress. Any attempt to modify that standard may "abridge, enlarge, or modify any substantive right" which the bankruptcy rules may not do under the Rules Enabling Act, 28 U.S.C. § 2075.

The first aspect of the suggestion – which is a disclosure requirement and does not run afoul of the Rule Enabling Act – has no proper purpose. The information about why a debtor has selected a particular venue can be obtained by the information contained in the petition. Form 201, questions 10 and 11, already ask whether there are any bankruptcy cases pending or being filed by an affiliate of the debtor, and why the case is being filed in this district. Question 11 lists as possible responses that "Debtor has had its domicile, principal place of business, or principal assets in this district for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other district," or "A bankruptcy case concerning debtor's affiliate, general partner, or partnership is pending in the district." All interested parties have an opportunity to ask for additional information about the answers to those questions in the meeting of creditors under § 341, and can make a motion to the court to transfer the case under the standard of 28 U.S.C. § 1412, implemented by Bankruptcy Rule 1014(a). To the extent that the suggestion is asking debtors to disclose their discussions with counsel about the strategic decision in selecting between districts where venue would be proper, it may infringe on protected attorney-client communications.

The Subcommittee recommended that the Advisory Committee take no action on this suggestion.

Ed Hartnett stated that he does not disagree with the recommendation. However, he stated that the topic of venue more generally is within the scope of procedural rules under the Rules Enabling Act, 28 U.S.C. § 2072, which is applicable to Civil Rules, but not to Bankruptcy Rules, and allows rules to supersede statutes.

The Advisory Committee agreed with the recommendation of the Subcommittee.

8. **Report of the Appellate Rules and Cross Border Subcommittee**

(A) ***Proposed amendments to Rule 8017 to conform with proposed amendments to Appellate Rule 29***

Judge Bress and Professor Bartell provided the report.

At its June meeting the Standing Committee gave final approval to amendments to Appellate Rule 29 (Brief of an Amicus Curiae). The bankruptcy equivalent to that rule is Bankruptcy Rule 8017. The Subcommittee submitted conforming amendments to Rule 8017 to the Advisory Committee for approval for publication at its meeting in September. Prof. Cathie Struve suggested at that time that conforming amendments to Rule 8015(h)(1) dealing with the certificate of compliance and the appendix of length limits should be proposed for publication at the same time as the amendments to Rule 8017. The Advisory Committee agreed and decided to defer approval of amended Rule 8017 until the conforming amendments were also presented for approval. The Subcommittee once again approved language for the amended Rule 8017 and the conforming amendments to Rule 8015(h)(1) and the appendix at its meeting in February and was prepared to present those amendments to the Advisory Committee at this meeting for approval for publication.

However, since the Subcommittee meeting the reporters have been informed that the Advisory Committee on Appellate Rules and the Standing Committee have voted to withdraw the proposed amendments to Appellate Rule 29, together with conforming amendments to Appellate Rule 32 and the Appendix of Length Limits. The reporter to the Appellate Rules Committee assumes that the Supreme Court will choose not to adopt those amendments this spring and will instead allow further deliberations by the Committee.

In light of that development, Prof. Bartell recommended that the Advisory Committee defer consideration of conforming amendments to Bankruptcy Rule 8017, 8015 and the appendix until the Appellate Rules Committee has finalized its proposals and made its recommendation to the Standing Committee, presumably at the June meeting. The Subcommittee can then consider any changes to the drafts previously approved and make its recommendation to the Advisory Committee next fall.

10. **New Business**

There was no new business.

11. **Future Meetings**

The fall 2026 meeting will be held on September 23, 2026, in Washington D.C.

12. **Adjournment**

The meeting was adjourned at 2:35 p.m.

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TAB 16

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE[1]

Rule 2002. Notices

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(o) Caption. The caption of a notice given under this Rule 2002 must ~~conform to Rule 1005~~ include the information that Form 416B requires. The caption of a debtor's notice to a creditor must also include the information that § 342(c) requires.

* * * * *

Committee Note

The amendment to Rule 2002(o) eliminates the requirement that all notices given under Rule 2002 include the caption required for the bankruptcy petition under Rule 1005. That caption requires, among other things, the debtor's employer-identification number, last four digits of the debtor's social security number or individual debtor's taxpayer-identification number, any other federal taxpayer-identification number, and all other names used within eight years before filing the petition. Instead, most Rule 2002 notices may use the caption described in Official Form 416B, which requires only the court's name, the name

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

of the debtor, the case number, the chapter under which the case was filed, and a brief description of the document's character. Rule 2002 notices sent by the debtor must also include the information that § 342(c) of the Code requires. The notice of the meeting of creditors, Rule 2002(a)(1), will continue to include all information required by Official Forms 309(A-I).

Fill in this information to identify your case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (*If known*): _____

Chapter you are filing under:
- ❑ Chapter 7
- ❑ Chapter 11
- ❑ Chapter 12
- ❑ Chapter 13

❑ Check if this is an amended filing

Official Form 101

Voluntary Petition for Individuals Filing for Bankruptcy 12/26

The bankruptcy forms use *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, these forms use *you* to ask for information from both debtors. For example, if a form asks, "Do you own a car," the answer would be *yes* if either debtor owns a car. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Identify Yourself

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
1. Your full name Write the name that is on your government-issued picture identification (for example, your driver's license or passport). Bring your picture identification to your meeting with the trustee.	_____ First name _____ Middle name _____ Last name _____ Suffix (Sr., Jr., II, III)	_____ First name _____ Middle name _____ Last name _____ Suffix (Sr., Jr., II, III)
2. All other names you have used in the last 8 years Include your married or maiden names and any assumed, trade names and *doing business as* names. Do NOT list the name of any separate legal entity, such as a corporation, partnership, or LLC, that is not filing this petition.	_____ First name _____ Middle name _____ Last name _____ First name _____ Middle name _____ Last name _____ Business name (if applicable) _____ Business name (if applicable)	_____ First name _____ Middle name _____ Last name _____ First name _____ Middle name _____ Last name _____ Business name (if applicable) _____ Business name (if applicable)
3. Only the last 4 digits of your Social Security number or federal Individual Taxpayer Identification number (ITIN)	xxx – xx – ____ ____ ____ ____ OR **9** xx – xx – ____ ____ ____ ____	xxx – xx – ____ ____ ____ ____ OR **9** xx – xx – ____ ____ ____ ____

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
4. 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, a partnership, or an LLC,c that is not filing this petition.	__ __ – __ __ __ __ __ __ __ EIN __ __ – __ __ __ __ __ __ __ EIN	__ __ – __ __ __ __ __ __ __ EIN __ __ – __ __ __ __ __ __ __ EIN
5. Where you live	_____ Number Street _____ _____ City State ZIP Code _____ County **If your mailing address is different from the one above, fill it in here.** Note that the court will send any notices to you at this mailing address. _____ Number Street _____ P.O. Box _____ City State ZIP Code	**If Debtor 2 lives at a different address:** _____ Number Street _____ _____ City State ZIP Code _____ County **If Debtor 2's mailing address is different from yours, fill it in here.** Note that the court will send any notices to this mailing address. _____ Number Street _____ P.O. Box _____ City State ZIP Code
6. Why you are choosing *this district* to file for bankruptcy	*Check one:* ❑ Over the last 180 days before filing this petition, I have lived in this district longer than in any other district. ❑ I have another reason. Explain. (See 28 U.S.C. § 1408.) _____ _____ _____ _____	*Check one:* ❑ Over the last 180 days before filing this petition, I have lived in this district longer than in any other district. ❑ I have another reason. Explain. (See 28 U.S.C. § 1408.) _____ _____ _____ _____

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Part 2: Tell the Court About Your Bankruptcy Case

7. The chapter of the Bankruptcy Code you are choosing to file under

Check one. (For a brief description of each, see *Notice Required by 11 U.S.C. § 342(b) for Individuals Filing for Bankruptcy* (Form 2010)). Also, go to the top of page 1 and check the appropriate box.

- ❑ Chapter 7
- ❑ Chapter 11
- ❑ Chapter 12
- ❑ Chapter 13

8. How you will pay the fee

- ❑ **I will pay the entire fee when I file my petition**. Please check with the clerk's office in your local court for more details about how you may pay. Typically, if you are paying the fee yourself, you may pay with cash, cashier's check, or money order. If your attorney is submitting your payment on your behalf, your attorney may pay with a credit card or check with a pre-printed address.
- ❑ **I need to pay the fee in installments**. If you choose this option, sign and attach the *Application for Individuals to Pay The Filing Fee in Installments* (Official Form 103A).
- ❑ **I request that my fee be waived** (You may request this option only if you are filing for Chapter 7. By law, a judge may, but is not required to, waive your fee, and may do so only if your income is less than 150% of the official poverty line that applies to your family size and you are unable to pay the fee in installments). If you choose this option, you must fill out the *Application to Have the Chapter 7 Filing Fee Waived* (Official Form 103B) and file it with your petition.

9. Have you filed for bankruptcy within the last 8 years?

- ❑ No
- ❑ Yes. District _____ When _____ Case number _____
  MM / DD / YYYY
  District _____ When _____ Case number _____
  MM / DD / YYYY
  District _____ When _____ Case number _____
  MM / DD / YYYY

10. Are any bankruptcy cases pending or being filed by a spouse who is not filing this case with you, or by a business partner, or by an affiliate?

- ❑ No
- ❑ Yes. Debtor _____ Relationship to you _____
  District _____ When _____ Case number, if known_____
  MM / DD / YYYY
  Debtor _____ Relationship to you _____
  District _____ When _____ Case number, if known_____
  MM / DD / YYYY

11. Do you rent your residence?

- ❑ No. Go to line 12.
- ❑ Yes. Has your landlord obtained an eviction judgment against you?
  - ❑ No. Go to line 12.
  - ❑ Yes. Fill out *Initial Statement About an Eviction Judgment Against You* (Form 101A) and file it as part of this bankruptcy petition.

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Part 3: Report About Any Businesses You Own as a Sole Proprietor

12. Are you a sole proprietor of any full- or part-time business?

A sole proprietorship is a business you operate as an individual, and is not a separate legal entity such as a corporation, partnership, or LLC.

If you have more than one sole proprietorship, use a separate sheet and attach it to this petition.

- ❑ No. Go to Part 4.
- ❑ Yes. Name and location of business

_____
Name of business, if any

_____
Number Street

_____

_____ _____ _____
City State ZIP Code

Check the appropriate box to describe your business:

- ❑ Health Care Business (as defined in 11 U.S.C. § 101(27A))
- ❑ Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
- ❑ Stockbroker (as defined in 11 U.S.C. § 101(53A))
- ❑ Commodity Broker (as defined in 11 U.S.C. § 101(6))
- ❑ None of the above

13. Are you filing under Chapter 11 of the Bankruptcy Code, and are you a *small business debtor*

For a definition of *small business debtor*, see 11 U.S.C. § 101(51D).

If you are filing under Chapter 11, the court must know whether you are a small business debtor so that it can set appropriate deadlines. If you indicate that you are a small business debtor, you must attach your most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or if any of these documents do not exist, follow the procedure in 11 U.S.C. § 1116(1)(B).

- ❑ No. I am not filing under Chapter 11.
- ❑ No. I am filing under Chapter 11, but I am NOT a small business debtor according to the definition in the Bankruptcy Code.
- ❑ Yes. I am filing under Chapter 11, I am a small business debtor according to the definition in the Bankruptcy Code, and I do not choose to proceed under Subchapter V of Chapter 11.
- ❑ Yes. I am filing under Chapter 11, I am a small business debtor according to the definition in the Bankruptcy Code, and I choose to proceed under Subchapter V of Chapter 11.

Part 4: Report if You Own or Have Any Hazardous Property or Any Property That Needs Immediate Attention

14. Do you own or have any property that poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety? Or do you own any property that needs immediate attention?

For example, do you own perishable goods, or livestock that must be fed, or a building that needs urgent repairs?

- ❑ No
- ❑ Yes. What is the hazard? _____

_____

If immediate attention is needed, why is it needed? _____

_____

Where is the property? _____
Number Street

_____

_____ _____ _____
City State ZIP Code

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Part 5: Explain Your Efforts to Receive a Briefing About Credit Counseling

15. Tell the court whether you have received a briefing about credit counseling.

The law requires that you receive a briefing about credit counseling before you file for bankruptcy. You must truthfully check one of the following choices. If you cannot do so, you are not eligible to file.

If you file anyway, the court can dismiss your case, you will lose whatever filing fee you paid, and your creditors can begin collection activities again.

About Debtor 1:

You must check one:

❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.**

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.**

Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.

❑ **I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.**

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy.

If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

❑ **I am not required to receive a briefing about credit counseling because of:**

- ❑ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.
- ❑ **Disability.** My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.
- ❑ **Active duty.** I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

About Debtor 2 (Spouse Only in a Joint Case):

You must check one:

❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.**

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.**

Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.

❑ **I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.**

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy.

If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

❑ **I am not required to receive a briefing about credit counseling because of:**

- ❑ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.
- ❑ **Disability.** My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.
- ❑ **Active duty.** I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Part 6: Answer These Questions for Reporting Purposes

16. What kind of debts do you have?

16a. **Are your debts primarily consumer debts?** *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."

- ❑ No. Go to line 16b.
- ❑ Yes. Go to line 17.

16b. **Are your debts primarily business debts?** *Business debts* are debts that you incurred to obtain money for a business or investment or through the operation of the business or investment.

- ❑ No. Go to line 16c.
- ❑ Yes. Go to line 17.

16c. State the type of debts you owe that are not consumer debts or business debts.

_____

17. Are you filing under Chapter 7?

Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available for distribution to unsecured creditors?

- ❑ No. I am not filing under Chapter 7. Go to line 18.
- ❑ Yes. I am filing under Chapter 7. Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available to distribute to unsecured creditors?
  - ❑ No
  - ❑ Yes

18. How many creditors do you estimate that you owe?

❑ 1-49	❑ 1,000-5,000	❑ 25,001-50,000
❑ 50-99	❑ 5,001-10,000	❑ 50,001-100,000
❑ 100-199	❑ 10,001-25,000	❑ More than 100,000
❑ 200-999		

19. How much do you estimate your assets to be worth?

❑ $0-$50,000	❑ $1,000,001-$10 million	❑ $500,000,001-$1 billion
❑ $50,001-$100,000	❑ $10,000,001-$50 million	❑ $1,000,000,001-$10 billion
❑ $100,001-$500,000	❑ $50,000,001-$100 million	❑ $10,000,000,001-$50 billion
❑ $500,001-$1 million	❑ $100,000,001-$500 million	❑ More than $50 billion

20. How much do you estimate your liabilities to be?

❑ $0-$50,000	❑ $1,000,001-$10 million	❑ $500,000,001-$1 billion
❑ $50,001-$100,000	❑ $10,000,001-$50 million	❑ $1,000,000,001-$10 billion
❑ $100,001-$500,000	❑ $50,000,001-$100 million	❑ $10,000,000,001-$50 billion
❑ $500,001-$1 million	❑ $100,000,001-$500 million	❑ More than $50 billion

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Part 7: Sign Below

For you

I have examined this petition, and I declare under penalty of perjury that the information provided is true and correct.

If I have chosen to file under Chapter 7, I am aware that I may proceed, if eligible, under Chapter 7, 11,12, or 13 of title 11, United States Code. I understand the relief available under each chapter, and I choose to proceed under Chapter 7.

If no attorney represents me and I did not pay or agree to pay someone who is not an attorney to help me fill out this document, I have obtained and read the notice required by 11 U.S.C. § 342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

I understand making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to $250,000, or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

✘ _____ ✘ _____
Signature of Debtor 1 Signature of Debtor 2

Executed on _____ Executed on _____
MM / DD / YYYY MM / DD / YYYY

For your attorney, if you are represented by one

If you are not represented by an attorney, you do not need to file this page.

I, the attorney for the debtor(s) named in this petition, declare that I have informed the debtor(s) about eligibility to proceed under Chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each chapter for which the person is eligible. I also certify that I have delivered to the debtor(s) the notice required by 11 U.S.C. § 342(b) and, in a case in which § 707(b)(4)(D) applies, certify that I have no knowledge after an inquiry that the information in the schedules filed with the petition is incorrect.

✘ _____ Date _____
Signature of Attorney for Debtor MM / DD / YYYY

_____
Printed name

_____
Firm name

_____
Number Street

_____

_____ _____ _____
City State ZIP Code

Contact phone _____ Email address _____

_____ _____
Bar number State

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

For you if you are filing this bankruptcy without an attorney

If you are represented by an attorney, you do not need to file this page.

The law allows you, as an individual, to represent yourself in bankruptcy court, but **you should understand that many people find it extremely difficult to represent themselves successfully. Because bankruptcy has long-term financial and legal consequences, you are strongly urged to hire a qualified attorney.**

To be successful, you must correctly file and handle your bankruptcy case. The rules are very technical, and a mistake or inaction may affect your rights. For example, your case may be dismissed because you did not file a required document, pay a fee on time, attend a meeting or hearing, or cooperate with the court, case trustee, U.S. trustee, bankruptcy administrator, or audit firm if your case is selected for audit. If that happens, you could lose your right to file another case, or you may lose protections, including the benefit of the automatic stay.

You must list all your property and debts in the schedules that you are required to file with the court. Even if you plan to pay a particular debt outside of your bankruptcy, you must list that debt in your schedules. If you do not list a debt, the debt may not be discharged. If you do not list property or properly claim it as exempt, you may not be able to keep the property. The judge can also deny you a discharge of all your debts if you do something dishonest in your bankruptcy case, such as destroying or hiding property, falsifying records, or lying. Individual bankruptcy cases are randomly audited to determine if debtors have been accurate, truthful, and complete. **Bankruptcy fraud is a serious crime; you could be fined and imprisoned.**

If you decide to file without an attorney, the court expects you to follow the rules as if you had hired an attorney. The court will not treat you differently because you are filing for yourself. To be successful, you must be familiar with the United States Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the local rules of the court in which your case is filed. You must also be familiar with any state exemption laws that apply.

Are you aware that filing for bankruptcy is a serious action with long-term financial and legal consequences?

- ❑ No
- ❑ Yes

Are you aware that bankruptcy fraud is a serious crime and that if your bankruptcy forms are inaccurate or incomplete, you could be fined or imprisoned?

- ❑ No
- ❑ Yes

Did you pay or agree to pay someone who is not an attorney to help you fill out your bankruptcy forms?

- ❑ No
- ❑ Yes. Name of Person_____.
  Attach *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119).

By signing here, I acknowledge that I understand the risks involved in filing without an attorney. I have read and understood this notice, and I am aware that filing a bankruptcy case without an attorney may cause me to lose my rights or property if I do not properly handle the case.

✘ _____	✘ _____
Signature of Debtor 1	Signature of Debtor 2
Date _____ MM / DD / YYYY	Date _____ MM / DD / YYYY
Contact phone _____	Contact phone _____
Cell phone _____	Cell phone _____
Email address _____	Email address _____

Committee Note

Question 4 has been amended to make it clear that only debtors who themselves have an employer identification number (EIN) should list it; they should not include the EIN of their employer or any other entity not filing the petition. Stylistic changes were made to Question 2.

Changes Made After Publication and Comment

Stylistic changes were made to Questions 2 and 4.

Summary of Public Comment

No comments were submitted.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 106C

Schedule C: The Property You Claim as Exempt

12/26

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. Using the property you listed on *Schedule A/B: Property* (Official Form 106A/B) as your source, list the property that you claim as exempt. If more space is needed, fill out and attach to this page as many copies of *Part 2: Additional Page* as necessary. On the top of any additional pages, write your name and case number (if known).

For each item of property you claim as exempt, you must specify the amount of the exemption you claim. One way of doing so is to state a specific dollar amount as exempt. Alternatively, you may claim the full fair market value of the property being exempted up to the amount of any applicable statutory limit. Some exemptions—such as those for health aids, rights to receive certain benefits, and tax-exempt retirement funds—may be unlimited in dollar amount. However, if you claim an exemption of 100% of fair market value under a law that limits the exemption to a particular dollar amount and the value of the property is determined to exceed that amount, your exemption would be limited to the applicable statutory amount.

Part 1: Identify the Property You Claim as Exempt

1. **Which set of exemptions are you claiming?** *Check one only, even if your spouse is filing with you.*
   - ❑ You are claiming state and federal nonbankruptcy exemptions. 11 U.S.C. § 522(b)(3)
   - ❑ You are claiming federal exemptions. 11 U.S.C. § 522(b)(2)

2. **For any property you list on *Schedule A/B* that you claim as exempt, fill in the information below.**

A. Brief description of the property and line on *Schedule A/B* that lists this property	**B.** Current value of the portion you own Copy the value from *Schedule A/B*	**C.** Amount of the exemption you claim *Check only one box for each exemption.*	**D.** Specific laws that allow exemption
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____

2.1 **Add the dollar value of all entries with a specific amount from Column C, including any entries for pages you have attached.** $_____

3. **Are you claiming a homestead exemption of more than $214,000?**
   (Subject to adjustment on 4/01/28 and every 3 years after that for cases filed on or after the date of adjustment.)
   - ❑ No
   - ❑ Yes. Did you acquire the property covered by the exemption within 1,215 days before you filed this case?
     - ❑ No
     - ❑ Yes

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Part 2: Additional Page

A. Brief description of the property and line on Schedule A/B that lists this property	**B.** Current value of the portion you own Copy the value from *Schedule A/B*	**C.** Amount of the exemption you claim *Check only one box for each exemption*	**D.** Specific laws that allow exemption
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____

Official Form 106C Committee Note (12/26)

Committee Note

Part 1 of Official Form 106C is amended to add space for providing the total amount of column C—amount of the exemption claimed. In adding up the exemption amounts, the debtor should include only those exemptions claimed in specific dollar amounts.

Changes Made After Publication and Comment

Item 2.1—the total of property values listed in column B—was deleted, and item 2.2 was renumbered 2.1.

Summary of Public Comment

BK-2025-0002-0008 – National Association of Consumer Bankruptcy Attorneys. The language "with a specific amount" should be added to the section calling for the total for Column B. Otherwise, the instruction suggests that a debtor cannot list the value of an asset in Column B as unknown.

TAB 17

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE[1]

Rule 2003. Meeting of Creditors or Equity Security Holders

(a) Date and Place of the Meeting.

(1) ***Date.*** Except as provided in § 341(e), the United States trustee must call a meeting of creditors to be held:

(A) in a Chapter 7 or 11 case, no fewer than 21 days and no more than 40 days after the order for relief; or

(B) in a Chapter 12 or 13 case, no fewer than 21 days and no more than ~~35~~ 60 days after the order for relief~~; or~~

~~(C) in a Chapter 13 case, no fewer than 21 days and no more than 50 days after the order for relief~~.

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

(2) ***Effect of a Motion or an Appeal.*** The United States trustee may set a later date for the meeting if there is a motion to vacate the order for relief, an appeal from such an order, or a motion to dismiss the case.

(3) ***Place; Manner of Conducting*** ~~***Possible Change in the Meeting Date.***~~ The meeting may be held at a ~~regular place for holding court~~ place and in the manner designated by the United States trustee. ~~Or the United States trustee may designate any other place in the district.~~ The meeting may be conducted in person or remotely. An in-person meeting may be held at a regular place for holding court, or at any place in the district designated by the United States trustee that is convenient for the parties in interest. ~~If the designated meeting place is not regularly~~

~~staffed by the United States trustee or an assistant who may preside, the meeting may be held no more than 60 days after the order for relief.~~

* * * * *

Committee Note

Subdivision (a) is amended to better reflect current practices in the conduct of meetings of creditors.

In paragraph (1) the time for convening the meeting of creditors in a chapter 12 or 13 case is extended to a maximum of 60 days after the order for relief. Prior to the amendment, meetings were frequently called for a date that was as many as 60 days after the order for relief under a provision in paragraph (3) that allowed such lengthening of the timeframe when "the designated meeting place [was] not regularly staffed by the United States trustee or an assistant who [could] preside." Now that provision has been deleted, and the rule allows the U.S. trustee to call for a meeting of creditors in any chapter 12 or 13 case to be held no fewer than 21 days and no more than 60 days after the order for relief.

Paragraph (3) is amended to clarify that meetings of creditors may be held remotely, as well as in person, as designated by the U.S. trustee.

TAB 18

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

JAMES C. DEVER III
CHAIR

CAROLYN A. DUBAY
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

ALLISON H. EID
APPELLATE RULES

REBECCA B. CONNELLY
BANKRUPTCY RULES

SARAH S. VANCE
CIVIL RULES

MICHAEL W. MOSMAN
CRIMINAL RULES

JESSE M. FURMAN
EVIDENCE RULES

MEMORANDUM

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

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

RE: Report of the Advisory Committee on Civil Rules

DATE: May 6, 2026

Introduction

The Civil Rules Advisory Committee met in Charlotte, N.C., on April 14, 2026. Members of the public attended in person, and public online attendance was also provided. Draft Minutes of that meeting are included in this agenda book. For the convenience of Standing Committee members, the entire agenda book for that Advisory Committee meeting may be accessed via the link below. This report will on occasion refer to parts of that agenda book as a source of additional information.

Civil Rules Committee Agenda Book (April 2026)

As authorized by the Standing Committee, proposed amendments to Civil Rules 7.1, 26, 41, 45(b), 45(c), and 81 were published for public comment in August 2025, and a public hearing was held on January 27, 2026. The above link provides access to the summaries of public comments and testimony about the various amendments, and the report below identifies the pages of the Advisory Committee agenda book on which those summaries can be found.

Part I of this agenda book presents the six action items the Advisory Committee is bringing forward—the six rule changes listed above. The Advisory Committee unanimously voted to recommend that all rule changes listed above should be approved for final adoption. Small clarifying changes were made in the Committee Notes for two of the rule changes.

Part II of this report provides a brief update on the rule amendments for which the Advisory Committee unanimously voted to recommend publication for public comment. These amendments are part of coordinated efforts with the Appellate, Bankruptcy, and Criminal Rules Committees to revise their respective rules regarding privacy protections and electronic filing and are addressed in separate reports to the Standing Committee.

Part III of this report provides updates on the work of two subcommittees that are considering whether to propose amendments for public comment.

(a) Remote testimony: During the Standing Committee's January 2026 meeting, members discussed the ongoing work of the Rule 43/45 Subcommittee at some length, and raised some concerns. This subcommittee (chaired by Chief Judge M. Hannah Lauck (E.D. Va.)) held four meetings after the Advisory Committee's Fall 2025 meeting. After hearing about the concerns expressed by Standing Committee members, the subcommittee discussed those concerns and presented them to the full Advisory Committee during its April 2026 meeting. The subcommittee continues to focus on removing the "compelling circumstances" requirement in Rule 43(a) (a term that appears nowhere else in the Civil Rules), but it has significantly recast the committee note explaining the rule change to emphasize the enduring commitment to in-person trial testimony. The subcommittee looks forward to further feedback from Standing Committee members.

(b) Third-party litigation funding (TPLF): For more than a decade, the Advisory Committee has had on its agenda a proposal to amend Rule 26(a)(1)(A) to add a requirement that the parties disclose litigation funding. Many submissions favoring and opposing such an amendment have been submitted during this period, and at least five bills have been introduced in the current Congress as well. The subcommittee continues to gather relevant material and to send representatives to bar gatherings and law school conferences addressing the subject. It welcomes reactions from Standing Committee members about the course forward. The report contains a fairly extensive discussion of the issues raised.

Part IV of this report presents matters that are the subject of ongoing Advisory Committee work though not assigned to any specific subcommittee.

(a) Rule 23 proposals: Important amendments to Rule 23 were made in 2003 and 2018. On each occasion, much effort was involved in evaluating possible rule changes. Recently, the Advisory Committee has received recommendations to consider further amendments dealing with

(1) "service" or "incentive" awards to class representatives; (2) revising the superiority provision in Rule 23(b)(3) to authorize the court to consider whether non-litigation alternatives to a class action might be superior to class certification; and (3) whether Rule 23(e) should be revised to call for court approval of a pre-certification settlement or dismissal of a proposed class action. These issues remain under study. During the Advisory Committee's April 2026 meeting, there were concerns about the potential magnitude of a Rule 23 project, and about whether inaugurating such a project would produce many additional amendment proposals. The Advisory Committee welcomes Standing Committee guidance.

(b) Right to have representative at Rule 35 examinations: Rule 35 authorizes a court order requiring parties to submit to examination by a licensed or certified examiner regarding the party's mental or physical condition when that is relevant to the case. It has been proposed that the rule be amended to provide that the party subject to the examination may have a representative present during the examination or to record the examination. Several states provide such a right. After discussion, the Advisory Committee decided the question should be the subject of further study.

(c) Rule 58 and collateral orders: A submission recommended amending Rule 58 to exclude collateral orders from the Rule's separate document requirement. The interaction of the "separate document" provision of Rule 58 and court orders denying, for example, motions to dismiss on qualified on grounds of immunity, may sometimes present confusing issues on the time for appeal. Though the interaction of Rule 54(a) and Rule 58 may present analytical difficulties, there was limited support for pursuing this proposal for amendment. But it was held on the agenda pending consultation with the Appellate Rules Committee.

Part V of this report briefly identifies a number of other proposals for amending the Civil Rules that the Advisory Committee decided to drop from its agenda. Details regarding these proposals are contained in the agenda book for the Advisory Committee's April 2026 meeting available via the link above.

I. ACTION ITEMS

(a) Rule 7.1—Disclosure Statement

The Rule 7.1 Subcommittee, chaired by Justice Jane Bland of the Supreme Court of Texas, was created in spring 2023 to address concerns that district judges were not being adequately informed of potential financial interests in a proceeding that would require them to recuse. In particular, there was a concern that the current rule's requirement that a party disclose "any parent corporation and any publicly held corporation owning 10% or more of its stock" obscured the identity of a "grandparent" or "great-grandparent" of a party in which a judge might hold a financial interest.

The proposed amendment, which was published in August 2025, changes the rule in two ways: (1) it replaces references to "a corporate party" with the broader term "business organizations"; and (2) it requires disclosure of both "a parent business organization" and "any publicly held business organization that directly or indirectly owns 10% or more" of a party. These changes track guidance issued to federal judges by the Codes of Conduct Committee in February

2024 and language in the committee note of the analogous Federal Rule of Appellate Procedure requiring a similar disclosure, Rule 26.1, which for decades has covered grandparents and great-grandparents.

The public-comment period yielded relatively little reaction: four witnesses at the hearing and eight written submissions, summarized at pages 96-97 of the Advisory Committee's April 2026 agenda book. Although one witness expressed concerns that the definitions of "business organizations" and "indirectly owns" might be confusing, all other comments were supportive and expressed confidence that these amendments are not onerous and will make it easier for judges to determine whether they have any financial interest in the outcome of the litigation that requires them to recuse. The subcommittee reviewed all of the testimony and written comments and unanimously recommended final approval of the rule with no changes to the rule or the note. At its April meeting, the Advisory Committee agreed, unanimously voting to recommend final adoption of the amended rule and note with no changes.

(b) Rule 41(a)—Dismissal Without Prejudice

The Rule 41(a) Subcommittee, chaired by Judge Cathy Bissoon (W.D. Pa.), was created at the March 2022 Advisory Committee meeting to address varying interpretations of the rule permitting voluntary dismissal of "actions." Despite the language of the rule, many courts allow parties to use it to dismiss less than an entire action—for instance, all claims against one of several parties or even one of several claims against an individual party. The reason for this divergence between the language of the rule and its use became clear: in a world where multiparty, multiclaim litigation is far more typical than 1938 (when the current language was drafted) it enhances efficiency to allow the court and parties to narrow the issues involved in a litigation by dismissing individual claims.

After extensive research and outreach, the subcommittee proposed two amendments to the rule for publication: (1) replace references to an "action" to "one or more claims"; and (2) require that only parties who "remain in the action" sign a stipulation of dismissal to solve a different problem involving challenges created by the inability to obtain a signature from a party who has long departed the litigation.

These proposed amendments were published for comment in August 2025. During the public comment period, three witnesses testified, and the Advisory Committee received 28 written comments. All testimony and feedback were in favor of the amendments and are summarized at pages 106-110 of the April 2026 agenda book. Themes emerging from the public comments include praise for the amendments' resolution of the varying interpretations across the circuits of the word "action" and confidence that the amendments will increase efficiency and reduce confusion. There were three suggested minor tweaks to the language of the rule that the subcommittee discussed via email and concluded were unwarranted. The subcommittee therefore recommended final adoption of the amended rule and note at the April Advisory Committee meeting, and the Advisory Committee agreed. It unanimously recommended final approval of the published draft without changes.

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

The preliminary draft of the Rule 45(c) amendment was published for public comment in August 2025, with comment closing in February 2026. On March 11, the Rule 43/45 Subcommittee met to discuss the public comments. Except for a modification of one paragraph of the committee note, the subcommittee saw no need to make other changes. Notes of that meeting are at pages 124-25 of the April 2026 agenda book via the link above.

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

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

The subcommittee's discussion during its March 11 meeting indicated that only one change was needed in the published preliminary draft—refinement of the next-to-last paragraph of the note. There was concern that the wording of the published draft of the note suggests that the Rule 43(a) standard for remote testimony at trial also applies to motion hearings or other proceedings. So the Subcommittee recommended that the next to last paragraph of the committee note be clarified as follows:

> The amendment does not alter the standards for deciding whether to permit in-court remote trial testimony. Instead, it applies to any subpoena for witness testimony. ~~Ordinarily, court approval is required for remote testimony in court.~~ Rule 43(a)~~, for example,~~ authorizes remote trial testimony ~~in trials and hearings~~ but depends on court permission for such testimony. ~~Rule 26(a)(3)(A)(i) requires that the parties disclose the identities of witnesses whose testimony will be presented, without distinguishing between in-person and remote testimony.~~[1] ~~Even remote deposition testimony is authorized only by stipulation or court order. See Rule 30(b)(4).~~

Without this clarification, the published draft note might be read to limit the court's present latitude to hold remote proceedings that are not trials. The basic point of the paragraph is that remote trial testimony—the only thing regulated by Rule 43(a)—requires court approval. Other

[1] After the Advisory Committee's meeting, this sentence (which was not removed when other deletions were made to this paragraph of the committee note during that meeting) was overstricken. It is not about the interpretation of Rule 45(c), and the Rule 26(a)(3) amendment speaks for itself. Removing this sentence shortens the note and avoids any possible confusion including this sentence might cause.

remote activities—court proceedings or depositions—are not affected by this amendment and referring to them might create confusion. This clarification avoids that potential confusion.

The subcommittee and later the full Advisory Committee considered various other proposed wording changes made by some who commented on the rule amendment. The summary of public comments and testimony about this rule appear at pages 126-33 of the Advisory Committee agenda book. Notes of the subcommittee's March 22, 2026, meeting appear at pages 124-25 of the agenda book.

Some who commented did not oppose the Rule 45(c) change, but thought it should not be made until the question of possibly amending Rule 43(a) on remote trial testimony was resolved. But the Ninth Circuit decision has already been invoked to resist subpoenas for pretrial discovery, and there is no necessary link to the ongoing consideration of amending Rule 43(a). There were also some wording changes proposed that are identified at pages 113-15 of the Advisory Committee agenda book accessible via the link above.

After discussion, the Advisory Committee unanimously voted to recommend final adoption of the published rule change with the change noted above to one paragraph of the committee note.

(d) Rule 26(a)(3)(A) Amendment—Disclosure of Intention to Offer Remote Trial Testimony

The Rule 26(a)(3) amendment directs the parties not only to identify the witnesses they intend to call or will call if needed at trial, but also to indicate whether any of these witnesses will offer remote testimony.

The proposed amendment attracted little comment. The summary of the comments appears at pages 141-42 of the Advisory Committee's agenda book for its April 2026 meeting. The clarification amendment makes clear that disclosure of the witnesses a party "expects to present" at trial or that it "may call if the need arises" must specify whether the witness is expected to provide remote testimony. Given the requirement of court approval for remote trial testimony under Rule 43(a), this revision may often ensure notice to the court and the other parties of the need to address that question of court permission for remote testimony.

The Advisory Committee voted unanimously to recommend final adoption of the proposed amendment as published.

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

The proposed amendment sought to clarify what is required to satisfy the current rule's provision that serving a subpoena calls for "delivering a copy to the named person." The current rule has engendered uncertainty about what suffices to serve a subpoena. The proposed amendment borrows service methods authorized for service of the summons and complaint under Rule 4(e)(2)(A) and (B) and adds another authorized method—service by U.S. mail or a commercial-carrier service that provides confirmation of actual receipt. The amendment also explicitly empowers the court to authorize additional methods of service in given cases.

In addition, the amendment provides a 14-day notice period for subpoenas that require the person to appear for a deposition or a trial (absent a court order shortening the period). It also removes the requirement that the witness fee be tendered at the same time the subpoena is served, providing that delivery of the witness fee "at the time and place the person is commanded to appear" would suffice.

This amendment received numerous comments during the public comment period, many from professional process servers who opposed the amendment. A summary of the comments and testimony appears at pages 160-83 of the Advisory Committee's April 2026 agenda book, accessible via the link at the beginning of this report.

After the public comment period closed, the Discovery Subcommittee met and decided that the issues raised during the public comment period did not warrant changes in the published draft. Notes of this meeting appear at pages 154-59 of the Advisory Committee's agenda book.

During the Advisory Committee's April meeting, a number of questions were raised about the amendment. One was about the proposed language of Rule 45(b)(1)(A)(i)—"delivering a copy to the named person personally." Rule 5(b)(2)(A) says "handing it to the person." But Rule 4(e)(2)(A), on which this amendment is based, calls for delivering the summons and complaint "to the individual personally," which the amendment parallels.

Other concerns were raised about the added methods of service added in proposed 45(b)(1)(A)(iii)—by U.S. Mail or commercial carrier. The rule calls for "confirmation of actual receipt." It was pointed out that the committee note mentioned Rule 45(b)(4) regarding proof of service, which calls for a "statement . . . certified by the server." That might prove difficult with U.S. mail or a commercial carrier. An additional concern was raised by Advisory Committee discussion—assuming confirmation of receipt, who must receive the subpoena? The committee note does not clearly answer that question.

The Discovery Subcommittee caucused during the lunch break at the April 14 Advisory Committee meeting and after lunch proposed changes to the third paragraph of the committee note as follows:

> The amendment also adds another option—service by United States mail or commercial carrier to the person's last known address, if the selected method provides confirmation of actual receipt by a person identified in Rule 45(b)(1)(A)(i) or (ii). The rule does not prescribe the exact means of confirmation, but courts should be alert to ensuring that there is reliable confirmation of actual receipt. ~~*Cf.* Rule 45(b)(4) (proving service of subpoena).~~ Experience has shown that this method regularly works and is reliable.

These changes clarify that the person who receives the subpoena is one of those on whom service would be authorized, and also removed the possibly confusing cf. citation to Rule 45(b)(4).

The subcommittee also decided that, given the parallelism between the new provisions in Rule 45(b)(1) and the service provisions from Rule 4(e), the published rule language "delivering a copy to the person personally" was clear.

The Advisory Committee unanimously voted to recommend final adoption of the Rule 45(b)(1) amendment as published for public comment, with the sole revision quoted above to the committee note.

(f) Rule 81(c)(3)—Demand for Jury Trial After Removal

The proposed amendment to Rule 81(c)(3) clarifies the timing of demands for jury trial in removed cases. If a demand has been made before removal, no further demand need be made. But if no demand has been made before removal, the amendment specifies when a demand under Rule 38 must be made within the time limits in that rule.

The amendment eliminates the uncertainty caused by the provision in the current rule that excuses a jury demand if "state law did not require an express demand for jury trial."

The proposed amendment received only a few comments, all but one positive. *See* Agenda Book for Advisory Committee on Civil Rules, April 14, 2026, at 192. It might be noted that one of the comments supporting the rule change came from the presidents of the Trial Lawyers Associations of 48 states and said the proposed rule changes added clarity to the rule by replacing the current rule, which creates confusion.

The Advisory Committee unanimously voted to recommend final adoption of the Rule 81(c) amendment as published for public comment.

II. RULES RECOMMENDED FOR PUBLICATION FOR PUBLIC COMMENT

(a) Rule 5.2—Privacy Protection for Filings Made with the Court

At its April 14, 2026, meeting, the Advisory Committee unanimously recommended publication of amendments to Rule 5.2 concerning privacy protections in court filings. The proposed amendments would require complete redaction of social-security numbers, individual taxpayer-identification numbers, adoption taxpayer-identification numbers, and employer identification numbers; require the use of pseudonyms, rather than initials, to refer to minors; and would apply these requirements to all documents in a court filing, including exhibits and attachments. Note that the proposed amendments do not address how to address the use of a pseudonym for a minor in a court filing once the minor ages out, but public comment may provide insight into whether this is an issue that should be addressed in a rule rather than through protective orders in individual cases.

(b) Rules 5 (Serving and Filing Pleadings and Other Papers) and 6 (Computing and Extending Time; Time for Motion Papers)

The Advisory Committee also unanimously voted to recommend that amendments to Rule 5 (and a conforming amendment to Rule 6) be published for public comment. The proposed amendments would increase electronic access to court by self-represented litigants. These proposed amendments are presented separately in a report by Professor Catherine T. Struve, Consultant to the Standing Committee, that addresses amendments to the Appellate, Bankruptcy, and Criminal Rules in addition to the Civil Rules.

III. SUBCOMMITTEE REPORTS

(a) Rule 43/45 Subcommittee

During the Standing Committee's January 2026 meeting, there was considerable discussion of the Advisory Committee's ongoing work regarding the limits on remote trial testimony under Rule 43(a). Since that time, the subcommittee has carefully considered the concerns raised by Standing Committee members. In total, it has held four meetings since the Advisory Committee's fall 2025 meeting, three of them after the Standing Committee's January meeting. Notes on these meetings are included below in this agenda book.

Since the January meeting, Sarah Sraders has done research on the interpretation of Rule 43(a), and her research memorandum is included in this agenda book. This research did not identify decisions in which judges said they would authorize remote trial were they not prevented from doing so by the "compelling circumstances" provision in the current rule. But it did show that judges are implementing the 1996 Committee Note and insist that only an unforeseeable, last-minute sort of development preventing in-court trial testimony could satisfy the "compelling circumstances" requirement.

Based on further consideration, and in light of the concerns of some Standing Committee members, the subcommittee substantially recast the committee note that might accompany a preliminary draft for public comment, but continues its work on the topic. The revised note makes clear that the amendment does not retreat from the time-honored centrality of in-person trial testimony. But the rule-amendment proposal is still to remove the "compelling circumstances" requirement for judicial authorization of remote testimony. Notably, the "compelling circumstances" term appears nowhere else in the Civil Rules.

The concerns raised in January by Standing Committee members were also presented to the full Advisory Committee. As presented in the Advisory Committee agenda book, the subcommittee invited reactions on a variety of points:

(1) Retaining the commitment to in-person trials: The hallmark of American trials is that they depend on in-court testimony. The subcommittee is *not* in favor of "fully remote" trials, a point that should be made clear going forward. Authorization for remote testimony depends on an individualized showing regarding a specific witness.

(2) Focusing on the choice between live remote testimony and a deposition substitute: "Fully remote" trials are not the goal, so it appears important to highlight that the choice the subcommittee is addressing is not typically between in-person and remote testimony so much as between remote live testimony and deposition testimony. Relying on depositions can produce many difficulties. The deposition may have occurred before certain facts came to light. And very often much time and expense (including the court's time and energy) can be wasted in resolving disputes about what deposition testimony can be presented at trial, a process that often involves many iterations and a great deal of effort for counsel and the court, and could involve rulings on many objections during the deposition.

(3) Access to justice concerns: For some witnesses or parties, for a variety of reasons, remote testimony may be the only practical option. And relying on depositions may not only require a great deal of extra work by the court and the parties, but also put some parties at a disadvantage if they cannot afford the cost of creating a video deposition and must rely instead on reading from transcripts. Moreover, allowing remote trial testimony may serve Rule 1 purposes ("just, speedy, and inexpensive" determinations) by ensuring effective presentation of key witness testimony.

(4) "Appropriate safeguards": Rule 43(a) says that the court must also be assured that appropriate safeguards are in place to safeguard the reliability of the remote testimony. Since the pandemic, there likely has been much learning on this front. Relying on party agreement and judicial evaluation of individual cases seems workable. It bears noting that the amendment draft leaves this requirement unchanged.

(5) Specifying "approved" safeguard methods: Though there has by now been considerable experience with safeguards that work, whether by party agreement or court direction, it may be difficult to specify what safeguards are effective in given cases. But the subcommittee tried to develop a list of specific safeguards and found that too difficult. For one thing, safeguards that work in other cases may be ill-suited to the current case. Good lawyers recognize that safeguards are context-dependent, and they can work together to craft safeguards for the particular case. Having an "approved" list creates the risk that "approved" safeguards might be urged in cases in which they are not appropriate, and other safeguards that would be appropriate might be opposed on the ground that they are not "approved" under the amended rule. If we are not prepared to be specific about what suffices, we would wisely be prepared to explain why we think trying to do that is ill-advised.

(6) Strictness of "compelling circumstances" standard: The "compelling circumstances" standard was introduced in the amendment to Rule 43(a). It does not appear in any other Civil Rule. It might be argued that this demanding standard is necessary to provide suitable protection for the traditional trial and to provide sufficient flexibility to enable judges to authorize remote testimony when really needed. Library research has not identified decisions that say, "I would authorize remote testimony in this case if the 'compelling safeguards' standard were not in the rule, but because it is there I can't." At least some judges seem to feel constrained. Whether there is a way to evaluate this concern is uncertain; it seems unlikely that many judges would go to the trouble of writing a decision if that were their view. It might be noted that the current draft committee note tries to make it clear that the amendment does not require any judge to authorize remote testimony.

(7) Utility of "good cause" standard: The "good cause" standard permeates the Civil Rules. So far as appears, the "compelling circumstances" standard appears nowhere else in the rules. (Rule 37 does use "compelling," but in the different context of a court order compelling discovery.) The committee note may be able to illuminate the flexibility of the standard while also making clear that it requires a real showing to justify remote trial testimony. Perhaps one source for this topic would be the set of considerations the Texas code has adopted regarding remote proceedings.

(8) Juror preferences: Different concerns have been raised. One suggestion was that jurors may feel put upon if they are required to show up in court while some witnesses are not. And some jurors may think that being able to observe the witnesses in person is an important aid to making credibility determinations. But other reports suggest that jurors sometimes find remote testimony more useful than in-person testimony. For one thing, in some courtrooms the witness may be better seen on a screen. The alternative of relying on depositions not only can require a great deal of extra work for the court and the parties, but also impair juror comprehension. Jurors may have difficulty staying focused on video depositions, and even more difficulty focusing on deposition testimony read from edited transcripts.

(9) Foreseeability issue from 1996 Committee Note: One thing that decided cases do indicate is that the statements in the 1996 Committee Note about whether the witness's inability to come to court was foreseeable should be considered central. The 1996 Note seems to say that the sudden last-minute problem is what the rule is addressing. But in many instances the difficulty could be foreseen from the outset. Whether that should make remote testimony unavailable because it was always foreseeable that the distant witness could not be compelled by subpoena to appear in court may actually be a reason to change the rule. Restricting remote live testimony to the "last-minute emergency" is dubious. Indeed, the pending amendment to Rule 26(a)(3) directing parties to indicate in their pretrial disclosures (due 30 days before trial) whether any witnesses will be offered remotely is not limited to last-minute emergencies.

(10) Apex witness concern: A theme in the commentary from what one might call the plaintiff side is that the large company headquartered far away can require the employees it wants as witnesses to show up to testify at trial, but the other side has no way to compel live testimony from the company employees it wants to testify before the jury. The Rule 45(c) amendment would partly address this question, but the concerns about abusive apex depositions might support caution about trial testimony as well.

As reflected in the minutes of the Advisory Committee's April 2026 meeting (included in this agenda book), the subcommittee's starting point is to respect judicial discretion in making case-by-case decisions about remote trial testimony.

One reaction from an experienced trial lawyer member of the Advisory Committee was always to favor live, in-person testimony from his witnesses, but at the same time to recognize that live remote testimony is superior to relying on a deposition. A judge member agreed that live remote testimony is preferable to trying to rely on a deposition at trial.

But another member of the committee raised concerns about the draft committee note language saying that granting a motion to permit remote testimony is a way for the judge to avoid the chore of resolving disputes about designation of parts of the deposition. A judge noted that, even when the witness is expected to provide live remote testimony, it may sometimes be necessary to go through the designation effort as a backstop—one can never be certain that the remote witness will show up and that the technology will work as it is supposed to work.

Another judge member favored the proposal, in part because there simply are not enough civil trials.

Another concern was that it be made very clear that the choice presented by Rule 43(a) is not between in-person and remote live testimony, but instead between live remote testimony and deposition testimony. It may be that the committee note should be strengthened on that point.

Safeguards were discussed also, although the current draft does not contemplate any change in that rule provision. An attorney member reported never having any trouble working out safeguards with opposing counsel. But the selection of safeguards depends heavily on the nature of the case and the circumstances presented. Another attorney member agreed that safeguard issues get worked out, and also that they are commonplace in arbitrations, which are increasingly common.

Another attorney member pointed out that due to the COVID pandemic there is much more experience now with remote depositions than was true in 1996, when Rule 43(a) was amended to permit remote trial testimony. Depositions are not the same as trials, but the experience gained in remote depositions should assist counsel in designing appropriate safeguards for a given case.

The "apex witness" issue was also addressed -- would adopting this change encourage strategic use of the remote testimony option to pressure an adverse company by seeking testimony from the CEO or other high officers? One view was that a party attempting such a stratagem would have to persuade the judge that testimony from this corporate officer was really essential. Another reaction was that, if the judge nevertheless directs that the officer testify, the company would very much prefer remote to live in-person testimony.

The Advisory Committee would very much appreciate the views of Standing Committee members on the current orientation of its discussions of a possible Rule 43(a) amendment. As noted in footnotes to the current working draft below, there are issues on which the subcommittee continues to focus in light of the comments at the April 2026 meeting

Here is the current working draft:

Rule 43. Taking Testimony

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

Committee Note

In-person trial testimony has been central from the beginning of the federal court system. It remains critical, particularly to determination of credibility. Relying on face-to-face evaluation of testimony is the time-honored method for evaluating credibility.

This amendment does not in any way represent a retreat from the rules' commitment to the centrality of live in-person witness testimony, which remains true under this amendment. The court is not required to authorize remote trial testimony even if the parties all agree to proceeding in that

manner. Remote testimony should be allowed only from specific trial witnesses when the court finds that a sufficient justification has been offered. The amendment has no effect on any other aspects of trial or the availability of remote testimony under Rule 43(c).

Sometimes critical trial witnesses are simply unable to appear in person in the courtroom, however. In 1996, Rule 43(a) was therefore amended to permit remote trial testimony when good cause was shown and appropriate safeguards were in place. The 1996 amendment also required "compelling circumstances." That very demanding requirement reflected the ongoing centrality of in-person witness testimony. Judges have found this requirement too constricting in some cases.[1]

This amendment removes the "compelling circumstances" requirement, but in no way retreats from the traditional importance of in-person interaction at trial between the finder of fact and the witness and in-person interaction between the witness and the lawyers, particularly the cross-examiner.

Developments since 1996 have prompted reexamination of that requirement at trial. Critically, technology has made important advances. While telephonic testimony may have been the only method available in 1996, 21st century technology offers a substitute much closer to in-person witness testimony. Many people, including jurors, have experience using this technology for business meetings and other important interactions. There are also reports that some jurors find live video a better method than in-person witness testimony. Not all courtrooms enable all jurors a view of an in-person witness that is equal to well-presented remote testimony.

In addition, the 2020-22 pandemic prompted, and sometimes forced, the courts to employ this new technology to manage cases and, sometimes, to receive remote witness testimony at trial. That judicial experience supports removing the "compelling circumstances" constraint. There have been many reports that this flexibility around remote participation has served the goal of Rule 1 to "secure the just, speedy, and inexpensive determination of every action" and also increased access to justice for all litigants, irrespective of their means.

When witnesses cannot attend trial, the choice is not between in-court testimony and remote testimony, but between remote live testimony and depositions taken before trial. When Rule 43(a) was amended in 1996, technology for remote testimony was in its infancy and the Committee Note suggested that deposition testimony would often be superior. Experience has shown that providing witness testimony by deposition at trial often has a negative effect on juror attentiveness. In addition, it may be that the deposition was taken long before trial and the testimony is as a consequence stale. And the task of designating portions of the deposition can prove contentious, often involving the court in time-consuming review that would largely be obviated by live remote testimony.

In making the choice whether to authorize remote trial testimony, the court properly may take account of many factors. A starting point is that witness inconvenience alone is not a reason for excusing in-person testimony. Good cause requires assessment of the circumstances of the

[1] The prior version began by saying "numerous" or "some" judges had felt constrained. Sarah Sraders' research sheds some light on this. Perhaps it is best not to try to quantify.

case, never losing sight of the central importance of in-person testimony. [But the court may consider whether the testimony of this particular witness is central to the case and whether assessment of credibility of this witness's testimony will be important.][2] [It may be that remote testimony raises fewer concerns in court trials than in jury trials.][3]

Technological difficulties may sometimes prove important. When the witness is at a remote location, there could be lapses in technology both at the witness's location and in the courtroom. The proponent of the testimony must satisfy the court that technological impediments will not intrude and that electronic transmission will be secure.

Besides evaluating the justification for relying on remote testimony and potential technological issues, the court must demand appropriate safeguards to protect the reliability of the remote testimony. This requirement has remained unchanged since 1996. Experience gained since 1996 can assist the court in evaluating safeguards, but the burden is on the proponent to satisfy the court that safeguards will be in place. The parties may be able to reach a stipulation on appropriate safeguards for the court's consideration.

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

[2] This bracketed sentence is designed to highlight something featured in prior drafts of the note and hinted at by the reference in the third paragraph of the draft note to "critical" witnesses. For example, a witness located far away may only be authenticating an exhibit. True, a Rule 36 request for admission could often solve such problems, as could deposition testimony. But having a witness travel across the country for 15 minutes on the stand to authenticate, for example, an exhibit offered only to counter a surprise development at trial seems exceedingly wasteful. Even if the witness could take two days off from work and the cost of last-minute transcontinental travel could be paid, a court might well conclude that under the circumstances good cause has been established to permit this witness to testify remotely.

[3] Is this bracketed sentence worth including?

MEMORANDUM

TO: Rule 43/45 Subcommittee

FROM: Sarah Sraders, Counsel, Rules Committee Staff

DATE: January 28, 2026

RE: "Good Cause in Compelling Circumstances" Under Rule 43(a)

The Rule 43/45 Subcommittee is considering whether and how to amend Federal Rule of Civil Procedure 43(a), which currently allows a court to permit remote testimony at trial "[f]or good cause in compelling circumstances and with appropriate safeguards[.]" This memorandum analyzes how courts have applied this standard, and whether the case law suggests that it has prevented judges from authorizing remote testimony in situations in which such testimony is warranted.

Research did not uncover a wealth of (or even any) cases where judges expressed a desire to allow remote testimony that was thwarted by the current standard in Rule 43(a). (There are cases where the court notes that it is "sympathetic" to the witness's circumstances as it denies the motion, but whether this truly indicates a desire to side with the movant is difficult to say.) However, the case law does show that courts closely follow the guidance in the Advisory Committee Note to the 1996 Amendments to Rule 43 (the 1996 Note) and view this as setting forth the applicable criteria for whether a movant has satisfied the Rule 43(a) standard. A review of these cases may help the Subcommittee determine whether this is still guidance that the Civil Rules Advisory Committee believes should be followed.

I. The 1996 Note

"Courts are guided by the Advisory Committee Notes on the 1996 Amendment to Rule 43 in determining whether a movant has demonstrated good cause and compelling circumstances." *Clowdus v. Am. Airlines, Inc.*, No. 1:21-cv-23155-KMM, 2022 WL 6497311, at *2 (S.D. Fla. Sept. 21, 2022); *see also Halig v. Nat'l Bd. of Examiners of Optometry*, No. 22-2118-BAH, 2025 WL 2661785, at *3 (D. Md. Sept. 17, 2025) ("The Fourth Circuit Court of Appeals has not stated a test for determining what constitutes 'good cause' or 'compelling circumstances,' but the Advisory Committee Notes to the 1996 Amendments to Rule 43(a) provide some guidance.") (quotations omitted); *Barbuto v. Ronquillo-Horton*, No. 22-C-569, 2024 WL 4212857, at *2 (E.D. Wis. Sept. 17, 2024) ("The court concludes from the text of Rule 43(a) and the Advisory Committee's comments that [defendant's] motion should be denied.").

There are several key features in the 1996 Note that are worth exploring in further detail.

A. Foreseeability

The 1996 Note explains that

> [t]he most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place. . . . A party who could reasonably foresee the circumstances offered to justify transmission of testimony will have special difficulty in showing good cause and the compelling nature of the circumstances.

Courts have paid close attention to this statement—the phrase "unexpected reasons, such as accident or illness" appears in more than 100 decisions citing Rule 43. Foreseeability is a driving factor in many courts' Rule 43(a) decisions, and "courts often deny leave to testify remotely when the proponent of the witness has long known of the reasons for its motion yet failed to file it until the eve of trial." *Savinova v. Nova Home Care, LLC*, No. 3:20-cv-01612 (TOF), 2025 WL 1279076, at *3 (D. Conn. May 4, 2025).

Thus, courts have denied motions to testify remotely when the moving party "cannot reasonably argue that they did not know where these witnesses reside and/or work. They do not assert any late-breaking reasons rendering their presence at trial unusually inconvenient or impossible." *J.D. v. Price*, 619 F. Supp. 3d 523, 530 (W.D. Pa. 2022). Conversely, courts tend to allow remote testimony when the motion is based on unforeseen developments. *See, e.g.*, *Gonzalez v. US Human Rights Network*, No. CV-20-00757-PHX-DWL, 2023 WL 5333261, at *2 (D. Ariz. Aug. 18, 2023) (finding good cause in compelling circumstances where witness's "ability to travel to Arizona to testify at trial has been impaired by a late-breaking medical condition").

Some courts have refused to allow witnesses facing immigration or visa difficulties to testify remotely where these issues were long known. In *Goodman v. Goodman*, for example, the court denied the plaintiff's opposed motion to testify at trial by video due to his inability to enter the United States, reasoning in part that "[b]ecause Mr. Goodman has known of his visa difficulties for years, there is nothing 'unexpected' or 'compelling' about the circumstances rendering him unable to testify in-person at trial." No. 1:21-cv-10902-GHW, 2026 WL 18630, at *9 (S.D.N.Y. Jan. 2, 2026); *see also Carvajal v. Mijelum, L.L.C.*, No. EP-23-CV-00245-RFC, 2025 WL 2110013, at *1 (W.D. Tex. July 24, 2025) ("Courts have denied requests for remote testimony in cases where foreseeable visa issues have arisen."); *Mobu Enters. Pty Ltd. v. John Galt Solutions, Inc.*, No. 3:23-cv-617-BN, 2025 WL 1426450, at *2 (N.D. Tex. May 16, 2025) (denying plaintiff's opposed motion for Australia-based witness to testify remotely where plaintiff "offers no facts from which the Court may reasonably infer that [the witness's] inability to travel to the United States is a new or sudden development"); *Li v. Walsh*, No. 9:16-cv-81871-KAM, 2024 WL 6887134, at *2 (S.D. Fla. Mar. 1, 2024) (finding that Chinese and other foreign plaintiffs seeking to testify remotely "have not come close to meeting the 'good cause in compelling circumstances' standard" where they "have had several years to make travel preparations and obtain visas to travel to the United States" but apparently failed to do so); *but see Zamora v. Ljubica Contractors LLC*, No. 18-CV-419 (VSB), 2025 WL 2494271, at *4 (S.D.N.Y. Aug. 29, 2025) ("Courts in this Circuit have found an exception to Rule 43(a) to be proper . . . where [plaintiffs] are unable to legally enter the United States due to their immigration status.") (collecting cases); *Medina v. Angrignon*, No. 15-CV-427-RJA-MWP, 2024 WL 108669, at *3 (W.D.N.Y. Jan. 10, 2024) (allowing plaintiff to testify remotely when he was his sole witness, had been deported to the Dominican Republic, and the parties agreed that he could not re-enter the United States).

B. Mere Inconvenience

Courts also heed the 1996 Note's guidance that contemporaneous remote transmission "cannot be justified merely by showing that it is inconvenient for the witness to attend the trial." This analysis routinely overlaps with the foreseeability concern, as courts denying motions to testify remotely due to distance or other obligations often emphasize that these were known to the movant in advance.

Courts have therefore denied requests for remote testimony where the movant argued that the witness would face professional or personal hardship by having to testify. *See Halig*, 2025 WL 2661785, at *1, *4 (finding no good cause in compelling circumstances where expert witness would be "required to request formal administrative leave [from work] for all days of travel," noting that although the court "is sympathetic to the difficulties presented by travelling to provide trial testimony and any compensation for lost work that may result," this is the case with every trial); *Savinova*, 2025 WL 1279076, at *4 (denying plaintiff's opposed motion to testify remotely at trial where "she provides no authority for the proposition that caregiving responsibilities constitute 'good cause' or 'compelling circumstances'" and had "known about these responsibilities for at least a year"); *Barbuto*, 2024 WL 4212857, at *2 (denying defendant's motion to testify remotely where defendant was unable to take time off from a new job in the U.K., as defendant "should have made arrangements with her new employer to attend the previously scheduled trials"); *Maslic v. ISM Vuzem d.o.o.*, No. 21-cv-02556-BLF, 2024 WL 3279524, at *2 (N.D. Cal. June 14, 2024) (denying motion for witness to testify remotely where he "has an active practice as an orthopedic surgeon," as a "scheduling conflict alone does not constitute good cause," particularly where the case schedule was set two years prior).

On the other hand, some courts have found that such hardships provided the necessary justification given the circumstances of the particular case. *See, e.g.*, *Rock v. Cummings*, No. CV-20-01837-PHX-DWL, 2025 WL 1270748, at *1 (D. Ariz. May 1, 2025) (finding good cause and compelling circumstances to allow remote testimony from disinterested witness who was being compelled to testify by subpoena where he was "scheduled to be on trauma call for a very busy level one trauma center" and failure to do so "would adversely compromise the health and safety of trauma patients"); *Childers v. TTI Consumer Power Tools, Inc.*, No. 3:23-cv-00547-HZ, 2025 WL 392462, at *7-8 (D. Or. Feb. 4, 2025) (denying motion for new trial based on court's decision to allow remote testimony, where witness lived and worked in Michigan, had three children, and the need for his impeachment testimony arose during trial); *Foster v. United States*, No. 6:19-cv-164-REW-HAI, 2024 WL 5683137, at *2 (E.D. Ky. Feb. 23, 2024) (granting plaintiffs' opposed motion for two expert witnesses to testify remotely due to "familial responsibilities" and a "scheduling conflict," respectively, and noting that because the court had already assessed their expert credentials, "their remote testimony does not pose the same credibility concerns as, for example, remote testimony from fact witnesses").

The costs of attendance, whether to the witness or to the party, are also often raised by parties as a ground to allow remote testimony. "[F]inancial hardship isn't the type of unexpected reason that is typically required in a showing of good cause for telephonic testimony." *Gil-Leyva v. Leslie*, 780 Fed. App'x 580, 587 (10th Cir. 2019) (cleaned up); *see Savinova*, 2025 WL 1279076, at *4 (denying motion for two plaintiffs who are "minimum wage earners who do not have the

funds to travel to Connecticut for trial" to testify remotely, noting among other things that they were voluntary parties to the case and could have raised claims of indigence a long time ago); *Monera v. Datis*, No. 24-80958-CIV-CANNON, 2025 WL 3776652, at *1 (S.D. Fla. Feb. 5, 2025) (holding that neither "the costs of foreign travel" nor "the purported difficulty associated with obtaining travel visas for [petitioner's] non-party witnesses" established, on the existing record, compelling circumstances for witnesses to testify remotely); *Halig*, 2025 WL 2661785, at *4 (expressing sympathy that costs of in-person expert witness testimony "present a significant financial hardship for Plaintiff," but noting that "this was obviously a risk known to Plaintiff when she secured [the witness's] services as an expert witness"); *cf. Kanuszewski v. Shah*, 650 F. Supp. 3d 575, 577 (E.D. Mich. 2023) (finding that parties' joint request for remote testimony based on "circumstances that they could reasonably foresee: the witnesses live in other states, and it will cost them money to come to the trial" did not warrant leave to testify remotely, but nonetheless finding "the recent uncertainty of air travel" due to "strange winter conditions and unknown technological issues" to be an unexpected compelling circumstance warranting remote testimony).

On a similar note, parties have also requested permission for remote testimony where witnesses would have to travel a great distance to attend the trial, including internationally. In *High School Servicos Educacionais, LTDA v. Choi*, defendants sought to have two expert witnesses living more than 5,000 miles away in Brazil testify remotely. No. 4:21-cv-00029-DGK, 2023 WL 7346452, at *1 (W.D. Mo. Nov. 7, 2023). The court denied the motion, concluding that "[m]ere inconvenience of travel . . . is not a compelling circumstance . . . The geographic distance between Brazil and Kansas City was neither unknown nor unexpected and cannot support Rule 43(a)'s limited exception to live testimony." *Id.; see also Video Artography LTD v. Champagne Cowgirl, LLC*, No. 3:24-cv-120-BN, 2025 WL 1116864, at *5 (N.D. Tex. Apr. 15, 2025) ("Rule 43(a) is not satisfied by the inconvenience caused by compelling that [plaintiff's owner/officer witnesses who reside in Scotland] travel to Dallas" to testify); *but see Blackmore v. Ramirez*, No. 4:21-cv-00026-AMA-PK, 2025 WL 1311121, at *2 (D. Utah May 6, 2025) (finding good cause in compelling circumstances to allow fact witness in Palau to testify remotely even though his "residence in Palau is certainly not unexpected," noting that travel from Palau to Utah "is not a situation of mere inconvenience"); *Virtual Architecture, Ltd. v. Rick*, 09 Civ. 5866 (SHS), 2012 WL 388507, at *2 (S.D.N.Y. Feb. 7, 2012) (citing cases where courts have found good cause "where the witness would have to face international travel, with its attendant costs of time and money," and allowing witness residing in the Seychelles—8400 miles and a 20 hour and 40 minute flight from New York City—to testify remotely).

C. Preference for Depositions

The 1996 Note also provides that "[o]rdinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena, or of resolving difficulties in scheduling a trial that can be attended by all witnesses." Some courts have also followed this guidance when determining whether to allow remote testimony. *See Mobu Enterprises*, 2025 WL 1426450, at *2 ("As the Advisory Committee Notes to Rule 43 reflect, depositions are ordinarily superior to remote testimony."); *see also Nagel v. Global Growth Holdings, Inc.*, No. 6:23-cv-2256-JSS-UAM, 2025 WL 417969, at *2 (M.D. Fla. Feb. 6, 2025) (noting, when granting motion to introduce deposition transcript in lieu of witness's live testimony, that "[t]he Advisory Committee Notes to Rule 43 express a preference for

deposition transcripts over testimony by remote means"); *but see Foster*, 2024 WL 5683137, at *2 (stating that live video testimony from expert witnesses "is preferable to their deposition testimony," as it "will allow the parties and the Court to obtain proper follow-up or clarity from the experts on technical and complex issues").

II. Other Notable Aspects of Rule 43(a)

There are a few other noteworthy points that came up during this research.

First, several courts have applied the Rule 43(a) standard to non-trial proceedings. In *United States v. Thrift*, No. 2:14-cr-0308 DJC DB P, 2023 WL 5672862, at *1-2 (E.D. Cal. Sept. 1, 2023), the court analyzed whether the requirements of Rule 43(a) applied to an evidentiary hearing in a petitioner's section 2255 proceeding. The petitioner sought to have a witness testify remotely from Germany, and argued that Rule 43(c) applied, which did not necessitate a good cause finding. *Id.* at *1. The court disagreed, reasoning that "the application of subsection (c) is explicitly limited to when a motion relies on facts outside the record. Section (a) of Rule 43, in contrast, applies in open court and 'at trial,' but the court does not find it is necessarily limited to trials as movant argues." *Id.* at *2. The court nonetheless found that the Rule 43(a) standard had been met. *Id.* Other courts have similarly applied Rule 43(a) in non-trial proceedings. *See, e.g.*, *Noshirvan v. Couture*, No. 2:23-cv-1218-JES-KCD, 2025 WL 1374954, at *1 (M.D. Fla. May 13, 2025) (applying Rule 43(a) standard to plaintiff's opposed motion for out-of-state nonparty witnesses to appear remotely for an evidentiary sanctions hearing); *Jefferson Street Holdings, LLC v. Otter Prods., LLC*, No. 1:23-cv-01514-RMR-SBP, 2023 WL 11196897, at *1 (D. Colo. Oct. 27, 2023) ("[a]ssuming that Federal Rule of Civil Procedure 43—concerning the taking of testimony at trial—applies to pretrial hearings with equal weight" and determining whether movant had satisfied Rule 43(a) standard for remote testimony on a motion to disqualify counsel).

Second, several opinions in multi-district litigation (MDL) cases have imposed something of an alternative test for remote testimony, based on factors first set forth in *In re Washington Public Power Supply System Securities Litigation*, No. MDL NO. 551, 1988 WL 525314 (W.D. Wash. Aug. 9, 1988), which predated even the 1996 amendments to Rule 43. These factors, generally known as the "*Vioxx* factors" after their adoption in *In re Vioxx Products Liability Litigation*, are:

> (1) the control exerted over the witness by the defendant; (2) the complex, multi-party, multi-state nature of the litigation; (3) the apparent tactical advantage, as opposed to any real inconvenience to the witness, that the defendant is seeking by not producing the witness voluntarily; (4) the lack of any true prejudice to the defendant; and (5) the flexibility needed to manage a complex multi-district litigation.

439 F. Supp. 2d 640, 643 (E.D. La. 2006). Although courts in MDL cases have found these factors instructive when determining whether good cause exists to allow remote testimony, *see, e.g.*, *In re 3M Combat Arms Earplug Products Liability Litigation*, No. 3:19-md-2885, 2022 WL 504451, at *3 (N.D. Fla. Feb. 18, 2022), other courts have found that they have limited use outside of the MDL context, *see Blue Cross & Blue Shield of Florida, Inc. v. Davita, Inc.*, No. 3:10-cv-574-BJD-

MCR, 2022 WL 18492515, at *2-3 (M.D. Fla. May 27, 2022) ("Other district courts have indicated . . . that the *Vioxx* factors are reserved for Rule 43 motions in multidistrict litigation only. . . [T]his Court instead turns to the advisory notes from Rule 43(a) to determine whether 'good cause in compelling circumstances' exist[.]"). Given the unique circumstances present in MDL cases, it is not clear that these factors reflect trial court considerations in non-complex cases.

Finally, as may be expected given the trial court's discretion concerning remote testimony, research generally did not uncover appellate reversals of trial court decisions permitting or denying remote testimony. *See Gil-Leyva*, 780 Fed. App'x at 587 (finding no error with magistrate judge's decision to deny request to testify remotely, nor with the magistrate judge's subsequent decision to allow remote testimony); *Thomas v. Anderson*, 912 F.3d 971, 977 (7th Cir. 2018) (in case implicating trial court's authority to issue writ of habeas corpus as well as Rule 43(a), holding that trial court's decision to allow inmate witnesses to testify only by video "was well within his discretion"); *Draper v. Rosario*, 836 F.3d 1072, 1082 (9th Cir. 2016) (concluding that district court did not abuse its discretion in denying motion for inmate to testify remotely where court "expressed reasonable concern over [the witness's] ability to testify safely, even by contemporaneous video transmission"); *Eller v. Trans Union, LLC*, 739 F.3d 467, 478 (10th Cir. 2013) (remarking that "[appellant] cites no case in which an appellate court has held that a trial court abused its discretion by *not* allowing remote testimony" and holding that district court did not abuse its discretion by refusing to allow telephonic testimony from two witnesses); *cf. Rodriguez v. Gusman*, 974 F.3d 108, 114 (2d Cir. 2020) (vacating district court's decision to administratively close case after plaintiff was deported to the Dominican Republic, since Rule 43(a) would allow plaintiff to appear remotely).

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

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

* * *

The main discussion focused on the ongoing consideration of possibly amending Rule 43(a). As the Subcommittee is aware, several members of the Standing Committee, including judge members, expressed significant reservations about relaxing the limits on remote trial testimony during the January 2026 Standing Committee meeting.

At the last Advisory Committee meeting, in October 2025, that committee was presented with the then-current discussion of the Subcommittee. The Advisory Committee members were initially receptive to the Subcommittee's approach. But the Advisory Committee members were not aware of the Standing Committee concerns. And the Subcommittee will benefit from a full discussion of these issues during the April Advisory Committee meeting. It is important that the Advisory Committee give full consideration to the concerns raised by members of the Standing Committee.

The Subcommittee's present goal, therefore, is to put before the Advisory Committee the issues that have emerged, including the concerns of the Standing Committee members that expressed reservations. On this score, one thing worth noting is that even though Rule 43(a) was not included in the amendment package published in August 2025 quite a few witnesses addressed it in their testimony.

The remote trial testimony issue is not directly connected to the problem for service of a subpoena created by the Ninth Circuit decision. There might be many instances in which the Ninth Circuit view would make the subpoena effective (because the witness was located within the traditional "subpoena power") but that would not control the decision whether the court would authorize remote trial testimony. As addressed in the committee note paragraph being revised as stated above, the Rule 43(a) standard remains unchanged.

Against that background, the discussion identified a number of issues on which Advisory Committee members might have views, including the following:

Retaining the commitment to in-person trials: The hallmark of American trials is that they depend on in-court testimony. The Subcommittee is *not* in favor of "fully remote" trials, a point that should be made clear going forward. Authorization for remote testimony depends on an individualized showing regarding a specific witness.

Focusing on the choice between live remote testimony and a deposition substitute: "Fully remote" trials are not the goal, so it appears important to highlight that the choice the Subcommittee is addressing is not between in-person and remote testimony so much as between remote live testimony and deposition testimony. Relying on depositions can produce many difficulties. The deposition may have occurred before certain facts came to light. And very often much time and expense (including the court's time and energy) can be wasted in resolving disputes about what deposition testimony can be presented at trial, a process that often involves many iterations and a great deal of effort for counsel and the court.

Access to justice concerns: For some witnesses or parties, for a variety of reasons, remote testimony may be the only practical option. And relying on depositions may not only require a great deal of extra work by the court and the parties, but also put some parties at a disadvantage if they cannot afford the cost of creating a video deposition and must rely instead on reading from transcripts. Moreover, allowing remote trial testimony may serve Rule 1 purposes ("just, speedy, and inexpensive" determinations) by ensuring effective presentation of key witness testimony.

"Appropriate safeguards": Rule 43(a) says that the court must also be assured that appropriate safeguards are in place to safeguard the reliability of the remote testimony. Since the pandemic, there likely has been much learning on this front. Relying on party agreement and judicial evaluation of individual cases seems workable.

Specifying "approved" safeguard methods: Though there has by now been considerable experience with safeguards that work, whether by party agreement or court direction, it may be difficult to specify what safeguards are effective in given cases. But it was noted that the Subcommittee had tried to develop a list of specific safeguards and found that too difficult. For one thing, safeguards that work in other cases may be ill-suited to the current case. Good lawyers recognize that safeguards are context-dependent, and they can work together to craft safeguards for the particular case. Having an "approved" list creates the risk that "approved" safeguards might be urged in cases in which they are not appropriate, and other safeguards that would be appropriate might be opposed on the ground that they are not "approved" under the amended rule. If we are not prepared to be specific about what suffices, we would wisely be prepared to explain why we think trying to do that is ill-advised.

Strictness of "compelling circumstances" standard: The "compelling circumstances" standard was introduced in the amendment to Rule 43(a). It does not appear in any other Civil Rule. At least some Standing Committee members seem to regard this standard as suitably protective of the traditional trial and sufficiently flexible to enable judges to authorize remote testimony when really needed. Library research has not identified decisions that say, "I would authorize remote testimony in this case if the 'compelling safeguards' standard were not in the rule, but because it is there I can't." At least some judges seem to feel shackled. Whether there is a way to evaluate this concern is uncertain; it seems unlikely that many judges would go to the trouble of writing a decision if that were their view. It might be noted that the current draft committee note tries to make it clear that the amendment does not require any judge to authorize remote testimony.

Utility of "good cause" standard: The "good cause" standard permeates the Civil Rules. So far as appears, the "compelling circumstances" standard appears nowhere else in the rules. (Rule 37 does use "compelling," but in the different context of a court order compelling discovery.) The note may be able to illuminate the flexibility of the standard while also making clear that it requires a real showing to justify remote trial testimony. Perhaps one source for this topic would be the set of considerations the Texas code has adopted regarding remote proceedings.

Juror preferences: Different concerns have been raised. There was a suggestion that jurors may feel put upon if they are required to show up in court while some witnesses are not. And some jurors may think that being able to observe the witnesses in person is an important aid to making credibility determinations. But other reports suggest that jurors sometimes find remote testimony more useful than in-person testimony. For one thing, in some courtrooms the witness may be better seen on a screen. The alternative of relying on depositions not only can require a great deal of extra work for the court and the parties, but also impair juror comprehension. Jurors may have difficulty focusing on video depositions, and even more difficulty focusing on deposition testimony read from edited transcripts.

Foreseeability issue from 1996 Committee Note: One thing that decided cases do indicate is that the statements in the 1996 committee note about whether the witness's inability to come to court was foreseeable should be considered central. The 1996 note seems to say that the sudden last-minute problem is what the rule is addressing. But in many instances (e.g., officers of the far-away defendant company), the difficulty could be foreseen from the outset. Whether that should make remote testimony unavailable because it was always foreseeable that the distant witness could not be compelled by subpoena to appear in court may actually be a reason to change the rule. Restricting remote live testimony to the "last minute emergency" is dubious. Indeed, the pending amendment to Rule 26(a)(3) directing parties to indicate in their pretrial disclosures (due 30 days before trial) whether any witnesses will be offered remotely is not limited to last-minute emergencies.

Risk of overuse and burden on courts: Some comments during the public comment period suggest that proponents of remote testimony may advance arguments for excusing in-court testimony in many cases. Though paid expert witnesses may readily be persuaded to travel to testify, others may not. Consider the argument about a treating doctor: "Well, we should not make the surgeon from the opposite coast take three days out of her professional schedule to spend three hours on the stand in court. There are lives on the line." On the other hand, the burden of resolving disputes about the editing of depositions (whether in transcript or video form) may be much greater.

Apex witness concern: A theme in the commentary from what one might call the plaintiff side is that the large company headquartered far away can require the employees it wants as witnesses to show up to testify at trial, but the other side has no way to compel live testimony from the company employees it wants to testify before the jury. The Rule 45(c) amendment would partly address this question, but the concerns about abusive apex depositions might support caution about trial testimony as well.

Changing Rule 43(c) as well: There was early consideration of changing Rule 43(c) as well, but on reflection doing so seems unnecessary and could cause difficulties. Rule 43(a) focuses on trial, which is different from the non-trial proceedings addressed by Rule 43(c). Blending the two could cause problems. Indeed, the Subcommittee has recommended revising the committee note to the pending Rule 45(c) amendment (which is only about subpoenas for remote trial testimony) to avoid possible arguments that Rule 43(a) must be satisfied before remote testimony may be used in a non-trial proceeding.

Notes of Teams Meeting
Rule 43/45 Subcommittee
January 30, 2026

The Rule 43/45 Subcommittee met by Teams on January 30, 2026. Participants included Judge Hannah Lauck (Chair of the Subcommittee), Judge Sarah Vance (Chair of the Advisory Committee), Bankruptcy Judge Benjamin Kahn (liaison to the Bankruptcy Rules Committee), Justice Jane Bland, David Burman, and Jocelyn Larkin. Also participating were Taylor Hall-Debnam, Judge Lauck's law clerk, Reporters Richard Marcus and Andrew Bradt, and Consultant Edward Cooper. Emery Lee represented the Federal Judicial Center. Sarah Sraders represented the Rules Office.

The focus of the meeting was on the revised proposed amendment and committee note circulated after the January 14 meeting of the Subcommittee. (Those materials are attached as an Appendix to these notes.)

Adding "by order" to the rule

The redraft includes "by order" in brackets in the rule. Such an addition might address concerns that have been expressed about (a) ensuring that remote testimony is subject to judicial control, and (b) guarding against over-use of the subpoena power to command witnesses to appear to provide remote testimony. Under the proposed pending amendment to Rule 26(a)(3), any party intending to offer remote witness testimony at trial would have to give notice of that intent in its Rule 26(a)(3) disclosures. And since 1996 there has been the opportunity to use a subpoena to compel witnesses within the court's "subpoena power" to show up for remote testimony, without any particular problem emerging. There seems little risk that a lawyer would expect to be able to walk into court for trial, hold up her cell phone, and announce that a witness would appear in that manner. In addition, the draft committee note says: "When a party wants to provide remote testimony at trial, it must obtain court approval for doing so in advance of trial."

It was noted that one witness during the January 27 hearing on the pending proposed amendment to Rule 45(c) reported that sometimes she would issue a subpoena without first obtaining court approval, but the subpoena would state that it was contingent on getting court approval. The issue is only one of timing. And regarding timing, one might say "in advance of trial," but the last-minute emergencies that the 1996 amendment emphasized can include developments while the trial is proceeding, such as the huge winter storm in the U.S. at the end of January of this year.

In addition, Rule 26(a) requires updating disclosures, which would include the intention to provide a witness by remote means.

The consensus was that "by order" need not be added to the rule.

Deferring Rule 45(c) amendment while 43(a) under consideration

During the January 27 hearing, some witnesses urged that an amendment to Rule 45(c) be held in abeyance until a decision was made about amending Rule 43(a). But the two changes do

not seem to be related. Whether the remote testimony is to come from across town or across the country, Rule 43(a) guides the court in deciding whether to permit remote testimony. The Rule 45(c) issue could arise only in instances in which the court has decided the requisite showing to justify remote testimony has been made but the witness is unwilling to provide it without being subpoenaed. Under *In re Kirkland*, the witness could thus defeat the court's decision to permit remote testimony if the witness were located outside the "subpoena power" of the court. In *Kirkland* itself, the court had already made the Rule 43(a) decision to authorize remote testimony, but the witnesses refused to do so and challenged the subpoena. As the Ninth Circuit majority recognized, a rule change could alter the result it reached. The pending rule change is designed to do that.

Committee Note

The main discussion was about the revised note. A starting point, related to the discussion of "by order" was a revision at lines 160-61 of the draft note:

> When a party wants to provide remote testimony at trial, it must timely obtain court approval for doing so ~~in advance of trial~~.

The discussion focused on other modifications of the new note.

A first point was that the substance of the sixth paragraph of the note should be moved up to the second paragraph, perhaps as follows (with possible revisions discussed during the meeting):

> But the amendment does not in any way represent a retreat from the rules' commitment to the centrality of in-person witness testimony. The default for trials is always live in-court witness testimony. The court is not ~~never~~ required to authorize remote trial testimony, even if the parties all agree to proceeding in that manner. Remote testimony should be allowed only when the court is satisfied it is justified. This rule ~~amendment does not authorize entire remote trials, and~~ relates only to specific witnesses at trial as to whom the court finds that a sufficient justification has been offered, and has no effect on other aspects of trial.

Though using "never" in this paragraph might stress the point, it was also noted that there might actually be circumstances in which it would be an abuse of discretion not to authorize remote testimony. For that reason, "not" may be preferred.

A caution was raised—we might in a sense "play offense" here by stressing the way in which remote testimony (based on a suitable showing) can actually further access to justice. This idea drew support—it would be desirable to work in Rule 1 and access to justice explicitly, and earlier if possible. Another participant noted that for some litigants the cost of the deposition alternative can appear prohibitive, particularly for a video deposition. A written transcript can cost $3,400 per day, and a video deposition may cost $7,500 per day. This point might bear on the 1996 note's seeming endorsement of deposition testimony as superior to remote live testimony.

Attention was drawn to line 147, which says that the proponent of remote testimony "ordinarily" must show that technological difficulties will not impede remote testimony. Does that suggest that sometimes the court should authorize such testimony without such assurance?

Appropriate Safeguards

The note does not try to enumerate techniques to provide safeguards. The explanation was, partly, that the rule has required them since 1996, and did not come with a list of "approved" safeguards then. Trying to provide a list now could be risky. For one thing, anything left off the list might be regarded as "unapproved." For another, technology might develop new safeguards in the future that are not presently known.

A concern was raised. The last sentence of the note paragraph about safeguards says party stipulation "might be important." It would be better to say: "The parties may be able to reach a stipulation on appropriate safeguards for the court's consideration." A reaction was that "the lawyers usually work this out." But another reaction was to make it clear that party stipulation cannot bind the court.

Deposition testimony as an alternative

As noted above, depositions can present significant financial challenges to some litigants. More generally, it was suggested that it may be time to retire the idea in the 1996 note that depositions would be preferable to live remote testimony. That attitude seemed linked to the reality that the 1990s were "the infancy of remote technology," and that more recent developments (and the stimulus of the pandemic) have worked a sea change.

One suggestion was to remove the draft reference to Zoom and Microsoft Teams. Product endorsements do not belong in a committee note, and other providers have already emerged, with more perhaps on the way. The solution is to remove the mention of specific products from the draft note.

Additional points were offered, besides cost. Much experience shows that jurors (and judges) frequently find even video depositions extremely boring to watch. Having a deposition transcript read is even more boring.

Moreover, the task of preparing deposition testimony for presentation at trial can be extremely burdensome for the parties, and often burdensome for the court when the parties cannot agree on the excerpts to be included. It would be useful to try to work these points into the note. Handling the testimony, though remote, "live" at trial may save the parties and the court much effort in addition to helping the jury engage when the trial is before a jury.

Relatedly, there is a loss of comprehension when the testimony is not presented live.

Rule 43(c)

The Subcommittee has been considering whether to recommend that Rule 43(c) be changed to parallel the proposed amendment to Rule 43(a). But an informal research effort turned

up no example of a court finding that current Rule 43(c) restricts it from permitting remote testimony during a motion hearing. The rule affirmatively authorizes use of affidavits, for example, which offer no opportunity to cross-examine.

Discussion supported leaving Rule 43(c) untouched. Rule 43(c) has remained relatively unchanged for a long time. In 1996, Rule 43(a) was amended to authorize remote trial testimony. As our proposal would amend it, Rule 43(a) retains limitations that do not appear in Rule 43(c)—good cause and appropriate safeguards. There is no jury involved in motion proceedings, which do not have to happen in open court.

At the same time, there is a risk that changing Rule 43(c) would support arguments that this amendment package constricts the ability of judges to receive remote testimony under Rule 43(c). One suggestion made was that if we do not propose an amendment to Rule 43(c) our note to the Rule 43(a) amendment can affirm that Rule 43(c) remains unchanged. Perhaps the note could even say that we are not revising Rule 43(c) because it has presented no problems. Another alternative would be to say the amendment to Rule 43(a) has no effect on Rule 43(c). The suggestion was amplified: this amendment "does not affect the continuing availability of remote oral testimony under Rule 43(c)."

APPENDIX
MEMO INTRODUCING JAN. 30 DISCUSSION

Post-January 30 Note drafting

This memo follows up on the material before the Rule 43/45 Subcommittee during the January 14, 2026, meeting. It is principally focused on changes to the draft committee note designed to address concerns raised at the Standing Committee's January meeting.

As a reminder, here is the summary of the January 14 meeting: (1) Except for adding "by order" or "as approved" or something of the sort to the rule-amendment language that should not be changed; (2) Library research would be useful on the reported cases deciding whether to authorize remote testimony—does this shed light on whether the current rule is suitably flexible?; (3) We should flesh out the "why" of our proposal—the Rule 1 aspect, perhaps with state court or bankruptcy court examples; (4) We should try to provide information about the social science evaluation of remote testimony; (5) We can consider whether the note could usefully offer some examples of adequate safeguards. The notes from the January 14 meeting, slightly revised in response to suggestions from Dave Burman and Ed Cooper, should accompany this memo.

Not all those things have been done since January 14. Library research is ongoing. An effort has been made to add an invocation of Rule 1 to the note. To date, we do not have the social science materials, but those probably do not belong in a note anyway. And the question of offering examples of safeguards remains open.

As should be discussed further, there may be reasons to leave Rule 43(c) unchanged. In part, that would avoid the possibility that parallelism with Rule 43(a) might be used to imply that limits on remote trial testimony should also limit the court's use of remote oral testimony during motion proceedings. When Rule 43(a) was amended to authorize remote trial testimony in 1996, no change was made to Rule 43(c), and the word "orally" was removed from Rule 43(a). Here is the explanation in the committee note to the 1996 amendment:

> The requirement that testimony be taken "orally" is deleted. The deletion makes it clear that testimony of a witness may be given in open court by other means if the witness is not able to communicate orally. Writing or sign language are common examples. The development of advanced technology may enable testimony to be given by other means. A witness unable to sign or write by hand may be able to communicate through a computer or similar device.

Intriguing though it may be, this comment seems not to be about remote testimony; perhaps remote testimony by sign language or other means (via "computer or similar device"?) has been done or will be done in the future.

For the present, the reality is that Rule 43(c) still says the court "may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions." Though research may show otherwise, since this rule permits a decision to be based on affidavits or depositions as well as "oral testimony," it does not seem to constrain the court from permitting that oral testimony

to be provided by remote means. Below, the question whether to propose an amendment to Rule 43(c) is discussed.

Meanwhile, the Rule 43(a) amendment proposal remains unchanged except for the possibility of adding "by order," but a revised committee note is presented below that attempts to follow up on the discussion on January 14. For purposes of comparison, this memo also presents the note that was before the Standing Committee and the revisions to that note after our December 15 meeting.

Rule 43(a)

Rule 43. Taking Testimony

(a) ~~**In Open Court**~~ **At trial.** At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause ~~in compelling circumstances~~ and with appropriate safeguards, the court may [by order][4] permit contemporaneous remote testimony in open court ~~by contemporaneous transmission from a different location~~.

COMMITTEE NOTE

In-person trial testimony has been central from the beginning of the federal court system. It remains critical, particularly to determination of credibility. Relying on face-to-face evaluation of testimony is the time-honored method for evaluating credibility.

But sometimes critical witnesses are simply unable to appear in person in the courtroom. In 1996, Rule 43(a) was therefore amended to permit remote trial testimony when good cause was shown and appropriate safeguards were in place. The 1996 amendment also required "compelling circumstances." That very demanding requirement reflected the ongoing centrality of in-person witness testimony. But [numerous] {some} judges have found this requirement too constricting in some cases.[5]

[4] Discussion on January 15 considered whether saying in the rule that an order is required would be a useful addition. It might even say "by prior order," but (as suggested by a bracketed sentence at the end of the revised note) this seems implicit in the entire setup. Another idea was to say something like "as approved by the court" or "with advance approval by the court." Given the Rule 26(a)(3) disclosure requirements regarding witnesses and depositions to be offered at trial, it is somewhat difficult to imagine how this matter could not come to the court's attention well in advance of trial, unless the problem is a last-minute development. The bracketed note language below—"Prior court approval is essential to management of remote trial testimony"—may suffice.

[5] It would likely be good if we had examples to support this assertion. Perhaps it is implicit in the reports from judges we heard from during the July 30, 2025, online conference.

This amendment removes the "compelling circumstances" requirement, but in no way retreats from the traditional importance of in-person interaction between the finder of fact and the witness and in-person interaction between the witness and the lawyers, particularly the cross-examiner. Developments since 1996 have prompted reexamination of that requirement.

Critically, technology has made important advances. While telephonic testimony may have been the only method available in 1996, 21st century technology (from providers such as Zoom, Microsoft Teams, and others) offers a substitute much closer to in-person witness testimony. Many people, including jurors, have gained much experience using this technology for business meetings and other important interactions. There are also reports that some jurors find live video a better method than in-person witness testimony. Not all courtrooms enable all jurors a view of an in-person witness that is equal to well-presented remote testimony.

In addition, the 2020-22 pandemic[6] prompted, and sometimes forced, the courts to employ this new technology to manage cases and, sometimes, to receive remote witness testimony. That judicial experience supports relaxing the "compelling circumstances" constraint. There have been reports that this flexibility about remote participation, in both federal and state courts, has served the goals of Rule 1 and increased access to justice.

But the amendment does not in any way represent a retreat from the rules' commitment to the centrality of in-person witness testimony. The default for trials is always live in-court witness testimony. The court is not ~~never~~ required to authorize remote trial testimony, even if the parties all agree to proceeding in that manner. Remote testimony should be allowed only when the court is satisfied it is justified. This amendment does not authorize entire remote trials, and relates only to specific witnesses as to whom a sufficient justification has been offered.

Often the choice is not, however, between in-court testimony and remote testimony, but between remote live testimony and depositions taken before trial, sometimes long before trial.

In making that choice, the court properly may take account of many factors. A starting point is that witness inconvenience alone is not a reason for excusing in-person testimony. Good cause requires assessment of the circumstances of the case, never losing sight of the central importance of in-person testimony. [It may be that remote testimony raises fewer concerns in court trials than in jury trials.][7]

Technological difficulties may sometimes prove important. When the witness is at a remote location, there could be lapses in technology both at the witness's location and in the courtroom. The proponent of the testimony ordinarily should be expected to satisfy the court that technological impediments will not intrude and that electronic transmission will be secure.

[6] Is this safer than saying COVID? There was some push-back about explicitly mentioning COVID, which our prior Note did.

[7] This idea was raised on January 14. Is it a useful addition?

Besides evaluating the justification for relying on remote testimony and potential technological issues, the court must demand appropriate safeguards to protect the reliability of the remote testimony. This requirement remains unchanged since 1996.[8] Experience gained since 1996 can assist the court in evaluating safeguards, but the burden is on the proponent to satisfy the court that safeguards will be in place.[9] On this score, a stipulation by all parties might be important.

When a party wants to provide remote testimony at trial, it must obtain court approval for doing so in advance of trial. As amended in 2027, Rule 26(a)(3)(A)(i) should call attention to this issue well in advance of trial. [Prior court approval is essential to management of remote trial testimony.][10]

[This is the Note that was before the Standing Committee with our Dec. 15 revisions]

COMMITTEE NOTE

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

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

A starting point is that the court is not ~~never~~ required to authorize remote trial testimony, even if the parties all agree to proceeding in that manner. Remote testimony should be allowed only when the court is satisfied it is justified.

Many factors bear on the court's decision.[11] ~~One central concern is the importance of receiving testimony from *this* witness. Evidence Rule 403 permits the court to refuse to hear a~~

[8] This point seems worth making. In 1996, there was probably almost zero experience with safeguards. Thirty years later, there ought to be much more.

[9] It seems worth emphasizing that this is another burden the proponent of remote testimony must shoulder, beyond showing good cause.

[10] This sentence might be an alternative to adding the need for a court order or court approval to the rule itself, a possibility suggested in brackets above. The need to get the court's approval before the witness begins to testify flows directly from Rule 43(a), which says that "the court may permit" remote trial testimony. It is also consistent with the pending amendment to Rule 26(a)(3)(i).

[11] This draft avoids getting into details about factors to be considered, preferring to leave that to courts and lawyers. Mentioning some might seem to make them more important than others,

~~witness present in court if that witness's testimony would be "cumulative." The good cause determination under Rule 43(a) might be close to the opposite end of a spectrum -- focusing on whether there is no other witness who can provide in person testimony on an important topic. Similar issues often arise with regard to depositions of high government officials who have no unique knowledge, which may justify a protective order preventing those depositions. Remote trial testimony would be similarly unwarranted in most such cases.~~

On occasion, ~~however,~~ judging the credibility of the remote witness may be critical to the case. Relying on face-to-face evaluation of testimony is the time-honored method for evaluating credibility. That can depend on in-person interaction between the finder of fact and the witness and in-person interaction between the witness and the lawyers, particularly the cross-examiner. ~~Though a video deposition would not afford the finder of fact an opportunity for in-person evaluation of credibility, it would provide an in-person examination by counsel that might be superior to examination via telecommunications of a remote witness. Some states have even recognized a difference between "discovery" depositions and "trial" depositions; something like the latter might be the best choice. If the witness was deposed early in the case, a second deposition might be important.~~[12]

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

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

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

The Rule 43(c) question

It is quite uncertain whether there is any need to propose a change to Rule 43(c). Adding the "good cause" and "appropriate safeguards" language to this rule might be questioned, and even suggest that the standard for remote testimony regarding motions is the same as the one for remote trial testimony. It seems to be a consensus that remote testimony on motions should not be so strictly policed as remote trial testimony. Such a wide array of matters can come up on motions,

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and the Standing Committee sometimes objects to committee notes that appear to be "practice manuals."

[12] This deletion avoids the question whether a deposition is better than remote live testimony, as the 1996 committee note seemed to say.

and the reasons why in-person testimony at trial is central do not apply to the wide variety of matters that bear on motions.

The rule already seems implicitly to authorize remote testimony, since it permits reliance on affidavits and on depositions. And adding "adequate safeguards" might be odd, since it is hard to conceive of the safeguards that attend preparation of an affidavit. At a deposition all parties may be represented, which provides a safeguard, but one would think that judges and lawyers could work these matters out.

And putting "good cause" into Rule 43(c) might call for a committee note to the Rule 43(c) change saying that what is good enough cause for remote testimony on a motion is not good enough for remote trial testimony. One might even be tempted to say that Rule 43(a) requires not only "good cause," but "better cause." At some point, we might seem to be counting angels on the head of a pin.

As pointed out on January 14, however, there are a lot more motion proceedings than trials. So we continue to consider this possible amendment. Below is what was before the Subcommittee on January 14.

One possibility would be to add a sentence to Rule 43(c):

> **(c)** ~~**Evidence O**~~**On a Motion.** When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions. With appropriate safeguards, the court may permit [oral testimony by means of] contemporaneous remote testimony.[13]

Another possibility before the Subcommittee on January 14 was to move Rule 43(c) up to follow Rule 43(a) or to be an additional provision in 43(a). One reaction to those possibilities is that they might unhelpfully reinforce the notion that the standards for remote testimony are the same under Rule 43(a) and Rule 43(c). That seems undesirable (and, perhaps, inconsistent with the permission under the Bankruptcy Rules for remote participation in "contested matters").

Alternative 1

Rule 43. Taking Testimony

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

[13] The bracketed language may be unnecessary, given that our draft for Rule 43(a) refers to "contemporaneous remote testimony" and Rule 43(c) already refers to "oral testimony."

(b) On a Motion. When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions. With appropriate safeguards, the court may permit [oral testimony by means of] contemporaneous remote testimony.

(cb) Affirmation Instead of an Oath. * * * * *

Alternative 2

Rule 43. Taking Testimony

(a) In Open Court Manner of Presentation.

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

(2) ***On a motion.*** When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions. With appropriate safeguards, the court may permit [oral testimony by means of] contemporaneous remote testimony.

* * * * *

(c) Evidence on a Motion. When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.

Notes of Teams Meeting
Rule 43/45 Subcommittee
January 14, 2026

The Rule 43/45 Subcommittee met by Teams on January 14, 2026. Participants included Judge Hannah Lauck (Chair of the Subcommittee), Judge Sarah Vance (Chair of the Advisory Committee), Bankruptcy Judge Benjamin Kahn (liaison to the Bankruptcy Rules Committee), Justice Jane Bland, David Burman, Jocelyn Larkin, and Mark Lanier. Also participating were Taylor Hall-Debnam, Judge Lauck's law clerk; Reporters Richard Marcus and Andrew Bradt; and Consultant Edward Cooper. Sarah Sraders represented the Rules Office.

The meeting began with an introduction about the concerns raised by some Standing Committee members about the Rule 45(c) amendment draft during that committee's January 6 meeting. These are serious and important concerns that the Subcommittee should address. At the same time, it has spent much more time addressing these issues, and it may still conclude that proceeding with an amendment is the best course.

One strand of concern reflected basic doubts about any relaxation of the "compelling circumstances" standard in current Rule 43(a). Additionally, there was concern that such a change would result in a "slippery slope" leading to jury trials regularly held entirely by remote means. Concern was also expressed about safeguards when witnesses testify remotely. Specifics in the committee note might be important on that topic. The possibility that someone is feeding the witness answers to questions calls for safeguards as close to airtight as possible. Another consideration is whether there is an adequate basis for thinking that the standard in the current rule has really prevented judges from authorizing remote testimony in situations in which remote testimony is warranted. Yet another concern was that jurors might react to remote witness testimony by thinking "How come the witness doesn't have to come to court, but I do?"

One summary of the current circumstances is that the concerns expressed by some Standing Committee members were not so much with the framing of the rule amendment but instead with (a) the basic question whether a rule amendment is needed, and (b) if so, how the committee note should explain the goal of the amendment.

Though holding a mini-conference proved impossible, the Subcommittee was able in July 2025 to receive the benefits of an online conference with a number of judges who had very favorable experiences with remote witness participation in trials. The Standing Committee meeting points up a reality that some judges do not think the tethers on remote trial testimony are too constricting. But it may be that a better explanation, perhaps with examples, of situations in which the current rule could limit a judge's latitude in handing trial testimony would be valuable.

While recognizing that these concerns are important, one reaction was that the choice is not usually between live in-person testimony and remote contemporaneous testimony. Instead, it is between contemporaneous testimony and a video or transcript of a deposition taken before trial, sometimes long before trial. Though it is surely true that "mere inconvenience" is not, by itself, sufficient to justify authorizing remote testimony, inconvenience and expense might sometimes support authorizing such testimony. For example, suppose a witness's only role is to authenticate

an exhibit, the work of perhaps fifteen minutes on the stand, but the expense and dislocation of requiring this witness to travel to a distant courtroom would support a finding of real hardship. Should the "compelling circumstances" standard deny the court the latitude to permit the witness to testify remotely?

A judge noted that the "appropriate safeguards" language would remain the same were our draft amendment to go forward. Since that term has been in the rule since 1996, it seems odd to say that it now requires extensive explanation. When it was introduced in 1996, the only thing the committee note said other than that advance notice should be given that there will be remote testimony was as follows:

> Safeguards must be adopted that ensure accurate identification of the witness and that protect against influence by persons present with the witness. Accurate transmission likewise must be assured.

The phrase "appropriate safeguards" does not appear elsewhere in the Civil Rules, or in the Appellate, Bankruptcy, or Criminal Rules.

Whether one could present a series of possible safeguards in a note is uncertain. But the starting point might be that the "good cause" standard itself is flexible, and to justify departing from the traditional insistence on in-person witness testimony at trial requires very good cause. So perhaps a starting point for our Note should be that the default is that witness testimony is presented in person, and that this expectation applies unless the court finds that there is a sufficient reason to depart from it

The Texas experience also involves a variety of considerations that bear on whether to permit remote testimony, including the case type, the sort of proceeding (trial, preliminary injunction, etc.), the number of parties and witnesses, whether it is a jury trial, whether the issues to be addressed by the witness are complex, whether the witness is familiar with the technology necessary for testifying, and the difficulties the witness might need to surmount to appear in court.

Another judge reported about hearing a "gazillion dollar" matter entirely via remote proceedings due to COVID. That is surely not something to do except in extreme circumstances.

Another judge reacted that it seems important to respond to the slippery slope worry. At some point the Subcommittee had before it a list of possible safeguards, but it got pretty long. And even with a long list, there could be difficulties. On the one hand, one might be taken to be saying that in every case any one of them is sufficient all by itself. Say there are a dozen possible safeguards listed in the note. That does not mean that each of them is a sufficient stand-alone safeguard. And if there are a dozen in a committee note, is it not possible that technology change or something else will mean that no. 13 or no. 14 would be more suitable to a given case? A note can try to make clear that the list is merely of examples, but arguments that it is an exclusive list would be likely.

A lawyer agreed that safeguards are important. But based on a dozen or more experiences with remote testimony, the reality is that the safeguards are worked out between the lawyers with reference to the particulars of the actual case. An example: the plaintiff was on his death bed but

wanted to testify remotely. The lawyers for the defendant properly tried to make the arrangements as appropriate as possible. For example, the plaintiff would not be permitted to have the family bible next to him on the hospital bed. But it is unlikely that specifics beyond "adequate safeguards" will really provide much useful guidance.

Another lawyer agreed. Safeguards vary greatly. Other points that have come up also call for a reaction. The 1996 committee note creates something of a presumption in favor of a deposition transcript or video. Given the range of appropriate safeguards, that overlay seems to intrude too far on a judge's discretion. The work done by Judge Fogel, and some social science studies, along with the Texas experience, provide support for flexibility in the rule. There is no evidence that permitting remote testimony in some circumstances leads directly to remote trials. Instead, there is now quite a lot of judicial experience with when to permit remote testimony and how to tailor the safeguards to the specifics of the given case.

A question was raised about whether the proposed amendment adequately demonstrates that prior approval by the court is necessary. Rule 43(a) does not say that a motion is required. Perhaps "as approved by order of the court" could be added to the rule to make that clear. Rule 7 makes it clear that a request to the court for an order must by motion.

On the other hand, there is nothing about that in the current rule. But there is also no indication that anyone has attempted to "call" a witness for testimony in court via electronic means without obtaining prior approval from the court. Moreover, the proposed amendment to Rule 26(a)(3)(A)(i) would direct any party that proposes to present remote testimony at trial to include that fact in its pretrial disclosure. Even if there is a problem in this regard for motion proceedings governed by Rule 43(c), that should ensure adequate notice to everyone about trial testimony. In addition, the risk of technological obstacles to presenting remote testimony practically ensure that advance arrangements will be made. Some courts have local practices that require that all such requests be made a certain number of days before the hearing or trial involved.

But it was noted that not all circumstances justifying leave to present remote testimony can be foreseen. Indeed, one theme of the 1996 committee note was that compelling circumstances would not exist if the need for remote testimony could be foreseen—the sudden emergency such as an accident or illness were the example invoked in 1996. And reported cases provide evidence that courts have invoked delay in requesting leave as a ground for refusing to permit remote testimony. One possible consequence of our amendment would be to permit remote testimony from a witness we always knew would not be able to appear in person.

A judge pointed out that there are often last-minute needs or adjustments during trials.

A summary of the discussion was offered: Except for adding "as ordered by the court" or something like that to the text of the rule amendment, it does not seem like there is a need to consider a revision of the rule amendment. But it seems important to recast the committee note to reflect and address the concerns raised during the Standing Committee meeting. Besides doing that, the main issue is whether changing the rule is a good idea or a bad idea.

On that basic policy choice, it may be desirable to assemble more information for the Advisory Committee and the Standing Committee that we have not previously presented. There is some social science research that bears on how jurors react to in-person testimony and remote testimony.

One point here is that some work shows that jurors prefer remote testimony, even to assess credibility. As we have been told, jurors sometimes are seated far from the witness, and acoustics in courtrooms may vary.

There are a number of academic papers that explore the positive and negative possibilities of remote testimony. This would not so much be committee note material as it would be useful as an introduction in presenting the proposed amendment to the Advisory Committee and the Standing Committee. It might even be possible to provide a bibliography. The point, in part, is that this is not out of the blue. Though the data do not uniformly point in one direction, one point is that given even divided data it makes sense to permit the judge to make a choice about whether to permit remote testimony in a given case.

A suggestion was made: Judicial discretion is key to these issues. We need to be clear that the judge is never required to permit remote testimony, even if all the parties favor that method. So one way of looking at the question is whether the rule should prohibit judges who are persuaded remote testimony from a given witness is justified from authorizing it.

A lawyer sought to push back on resistance to this rule change. There is not a huge amount of remote testimony. Lawyers do not want that if they can present the witness in person before the jury. Indeed, one of the arguments against permitting a subpoena to compel a distant witness to provide remote trial testimony (the subject of our pending Rule 45(c) amendment out for public comment) is that some parties may feel that they have to bring the witness to court lest the jury hold it against the party that the witness did not bother to come to the courthouse to testify in person and insisted on proceeding by remote means. This concern has been mentioned by some attorneys who represent corporate defendants, for example. Moreover, there is little need to provide detailed guidance on safeguards. Lawyers can debate those and propose solutions for their cases.

A judge urged that this is really a Rule 1 issue—allowing judges flexibility on this topic is a way to make justice more accessible. Back when this rule was written 30 years ago, the alternative was testimony by telephone and even remote motion hearings were extremely rare. Now we have technology that has changed the way participation in court proceedings can proceed remotely, and the COVID experience has shown that many judges are comfortable with remote proceedings, or even prefer them. The experience of various state courts, particularly in larger states, confirms that this method can be a cure to an access to justice problem. Particularly with self-represented litigants who cannot readily come to court, being able to participate in a remote manner can be critical.

True, some judges continue to insist on in-person participation even in motion hearings. Nothing in this amendment would direct them to change their preferences.

Another judge agreed. Indeed, it may be that the current rule has not been a huge obstacle for judges only because they are "winking" at the "compelling circumstances" requirement.

A summary was offered: (1) Except for adding "by order" or "as approved" or something of the sort to the rule-amendment language that should not be changed; (2) Library research would be useful on the reported cases deciding whether to authorize remote testimony—does this shed light on whether the current rule is suitably flexible?; (3) We should flesh out the "why" of our proposal—the Rule 1 aspect, perhaps with state court or bankruptcy court examples; (4) We should try to provide information about the social science evaluation of remote testimony; (5) We can consider whether the note could usefully offer some examples of adequate safeguards.

One additional question was raised—how about Rule 43(c)? The draft contains a possible parallel amendment to that rule about remote testimony on motions because the rule does not exactly say that. It might be useful to say that remote testimony is permitted on motions. But it is not clear that any such change is needed. As pointed out by a Standing Committee member during the January 6 meeting, Rule 43(c) permits the court addressing motions to rely on affidavits or depositions or "oral testimony." It does not say that such oral testimony must be delivered by a witness present in the courtroom, and Rule 77(b) draws a distinction between "trial on the merits" and "[a]ny other act or proceeding." The trial must be conducted in open court, but motions may be presented in chambers. Nothing in Rule 77(b) says the witness must be present in chambers to present that oral testimony. And we have not been told that judges that wanted to receive remote witness testimony for hearings have encountered difficulties due to the current rule. Maybe there is no need to change Rule 43(c).

And there may be reasons to leave Rule 43(c) alone to avoid difficulties. One is that inserting "good cause" and "appropriate safeguards" into Rule 43(c) may erect obstacles to use of remote testimony at motion hearings. Another is that suggesting that the standards for remote testimony in the two settings—motion proceedings and trials—are identical disregards the wide range of issues that may come up in a motion proceeding. Replicating the Rule 43(a) language in Rule 43(c) could thus produce negative results. Moreover, trying to draft a committee note for a Rule 43(c) change that somehow says that the standard for permitting remote testimony in motion proceedings is less demanding than the standard in Rule 43(a) for trials—even though they say the same thing—could be challenging.

A lawyer urged that it is important to continue to consider amending Rule 43(c). Trials are rare, and motion hearings are much more plentiful. It might seem that leaving Rule 43(c) untouched is inviting a "Wild West" approach to these issues in motion hearings. Whether there are actually instances of judges going "off the rails" when permitting remote testimony in motion proceedings is unknown.

The resolution for this meeting was that Professor Marcus would try to reflect this discussion in a recast committee note, and try to introduce into the Rule 43(a) amendment a directive that remote testimony can occur only by court order. The Subcommittee would meet again on **January 30 at 11:00 a.m. Eastern** to continue its discussions. The target is to have a proposal (perhaps with alternatives) to present to the Advisory Committee during its April 14

meeting, looking to asking the Standing Committee to approve a preliminary draft for publication for public comment at its June 2026 meeting.

Notes of Teams Meeting
Rule 43/45 Subcommittee
December 15, 2025

The Rule 43/45 Subcommittee met by Teams on December 15, 2025, to discuss possible rule amendments to address remote testimony. Participants included Judge Hannah Lauck (Chair of the Subcommittee), Judge Sarah Vance (Chair of the Advisory Committee), Bankruptcy Judge Benjamin Kahn (liaison to the Bankruptcy Rules Committee), Justice Jane Bland, David Burman, Jocelyn Larkin, and Mark Lanier. Also participating were Taylor Hall-Debnam, Judge Lauck's law clerk; Reporters Richard Marcus and Andrew Bradt; and Consultant Edward Cooper. Emery Lee represented the Federal Judicial Center, and Sarah Sraders represented the Rules Office.

The meeting was introduced with the question whether the reframing proposal from Joseph Sellers, a former member of this Subcommittee, should be pursued. Email exchanges over the past week suggest that doing so could raise unnecessary problems, including trying to prescribe a rule dealing with all "live" testimony, even in motion proceedings, and thereby create possible inconsistency with Rule 77(b). The consensus was that, though Mr. Sellers' approach was very creative, it probably would present difficulties best sidestepped while the subcommittee dealt with the primary issue presented by the "compelling circumstances" requirement in Rule 43(a) for remote trial testimony.

A separate observation was that at present Rule 43 looks like something of "a mess." Some rearrangement might be a good way to clean it up and reorganize things in a user-friendly manner. One way to do that would be to move present Rule 43(c) up before present Rule 43(b), so that the contrast between methods of presenting testimony at trial and methods for presenting factual materials in motion hearings appear immediately after one another.

One possible concern with such rearrangement would be that existing citations to Rule 43(c) would not pop up on a computer-based research effort to locate prior caselaw if the provision were renumbered. On the other hand, that provision was renumbered 43(c) only after the Rule 43 provisions that dealt more extensively with evidence were removed from the Civil Rules when the Evidence Rules were adopted. It was Rule 43(e) before that.

A different consideration was whether current Rule 43(b) could simply be abrogated. There is a statute—28 U.S.C. § 1746—that, at least partly, addresses the oath requirement. If that were abrogated, the revised rule would present 43(c) right after 43(a). But that statute is not really about the same subject as current Rule 43(b). No problems with current Rule 43(b) have been brought to the Advisory Committee's attention.

Another alternative that had been suggested was to combine 43(a) and (c) into a single subdivision (a) and abrogate current 43(c) in favor of that treatment, leaving current 43(b) alone.

Attention turned to the rule language. A question was raised about the first sentence of Rule 43(a). Is this really needed? Rule 77(b) already directs that trials be conducted in open court. Though Rule 77(b) does not single out witness testimony, it would seem to accomplish what the

first sentence of Rule 43(a) does. A reaction was that this sentence is presently in the rule, and there has not been any proposal to change or remove it.

A different concern had been raised in email exchanges leading up to this meeting: Should a rule change include a provision regarding required advance notice of a party's desire to present remote witness testimony? A reaction was that such a requirement could cause problems in some circumstances. For example, suppose the witness were suddenly unable to appear in person, possibly due to a flight cancellation, sudden illness, family emergency, or the like. Should a rule prevent or interfere with remote testimony in such circumstances? That comment prompted the reaction that the committee note to the 1996 amendment to Rule 43(a) suggested that a last-minute emergency was exactly the sort of situation that would constitute a compelling circumstance under the current rule. A notice requirement (say 2 days' notice) in the rule could cause problems.

Discussion shifted to the practicalities involved. Can a lawyer walk into trial and hold up her cell phone, proposing that a witness testify in that manner? Attorney members of the Subcommittee affirmed that lawyers know they must get prior permission from the court. They also know they need to deal with possible technical problems with presenting such testimony. Even when allowed by court order, it can be frustrated by technical problems.

In addition, there is a major practical problem with what might fall under the "appropriate safeguards" heading—Will attorneys be allowed in the room with the witness?; How will exhibits be shown to the witness?; Will the court reporter be in the room?; How will the oath be administered?, etc. It is essential that lawyers alert the court to the need to address these concerns, but it's fair to expect them to do so. And to do so, they will have to raise these concerns in advance unless a sudden development makes that impossible.

On the other hand, with regard to motions (addressed in Rule 43(c)), there is not necessarily the sort of prehearing preparation that is provided by Rule 26(a)(3), which directs the parties to identify the trial witnesses they intend to call and those they may call if needed. Indeed, the Subcommittee's proposed amendment to this rule to call for identifying any witnesses who will provide remote trial testimony is out for public comment now.

A judge noted that procedures for addressing such matters are often the subject of local rules, standing orders, etc. It is reasonable to expect that parties know that they need the court's approval before attempting to present remote testimony. And Rule 7(b) says that a request for a court order must be by motion, though it does not specify notice periods or the like. In that setting, building in special procedures for this issue seems unwarranted. Many courts have required notice periods for ordinary law and motion matters. Those are not prescribed in the national rules.

A consensus emerged that there is no need to include a specified notice period in the rule.

Discussion turned to the rough draft committee note to Rule 43(a) that Professor Marcus circulated before the meeting. A first question was about the second paragraph of that draft note including the following:

> In this context, the good cause standard has real teeth; a court may authorize remote witness testimony only on finding that the testimony of this witness is essential, or extremely important.

The email exchanges included a suggestion that the first clause of this sentence seems unnecessary. Does this sentence suggest that "good cause" in other rules is a standard that lacks real teeth? And discussion indicated that the remainder of the sentence probably overstates the urgency of obtaining this witness's testimony. Removing these sentences seemed wise.

Another observation was that the following paragraph began by saying that the court is "never" required to permit remote testimony. Changing that to "not" was endorsed as preferable. That sufficiently drives home the point that one needs to get prior permission from the court to present remote testimony.

Another comment focused on the sixth paragraph of the draft note, and suggested that drawing a contrast with in-person testimony (which the draft says presents "nonexistent" difficulties) seems unnecessary and, according to what some said during the July 2025 online conference may also be inaccurate. At least on occasion, it seems jurors find a witness presented on screen preferable to an in-person witness seated far away. The suggestion was to revise that paragraph as follows:

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

Attention also focused on the fourth paragraph of the draft, which emphasized that the importance of having *this* witness testify might be important. Though that is a possible antidote to the "apex witness" concern, it was suggested, surely the fact that a given witness is expected only to authenticate a given exhibit would not require a showing that nobody else could provide such authentication.

More generally, the desired focus seems to be on ascertaining whether credibility issues will be important in assessing this witness's testimony.

Attention turned to motion practice, currently covered in Rule 43(c). One question was whether to invoke the good cause standard here as well. That would be parallel to the Rule 43(a) approach. It would also correspond to the new provision for remote participation in "contested matters" under Bankruptcy Rule 9014. But there has been concern about how to explain in a note that "good cause" for Rule 43(c) purposes need not be as "good" as it need be for trial testimony under Rule 43(a).

A semi-consensus emerged to leave "good cause" out of Rule 43(c). The use of "may" authorizes a court order for remote testimony. Adding "appropriate safeguards" in Rule 43(c)

alerts the court and the attorneys to the need to focus on setting guardrails. Party agreement may often suffice to support remote motion testimony.

There was discussion about likely resistance to a change like the one under discussion. One reaction was that, because this is up to the judge, it may be that judges will be comfortable with such a change. There does seem to be a considerable range of views among judges about remote testimony, but this rule does not say any judge who is uncomfortable must permit it.

From among lawyers, there may be strategic reasons for favoring or opposing relaxation of the constraints on remote testimony. The general expectation might be that plaintiff-side lawyers would endorse permission for remote testimony more enthusiastically than defense-side lawyers. But perhaps there could be exceptions. Consider, for example, the CEO of a corporate defendant who can be compelled by subpoena to testify at trial (in the same state, for example, under Rule 45(c)(1)(B)). That CEO might very much prefer to testify remotely rather than appear in person in court. There might even be security issues for the CEO. It may be likely that plaintiff counsel would not agree to remote testimony, but in general it would not seem that the CEO's schedule would take priority over in-person testimony (subject to the court's power under Rule 26(c) to grant a protective order excusing the CEO from testifying).

That prompted attention to a footnote in the draft note under discussion about whether remote testimony or a video deposition is superior. The 1996 committee note evinced a preference for the video deposition, but at a time when the only alternative to in-person testimony was by telephone. Contemporary methods are worlds away from that; hence (as suggested by the introduction to the draft committee note) the current willingness to remove the "compelling circumstances" constraint.

One possibility is that the witness's deposition was taken before discovery produced new evidence the other side would want to use with this witness. That situation would seem to indicate that the deposition is not a suitable substitute. But how about a second deposition, limited (if possible) to evidence that surfaced after the first deposition?

Indeed, some lawyers may forgo deposing an important adverse witness to deny the witness the "practice" that the deposition would provide. That tactic may be particularly important with expert witnesses. And a different problem can arise because ordinarily counsel for the witness does not ask questions during a deposition, but prefers to save direct for trial. What if the witness is incapacitated or otherwise unavailable when the trial date arrives? Should that party be permitted to "supplement" the video deposition with the direct examination that could have but did not occur during the deposition?

The emerging consensus was that getting into these sorts of concerns in a note is probably not wise, though calling attention to safeguards for remote testimony is important for motion proceedings.

The meeting concluded with some discussion of next steps. One is for Professor Marcus to attempt to provide a redraft of the draft under discussion during this meeting, including a committee note for a possible change to Rule 43(c). At the same time, alternatives might be

proposed to move current Rule 43(c) up into (a), which would be subdivided into (a)(1) on trials and (a)(2) on motions.

Going forward, the Subcommittee will try to meet again. Professor Marcus will endeavor to get out a discussion redraft this week, and Judge Lauck will try to identify a date in January that works for all for another meeting. Ideally, that meeting could support a recommendation to the full Advisory Committee for publication for public comment of draft amendments. It is likely that the agenda book for the Spring meeting of the Advisory Committee will be due in early March. If a published preliminary draft goes forward, the Subcommittee will be able to revisit the proposals after the public comment period concludes.

(b) TPLF Subcommittee

The TPLF Subcommittee is continuing its work in considering a disclosure rule. TPLF is currently the subject of at least five bills pending in Congress, and was also the focus of four recent submissions to the Advisory Committee. Copies of these bills and the recent submissions are on pages 299-377 of the agenda book for the Advisory Committee's April meeting, accessible via the link at the beginning of this report.

The current focus for the Civil Rules is on a possible disclosure requirement in Rule 26(a)(1), or perhaps adding some mention of TPLF to the judicial management provisions in Rule 16 or Rule 16.1. Meanwhile, the environment for litigation funding seems to continue to evolve. In at least some states, nonlawyer investment in law firms is now permitted. Meanwhile, push-back may be emerging in other states. In California, for example, a bill has been proposed in the state legislature to forbid investor influence on litigation decisions. *See* Emily Siegel, *Private Equity Control in Law Firms Bill Advances in California*, Bloomberg Law News, Apr. 7, 2026 (reporting on AB 2305).

The original disclosure proposal was made in mid-2014, and the Advisory Committee has been monitoring the evolution of these issues over the years. The TPLF Subcommittee was formed at the Advisory Committee's October 2024 meeting to study the issues. On the day before the Advisory Committee's October 2025 meeting, the George Washington University National Law Center convened a full-day conference on TPLF issues that provided important background for the subcommittee, but also revealed considerable contention about these issues. At the request of the subcommittee, the Federal Judicial Center is studying the experience in the District of New Jersey under its local rule requiring disclosure (described below), which has been in effect for several years.

Though this work is ongoing, it seems safe to offer some initial reactions based on the last decade of discussion of a TPLF disclosure rule including (a) a sense that requiring disclosure of the fact of funding ought not often pose problems; (b) requiring disclosure of all details of the funding arrangement (including communications between counsel and the funder about counsel's request for funding) could raise very serious (opinion) work product problems; and (c) that there remain serious questions about what the court can do with information about funding arrangements.

The Advisory Committee would benefit from the views of Standing Committee members on the topics on which it is focused, and offers the following description:

Existing models

Original rule proposal

The original proposal in 2014 (14-CV-B) was to add the following new (v) to Rule 26(a)(1)(A):

> (v) for inspection and copying as under Rule 34, any agreement under which any person, other than an attorney permitted to charge a contingent fee for representing

> a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise.

The proponents analogized this proposed new provision to the longstanding discovery (and now disclosure) provision about insurance coverage in Rule 26(a)(1)(A)(iv). That analogy is not airtight. For one thing, the insurance disclosure directive is limited to an "insurance agreement" from "an insurance business." It may also be relevant that insurance companies are highly regulated in many places. California, for example, has a pretty substantial Insurance Code.

A second difference that may matter is that the main interest in the insurance policy was probably the indemnity feature, not the insurer's undertaking to provide a defense (which may be somewhat analogous to what a litigation funder provides). It does not seem that litigation funders have indemnified the parties they fund, even as to litigation-related sanctions, and usually the funded party is seeking a money award. Hence the proposal seems not to be directed at finding out about something that plays as prominent a role in resolving the action as the indemnity issue ("settlement for the policy limits"). But the Committee Note accompanying the addition of discovery of insurance coverage in 1970 did mention not only that "insurance is an asset ordinarily created specifically to satisfy a claim," but also that "the insurance company ordinarily controls the litigation."

When it first addressed this proposal in fall 2014, the Advisory Committee did not pursue it, in part because litigation funding was new and was rapidly changing and growing, making its contours and importance unclear.

From 2014 to 2024, there were several further submissions to the Advisory Committee. Some of those urged that the 2014 proposal be adopted. Some funders submitted opposing arguments, occasionally contending that the Advisory Committee's limited fact-gathering constituted "findings" that no action was needed. Some of the submissions and inquiries came from members of Congress.

Rep. Issa Bill

In January 2025, Rep. Issa introduced H.R. 1109, which proposed a new § 1660(a) for the Judicial Code (Title 28) requiring counsel of record to:

> (1) disclose in writing to the court and all other named parties to the civil action the identity of any person (other than counsel of record) that has a right to receive any payment or thing of value that is contingent on the outcome of the civil action or a group of actions of which the civil action is a part; and
>
> (2) produce to the court and to each other named party to the civil action, for inspection and copying, any agreement creating a contingent right referred to in paragraph (1), including any ancillary agreement or document, except as otherwise stipulated or ordered by the court.

This proposal differs from the 2014 submission in several ways. It speaks of receiving "any payment or thing of value that is contingent on the outcome of the civil action." So it might also

apply to a suit for non-monetary relief. That might be even broader. Consider the famous suit by Hulk Hogan against Gawker, which was reportedly funded by Silicon Valley billionaire Peter Thiel. It may be that though Hogan got a money judgment, Thiel had no right to a share of that money. If he was seeking to harm Gawker, that might be the "thing of value" for him. And in a suit for injunctive relief or other non-monetary relief, that might be the "thing of value."

The Issa bill also speaks of a "group of actions of which the civil action is a part." Determining what constitutes a "group of actions" could present problems. This provision sounds like it is partly about multidistrict litigation (MDL) proceedings. But how does that affect state court Roundup actions in relation to the pending MDL in federal court about the same substance? Given the reported emergence of "inventory funding," this might also apply in that sort of situation, though it is less clear how that would work.

The Issa bill also contains a section (b) which would exclude from the disclosure requirement any instance in which the funding agreement entitles the funder to receive only repayment, or repayment plus interest at a relatively modest rate specified in the statute, or for reimbursement of attorney's fees.

This bill also has a section (c), which expressly addresses timing—disclosure must occur within ten days of execution of the funding agreement or at the time of the filing of the action, whichever is later. Finally, in section (d) it requires supplementation or correction of prior disclosures.

Foreign Funding

Also pending in the House is H.R. 2675, the Protecting Our Courts from Foreign Manipulation Act of 2025. This bill would add a different § 1660 to the Judicial Code. It focuses on funding from a "foreign person," as defined in the Foreign Intelligence Surveillance Act of 1978, or a foreign state, or a sovereign wealth fund. It requires disclosure not only to the court and other parties to the action, but also to the Attorney General and the Principal Deputy Assistant Attorney General for National Security of details about the "foreign person" that has "a right to receive any payment that is contingent in any respect on the outcome of the civil action by settlement, judgment, or otherwise."

It requires disclosure also of agreements providing a "right to receive any payment that is contingent in any respect on the outcome of any matter within a portfolio that includes the civil action and involves the same counsel of record." This provision seems to reach the portfolio funding situation but not to address "malign" U.S. litigation brought to disrupt the defendant's activities rather than obtain a money judgment.

Proposed section (c) of this proposed § 1660 (entitled "Prohibition on Third-Party Funding Litigation by Foreign States and Sovereign Wealth Funds") would make it unlawful for any party or counsel of record to enter into a funding agreement with such a "foreign party."

Possible Rule 16 or 16.1 approach

Rule 16 might be a place to add a provision about TPLF. It calls for the court to become involved early on in managing the action. Suggesting that this judicial oversight include consideration of funding arrangements might facilitate a response tailored to the particular case.

Rule 16.1 addresses only MDL proceedings. But at least some who have commented on TPLF issues contend that funding is common in relation to some MDL proceedings. Eight years ago, the Judicial Panel found that transferee judges had not frequently encountered TPLF, but that might be because they were not asking about it. In any event, circumstances may have changed. So another approach might be to try to identify sorts of proceedings in which funding issues often appear and limit a rule to those proceedings. On the other hand, if patent infringement proceedings are also commonplace funding targets, such a "sectoral" approach might not be promising.

District of New Jersey Local Rule

Effective June 21, 2021, the District of New Jersey added its Local Rule 7.1.1, requiring disclosure of Third-Party Funding:

> (a) Within 30 days of filing an initial pleading or transfer of the matter to this district * * * all parties, including intervening parties, shall file a statement (separate from any pleading) containing the following information regarding any person or entity that is not a party and is providing funding for some or all of the attorneys' fees and expenses for the litigation on a non-recourse basis in exchange for (1) a contingent financial interest based upon the results of the litigation or (2) a non-monetary result that is not in the nature of a personal or bank loan, or insurance:
>
> 1. The identity of the funder(s), including the name, address, and if a legal entity, its place of formation;
>
> 2. Whether the funder's approval is necessary for litigation decisions or settlement decisions in the action and if the answer is in the affirmative, the nature of the terms and conditions relating to that approval; and
>
> 3. A brief description of the nature of the financial interest.
>
> (b) The parties may seek additional discovery of the terms of any such agreement upon a showing of good cause that the non-party has authority to make material litigation decisions or settlement decisions, the interests of parties or the class (if applicable) are not being promoted or protected, or conflicts of interest exist, or such other disclosure is necessary to any issue in the case.
>
> (c) Nothing here in precludes the Court form ordering such other relief as may be appropriate.

The adoption of this local rule generated considerable controversy (somewhat along the lines of submissions received by the Advisory Committee). Preliminary inquiry by FJC Research

has not revealed any major problems, however. The main difficulty was that many lawyers thought they had to file "disclosures" saying that they did not have funding. The court eventually issued some sort of notice alerting lawyers that disclosure was unnecessary in the absence of funding.

This provision adheres to the Civil Rules format, but treats this disclosure as akin to Civil Rule 7.1, not part of Rule 26(a)(1)(A). Presumably, that means that the sanctions of Rule 37(c)(1) would not apply to failure to disclose. It is not clear what enforcement mechanism applies to instances of failure to comply with the disclosure requirement.

This provision applies to funding for attorneys' fees and expenses, but would not seem to apply to the "consumer" situation in which the funding is for the party's living expenses.

This provision addresses both a "financial interest" and a "non-monetary result" in the litigation, and therefore could apply in situations in which there is no contemplated pay-out of settlement financial proceeds to the funder. Though it requires a "brief description of the nature of the financial interest," it seems not to require any disclosure of the "non-monetary result."

This provision keys on control of the litigation or settlement of the action. It focuses only influence on "material" decisions, though it's not clear which decisions are not "material."

More detailed information about the actual experience under this rule would be informative. Some questions might be:

1. How frequently are disclosures of funding made? Is it in 30% or 1% of filed cases? (This would exclude the "false negatives" that resulted from early confusion about whether one must affirmatively disclose that there is no funding in a given case.)

2. In what sorts of cases are these disclosures made? (We have heard a lot about patent infringement cases, for example. We have also heard a great deal about mass tort cases, particularly MDL proceedings.)

3. Have there been instances in which the court ordered follow-up discovery in light of the disclosures made? What sorts of showings were offered to justify such follow-up discovery?

4. What kinds of "financial interests" have been disclosed? Has there been any instance of disclosure of an interest in a "non-monetary result"?

5. Did disclosures or follow-up discovery lead to any significant action by the court? Possibilities include sanctions against the attorneys for the funded party or the one pursuing the funding discovery, reference to the state bar, etc.

No doubt additional questions could be pursued. An untutored and informal reaction is that despite the considerable controversy about adopting this local rule, the actual experience over the last four plus years has not caused tumult. The FJC is gathering information about the New Jersey experience.

State court provisions

Several years ago, Wisconsin adopted a funder disclosure requirement as a part of legislative tort reform legislation. An informal effort by the reporter (contacting Wisconsin law professors) did not indicate that this disclosure provision produced waves.

The Chamber of Commerce has lobbied the legislatures in other states to adopt similar provisions, sometimes successfully.

It is quite unclear whether there is a way to get firm information about the results of these state court provisions. The National Center for State Courts might have some information.

ELI/UNIDROIT disclosure approach

It seems useful to include some mention of EU proposals that go beyond disclosure. Regarding disclosure it seems worth mentioning Rule 245(1) of the proposed Model European Rules of Civil Procedure, promulgated by the European Law Institute (modeled on the American Law Institute) and the International Institute for the Unification of Private Law says (UNIDROIT):

> A party who receives funding for the proceedings from a professional third-party funder or from a crowd-funder shall disclose this fact and the identity of the funder to the court and the other party at the commencement of proceedings. The details of such a third-party funding arrangement are, however, not subject to this requirement.

This provision is only a proposal to EU member states. It offers several notable features. First, it focuses on "a professional third-party funder." That would seem to exclude Uncle Fred who supports his niece after her car crash. But it includes "a crowd-funder." It requires disclosure "at the commencement of proceedings," and thus would not seem to include funders who only fund costs on appeal after success in the trial court. It says nothing about litigation control by the funder. It also does not seem to focus on whether the funding is recourse or non-recourse. The NAACP Inc. Fund would seemingly be subject to this disclosure requirement. It calls for disclosure to the opposing party, not just the court. But it excludes the "details of such a third-party funding arrangement" from the disclosure directive, and does not authorize discovery probing for more information. (It bears noting that discovery in EU legal systems is vastly more limited than American discovery. For discussion, *see* Marcus, *Reflections of an Outlier: An American Reaction to the EU Rules on Evidence*, 11 Int'l J. Procedural Law 106 (2021).)

Drafting issues going forward

The introduction above (and the very helpful October 23, 2025, conference at GW Law School) suggest a lot of drafting issues that might first be addressed at the level of determining what we want a rule to do.

Scope—What arrangements must be disclosed?

Except for mass torts, there seems not to be much appetite for disclosure of funding of personal injury claims. An early session on TPLF in Berkeley in about 2016 included a representative of what might be called the funding of "car crash" cases, and that seemed to be a high volume activity in which funder control would not be an issue because the funder would not know enough about all the cases it was funding to exercise control, even over settlement.

Nonetheless, defining what must be disclosed in light of the manifold accusations directed towards TPLF activity is a challenge, and drafting something that is workable, while presenting the usual drafting challenges, begins by deciding what one wants to include. It seems that the definition of what triggers the disclosure requirement is the biggest obstacle. Here are at least some of the issues.

Focus only on funding for attorney fees and litigation expenses: The District of New Jersey rule seems to exclude cases that involve funding for the plaintiff's living expenses—sometimes called "consumer funding"—by focusing on funding for "some or all of the attorney's fees and expenses for the litigation." That would seem to exclude the "Uncle Fred" situation in which Fred loans money to his niece to pay living expenses while her claim progresses, but expects to be paid back if the case pays off.

Exclude funding that does not seem designed to make the funder a profit: Another approach is suggested by Rep. Issa's bill—exclude any instance in which the payout is either only repayment or repayment plus a modest interest add-on. Much "social justice" funding probably would be excluded even though this is funding for litigation costs. Much of the lobbying for disclosure assumes that there is a big profit to be had for the funder; excluding instances in which that is not part of the deal could be a good idea, though figuring out what interest rate or profit is acceptable could get tricky.

Include crowd funding?: There is some indication that this activity has been involved in litigation funding in the U.S. How exactly it works is not clear to this reporter. Mentions of crowd funding in the press usually seem to deal with financial support for people who have suffered catastrophic injuries or other serious harms (including possible eviction). It is not clear how the provider of such funding would seek or obtain repayment of the amount provided.

Address litigation seeking non-monetary relief?: The original proposal seemed only to address the big bucks judgment or settlement. Others have taken account of additional litigation outcomes that would benefit funders in other ways. To the extent, however, that one is concerned about malicious litigants trying to use American litigation to bring down American companies that compete with foreign competition, however, there may be no payout contemplated; the goal could be simply to make trouble, not win money. Whether that really happens in litigation (possibly putting aside Hulk Hogan v. Gawker) is unclear. But maybe a variant could happen if Big Pharma Co. *A* finances patent holder's suit against Big Pharma Co. *B* to achieve a commercial objective by sullying the reputation of Co. *B* or tying it up in court. Similarly, perhaps, environmental litigation might be funded by competitors of the company accused by the "stooge" of environmental violations. In California, for example, litigation under the California Environmental

Quality Act is sometimes characterized as principally designed to hamstring proposed projects in the hope that the developer will eventually give up.

Exclude "social justice" funders?: The NAACP Inc. Fund might be an example of a "social justice" funder. In the present day, there are many groups that seem to fund "cause" litigation. For example, it seems that the Chamber of Commerce funds such litigation, at least at the appellate level. Indeed, that current reality appears to be one reason for considering expanded disclosures in the Appellate Rules with regard to amicus filings in the appellate courts. Probably most or all such funding could be exempted under something like the exclusion in H.R. 1109 for arrangements that do not call for a profit beyond a low percentage rate.

A special rule for patent infringement cases?: This sort of litigation surely has gotten a lot of attention. But the Civil Rules supposedly govern all cases, not only cases of a certain type. About a decade ago, there were stirrings in Congress about legislation to address the problem of "patent trolls." Some of that legislative effort focused directives to the rules process to develop rules to solve the reported problems.

Funding only appeals: In the U.S., some funders focus on appeals mainly or solely. Thus, if plaintiff wins a whopping verdict at trial the funder will provide funding to cover defendant's appeal for a share of the proceeds if the appeal does not wipe out the judgment. But that cannot be known until the trial court litigation is over or nearly over.

Address "portfolio funding"?: Particularly with mass torts, but perhaps with patent infringement cases also, one notion is that funders may not limit themselves to a single case. Instead, they may fund a law firm's portfolio of cases of a certain sort (e.g., Camp Lejeune claims). In the Camp Lejeune example, there have been reports that millions were spent on lobbying Congress to get what claimants' lawyers wanted in the bill that has led to the outburst of claims. Where all that money came from is not clear, but it is difficult to see how a funder could be funding not-yet-existing claims. Ongoing recruitment of claimants for some MDL mega-proceedings (e.g., Roundup and Zantac) are clearly widespread and must pay off in some way.

Including only non-recourse funding: A recurrent feature of the push for disclosure is that the funder gets nothing back unless the litigation is successful. The "portfolio funding" wrinkle is related to this concern. If the funder has provided funding for a share of all Camp Lejeune claims the firm has, and 50% are unsuccessful but the other 50% are successful, is that non-recourse funding or more like a law firm line of credit, in which the firm has pledged all its receivables as collateral. (True, the line of credit might also call for personal guarantees by the partners of the firm, but we are moving closer to a bank line of credit.) The claim that funders fund patent infringement claims hoping for a few big strikes alongside many failures may be similar.

Disclosure of what?

Fact of funding and identity of funder: The District of New Jersey local rule requires disclosure of the fact of funding (however defined) and the identity of the funder. That alone might avoid difficulties. In 2019, for example, a funder so suggested. *See* Michael German, *Sensible Disclosure Rule for Litigation Finance is Right Balance*, U.S. Law Week, Mar. 15, 2019.

Control: The District of New Jersey local rule also requires disclosure of what it defines as control. If one wants to exempt those funding arrangements that do not include such features, one would need a definition (going to the scope of the disclosure obligation). Otherwise, one could insist on disclosure of all covered funding arrangements and add this sort of disclosure feature. But defining what constitutes control could be difficult. Must the funding be a blank check because otherwise the funder can control the litigation by refusing further funding? Presumably the funder could condition further funding on adopting certain litigation tactics. One concern expressed by some proponents of disclosure is that funders will press claimants to settle for less than they could get by persisting in the litigation effort, and that their lawyers would disobey their duty of loyalty to the client to please the funder. On the other hand, the notion that getting funding may be critical to the ability of some claimants to pursue their claims at all suggests that, by definition, there is an element of control—the initial decision whether to provide funding. (Commercial funders say they provide funding in only a small percentage of the applications they receive.) If a disclosure rule keys on control, it may be tricky to define that term.

Additional details?: The District of New Jersey local rule also requires disclosure of "a brief description of the nature of the financial interest." It is not immediately clear what that adds to disclosure of "control." Perhaps it means whether this is non-recourse funding (if that is not a part of the definition of what arrangements must be disclosed). As suggested by the much more aggressive EU ideas on regulating litigation funding (briefly described below), it might also key on whether the funder has the financial wherewithal to provide the promised funding.

Adding Rule 7.1 types of disclosures regarding the funder: The Advisory Committee has recently dealt with expanding the Rule 7.1 disclosure requirements to identify corporate "grandparents," etc. It has often been asserted that disclosure is required to alert judges to the possible need to recuse. Rule 7.1 focuses on parties to litigation, not the funder of those parties. If one regards the recusal issue as important, some disclosure about corporate affiliations of the funder might be in order. There is an undercurrent in some of the writing expressing concern about patent infringement litigation that cleverly contrived and interlocked funders are hiding from sight. Trying to devise a rule that would ferret them out would be a challenge.

The entire funding agreement: The original disclosure provision mirrored the insurance disclosure provision already in the rules and called for the disclosure of the entire agreement. That could pinpoint things about "control" and other things that might justify authorizing further investigation via discovery. But one can say that this disclosure is different from insurance disclosure because, in the insurance situation, one is likely focused on "settlement for the policy limits." That, of course, lies behind tort claims against insurers for bad faith refusal to settle. In the TPLF context, on the other hand, unless litigation funding must be a blank check, disclosure of details may provide the opposing party with a guide to exhausting its opponent's resources (perhaps via expensive discovery forays about funding arrangements).

Communications leading up to execution of the funding agreement: As noted above, funders say they provide funding in response to only a small proportion of the requests for funding they receive. Commercial funders often say they have expert in-house lawyers who can assess the claim and know what to ask of the lawyers requesting funding. That would often include core opinion work product. But eliciting details about the assurances, etc., that led up to the agreement

might also shed light on "control" issues. Thus far, proposals do not seem to call for this sort of disclosure, but it may be that follow-up discovery efforts would target these communications.

Disclosure to whom?

The court alone: There seems to be little question that the court now has authority to direct disclosure on a case-specific basis. The District of New Jersey local rule has not been challenged as violating the strictures of Rule 83 (so far as has been reported to us). So it is not at all clear that a rule saying courts may direct disclosure would add significant authority to what already exists. Perhaps adding this possibility to Rule 16 would be a way to flag the question for the court. If so, one might add it to the laundry list in Rule 26(f) as well.

To other parties: Ordinarily proponents of disclosure insist on disclosure to other parties. They are thinking about the adverse parties, and they claim that disclosure to the court alone is a forbidden "ex parte" communication. Disclosure proponents sometimes say that they can identify topics glossed over in the funding arrangements that the court needs to pursue but may not recognize. On this score, it has not been said, but comes to mind, that funding might be of interest to co-parties. For example, suppose some plaintiffs have funding and others do not. Of course, co-parties are fully free to make disclosures to one another. (Compare the common-interest exception to waiver of privilege when attorney-client or work-product materials are shared among co-parties.) So probably the focus should be on adverse parties, but if disclosure is required to them, it presumably would be made to co-parties as well.

To bar associations, etc.: Proponents of disclosure often suggest that plaintiff attorneys who receive funding may be tempted to breach their duty of loyalty to their clients because they are beholden to the funders. Maybe there are sometimes concerns that would warrant disclosure to regulators of lawyer ethics. To date, despite these intimations from disclosure advocates, this has not been an included ingredient.

Explicitly authorizing further discovery

The District of New Jersey local rule explicitly alerts the judge about possible discovery, but it is seemingly limited to issues of control or a showing of a conflict of interest. Perhaps that expands the scope of discovery on the notion that funding arrangements are not within Rule 26(b)(1). But one might expect that if disclosure to adverse parties is required, they would seek discovery on whatever ground they could devise. For example, in terms of discovery of communications between the funder and the attorney seeking funding, one argument might be that there are Rule 11 issues that call for further revelations. Unless there is some concern that—absent a provision authorizing discovery—courts might consider themselves constrained by the scope of discovery from ordering it in appropriate cases, it is not clear why this sort of provision is needed.

Alternatively, it might be that a rule could explicitly *forbid* certain sorts of discovery. By way of comparison, Rule 26(b)(3)(B), which applies when the court concludes that a party has made a sufficient showing to justify discovery of fact work product, directs that the court "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." *Compare* Cal. Code Civ. Proc.

§ 2018.030(a) ("A writing that reflects an attorney's impressions, conclusion, opinions, or legal research or theories is not discoverable under any circumstances.").

The EU regulatory contrast

The introduction includes the disclosure provision included in the ELI/UNIDROIT Model European Rules of Civil Procedure (2020). The EU has moved on beyond that are discussed in Marcus, *The "Advanced" Systems Grapple With Third Party Litigation Funding*, 29 ZZPInt. 129 (2025). In 2022, the EU Parliament adopted a resolution on "Responsible private funding of litigation." *See* European Parliament resolution of 13 September 2022 with recommendation to the Commission on Responsible private funding of litigation (2020/2130 (INL)). In early 2025, an agency of the EU released a 700-page study entitled Mapping Third Party Litigation Funding. This study does not show that most EU member states have yet taken up the cudgel recommended in the 2022 document. But it may be useful to describe elements of that 2022 set of proposals for purposes of comparison:

Definition of covered activities: The 2022 proposal was that a "litigation funder" be a commercial entity "which has the primary aim of receiving a return on an investment it makes." That might well exclude the deal between Peter Thiel and Hulk Hogan, and funding by malign foreign governments trying to use American litigation to achieve malign purposes but not to make money directly from the litigation. But unless the funder is primarily or solely engaged in litigation funding (as opposed, perhaps, to "hedge funds" looking for profit-making activities of whatever sort), such a definition might not catch some the proponents of disclosure would prefer that a rule identify.

Regulation of funders: The EU 2022 resolution also urges that member states "create a system for the authorisation and monitoring of the activities of litigation funders." This sounds like the way most or all states treat insurers. This regulatory setup would include "an independent supervisory department or authority tasked with granting, suspending, or withdrawing authorisations for litigation funders and supervising the activities of litigation funders."

Registration of funders: The EU resolution also urges that member states provide that funders "conduct their activities through a registered office in a Member State." That is probably true of insurers in the U.S. to some extent, under existing state regulation of insurers.

Adequate financial resources: Member state regulation should require that a funder demonstrate "adequate financial resources to * * * fund all stages of any proceedings they have committed to." Regulatory authorities should ensure that their supervisory authorities can verify the funder's financial capacity, and the regulators should "set up a specific insurance fund to cover all the outstanding costs of claimants * * * in case a litigation funder becomes insolvent."

Acting in the best interests of claimants: The 2022 resolution also proposes that the regulators require funders to adhere to "a fiduciary duty of care requiring them to act in the best interests of a claimant." This recommendation seems to focus on the risk the funder would pressure the lawyer to violate the lawyer's duty of loyalty to the client by imposing a similar duty on the funder.

Contents of funding agreements: The 2022 resolution calls for member states that permit litigation funding to direct that funding agreements not include any provision that gives the funder control. Such agreements may not guarantee the funder a minimum return, and (absent "exceptional circumstances") include anything that would dilute the share paid through to the claimant below 60% of the total award.

Withdrawing funding: Agreements should provide that the funder cannot withdraw funding unless the court has authorized termination of the agreement. It is not entirely clear if this sort of provision would give the recipient of funding a blank check.

Judicial authority to modify the funding agreement: Disclosure to the court is also required, and the court is to be given authority to modify the agreement so that it conforms to the requirements mentioned above. The court would be authorized to determine whether the agreement would give the funder "an unfair, disproportionate or unreasonable share of any award," and to take account of "the value of a litigation funder's financial contribution."

* * * * *

In a sense, one might say that this list of detailed requirements and prohibitions with regard to the funding agreement resembles the sort of regulation states often impose on insurers. It is difficult to imagine that the Enabling Act authorizes the Advisory Committee to propose rules along these lines. This thumbnail description is not offered to suggest that this committee can do these things, but it may provide a context for evaluating what this committee can propose.

Moving forward from here

One conclusion that might be said to flow from various discussions of TPLF disclosure was put into words by litigation funders:

> Neutral bodies attempting to objectively evaluate disclosure proposals are perpetually presented with the diametrically opposed narratives of the defense bar, on the one hand, and the commercial funding industry, on the other.

Dai Wai Chin Feman & William Weisman, *Litigation Funders Seek Transparency in Disclosure Debate*, Law 360, Nov. 23, 2022.

One might say there is a lot of underbrush to clear away to devise a possible rule amendment proposal. Ideally, reviewing all these ideas and assertions will enable choices to be made about what should be included and what need not be included.

IV. ADDITIONAL MATTERS UNDER CONSIDERATION

(a) Rule 23 Issues

As reported during the Standing Committee's January 2026 meeting, the Advisory Committee has received proposals for Rule 23 amendments to address three topics: (1) resolving a circuit split about the legality of "service awards" for class representatives; (2) providing judges

with some authority to review pre-certification settlements in cases filed as putative class actions but not yet certified; and (3) amending Rule 23(b)(3) to permit a court asked to certify a class action to consider not only adjudicatory alternatives but non-adjudicatory alternatives in making the superiority determination the current rule says should be considered.

The Advisory Committee has undertaken Rule 23 projects on three prior occasions. First, in the 1990s it undertook a review of certification provisions leading in 1996 to publication of a preliminary draft of several amendments, including a new Rule 23(f) on interlocutory appellate review of class-certification decisions. After public comment, all the proposed changes except the Rule 23(f) provision were withdrawn. Second, in 2001 a new set of proposed amendments was put out for public comment, about the timing of certification decisions and also a new Rule 23(g) about appointment of class counsel and Rule 23(h) about awards of attorney fees in class actions. These changes went into effect in 2003. Then in 2016, a package of amendments was published for comment, leading to extensive expansion of the settlement approval provisions of Rule 23(e), which went into effect in 2018. The process leading to the 2018 amendments to the rule included extensive consideration of a number of amendment ideas and at least one full-day mini-conference following which many of these amendment ideas were dropped.

At its April 2026 meeting, some members of the Advisory Committee expressed misgivings about inaugurating another class action project. Though the three issues identified above have been presented to the Advisory Committee, a new project would likely attract additional proposals to change the rule. Some members of the Advisory Committee observed that they personally favored pursuing several other amendment ideas rather than the ones raised in the recent submissions. As a possible measure of the prominence of the issues described above, it might be noted that in 2026 the Advisory Committee has received eight more submissions on those issues already raised—mainly in support of the Rule 23(b)(3) superiority change.

The question whether to proceed with work on Rule 23 remains before the Advisory Committee. It would benefit from reactions by Standing Committee members on whether proceeding would be useful.

(b) Rule 35—Presence of Representative of Examined Party and Right to Record Examination

The American Association of Justice (AAJ) has proposed that Rule 35 be amended to authorize the party subject to examination to have a representative present at the court-ordered examination, and also to permit the party to record the examination. The AAJ submission identifies several states that have such provisions for court-ordered examinations. The issues are presented at pages 425-36 of the Advisory Committee's agenda book for the April meeting, accessible via the link the beginning of this report.

Discussion at the April Advisory Committee meeting raised questions about whether this would be a promising idea, but some attorney members urged that it would be an important improvement. The Advisory Committee is undertaking research on the situation, and would benefit learning any views of Standing Committee members.

(c) Rule 58—"Separate Document" Requirement and Collateral Orders

There was a proposal to exempt collateral orders from Rule 58's requirement of a separate document. At the Advisory Committee's April 2026 meeting, there was discussion of the problems resulting from Rule 54(a)'s description of a "judgment" as "any order from which an appeal lies," and the operation of the collateral order doctrine. The entry of a separate document on the docket triggers the running of the 30-day time limit to notice an appeal. But if no separate document is entered on the docket the time to appeal would not start running until 150 days after the entry of the order. Amendments were made to Rule 58 in 2002, but district courts rarely enter a "separate document" on the docket after entering orders that might qualify for collateral order treatment. The main example seems to be orders denying qualified-immunity defenses, but defendants who make motions to dismiss on that ground ordinarily pursue prompt appeals. Ordinarily defendants want to avail themselves of an immediate opportunity to appeal.

The committee note to the 2002 amendment to Rule 58 observed that "[d]rastic surgery on Rules 54(a) and 58 would be required to address this and related issues." The Civil Rules Committee members did not express enthusiasm for embarking on this project. If such an effort were pursued, however, that would inevitably require a joint effort with the Appellate Rules Committee. The matter remains pending.

V. MATTERS DROPPED FROM AGENDA

During its April 2026 meeting, the Advisory Committee also decided to drop a number of matters from its agenda. The following report briefly describes these matters and refers to the pages in the Advisory Committee's April 2026 agenda book where more information can be found:

A rule for FSLA collective actions (pages 420-23)

A rule addressing artificial intelligence "hallucinations" (pages 438-50)

"Algorithmic spoliation" of discoverable material (pages 466-72)

Protective order "templates" (pages 474-96)

Mandatory Assistance for Pro Se Litigants (pages 498-511)

As reflected in the draft Advisory Committee minutes included in this agenda book, the Advisory Committee voted unanimously to drop each of these matters.

TAB 19

DRAFT MINUTES
CIVIL RULES ADVISORY COMMITTEE
Charlotte, NC
April 14, 2026

The Civil Rules Advisory Committee met at the United States District Courthouse for the Western District of North Carolina in Charlotte, North Carolina, on April 14, 2026. The meeting was open to the public. Members present included Judge Sarah Vance, Advisory Committee Chair; Advisory Committee Members Judge Cathy Bissoon, Justice Jane Bland (remotely), David Burman, Judge Annie Christoff, Dean Zachary Clopton, Mark Lanier, Jocelyn Larkin, Judge Hannah M. Lauck, Judge R. David Proctor, Judge Marvin Quattlebaum, Judge Manish Shah (remotely), and David Wright. Professor Richard L. Marcus participated as Reporter, Professor Andrew D. Bradt as Associate Reporter, and Professor Edward H. Cooper as Consultant (remotely). Judge James Dever III, Chair, Professor Edward Hartnett, Reporter, and Professor Catherine Struve, Consultant (remotely), represented the Standing Committee. Judge Catherine P. McEwen participated as liaison for the Bankruptcy Rules Committee. Clerk Liaison Thomas Bruton also participated. The Department of Justice was represented by Joseph Bosen and Betsy Shapiro. Judge Robert Conrad, Director of the Administrative Office of the U.S. Courts (AO), was also in attendance. The Administrative Office was also represented by Carolyn Dubay, Sarah Sraders, and Rakita Johnson. Dr. Emery Lee and Dr. Tim Reagan (remotely) represented the Federal Judicial Center (FJC).

Welcoming Remarks

Judge Vance opened the meeting by welcoming Advisory Committee members, other participants, and observers, and thanking them for their participation and interest in the rulemaking process. Judge Vance noted that several members will be leaving the Advisory Committee before its Fall 2026 meeting. Each of them will be missed.

Judge Godbey chaired the Discovery Subcommittee and shepherded amendments designed to improve the handling of "privilege logging" in compliance with Rule 26(b)(5)(A), now in effect, and (as addressed in the agenda book) revising the method for serving subpoenas in Rule 45(b)(1).

Judge Proctor chaired the Multidistrict Litigation (MDL) Subcommittee, which produced new Rule 16.1, now in effect, and has also chaired the Third-Party Litigation Funding (TPLF) Subcommittee, which has made substantial progress in dealing with possible Civil Rule treatment of this topic.

David Burman may have set a record for subcommittee service, since he actively served on almost all of the subcommittees during his tenure on the Advisory Committee. In particular, he was a member of the Discovery Subcommittee, the MDL Subcommittee, and the Rule 43/45 Subcommittee.

Judge Vance also thanked Chief Judge Martin Reidinger, Clerk of Court Katherine Simon, and the staff of the Western District of North Carolina for their great help in organizing this meeting. In addition, she thanked the hard-working Rules Committee staff members whose arrangements ensured that the Advisory Committee could smoothly address its work.

Draft

Opening Business

Report of the Rules Committee Staff

Carolyn Dubay reported that a new rules amendment package was delivered to the Supreme Court, but also that it did not include any civil rules. Rule 16.1 and the "privilege logging" amendments (shepherded by Judge Godbey's subcommittee) went into effect on December 1, 2025.

Sarah Sraders called attention to the legislative report beginning on page 65 of the agenda book for the meeting and noted that there had been considerable legislative activity regarding TPLF, but that this topic would be taken up in the report of the TPLF Subcommittee.

Before turning to the action items, Judge Vance reported that in January the Standing Committee approved for publication the proposed amendment to Rule 55 on default judgments. Judge Vance congratulated the Advisory Committee on its work on this proposal.

Action Items

Approval of Minutes

The draft minutes of the Advisory Committee's October 2025 meeting were in the agenda book, beginning at page 71. On motion, the Advisory Committee unanimously approved them.

Items for Final Approval

Judge Vance noted that the next six action items recommend that the Advisory Committee seek final approval of the amendments to Rules 7.1, 41(a), 45(c), 26(a)(3)(A), 45(b)(1), and 81(c)(3), all of which were published for public comment in August 2025.

Rule 7.1

The pertinent provisions of the amendment to Rule 7.1 were introduced by Judge Vance. It substitutes "business organization" for "corporation," which appears in the current rule. It also calls for disclosure when such an entity "indirectly" owns more than 10% of a party to the case. This change was a response to the "grandparent" corporation problem that caused concerns under the current rule.

The proposed amendment received few comments during the public comment period, and all but one were favorable. There was a suggestion that disclosure of third-party litigation funding be added to Rule 7.1, but that is the topic of the TPLF Subcommittee. These changes to Rule 7.1 are principally designed to assist judges in determining whether they should consider recusal.

The Rule 7.1 Subcommittee, chaired by Justice Jane Bland, recommended final adoption of preliminary draft as published. On motion, the Advisory Committee voted unanimously to recommend final adoption of the amendments to Rule 7.1 as published for public comment.

Draft

Rule 41(a)

The proposed amendment makes it clear that the rule authorizes timely dismissal without prejudice of one or more claims even if the dismissing party does not dismiss the entire action. In addition, the amendment changes the participation required for stipulated dismissal to require stipulation only by the parties that "have appeared and remain in the action."

Judge Bissoon (Chair of the Rule 41(a) Subcommittee) noted that the rule revision proved very popular during the public comment period. During the public comment period there were, however, a number of suggested tweaks to the amendment. The subcommittee considered these proposed changes and concluded that they were unnecessary and could actually complicate practice under the amended rule. The subcommittee therefore recommended final adoption of preliminary draft as published.

On motion, the Advisory Committee voted unanimously to recommend final adoption of the amendments to Rule 41(a) as published for public comment.

Rule 45(c)

Judge Vance introduced the discussion. The proposed amendments are largely designed to reverse the outcome in the Ninth Circuit decision in *In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023). The amended rule clarifies that a subpoena for remote trial testimony can be served nationwide, so long as the witness is not required to appear at a location farther than the distance authorized in Rule 45(c)(1) to give the remote testimony. The Rule 43/45 Subcommittee recommends only one change to the published amendment proposal, and that only in the note. The note, which appears at lines 69-80 on page 119 of the agenda book, would be revised as follows:

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

Judge Hannah Lauck, Chair of the Rule 43/45 Subcommittee, noted that this small change in the note avoids the risk that the amendment might be read to place new limits on the use of remote testimony for proceedings other than trials. The question whether to revise Rule 43(a)'s current "compelling circumstances" requirement for remote testimony remains before the Rule 43/45 Subcommittee and appears later in the agenda for this meeting.

Judge Lauck outlined the subcommittee's consideration of the public comments on Rule 45(c). Various wording changes were urged, as noted in the agenda book for this meeting at pages 113-15. Except for the revision of one paragraph of the note, the subcommittee did not favor any of these changes.

Draft

One proposal made during public comment was to defer action on this change until after the question whether Rule 43(a) would be revised is finished. Those who favored this delay did not voice opposition to the Rule 45(c) change but thought it should not happen until the Rule 43(a) revision question was resolved. But doing that would be risky and leave open the possibility that the *Kirkland* decision might cause difficulties.

There were also recommendations that the rule itself require advance approval by the court as a precondition for serving a subpoena for remote trial testimony. But that seems unnecessary; remote trial testimony is always subject to the court's approval under Rule 43(a). In addition, the proposed amendment to Rule 26(a)(3) (discussed next) alerts the parties that a party intends to call a trial witness by remote means, which should often call attention to the need for court approval. Though there may be situations in which a last-minute unforeseen problem causes the need for remote testimony (the main focus of current Rule 43(a)), except in that situation the remote trial testimony issue should not be a surprise to the court or the parties.

On motion, the Advisory Committee voted unanimously to recommend final approval of the proposed amendment to Rule 45(c) as published for public comment, with the change noted above to one paragraph of the committee note.

Rule 26(a)(3)(A)

As noted above in regard to the Rule 45(c) amendment, the preliminary draft of proposed amendments included a small change to Rule 26(a)(3)(A)(i) directing each party to specify whether any of the witnesses it "expects to present [at trial] and those it may call if the need arises" will provide remote testimony. Though there may be emergency situations in which this advance notice is impracticable, this change should be useful generally.

The amendment proposal received little comment during the public comment period, most of it favorable.

On motion, the Advisory Committee voted unanimously to recommend final approval of the proposed amendment as published.

Rule 45(b)(1)

Judge Vance introduced the proposed amendment as addressing uncertainty that sometimes resulted from the directive in current Rule 45(b)(1) that a subpoena be "delivered" to the witness. The current rule does not specify how that delivery is to occur. The amendment borrows methods authorized for service of original process under Rule 4(e)(2)(A) and (B) and adds the possibility of service by U.S. mail or commercial carrier, providing that "the selected method provides confirmation of actual receipt." In addition, the amendments would add a 14-day notice requirement (subject to change by the court) and relax the current requirement that the witness fee be tendered at the time of service, offering the alternative of tendering the fee "at the time and place the person is commanded to appear."

Judge Christoff represented the Discovery Subcommittee in the absence of Judge Godbey (who was out of the country). Many comments came from process servers, expressing misgivings about adverse consequences of adopting the amended rule.

Draft

Judge Christoff noted that a number of public comments were considered by the subcommittee but not found to justify changes in the published amendment proposal.

Some comments raised specific issues. Some seemed to find the invocation of the terms in Rule 4(e)(2)(A) and (B) to create uncertainty. One question was whether the proposed amendment directing that "delivering a copy [of the subpoena] to the named person personally" created uncertainty—is that hand delivery or something else? But this locution had been approved by the Standing Committee Style Consultants.

Other comments worried that the term "confirmation of receipt" might cause difficulty under the proposed new Rule 45(b)(1)(A)(iii). But trying to be more specific about what exact method of confirming receipt suffices could fail to anticipate advances in technology or otherwise that would make various new methods of service suitable. (As noted below, other concerns led to a revision of the committee note discussion concerning who must be shown to have received the subpoena via U.S. mail or commercial carrier.)

Some comments expressed misgivings about the relaxation of the current requirement that the witness fee be tendered as part of the process of serving the subpoena. Some worried that—particularly in depositions—serving parties might withhold tender of the fee until satisfied with the witness's testimony. But the amended rule says that, if not tendered at the time of service, the fee must be tendered "at the time and place the person is commanded to appear." Waiting until the end of the deposition would not comply with that directive.

It was also noted that ordinarily parties serving subpoenas want the witness to appear and therefore want to be of assistance in ensuring that happens.

Regarding the 14-day notice period introduced by these amendments, there was one suggestion that the period be increased to 21 days, but the subcommittee did not decide that should be adopted.

A question was raised about the provision of (iii) that the selected method must provide "confirmation of actual receipt"—does that only apply to commercial-carrier delivery, or also to U.S. mail. The answer was that it applies to any method authorized under (iii).

A different concern about (iii) was raised, however—receipt by whom? The answer was that it should be a person on whom service is authorized under (i) or (ii); the goal of the amendment is to offer an alternative means of serving a person who must receive the subpoena under (i) or (ii).

A different question was raised about a citation in the committee note—"*Cf.* Rule 45(b)(4) (proving service of subpoena)." But Rule 45(b)(4) says that proof of service "must be certified by the server." How does that work with FedEx?

Yet another question was raised—Rule 5(b)(2)(A) says service in general involves "handing it to the person." Is that different from the proposed amendment in (i)—"delivering a copy to the named person personally"? One response was that the Rule 45(b)(1) amendments were modeled on Rule 4, not Rule 5, and Rule 4(d)(2)(A) says "delivering a copy * * * to the

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individual personally." This language (approved by the Standing Committee Style Consultants) is parallel.

Another comment raised concerns about the uncertainty about who must receive service under (iii) when done by U.S. mail or commercial carrier.

These concerns prompted the suggestion that the subcommittee caucus during the lunch break and determine how best to proceed.

During the lunch break, the subcommittee met (along with reporters and the Advisory Committee Chair). After the lunch break, Judge Christoff reported the subcommittee's views.

First, given the parallelism with Rule 4, the published rule language "delivering a copy to the person personally" seemed clear, and changing the rule amendment seemed unnecessary.

But with regard to the committee note paragraph at lines 63-71 of the agenda book, the subcommittee believes it should be changed to state explicitly that the person who must receive notice is a person identified in (i) or (ii), and also to delete the unnecessary Cf. reference to Rule 45(b)(4). Accordingly, the subcommittee recommended that paragraph should be revised as follows:

> The amendment also adds another option—service by United States mail or commercial carrier to the person's last known address, if the selected method provides confirmation of actual receipt <u>by a person identified in Rule 45(b)(1)(A)(i) or (ii)</u>. The rule does not prescribe the exact means of confirmation, but courts should be alert to ensuring that there is reliable confirmation of actual receipt. ~~*Cf.* Rule 45(b)(4) (proving service of subpoena).~~ Experience has shown that this method regularly works and is reliable.

On motion, the Advisory Committee voted to unanimously recommend final approval of the amendment as published, with the above revision to the note.

<u>Rule 81(c)(3)</u>

The amendment seeks to clarify the timing and need for a jury demand in removed cases. Presently, unless a jury demand was made before removal, a demand must be made within the time limits of Rule 38 unless "state law did not require an express demand for a jury trial," in which case a demand must be made only if the district court so orders. This provision introduced uncertainty about when a demand is required because there may be uncertainty about whether a given state is one that requires such a demand. Informal inquiry revealed that some very experienced federal judges were not certain whether such a demand is required by the state courts in their states.

The amendment requires a demand in accordance with Rule 38 unless a demand has been made before removal. But as noted in the committee note the court may, under Rule 39(b), order a jury trial even though no timely demand was made.

The proposed amendment attracted few comments, all favorable.

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On motion, the Advisory Committee unanimously voted to recommend final approval of the amendment as published for comment.

Items for Publication for Public Comment

Service and E-filing by Self-Represented Litigants

Judge Vance introduced the next item, which was a proposal that the Advisory Committee recommend for publication proposed amendments to Civil Rules 5 and 6 to address service and electronic filing by self-represented litigants. This proposal parallels proposals to be considered by the other rules committees, which, if approved, would be presented as a package to the Standing Committee in June. The proposed amendment to Civil Rule 5 would flip the default presumption from one of non-access to one of access by self-represented litigants to the court's electronic-filing system. The proposals as set out in the agenda book include bracketed language in two places.

Judge Vance first highlighted bracketed language in the committee note to proposed Civil Rule 5(d)(2)(B), agenda book page 211, lines 220-223, which states an example of a "reasonable exception" to a general rule permitting electronic filing: "For example, local provisions that require unrepresented parties who seek to use the court's electronic-filing system to obtain permission from the judge to whom the case is assigned would count as including reasonable exceptions, so long as such permission is not unreasonably withheld in practice." This language was included in the draft at the suggestion of a member of the Criminal Rules Committee. In essence, it means that a court could prohibit all self-represented parties from using the court's electronic-filing system if the court has a provision requiring self-represented litigants to obtain permission from the presiding judge—so long as that permission is not unreasonably withheld in practice. The language would recognize practices in the many district and appellate courts that now permit self-represented litigants to request permission to use the court's e-filing system. But it has been pointed out it could be difficult for a self-represented litigant to show that a court unreasonably withholds permission as a matter of practice, and it has been suggested that the language could be used to bless denying electronic-filing access to self-represented litigants in general.

Professor Marcus observed that the proposed amendments are the product of years' worth of coordinated work. What is needed at this point is public comment. Picking up on Judge Vance's observation that the proposed amendment to Civil Rule 5 would flip the default presumption from one of non-access to one of access, Professor Marcus observed that the bracketed note language made it sound as though a given judge could decide to flip the default presumption back to one of non-access. If the bracketed language stays in the draft for purposes of public comment, it could draw a lot of fire. It does not sit well with the text of the proposed rule as shown on page 207, lines 80-86. On the other hand, if the bracketed language is removed, people might argue it should be put back. Professor Marcus suggested that ultimately, the Standing Committee would need to make the judgment call.

Judge Vance requested comment on the bracketed note language. The Clerk of Court Representative suggested that the Advisory Committee should delete the bracketed language.

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The text of the rule is clear, but the bracketed note language would cause confusion among clerks of court.

A judge member asked what kind of local rule might be adopted as a prohibition on self-represented litigants' access to the court's electronic-filing system, other than the type of local rule described in the bracketed note language. Professor Marcus observed that the bracketed note language referred to "local provisions"; he said that a local rule would count as a local provision, and he observed that a court could order that a particular self-represented litigant not be allowed to use the electronic-filing system, but he suggested that the rule would not permit an individual judge (in the absence of a local rule) to adopt an individual practice of disallowing use of the electronic-filing system by all self-represented litigants appearing before that judge. Judge Vance noted that the bracketed note language pertained to proposed Civil Rule 5(d)(2)(B)(ii), which would state that

> 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.

The bracketed note language goes to the question of what constitutes a reasonable exception. The judge member who had asked about possible local rules suggested that the note language seemed to be consistent with what the rule text is trying to accomplish.

The academic member observed that, throughout the proposed rule text, there are references to "court order or local rule," except that on page 207, lines 85-86, the proposed rule text says that a self-represented litigant "may be required to file electronically only by order in a case or by a local rule that includes reasonable exceptions." He observed that district courts manage procedure through various means, including court-wide standing orders, individual judge standing orders, and orders in a case. The language at lines 85-86, he noted, seems to permit local rules and orders in a case but not standing orders, and he wondered whether the rule text was intended to exclude the use of standing orders.

Professor Struve responded that the language was intentionally used. The current rule says that a self-represented litigant may be required to file electronically "only by court order, or by a local rule that includes reasonable exceptions." She thought it would be quite unusual for courts to be requiring unrepresented parties to file electronically in federal court, and that is something that the rules have been cautious about for years. Criminal Rule 49 does not even have the provision permitting courts to require self-represented litigants to file electronically. If a court feels that they need to be able to use a general order to require self-represented litigants to file electronically, in order to preserve the spirit of the existing rule it would need to be a general order that includes reasonable exceptions. But, she noted, none of the project participants had hitherto asserted that a court needed more flexibility to be able to compel self-represented litigants to file electronically. The provision is deliberately designed to be protective—that is, if the court is not adopting such a requirement by means of a provision that includes reasonable exceptions, then it can only do so by order in a case. By contrast, the rule text at line 83 refers to

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"a court order or local rule" because—when the question is the court's ability to opt out of the new presumption of access to the electronic-filing system—the rule is designed to afford courts flexibility to comply with the new rule in the way that best fits their circumstances, and in many courts the topic of access to the court's electronic-filing system is addressed in the court's CM/ECF order rather than solely by local rule.

On the general policy choice about whether to include the bracketed note language, Professor Struve noted that the current landscape of district-court practices includes some courts that provide self-represented litigants with access to the electronic-filing system as a matter of course; many courts that say self-represented litigants can use the electronic-filing system if they get permission; and perhaps 15 percent of courts that say self-represented litigants can never use the court's electronic-filing system. So the question is how much of the current landscape the rulemakers wish to alter. If the current note language is retained, it could reassure potential opponents of the overall change by evincing an intent to outlaw only the most extreme practice of saying, "don't even try to apply for access." The thought was that there could be more opposition to the electronic-filing amendments absent this type of reassurance to courts that are currently operating a by-permission system that they can continue using their current practice so long as they, in fact, are in good faith generally giving permission when it seems reasonable to do so. But, Professor Struve noted, the Clerk Representative's prediction that the bracketed note language could cause confusion in clerks' offices should be taken seriously. She noted that either way, there would likely be public comment on this point.

A judge liaison noted that an example of a local rule that she would consider useful would be one that says that a person will lose their right to use the court's electronic-filing system if they use the system to purport to tender payment of a mortgage, or purport to pay fake money through the system, or file a picture of a dead body that has no connection to the case.

A judge member stated that he had no strong feelings about whether to keep the bracketed note language in for purposes of publication. He stated that the language did not directly contradict the text's "reasonable exceptions" language, but that the two were in some tension: If someone were strictly following the rule text, he was not sure that they would arrive at the approach described in the bracketed note language.

Judge Vance pointed out that the draft included one other bracketed item, this one being non-controversial. It was on lines 21-22 on pages 204-05 of the agenda book, and the proposal was to include the bracketed language "by a notice of case activity" in the sentence addressing when service is complete for deadlines that run from the date of service. She asked whether anyone objected to including that language; no objection was raised.

Judge Vance asked whether there was a motion to recommend that the Standing Committee approve for publication and public comment the proposed amendments to Rules 5 and 6 as they appeared on pages 204-211 of the agenda book, including the bracketed language on lines 21-22 on pages 204-205 and including the bracketed language in the committee note on lines 220-223 on page 211 of the agenda book. The motion was made and seconded and passed unanimously.

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Privacy-Related Amendments to Rule 5.2

Judge Vance introduced this inter-committee proposal to publish proposed amendments to Rule 5.2 on privacy protections for court filings. This proposed amendment is expected to correspond with an anticipated proposal from the Criminal Rules Committee regarding Criminal Rule 49.1. Similar to the amendments related to filings by self-represented litigants, these proposals result from a project initiated by the Standing Committee in 2022 to develop updated privacy protections in parallel across the various rule sets. The other rules committees will consider whether to approve their respective privacy proposals at their spring meetings.

Sarah Sraders, Counsel to the Rules Committees, then presented the proposed amendments, which are substantially the same as those that appeared in the agenda book for the Advisory Committee's October 2025 meeting. The main thrust of the amendments is to enhance privacy protections by requiring complete redaction of Social Security numbers (SSNs), Individual Taxpayer Identification Numbers (ITINs), Adoption Taxpayer Identification Numbers (ATINs), and Employer Identification Numbers (EINs). This redaction requirement would also apply to filed exhibits and attachments. The proposed amendments would also require the use of pseudonyms rather than initials for minors. The civil, criminal, and appellate rules committees are all apparently in agreement that these proposals should go forward so that an aligned proposal covering all three rule sets may be considered for publication by the Standing Committee at its upcoming meeting in June.

The Criminal Rules Committee has taken the lead on drafting these amendments, and its subcommittee had just recently resolved a question over whether the redaction requirement should apply to EINs. The DOJ had opposed such redaction, deeming it unnecessary, but the subcommittee was persuaded that inclusion of such numbers in filings could present potential for fraud and concluded that they should be redacted. A lawyer member of the advisory committee sought more information on that decision, noting that disclosure of EINs is often required in various non-litigation settings. Ms. Sraders elaborated that EINs had sometimes been misused in an effort to commit fraud against the government. Chief Counsel to the Rules Committees Carolyn Dubay added that sometimes individuals have EINs they must use when paying household employees, and they are more vulnerable to identity theft than corporations. She added that the Bankruptcy Rules Committee may conclude that redaction of EINs is not necessary. Professor Bradt added that the Criminal Rules subcommittee had also noted that the Social Security Administration and Tax Court have begun requiring full redaction of EINs, suggesting that there may be broader concerns. Mr. Bosen, on behalf of the DOJ, noted the Department's disagreement with the decision to require redaction of the full EIN, but that this disagreement should not stand in the way of moving the proposed amendments toward publication.

A judge member asked whether there had been discussion of how to treat cases where parents bring a case on behalf of a minor, since the minor's name would be easily identifiable under such circumstances even if a pseudonym were used. Ms. Dubay reported that she was unaware of such a discussion but that she would note the issue.

Another judge member suggested making clear in the committee note that the clerks' office is not responsible for correcting a party's failure to redact personal information. Professor

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Marcus noted that failure to redact that information serves to waive the protection under Rule 5.2(h). Any other concerns are likely to come up during the public-comment period.

After a motion, the Advisory Committee unanimously voted to recommend that the Standing Committee approve the amendments for publication.

Information Items

Subcommittee Reports

Rule 43(a) Remote Trial Testimony

Judge Lauck (Chair of the Rule 43/45 Subcommittee) introduced the topic of remote trial testimony by thanking the members of the subcommittee for their untiring work on the project. The subcommittee had met four times since the Advisory Committee's October 2025 meeting and had made substantial progress.

Judge Lauck noted that at first, this project may have seemed like an easy task, since technology has changed dramatically since the current rule was adopted in 1996, when telephone was the likely mode of providing remote testimony. The caution reflected in the rule's current insistence on "compelling circumstances" to justify remote testimony reflects not only the system's central commitment to in-person, in-court testimony at trial, but also the extent to which the use of telephonic means would deprive the jury of critical information needed to evaluate that testimony. This technological state of affairs is even reflected in the dated language used in the current Rule 43(a)—"contemporaneous transmission from a different location." The amendment draft substitutes "contemporaneous remote testimony," reflecting contemporary usage.

But the subcommittee's deliberations focused on how current alternatives to the telephone now offer something much more like in-person witness testimony. And the pandemic beginning in 2020 prompted and in some instances required courts to employ the new technology in situations in which in-court proceedings would have been assumed in the past. This change was particularly notable in non-trial proceedings including motion proceedings governed by Rule 43(c).

So the subcommittee's initial approach, presented at the Advisory Committee's October 2025 meeting, sketched out in its draft committee note an appreciation that the tethers of the "compelling circumstances" standard could be loosened.

At the Standing Committee's January 2026 meeting, several members of that committee voiced serious concerns about the approach the subcommittee had presented to the Advisory Committee during the October 2025 meeting, which was included in the Advisory Committee's report to the Standing Committee. Among the concerns were (1) that the rule change could make entirely remote trials routine or the new norm; (2) that jurors cannot reliably assess credibility based on the image of the witness on a screen; (3) that coaching of the witness could be enabled; (4) that more generally there was an increased risk of improper actions that could not occur in a courtroom; (5) that some jurors might feel put upon if they had to show up in court but the witness did not; and (6) that judges would be besieged with requests for remote testimony.

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Since the Standing Committee meeting, the subcommittee has reflected carefully on these concerns. It continues to favor the same change to the rule but has significantly recast the note. From the start, the note makes clear that the amendment does not represent a retreat from the Rules' commitment to the centrality of live in-person trial testimony. It provides that the decision whether to permit remote trial testimony is entirely up to the court, even if the parties stipulate to permit remote trial testimony. The amendment does not authorize fully remote trials; rather, it provides that remote testimony should be allowed only from specific witnesses when the court finds sufficient justification, and the amendment has no effect on other aspects of trial. The note also makes clear, as was clarified in the revision to the committee note to the Rule 45(c) amendment the Advisory Committee recommended for final adoption, that the requirements of Rule 43(a) do not apply to proceedings governed by Rule 43(c).

It is important also to appreciate that ordinarily the choice between remote trial testimony and in-court trial testimony is not the real choice the court must make. Instead, that choice is between live remote testimony and deposition testimony, either by video means or by reading a transcript of a deposition. And there may be important access to justice issues in making this choice. For some litigants, the cost of a video deposition may be an obstacle in a way that remote testimony would not.

There may be questions on whether the "compelling circumstances" requirement of current Rule 43(a) has caused judges who found good cause for permitting remote trial testimony nevertheless to refuse to permit such testimony. Sarah Sraders did research on the application of that provision of Rule 43(a), and her memo is in the agenda book. She did not find case reports in which judges said the requirement prevented them from permitting remote trial testimony when they would otherwise have done so. But she did find cases in which courts said that remote testimony should not be allowed because the need for it was foreseeable, something stressed in the 1996 committee note. Judge Lauck raised the question of the weight to be given to foreseeability in determining whether to permit remote testimony.

It also bears noting that it appears that "compelling circumstances" are not required anywhere else in the Civil Rules.

The rule's separate requirement of "appropriate safeguards" would be unaffected by the removal of the "compelling circumstances" requirement. That was introduced in 1996, and the courts have now had three decades of employing it. Lawyers report that the parties are often able to agree (subject to the court's approval) on safeguards that would be appropriate in a given case. Judge Lauck reported that the subcommittee considered more than a dozen potential safeguards, only to conclude that safeguards are best determined on a case-by-case basis in light of the particularities of each case. The subcommittee thus opted not to include a list of safeguards in the note.

Judge Lauck reported that the question of juror preferences has not pointed all in one direction or the other. Some jurors may favor in-person testimony to assist them in judging credibility. But some might actually feel they can see the witness better on a screen. And in different courtrooms these factors might play out differently.

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The bottom line is that the focus of the amendment draft is on ensuring judges have discretion to make appropriate case-specific decisions about remote trial testimony. And many have said the relying on depositions as an alternative to remote live testimony—particularly if that involves reading to the jury from a written deposition transcript—is often a "jury attention killer."

The subcommittee then sought reactions from the Advisory Committee members on its recast approach to this amendment idea, particularly in light of the concerns raised by members of the Standing Committee.

An attorney member with broad trial experience reacted that "I always want to present my witnesses live in the courtroom. If the other side wants some other arrangements, I will resist." Video remote testimony is better than relying on a deposition, however. And it may be that jurors are now more comfortable with interactions via Zoom and Teams and similar methods.

A concern was raised: The draft committee note seems to invite the judge to authorize remote testimony as a way to avoid the chore of resolving disputes about what portions of the deposition testimony to admit. Specifically, the draft says that "the task of designating portions of the deposition can prove contentious, often involving the court in time-consuming review that would largely be obviated by live remote testimony." Is this an appropriate observation? The proposed change to the rule should be applauded, but the explanation should be carefully crafted.

A judge member observed that live remote testimony is preferable to trying to rely on a deposition at trial.

Another judge member observed that the proposal is a good one. In part, that is because there are not many civil trials anymore. But there are logistical concerns about safeguards. All the same, it is important to facilitate civil trials. And in-person trials should remain the gold standard. The rule's use of the verb "may" (as in the current rule) may not sufficiently stress that point.

Another concern was whether the draft note adequately makes the point that the main choice is not between in-person testimony and remote testimony, but rather between live remote testimony and relying instead on deposition testimony. That should be stressed in the note.

A judge noted that it may often be necessary to complete the process of designating deposition testimony even when the witness is expected to provide remote testimony. So there may not be that much judicial time or effort saved by authorizing remote testimony. For example, if problems of technology impede or prevent the remote testimony the parties may have to revert to relying on the depositions even though the court had authorized remote testimony.

Regarding safeguards, an attorney member reported never having had any trouble working out safeguards with opposing counsel. But the choice of appropriate safeguards differs vastly depending on the circumstances of a given case. For example, one might ask a number of questions: Should lawyers be in the room? Should the court reporter be in the room? How should the equipment be tested? Can the witness (for example, a treating doctor) be assured that the

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testimony will occur at a specific time (rather than having to wait outside the courtroom until called)?

Another attorney member noted that, due to the COVID experience, many depositions now occur remotely. As a consequence, there is now much more experience with safeguard issues than was true in 1996, although perhaps mainly for depositions. That experience ought to inform the handling of remote trial testimony, even though that is a different creature from a deposition.

Another attorney member observed that these safeguard issues get worked out. Indeed, they are commonplace in arbitrations, which are increasingly popular.

Another concern was raised—the "apex witness" concern. Could this amendment invite strategic use of the remote testimony option to pressure a company or governmental agency with the prospect that the CEO would have to provide remote testimony? An attorney responded that a lawyer seeking to justify such testimony will have to win that battle, and also that if the court is unpersuaded by the company's argument that the testimony ought not be required (i.e., that the subpoena be quashed) the company may "beg" to have to CEO provide the testimony remotely rather than in person in the courtroom.

A final point was that three footnotes in the agenda book call attention to issues on drafting of the note that the subcommittee will continue to ponder as it moves forward. The subcommittee will continue its work.

Third Party Litigation Funding (TPLF)

Judge Proctor (Chair of the TPLF Subcommittee) introduced the topic of third-party litigation funding by thanking Professor Marcus and the subcommittee members, who have been working continuously since the subcommittee was created in October 2024. He specifically cited Dean Clopton's effort at ensuring that a diverse subset of the subcommittee has undertaken a "listening tour" to various conferences, events, and symposia on this subject. Judge Proctor also cited the assistance and support of the Rules Committee staff.

As Judge Proctor noted, to varying degrees, the issue of TPLF has been before the Advisory Committee for over a decade, including in connection with various disclosure rules and multidistrict litigation. Moreover, Congress has remained interested in the topic, though no legislation has yet passed. Some districts have also been experimenting with rules requiring disclosure of TPLF, including the District of New Jersey, whose experience Emery Lee is helping the subcommittee to understand.

For its part, the subcommittee's work has been vigorous and intentional when it comes to developing an understanding of how the funding industry works. One thing it learned is that this industry is constantly and rapidly evolving, and the subcommittee has received helpful assistance from many knowledgeable parties to understand how it operates today and how it might change.

That said, unlike Congress or state legislatures, the Advisory Committee's focus is not on whether TPLF is "good or bad," since such a policy judgment would be beyond its ambit. Rather, the subcommittee has been focused on a potential disclosure rule and what it might look like. As

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the agenda book notes, however, even a disclosure rule presents challenging questions about its scope. Among such questions are: what sorts of agreements should trigger disclosure, what should be disclosed and to whom, and what discovery should be available following such disclosure? The challenge is to draft a rule that accounts for all of the nuances and varying circumstances of TPLF while also anticipating how rapidly the industry is changing. Judge Proctor then turned to subcommittee members for any additional comments.

One lawyer member noted that any rule should be tailored to the real-world problem it seeks to solve. We have heard many different concerns about TPLF, including interference by foreign funders, provisions that wrest control of cases from lawyers and their clients, and whether lawyers reliably have the authority to settle cases when funders are involved. In this member's view, it is important that the Advisory Committee focus on whether a rule will actually facilitate better case management or instead makes a policy judgment about the desirability of TPLF.

An academic member of the subcommittee added a concern about whether a trans-substantive procedural rule can adequately address the particular issues TPLF raises in different kinds of cases. The problem may be different, for instance, in patent versus mass-tort cases.

Professor Marcus then added his observation from both his research and attendance at various conferences that the subcommittee has encountered "diametrically opposed narratives from the defense bar on the one hand and the commercial funding industry on the other. Here we are in the crossfire." He also added that there is activity in state legislatures addressing this problem, including in California.

Judge Proctor then turned to the full Advisory Committee members for their thinking on the subject to assist the subcommittee in developing next steps. One judge member responded that the subcommittee is on the right track and expressed interest in what a disclosure rule might look like but added that anything beyond disclosure is likely beyond the committee's rulemaking authority.

Judge Proctor then sought feedback on a more specific question: under a proposed disclosure rule, to whom should the disclosure be made? To the court, the court and the parties, to the public on the docket? A judge member responded that, in her view, such a disclosure should be to both the court and the parties so everyone can know who the relevant players are when it comes to settlement discussions. Professor Marcus followed up by asking whether the disclosure should lead to discovery related to the evolution of the terms of the funding agreement. The judge responded that this should not be a worry, and if there is a reason the facts surrounding the agreement are relevant, they should be discoverable.

An attorney member then raised a different issue: if the agreement is disclosed, the opposing party may learn how much money is available, knowledge that can provide substantial leverage in settlement negotiations and potential for abuse. A judge member noted, however, that all litigation has potential for an unlevel playing field that could affect results, and it is not the judge's role to try to correct for that.

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A lawyer member noted that a similar dynamic is created by the requirement that insurance contracts be disclosed, though TPLF is somewhat different. One concern, however, is what the judge should be expected to do with the disclosure, as it does not affect the merits of the case and could lead to "picking sides" between the parties.

Judge Vance then inquired whether the committee members could comment on their experience with respect to the allegation that, in mass-tort cases, TPLF leads to the filing of large numbers of unvetted and frivolous claims. An attorney member responded that the landscape was more complex than a funder providing funds for a particular litigation. Rather, a funder might provide an attorney funding for a litigation, but the collateral might be an interest in other litigations in that attorney's portfolio. This creates complexity when it comes to disclosures— in the attorney's cases that serve as the collateral for the funder's loan, must the agreement be disclosed? Must the entire funding scheme for the firm be disclosed?

Judge Proctor recounted a lawyer's anecdote of funders' providing millions to a small firm to file cases in mass tort litigation that the lawyers had no idea how to handle. Judge Proctor said there were situations like that and the control question is one argument for disclosure because judges may not be aware of these issues in their cases.

Another judge member asked whether a disclosure rule would serve as a deterrent from seeking TPLF, and if so, whether that is a proper goal for rulemaking? Judge Proctor responded that encouraging or deterring TPLF has never been the goal of this effort, though either could be an effect of a disclosure rule. Another judge member of the subcommittee added that whether the rule causes more or less TPLF has never been a topic of discussion of the subcommittee.

Professor Marcus then asked whether there is any question that under current law, a judge may require disclosure of a TPLF agreement in an individual case. One judge member responded that it is clear that a judge may order such disclosure because of ethical considerations, and a judge may require a funder to be available for a settlement conference if need be. Judge Proctor agreed that the judge can always ask questions about such agreements.

The subcommittee will continue its efforts and report its progress at the October meeting.

Other Matters Under Consideration

Rule 23—Class Actions

Professor Bradt explained that the reporters had been monitoring developments on the three Rule 23 proposals that the Advisory Committee had discussed at its October 2025 meeting and remain on the agenda: service awards for class representatives, pre-certification approval of settlements by putative class representatives, and whether the superiority requirement of Rule 23(b)(3) should be amended to include explicit consideration of privately administered out-of-court remedies. He added that there had been two developments since the October meeting that the Advisory Committee should be apprised of: the reaction of the Standing Committee to these proposals at its most recent meeting, in January 2026; and the several recent submissions to the Advisory Committee in support of amending the superiority requirement that have been received since the agenda book was published.

With respect to the Standing Committee, Professor Bradt reported that its enthusiasm for these particular projects was limited, in part because members recognize the potential scope of a Rule 23

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project and the time and resources it would consume. It is illustrative that one lawyer member of the Standing Committee who typically represents plaintiffs and another lawyer member who typically represents defendants agreed on this score, while also noting that if the Advisory Committee were to take up Rule 23 each would have several more issues with the rule they considered more important to examine than the three already on the Advisory Committee's agenda. Professor Bradt noted that in light of the continuous debate about Rule 23, which has moved in new directions since the Supreme Court's decision regarding nationwide injunctions in *Trump v. CASA*, it may be difficult to cabin a Rule 23 project to any discrete set of proposals. He also noted, however, that the Advisory Committee had received several suggestions regarding the specific "superiority" question, indicating some momentum in favor of close study of that issue.

In light of these developments, Professor Bradt sought Advisory Committee feedback on its enthusiasm for taking on Rule 23 now, as opposed to continuing to monitor developments on these and other related issues in order to potentially return to them later. Professor Marcus added, as a "caution," that any Rule 23 project would be "work-heavy," but history suggests that such work might not yield significant results. A judge member of the committee noted that if there are other Rule 23 issues that practitioners feel are more important, perhaps the Advisory Committee's time would be better spent on those. A lawyer member agreed. An academic member did, too, adding his view that "I've got five other Rule 23 issues I'd put in front of these."

Another lawyer member cautioned, however, that this is an important area of law that "has significant impacts nationwide" and that class actions should remain on our agenda. But this member also opined that the Advisory Committee should focus on wrapping up its work on third-party litigation funding before tackling Rule 23. Professor Bradt noted that he and Professor Marcus, as co-authors of a casebook on Complex Litigation, would be monitoring the area closely. He added that the new edition of the Manual for Complex Litigation would likely soon be published, and that, too, might provide clarity on the path forward for Rule 23. The reporters will continue to monitor these proposals and will report again at the fall meeting.

Fair Labor Standards Act Collective Actions

Professor Bradt reported on a proposal submitted by former Advisory Committee member Judge Michael Baylson (E.D. Pa.) focused on providing guidance for "hybrid" actions that include collective-action claims brought under the federal Fair Labor Standards Act (FLSA) and class-action claims brought under state law and governed by Rule 23. There are numerous differences between collective actions and class actions that create management challenges, but the most important is that parties to collective actions under the FLSA must "opt in," while members of a class certified under Rule 23(b)(3) are bound unless they timely "opt out." The reporters sought feedback from the committee regarding how much of a challenge these cases create, whether such challenges can be handled using the case-management tools available under Rules 16, 16.1, and 23, and whether a rule-based solution seemed worth investigating. Advisory Committee members did not view such a project as promising at this time, and, after a motion, the Advisory Committee unanimously voted to drop this item from the agenda.

Right of Representative at Rule 35 Examinations

Professor Marcus reported on a proposal from the American Association for Justice that would entitle a party subject to an examination under Rule 35(a) to have a representative present at the examination or to record the examination. Several states have modified their rules in a similar manner, allowing a representative of the examined party to have a representative present who may observe, but not disrupt, the examination, and/or record it. These changes respond to complaints of harassment or bias by

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the examiner selected by the opposing party. Professor Marcus sought feedback from committee members on the importance of the issue and whether to investigate a rule change.

One judge member reported that the issue had never come up in 22 years on the bench; another judge member agreed that the issue had not come up in 33 years. But a lawyer member disagreed, having recently tried a case in California, which allows a lawyer to observe the examination, which is also recorded by a court reporter. This member expressed gratitude for the opportunity to have a lawyer in the room for his client's examination by the opposing party's psychiatrist, who had strategized with counsel for 15 hours, read from a script, and asked leading questions. In this case, the party had been a victim of abuse, and the doctor was "going after her." The member reported that, due to the recording, he was able to use the transcript to cross-examine the doctor and "help rehabilitate the plaintiff on redirect." Another lawyer member added that examinations sometimes happen in state courts "by ambush" without a lawyer present. Judge Vance noted that Rule 35 would prevent such an ambush in a federal case, but the lawyer member responded that for very vulnerable parties, being examined without a lawyer present could be traumatizing and without a recording there is no record.

Professor Bradt noted that any such project would also necessarily require reexamining the provisions of Rule 35(b) addressed to exchange of examiners' reports and the effect on any applicable privilege.

Another lawyer member noted that under the current rule, a judge could make an individualized determination to allow a lawyer to be present or record the examination, so perhaps this would be an example of making a new rule that informs a judge of a power that already exists.

Given the level of interest in this topic, Professor Marcus suggested that the next step would be research on the various approaches taken by the states. Emery Lee of the FJC volunteered to reach out to the National Center for State Courts to see if they have any information. Further research on Rule 35 in the federal courts will be useful, as well. The reporters will further update the committee at the fall meeting.

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Artificial Intelligence Hallucinations

Professor Marcus presented the next item, two proposals to the Advisory Committee addressed to "hallucinations" of cases by Artificial Intelligence (AI) that lawyers erroneously insert into court filings. This has become a widespread issue in these early days of legal AI, and several such incidents have been widely reported (as they have in all sorts of other fields grappling with the introduction of AI technology). Professor Marcus noted that the Evidence Rules Committee had been focusing on AI with respect to its own potential new Rule 707, which remains under study. The basic question for this committee is whether AI hallucinations of nonexistent authority require a new rule, or whether current Rule 11(b)(2), which requires a certification that "after an inquiry reasonable under the circumstances . . . legal contentions are warranted by existing law or by a nonfrivolous argument" for changing the law. Professor Marcus added that after publication of the agenda book, the Fifth Circuit reported that it had considered and declined to adopt a specific rule related to AI on the ground that sanctions for such "hallucinations" are adequately covered by Federal Rule of Appellate Procedure 46(c). *See Fletcher v. Experian Info. Solutions, Inc.*, 168 F.4th 231 (5th Cir. 2026).

The Advisory Committee agreed that rulemaking would not be appropriate at this time, while also recognizing that AI may return to the agenda as warranted. After a motion, the Advisory Committee unanimously voted to drop this item from the agenda.

Rule 58—Separate Document Requirement

Judge Vance then turned to Professor Bradt and Professor Cooper to discuss a proposal to add district-court orders appealable under the collateral-order doctrine to the list of orders exempt from the "separate document" requirement of Rule 58. Professor Bradt noted that this was an especially complex problem that the Advisory Committee had last addressed in 2002 in concert with the Appellate Rules Committee.

In short, the problem is this: Rule 54(a) defines a "judgment" to include "any order from which an appeal lies." In order to avoid confusion about when the 30-day time window for filing a notice of appeal under Appellate Rule 4(a) opens, Rule 58(b) requires that a "separate document" be entered on the docket. For a final judgment after a jury verdict or otherwise disposing of a case, Rule 58(c) is straight-forward—the window for filing a notice of appeal opens when the separate document is entered on the docket. If the district court entirely fails to comply with the separate document requirement, then the 30-day clock to appeal does not start running until 150 days after the entry of the judgment (that is, the appealable order) on the docket.

In 2002, this committee and the Appellate Rules Committee undertook a joint project to deal with what the subsequent committee note referred to as "horridly confused problems" created by the interaction between time limits for post-trial motions, Appellate Rule 4, and the separate document requirement. The result of that multi-year project was amended Rule 58(a), which exempts certain orders from the separate-document requirement, such that the 30-day clock to appeal starts running when these orders are entered on the docket. These exempt orders are those disposing of a motion: for judgment under Rule 50(b); to amend or make additional findings under Rule 52(b); for attorney's fees under Rule 54; for a new trial, or to alter or amend the judgment, under Rule 59; or for relief under Rule 60.

The proposed amendment would add interlocutory orders that are appealable under the collateral-order doctrine to the list of orders exempt from the separate-document requirement. In particular, the concern is with orders denying defendants' dispositive motions asserting a defense of qualified immunity. Although such orders are immediately appealable, district courts rarely file a "separate document" on the docket, meaning it is unclear when the 30-day window to appeal begins to run. The proponent of the amendment brought a circuit split to the Advisory Committee's attention on this question, though Professor Bradt noted that his research had revealed few such cases addressing the issue in the district or circuit courts, perhaps because it is rarely in such a defendant's interest not to appeal immediately in order to capture the benefits of the collateral-order doctrine, including often a stay of the litigation in the district court.

As the committee note to the 2002 amendments to Rule 58 explains, this is not a new problem, and "[d]rastic surgery on Rules 54(a) and 58 would be required to address this and related issues." Professor Cooper then elaborated on his experience as reporter during the effort that resulted in the 2002 amendments. He first noted that any effort to amend Rule 58 must be undertaken with the Appellate Rules Committee, and that any such effort should be based on real-world problems and not the more theoretical issues with the rule, which have long been apparent. Professor Cooper also noted that reopening the Rule 58 question would require

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rethinking questions of forfeiture of such an appeal from a final judgment. All told, Professor Cooper noted, "it's a messy swamp."

Judge Vance then turned to the committee to seek feedback on the degree to which these problems had arisen in practice. One appellate judge member noted that he had not had occasion to address any timeliness questions when it comes to immunity defenses. Professor Hartnett suggested that, in his view, the issues with the rule may be solvable, but the effort is worthwhile only if there is a big enough problem. He suggested reaching out to the reporter of Appellate Rules to solicit his views. Professor Bradt agreed to do so and report back to the Advisory Committee.

Attorney Admissions

Judge Vance then turned to Professors Struve and Bradt for an oral report on the intercommittee subcommittee considering proposals for unified district-court bar admission. Professor Bradt reported that the subcommittee had most recently met in February. He reported that after three years' worth of research, outreach, and deliberation, the subcommittee had unanimously voted to recommend to the Standing Committee that it not move forward with this proposal. Reaction to the proposals in the various advisory committees was mixed at best, and in some cases quite negative. As a result, the subcommittee concluded that the time had come to suggest dropping the proposal from the Standing Committee agenda. A judge member of the Advisory Committee who was also a member of the attorney-admissions subcommittee added her view that this was a "tremendous effort" and that the subcommittee "explored it extremely thoughtfully."

Recommendations to Drop From the Agenda

"Algorithmic Spoliation"

Professor Marcus noted that this proposal focuses on how certain data systems' algorithms might delete or alter data automatically—a kind of spoliation without specific intent. The proposal is vague but appears to suggest changing Rule 37(e) to account for this phenomenon in some way. Professor Marcus noted, however, that current Rule 37(e) and its accompanying committee note were drafted in order to adapt to new technology and currently equip a district judge to respond to this concern in a specific case, should it arise. After a motion, the Advisory Committee unanimously voted to drop this item from the agenda.

Protective Order "Templates"

This proposal raises a concern about templates for protective orders provided by the Northern District of California and other districts intended to assist litigants. The proponent views such forms as coercive and beyond the power of districts to provide. The proponent also raises more familiar concerns about alleged overuse of protective orders generally. One attorney member noted that the template appeared to be both legally accurate and carefully crafted. Professor Marcus agreed and noted that such forms and templates are likely to be especially useful for self-represented litigants. After a motion, the Advisory Committee unanimously voted to drop this item from the agenda.

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Mandatory Assistance for Pro Se Litigants

Professor Marcus presented this proposal, which would create a new Rule 83.1 that would provide mandatory administrative assistance to self-represented litigants in complying with procedural rules and deadlines. Although it may be desirable to improve and increase legal services available to civil litigants who cannot afford an attorney, it would be difficult to fit this proposal within the limits imposed by the Rules Enabling Act and would likely be regarded by district courts as an unfunded mandate. While this proposal does identify a serious problem, it does not seem to be one that this committee can solve through a rule amendment. After a motion, the Advisory Committee unanimously voted to drop this item from the agenda.

Update

Report from the Federal Judicial Center

Tim Reagan, the FJC liaison to the Standing Committee, reported (via Teams) to the Advisory Committee on recent FJC activities. He referred members to the agenda materials but highlighted a forthcoming video on how some district courts facilitate electronic filing by self-represented litigants, whether through CM/ECF or other means. Emery Lee, the FJC liaison to the Advisory Committee, added that the FJC is available to provide assistance or information about materials and programs. Judge Vance thanked the FJC for its important contributions to the Advisory Committee's work.

Judge Vance then adjourned the meeting.

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TAB 20

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

Rule 7.1. Disclosure Statement

(a) Who Must File; Contents.

(1) ***Nongovernmental*** ~~***Corporations***~~ ***Business Organizations***. A nongovernmental ~~corporate~~ business organization that is a party or ~~a nongovernmental corporation~~ that seeks to intervene must file a statement that:

(A) identifies any parent ~~corporation~~ business organization and any publicly held ~~corporation~~ business organization ~~owning~~ that directly or indirectly owns 10% or more of ~~its~~ ~~stock~~ it; or

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

(B) states that there is no such ~~corporation~~ business organization.

* * * * *

Committee Note

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

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

Second, the rule is amended to require disclosure of business organizations that "directly or indirectly own 10% or more of" a party, whether or not that ownership interest is formally denominated as stock. Such a direct or indirect owner is presumed to hold a sufficient interest in a party to raise a rebuttable presumption that a judge's financial interest in the owner extends to the party, warranting recusal. *See* U.S. Judicial Conference, Guide to Judiciary Policy § 220, Committee on Codes of Conduct, Advisory Opinion No. 57: Disqualification Based on a Parent-Subsidiary

Relationship (Feb. 2024). Under the amended rule, a party must disclose not only a parent business organization but also any publicly held business organization that is a grandparent, great-grandparent, or other corporate relative that owns 10% or more of a party, whether directly or through another business organization. The requirement to disclose "indirect" owners of 10% or more of a party is a pragmatic effort to better inform judges of circumstances when their financial interests may be affected by a litigation or when further inquiry into the ownership interests in a party is appropriate.

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

Changes Made After Publication and Comment

No changes were made after publication and comment.

Summary of Public Comment

A summary of public comment can be found on pages 96-97 of the April 14, 2026 Agenda Book for the Advisory Committee on Civil Rules.

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

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

* * * * *

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

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

(i) the name and~~,~~ (if not previously provided)~~,~~ the address and telephone number

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

of each witness—separately identifying those the party expects to present and those it may call if the need arises, and whether the testimony will be in person or remote;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

* * * * *

Committee Note

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

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

Changes Made After Publication and Comment

No changes were made after publication and comment.

Summary of Public Comment

A summary of public comment can be found on pages 141-142 of the April 14, 2026 Agenda Book for the Advisory Committee on Civil Rules.

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

Rule 41. Dismissal of Actions or Claims

(a) Voluntary Dismissal.

(1) ***By ~~the~~ a Plaintiff.***

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, ~~the~~ a plaintiff may dismiss ~~an~~ its action or one or more of its claims without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have

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appeared and remain in the action.

* * * * *

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

* * * * *

Committee Note

Rule 41 is amended in two ways. First, Rule 41(a) has been amended to add language clarifying that a plaintiff may voluntarily dismiss "one or more of its claims" in a multi-claim case. A plaintiff may accomplish dismissal of either its action or one or more of its claims unilaterally prior to an answer or motion for summary judgment by a party opposing that claim, or by stipulation or court order. Some courts interpreted the previous language to mean that only an entire case, *i.e.* all claims against all defendants, or only all claims against one or more defendants, could be dismissed under this rule. The language suggesting that voluntary dismissal could only be of an entire case has remained unchanged since the 1938 promulgation of the rule. In the intervening years, multi-claim and multi-party cases have become more typical, and courts are now encouraged to both simplify and facilitate settlement of cases. The amended rule is therefore more consistent with widespread practice and the general policy of narrowing the issues during pretrial proceedings. This amendment to Rule 41(a), permitting voluntary dismissal of a claim or claims, does not affect the operation of Rule 41(d), whose applicability is limited to situations when the plaintiff has previously dismissed an entire action.

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

provide both sufficient notice to those actively involved in the case and better facilitate formulating and simplifying the issues and eliminating claims that the parties agree to resolve.

Changes Made After Publication and Comment

No changes were made after publication and comment.

Summary of Public Comment

A summary of public comment can be found on pages 106-110 of the April 14, 2026 Agenda Book for the Advisory Committee on Civil Rules.

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

Rule 45. Subpoena

* * * * *

(b) Service.

(1) ~~***By Whom and How; Tendering***~~ ***Means; Notice Period;*** ***Fees.***

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

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

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

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

suitable age and discretion who resides there;

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

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

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

otherwise, the subpoena must be served at least 14 days before the date on which the person is commanded to attend. In addition, the party serving the subpoena must tender~~ing~~ the fees for 1 day's attendance and the mileage allowed by law at the time of service, or at the time and place the person is commanded to appear. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies.

Committee Note

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

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

The amendment also adds another option—service by United States mail or commercial carrier to the person's last known address, if the selected method provides confirmation of actual receipt by a person identified in Rule 45(b)(1)(A)(i) or (ii). The rule does not prescribe the exact means of confirmation, but courts should be alert to ensuring that there is reliable confirmation of actual receipt. Experience has shown that this method regularly works and is reliable.

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

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

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

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

Changes Made After Publication and Comment

The committee note was revised to clarify to whom actual receipt must be made for service by US mail or commercial carrier. The reference to Rule 45(b)(4) in that same paragraph was also removed to avoid confusion as to what Rule 45(b)(4) requires.

Summary of Public Comment

A summary of public comment can be found on pages 160-183 of the April 14, 2026 Agenda Book for the Advisory Committee on Civil Rules.

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

Rule 45. Subpoena

* * * * *

(c) Place of Compliance.

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

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

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

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

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

(ii) is commanded to attend a trial and would not incur substantial expense.

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

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

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

* * * * *

Committee Note

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

Since the 2013 amendments, however, some courts have concluded that they are without authority to command witnesses to provide remote trial testimony because the witnesses are not within the "subpoena power" of the presiding court. *See, e.g., In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023) (holding that a subpoena can compel remote trial testimony from a witness only if the witness resides or transacts business in person within 100 miles of the court or within the state in which the court sits). Questions have also been raised about whether a subpoena can compel a nonparty to provide discovery if the nonparty witness is located outside the geographical scope of the subpoena power to command the witness to appear in court. *See, e.g., York Holding, Inc. v. Waid*, 345 F.R.D. 626 (D. Nev. 2024) (rejecting the argument that a Nevada district court subpoena could not command production of documents within 100 miles of the nonparty's place of business in New Hampshire).

This amendment clarifies that the court's subpoena power for in-court testimony or to provide discovery extends nationwide so long as a subpoena does not command the

witness to travel farther than the distance authorized under Rule 45(c)(1), which provides protections against undue burdens on persons subject to subpoenas. It specifies that, for purposes of Rule 45(c)(1), the witness "attends" at the place where the person must appear to provide the remote testimony. For purposes of Rule 43 and Rule 77(b), such remote testimony occurs in the court where the trial or hearing is conducted.

The amendment does not alter the standards for deciding whether to permit in-court remote trial testimony. Instead, it applies to any subpoena for witness testimony. Rule 43(a) authorizes remote trial testimony but depends on court permission for such testimony.

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

Changes Made After Publication and Comment

The committee note was revised to avoid suggesting that the Rule 43(a) standard for remote testimony at trial applies to motion hearings or other proceedings. A cross-reference to the amendment being made to Rule 26(a)(3)(A)(i) was also removed from the committee note to avoid potential confusion about that amendment. In addition, two words ("or hearing") were mistakenly included in the preliminary draft of Rule 45(c)(1)(B)(ii) that are not in the rule. There was no intention to change the existing provision and the mistake has been corrected.

Summary of Public Comment

A summary of public comment can be found on pages 126-133 of the April 14, 2026 Agenda Book for the Advisory Committee on Civil Rules.

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

Rule 81. Applicability of the Rules in General; Removed Actions

* * * * *

(c) Removed Actions.

(1) ***Applicability***. These rules apply to a civil action after it is removed from a state court.

* * * * *

(3) ***Demand for a Jury Trial.***

(A) *Before Removal* ~~*As Affected by State Law*~~. A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal.

(B) *After Removal.* If no demand has been made before removal, Rule 38(b)

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

governs a demand for a jury trial. If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38(b) must be given one if the party serves a demand within 14 days after:

~~If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.~~

~~**(B)** ***Under Rule 38.*** If all necessary pleadings have been served at the

~~time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 14 days after:~~

(i) it files a notice of removal; or

(ii) it is served with a notice of removal filed by another party.

* * * * *

Committee Note

Rule 81(c) is amended to remove uncertainty about when and whether a party to a removed action must demand a jury trial. Prior to 2007, the rule said no demand was necessary if the state court "does" not require a jury demand to obtain a jury trial. State practice on jury demands varies, and it appears that in at least some state courts no demand need be made, although it is uncertain whether those states actually guarantee a jury trial unless the parties affirmatively waive jury trial. In other state courts, a jury demand is required, but only later in the case than the deadline in Rule 38 for demanding a jury trial. A number of states have rules similar to Rule 38, but time limits for making a jury demand differ from the time limit in Rule 38.

This amendment is designed to remove uncertainty about whether and when a jury demand must be made after

removal. It explicitly preserves the right to jury trial of a party that expressly demanded a jury trial before removal. But otherwise it makes clear that Rule 38 applies to removed cases. If all pleadings have been served at the time of removal, the demand must be made by the removing party within 14 days of the date on which it filed its notice of removal, and by any other party within 14 days of the date on which it was served with a notice of removal. If further pleadings are required, Rule 38(b)(1) applies to the removed case.

When no demand has been made either before removal or in compliance with Rule 38(b), the court has discretion under Rule 39(b), on motion, to order a jury trial on any issue for which a jury trial might have been demanded.

The amendment 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. Courts no longer have to order parties to cases removed from such state courts to make a jury demand; the rule so requires.

Changes Made After Publication and Comment

No changes were made after publication and comment.

Summary of Public Comment

A summary of public comment can be found on page 192 of the April 14, 2026 Agenda Book for the Advisory Committee on Civil Rules.

TAB 21

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

JAMES C. DEVER III
CHAIR

CAROLYN A. DUBAY
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

ALLISON H. EID
APPELLATE RULES

REBECCA B. CONNELLY
BANKRUPTCY RULES

SARAH S. VANCE
CIVIL RULES

MICHAEL W. MOSMAN
CRIMINAL RULES

JESSE M. FURMAN
EVIDENCE RULES

MEMORANDUM

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

FROM: Hon. Michael W. Mosman, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: May 8, 2026

I. INTRODUCTION

The Advisory Committee on Criminal Rules met in Washington, D.C. on April 29, 2026. Draft minutes of the meeting are attached.

This report presents several action items. The Advisory Committee unanimously recommends final approval of amendments to Rule 17, which governs subpoenas. It also recommends publication for public comment of amendments to Rules 11 (pleas), 32 (sentencing), and 49.1 (privacy). In addition, the Advisory Committee unanimously recommends approval for publication amendments to Rules 49 and 45 concerning access to electronic filing by self-represented litigants. These proposed amendments will be presented in a report by Professor Catherine Struve that incorporates amendments to the Appellate, Bankruptcy, and Civil Rules as well as the Criminal Rules.

Finally, the report presents information items concerning the Advisory Committee's continuing work on Rule 40, and the formation of a new subcommittee to consider proposals to amend Rule 15, which governs depositions.

II. ITEM FOR FINAL APPROVAL

A. Subpoena Authority (Rule 17) (22-CR-A; 24-CR-J; 25-CR-G)

The Advisory Committee unanimously recommends final approval of the amendments to Rule 17 with three changes to the text as published and several revisions to the committee note.

1. The Major Elements of the Published Amendments

The goal of the published amendments is to respond to the wide disparity in the interpretation and application of Rule 17, and particularly to the problems encountered by counsel in some districts where the courts interpret the rule so narrowly that subpoena practice is almost nonexistent. The amendments make incremental changes and set default rules, while also allowing districts and individual judges substantial discretion to adopt local rules or orders refining the procedures. Although minor adjustments were made to other portions of the rule, these are the amendments' most significant changes to the existing rule.

- *Proceedings Other Than Trial*

Some courts had interpreted the existing language in (c)(1), which refers only to "trial," as barring subpoenas for all proceedings other than trial. This interpretation leaves the defense with no mechanism to obtain evidence from third parties for proceedings other than trial, and drastically limits the government's options to do so.[1] To fix this, new (c)(2)(A) expressly authorizes the use of subpoenas at sentencing and suppression hearings (where subpoenas are already used regularly in many districts) as well as detention and revocation hearings, where there is statutory or rule authority for parties to present evidence and the need for third party evidence arises on occasion.

The amendment also provides flexibility to the court to allow the use of subpoenas for other evidentiary hearings in an individual case.

- *Codifying a Somewhat Loosened* Nixon *Standard*

Rather than substituting an entirely different standard for non-grand-jury subpoenas seeking the production of documents or other items, the amendment makes an incremental change, codifying in (c)(2)(B) an interpretation of the *Nixon*[2] standard that is slightly looser than what some courts have demanded. Some courts have required the requesting party to prove with

[1] The government may obtain evidence from third parties for non-trial proceedings with a search warrant, or, under limited circumstances, with a grand jury subpoena.

[2] *United States v. Nixon*, 418 U.S. 683 (1974).

certainty that the information sought by the subpoena would be admitted, thus barring, for example, subpoenas for impeachment evidence until after the other party had presented its witnesses. The Advisory Committee was persuaded these decisions had applied the admissibility requirement in *Nixon*'s interpretation of prior text too rigidly. In other districts, judges have found the "admissibility" requirement of *Nixon* can be satisfied by a showing of likely admissibility, and defense and government practitioners in such districts reported no problems. Retaining some relationship to admissibility narrowed the scope of what can be sought by tying that information to the designated proceeding and further preventing "fishing expeditions."

The Advisory Committee adopted the "likely admissible" language to indicate that somewhat more flexibility is intended. In doing so, it rejected an alternative formulation— "likely to lead to" admissible evidence—that would have nudged the amendments even closer to the standards supported by the City Bar Committee, the National Association of Criminal Defense Lawyers (NACDL), and many of the defense practitioners who spoke with the Advisory Committee. The note also observes that if a court is concerned that some categories of subpoenas—such as those seeking particular types of information, or seeking information for a particular type of proceeding—pose a special risk of noncompliance with these requirements, the court has discretion to require that those subpoenas be authorized by court order upon motion and/or to order that the recipient produce the items to the court instead of directly to the requesting party's counsel.

- *When Motion and Order Required*

New (c)(2)(C) provides a clear rule explaining when a party must obtain the court's permission by motion before serving a subpoena and when the party may serve a subpoena without motion. Courts continue to differ on when a motion is required based in part on the ambiguity of the language in (c)(1), and the *Nixon* Court's interpretation of this provision as requiring court authorization for a subpoena seeking production in advance of trial. In many districts, motions before issuance are not routinely required. Practitioners and judges expressed significant concerns about the burdens that a motion requirement for all or most 17(c) subpoenas would create in their districts, for both counsel and courts.

The added text ensures court supervision when needed most, while providing flexibility to courts to add or continue a motion requirement for particular types of subpoenas or cases. It retains the motion requirement in (c)(3)—the existing provision regulating subpoenas seeking personal or confidential information about a victim—and adds new (c)(4) requiring a motion before a self-represented party may serve a subpoena to produce items. Otherwise, the new provision allows a represented party to serve a subpoena without a motion, unless a motion is required by local rule or court order. The committee note explains that protective orders and other requirements can be adequate to control potential abuse of the subpoena process by the parties, but that individual courts may choose to adopt or continue broader motion requirements by local rule or court order.

- *Proceeding Ex Parte*

New (c)(2)(E) and (F) respond to concerns raised by some courts' decisions that the existing text of the rule mandates disclosure of every motion and subpoena to all parties. The Advisory Committee concluded that both the defense and the government had advanced persuasive reasons for proceeding ex parte under Rule 17(c), and that permitting ex parte motions and production had been working well in many districts.

New (E) provides that upon a showing of good cause a court must permit a party to file ex parte a motion for a subpoena. The proposed amendment uses mandatory language to avoid any possibility that an individual judge, or a district by local rule, could prohibit ex parte motions. New (c)(2)(F) also states that a party has no duty to inform the other parties about a subpoena when no motion is required, absent an order to do so.

- *Place of Production*

New (c)(5) clarifies the circumstances that require a subpoena recipient to produce the designated items to the court rather than to the requesting party. This is yet another issue that has divided courts interpreting the rule's existing text in (c)(1). Some courts read the current rule as requiring recipients of all subpoenas to produce the designated items to the court. Others regularly permit returns directly to the party seeking the items. The revised text again adopts a default rule, mandating returns to the court, unless the court orders otherwise, if the requesting party is self-represented. For other subpoenas, the new text makes returns to a party's counsel discretionary, allowing courts to determine when they wish to receive and review subpoenaed materials before receipt by counsel.

- *Preserving Disclosure Policies in Rule 16*

New (c)(6) resolves another dispute about the meaning of the rule's existing text, which some courts read as requiring that each party have access to any items that a subpoena recipient produces to another party, regardless of whether they would be subject to discovery under Rule 16. By providing that disclosure to an opposing party is required only if the item is discoverable under the rules, the amendment avoids undermining the careful calibration of discovery and disclosure in Rule 16 and other discovery rules.

- *Clarifying Which Provisions Apply to Different Proceedings*

To improve clarity and avoid confusion, the amendments clearly indicate what types of subpoenas are governed by each provision.

  - Subdivision (a) applies to all subpoenas: those to testify and those to produce material, and to grand jury and non-grand-jury subpoenas.
  - Subdivision (b) applies only to subpoenas to testify.
  - Subdivision (c) applies only to subpoenas to produce designated items. Within (c), paragraphs (2) through (6) apply only to non-grand-jury subpoenas.

- Subdivisions (d) and (e) regarding service apply to both subpoenas for testimony and subpoenas to produce designated items.

In sum, the published amendments, endorsed unanimously by all of the judicial, prosecution, and defense members of the Advisory Committee and unanimously approved for publication by the Standing Committee, reflect a series of compromises on major issues:

• Scope of proceedings: NACDL argued subpoenas should be available for any evidentiary hearing, while victims' advocates wanted subpoenas to be limited to trials. The published rule took a middle position, listing certain hearings in (c)(2)(A) and requiring judicial permission for others.

• Evidentiary standard: Defense advocates called 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.

• Motion and order. An early subcommittee draft required a motion and order for any subpoena seeking personal or confidential information about anyone, but that requirement was strongly opposed by judges and practitioners alike during the November 2024 Advisory Committee meeting. As a compromise, the published amendment added to the motion and order requirement for victim information a motion requirement for all subpoenas sought by self-represented defendants and restrictions for other subpoenas (e.g., the requirement of advance judicial authorization to proceed ex parte).

• Ex parte procedures: Defense advocates strongly supported the availability of ex parte applications to protect trial strategy, work product, and client confidences, while 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's middle position permitted ex parte applications but allowed a local rule or court order to require disclosure that one party is seeking or has served the subpoena.

• Direct production to counsel: Defense advocates argued judges should not have the option of ordering returns to the court, while victims' advocates strongly opposed direct returns to defense counsel, citing the potential harm to victims. The published amendment provided a default of production to the court for self-represented defendants, and allowed direct production to counsel unless otherwise ordered by the court or by local rule.

2. The Public Comments

The public comments included renewed advocacy for stronger positions on several of these contested issues. The thirteen comments[3] on Rule 17 reveal a division between supporters of

[3] This count includes Professor Garvin's testimony, but not Comment USC-RULES-CR-2025-0003-001 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.

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 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. A brief summary of each comment appears at the end of this memorandum.

3. The Advisory Committee's Recommendations

The Advisory Committee concluded that the compromises reflected in the published amendments largely 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 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,

- the relaxation of the *Nixon* standard, including the evidentiary standard of "likely to be admissible," and

- the explicit authorization of ex parte applications upon a showing of good cause.

The Advisory Committee also reaffirmed its support for allowing direct production of material produced to counsel. However, 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 discussion below begins with the Advisory Committee's recommended changes to the published text, then its recommended changes to the note, and ends with issues raised by the commenters that the Advisory Committee concluded raised no changes.

a. Recommended changes in the text

The Advisory Committee recommends the following revisions to the published text, none of which in its view require republication.

- **17(a)** – technical correction making explicit that a subpoena can require testimony, production, or both testimony and production

- **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

- **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

(i) 17(a) (subpoena contents)

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 as published had been revised to clarify that it applies to both subpoenas for producing items as well as those for testimony. However, as NACDL noted in its submitted comments, the published language did 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 Advisory Committee 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 ~~to attend and testify or produce designated items~~ — 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 Advisory Committee intended to carry forward. For the same reason, republication is not required.

(ii) 17(c)(3)(A) (victim information subpoenas)

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."

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 to be served on a third party, and not when service is to be made directly on the victim. Cassell Revised Statement, USC-RULES-CR-2025-0003-0016, at 11-12 (hereinafter Cassell Revised Statement). He argued that the proposed revisions would allow subpoenas to victims for a wide variety of personal or confidential information before trial and 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.* The Advisory Committee's research identified two cases which

supported Professor Cassell's concern, concluding that victims are not "third parties" under current Rule 17(c)(3).

Given the confusion on this point, the Advisory Committee approved 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 437-444):

> 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.

There was no 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 a victim's personal and confidential information is so sensitive that it warrants judicial prescreening of a subpoena to allow the judge to reject or narrow the scope of the request and put in place an appropriate protective order to safeguard the information, then judges should exercise the same oversight for *any* such subpoena, 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.

Because the Advisory Committee 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 concluded additional public input was not needed. Accordingly, it concluded the revision does not require republication.

(iii) 17(c)(5) (place of production)

As published, **Rule 17(c)(5)** stated 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 amendment provided that the subpoena must require production to the court unless the court orders otherwise. The published committee note explained:

> … [(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.

This part of the published amendment generated widely divergent comments. Defense commenters expressed strong support for this provision for the reasons stated in the published committee note, but NACDL claimed that the statement in the committee note at lines 333-337 erroneously limited what it read as a more sweeping change by the text. USC-RULES-CR-2005-0003-0015 at 4 n. 3. The statement in the published Note read: "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))." 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 reading of the text, was 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, 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, USC-RULES-CR-2025-0003-0017, at 8 (hereinafter Eliason Revised Statement). 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,[4] the Advisory Committee favored clarifying the rule to remove this ambiguity. It also 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

[4] NACDL's interpretation of the rule was not unreasonable—though it is not consistent with the committee note nor, we believe, with the intent of the Advisory 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." (Emphasis added). 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.

court orders otherwise. The Advisory Committee understood that production to the court in this situation was common practice.

The Advisory Committee approved the following revised text for (c)(5). For clarity, the clean version appears below:

> **(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; and
>
> (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.

The changes are shown on lines 111-132 of the redline version. The revision to the committee note approved to accompany this change explains (at lines 455-506):

> **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.

The Advisory Committee concluded that the proposed revision would not require republication. It responds to public comments contending that the proposed amendment would have the unintended effect of bypassing a common procedure that has provided substantial protection to victims. The testimony and written comments provided an ample basis for the Advisory Committee to make its decision, and the Advisory Committee saw no need for further public comments. Moreover, the proposed revision received unanimous support from all members of the Advisory Committee, who did not see it as controversial.

b. Recommended changes in the notes

In addition to the note revisions discussed above, the Advisory Committee recommends revisions to the published committee notes to **17(c)(5)**, **17(c)(3)(B)** and **17(c)(2)(B)(ii)**.

(i) 17(c)(5)

An addition to the note on **17(c)(5)** is discussed in the next section, pages 19-22, in connection with comments seeking a change in the text.

(ii) 17(c)(3)(B)

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. 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.

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. Cassell Revised Statement at 16-25; Eliason Revised Statement at 11-14. Their 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. 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):

> 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." Cassell Revised Statement at 23-25; Eliason Revised Statement at 11-12. This, they 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.

Responding to this concern, the Advisory Committee agreed to add language to the published committee note accompanying the statutory duty of notice in (c)(3). Specifically, the addition draws attention to the distinction between disclosing a detailed explanation of reasons for requesting an ex parte subpoena, which in some cases may prematurely disclose trial strategy, and notifying the victim that a party is seeking his or her information from a particular subpoena recipient, which would not ordinarily reveal confidential strategy. Becoming aware that a subpoena is being sought is not the same as being handed a roadmap of how a party 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.[5] 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 Advisory Committee'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.

(iii) 17(c)(2)(B)(iii)

Finally, the Advisory Committee recommends a revision in the note accompanying **17(c)(2)(B)(ii)** for clarity. Subparagraph (c)(2)(B) articulates the modified version of the test announced by the Supreme Court in *Nixon*. At lines 326-28 the committee note explains that the published rule included no separate reference to relevance "because it is not likely that information would be admissible unless it was relevant." The Advisory Committee concluded that this sentence was wordy and confusing, and it recommends that it be revised to read "There is no separate reference to "relevance" in **(c)(2)(B)** because information would not be admissible unless it were relevant."

[5] To make the note read more smoothly than the version approved by the Advisory Committee, Judge Mosman suggests the Standing Committee add the words "a showing" to the note. If approved by the Standing Committee, the sentence would read:

> Exceptional circumstances under (c)(3) would include a showing 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.

The revised language recognizes that relevance is a foundational requirement for admissibility. This clarification is especially helpful in light of the concerns expressed by some commentators that the "likely to be admissible" standard was a poor fit for proceedings like sentencing and suppression hearings, where the Federal Rules of Evidence do not apply. As members noted at the meeting, even in proceedings where the FRE are not applicable, courts still determine admissibility applying the basic standards of relevance, as well as authenticity, and reliability. Privileges apply as well under FRE 1101(c).

c. Recommendations for no changes

(i) 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 at 7. 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 Advisory Committee's assumption that detention hearings happen so swiftly such subpoenas will be rare. *Id.* He noted that the Advisory 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," and 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. 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 at 7. 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 Advisory Committee 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 Advisory Committee 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.[6] 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.[7] A 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 for use 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 "[T]he court may permit the parties to introduce evidence on the 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[.]"

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

[7] 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.

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.[8]

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 Rule17(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.

(ii) The revised Nixon standard

Rule 17(c)(2)(B) governs the standard for the contents of subpoenas and includes the Advisory 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:
> (i) are likely to be possessed by the subpoena's recipient;
> (ii) are not reasonably available to the party from another source; and

[8] 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.

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

Multiple comments urged the Advisory 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); USC-RULES-CR-2025-0003-0005 (Morgan Noel).

Defense witnesses at both of the Advisory 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 Advisory 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 the 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 Advisory Committee recommends no changes in 17(c)(2)(B) as published. 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.

(iii) Subpoenas for personal or confidential information of persons other than victims

The Advisory Committee recommends no change in the text of **Rule 17(c)(2)(C)** as published, but it does recommend an addition to the committee note for 17(c)(5), as noted above. 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 require motions for additional subpoenas through local rules or other orders, this provision received strong support in the Advisory 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 use 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). A version of this argument that all subpoenas seeking personal or confidential information should require a motion and order had been 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.[9] But judges and practitioners alike expressed strong views against requiring motions for *all* subpoenas seeking such protected information. At that point, the Advisory Committee understood that a proposal requiring motions and a court order for

[9] The subcommittee's discussion draft, presented at the Advisory Committee's November 2024 meeting in New York, required a motion and order for *all* Rule 17(c) non-grand jury-subpoenas, and heighted 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.

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 the full Advisory Committee, and it was approved for publication by the Standing Committee. Thus Mr. Wrobleski's policy arguments were, in effect, rejected before publication as part of the compromises required to obtain full support for the amendments.

Mr. Wroblewski's post-publication 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.[10] 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 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 Advisory Committee 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, by local rule or court order, require a motion for any such subpoena, as many courts already do. The rule as published does not discourage or prevent a court

[10] 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.)

from adopting the policy Mr. Wroblewski proposed.

Although the Advisory Committee did not recommend changes to the text, members did express concern about the wider availability of subpoenas seeking personal or confidential information about persons other than victims. Members emphasized that there had been no reported problems in districts where subpoenas are now available without a motion and order, and the published rule provides courts with multiple options to deal with any concerns, including local rules or orders that would require a motion and order in particular kinds of cases, or for subpoenas seeking particular kinds of material or information. On the other hand, the purpose of the amendments is to expand the availability of subpoenas in other districts, where subpoena practice has been limited or virtually nonexistent, and thus practice norms and expectations have not developed.

The Advisory Committee recognized that there were multiple options for providing an opportunity for more judicial oversight other than requiring a motion and order, such as requiring production to the court of all personal or confidential information, requiring the filing of a sealed notice when a subpoena sought personal or confidential information, an idea offered by Ms. Ralston, or adopting some states' practice of allowing the recipient to object in writing without a lawyer. But many members expressed their view that these options had not been adequately investigated or vetted, that it was not possible to predict which procedures would be most effective at protecting privacy, or which would be less burdensome to the courts and the parties, and that probably republication would be necessary if such a change to the text was adopted.

After substantial discussion, the Advisory Committee unanimously agreed that the best resolution of these concerns was to recommend no change in the text of Rule 17(c)(2)(C) and instead adopt a three-pronged approach: (1) adding a short statement to the committee note for (c)(5) about judicial oversight, (2) exploring other avenues to facilitate the development of best practices, and (3) working with the Federal Judicial Center to monitor the implementation of the amendments closely to identify any problems as well as the approaches that prove to be most effective.

First, the Advisory Committee unanimously recommends this addition to the committee note to **Rule 17(c)(5)**:

> And to provide greater judicial oversight—for example, 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.

Second, the Advisory Committee will pursue multiple avenues to facilitate best practices. This includes consideration of revisions to AO form 89B (Subpoena to Produce Documents, Information, or Objects in a Criminal Case), working with the Bench Book Committee on revisions addressing the expansion of subpoena authority, and assisting in the prompt development of local rules and orders.

Finally, the Advisory Committee will work with the Federal Judicial Center to develop mechanisms to monitor the practice under the amendments in order to identify any problems that arise and to identify the approaches—such as local rules and orders—that might be recommended as best practices.

(iv) Expanding the scope of the motion and order requirement for victim information

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 Advisory 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 Advisory Committee 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 Advisory Committee 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.

The Advisory Committee anticipates that its efforts to develop and facilitate best practices and the close monitoring it anticipates will allow it to determine whether any changes of this nature are needed.

(v) Requiring the government to give notice to victims

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 Advisory Committee recommends no change in this provision as published, which retains the same language about notice that currently appears 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 Advisory 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.

(vi) Ex parte subpoenas and gag orders

Professor Cassell argued that the ex parte provisions would 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.* Professor Cassell contended that by preventing victims from conferring with prosecutors such gag orders would violate both the CVRA, 18 U.S.C. § 3771(a)(5), and the First Amendment.

The Advisory Committee 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. The published amendment makes no change in the existing law concerning gag orders and prior restraints on speech, and it does not modify or affect the CVRA, 18 U.S.C. § 3771(a)(5), which gives victims "[t]he reasonable right to confer with the attorney for the Government in the case." 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.)

(vii) 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 suggested that the committee note be amended "to clarify that 'personal or confidential,' as used in this provision, is to be narrowly construed." *Id.* NACDL proposed 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 an alleged crime victim, for example, are not 'personal or confidential' within the meaning of this new rule." *Id.* at 4-5.

The Advisory Committee does not recommend this change. It would go far beyond issues the Advisory Committee considered, and it expresses views the subcommittee has not discussed. During the development of the published amendment, the Advisory Committee had concluded not to attempt to define the scope of the term "personal or confidential," noting no reports that the phrase "personal or confidential" had been interpreted improperly by courts since its addition in 2008, or that there had been any "abuse" of the motion and order requirement. In addition, early in the process the Advisory Committee heard testimony that trying to define categories of what is

personal and confidential would require working through a very crowded field of federal, state, and local laws and regulations defining protections for various information.

(viii) 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 Advisory Committee does not support the proposed revisions.[11]

Professor Cassell and Ms. Eliason both urged that, if revised, Rule 17 should exclude 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 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 Advisory 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 Advisory Committee. They contended that it would be consistent with the Advisory Committee's incremental approach to tailor the proposed amendments to cases not arising from violent crimes.

The Advisory Committee did not adopt this proposed limitation, which 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.

In the alternative, Ms. Eliason urged 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

[11] Professor Cassell also urged the Advisory 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.

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 Advisory Committee also declined to add this proposed limitation, which 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.

(ix) Information that is not subject to subpoena

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 Advisory Committee declined to make the proposed change to the rule as published. This issue was not among those raised by practitioners (and judges) during the Advisory Committee's sessions in Phoenix and New York, was not debated in the subcommittee and full Advisory 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.

(x) Requirements for self-represented parties

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 commentor, 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.

The Advisory Committee 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 comprise a very small subset, the motion and order requirement in those cases would not add significantly to the courts' burden.

III. ITEMS FOR PUBLICATION

A. Rule 49.1, Reference to Minors by Pseudonyms (24-CR-A and 24-CR-C); Full Redaction of Social-Security Numbers (22-CR-B)

The Advisory Committee unanimously recommends publication of 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 proposed text provides:

Rule 49.1. Privacy Protection for Filings Made with the Court

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

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

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

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

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

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

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

* * * * *

Because the privacy rules are parallel and consistent to the degree possible, a working group convened by Ms. Dubay and including the reporters for the Appellate, Bankruptcy, and Civil Committees has been coordinating the consideration of parallel amendments to be presented at this meeting. The Advisory Committee has been informed that the Civil Rules Committee is recommending amendments to Civil Rule 5.2(a) that parallel the proposed changes in Rule 49.1. Because of the specialized needs in bankruptcy cases, the Bankruptcy Rules Committee is recommending an amendment to Bankruptcy Rule 9037(a) that requires the substitution of pseudonyms rather than initials for minors, but no redaction of social-security and taxpayer-information numbers. Although the Appellate Rules Committee is considering an amendment to add additional protections, there is no need to delay publication of the proposed amendments. Under Federal Rule of Appellate Procedure 25(a)(5), an appeal in a case in which privacy was governed by the bankruptcy, civil, or criminal privacy rules is governed by those rules as well on appeal. Thus, the proposed amendments to Criminal Rule 49.1(a), Bankruptcy Rule 9037(a), and Civil Rule 5.2(a) would govern criminal, bankruptcy, and civil appeals.

1. Reference to Minors by Pseudonyms

As explained in the Department of Justice's suggestion (24-CR-A), Rule 49.1(a)(3)'s current requirement that a filing may include only the initials of a minor does not sufficiently ensure the privacy and safety of child victims and child witnesses, especially in crimes involving the sexual exploitation of a child. The Department explained that child victims and witnesses may face increased shame, embarrassment, and fear if their identity as a victim or witness becomes publicly known, and child-exploitation offenders sometimes track federal criminal filings and take other measures to uncover the identity of child victims and contact and harass the minors. The American Association for Justice and 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 state, "the use of gender, especially when combined with the identification of adults by name or initials around the minor, makes the true identity of minors easier to uncover."

The Advisory Committee's proposed revision requires the use of pseudonyms—rather than initials—to refer to minors in public filings. This practice is already well established among federal prosecutors, and neither defense attorneys nor the courts reported any problems with that practice. Because minor victims are so fearful of being identified, it is important to address this issue in the rules. The proposed amendment does not require the use of gender-neutral pseudonyms, because the evidence required to prove certain offenses would make that impractical. Instead, the

committee note suggests that gender neutral or other non-identifying terms should be considered where possible.

One question that arose during the consideration of the proposed amendment was how the existing rule (and 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 Criminal, Civil, and Bankruptcy Rules do not expressly extend protection to individuals after they have turned eighteen, the courts have used protective orders effectively to provide continued protection. The Advisory Committee concluded that the current practice of using protective orders to extend the protection of minors seems to be working well, and it 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.[12]

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.[13] Courts employ a balancing test to determine if particular 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.[14]

[12] *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).

[13] 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, 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).

[14] 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).

Members did express 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.

2. Complete Redaction of Social-Security and Taxpayer-Identification Numbers

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 Rules[15]—permit filings to include "the last four digits of the social-security number and taxpayer-identification number."

a. Social-security numbers

The Advisory Committee 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. Neither the prosecution nor the defense needs the last four digits of social-security numbers in public filings, and this information can be misused by identity thieves and fraudsters.[16] Moreover, full redaction is now considered a best practice by a variety of government agencies. The Advisory Committee found this analysis very convincing, and it concluded the case had been made for complete redaction of social-security numbers in Rule 49.1.

Note, however, that the proposed amendment highlights the filer's option to "omit or completely redact all social-security . . . numbers."

b. Other taxpayer-identification numbers

The Advisory Committee also 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. Although this recommendation goes beyond Senator Wyden's original suggestion, the Advisory Committee concluded that the underlying concern for protecting privacy applies to these other forms of taxpayer information as well, and that the amendment should address these privacy concerns comprehensively.

(i) 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

[15] 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.

[16] Then-Rules Law Clerk Kyle Brinker prepared an excellent research memorandum on this issue. To avoid providing a roadmap for misuse, we have not included it in the Advisory Committee's published reports and agenda books.

Numbers (ITIN), Adoption Taxpayer Identification Numbers (ATIN), and Employer Identification Numbers (EIN).[17]

The most common form of taxpayer-identification number other than an SSN is the ITIN. The IRS 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.[18] As of December 2023, the IRS had issued 26 million ITINs, and there were more than 5.8 million active ITINs.[19] 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.[20]

(ii) The history of the privacy rules and taxpayer-identification-numbers

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

Although the Department of Justice initially opposed applying the same privacy redaction rules to social-security and taxpayer identification numbers, the E-Government Subcommittee "determined that tax identification numbers raise the same privacy concerns as social security numbers; for many individuals, those numbers are the same."[21] The E-Government Subcommittee

[17] The IRS website also recognizes a Preparer Tax Identification Number (PTIN) as a type of taxpayer identification number. A memo prepared for the Advisory Committee by Former Rules Law Clerk Kyle Brinker also discussed 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.

[18] 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).

[19] 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).

[20] *Id.* at 1-2.

[21] 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).

also considered whether EINs should be included as identifiers to be redacted,[22] and it "discussed whether an EIN raised the same privacy risks as social security or tax identification numbers."[23] A Subcommittee member stated that an EIN "did not present the same privacy concerns" because it "was solely used to file taxes."[24] The Subcommittee then agreed and decided not to include EINs in the list of redacted identifiers.[25] 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.[26]

(iii) Reasons to require omission or redaction of all taxpayer identification numbers

At its April meeting, the Advisory Committee concluded that Rule 49.1(a) should afford the same protection to ITINs, ATINs, and EINs that it provides to social-security numbers—requiring full redaction in public filings if any of these taxpayer-identification numbers are included. The Advisory Committee was persuaded that inclusion of these numbers in public filings in criminal cases raised some threat to privacy and risk of misuse, and that tolerating these potential harms was not justified by any countervailing need for inclusion.

ITINs and ATINs. What sparse caselaw there is interpreting the phrase "an individual's . . . taxpayer-identification number,"[27] suggests that the existing rule likely already includes ITINs and possibly ATINs. 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.[28] 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."[29] Several Directors Forms were also changed to require ITIN information "in order to

[22] 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).

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] 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).

[27] Only one case was identified as applying the privacy rules 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).

[28] 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).

[29] 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).

comply with" Bankruptcy Rule 9037."[30] Current bankruptcy case policy likewise instructs debtors to redact ITINs in order to comply with Bankruptcy Rule 9037. The bankruptcy case policy provides that, "according to the criteria provided in Fed. R. Bankr. P. 9037," only the last four digits of an ITIN should appear if an individual has an ITIN instead of a social security number.[31]

Like SSNs, ITINs are now frequently employed for a variety of non-tax purposes.[32] Disclosure may thus provide a similar opportunity for misuse by persons with fraudulent or malicious purposes. And although there is little information about how helpful the last four digits of an ITIN would be to those with nefarious purposes, the Advisory Committee's investigation uncovered no reason such numbers were needed in criminal filings.

As a temporary number assigned to a child during adoption to permit the parents to claim tax benefits (such as dependency exemptions and childcare credits), an ATIN appears to pose less risk of harm to privacy than the disclosure of SSNs and ITINs, and is less likely to appear in filings in criminal cases. The Advisory Committee concluded, however, that all taxpayer identification numbers deserved protection and found no reason to exempt ATINs.

EINs. The Advisory Committee considered but was not persuaded by the Department of Justice's preference not to require redaction for EINs, whether personal or corporate, and ATINs. In the Advisory Committee's view, EINs may raise an interest in individual privacy, especially when used by families who employ domestic workers and by sole proprietorships and small businesses. Although a tax-exempt organization or public company must disclose its EIN in public filings,[33] and a company may provide its EIN to employees or to vendors,[34] otherwise EINs are not public, which supports the view that their disclosure raises privacy risks. 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.[35] The IRS also provides for truncated EINs on statements and other documents.[36] Similarly, the U.S. Tax Court's privacy

[30] 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).

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

[32] "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 18, at 1.

[33] *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, 2026); Secs. and Exch. Comm'n, Off. of Investor Educ. and Advoc., *Investor Bulletin: How To Read a 10-K* (Sept. 2011), https://www.sec.gov/files/reada10k.pdf (last visited Apr. 12, 2026).

[34] *See* IRS, *About Form W-2, Wage and Tax Statement*, https://www.irs.gov/forms-pubs/about-form-w-2 (last visited Apr. 9, 2026); 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.

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

[36] 26 C.F.R. § 301.6109-4(a)-(b).

protection rule requires omission or redaction of all "[t]axpayer identification numbers (e.g., Social Security numbers *or employer identification numbers*)" in court filings.[37] The Advisory Committee felt these institutions had a good appreciation of the risks, and that the Tax Court's Rules—which require complete redaction—were a good model.

Moreover, whatever the situation in 2007, when the rule was first promulgated, EINs are now widely used for non-tax purposes, such as opening bank accounts and applying for credit.[38] Given these functions, disclosing a sole proprietorship's EIN raises a risk of fraudulent use. Although the Department reported that it had found no evidence of any problems with fraud or identity theft with any tax numbers other than SSNs and ITINs, the Advisory Committee noted 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,[39] and members expressed continuing concern that EINs could be misused. Members also expressed the view that the rules should not facilitate fraud, and they should 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.

The Advisory Committee favored a simple, uniform rule that treated all Social-Security numbers and all taxpayer-identification numbers the same, requiring their full redaction in all public filings, thus better protecting privacy and reducing the risk of fraud.

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[37] Fed. Tax Ct. R. 27(a)(1) (emphasis added). The explanation accompanying the rule states: "The Judicial Conference privacy policy applies to protect only individual privacy. The Court believes, however, that the same privacy and security interests of corporations, trusts, estates, and other entities as those of individuals should be protected in this Court. Consequently, the Court amends its Rules and petition forms to eliminate the requirement of providing any part of the taxpayer identification number, and to extend the protection to any party or nonparty." Explanation to Fed. Tax Ct. R. 27(a)(1).

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

[39] 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.

3. Attachments and exhibits

The proposed amendment requires redaction or omission of "an electronic or paper filing, including any exhibit or attachment." The Advisory Committee 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 Advisory Committee 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.[40] 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.

B. Rule 11, Advice to Defendants (25-CR-N)

Judge Patricia Barksdale wrote suggesting that Rule 11 be amended to address recent amendments to the Federal Sentencing Guidelines.[41] 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 Advisory Committee unanimously recommends publication of amendments to Rules 11 and 32 that reflect the 2025 amendments to the Sentencing Guidelines.

[40] 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."

[41] Judge Barksdale submitted her suggestion while the amendment was pending. It went into effect on November 1, 2025.

1. The 2025 Guideline Amendments

The 2025 amendments to the U.S. Sentencing Commission 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.

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.

Given the change in the Guidelines, the subcommittee concluded that Rules 11(b)(M) and 32(h) require revision.

2. Rule 11(b)(M)–Revision and Proposed Committee Note

The Advisory Committee 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—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed to meet the purposes of sentencing listed in 18 U.S.C. § 3553(a)(2);

(3) the kinds of sentences available;

(4) the need to avoid unwarranted sentence disparities among defendants

with similar records who have been found guilty of similar conduct; and

(5) the need to provide restitution to any victims of the offense.

After considering various options, the Advisory Committee concluded that the following language best reflects the current two-step sentencing process:

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(2) ***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~~ the factors under 18 U.S.C. § 3553(a), including the Sentencing Guidelines; . . .

The proposed committee note explains:

The amendment reflects the 2025 changes to the U.S. Sentencing Guidelines, which (1) deleted most of the provisions in Chapter Five, Part K (Departures), and (2) revised U.S.S.G. § 1B1.1(a) to eliminate the requirement that the court consider departures at step two of a three-step sentencing process. As revised, § 1B1.1 now provides for a two-step process, considering at step one "the kinds of sentence and the guideline range as set forth

in the guidelines," and at step two "other applicable factors in 18 U.S.C. § 3553(a)."

3. Rule 32(h)–Deletion and Proposed Committee Note

Because the Guidelines no longer employ the concept of departures, the Advisory Committee also recommends amending Rule 32 to eliminate paragraph (h), which currently provides:

> **(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 Advisory Committee recommends that subdivision (h) be reserved. The proposed amendment to Rule 32(h) would provide:

* * * * *

(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.~~

* * * * *

The proposed committee note describes the purpose and effect of deleting 32(h).

> The amendment reflects developments in the Supreme Court and the Sentencing Guidelines that eliminated the need for notice regarding departures.

C. Rules 49 and 45, electronic filing by a self-represented party

The Advisory Committee's recommendation that amendments to Rules 49 and 45 be published will be presented by Professor Struve in a comprehensive report.

IV. INFORMATION ITEMS

A. Rule 40, clarifying procedures after arrest in one district under a warrant issued in another district for violating a condition of release pending trial,

sentencing or appeal, or for failing to appear as required by subpoena (24-CR-D & 23-CR-H)

The Magistrate Judge's Advisory Group (MJAG) and Judge Zachary Bolitho have both recommended clarification of Rule 40, which governs arrest for failing to appear in one district for violating conditions of release set in another district.

The Rule 40 Subcommittee presented a discussion draft of an amended rule at the Advisory Committee's April meeting. It plans to solicit additional input from magistrate judges, continue its work on the text, and develop a draft committee note. The subcommittee's work so far has focused on arrests for violations of conditions of release. It has not yet considered what changes, if any, to recommend to the language in Rule 40(a)(i) that addresses arrests for "failing to appear as required . . . by a subpoena," and more research will be needed to understand the appropriate procedures in such cases.

B. Rule 15, depositions for discovery

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 Advisory Committee's study agenda. At its November 2025 meeting, the Advisory Committee briefly discussed five additional proposals that supported amending Rule 15 to permit depositions or witness interviews.

The Advisory Committee has now received a total of 49 suggestions supporting the amendment of Rule 15 to permit a limited number of pretrial depositions for discovery. 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 access by the defense, 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 Arizona, Florida, Indiana, Missouri, 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 Advisory Committee's agenda, Judge Mosman announced that he would be forming a new subcommittee to consider these suggestions. The new subcommittee's work will include a study of the submissions, 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.

TAB 22

ADVISORY COMMITTEE ON CRIMINAL RULES
MINUTES
April 29, 2026

Attendance and Preliminary Matters

The Advisory Committee on Criminal Rules (the "Committee") met on April 29, 2026, in Washington, D.C. The following members, liaisons, reporters, and consultants were in attendance:

Judge Michael Mosman, Chair
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
Professor Nancy J. King, Associate Reporter
Professor Edward Hartnett, Reporter, Standing Committee
Professor Catherine T. Struve, Standing Committee Consultant (via Microsoft Teams)

The following persons participated to support the Committee:

Carolyn A. Dubay, Esq., Secretary to the Standing Committee
Shelly Cox, Management Analyst, Rules Committee Staff
Bridget M. Healy, Esq., Counsel, Rules Committee Staff
Rakita Johnson, Administrative Analyst, Rules Committee Staff
Sarah Sraders, Esq., Counsel, Rules Committee Staff
Dr. Timothy Reagan, Federal Judicial Center (via Microsoft Teams)
Dr. Brittany Ripper, Federal Judicial Center

Opening Business

Judge Mosman opened the meeting and welcomed the attendees.

[1] Ms. Ralston represented the Department of Justice.

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Judge Mosman stated that Judge Nguyen would be leaving the Committee after this meeting, and he expressed his gratitude for all of the hard work that she had done, especially in carrying the Rule 17 project forward. Judge Nguyen said that she had already said goodbye to the Committee once before, since this last year had been her "bonus" year. It had been a pleasure for her to serve on the Committee, first under Judge Kethledge, then Judge Dever, and now Judge Mosman. She thanked the chairs, the committee members, the members of the Rule 17 Subcommittee, and the reporters for all of their hard work and for making the Committee's work such a collaborative process.

Judge Mosman reminded those participants appearing remotely to turn on the "raise hand" feature in Microsoft Teams, or simply raise their hand, to be acknowledged. He also asked members present in the room to raise their hands before speaking. Finally, he noted that the meeting today would need to conclude by 3 p.m.

Judge Mosman then turned to the draft minutes of the November 2025 Committee Meeting and asked whether there were any changes recommended. Professor Beale said that she had been notified of two typographical errors that needed correction. She said that even if a small mistake like that were to be noted later, the reporters were permitted to correct a misspelling. She asked that members let the reporters know of any other typographical errors.

A motion to approve the minutes was made, seconded, and approved unanimously.

Ms. Dubay then provided a report on the progress of proposed amendments to the Federal Rules. She directed the Committee to page 94 of the agenda book, which showed the amendments that would be effective as of December 1, 2026. She noted that the chart listed Appellate Rules 29 and 30, which had been withdrawn. Those would later be resubmitted with the changes voted on by the Appellate Rules Committee two weeks earlier. The other amendments identified on that chart, however, were approved by the Supreme Court and delivered to Congress on April 8, 2026. Barring any action by Congress, those will become effective at the end of this year.

Ms. Sraders provided an update on legislation that would directly or effectively amend the Federal Rules. She directed the committee members to page 99 of the agenda book and drew their attention to the Prohibiting Political Prosecutions Act of 2026. This legislation would add several provisions to Criminal Rules 6, 16, and 48. No action had been taken on this bill since it was introduced, but the Rules staff would continue to monitor it.

Dr. Reagan then provided a report on the work of the Federal Judicial Center (FJC). First, the research on deepfakes and authenticity was complete and had been published in the spring agenda book for the Evidence Rules Committee. Second, the FJC planned to release a documentary video on how two district courts were allowing self-represented litigants to file electronically in civil cases. One district allows them to use CM/ECF, and the other does not. Both allow self-represented litigants to use an online upload portal to submit documents for electronic filing.

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Rule 17

Judge Mosman then turned to Judge Nguyen to report on Rule 17. Judge Nguyen said that the Standing Committee had recommended that the amended Rule 17 be published. The subcommittee met and reviewed all testimony and comments received during the publication period. The subcommittee heard from 13 commenters, which included individuals as well as organizations. Eight of these supported the revised rule with some modifications, and three commenters expressed strong opposition, primarily based on concerns about victims' rights. Judge Nguyen explained that the public comments received could be divided into three categories: comments for which the subcommittee believed no change to the proposed rule was warranted; comments for which the subcommittee recommended a change; and comments for which the subcommittee was divided as to how to respond.

Subcommittee recommendation of no changes

Judge Nguyen began with the category of comments for which the subcommittee thought no change was warranted. She turned the Committee's attention to the redline on page 145 of the agenda book. The Committee received strong opposition to subparagraph 17(c)(2)(A), which would expand the availability of subpoenas beyond trial. Professor Cassell, one of the commenters, argued that 95% of criminal cases result in pleas, so expanding the availability of subpoenas beyond trials would dramatically increase the number of subpoenas to victims. There was concern expressed about fishing expeditions, especially in sexual assault cases or cases involving violent crimes.

The subcommittee thought that the concerns expressed were very serious but recommended making no changes to the proposed rule text. Expanding the availability of subpoenas beyond trial was an issue that was extensively discussed and considered both by the subcommittee and the full Committee. The Committee made a deliberate choice to expand subpoena availability beyond trial, for several reasons. One was that the defendant has the right to present evidence in these other proceedings. The expansion was designed to correct inconsistencies across districts: in some districts, defendants are permitted to use subpoenas, but in other districts, the practice is more restrictive. The subcommittee was not aware of any examples of the harms identified by commenters in any of the districts that have liberal subpoena practices. Judge Nguyen reiterated that under the amended rule, courts in every district have full discretion to control the way that subpoenas are handled. Accordingly, the subcommittee unanimously recommended that no changes be made.

The subcommittee also reviewed comments about the relaxation of the *Nixon* standard, in subparagraph (c)(2)(B). Judge Nguyen stated that the defense bar—the National Association of Criminal Defense Lawyers (NACDL) and others—renewed their argument for a more generous "relevant and material" standard. On the other hand, the victims' rights groups advocated strongly for the *Nixon* standard, which is very restrictive. Their primary argument was that relaxing the standard beyond *Nixon*, along with the other proposed changes in the amended rule,

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would magnify the harm to victims and decrease district judges' abilities to protect the victims' rights.

The subcommittee again felt that these issues had already been fully explored and considered. Judge Nguyen explained that the standard that was implemented in the proposed rule—"likely to be possessed by the subpoena's recipient," "not reasonable available" elsewhere, and "likely to be admissible"—was a middle ground that drew a balance between the very restrictive *Nixon* standard and the "relevant and material" standard. Relaxing the *Nixon* standard was the thrust of this entire project, and was extensively discussed. Accordingly, the subcommittee members unanimously recommended that no changes be made in response to these comments.

Next, Judge Nguyen turned to the comments received in response to subparagraph (c)(2)(E), on line 61 of the redline. The amendments provided that, for good cause, the court must permit the party to file the motion ex parte. This was an issue that the subcommittee worked very hard on, and the Advisory Committee and Standing Committee approved. The objection to this provision was that it would open the floodgates and undercut the court's ability to safeguard victims' rights. Judge Nguyen stated that Professor Cassell raised one point that the subcommittee had not previously considered, which was that this may somehow facilitate the district court's ability to issue a gag order preventing victims from talking to AUSAs. Judge Nguyen said that the proposed amendments to Rule 17 did not do anything regarding gag orders, so any law regarding gag orders remained the same.

The subcommittee thought that this was, again, something integral to the compromise struck in the amended rule, to allow the defendant to have—upon a showing of good cause—the ability to file an ex parte motion. The subcommittee therefore recommended no change to the proposed rule.

The final comment for which the subcommittee was recommending no change be made concerned paragraph (c)(4), beginning on line 88 of the redline. This provision imposed additional requirements for self-represented parties. One commenter questioned why self-represented parties should be treated differently and argued that this potentially undermined their Sixth Amendment rights. Judge Nguyen explained that these requirements were a deliberate choice made by the subcommittee, acknowledging that self-represented litigants do not have the same ethical obligations or legal training as attorneys, warranting greater judicial supervision. The subcommittee therefore recommended no change to the proposed rule.

Professor Beale stated that prior to the meeting the Committee had received a comment from one of the other reporters suggesting clarification of the committee note. She explained that one of the concerns raised by victims about the expansion of the availability of subpoenas to non-trial proceedings was that the Federal Rules of Evidence do not apply. The published committee note, at line 313 on page 159 of the agenda book, said, "There is no separate reference to 'relevance' in **(c)(2)(B)** because it is not likely that information would be admissible unless it was relevant." Professor Beale noted that this language could be stronger. The suggestion was to say, ". . . because information would not be admissible unless it was relevant." She said that if

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the Committee believed that this was correct and less convoluted, then it would deliver a more reassuring point.

Judge Nguyen agreed that this tightened up the language and said the same thing in a clearer and more straightforward way. She believed that this should be fairly non-controversial.

A member noted that this had been a concern of his, an evidentiary standard that may have indirect application and a proceeding where the Federal Rules of Evidence would not apply. He asked how a magistrate judge should prepare for a detention hearing and apply the standard, which talked about the likelihood of admissibility.

Professor Beale said that her understanding based on Committee discussions was that judicial officers apply concepts of relevant, reliability, and authenticity when making these determinations, but do not strictly apply the Federal Rules of Evidence. She stated that it was fairly well-understood that these proceedings were not the "wild west," and judges looked at whether the party was introducing something that was actually relevant to the detention decision, and sufficiently reliable that the judge would want to admit it. The judge would then apply those same standards when thinking about something that a party wanted to subpoena.

Judge Mosman remarked that his experience, which he thought was shared widely, was that even in hearings where the Federal Rules of Evidence do not apply, there was an independent issue of admissibility that was applied, that involves things like relevance, authenticity, and the like. There was still a question to be answered by any magistrate judge: is this admissible? It may not be. The answer is not guaranteed simply because the Federal Rules of Evidence do not apply.

Professor King noted that privileges apply in all proceedings.

A member commented that in the context of detention hearings, seeking the subpoena was almost a higher standard. At a detention hearing, the government and defense lawyers can proffer information as officers of the court. The attorneys simply tell the court what their position is. She noted that although she had yet to uncover a subpoena at a detention hearing with her colleagues, she anticipated that this would occur where the proffers did not align. She thought that getting a subpoena would be relevant to that particular consideration. The member therefore agreed that although the Federal Rules of Evidence would not technically apply, attorneys must always present relevant evidence to the court, at every juncture.

Ms. Ralston stated that the primary feature of the Federal Rules of Evidence that do not apply at these other proceedings is the hearsay rules. The government thought that most other rules apply by principle—things like relevance and authenticity—even if they do not technically apply. Hearsay was the one thing that generally did not apply; for example, at sentencing, the government would introduce a victim witness statement without the victim. For a subpoena for documents, that would be the purpose: to bring in a document instead of a witness.

The member who initially asked the question said that he did not disagree with anything that had been said, and that was how he would have answered his own question. He noted that he was always concerned with relevance, but was almost never concerned with strict hearsay. He was always thinking about reliability, which is what hearsay tried to address. The member said

that the standard here was something that magistrate judges can work with, and that he had received a sufficient answer to his question.

Judge Nguyen asked whether there was a motion to approve the amendments to the committee note, at lines 313-315 on page 159, as Professor Beale had suggested. Ms. Ralston offered a friendly amendment to change "was" to "were." The revised committee note would read, "There is no separate reference to 'relevance' in **(c)(2)(B)** because information would not be admissible unless it were relevant." A motion to accept the committee note language, as amended, was made, seconded, and approved unanimously.

Subcommittee recommendation to change the rule and/or committee note

Judge Nguyen then turned to the comments for which the subcommittee thought that some change was warranted. The first concerned subdivision 17(a), which was clarified to make clear that it applied to both subpoenas for producing items as well as to testimony. However, NACDL noted that this portion of the rule could be construed to preclude testimony and the production of documents at the same hearing. Judge Nguyen said that it was the Committee's intention all along to allow this, but to the extent someone thought that this was somehow precluded or unclear, the subcommittee thought that the language needed to be clarified. It proposed the language on page 145, lines 6 and 7, to correct that.

Professor Beale noted that she did not believe that this change required republication. It was absolutely clear that what the Committee meant all along was not to prevent people from, at one proceeding, being able to be subpoenaed to both present documentary evidence and testify. These proposed amendments only clarified what the Committee thought was already clear. The committee note was still consistent with the proposed change in the text because the committee note was written with this interpretation of the rule in mind. Professor Beale thanked the Style Consultants for their help in ensuring that the new language was clear and efficient.

A motion to approve the amended language in Rule 17(a) was made, seconded, and approved unanimously.

Next, Judge Nguyen turned to another change recommended by the subcommittee, which fell into the same category of things that the Committee had intended, but did not make clear. A commenter had raised the question whether a "third party," as referenced in subparagraph (c)(3)(A), included a victim. The subcommittee thought that a victim was a third party, and so recommended adding language to the rule (in line 79 of the redline) and committee note (in lines 424-431 of the redline) to make this clear.

Judge Nguyen noted that this was also a change for which the subcommittee members thought no republication was needed. Professor Beale elaborated that the analysis for republication asks whether this would be a substantial change, and if so, whether it was one where the Committee would really need to get more input to understand the implications. The subcommittee thought that including a victim as a third party was what the amendment already intended to do. After some research, though, the subcommittee found cases that said that a victim is not a third party. The subcommittee therefore thought that this should be clarified and that this was non-controversial.

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A motion to approve the amended language in the rule and committee note was made, seconded, and approved unanimously.

The next item concerned proposed changes to Rule 17(c)(3)(B). Judge Nguyen explained that this rule required notice to the victim before an order is entered allowing a subpoena for the victim's personal or confidential information, unless there are exceptional circumstances. Since 2008, the committee note had defined "exceptional circumstances" to include the risk of revealing defense strategy. Commenters raised an objection that this would be very easy to show, and victims would rarely receive notice. The concern expressed was that this would violate the Crime Victims' Rights Act (CVRA), and that notice to the victim was the only way that would allow the victim to contest the subpoena in any way.

The subcommittee considered this comment and thought that the Committee should, at a minimum, revise the language to the note. Page 162 of the agenda book, lines 409 to 423, showed the draft language that the subcommittee proposed adding to the committee note. Judge Nguyen explained that this paragraph was designed to address the concern raised by the commenters and to draw a distinction between providing notice to the victim and providing a detailed explanation of why a subpoena was needed. Notice was different from the "good cause" showing for ex parte applications. The notice to a victim that their information was being sought would not necessarily reveal a sensitive defense strategy, so that would not qualify as "exceptional circumstances."

Judge Nguyen said that there was also a suggestion that the *government* be required to give notice to the victim in every instance, which aligns with the practice of at least one district. She noted that this does not align with some other districts' practices, and so the subcommittee did not recommend that change.

A member stated that she supported the amendment, but she noted that the amended language did not entirely adopt Professor Cassell's position that the CVRA forbids a lack of notice if it would reveal defense strategy. The amended committee note language recognized that it would be uncommon for merely providing notice to reveal a defense strategy. The member stated that this was why the defense bar could accept the amendment, because the court would ultimately make the determination on whether exceptional circumstances had been met (under the possibility that evidence would be destroyed or that perhaps even the mere notice would impede the defense). She stated that the word "uncommon" in the committee note was important for that reason, but thought that this accurately stated the practice in most districts.

Professor Beale addressed the question of the necessity of republication. She stated that the proposed change was in the committee note, not the text. The committee note could not change the meaning of the rule text, or add to or subtract from the text, but it did clarify the intent of the text. She noted that the amended committee note was consistent with the 2008 committee note, but it did draw a distinction with the additional ex parte provisions that were being added to the rule. The subcommittee thought that this was very useful and important to add, and that it did not require republication to do so.

Ms. Ralston responded to the previous member's statement and said that the rule as written would not prevent a court from adopting Professor Cassell's statutory interpretation of

the CVRA. The rule said that *unless* exceptional circumstances apply, the court *must* require giving notice. It did not say that even if exceptional circumstances apply, the court may not require notice. The court may still require notice even if there are exceptional circumstances; it was just not required to do so. The rule left the court with discretion.

A motion to amend the committee note was made, seconded, and approved unanimously.

Judge Nguyen then turned the Committee's attention to comments regarding paragraph (c)(5). The portion of the memo addressing this issue began on page 134 of the agenda book. Paragraph (c)(5) stated that a non-grand jury subpoena requested by a represented party may require the recipient to produce the designated items to the party's counsel. But for subpoenas sought by self-represented parties, the subpoena must require production to the court, unless the court orders otherwise. Judge Nguyen reminded committee members that there were many conflicting practices in various districts as to what the original rule meant. Some courts had read the original Rule 17(c)(5) as always requiring a return to the court. Other courts said that if there was a production ordered before trial, then it had to be returned to the court, but otherwise, it did not. And some courts permitted returns directly to the requesting party unless the court ordered otherwise. So to clarify this, the amended Rule 17(c)(5), as published, set two different defaults. If the subpoena was from a self-represented litigant, then the production was to the court unless it was ordered otherwise. If the subpoena was from a represented party, then the materials were produced directly to counsel.

Judge Nguyen said that NACDL strongly supported this change, but had argued that because of the way that the published rule was written, the district court should have no discretion to order production to the court unless the subpoena was requested by a self-represented litigant. Judge Nguyen did not think that this was the intention of the rule, but thought that it was arguable as to whether NACDL's interpretation was a fair reading or not. Since NACDL read the language this way, the subcommittee thought that the language should be changed. The reporters sought input from the Style Consultants on the proposed changes. The committee note was also revised, throughout lines 442-495.

Judge Nguyen explained that the major change being made was to set a third default: unless the court ordered otherwise, production in response to a subpoena requested by a represented party, that does not require the production of personal or confidential information about a victim, could be made directly to counsel. Personal or confidential information about victims would go to the court.

Professor Beale expressed her appreciation for the assistance from the Style Consultants in drafting this provision. She said that the subcommittee had wished to put the provisions about production of personal or confidential information about victims in the victim provision, thinking that was where people would look for it. The Style Consultants pointed out that the heading of subsection (c)(5) was, "Place to Produce the Designated Items," and readers would follow those headings. It was important for provisions about the place to produce designated items to be in that subsection—not somewhere else, and not in two places. Professor Beale also stressed the importance of avoiding unnecessary cross-references.

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Professor King said that the changes in (c)(5)(A) and (B) did two things. First, they clarified that NACDL's reading of the published text was incorrect, and that the court was always in control of where the subpoenas would be returned. There was not a requirement that the production go to defense counsel if the party was represented. Second, and more consequentially, the change would add a category of subpoenas—personal or confidential information about the victim—to those that were presumptively returned to the court unless the court ordered otherwise. This would create a substantial difference, but for a very narrow category of subpoenas. There was unanimity on the subcommittee that this should not require republication.

Professor Beale elaborated that the first change was simply a clarification, to make clear what the Committee intended all along. This did not require republication. The second change came out of expressions of deep concern from the victim advocates that the Committee was changing a well-established and important practice, where the court would referee and protect victims when their personal and material information was sought. There would be an opportunity for redaction or to hold back things that were not relevant; the information would not simply be provided directly to the defendant's counsel. Professor Beale said that the victim advocates were extremely concerned that the Committee was inadvertently changing the established rule in a way that seriously disadvantaged and concerned victims and their advocates. The subcommittee agreed with the view that it was important to have the court as a gatekeeper for this fairly narrow category of subpoenas that sought personal or confidential information about a victim. Professor Beale highlighted that this provision would apply only to personal or confidential information about *victims*, not just anyone. The concerns were well-voiced in the hearings and written testimony, and the subcommittee had had the opportunity to think about the policy implications. If the Committee did not think it needed to hear more information beyond that which came out clearly in the hearings and written testimony, and was able to fully understand the implications of the change, then Professor Beale thought that the change could be presented to the Standing Committee without the need for republication, even if it was a substantial change.

Judge Nguyen added that throughout the subcommittee's work, the key was flexibility, so that the *Nixon* standard could be relaxed for the districts that had no subpoena practice, but would leave alone the practice of districts that had always had a robust subpoena practice. The subcommittee thought that the rule as published already had that built-in flexibility, because the rule began, "Unless the court orders otherwise," and then set out a default that self-represented parties return to the court, but otherwise the return was to counsel. The idea was that in districts where judges wanted to tighten that practice, they could. The change now was that the rule made more explicit that the presumption for personal or confidential information of victims was return to the court, unless the court ordered otherwise.

A member said that he liked the way that paragraph (5)(A) was worded, because it said that unless the court issued an order to the contrary, the court must do what (A) said. But he thought paragraph (5)(B) was strange, because (B) gave the court discretion. It seemed odd to the member to say, "Unless the court orders otherwise, the court may order this." He thought that perhaps the language in paragraph (5) should only be included in subparagraph (A).

Judge Mosman stated that he had originally read the language the same way as the member. However, the rule said, "Unless the *court* ordered otherwise, the *subpoena* may require

the following." The rule did not say that the court had discretion twice. Rather, it addressed what the subpoena could say.

Ms. Ralston said that the "court" was the subject of the introductory clause in (5), but the subject of the next clause was the "subpoena." The verbs that followed in (5)(A) and (B) applied to the "subpoena," not the "court." The opening clause said that the court could always order otherwise. The default rule in subparagraph (A) was that the subpoena must require the recipient to produce these objects to the court. The subpoena must state this. Then subparagraph (B) said that the subpoena "may require the recipient" to produce the items to counsel. It again would be the subpoena that would direct the recipient to produce the items to defense counsel.

Professor Beale noted that this left the option for a party drafting the subpoena. They did not have to draft it this way, but Professor Beale guessed that defense lawyers would want to do so. If they were permitted to do so, they would rather have the production come directly to them. And they were permitted to do so, unless the court ordered otherwise. The court could order otherwise by local rule or by an order in the particular case. The rule was a directive of what must or may be in the text of the subpoena and would instruct the drafter of the subpoena.

Judge Nguyen stressed that that was the difference between the "must" and "may" language. The court could always order otherwise, but there were certain categories for which the subpoena must order production to the court. The permissive provision was for defense counsel.

Judge Mosman stated that the oddness that the member had originally raised would disappear if subparagraph (5)(B) were also mandatory and used the word "must" instead of "may." However, the Committee did not want this section to be mandatory.

A member asked whether someone could clarify what "personal or confidential" meant, because that affected both the motion and order practice and the return. She questioned how lawyers determined whether they should proceed by motion or not.

Judge Nguyen answered that it was a deliberate choice not to define "personal or confidential." That could be defined in many different ways and could be subject to extensive litigation as well. The subcommittee had lengthy discussions on whether to define it, and if so, how, and eventually decided not to do so.

Professor Beale added that this language had been in the Criminal Rules since 2008, when the Rules were revised to incorporate the CVRA. "Personal or confidential" was not defined at that time. It had been working in practice thus far, because there must be a motion and order to subpoena confidential information about a victim. The amended rule carried forward the way that courts and litigants had been applying that language, without getting into a fight about its meaning.

Judge Nguyen noted that even within the same district, or even within the same courtroom, "personal or confidential" could be defined differently. It was a highly fact-specific analysis. Even the same judge might say that something was "personal or confidential," without providing a specific definition, and something else that was close might fall the other way.

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Professor Beale added that NACDL had asked that the committee note define "personal or confidential" narrowly, but the subcommittee decided not to choose a definition.

A member said that sometimes non-lawyers were deciding what "personal or confidential" meant, because they were the recipients of the subpoena. This could be a police department or a victim advocacy group. In the member's experience, they were much more protective over the information that they turn over, and so would want to follow any rules that apply to them rather than turn over things they hold in confidence.

Ms. Ralston responded that it would not be up to the police department to decide whether information was "personal or confidential," because that decision was made when the subpoena was written. The subpoena itself would require the return to the court. She stated that she did not know what would happen if a party thought that they were issuing a (5)(B) subpoena, but the recipient thought that it was a (5)(A) subpoena. She added that even though this language had been in the rule for 18 years, and seemed to have been working well, there was not much case law on this. It appeared that this issue was being worked out behind the scenes. Maybe the rule change would make the definition of "personal or confidential" more frequently litigated, because there would be more subpoenas and more opportunities to talk about what it meant. If there was a split in the case law, then the Committee would have the opportunity to come back and clarify the definition. This was something that the rules do often, clarifying between different court interpretations of what the rules mean. Ms. Ralston stated that in November 2024, when the Committee held a hearing, there was an attempt to define the term more explicitly, in reference to state privacy laws and the like. The Committee had determined that that would be unworkable.

A member asked whether subparagraph (5)(B) could say "the subpoena" again, to clarify that the subpoena was the subject of the clause in (B). Professor Beale responded that the Style Consultants would not accept that.

Professor King stated that because this carried over a category that had been in the rule since 2008, the question of what was "personal or confidential" had to come up much earlier than the return of the production. This issue would arise at the front end of the subpoena process. If the drafter of the subpoena erred at the front end, they would be in more trouble than just missing the production. They missed the motion and court order entirely. Thus, this was not just a question of whether "personal or confidential" in this clause was undefined; this was a concept that carried throughout Rule 17 and had done so since 2008.

A member said that although this was a change to the text of the rule, she did not believe that this required republication, for the reasons set forth in the reporters' memorandum. As a member of the subcommittee, she said that there was no question that victims were forefront in the subcommittee's efforts to try to protect their information. When the subcommittee drafted the language that was ultimately published, the thought was that all of the discussion about "personal or confidential" would take place on the front end of the subpoena process, because it would require a motion. She said that the victims were very persuasive at the January hearing that there was still a concern about the return. To the extent the court did not require the return under the published rule, that would be a departure from what the subcommittee intended. For those

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reasons, the member did not think that this change required republication. She supported the change.

Professor Beale said again that there was not much case law on personal or confidential information. As Professor Cassell had pointed out, victims do not always have their own lawyers. Even if they did, this issue would arise at a stage of the proceeding where it may not ever give rise to appellate decisions. This was being worked out behind the scenes at the trial level. The rule change accepted that reality and did not try to crystallize that reality into a particular definition. There could come a time when the Criminal Rules would need to define "personal or confidential" information, perhaps as applied to non-victims, where this had not been in place since 2008. But in her opinion, the subcommittee made a wise choice to accept the status quo.

Professor King stated that many of the categories of personal or confidential materials are routine: health records, school records, etc. For a large portion of what would fall under "personal or confidential," there is no question as to whether it fits in that category. Thus, this not only concerned one category of people—victims—it also concerned a relatively small category of information for which there is a question as to whether it is "personal or confidential."

A motion to approve the change to the rule text and committee note was made, seconded, and approved unanimously.

Judge Dever expressed his view that republication was unnecessary for all of the reasons that had been stated thus far. He added that the text and the language of the note, especially lines 470-500, talked about judicial discretion.

A motion to proceed without republication was made, seconded, and approved unanimously.

Subcommittee divided as to recommendation

Judge Nguyen then turned to the final category of responses to comments, those as to which the subcommittee was divided. She directed the Committee's attention to Rule 17(c)(2)(C), on page 147, line 48 of the agenda book. In the published rule, except for subpoenas seeking personal or confidential information about victims, or subpoenas sought by self-represented victims, no motion and order were required before service (unless otherwise ordered by the court). There were thus two categories that required a motion and order: self-represented litigants, and subpoenas seeking personal or confidential information of a victim. One commenter, Jonathan Wroblewski—the former DOJ representative on the Committee—argued that the amendment should be revised to require a motion and order any time a subpoena seeks personal or confidential information about *anyone*, not just a victim. His concerns were, first, that this operates on an honor system. The defense attorney is the one who decides whether the subpoena meets the standards that are articulated in Rule 17. Second, if the person whose personal or confidential information is being sought does not know that a subpoena is issued, how can they object to it? Third, he argued that there was a constitutional dimension to the issue, analogizing to *Carpenter v. United States*, 585 U.S. 296 (2018), which requires the government to seek a warrant for cell-site location information held by third parties. Judge Nguyen noted that this analogy highlights the confidentiality concerns that people have in information they may

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want to keep private. She said that the subcommittee spent a fair bit of time going over Mr. Wroblewski's concerns, but was not persuaded that *Carpenter* was a perfect analogy. The Fourth Amendment does not apply in the subpoena context; the concern, and the analogy, is in the privacy interest. Nevertheless, the subcommittee was unanimous in recommending that the Committee not revisit the requirement for a motion and order for all subpoenas seeking personal or confidential information.

Judge Nguyen added, for the benefit of those new to the Committee, that this was the subject of extensive discussion. Initially, the subcommittee was persuaded by that approach: put all personal or confidential information into one category, regardless of whether it was a victim's or non-victim's, and require a motion and order for those subpoenas. There would be another system for other types of subpoenas that did not seek personal or confidential information. That was part of the initial draft that the subcommittee presented at the Criminal Rules Committee's fall 2024 meeting in New York. Judge Nguyen said that this approach was roundly rejected by many, if not all, of the committee members who were not on the subcommittee. The subcommittee therefore thought that, since this had been so extensively considered, it should not retread that same ground. The amended rule reflected a series of compromises to make incremental changes that preserved the flexibility of subpoena practice in some districts and opened up the practice a bit more in other districts.

Professor Beale added that it was not only the committee members who rejected this other approach to the rule; there were a variety of invited speakers at the meeting, from different districts and with different perspectives, and they generally did not like this approach, either. For a practicing lawyer, it was an unnecessary burden and unhelpful; judges also felt that this would be very burdensome. The question for the subcommittee then became how to draw that back and determine when a motion and order should be required. The compromise approach was created because of that very strong and widespread opposition.

Judge Nguyen explained that this strong opposition to motion and order practice for all personal or confidential information was part of what extended the subcommittee's work. She said that part of the opposition was from district judges, who thought that this would dramatically increase their workload, and it was not necessary to go that far.

Judge Nguyen then explained that, although the subcommittee was unanimous that it would not revisit the motion and order practice that was previously rejected by the full committee, the views were divided as to whether it should somehow tip the balance in favor of greater supervision for personal or confidential information of non-victims. Some subcommittee members were strongly opposed to any amendment at all. The view was that this was already fully considered and exhaustively discussed. There were no problems in the districts that had allowed the defense to have this flexibility, and no widespread abuses had been brought to the subcommittee's attention. To the extent that there were any problems, the subcommittee should instead consider adding something to the committee notes or working with the FJC to better educate the bench and bar on best practices.

There were some views expressed that maybe some adjustment should be made to the rule text. Many people, including the reporters, felt that this would require republication of the rule. Ms. Ralston had floated the idea that the rule require the filing of a sealed notice to the

court, so that the court could choose to say that, for this particular subpoena, it wants notice to be given to the person whose information was being sought. Judge Nguyen said that this idea had not been explored yet, so the subcommittee would need to pause, slow down, and gather information and feedback on how this would actually work. She said that another idea was for the default rule to require the return to the court. This would be a significant consideration.

The Committee's choice was now to (1) make no change to the text, but perhaps add something to the note, or (2) really consider whether something new needs to be done, among the options floated at the subcommittee meeting. Judge Nguyen said that there were a few considerations that counseled in favor of Option One. The published rule strove to create a balance between some traditional oversight and the burdens imposed on courts and litigants. Requiring some sort of a default production back to the court puts the rule closer to the motion and order practice that the Committee previously rejected. The other consideration was that this was a substantial change to the rule that would warrant republication. There was momentum behind the change to Rule 17 now; should the Committee take advantage of that momentum and move forward? Judge Nguyen observed that the earliest time that amended Rule 17 would go into effect would be December 2027. The Committee could monitor the situation and determine whether there was a problem in practice. Judge Nguyen said that although she was very concerned about the lack of notice to individuals from whom personal or confidential information was being sought, she did not know whether it would be much of a problem in the real world. Maybe it could be adequately addressed by a particular district imposing local rules. Or maybe it was something that was much more of a concern, that could not be adequately addressed through bench books, best practices, local rules, and the like. She noted also that the rule had built-in flexibility, so some judges could supervise the practice very strictly while others might choose not to. She therefore believed that the Committee could move forward now, and revisit the issue in a year or two if there was a problem.

Judge Nguyen stated that the proposed change to the committee note, lines 495-500, re-emphasized the flexibility and discretion that rests in the hands of the district judges. She concluded by saying that she was in favor of adding to the note.

Judge Mosman said that he was in favor of making no change to the text but revising the note.

A member stated that she was the sole member of the subcommittee who wanted *no* change made, but having been defeated in the subcommittee, she was now arguing in favor of Option One, amending the committee note. She stated that the proposed rule change had been fully vetted multiple times—not just by the subcommittee, but in multiple public hearings. She observed that oftentimes things that are personal or confidential, like medical records, are going to require a motion and order because the recipient wants a court order to accompany the subpoena. The subcommittee had heard testimony that trying to define these categories would be adding to a very crowded field of federal, state, and local laws and regulations defining what is personal or confidential. She thought that what was published provided enough protection. Option One, with or without the bracketed language, would reinforce what was already part of the published rule and would not require republication. That option was consistent with the published draft and with the public work of the Committee.

The member said that at the end of the Committee's fall 2024 meeting in New York, the subcommittee was directed to make an incremental step to loosen the *Nixon* standard, minimize the burden on courts, and allow for the preservation of practices in districts that already had a more robust subpoena practice. This balance was struck in the published version of the rule. But if the Committee were to change the text, she thought that that would require republication. It would be a significant change, and the public had no reason to think that the Committee would be making this type of change to the text. The member reiterated that the Committee's focus must be, what is the problem that we have identified? Notably, both defense attorneys and prosecutors that testified in New York—where there are robust subpoena practices, with no motion required in some districts—identified no issue with their subpoena practices. There was no problem to be fixed. Although the Committee was tweaking a rule that could generate more subpoena practice, the Committee had heard from litigants in districts that already had a significant subpoena practice, and practitioners confirmed that there were no problems.

Another member said that she was one of the two subcommittee members identified in the reporters' memorandum as favoring a change to the text—specifically, return to the court—but she was now persuaded that Option One, clarifying the committee note, was the best choice. She said that the reaction of the judicial members of the subcommittee, that the return to court could be very burdensome on them, was persuasive. She stated, however, that it would be very important to get, as soon as practicable, full comprehensive input on the impact that these changes would have, particularly in those districts that did not currently have robust subpoena practices.

Another member stated that he also favored moving forward with Option One. He was very impressed by how thorough the testimony was at the 2024 New York Committee meeting, observing that the Committee had been able to bring in people from various segments of the criminal justice system. Everyone, by and large, supported the idea that there is trust that exists when an attorney practices in a certain district—between the court, the defense attorneys, and the prosecution. That trust is based on dialogue that occurs back and forth about what is appropriate to do. The member thought that requiring the courts to have greater supervision undermined the trust that exists with respect to what defense attorneys do. He added that as an attorney, regular subpoena practice was very robust, and it took significant time to review the information provided, even for just one case. He said that although he obviously was not a judge, he could not begin to imagine what it would be like for the district courts to receive all that information, take it back into chambers, and make decisions on what to do with it, in addition to everything else that the courts have to handle. Option One relieved the district courts of that potential burden.

Ms. Ralston said that she wanted to clarify a few things. First, if the subpoena, by statute or other law, already required a court order to begin with—for example, for medical records and similar things—then there would not necessarily be a much larger scope of "personal or confidential" things that were not already being examined by the court. It could not be true both that there were not many things that would have to be examined and that this examination would create a huge burden on the courts. The rule retained the discretion for a court—in an individual case, by local rule, or by standing order—to do something different. She said that a rule that said that if there was a motion approved by a court order, then the subpoena production can be

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returned to counsel, was a different situation. She thought that the return to court was intended to be a much lower burden than the motion and order requirement generally.

Second, the current rule, Rule 17(c)(1), reads as though the return for *everything* is to be to the court, because it says that the court may allow the parties to inspect the return. If the court allows the parties to inspect the return, the materials must be in the court's possession. Ms. Ralston understood that this was not how this works in practice everywhere, but the local practices exist in the shadow of Rule 17. They are also in the shadow of *Nixon*, which is a tighter standard. Subpoenas are also only available for trial, which is a very small percentage of cases. This proposed rule change is broadening the scope of the proceedings, loosening the *Nixon* standard, and generally dispensing with the motion requirement. All of that would take what is currently a small circle and make it much bigger. To now pare back on the broad scope of this change as published would still be an incremental step in making the small circle slightly bigger.

Ms. Ralston said that the idea that "personal or confidential information" would need to be defined was a red herring. That term has been in the Criminal Rules since 2008, and there was no reason that it would mean something different when applied to non-victims as to victims. If there were litigation about this term, then all the better, because then the Committee could get a definition of what it means.

As for republication, Ms. Ralston said the Committee already considered the motion and order requirement, which people said would be onerous. The return to the court, however, does not *require* the court to do anything. It gives the court the opportunity to do something. This was already required for victims, and the court was not expected in those instances to read every line or every page of the document. She reiterated that this may not come up often enough to impose a substantial burden on the courts, but said that in contrast to the victims, there are situations where there could be subpoenas issued with absolutely no oversight by the court and no check by another party. A motion would not be required, because under Rule 17(c)(2), it was not a pro se party and it was not personal or confidential information of a victim. The attorney does not have to notify the other party that they are serving it, and does not have to notify the subject whose information they are seeking. If the subpoena recipient is a major organization, it might have the resources to resist, but a smaller entity may not have the incentive or the resources to move to quash. In those situations, she said, there deserved to be an additional thumb on the scale to protect people's privacy.

Ms. Ralston further noted that when the government seeks personal information, or information in which someone has a reasonable expectation of privacy, the government has to go to court and convince the judge to issue a warrant. That rule does not apply to defense counsel. But the change that the Committee is making to subpoena practice will not, and cannot, benefit the government. She did not understand why, as a matter of trial practice, this should be asymmetrical. Further, as an individual, she thought that personal information deserved to be protected as least as much from someone who a grand jury has charged with committing a federal crime as it did from the government. She said that it was worth putting a thumb on the scale in favor of privacy in those circumstances where otherwise there would be basically no check on the practice. She agreed with the member who said that criminal practice was built on trust, but said that right now, that trust was built in the shadow of a very limited rule. Everyone operates under an understanding that the rule itself is very restrictive. That is much different

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from a situation where the underlying rule is much looser. She observed that defense attorneys have an ethical obligation to do the best for their clients, and have no obligations to the third parties whose privacy might be invaded. Ms. Ralston concluded by saying that although she proposed the idea of requiring sealed notice for the subcommittee's consideration, there was no interest in pursuing that, and she did not think the Committee needed to spend more time on it.

Judge Mosman offered two brief comments. First, he addressed whether the return-to-court requirement would really operate as a useful check. He observed that a recurring theme from commenters was that this would not require the court to do anything. However, if he had personal or confidential information as a return submitted to him, he would view it as a dereliction of his duty to do nothing and simply hand the information over. So, yes, the return to court did require the judge to do something. He further stated that he had reviewed these sorts of materials many times, but it was almost impossible to do any sort of meaningful review, because he did not know the case. The case had not yet gone to trial and may not have even had any hearing. He therefore questioned whether the return-to-court requirement was a meaningful change, rather than a symbolic one.

Second, he agreed that the Committee should monitor how the rule change plays out. He thought that there were two ways to do this. First, the Committee could back off and create a new idea, whether that was sealing, return to court, or something else. This could be implemented years from now. The other way was one the rule allows, which would be to allow 93 districts to develop 93 different subpoena practices over time. Some may require sealing; some may require returns to the court; some may not require anything. Then, two years from now, the Committee can review to see what went well and what went poorly among those districts. It will not have committed to one particular path, but can look at all 93 paths to see which ones best protect non-victims. Judge Mosman agreed that the Committee should care about the privacy interests of non-victims, but did not pretend to know the best way to do that right now. He agreed with adding language to the committee note, which would cement that the courts have discretion.

Professor Beale said that this would be Option One, with a commitment to monitoring subpoena practices as they play out in the different districts. She said that the Committee would talk to the FJC about when it might make sense to begin studying this. She also noted that the Committee could talk to the committee that revises the *Bench Book for United States District Judges* about best practices. This would be an open issue that would need attention going forward.

Judge Nguyen stated that those best practices can sometimes come from districts where there is a robust practice. Those judges create a set of local rules or orders that others follow. Professor Beale added that Jonathan Wroblewski's proposal said that there should be a standard protective order, which could be another part of what the Committee is looking at with this. Monitoring could be the next stage, if the Committee decides to move forward.

A member said that he was torn, because he saw both sides of the issue. He was reluctant to try to make the rule perfect and delay at this late stage. But he also identified with the concerns raised by Ms. Ralston about privacy. He asked what the rationale was for distinguishing between personal or confidential information about victims and personal or confidential

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information about other people. He also asked how often personal or confidential information about non-victims comes up in federal court.

Judge Nguyen responded to his first question by saying that the original draft of the amended rule did not distinguish between personal or confidential information for victims and for everyone else. This approach was rejected at the fall 2024 Committee meeting in New York. The subcommittee thought that it was still very important to protect victims' rights, particularly because under the CVRA, victims warrant different treatment. This was the compromise position that was reached.

Professor Beale added that the CVRA itself creates a distinction for victims. Everyone has privacy rights, but victims' privacy rights are elevated. In 2008, the Committee amended Rule 17 and put in, as part of a package of amendments, the requirement for a motion and order and notice to the victim. There was a question as to whether the rules should try to incorporate the statute, and the Committee decided that it should incorporate aspects of it. Rule 17 therefore reflects that notion without denigrating other people's privacy rights.

A member said that she understood the concerns raised by Ms. Ralston, as well as the concerns that this had been studied extensively for three years. She did not want to make the perfect the enemy of the good, and noted that republication would delay the process by another two years. She was personally comfortable with Option One, but liked the idea of having some commitment to study its development and maybe put some best practices in the Bench Book. She said that another option could be to allow the subpoena recipient to object just in writing, without having to hire a lawyer. This would relieve courts of a burden, unless the person seeking the subpoena moves to compel, which usually does not happen. The member noted that Vermont and West Virginia have this option.

Another member said that the testimony in Arizona highlighted issues in districts where there was a complete absence of defense subpoena practices because the court, for example, would not accept an ex parte application, or would require any return to be disclosed immediately to the government. But it was not true that federal practice, broadly speaking, was that subpoenas are only used for trial, that this would be a loosening of the *Nixon* standard everywhere, or that there was no motion practice required. There are districts that already apply a loosened *Nixon* standard, including the member's own district. She had surveyed her colleagues quite extensively, and many districts already routinely allow subpoenas in non-trial proceedings. That would not be new under this rule. And return to the parties differs from district to district and judge to judge. There are already places where return to the parties is common practice. The member stated that she did not make these points to undermine the importance of the topic, which should be studied and will be made part of the Bench Book.

She noted that a member had asked how often victims' personal or confidential information is requested, and said she did not know the answer. In surveying her colleagues, she learned that the type of private information most commonly requested is their client's own information, often from a state or local department of corrections, or a juvenile facility of some sort.

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The Committee had heard from many people in the districts where there was already practice in line with the proposed rule. It had also heard from attorneys who could not ethically make an application for a subpoena because they would be required to disclose too much. Nowhere in the spectrum of information that the Committee had gathered had it heard, other than in the victim category, that this was an issue. Option One would address the concerns raised by the Committee and guide the court on what to look for in adopting new practices under the rule, if they indeed change their practice. But the practice would not change in the districts that already have robust subpoena practices. The member thought that the world currently followed many of the things that the rule would now incorporate.

A member noted that the original suggestion came from defense counsel in New York several years ago. She acknowledged that there may still be small issues that needed to be resolved, but this proposed amended rule was a significant improvement over the original rule. She was thrilled with the changes that the Committee had made.

Ms. Ralston asked for more detail on how the Bench Book is amended, and how much control this Committee has over the process. Can the Committee ensure that something is put into the book, or does it simply make a suggestion and hope that someone listens?

Judge Dever said that he would answer her question, but first reminded everyone that if the rule is changed, the AO form for subpoenas would also be changed. The AO form now begins, "Before requesting and serving a subpoena pursuant to Federal Rule of Criminal Procedure 17(c), the party seeking the subpoena is advised to consult the rules of practice of the court in which the criminal proceeding is pending to determine whether any local rules or orders establish requirements in connection with the issuance of such a subpoena." That was the current reality of what attorneys were supposed to do. And based on what the Committee had heard in hearings, this *was* what attorneys actually do. The form goes on to quote the language in Rule 17(c)-(g), including the ability of the receiving party to object.

As to Ms. Ralston's question, Judge Dever said that there was a committee that oversees the Bench Book, and the Criminal Rules Committee could certainly make recommendations. But the more immediate issue, in his mind, was that the language of the subpoena form would be immediately changed to reflect the current text of any change in the rule. It would continue to have the reminder that, if an attorney is going to issue a subpoena, the first thing they need to do is look to see whether there is a local rule or court order that governs this practice. The AO form would immediately change, if the rule changed, to reflect the new text.

Judge Mosman responded to Ms. Ralston by saying that the Committee could not rewrite the Bench Book, but it could make suggestions. It could also request the help of the FJC to study what is happening in various districts. The Committee itself could also monitor this issue, by holding hearings and inviting testimony. He committed to monitoring the situation within this Committee's power as long as he was chair, because this issue was so important.

Professor Beale directed the Committee's attention to footnote 6 on page 124 of the agenda book, which provides the historical example of Judge Raggi, the former chair of this Committee. At the Committee's urging, she requested to sit with the Bench Book Committee; she reported back that the FJC's Bench Book Committee had acted on the Criminal Rules

Committee's suggestion that a discussion of *Brady*/*Giglio* obligations be included in the next edition. A copy of that Bench Book comprehensive section was included in the agenda book for the spring 2013 Criminal Rules Committee meeting. At that meeting, Judge Raggi expressed her gratitude to the Bench Book Committee for allowing her to participate in the discussions. Professor Beale noted that she did not know the current schedule for revisions to the Bench Book, but it seemed like the Committee would be interested in exploring this.

Ms. Ralson asked about the process for amending local rules. Could that process proceed in districts in advance of the amended Rule 17 going into effect, such that a local rule would go into effect on the same date that amended Rule 17 does, or does Rule 57 require some sort of six- or twelve-month lag?

Judge Mosman answered that the local rules could be amended without any delay, so long as any amendment was consistent with the current rules. The courts could also anticipate changes, discuss them in advance of the rule change, and make anticipatory changes to local rules that would be effective immediately upon Rule 17's enactment. Judge Nguyen added that individual judges could amend their own standing rules as well.

A member said that the example with Judge Raggi, about the change to the *Brady* order, happened very quickly. It was anticipated on December 1, and multiple judges in her district put something together quickly. Her district's local rules committee then tried to create a district plan, but while that was happening, the AO sent out very specific language that is now read in every case, consistent with the rule. She said that this process happens very quickly and judges would be ready for this by December 1, because it would be a significant change.

A member said that he was persuaded to go with Option One. He asked whether the Committee intended to include the bracketed language in the committee note.

Judge Nguyen said that she had been planning to propose that the Committee vote on the options with or without the bracketed language, then decide whether it wants to include the bracketed language.

A member said that this was a difficult issue. He agreed with much of what Ms. Ralston had said. He also found Jonathan Wroblewski's article interesting and thought that it raised some real concerns. The member noted that he had said from the beginning that he was concerned about the application of other law to these subpoenas. To what extent does the Constitution or something like the Stored Communications Act apply to these subpoenas? It was unclear in his mind how they may be applicable. He appreciated that there was support for the idea that the Fourth Amendment was not applicable, as set forth in the reporters' memorandum in the agenda book. He said that this did not give him a great deal of comfort. The Stored Communications Act was pointed almost entirely at the government and restricting its ability. That act applies to all data held by third parties. It generally prohibits disclosure of content by internet service providers to anyone, with a few narrow exceptions not applicable here. But as he read the statute, there was no prohibition on providing anything less than content to a private party. There was a gap between what the government could get with a warrant and what an individual may be able to get with a subpoena. Anything less than content, someone could arguably get under the Stored Communications Act. That would include cell site location information, perhaps a tower dump,

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and maybe even a geofence. The member noted that issues with respect to privacy in the Fourth Amendment change constantly; geofence warrants were before the Supreme Court this week. He was worried about how this would impact personal privacy and whether the Committee had set the right balance. On balance—especially given that a change at this time would require republication, and that the rule just sets a default and would permit local courts and individual judges to alter these rules with what they think is appropriate in their courtrooms—he would support the moving forward the with amendment without a revision providing oversight for personal or confidential information.

Judge Nguyen then asked whether there was a motion to approve Option One, with the amendment to the note and no change to the text, with or without the bracketed language. A motion was made, seconded, and approved unanimously.

Judge Nguyen then asked whether any committee members had a preference as to whether to include the bracketed language on page 164, lines 495 to 500.

Ms. Ralston said that she liked the bracketed language, but asked that it be introduced by dashes. It would read, "And to provide greater judicial oversight—for example, 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."

Professor Beale said that this was a friendly amendment. She noted that after the subcommittee meeting, the reporters asked that members send them potential language. One member had done so. Professor Beale asked if she supported the amendment and the bracketed language, and the member said that she did.

A motion to amend the note with the specific language proposed by Ms. Ralston was made, seconded, and approved.

Judge Mosman asked the Committee to vote on the entire Rule 17 package. He asked for a show of hands, and all members voted in favor.

Judge Nguyen said that the reporters' memorandum in the agenda book addressed the miscellaneous comments on Rule 17, but these did not warrant full discussion from the Committee.

Judge Mosman stated that these amendments to Rule 17 were a great accomplishment and applauded Judge Nguyen for her excellent work on this project over many years.

Rule 49.1

Judge Mosman asked Judge Harvey to present the efforts of the Rule 49.1 Subcommittee. Judge Harvey said that the subcommittee was submitting proposed amendments to Rule 49.1 for approval for publication. In the subcommittee's view, the amendments will strengthen privacy protections for minors and for social-security numbers (SSNs) and other taxpayer-identification numbers in public criminal filings. He directed the Committee's attention to page 215 of the agenda book, where the reporters' memorandum explained in detail the subcommittee's efforts to

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date. He thanked Professor Beale and Professor King for the memorandum and for their guidance throughout this process. Judge Harvey said that redline and clean versions of the proposed amendments began on page 225. The language in the proposed rule reflected input from subcommittee members, the reporters, the Rules staff, and the Style Consultants.

At the same time that the Rule 49.1 Subcommittee had been working on the amendments to the criminal rule, the Appellate, Bankruptcy, and Civil Rules Committees had been considering parallel amendments to their privacy rules. Maintaining uniformity across the rules, where appropriate, had been a consideration for all committees. There would be some differences; the Bankruptcy Rules would likely have fewer changes to their privacy rule because of the unique nature of bankruptcy filings.

Judge Harvey summarized the proposed changes to Rule 49.1. First, the proposed amendments responded to the DOJ's March 2024 request to better protect minors' privacy by requiring the use of pseudonyms, rather than minors' initials, in public filings. The subcommittee unanimously agreed that this change was appropriate and uncontroversial. The subcommittee reached that conclusion early in its first meeting several years ago based on a showing that the use of initials for minors in public filings did not adequately protect their identities. The subcommittee also unanimously supported, where feasible, a request from the American Association for Justice and the National Crime Victim Bar Association to encourage the use of gender-neutral pseudonyms in public filings. It concluded that doing so could further protect minors' identities in cases where other information in the record would otherwise make the identification of the minor possible if gendered terms were used. However, since it was not always feasible to require gender-neutral language in criminal cases—for example, where the evidence of the crime was inherently gender-specific—the subcommittee expressed this preference in the committee note rather than in the rule text.

The subcommittee also considered whether the rule should address situations in which a minor reaches the age of majority while the litigation is ongoing. The rule presented did not explicitly address that circumstance. Research conducted by Lara Venegas,[2] however, showed that courts have consistently extended privacy protections to minors who age out, typically through protective orders, which are permitted under Rule 49.1(e). For that reason, because it did not appear that courts were struggling to reach what the subcommittee believed was the right result, the subcommittee concluded that no amendment was necessary at this time. Judge Harvey said that this decision was admittedly influenced by the subcommittee's desire not to further delay publication of other important amendments to the rule that had been under consideration for several years. However, he said that the subcommittee had asked the reporters to explore whether public comment might be solicited on the need for the rule to expressly address the issue of minors aging out.

The second principal assignment of the subcommittee was to consider Senator Wyden's proposal to require full redaction of SSNs rather than permitting disclosure of the last four digits in public filings, as the present rule permits. Based on the very helpful research done by Kyle Brinker, the former Rules Law Clerk, the subcommittee concluded that full redaction of SSNs

[2] Ms. Venegas was detailed from the Defender Services Office in the Administrative Office of the U.S. Courts to assist the Committee during a staffing shortage.

was warranted, for three reasons. First, the subcommittee identified no need to include even partial SSNs in public criminal filings. Second, there was good evidence that even partial disclosure could be misused for identity theft and by fraudsters. Finally, full redaction was widely recognized as the best practice by government agencies who probably understand the risk better than most, including the IRS. Thus, the proposed amendment requires full redaction of SSNs.

Next, the subcommittee considered whether other taxpayer-identification numbers should also be fully redacted. In the present rule, individual taxpayer-identification numbers (ITINs) were treated the same as SSNs in terms of redaction. Judge Harvey explained that were three taxpayer-identification numbers at issue: ITINs, Adoption Taxpayer Identification Numbers (ATINs), and Employer Identification Numbers (EINs). The subcommittee ultimately concluded that all of those numbers should be fully redacted or omitted in public filings. ITINs presented the easiest decision for the subcommittee, which identified no reason to include any part of them in public filings. They raise privacy concerns comparable to SSNs in that they identify individuals, and like SSNs, they are often used for things other than filing taxes—for example, to open bank accounts and apply for credit cards. The subcommittee supported their full redaction. ATINs fell somewhere in the middle. They are temporary and less widely used, so identity theft and fraud risks appear lower. But like ITINs, they identify individuals and therefore raise privacy concerns. The subcommittee saw no reason to include them in public filings. For consistency and uniformity, it recommended treating ATINs the same as SSNs and ITINs.

EINs created the most discussion among the subcommittee. The subcommittee had agreed twice over the past year to propose their full redaction, just like SSNs and ITINs. Judge Harvey highlighted, however, that requiring their full redaction represented a change from the present rule. It was quite clear from the rule's history that when Rule 49.1 was initially promulgated some twenty years ago, the decision was made not to include EINs within the realm of protection. That was the DOJ's position in 2007, and it remained the DOJ's position today. The DOJ's view was that EINs should not fall within the rule's protection, meaning that there should be no redaction requirement for them. This was because there was limited evidence of their misuse, because some EINs were already publicly available from other sources, because requiring the redaction imposes some burdens on litigants, and because of the presumption of public access to court records. The subcommittee was not persuaded on those points, for a number of reasons. It believed that EINs may raise an interest in individual privacy, especially in cases where they were used for families who employ domestic workers, or for sole proprietorships and small businesses. Second, regardless of the situation in 2007, EINs were now widely used beyond tax filings, such as for opening bank accounts or applying for credit. Third, not requiring redaction would create meaningful risks of their misuse by fraudsters. The subcommittee considered government reports documenting significant fraud involving stolen EINs, which caused hundreds of millions or even billions of dollars of fraud on the U.S. Treasury. In the subcommittee's view, the rules should not facilitate fraud, regardless of whether the losses from misused EINs fall on the U.S. Treasury or on private parties. These fraud risks appeared to be increasing. Finally, there was no demonstrated need to include even partial EINs in public criminal filings. The subcommittee voted that the rules should be protective and forward-leaning, and therefore require full redaction of EINs. Notably, this was what the IRS and the Tax Court require.

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Finally, Judge Harvey said that the amended rule would apply not only to briefs but also to all attachments and exhibits thereto. The subcommittee had learned that this was where most improper disclosures occur, so it was important to make this explicit in the rule.

Ms. Dubay then provided an update on the work of the Appellate, Bankruptcy, and Civil Rules Committees, which had met the week of April 13 to discuss amendments to their respective privacy rules. The Civil Rules Committee voted to approve for publication and public comment amendments to Civil Rule 5.2, which would include extending full redaction to not only SSNs and ITINs but EINs as well. There were concerns raised at that meeting about whether this was a necessary extension, but the Civil Rules Committee ultimately voted to approve that for publication. It also approved the amendments that would change the requirement of using initials for minors to pseudonyms and the extension to exhibits and attachments. The Bankruptcy Rules Committee had previously specified certain reasons why EINs were useful in the bankruptcy context, and why the last four digits of SSNs were important as well. That committee therefore voted to approve for publication amendments to Bankruptcy Rule 9037 only with respect to the use of pseudonyms for minors. They would make no change to the existing redaction requirements for taxpayer-identification numbers. The Bankruptcy Rules also have a rule that would apply in certain bankruptcy appeals that parallels Appellate Rule 25. There was a slight wrinkle because the last committee to meet on this issue was the Appellate Rules Advisory Committee. At that meeting, the DOJ and practitioners raised an issue with respect to the onerous work that would go into redacting the appendix on appeal, which can be quite voluminous. A decision was therefore made to further study the appellate rule amendment to determine whether there needed to be some carve out with respect to that redaction requirement. The Appellate Rules Committee voted to form a subcommittee to look into those amendments, and it would not be sending their appellate privacy rule to the Standing Committee in June.

Professor Hartnett, Reporter to the Standing Committee, clarified that the Appellate Rules Committee's decision should not affect this Committee at all. The Appellate Rules Committee had been deciding whether to layer additional protection. But the existing Appellate Rule 25(a)(5) incorporated Criminal Rule 49.1. There was therefore no reason for anyone to be concerned about the delay on amending the Appellate Rules.

A member asked whether the rule could be changed stylistically. Instead of saying, "if any of the following types of information appear in the filing, include only . . . the year of an individual's birth," could the rule instead spell out those following types of information?

Professor Beale explained that this decision had been made by the Style Consultants. Substantive rule changes were for the Committee to decide, but if an issue concerned grammar, structure, placement, and did not change the meaning of the rule, the Style Consultants controlled the revision. This particular language was negotiated with the Style Consultants. Judge Harvey added that this sentence was discussed with the Style Consultants three or four times, and the subcommittee was ultimately satisfied with this version of the amended rule.

A motion to approve amended Rule 49.1 and the committee note for publication, as set forth on pages 225-228 of the agenda book, was made, seconded, and approved unanimously.

Ms. Ralston asked whether the Committee could include a request for comment on the particular issue of minors aging out in the rule published for public comment. Professor Beale said that it could, and that the reporters and Rules Committee Staff would discuss how to do so.

Rules 11 and 32

Judge Mosman asked Judge Boyle to present the proposed amendments to Rules 11 and 32. Judge Boyle explained that Rule 11 dealt with guilty pleas and set forth what a judge must do when taking a guilty plea. In subparagraph (b)(1)(M), the rule stated that the court must inform the defendant of, "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)." Rule 32(h) provided, "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."

The 2025 amendments to the Sentencing Guidelines made sweeping changes to Section 5K, which dealt with departures. The amendments deleted most of those departure provisions and kept only those provisions under 5K1.1, which dealt with substantial assistance, and 5K3.1, which concerned early disposition programs. Judge Boyle stated that Judge Patricia Barksdale brough this issue to the Committee's attention and said that Rule 11(b)(1)(M) should be amended to address the recent changes to the Guidelines. The subcommittee agreed and thought that Rule 32(h) should be amended as well, since it also mentions departures.

Professor King directed the Committee to pages 241-242 of the agenda book, which showed the redline of proposed changes to Rule 11, and page 243, which showed the proposed elimination of Rule 32(h). She explained that the committee note for Rule 32(h) was short because there was not much to say about it. For Rule 11(b)(1)(M), the rule now says that the court must discuss the factors under 18 U.S.C. § 3553(a), including the Sentencing Guidelines. The subcommittee worked at some length to come up with this particular phrasing. It considered putting the Sentencing Guidelines first and then the statutory factors; leaving the Sentencing Guidelines out; and other formulations. Ultimately, the subcommittee thought that this formulation would convey the appropriate prominence of section 3553(a) as the governing statute, but still remind judges that they must start with the Guidelines. This was faithful to the Guidelines' description of Step 2, which was the subcommittee's guide to accurately describing what the court must do. It begins with the statutory provisions, which is highlighted in the proposed amendment.

Professor King further explained that Rule 32(h) would be eliminated, but it was "reserved." Professor Beale said that the advantage of reserving that subdivision was that it would not require re-lettering or re-numbering the rest of the provisions.

A member observed that the prior version of Rule 11(b)(1)(M) had more specificity—it said to look at the Guidelines, the range, possible departures, and section 3553(a) factors. The amended version would just say to consider section 3553(a) and the Guidelines. Professor Beale confirmed that this was an intentional choice, because Step 2 of the Guidelines analysis involves

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not just the range, but also the type of sentence. Listing everything did not seem to the subcommittee to be productive or provide more specificity than just looking at section 3553(a), which lists all of the relevant information.

A member added that the Sentencing Commission was continuing to work on simplifying the Guidelines. Part of the subcommittee's consideration was that by using this broader language, it would incorporate any potential future changes to the Sentencing Guidelines. It would also ensure that 5K1.1 was not lost, which was still relevant even though it was no longer called a departure.

Judge Dever noted that the change to the Sentencing Guidelines would also involve a change to the Bench Book, because that provides the script that many judges use for their guilty pleas. Professor Beale stated that there was a different committee and a different process for revising the Bench Book, but since this Committee planned to speak with the Bench Book Committee about the Rule 17 changes, perhaps the Criminal Rules Committee could mention this as well.

Motions to approve the changes to Rule 11(b)(1)(M) and to approve the changes to Rule 32(h) were made, seconded, and approved unanimously.

Rule 40

Judge Mosman asked Judge Harvey to provide an update on Rule 40. Judge Harvey stated that the Rule 40 Subcommittee was presenting a discussion draft for the Committee's review today. This rule governed arrest of defendants on warrants issued by a district other than the arresting district which arise from violation of release conditions pending trial, sentencing, or appeal. Current Rule 40 does not say much about this, and the subcommittee had proposed significant rewrites to clarify what procedures were required for proceedings in the arresting district. He directed the Committee's attention to page 258 of the agenda book. The subcommittee's intention, with the Committee's permission, was to push out the rule to magistrate judges across the country (for example, the Magistrate Judges Advisory Group (MJAG) and the Federal Magistrate Judges Association (FMJA)) to get feedback on whether the subcommittee was headed in the right direction. Judge Harvey thanked the reporters, the staff, and the subcommittee members for their efforts on the draft.

At a high level, the discussion draft of Rule 40 did a number of things. It specified the core rights and procedures for a Rule 40 hearing in the arresting district, including requiring that a copy of the arrest warrant be produced, that the defendant's identify be established, and that the defendant be advised of the nature of the release violation, the right to remain silent, and the right to counsel. Importantly, with respect to counsel, the draft recognized that the defendant must be given the reasonable opportunity to consult with existing counsel. This was unique to the Rule 40 context, because counsel may have already been appointed for the defendant during initial proceedings in the case in the issuing district. The draft rule therefore reminded the magistrate judge and the litigants of the need for consultation and required reasonable opportunity for the defendant to consult with his or her attorney. The draft also recognized and permitted the use of stand-in counsel in the arresting district, which is often what happens in Rule 40 proceedings. The duty assistant federal public defender would speak to the defendant's

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counsel in the issuing district, and then stand in for them in the Rule 40 proceeding in the arresting district, so that the proceeding could go forward without undue delay. The draft rule acknowledged and expressly permitted that practice.

Perhaps most importantly, the draft made clear that a defendant had a right to seek his release in the arresting district before being transferred to the issuing district, and that it was the magistrate judge in the arresting district who would make that decision. The draft also cross-referenced sections of the Bail Reform Act, where the detention or release standards could be found. The standard varies depending on whether the defendant's violation occurred while on pretrial release or post-conviction release, so the draft rule provided guidance on where to find those standards in the Bail Reform Act. This was one of the things that MJAG requested that the new rule accomplish, to assist magistrate judges.

Judge Harvey said that the draft did not require a preliminary hearing on the warrant, which was consistent with the case law. It also omitted certain Rule 5 advisements that did not fit well in the Rule 40 context—for example, there was no requirement to advise the defendant of his or her rights under Rule 20 or of counselor notification. Both of those make sense at the start of a case, and are included in Rule 5, but do not apply in a Rule 40 proceeding, which comes later or even near the end of a prosecution when the defendant is awaiting sentencing or appeal.

The other provisions—allowing for first appearance in the neighboring district if it can occur promptly and requiring transfer of the defendant to the issuing district if detained; for the clerk's office to provide the paperwork; and permitting video teleconferencing with the defendant's consent—were all drawn from either Rule 5 or present Rule 40 without substantial change.

A member asked what the biggest change was that this draft accomplished. Judge Harvey responded that it made clear that the defendant had a right to a hearing and that it would be the magistrate judge in the arresting district who would make that determination. There were some cases that had expressed confusion about this, and Judge Harvey thought that the confusion largely arose from Rule 5. But the new Rule 40 would make clear that this is a decision that needed to be made, and that the magistrate judge in the arresting district had the power to release someone regardless of what the warrant said. The warrant did not control the magistrate judge in the jurisdiction of arrest. It was also helpful to make clear where the standard comes from, and ensure that magistrate judges understand that it is more difficult for a defendant to obtain release when they are on release pending sentencing or pending appeal. The Bail Reform Act says that the standard gets increasingly difficult. Without the reminder, a magistrate judge might reflexively apply the normal factors under 18 U.S.C. § 3142. Those are appropriate if the individual was on pretrial release and was before a magistrate judge for violating those release conditions. He noted that Rule 32.1, which outlines the proceedings with respect to violations of supervised release, refers to the Bail Reform Act. The MJAG requested that this rule provide similarly, and Judge Harvey thought that this would assist magistrate judges.

Professor King stated that based on empirical data from multiple districts provided by the FMJA, somewhere between 6 and 40 percent of arrests for pretrial violations are out of district. That was the context in which the subcommittee was asked to investigate and clarify the rule. However, Rule 40 covers other things, including violations of release pending sentencing and

violations for failure to appear when ordered by subpoena as a witness. The subcommittee chose to set those less common things aside and focus on the pretrial context to start. The draft it presented to the committee encompassed release pre-sentencing and pending appeal as well, because there was so much overlap that it was easy enough to put those things together in one product. The witness aspect would be somewhat different and would require different kinds of procedures. The subcommittee had not yet tackled that issue.

Professor King said that the existing version of the rule could be quite unclear, so that was what the subcommittee was trying to fix. She had heard of a magistrate judge who was new to the bench and asked a more experienced judge how to handle Rule 40 arrests, and the experienced judge told the new judge to ignore the text of the rule, because it was unhelpful. This is not what the Committee wants; it wants a rule that tells judges clearly what to do.

Judge Harvey clarified that the draft covered almost the entirety of Rule 40, with failure to appear as required by subpoena as the sole exception. The subcommittee would look at that next and determine how best to address that—whether it needed to be in the rule and if so, whether the procedures should be any different.

Ms. Ralston said that the DOJ felt strongly that Rule 40 should address material witnesses and subpoena no-shows. She also asked whether it would be possible to get feedback from the Probation Officers Advisory Group at the same time as the subcommittee was getting feedback from magistrate judges. She had heard several times from U.S. attorneys that the probation and pretrial office in the arresting district typically does not have any information to provide for these hearings, which leaves everyone a bit at sea about what appropriate conditions or modifications should be made. This seems to be a record-sharing issue. But it may be useful to get their feedback.

Judge Harvey agreed. He noted that he had met with the clerk's office and with pretrial services in D.C., and they had not expressed confusion about the paperwork that they were supposed to provide or the process for doing so. He nonetheless thought broader feedback would be helpful. Judge Harvey noted that on page 262, line 72, the draft rule read, "Once the person is transferred or released, the clerk must promptly transmit the papers and any bail to the clerk in the district where the warrant was issued." He said that the subcommittee had discussed what this meant and thought that there was not much confusion about it among courtroom deputies and pretrial services. This language came directly from Rule 5.

Ms. Ralston explained that the confusion she had heard about was not about what happens after the proceeding, but instead what needed to happen before the proceeding, particularly to ensure that pretrial services would be able to provide information that would inform the release or detention decision. Judge Harvey thanked her for clarifying and said that this was a great point.

Judge Dever stated that, because these defendants are being processed under Rule 40, they necessarily had been arrested and released in their original districts. When they were arrested somewhere else, there must have been a pretrial services report created, which could be transmitted to the magistrate judge in the arresting district. The report would have the

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defendant's criminal history, family issues, and anything that allowed them to be released in the first place.

Judge Harvey said that there was not always a warrant application. The best example was a bench warrant—someone is supposed to appear in court, and does not, so a judge issues a bench warrant because this was a violation of the defendant's condition of release. If that defendant appeared before a magistrate judge in a district two states away, there would not be any application for that judge to review. Or, if pretrial services calls a magistrate judge and says that a defendant removed his location device, the magistrate judge may just issue a bench warrant. But he agreed with Judge Dever that in a situation where a warrant was issued because someone was violating some other conditions of release, pretrial services would have prepared a report, and it would have been on that basis that the court issued a warrant.

A member pointed to Suggestion 23-CR-H from Judge Zachary Bolitho, which concerned the authority of the magistrate judge in the arresting district to conduct a detention hearing and the standard applied at any such hearing. She asked for Judge Harvey's view. Judge Harvey noted that in Judge Bolitho's case, as described in his suggestion, there was a question about whether a detention hearing should be held at all. He thought that yes, there certainly must be a detention hearing. This was not a change to Rule 40; this was a clarification. The existing rule says that the arresting judge "may modify any previous release or detention order issued in another district." The magistrate judge in the arresting district should make a detention determination regardless of what the judge in the issuing district had determined.

The member asked whether there was any difference in the standard that applied to the detention hearings. Judge Harvey answered that there was a difference, and it depended on the type of violation. The standards in section 3142 apply to violations of pretrial release. If someone had violated a condition of pre-sentence release, or release on appeal, the standard was more difficult to meet, because the defendant was closer to judgment.

A member agreed with Ms. Ralston that it was a good idea to solicit feedback from pretrial services. She asked whether the Committee could find out a bit more information from them about how these cases typically arise. If someone absconded from her district and was picked up somewhere else, that district would have no connection to her client. That district would need to contact the pretrial officer in her district and get the report. But many times, someone will be released and live in a different district. They will be supervised by that district's pretrial office, who will have a lot of information. And, for example, there may be a few positive drug tests, such that the judge in the member's district would want the issue addressed and issue a warrant or a summons. This was why the right to a hearing in the arresting district was important, so that the defendant could address whether conditions could be changed to allow them to remain on release. The member added that a third type of situation could occur if, following the positive drug tests, the judge in the member's district required the defendant to appear in that district. This would not implicate Rule 40. The member thought that getting perspective from pretrial services would be helpful, especially if they could provide information about the circumstances in which these Rule 40 proceedings regularly take place.

Another member said that she read the draft rule to say that the arrestee must be taken to a court in the district of arrest unless the arrestee could be brought back to the home district that

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same day. What if, for example, a defendant was charged in the Central District of California and then arrested in Las Vegas? This was a six- to eight-hour drive, depending on traffic. She thought that there was some flexibility for the magistrate judge to tell the defendant to start the drive—even if he would not make it that same day. It did not sound to her as though this flexibility existed under the draft rule, because if a defendant could not get to the home district that same day, then the magistrate judge in the arresting district must hold a brand new detention hearing. She was interested to see how magistrate judges felt about what is potentially a lot of extra work for a defendant who was not under that district's supervision, when they could very easily get the defendant to court the next day.

Judge Harvey responded that this language came from Rule 5. He reiterated that these were a relatively small portion of out-of-district warrants that magistrate judges must address. The vast majority arise under Rule 5, when an arrest warrant is issued for a complaint or indictment, and the defendant is arrested in a different state. The second most common category is for violations of supervised release. Those are more common than a Rule 40 scenario because there are many people out on supervised release. Judge Harvey said that this had been how Rule 5 treated the issue—he was not saying that this was the right way to do so, but simply that this was a longstanding practice.

The member said that she saw the Rule 5 context as slightly different than a Rule 40 arrest. She noted that she had had an experience many years ago where a defendant was arrested in another district and she was told that the defendant would appear in her district the following day. She thought that the rules therefore accounted for this flexibility. She did not have a view as to whether it was acceptable to remove that flexibility if magistrate judges thought that was the better course.

Judge Harvey said that the subcommittee would certainly get input from magistrate judges. He observed that it could often take several days for the U.S. Marshals to transfer a defendant to another district, and the defendant might be detained for far less time if they were simply brought before the magistrate judge in the arresting district. On the other hand, in cases involving bordering districts, it may help to provide a bit more flexibility in the rule. He said that the subcommittee would continue to look at this issue.

Judge Harvey asked whether there were any further questions from the committee members, and there were not. He stated that the subcommittee would reach out to magistrate judges, clerk's office representatives, and pretrial representatives for informal feedback on the draft rule.

Rules 49 and 45

Judge Mosman turned to Judge Burgess and Professor Struve to present the proposed changes to Rules 49 and 45. Judge Burgess directed the Committee to Professor Struve's memorandum on page 281 of the agenda book and explained that the subcommittee had been focused on proposed amendments to Rule 49 relating to self-represented litigants. He also thanked the subcommittee members, Professor Struve, and the reporters for their hard work throughout this process.

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Judge Burgess stated that the first proposed change was to make the filing provisions clear for self-represented litigants. Rule 49(a)(3) would now read, "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 is complete as of the notice's date." The subcommittee wanted to ensure that self-represented litigants were not penalized if they submitted something to the clerk's office but it was not posted until a later date.

The next proposed change was to Rule 49(b)(2)(B). This subparagraph previously used a four-part structure, as seen in the fall 2025 agenda book. The subcommittee received some suggestions to shorten it, and in March, came up with the language of what was now a two-part structure. This version was simpler and cleaner; it now read, "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 particular self-represented parties if they misuse the system). But the court may not prohibit all self-represented parties from using the court system unless that prohibition includes reasonable exceptions or the court permits the use of another electronic method . . . ." The subcommittee wanted to ensure that courts would not prohibit any access at all by self-represented litigants.

Finally, the subcommittee proposed three additional changes. First, for the provision on service of sealed filings in Rule 49(a)(3)(B), the subcommittee retained the provision for local control, and added a court order as an option. The provision would now read, "A court may provide by order or local rule that if a paper is filed under seal, it must be served by other means." Next, in Rule 49(a)(5), the subcommittee decided to delete the provisions that addressed service of papers not filed, since it did not think those were necessary. Lastly, there was a recommendation to replace "person" with "party." There was a concern that "person" could lead self-represented litigants to think that they could file something in a case that they have no relation to. Changing "person" to "party" would resolve that potential problem. Judge Burgess then turned to Professor Struve to provide additional comments.

Professor Struve thanked Judge Burgess; the subcommittee; Dr. Lonchena, Dr. Reagan, and their colleagues at the FJC; the Style Consultants; and the reporters, Professor Beale and Professor King, for their work on this project. She drew the Committee's attention to the portion of the committee note concerning Rule 49(b)(2), which was on page 311, lines 253 to 258. This sentence discussed what would constitute reasonable exceptions if a court decided to have a provision that barred self-represented litigants from accessing the court's electronic filing system. It said, 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. This sentence addressed what would constitute compliance with the new flipped default presumption concerning access to the court's e-filing system.

Rule 49(b)(2)(B)(i) said that presumptively, self-represented parties can use the court's e-filing system unless a court order or local rule prohibits them. Then, in (B)(ii), the rule said that the court may set and enforce reasonable conditions and restrictions on that access, including by denying or revoking access for a particular party. "But the court may not prohibit all self-represented parties from using the system unless that prohibition includes reasonable exceptions

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or the court permits the use of another electronic method" for filing and receiving electronic notices.

The committee note language honed in on the question of what would count as "reasonable exceptions," and said that it would qualify for a court to say that it would require each self-represented litigant who wanted to use the court's e-filing system to get permission from the court, so long as the permission was not unreasonably withheld in practice. Professor Struve noted that there was significant attention focused on this language from the Appellate, Bankruptcy, and Civil Rules Committees, which met two weeks ago. There were two schools of thought about this. One view was that this was an important piece of the committee note because there were many courts that currently say that if self-represented litigants want to use the e-filing system, they must get the court's permission. There was value to validating that practice. The committees had heard from clerk representatives that an important way to run the system is to require a self-represented litigant who wants access to go and ask for permission. That allows for some gatekeeping and a dialogue with, most often, the clerk's office. The other view, expressed in the Civil and Appellate Rules Committee meetings, was that this language risked undercutting the change to a default principle of access for self-represented litigants that the committees have worked so hard to present. The committee note language could be read as validating a court's decision to have a permission-only system that operates in a mode of standardless discretion for the court. This could make it quite difficult for a self-represented litigant who believes that they reasonably should qualify for electronic access to challenge the court's denial or practice of denials of that permission.

Professor Struve stated that, after a good deal of discussion, the Civil Rules Committee ultimately voted to proceed with this committee note language, even though some members expressed doubts. The Bankruptcy Rules Committee voted to proceed as well. However, the Appellate Rules Committee came up with different language, which appears on page 330 of the agenda book. This language would begin similarly to the existing language, but would then say that local provisions requiring permission would count as including reasonable exceptions, "so long as such permission is granted or withheld in accordance with the reasonable conditions and restrictions on access set by the court." Professor Struve explained that this was a reference to the language a few paragraphs earlier in the committee note. The thought was that this language would validate the practices of courts that wish to have a permission-based system, but would do so in a way that would avoid blessing standardless, discretionary systems that could never be challenged in practice by a self-represented litigant who was denied access. She added that the proposed new language on page 330 of the agenda book would also change the requirement that self-represented litigants seek "permission from the judge to whom the case is assigned" to say that they must obtain "the court's permission." This was because the subcommittee had heard from clerk representatives that it was often the clerk's office, not the judge, who played this role in practice. Professor Struve invited the Committee's feedback on the changes.

Professor King stated that the proposed text said that "a court may set and enforce reasonable conditions and restrictions on self-represented parties' access to the court's electronic system," which the committee note suggested could mean, for example, only to self-represented litigants who are not incarcerated, who satisfactorily complete required training, and who comply with other reasonable conditions on access. Did this mean that the court *must* set them, rather

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than *may* set them? If compliance with the conditions and restrictions was a condition of having a policy of permission, then these conditions and restrictions must be in place.

Professor Struve agreed that conceptually, that was true. However, the way that it generally worked in practice was that the clerk's office would tell a self-represented litigant the court's requirements for electronic access, such as completing a training module. The idea was that the note would push courts towards creating policies—if a court wanted to have its policy be that self-represented litigants need to request permission, then it needed to have some idea of the bases on which it would withhold permission. She added that because the rule was now flipping the default presumption to allow electronic access to self-represented litigants, courts *would* need to do something to create a policy. A court could adopt a rule that says, "No self-represented litigants may ever use the system, but they can use our alternative method of using an upload portal and court-based electronic notice." Thus, the courts would need to create something, and the implication in the note was that the court cannot create a policy that said that it might let self-represented litigants file electronically, but it would not disclose the standards it would use to make that determination.

Judge Burgess said that it made him nervous to look at brand new language for the first time in a committee meeting. He also stated that he liked the concept of a judge to whom the case was assigned making a decision as to electronic filing, rather than the court, as the new language stated. Lastly, he asked whether the rule sets needed to be consistent with one another.

Judge Dever stated that at the Appellate Rules Committee meeting, the clerk representative was very helpful. He told the committee that he and his staff would be the ones getting calls from self-represented litigants, and the clerks' offices want something in the rule language that they can point to when having these discussions. The clerk's office can tell the self-represented litigant that they do not need to call the judge's chambers; the clerk's office represents the court and can tell the self-represented litigant what to do. The clerk representative for the Appellate Rules Committee said that otherwise, a self-represented litigant might say, "Well, the committee note says 'judge.' So that means that I get to talk to the judge." The representative thought that changing the language to refer to the court would result in fewer difficulties for the clerks' offices. As to the question about consistency, Judge Dever said that while the rules committees strive for consistency, the Bankruptcy Rules are often set apart, for various reasons.

Professor Struve added that the proposed change to refer to the "court's" permission still left the court perfectly free to have it be the individual judge who makes the determination, because the judge is the court. It simply broadened it to permit the practices of courts that want the clerk to handle it instead. She said that this particular feature of the rule really should mean the same thing across the rule sets, and the Standing Committee will want to make this uniform. If the Criminal Rules Committee felt differently from the Appellate Rules Committee, then it should let the Standing Committee know its reasons for taking a different approach, so that the Standing Committee could pick one or the other.

Professor Hartnett said that for the other three rules committees, the question was framed as, "Do you want this sentence at all?" The Civil and Bankruptcy Rules Committees decided that they did. The Appellate Rules Committee was troubled but thought that it had come up with

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compromise language that would meet both concerns—so rather than eliminating the sentence entirely, or having it as originally drafted, there was a way that would get both sides' support.

A member asked whether the Civil Rules Committee had considered the language proposed by the Appellate Rules Committee, and Professor Struve responded that it had not, because the Appellate Rules Committee was the last of those three committees to meet. Judge Harvey said that he shared Judge Burgess's concern with the new language and wanted to give it further thought. The issue here was whether judges were going to be unfair and deny access to self-represented litigants across the board. He thought that this was unlikely to occur, and to the extent that it did, the fact that the committee note says that the permission should not be unreasonably withheld would enable interested stakeholders, both within the courthouse and outside, to take whatever action they want to, even informally, when it becomes clear that a judge is doing so. He thought that the existing language was sufficient and important.

Judge Burgess said that he understood the reasons the member gave for preferring the language that had been discussed by the subcommittee. However, Judge Burgess said that he liked the idea of referring to the court's permission rather than the judge's permission. The member responded that he had no objection to that and thought saying "the court's permission" made sense. He objected only to the last newly proposed line.

The clerk representative said that she agreed with Judge Dever. In her court, the presumptive approach was that self-represented litigants could e-file with permission so long as they met certain criteria. The issue never went before a judge. On the other hand, the decision to revoke the permissions typically does come from a judge. She supported the change from "judge" to "court" because it allowed each district the flexibility to handle the situation as it saw fit.

Judge Burgess asked whether the Committee could vote first on the proposed modifications to Rule 49, then vote on the language in the Committee Note. Professor Struve first directed the Committee's attention to page 303, line 14, of the agenda book, which contained bracketed language in paragraph (a)(3). She explained that this language would simply add "by a notice of case activity" to the rule, and that the other three committees had already voted to include this language in their respective rule sets. She asked that the Committee decide whether to include this language in its rule.

A motion to remove the brackets in Rule 49(a)(3) was made, seconded, and approved unanimously.

Judge Burgess asked whether the committee members favored making the suggested changes to the text of Rule 49, and all member agreed.

Judge Burgess then turned to the new language proposed for the committee note. He stated that he shared some of the concerns expressed earlier by another member, but also thought that the new language would have some advantages. It would create consistency across the rules, and was a step in the right direction, although it may not have individual accountability.

Professor Struve said that on the question of individual accountability, she understood that one concern with the proposed language from the Appellate Rules Committee was that it

would foreclose individual denials of electronic access on the basis that a particular litigant was not viewed as an appropriate person to be on the system. She did not think that this concern was warranted because the note language refers to the reasonable conditions and restrictions set by the court. In the text of the rule, in item (b)(2)(B)(ii), there is a parenthetical that says, "including by denying or revoking access for a particular self-represented party." The language therefore could not be read to foreclose the court from saying that a particular litigant would cause trouble and should be restricted from electronic filing, because the text of the rule absolutely permits that as a reasonable condition or restriction.

A member said that when she initially read the agenda book, she questioned whether the phrase "so long as such permission is not unreasonably withheld in practice" was necessary, because the way the amendment was structured was that the court could set reasonable restrictions and conditions on access. The presumption should be that the court and court staff would act reasonably. She preferred the newer language, because it referred back to the standards set by the court. She agreed that the language should be changed to refer to "court" rather than the "judge," and said that if the Committee wanted to include the last phrase, she preferred the newer version over the version originally in the memorandum.

The member made a motion to amend the committee note with the language suggested by the Appellate Rules Committee, as shown in the last full paragraph on page 330 of the agenda book. Judge Dever added that the clerk representatives had consistently said that they would prefer to deal with electronics than paper, and this project was designed with that in mind.

The motion was seconded and approved by all but one of the committee members.

Professor Struve said that there was one more issue in the committee note that needed the Committee's attention. On page 311, line 219, the Committee had an option to say that a "district" or a "court" wished to restrict self-represented parties' access to electronic filing. The Civil Rules Committee decided to use "district."

A motion to use "district" was made, seconded, and approved unanimously.

A motion to recommend amended Rules 45, 49, and the committee notes for publication for public comment was made, seconded, and approved unanimously.

Rule 15

Judge Mosman stated that many comments had come in on Rule 15, which were discussed in the agenda book. The Committee would not be discussing this issue today, but Judge Mosman had created a new Rule 15 Subcommittee, which would be chaired by Judge Burgess.

Attorney Admission

Judge Mosman turned to Judge Birotte to present this item. Judge Birotte said that this project stemmed from a 2023 recommendation from Dean Alan Morrison to have a unified bar admission for all federal courts. The subcommittee created to address this issue consisted of members from the Bankruptcy, Civil, and Criminal Rules Committees. Dean Morrison had raised two primary issues. District courts' admission requirements vary across the country, which can

cause some challenges for lawyers who practice in numerous federal courts. Additionally, with the increase in multi-district litigation, the suggestion was to make it easier to obtain access to courts across the country.

The subcommittee thoroughly examined this issue, considering various proposals and examining Appellate Rule 46. However, there were concerns among the subcommittee members about quality control across the different districts and the ability to discipline attorneys or to have access to information about whether lawyers had previously been disciplined. There were also concerns about revenue impacts on certain districts. Additionally, Professor Struve contacted some state bar counsel to get their input. They questioned whether it would be considered unauthorized practice of law in some jurisdictions if someone were allowed to practice in the district court, but the state would not permit this. Overall, there was a recognition that reducing the barriers to practice—especially for military spouses or people who travel in different districts—was important. But that was outweighed by the concerns regarding accountability, control, and culture across different districts. Ultimately, the subcommittee felt that there was not sufficient widespread concern to justify a national rulemaking proposal.

Accordingly, the subcommittee will recommend to the Standing Committee that the attorney admission project be terminated, and that the subcommittee be disbanded.

Closing Comments

Judge Mosman announced that Judge Harvey had agreed to renew his term on the Committee. Judge Burgess had also agreed to a one-year extension of his term.

The next Committee meeting will be held in Boston, in the federal courthouse, in October.

Judge Mosman adjourned the meeting.

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TAB 23

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE[1]

Rule 17. Subpoena

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

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

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

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

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

(1) ***In General—Items Obtainable.*** A subpoena may ~~order~~ require the ~~witness~~ recipient to produce any ~~books, papers, documents,~~ item, including any data or information or any book, paper, document, or other ~~objects the subpoena designates~~ object~~. The court may direct the witness to produce the designated items in court before trial or before they are~~

~~to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.~~

(2) ~~***Quashing or Modifying the Subpoena.*** On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.~~ ***Non-Grand-Jury Subpoena—When Available; Required Content and Limitations; Issuance; Disclosure.***

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

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

(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.

(C) *Motion and Order Not Ordinarily Required.* A motion and order are not required before service of a non-grand-jury subpoena unless (3) or (4),

a local rule, or a court order requires them.

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

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

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

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

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

rule or court order provides otherwise.

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

(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.

(B) *Notice to a Victim.* ~~Before entering the order and u~~Unless there are exceptional circumstances, the court must, before entering the order, require giving notice to the victim so that the victim can move to quash or

modify the subpoena or otherwise object.

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

(A) files a motion;

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

(C) obtains an order.

(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; and

(B) may require the recipient to produce the designated items to 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.

(6) *Disclosing to Other Parties the Items Received.* A party must disclose to an opposing party an item the party receives from a subpoena's recipient only if the item is discoverable.

(7) ***Quashing or Modifying the Subpoena.*** On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive. A party responding to a motion to quash a non-grand-jury subpoena must make the showing described in (2)(D).

(d) Service. A marshal, a deputy marshal, or any nonparty who is at least 18 years old may serve a subpoena. The server must deliver a copy ~~of the subpoena~~ to the witness or to the subpoena's recipient and must tender to the witness one day's witness-attendance fee and the legal mileage allowance. But t~~T~~he server need not tender the attendance fee or mileage allowance ~~when~~ if the United States, a federal officer, or a federal agency has requested the subpoena.

(e) Place of Service.

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

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

(f) ~~Issuing~~ Subpoena for a Deposition ~~Subpoena~~.

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

(2) ***Place.*** After considering the convenience of the witness and the parties, the court may order—and the subpoena may require—the

witness to appear anywhere the court designates.

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

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

Committee Note

The amendments to Rule 17 respond to gaps and ambiguities in its text that have contributed to conflicting interpretations in the courts and difficulties in application. The changes include revisions that clarify the procedures for

subpoenas to produce data, objects, or other items and the availability of such subpoenas for proceedings other than trial, as well as revisions that delineate which provisions apply to certain types of subpoenas. The amendments also include stylistic revisions to text and headings.

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

Rule 17(b) formerly headed "Defendant Unable to Pay," has been retitled to clarify that it applies only to subpoenas for testimony. Changes to the text are stylistic only.

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

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

Perceived ambiguities in the language of the last two sentences of former (c)(1) contributed to several conflicts in

case law, including when a subpoena may be sought ex parte, and the rules for production and disclosure. The revised rule replaces these two sentences with separate provisions containing explicit direction about each of these issues.

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

The ending clause explicitly recognizes the discretion of the court in an individual case to permit a Rule 17 subpoena to produce items in other evidentiary hearings not listed in the Rule in which a party may be allowed to present witnesses or evidence. Examples include preliminary hearings and new trial hearings. The present use of Rule 17 subpoenas for items in such proceedings is not as common, in part because of the difficulties, costs, and delays that may arise when subpoena practice is imported into these less formal or more expedited proceedings.

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

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

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

The new text now codifies a modified version of the *Nixon* standard intended to provide an adequate and more predictable opportunity for both the prosecution and defense to obtain from third parties the evidence they need for the

proceeding designated in the subpoena. The new text imposes upon a party the duty to ensure that every subpoena to produce items meets this standard, including those obtained and served without motion.

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

The text of **(c)(2)(B)(iii)** requires that each item either be, or contain information that is, "likely to be admissible as evidence in the designated proceeding." In using "*likely* to be admissible," the Committee deliberately rejected stricter formulations applied by some courts. In some circumstances, it will be impossible to be certain *before* a proceeding begins that a precisely identified item will be admissible. Such circumstances include when an item's admissibility depends on whether the opposing party first presents other evidence. For example, impeachment evidence should be available to a party by subpoena for use at trial when a party knows that a witness will or is likely to testify. That evidence should not be unavailable simply because admissibility cannot be determined definitively until after the witness has actually testified. The "likely to be

admissible" standard is already used by some courts applying Rule 17 and more accurately describes the appropriate inquiry. There is no separate reference to "relevance" in **(c)(2)(B)** because information would not be admissible unless it were relevant.

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

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

Rule 17(c)(2)(C) defines when a motion and court order are required before a party may serve a non-grand-jury subpoena to produce items. Courts have disagreed about if or when the former language in (c)(1)—which stated "the court may direct the witness to produce the designated items in court before trial or before they are offered in evidence"—required a court to first approve a subpoena under 17(c). The resulting practice has differed greatly from court to court (and in some cases judge to judge), with some courts requiring motions for every subpoena to produce items, others permitting parties to obtain and serve such subpoenas without judicial involvement (unless the subpoena sought victim information under (c)(3)), and still others insisting on prior approval in certain circumstances but not others.

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

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

Rule 17(c)(2)(D). When a motion is required for a non-grand-jury subpoena, new (c)(2)(D) states exactly what a party must do in the motion to prove that the proposed subpoena does indeed comply with (c)(2)(B)'s requirements. Rule 17(c)**(**2)(D)(i) requires the party to demonstrate to the court that the subpoena describes each designated item with reasonable particularity. And (2)(D)(ii) requires the party to "state facts," showing each item is "likely to be possessed by the subpoena's recipient," "not reasonably available to the party from another source," and "likely to be admissible as evidence in the designated proceeding." Requiring a factual

basis is intended to prevent the use of Rule 17 subpoenas based upon unsubstantiated guesses or mere speculation.

Rule 17(c)(2)(E) ensures that a court must, for good cause, allow a party to file a motion for a subpoena to produce items ex parte. Whether a party may seek a subpoena ex parte has been another contested question under the prior language of Rule 17(c). Although some courts have read the Rule to preclude ex parte subpoena practice, most allow it, some by local rule. 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).

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

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 [a showing] 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.

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.

Rule 17(c)(4). This new provision extends the motion requirement to a subpoena requested by a self-represented party. Two reasons underlie this decision. First, self-represented parties are not bound by ethical rules that deter an attorney's misuse of the court's compulsory authority, raising the risk that the subpoena would not comply with (c)(2)(B). Second, requiring judicial oversight of this very small subset of subpoenas would not significantly add to the courts' burden, even in districts where there is relatively little motion practice under Rule 17.

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 three defaults, each subject to departure by court order.

First, (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 non-grand-jury subpoenas that require the production of personal or confidential information about a victim. 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, 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 the requesting party's counsel. 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. And to provide greater judicial oversight—for example, 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.

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

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

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

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

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

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

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

Changes Made After Publication and Comment

The language of (a) was revised to clearly state that a subpoena may order both testimony and the production of items. The words "including a victim" were added to the text of (c)(3)(A) to clarify that the requirements in (c)(3) for non-grand-jury subpoenas seeking personal or confidential information about a victim apply when the third party receiving the subpoena is a victim.

The language of new (c)(5), regulating the place to produce designated items, was revised both to make clear that under the amended rule the court continues to control that location for all subpoenas and to provide that, unless the court orders otherwise, personal and confidential information about a victim must be produced to the court rather than directly to counsel.

In addition to explanations for the changes above, three revisions were made to the committee note. First, language was added to the end of the portion of the note accompanying (c)(5)—the provision addressing when a motion and order are required before a party may serve a non-grand-jury subpoena to produce items. The added language explains that the rule permits a court to require, by local rule or court order, the return of personal or confidential information to chambers before disclosure to the requesting party. Second, language was added to the

portion of the note accompanying (c)(3)(B) explaining the difference between the showing of good cause required for an ex parte motion and the "exceptional circumstances" exception from notice in (c)(3). Finally, a sentence in the note accompanying (c)(2)(B) discussing relevance was revised for clarity.

Summary of Public Comment

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.

TAB 24

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE[1]

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

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

obligation to ~~calculate the applicable sentencing guideline range and to~~ consider ~~that range, possible departures under the Sentencing Guidelines, and other sentencing~~ the factors under 18 U.S.C. § 3553(a), including the Sentencing Guidelines;

* * * * *

Committee Note

The amendment reflects the 2025 changes to the U.S. Sentencing Guidelines, which (1) deleted most of the provisions in Chapter Five, Part K (Departures), and (2) revised U.S.S.G. § 1B1.1(a) to eliminate the requirement that the court consider departures at step two of a three-step sentencing process. As revised, § 1B1.1 now provides for a two-step process, considering at step one "the kinds of sentence and the guideline range as set forth in the guidelines," and at step two "other applicable factors in 18 U.S.C. § 3553(a)."

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE[1]

Rule 32. Sentencing and Judgment

* * * * *

(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.~~

* * * * *

Committee Note

The amendment reflects developments in the Supreme Court and the Sentencing Guidelines that eliminated the need for notice regarding departures.

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

TAB 25

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

JAMES C. DEVER III
CHAIR

CAROLYN A. DUBAY
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

ALLISON H. EID
APPELLATE RULES

REBECCA B. CONNELLY
BANKRUPTCY RULES

SARAH S. VANCE
CIVIL RULES

MICHAEL W. MOSMAN
CRIMINAL RULES

JESSE M. FURMAN
EVIDENCE RULES

MEMORANDUM

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

FROM: Hon. Jesse M. Furman, Chair
Advisory Committee on Evidence Rules

RE: Report of the Advisory Committee on Evidence Rules

DATE: May 17, 2026

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on May 7, 2026, in Washington, D.C. The Committee reviewed proposed amendments to Rule 609 and a proposed new Rule 707, which were approved for publication by the Standing Committee at its June 2025 meeting. It also considered four other proposed amendments to the Evidence Rules.

The Committee now recommends (1) final approval of the proposed amendments to Rule 609 and (2) proposed amendments to Rule 902(1) and Rule 104(a) and (b) for public comment. The Committee does not recommend action on the proposed Rule 707 at this time. Instead, it has revised the proposed Rule and plans to conduct further study on it and another issue relating to artificial intelligence — the problems posed by "deepfakes" — at its next meeting.

A full description of the Committee's discussion can be found in the draft minutes of the Committee meeting, which are attached to this Report.

II. Action Items

A. Proposed Amendments to Rule 609 — for Final Approval

The Committee recommends that proposed amendments to Rule 609 be forwarded to the Judicial Conference for final approval. In June 2025, the Standing Committee approved for public comment a modest proposed amendment to Rule 609(a)(1)(B), which currently allows for impeachment of criminal defendant witnesses with convictions not involving dishonesty or false statement if the probative value of the conviction in proving the witness's character for truthfulness outweighs the prejudicial effect. The proposed amendment would result in the provision becoming somewhat more exclusionary. To be admitted, the probative value of the conviction would have to *substantially* outweigh its prejudicial effect. The amendment is narrower than other suggestions for changes made to, and rejected by, the Committee in the last three years, including a proposal to eliminate Rule 609 entirely and a proposal to delete Rule 609(a)(1), which would have meant that all convictions not involving falsity would be inadmissible to impeach a witness.

After extensively reviewing the case law, the Committee concluded that the amendment was warranted because a large number of courts have misapplied the existing test to admit convictions that are either similar to the crime charged or otherwise inflammatory. This is especially problematic because appellate review of decisions to admit prior convictions for impeachment is rare. That is because, in *Luce v. United States*, 469 U.S. 38 (1984), the Supreme Court held that a defendant may appeal an adverse Rule 609 ruling only if he or she takes the stand at trial, so appeals by defendants of adverse Rule 609 rulings are rare.

Through its slightly more protective balancing test, the amendment would promote Congress's intent to provide more protection to criminal defendants so that they would not be unduly deterred from exercising their rights to testify. The Committee believes that the tweak to the applicable balancing test would encourage courts to more carefully assess the probative value and prejudicial effect of convictions that are similar or identical to the crime charged, or that are otherwise inflammatory or less probative because they involve acts of violence. The proposal leaves intact Rule 609(a)(2), which governs admissibility of convictions involving dishonesty or false statements.

In addition, the proposal released for public comment contained a slight change to Rule 609(b), which covers older convictions. Subdivision (b) is triggered when a conviction is over ten years old. That ten-year period begins running from the date of conviction or release from confinement, whichever is later. But the current Rule does not specify the end date of the ten-year period. The absence of any guidance in the Rule has led courts to apply varying dates, including the date of indictment, the date that trial begins, and the date that the witness to be impeached actually testifies. The proposal released for public comment provides that the ten-year period

would end on the date that the trial begins. The Committee determined that the date of trial is the date that is most easily administered, the least amenable to manipulation, and that it is a proper date for determining the credibility of a witness who is going to testify at the trial.

The Committee received fifteen public comments on the amendments to Rule 609. Save one, all commenters — including the Federal Magistrate Judges Association, the American College of Trial Lawyers, the New York City Bar Association, the National Association of Criminal Defense Lawyers, and the New York Council of Defense Lawyers — strongly supported the amendment. The one critical comment suggested a different endpoint for the Rule 609(b) time period; the Committee considered that suggestion and rejected it.

At its May 7th meeting, the Committee voted, by a margin of 7-2, in favor of recommending final approval of the proposed amendments to Rule 609. The Department of Justice voted in favor of the proposal. Accordingly, the Committee recommends that the proposed amendments, and the accompanying Committee Note — which are attached to this Report — be sent to the Judicial Conference for final approval.

B. Proposed Amendment to Rule 902(1) – for Publication

Before its Fall 2024 meeting, Judge Gregory K. Frizzell of the Northern District of Oklahoma suggested that the Committee consider adding federally recognized Indian tribes to Rule 902(1)(A), which provides that domestic public records that are sealed and signed are self-authenticating. Because Rule 902(1)(A) does not list Indian tribes, the government must use another route to authenticate proof of a defendant's (or a victim's) Indian status in federal prosecutions brought for crimes occurring in Indian country. There have been some recent cases in which the prosecution failed to prove Indian status by attempting, unsuccessfully, to meet the requirements of the business records exception to the hearsay rule, with authentication by certificate under Rule 902(11). The issue has arguably taken on more importance in light of the increase in relevant federal cases following the Supreme Court's decision in *McGirt v. Oklahoma*, 591 U.S. 894 (2020).

The Committee sought and received input from Indian Tribes and Nations, as well as from the Federal Defenders. The Tribes and Nations that did weigh in strongly supported the change, on the ground that it would recognize the dignity and sovereignty of Indian tribes and Nations and would avoid the burden and expense of tribal officials traveling long distances to qualify tribal records. The Federal Defender's position is that it is relatively simple to qualify a tribal record through a certification under Rule 902(11) (meaning that the failures of proof in the recent cases were attributable to the Department of Justice, not to the rules), that recordkeeping among Indian tribes may not be uniform, and that generally Indian Tribes do not allow open access to their records to non-members of the Tribe.

After discussion, the Committee determined that it would be appropriate to add Indian Tribes and Nations to the list of entities in Rule 902(1)(A) whose public records are self-

authenticating. The Committee ultimately saw no reason to differentiate the Tribes and Nations from the many other government entities whose records are currently self-authenticating.

At its meeting, the Committee voted, by a margin of 8-1, to recommend approval of the proposal to amend Rule 902(1) for publication. The sole dissent was the Federal Defender representative on the Committee. The Committee therefore recommends that the proposed amendment to Rule 902(1)(A) and the accompanying Committee Note — which are attached to this Report — be released for public comment.

C. Proposed Amendments to Rule 104 — for Publication

Rule 104(a) makes the important point that, in deciding preliminary issues of fact, the trial judge is ordinarily not bound by the rules of admissibility. But one failing of Rule 104(a) is that it does not specify the *standard of proof* required for the court to find that evidence is admissible.

In *Bourjaily v. United States*, 483 U.S. 171, 175 (1987), the Supreme Court held that the standard of proof for determinations of preliminary fact under Rule 104(a) is a preponderance of the evidence. But not having that standard in text has raised problems, some of which led to the amendment of Rule 702 in 2023 to set forth the preponderance standard in text (because many courts and litigants had been treating the admissibility requirements of the Rule as questions of weight rather than admissibility under Rule 104(a)). After the Rule 2023 amendment to Rule 702, some have argued that every subsequent amendment to the Evidence Rules will have to set forth the preponderance standard in text to avoid ambiguity.

By contrast, Rule 104(b) does set forth a standard of proof, one less stringent than Rule 104(a): evidence sufficient to support a finding. Per the Rule, that standard purportedly applies only to questions of "conditional relevance" — i.e., when the probative value of one piece of proffered evidence depends on the existence of another. (For example, when a statement is offered to prove someone's state of mind, it is conditioned on that person having heard it.) In *Huddleston v. United States,* 485 U.S. 681, 687 (1988), the Supreme Court held that Rule 104(b) requires a court to find only whether the finder of fact could reasonably find a fact by a preponderance of the evidence. But the problem with Rule 104(b) is that the standard covers only so-called "conditional" relevance, as distinct from all other questions of relevance (which some have called "logical" relevance). This leaves the standard of proof for other relevance questions undetermined. What's more, "conditional" relevance is a confusing concept, because it fails to recognize that *all* questions of relevance involve some condition. *See, e.g.*, Ron Allen. *The Myth of Conditional Relevance,* 25 Loyola L. Rev. 871, 879 (1992).

The Committee reviewed the case law on Rule 104(b) and found that there is some confusion about its application. Some courts have mistaken admissibility requirements (supposed to be covered by Rule 104(a)) as "conditions" and thus covered by the less demanding requirements of Rule 104(b). Some litigants have argued that the court must make a finding of "conditional" relevance when the proffered evidence is clearly relevant. Some courts have applied

Rule 104(a) to issues that are really questions of trial sequencing rather than conditional relevance. Moreover, even where cases get it right, there is often a substantial waste of resources litigating "conditions" that are virtually pointless to litigate. Relevancy questions should be quite straightforward determinations of reasonableness that do not require briefing and hearings.

After discussion, the Committee unanimously approved amendments to both Rule 104(a) and (b) for release for public comment. The amendment to Rule 104(a) is straightforward. It simply adds a sentence to the Rule:

> **(a) In General.** The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege. Unless otherwise provided in these rules, the proponent must establish the existence of a preliminary fact by a preponderance of the evidence.

The proposed amendment to Rule 104(b) would eliminate the unhelpful concept of "conditional" relevance and provide that the standard of proof for *all* questions of relevance is whether a jury could reasonably find that the evidence has a tendency to make a fact of consequence more or less probable than without the evidence:

> **(b) Relevance ~~That Depends on a Fact.~~** ~~When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist.~~ To establish that evidence is relevant, the proponent must demonstrate to the court that the trier of fact could reasonably find that the requirements of Rule 401 have been met. In making its relevance determination, the court may consider the evidence itself, other evidence, and common knowledge and experience. The court may admit proposed evidence on the condition that ~~the~~ further proof be introduced later.

Beyond eliminating the confusing concept of "conditional" relevance, the proposed amendment to Rule 104(b) makes two further improvements:

- It sets forth a standard of proof for all relevant evidence, which was a question not specifically covered in the original Rule, meaning technically the question of "logical" relevance was covered by Rule 104(a) — thus creating the anomaly that questions of "conditional" relevance were subject to a lesser standard of proof than questions of "logical" relevance.

- It eliminates the confusing and problematic phrase "proof sufficient to support a finding." The fact is that questions of relevance may be determined without "proof" as they might be simple questions of logic and experience.

At its meeting, the Committee unanimously voted to recommend the proposal to amend Rule 104(a) and (b) for publication. Accordingly, the Committee recommends that the proposed

amendments to Rule 104, and the accompanying Committee Note — which are attached to this Report — be released for public comment.

III. Information Items

A. Artificial Intelligence

For the past three years, the Committee has been researching and investigating whether the existing Evidence Rules are sufficient to assure that evidence created by artificial intelligence ("AI") will be properly regulated for reliability and authenticity. The Committee has determined that there are two evidentiary challenges raised by AI: (1) evidence that is an acknowledged product of AI, such as machine learning, which would be subject to Rule 702 if propounded by an expert witness; and (2) evidence that is not authentic because it is a difficult-to-detect deepfake.

1. Output of Artificial Intelligence

As to acknowledged AI (such as a machine-learning program that compares two works of art to determine similarity), the concern is that it might be unreliable, and yet the unreliability will be buried in the program and difficult to detect. The hearsay rule is likely to be inapplicable because the solution to hearsay is cross-examination, and an AI process cannot be cross-examined. The Committee's view is that the reliability issues attendant to AI are akin to those raised by experts under Rule 702. Indeed, Rule 702 is applicable to AI if it is used by a testifying expert to reach her conclusion. But Rule 702 is not clearly applicable if the AI output is admitted without any expert testimony — either directly (for example, under Rule 902(13)) or by way of a lay witness (such as where facial recognition testimony is proffered by a person who merely "pressed the button" and has no idea how the system works).

After extensive study and discussion, the Committee concluded that a new rule of evidence might be appropriate to regulate the admissibility of a product of AI that is introduced without the testimony of any expert. The Committee concluded that amending Rule 702 itself would not be workable, for two reasons: (1) that Rule was just amended in 2023; (2) it is a rule of general applicability, and a separate subdivision dealing with machine evidence would be inappropriately specific and difficult to draft. The Committee's solution was to draft a new Rule 707 providing 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.

That proposed Rule 707 was released for public comment last August. The Committee was of the view that the issuance for public comment did not mean that there was a presumption that the Rule would go forward. The Committee believed that, in this difficult and fast-developing area, public comment would be useful in sharpening the Rule and, indeed, in determining whether any Rule is even necessary.

The public comment on the proposed Rule 707 was mixed, but helpful. A few commentators were of the view that the time is not ripe for an amendment requiring that AI-generated evidence offered without an expert must be reliable because, at this point, there is no problem to address, and the Committee should wait to see how AI develops. (By contrast, many commentators, such as the ACLU and the New York City Bar Association, stated that the time is ripe and that the problem of AI being presented without expert testimony is occurring today, especially in criminal cases.) Most commentators thought that the term "machine-generated" was overbroad. Others contended that any rule should contain notice provisions, either in the rule text itself or as part of a joint project with the Civil and Criminal Rules Committees. Others thought that any rule should have its own independent requirements and should not tie into Rule 702 (even though this would lead to AI evidence being covered by one set of rules when an expert testifies and a different set when the expert does not).

Another important issue of dispute raised by public commentary was whether AI-produced evidence should ever be admissible without an expert foundation. Some argued that an expert foundation should always be required. Others argued that an "expert-only" foundation was unnecessarily strict and that AI could be shown to be reliable through evidence such as unbiased validation tests — or perhaps that, in the future, AI could be "self-validating," in which event an "expert-only" requirement would be outmoded.

The Committee reviewed all the public comments and considered several alternative redrafts of Rule 707 prepared by the Reporter. Committee members preferred the draft that provided a presumption that an expert foundation was required but also allowed for the possibility that other evidence might show that the AI is reliable. This redraft also includes a notice provision, and focuses on "artificial intelligence" rather than "machine-generated" information. The draft, and proposed Committee Note, provides as follows:

Rule 707. Evidence Produced by Artificial Intelligence and Presented at Trial Without an Expert

(a) **General Rules.** If evidence is a product of artificial intelligence and is offered without an expert witness, but would be subject to Rule 702 if testified to by a witness, the proponent must establish that the evidence:

(1) will help the trier of fact;

(2) is based on sufficient facts or data;

(3) is the product of reliable principles and methods; and

(4) reflects a reliable application of the principles and methods to the facts of the case.

(b) Establishing Admissibility. Admissibility under this rule ordinarily requires the proponent to provide an expert to explain how the system of artificial intelligence reliably produced the evidence; but in exceptional circumstances, the court may rely upon other proof to find that the output satisfies the requirements of (a)(2)-(4).

(c) Notice. The evidence is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the evidence — so that the party has a fair opportunity to meet it.

(d) Judicial Notice. This rule does not apply to facts that may be judicially noticed under Rule 201.

(e) Definition. In this rule, "artificial intelligence" means a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments.

Committee Note

The admissibility of evidence generated by artificial intelligence (AI) raises questions about reliability. AI involves the use of a computer-based process or system to make predictions or draw inferences from existing data. The concerns about the reliability of that process are akin to the reliability concerns about expert witnesses. Problems include using the process for purposes that were not intended (function creep); analytical error or incompleteness; inaccuracy or bias built into the underlying data or formulas; and lack of interpretability of the machine's process. Where a testifying expert relies on AI, the validity of that reliance will be scrutinized under the reliability requirements of Rule 702. But if AI is proffered without the accompaniment of a human expert (for example through a witness who applied the program but knows little or nothing about its reliability), Rule 702 is not obviously applicable. Yet it cannot be that a proponent can evade the reliability requirements of Rule 702 by offering AI output directly or through a lay witness, where the output would be subject to Rule 702 if rendered as an opinion by a human expert. Therefore, new Rule 707 provides that if AI is offered without the accompaniment of an expert, and where the output would be treated as expert testimony if coming from a human expert, its admissibility is subject to requirements that are the same as imposed by Rule 702.

The rule applies when AI-generated evidence is entered directly, but also when it is accompanied by lay testimony. For example, the technician who enters a question and prints out the answer might have no expertise on the validity of the output. Rule 707 would require the proponent to make the same kind of showing of reliability as would be required when an expert testifies on the basis of AI-generated information.

If the AI output is the equivalent of expert testimony, it is not enough that it is self-authenticated under Rule 902(13). That rule covers authenticity, but does not assure reliability under the preponderance of the evidence standard applicable to expert testimony — and of course applicable under Rule 707. See Adv. Comm. Note to Rule 902(13) (noting certification authenticating computer output "does not preclude an objection that the information produced is unreliable").

This rule is not intended to encourage parties to opt for AI evidence over live expert witnesses. Indeed the point of this rule is to provide reliability-based protections when a party chooses to proffer AI evidence instead of a live expert. These reliability standards will ordinarily be impossible to meet without presenting an expert. It is possible, however, that the proponent can establish the requirements of the rule through other evidence, such as convincing validation tests and objective studies indicating a low rate of error.

It is anticipated that a Rule 707 analysis will usually involve the following, among other things:

- Considering whether the inputs into the process are sufficient for purposes of ensuring the validity of the resulting output. For example, the court should consider whether the training data for an AI process is sufficiently representative to render an accurate output for the population involved in the case at hand.

- Considering whether the process has been validated in circumstances sufficiently similar to the case at hand.

- Reviewing information about what records the system keeps, what is deleted, and whether the output can be reproduced or audited.

- Considering whether the process or system has been subject to evaluation by entities independent of the developer, and whether the opponent and independent evaluators have access to the system, e.g., through meaningfully available research licenses.

- Considering whether the opponent has received sufficient information about how and why the process works, including information analogous to that which would be disclosed if the conclusion were that of a human expert.

An AI process can sometimes develop in such a way that nobody is able to explain how the system has reached a result, because the machine has developed the ability to program itself. If the process cannot be explained then the court should in most cases find that the proponent has not established more likely than not that the methodology is reliable. As with experience-based

testimony, the proponent is required to show how the methodology leads to a reliable conclusion. See Committee Note to the 2000 amendment to Rule 702 ("If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts."). That said, the proponent of AI output may overcome the problem of inexplicability by showing through an expert how the machine got trained and establishing, for example through validation studies, that the process leads to a low rate of error.

Rule 901(b)(9)'s requirement that the process or system "produces an accurate result" is subsumed by the reliability requirements that must be established by a preponderance of the evidence under Rule 702 or 707. Given the fact that the threshold requirement for authenticity is significantly lower than that for reliability, it follows that if machine-generated evidence is qualified under Rule 702 or 707, then it automatically satisfies the lesser requirements of Rule 901(b)(9). In contrast, satisfying Rule 901(b)(9) does not suffice for admissibility.

Under this rule, AI-generated output will be regulated pre-trial by the court in essentially the same way as expert testimony. But there may well be a difference at trial when AI evidence is found by the court to be admissible under this rule, because while an expert is ordinarily required to provide the foundation for admissibility, it would be possible for a proponent to offer that evidence at trial without an expert. A human expert can be cross-examined, and the jury will be able to weigh the expert's testimony accordingly. But it may be more difficult to attack the weight of AI output. The opponent may be able to introduce reports and data, as well as expert testimony, to undermine the output. Or the opponent might be able to impeach the conclusion by showing prior inconsistencies or specific contradiction, akin to Rule 806. But in the end, the inability to cross-examine is a concern. Accordingly, the court should consider providing a limiting instruction that machine-generated evidence is subject to error and that evidence should not be assumed to be reliable simply because it was produced by a machine.

The rule provides for pre-trial notice, as it is important that the significant reliability issues attendant to AI evidence be handled before the trial. The notice provision is intentionally flexible. See the notice provisions in Rules 404(b) and 807. The proponent of AI evidence must also consult the Federal Rules of Civil and Criminal Procedure to determine pretrial obligations.

Rule 707(d) specifically provides that the rule is not applicable if the reliability of an AI process is subject to judicial notice.

The definition of "artificial intelligence" in Rule 707 is taken from the National Artificial Intelligence Initiative Act of 2020 (116 Pub. L. 283 (2021)). That Act also notes that "[a]rtificial intelligence systems use machine and human-based inputs to—(A) perceive real and virtual environments; (B) abstract such perceptions into models through analysis in an automated manner; and (C) use model inference to formulate options for information or action." This further

elaboration by Congress should be considered in determining whether proffered computer-based information is subject to this rule.

* * *

At its May 7th meeting, the Committee agreed that the revised version of Rule 707 would require re-publication were it to go forward. But the Committee decided *not* to propose that the revised Rule 707 be released for a new period of public comment at this time. At the suggestion of Judge Dever, the Committee thought the more prudent course would be to have the proposed Rule vetted at the Committee's Fall meeting by technology experts and others in the field of AI and law. That input can help to sharpen and refine the proposed Rule and will also help the Committee to determine whether an amendment is necessary.

2. Deepfakes

As discussed above, one of the problems of AI is that deepfakes are easy to generate and difficult to detect. As a matter of evidence, deepfakes raise a problem of authenticity, which traditionally is governed by a low standard of admissibility under Rule 901(a): evidence sufficient to support a finding that the item is what the proponent says it is.

The Committee is of the view that, at least for now, an amendment to Rule 901 to address deepfakes is not warranted. This is because, despite extensive commentary on the subject, few examples exist of courts having to address the possibility of deepfakes. In making the decision to wait, the Committee also took into account a survey of District, Magistrate, and Bankruptcy Judges by the Federal Judicial Center, in which only fifteen respondents reported having dealt with deepfake issues.

That said, the Committee is working to develop rule language that could be employed to assist courts in reviewing deepfake claims in the event that the Committee concludes that the existing rules are not adequate. The working rule is based on two agreed-upon principles. The first is that an opponent should not have the right to an inquiry into whether an item is a deepfake merely by claiming that it is a deepfake. Some initial showing of a reason to think the item is a deepfake should be required. The second principle is that, if the opponent does make an evidentiary showing that the item may be a deepfake, then the opponent must prove authenticity under a higher evidentiary standard than the prima facie standard ordinarily applied under Rule 901. Mindful that technology develops quickly and the rule-making process is slow, the Committee's objective is to fine tune a possible amendment to hold in abeyance until such time that it concludes an amendment is warranted, at which point the rule would be ready to go without delay.

The working draft of a new Rule 901(c), to address deepfakes, is as follows:

Rule 901(c) Potentially Fabricated Evidence Created by Generative Artificial Intelligence

(1) ***Showing Required to Warrant an Inquiry into Fabrication.*** If a party challenges the authenticity of an item of evidence on the ground that it has been fabricated, in whole or in part, by generative artificial intelligence, the party must present evidence sufficient to support a finding of fabrication to warrant an inquiry by the court.

(2) ***Showing Then Required by the Proponent.*** If the opponent makes that showing, the item of evidence is admissible only if the proponent demonstrates to the court that it is more likely than not authentic.

(3) ***Applicability.*** This rule applies to items offered under either Rule 901 or 902.

(4) ***Notice.*** Unless the court orders otherwise, a party claiming that an item is fabricated in whole or part by generative artificial intelligence must provide reasonable pretrial notice to all opposing parties of the intent to present evidence of fabrication, so that the opposing parties have a reasonable opportunity to respond to that evidence before trial.

(5) ***Definitions.*** In this rule, "generative artificial intelligence" means a computer system that emulates the structure and characteristics of input data in order to create derived synthetic content, including images, video, audio, text, and other digital content.

Committee Note

This new subdivision is intended to set forth guidance and standards when an opponent alleges that a proffered item of evidence is a "deepfake" — i.e., that it is an inauthentic item prepared by software programs using generative artificial intelligence.

The rule sets out a two-step process for regulating claims of deepfakes. First, the opponent must set forth enough information for a reasonable person to find that the item has been fabricated in whole or part by the use of generative artificial intelligence. Thus, a broad claim of "deepfake" is not enough to put the court and the proponent to the time and expense of showing that the item has not been manipulated by generative artificial intelligence. A proponent should not in the first instance be required to show that every video or audio it proffers is not a deepfake. Second, if the opponent has shown enough to merit the inquiry, the proponent must then show to the court that the item is more likely than not authentic. While that Rule 104(a) standard is higher than what is ordinarily required for a showing of authenticity, it is justified because any member of the public now has the capacity to make a deepfake, with little effort and expense, and deepfakes have become more difficult to detect by jurors. It is therefore reasonable for the court to require a showing, by a preponderance of the evidence, that the item is not a deepfake, once the opponent has met its burden of going forward.

If the opponent satisfies its burden of going forward, the proponent will not establish authenticity simply by satisfying one of the illustrations of authenticity set forth in Rule 901(b). Rule 901(b) sets forth illustrations that "establish" the authenticity requirement — but that is in the context of the lower standard of proof set forth in Rule 901(a). So for example, testimony of a witness with knowledge (Rule 901(b)(1)) will provide evidence sufficient to support a finding that the item is authentic under Rule 901(a). But that knowledge will not ordinarily prove more likely than not that the item is authentic, especially given the opponent's submission showing some likelihood of a deepfake. Requiring a stronger showing of authenticity is justified for the very reason that a person with "knowledge" may well think that the item is genuine when in fact it is a deepfake.

This amendment covers specific proffered items as to which the opponent has presented a sufficient foundation of fabrication. It does not directly address another possible consequence — that because of the background risk of deepfakes, juries might be led to think that no evidence can be trusted. This phenomenon has been called the "liar's dividend." But rules are in place to combat claims that "you can't believe anything you see." To the extent *evidence* of such a broad point is proffered, it is subject to exclusion under Rule 403 for being distracting and confusing in the absence of the necessary foundation. *See* United States v. Peterson, 945 F.3d 144, 157 (4th Cir. 2019) (finding that a demonstration of how easy it is to fake a text was properly excluded under Rule 403; the proposed demonstration "was an attempt to prejudice the jury—an attempt to confuse it by throwing the veracity of text message screenshots writ large into doubt, without any effort to identify a connection to Peterson's case."). And to the extent the point is expressed by lawyers in argument, it is subject to the court's inherent authority to regulate lawyer argument that is made without foundation in the evidence. *See* Lee v. City of Troy, 339 F.R.D. 346, 367–68 (N.D.N.Y. 2021) (reversing the judgment for the defendant after defense counsel argued, without any basis, that the plaintiff's videos were "manufactured" and stating that "attorneys may not make comments to the jury that are so inflammatory or so unsupported by the record as to affect the integrity of the trial.").

The requirements of the rule apply to authentication under either Rule 901 or 902. The risk of deepfakes extends to many of the items designated in Rule 902 as self-authenticating — most obviously newspapers and publications.

The rule requires that an opponent pressing a deepfake argument must provide pretrial notice of the intent to present evidence of fabrication, so that the proponent of the item has a reasonable opportunity to respond. The purpose of the notice requirement is to assure that deepfake arguments under Rule 901 are resolved, if possible, before trial. The rule does not set forth specific time periods because the deepfake issue is likely to arise in different contexts, and the appropriate notice that a party with a deepfake argument must provide may well depend on whether it is a civil or criminal case and on whether the item of evidence is offered for impeachment. The rule provides

that a court might excuse the lack of pretrial notice, as there may arise situations in which the opponent discovers that an item may be a deepfake after the trial has begun.

The term "generative artificial intelligence" applied in this rule is derived from Executive Order 14110 (Oct. 30, 2023).

* * *

At its May 7th meeting, the Committee concluded that this issue should also be considered with the assistance of technological experts and lawyers in the field at the Committee's Fall meeting. The Committee is hoping to get input on whether an amendment should cover all AI as opposed to generative AI. In addition, the Committee hopes to get views on whether this amendment is necessary now, in the future, or at all.

C. Rules 703 and 606(b) and Constitutional Red Flags

In *Smith v. Arizona*, 602 U.S. 779 (2024), the Supreme Court addressed whether a forensic expert may testify to a positive drug test by relying on and disclosing to the jury the testimonial hearsay of another analyst. The Court held that an expert's disclosure to the jury of testimonial hearsay violated the defendant's right to confrontation, even if the purpose of the disclosure was purportedly to illustrate the basis of the testifying expert's opinion. At its May 7th meeting, the Committee considered whether the Court's holding counsels or mandates some amendment to Rule 703, which allows experts to rely on hearsay but strictly limits the disclosure of that hearsay to the jury. The Committee determined that, to the extent that the Court was concerned about *disclosure* of the report as the basis of the expert's testimony, there would be little to no impact on federal practice because Rule 703 already limits disclosure of inadmissible hearsay as the basis of the expert's opinion. But if the Court's decision is construed to apply also to the expert's *reliance* on the lab report, it could have a substantial effect on federal practice because Rule 703 specifically allows the expert to rely on inadmissible hearsay if it is the kind of information on which other experts in the field would reasonably rely.

The Academic Consultant to the Committee conducted a survey of lower court cases and presented her research, indicating that courts are split on whether *Smith* bars reliance on the testimonial report. The majority rule appears to be that *Smith* does in fact prohibit reliance by the expert on the testimonial hearsay. But the issue is still a live one, and it is an important enough question that it seems likely that the Supreme Court will resolve it in the not-too distant future. Therefore, the Committee voted to table any amendment to Rule 703.

The Committee also discussed whether to add a "red flag" to Rule 606(b), which bars testimony from jurors about jury deliberations when a party is seeking to attack the verdict. In *Peña-Rodriguez v. Colorado,* 580 U.S. 206 (2017), the Supreme Court held that the defendant's

Sixth Amendment right to a fair trial was violated when Rule 606(b) was applied to exclude racially biased statements of jurors. But after discussion, the Committee decided not to proceed with any amendment on this subject, and the question was taken off the Committee's agenda. As to *Peña-Rodriguez,* its holding is clear, and it can reasonably be expected that courts and litigants will know about it and apply it in preparing for any hearing to attack a verdict. Moreover, any attempt to codify the ruling in *Peña-Rodriguez* threatens to impinge on the important policies promoted by Rule 606(b).

IV. Minutes of the Spring 2026 Meeting

A draft of the minutes of the Committee's Spring 2026 meeting is attached to this Report. These minutes have not yet been approved by the Committee.

Attachments:

- Proposed amendments to Evidence Rule 609, with the recommendation that they be forwarded to the Judicial Conference for final approval.
- Proposed amendment to Rule 902(1), with the recommendation it be released for public comment.
- Proposed amendments to Rule 104(a) and (b), with the recommendation that they be released for public comment.
- Draft Minutes of the Spring 2026 meeting of the Advisory Committee on Evidence Rules.

TAB 26

Advisory Committee on Evidence Rules

Minutes of the Meeting of May 7, 2026
Thurgood Marshall Federal Judiciary Building
Washington D.C.

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on May 7, 2026, at the Thurgood Marshall Federal Judiciary Building in Washington, D.C.

The following members of the Committee were present:
Hon. Jesse M. Furman, Chair
Hon. Valerie E. Caproni
Hon. Mark S. Massa
Hon. Edmund A. Sargus, Jr.
Hon. Richard J. Sullivan
John S. Siffert, Esq.
James P. Cooney III, Esq.
Rene L. Valladares, Esq., Federal Public Defender (*via* Microsoft Teams)
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:
Hon. James C. Dever III, Chair of the Committee on Rules of Practice and Procedure
Professor Edward Hartnett, Reporter to the Standing Committee
Hon. Edward M. Mansfield, Liaison from the Standing Committee
Hon. Hannah Lauck, Liaison from the Civil Rules Committee
Hon. Thomas Durkin, Liaison from the Criminal Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Liesa L. Richter, Academic Consultant to the Committee
Professor Joseph Kimble, Style Consultant to the Standing Committee (*via* Microsoft Teams)
Beth Wiggins, J.D., Ph.D., Federal Judicial Center
Timothy Lau, J.D., Ph.D., Federal Judicial Center
Carolyn Dubay, Esq., Chief Counsel, Rules Committee Staff
Bridget Healy, Esq., Counsel, Rules Committee Staff
Shelly Cox, Management Analyst, Rules Committee Staff
Rakita Johnson, Administrative Analyst, Rules Committee Staff

Invited guests included (via Microsoft Teams):
Professor Andrea Roth, UC Berkeley School of Law
Professor Ronald Allen, Northwestern Pritzker School of Law
Nicole Owens, Federal Public Defender (Idaho)
Jami Johnson, Assistant Federal Public Defender (Arizona)

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I. Opening Business

Judge Furman opened the meeting by welcoming the Committee and other participants and attendees. He noted that it was a pleasure to meet in person again following the virtual fall meeting that occurred during the government shutdown. He also welcomed Committee member Rene Valladares and Professor Cathie Struve, Academic Consultant to the Standing Committee, who both joined remotely. Judge Furman next welcomed two new regular attendees - Chief Judge Thomas Durkin of the U.S. District Court for the Northern District of Illinois, who will be serving as the liaison from the Criminal Rules Advisory Committee, and Professor Ed Hartnett, the newly appointed Reporter to the Standing Committee.

Next, Judge Furman recognized the invited guests who attended remotely. Professor Andrea Roth of the University of California Berkeley School of Law was present with regard to the Advisory Committee's work on new Rule 707 regarding AI. Professor Ronald Allen of Northwestern Pritzker School of Law was present to offer remarks on the Rule 104(b) conditional relevance issue. The Chair also welcomed two members from the Federal Defenders' community, Ms. Jami Johnson, Assistant Federal Public Defender from Arizona to offer feedback on the Indian Tribes issue under Rule 902, and Ms. Nicole Owens, Federal Public Defender from Idaho, who joined to provide insight with respect to potential new Rule 707 on machine-generated evidence.

Following general remarks and reminders on meeting logistics, Judge Furman informed the members about three items of interest. First, he advised members that in recognition of the 50th Anniversary of the Rules of Evidence in 2025, a short article was available on the USCourts.gov website to mark the event, and that additional materials will also soon be posted on the website. He also noted that there was a small celebration in New York during the November 2025 virtual meeting to share some cake to celebrate the occasion. Judge Furman thanked Ms. Dubay for her work to organize these events and projects.

Second, Judge Furman informed the Committee that a proposal to amend Rule 611, which was not ultimately adopted, did result in additions to the Federal Judicial Center's Benchbook for United States District Courts to give guidance to trial judges who allow jurors to ask questions of witnesses. An amendment to Rule 611 that would have offered safeguards for trial judges wishing to allow juror questions was not proposed due to concerns expressed by some Standing Committee members that a rule change might encourage the practice of allowing juror questions. At Professor Capra's suggestion, however, the Committee sent its draft proposal to the FJC for possible inclusion in the new Benchbook. The Benchbook excerpt on Rule 611 is found on page 36 of the agenda book and gives proper attribution to this Committee. Professor Capra commented that including the necessary safeguards for juror questions in the Benchbook was a very good result.

Third, Judge Furman offered his appreciation to Judge Richard Sullivan for his service on the Committee, which will end on September 30, 2026. Judge Furman commented that Judge Sullivan has been a stalwart member of the Committee since January 2021, despite extraordinary service also chairing the Judicial Conference Security Committee. He thanked Judge Sullivan for being an incredible member of the Committee during his time as Chair and noted that he would be missed and would leave big shoes to fill. Judge Sullivan thanked Judge Furman for the kind words

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and said that it was a joy to be on the Committee even while serving on the Security Committee. With respect to security, Judge Sullivan remarked that it has been a difficult time for the security of judges, their families and our courthouses. Judicial security is also closely tethered to judicial independence, which is crucial for justice. Judge Sullivan also remarked on a quote on the state courthouse in New York. The quote from George Washington to Edmund Randolph, the first Attorney General of the United States, states that "the true administration of justice is the firmest pillar of good Government." Through this quote, Judge Sullivan observed, Washington recognized that the courts were going to play a very important role in our democracy. Judge Sullivan expressed his feeling that it takes more than just judges for the true administration of justice, and that the work and members of the Committee epitomizes that fact by bringing together judges from every level of the federal judiciary, judges from state courts, leading academics in the field, practitioners who are the best at what they do, and staff who ensure the process moves forward. Jury trials are also crucial for liberty, for dignity, and for checking Government overreach, and the Committee is dedicated to ensuring that trials are fair.

Next, Judge Furman asked if there was a motion to approve the Minutes of the Committee's Fall 2025 meeting, which are found at page 14 of the agenda book. A motion was made and seconded and the minutes were unanimously approved. Judge Furman also directed members to the draft minutes of the January 2026 Standing Committee meeting, found at page 40 of the agenda book. Judge Furman noted that the Committee had only informational items before the Standing Committee at the January 2026 Standing Committee meeting, including feedback on proposed Rules 707 and 609 that had been published for public comment. Judge Furman then asked Ms. Dubay to provide an update on the status of proposed amendments to the rules. Ms. Dubay called the Committee's attention to pages 91 and 92 of the agenda book, which cover the amendments that will go into effect December 1, 2026. She noted that Appellate Rules 29 and 32 and the Appendix of Length Limits were withdrawn for further consideration and were not delivered to Congress. Evidence Rule 801 was approved by the Supreme Court and was delivered to Congress on April 8, 2026, and, unless Congress acts, will go into effect on December 1, 2026. Ms. Dubay also provided a brief legislative update, referencing the legislative chart on page 95 of the agenda book, noting that there are no bills pending at this time would directly affect the Rules of Evidence.

II. Proposal to Amend Rule 609

The Chair next directed the Committee's attention to Tab 2 of the agenda book and consideration for final approval of the proposed amendment to Federal Rule of Evidence 609. Judge Furman reminded the Committee that two proposed amendments to Rule 609 had been approved for public comment at the Spring 2025 meeting. The first would make the balancing test under 609(a)(1)(B) somewhat more exclusionary by adding the word "substantially." The second would clarify that the ten-year period under Rule 609(b) ends on the date the trial begins. Both amendments were approved for publication and public comment by the Standing Committee with a few minor changes that are noted in the Reporter's memorandum. The comment period closed in February 2026, and the public comment was almost uniformly positive. A wide range of organizations, including the Federal Magistrate Judges' Association, the American College of Trial Lawyers, the New York City Bar Association, NACDL, and others strongly supported the amendment. There was only one slightly negative comment with respect to the 609(b) proposal,

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which the Committee previously considered and rejected. There were a few comments that made relatively minor suggestions, but for reasons explained in the Reporter's memorandum, the Chair did not recommend changes in response to those comments. Judge Furman flagged one comment that suggested amending Rule 609 to respond to the Supreme Court's holding in *Luce v. United States*, which requires a defendant to testify and suffer impeachment before challenging a Rule 609 ruling on appeal. Judge Furman noted that he shared the Reporter's view that such a significant change to the Rule 609 proposal at this point would require republication. He noted that the Committee had previously considered the issue and had decided not to address it as part of this amendment package.

Judge Furman highlighted a couple of minor changes to the proposed committee note that came from the Standing Committee. These included changing "the date of trial" to "the date trial begins" and using "specific instances of conduct" instead of "bad acts," and adding "absent agreement of the parties" to the end. The Reporter further added that he was withdrawing a suggested addition to the end of the draft committee note in the agenda memorandum because it had not been vetted by the Department of Justice (DOJ). The Reporter also noted that the Standing Committee had suggested referencing the "existing rule" in the committee note instead of the "original rule." As explained in a footnote on page 111 of the agenda book, the language "original rule" was retained to make it clear that the note was referring to the previous rule and not the one then in force. Judge Furman added that the Reporter had included an appendix with recent Rule 609 rulings that suggested that some courts continue to misapply the rule.

Judge Furman then solicited questions and discussion. On hearing none, Judge Furman called the question of whether to recommend that the Standing Committee give final approval to the proposed amendments to Rule 609. Upon a motion and second, and with two members opposed, the Committee voted to recommend final approval of the amendments to Rule 609.

III. Deepfakes and Federal Rule 901 Governing Authenticity

The Chair next directed the Committee's attention to Tab 4 of the agenda book and the issue of amending Rule 901 that governs authenticity to include a new subsection that would regulate claims that proffered evidence is a deepfake generated by Artificial Intelligence ("AI"). The Chair explained that it was appropriate to discuss a proposed deepfake amendment before discussing proposed Rule 707 governing machine-generated evidence because any decision on how to proceed with respect to Rule 901 might impact next steps for Rule 707.

Judge Furman summarized the Committee's work on AI that began in 2023. He noted that one area of focus had been authentication issues relating to deepfakes - audio and video evidence that can be now easily fabricated using generative AI and is increasingly difficult to detect. He noted that the Committee had largely coalesced on the substance of proposed Rule 901(c) that appeared on page 224 of the agenda book. Rule 901(c) would impose a burden on an opponent challenging an item as a deepfake to present evidence sufficient to support a finding of fabrication. If the opponent satisfies that burden, then the burden would shift to the proponent of the evidence to demonstrate by a preponderance of the evidence that the item is authentic. This Rule 104(a) preponderance standard is higher than the typical prima facie standard that applies to issues of

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authentication. Judge Furman emphasized that the higher standard is the key innovation in proposed Rule 901(c), because it would establish a standard that would require the court to engage in a more rigorous gatekeeping role. The big question for the Committee is whether a proposed amendment is warranted.

Turning to the substance of the proposed rule and note, Judge Furman directed the Committee's attention to the Reporter's memorandum on pages 221-223 of the agenda book and to several changes made to the draft rule originally discussed by the Committee. The first change proposes to cover claims that evidence was fabricated by "generative AI," as opposed to simply "AI." The second change adds a notice provision to the text of the rule to ensure that deepfake claims are raised and resolved before trial. The third adds a definition of "generative artificial intelligence" to the text of the rule. Judge Furman noted that the language in the agenda book in subsection 4 of the draft rule on notice stated that ". . . the party claiming that an item is fabricated in whole or in part by generative artificial intelligence must . . ." Judge Furman suggested that this language could be simplified to refer to "a party challenging an item of evidence under this subdivision . . .". The Reporter noted that the original language was drawn from the notice provision in Rule 807 that was amended in 2019, but explained that Judge Furman's proposed change would be appropriate as it would be stylistic only. Judge Furman emphasized that the Rule 901(c) notice provision should be a flexible one that requires sufficient notice to respond to the evidence at trial, and not a rigid requirement to provide written notice as in Rule 807.

Judge Furman then invited discussion of draft Rule 901(c). One Committee member raised a question about limiting the proposal to "generative AI" and queried whether there are other ways of producing a deepfake that should also be covered by the proposed rule. The Reporter explained that the focus on "generative artificial intelligence" was intentional because other fakes are much more easily detectable. He explained that the current draft rule would apply only to items allegedly produced with generative AI and that standard authentication rules would continue to apply to other items of evidence.

The Committee member then asked about defining "generative artificial intelligence" to allow courts and litigants to distinguish between generative AI and non-generative AI. He suggested that tracking a legislative definition and having consistency between definitions that would apply to both Rules 707 and 901(c) makes good sense, but he stated that he was unable to discern what was meant to be covered by the draft definition simply by reading it. The Reporter explained that the draft definition would capture synthetic content created by a computer. The Committee member noted that generative AI also can take existing, genuine content and make something else out of it. The Reporter explained that the draft definition was based on language in the Executive Order on AI, and that the draft provides a starting point for discussion utilizing language that is already in the law. He suggested that public comment might offer useful ideas for improving or refining the definition. Judge Furman observed that there are slight differences between the proposed definition of "generative AI" in the draft of Rule 901(c) and the more general definition of artificial intelligence in proposed Rule 707. He agreed with the Reporter that it makes sense to start with a definition already developed by the legislative or executive branches and to refine the definition through input from members of the public and specialists in the area.

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Another Committee member suggested that the language in the notice provision should refer to "all parties" rather than simply to "opposing parties" to account for situations (such as co-defendants) where parties are not technically *opposing* each other but may need notice of a deepfake claim. The Chair queried whether the language "all parties" would risk including parties who are no longer in the case. He noted upcoming changes to Civil Rule 41 to address parties who are no longer in the case. Another Committee member suggested that the most natural reading of the language "all parties" in the notice provision would be to reference existing parties only. Alternatively, the rule could refer to "all existing parties" or to "parties remaining in the case." The Chair then suggested shortening the notice provision to require "pretrial notice of the intent to present evidence of fabrication so that all other parties have a reasonable opportunity to respond." The Reporter and Committee members agreed that this language would best capture the intent of the notice provision.

Another Committee member noted that Rule 807 requires "written" pretrial notice and asked whether Rule 901(c) should also require notice to be in writing unless otherwise ordered by the court. Judge Furman opined that requiring "written" notice might be too inflexible for AI objections. He explained that a discussion of deepfakes at a pretrial conference could be sufficient to provide the requisite notice without any writing. The Reporter explained that Rule 807, which governs residual hearsay, raises distinct notice concerns. He agreed that more flexible notice would be appropriate for Rule 901(c). All agreed that draft Rule 901(c) should not require notice in "writing." The Reporter then read the updated notice language in subsection 4:

> Unless the court orders otherwise, a party challenging an item of evidence under this subdivision (c) must provide reasonable pretrial notice of the intent to present evidence of fabrication so that all other parties have a reasonable opportunity to respond to that evidence.

The Chair then called upon Ms. Shapiro to weigh in regarding draft Rule 901(c) on behalf of the DOJ. She explained that the DOJ does not believe Rule 901(c) is ready for publication. That position notwithstanding, Ms. Shapiro offered input on the existing draft. She first opined that the notice provision would not function appropriately in criminal cases where it provides that notice is required "unless the court orders otherwise." She predicted that notice would be routinely excused for criminal defendants because criminal defendants are unwilling to share trial strategy and judges are understandably reluctant to force them to do so. Ms. Shapiro also raised concerns about the definition of generative AI as applied to criminal matters, where evidence can be created through a combination of generative AI and other AI functions. She further highlighted situations in which the evidence against a criminal defendant is admittedly created through generative AI, such as in child exploitation cases where the government offers AI-generated images. She suggested that a defendant might seek to use Rule 901(c) to exclude such evidence as inauthentic. The Reporter explained that Rule 901(c) would not cover AI-generated images offered to prove an element of a child exploitation crime when the government concedes that the images are fabricated because this would not involve a deepfake being offered as something that it is not. Ms. Shapiro responded that prosecutors and the courts have been handling photo-shopped and edited evidence for many years. She opined that the existing Federal Rules of Evidence are adequate to

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address the issue of potential deepfake evidence, and she suggested that the Committee has much more work to do before proposing a deepfake rule.

One Committee member suggested removing the requirement that notice be given "pretrial" in favor of a simple provision requiring sufficient notice to give other parties a "fair opportunity to respond." The judge would then be the arbiter of when that notice has to be given, and "fair" notice might not be given before trial in every instance. Ms. Shapiro reiterated her concern that, in criminal cases at least, a judge would be unlikely to enforce any notice provision against a defendant. The Reporter noted that the notice provision had been added to improve the draft at the DOJ's suggestion. Another Committee member suggested that deepfake objections could be easily handled through motions in limine, even in criminal cases.

Another Committee member expressed sympathy for the DOJ's concerns. She hypothesized that the government would generally not be the party seeking to admit deepfakes as genuine evidence, but that a criminal defendant might. She hypothesized a scenario involving a defense deepfake video depicting a cooperator in a damning situation. The Committee member opined that the government would not learn of the video until the defense pressed play at trial. The Committee member agreed that Rule 901(c) is premature, and suggested that it seeks to regulate a situation that has yet to arise with any frequency. She emphasized that a litigant would be committing a crime by proffering deepfake evidence, which remains a significant disincentive. She argued that the Committee could address the issue if it ever starts to arise in federal proceedings, armed with real-world examples. The Reporter asked what would happen under existing law if a defendant offered a deepfake video to incriminate a cooperator, suggesting that Rule 901(c) would afford the government *more protection* than it currently enjoys in such a scenario. The Committee member responded that the defense would be able to present the video under existing evidentiary standards, but that the obligations of the prosecution and defense remain symmetrical under existing law. She suggested that Rule 901(c) would create asymmetry between the prosecution and defense, Another Committee member added that the burden-shifting feature of draft Rule 901(c) is its principal innovation. He suggested that the government would obtain *more information* than it would currently under the proposed rule and ultimately would get the benefit of the higher standard of proof.

Ms. Shapiro next explained that the Committee note should not utilize the word "deepfake" because it is not definitionally appropriate where a "deepfake" may be created by generative or nongenerative AI. The Reporter responded that the term "deepfake" was used in the note colloquially as a term that everybody understands. Ms. Shapiro and the Reporter then discussed possible ways to define deepfakes created through generative AI as a way to narrow the types of fake evidence covered by the proposed rule. They also discussed the scope of the rule to clarify that it would include any item that can be generated by AI, images, photos, videos, reports, papers, and forgeries.

The Chair turned to the broader issue of whether the issue of deepfakes is ripe for rule-making. The Reporter referred to his agenda memorandum detailing case law indicating that these issues are already arriving in federal and state courts. He noted a New York appellate opinion excluding a video on the grounds that it was a deepfake and was insufficiently authenticated. The

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dissent in that case objected that the court was shifting the traditional burden of proof regarding authenticity, requiring the proponent of the evidence to prove that it's not a deepfake in every instance. He noted a case in the Eastern District of Virgina in which the court held that witness testimony was sufficient to authenticate a video despite a credible deepfake challenge. He noted that draft Rule 901(c) would change both these results. He further referenced the FJC Survey of district, magistrate and bankruptcy judges regarding the incidence of deepfake arguments (page 226 of the agenda book).

Judge Furman thanked the FJC for conducting the survey and explained that the FJC surveyed all federal trial court judges (district, magistrate, and bankruptcy) on their experience with deepfake challenges. Mr. Lau, present on behalf of the FJC, thanked his colleague, Ashley Walters, for her work on the survey and noted that she could answer any questions from the Committee. The Chair also summarized the survey, noting that there was a 45 percent response rate. Of the 931 judges who responded, only 15 reported having encountered a deepfake challenge. Of those who had not yet encountered such a challenge, 82 percent said that they would require some initial showing before entertaining a claim of fabrication, as would proposed Rule 901(c). A narrow majority of respondents without prior deepfake experience also said that the rules should be amended to address deepfake issues. Judge Furman also pointed to one noteworthy anecdote in the survey results in which a defendant pleaded guilty to obstruction of justice for fabricating audio/visual evidence that resulted in the indictment of another person. Although the deepfake issue came up only at sentencing and was not adjudicated, the anecdote suggests that these issues are emerging. Judge Furman further added that AI capabilities are advancing very quickly, and while issues may start to appear more in state courts (in family court cases, for example), the Federal Rules of Evidence are a model for the state courts. Judge Furman also acknowledged the slow pace of rulemaking, and emphasized that Rule 901(c) would not go into effect until December 1, 2028 – even if published this summer. This could militate in favor of putting it out for public comment to gather information and feedback with respect to the definition of "generative AI" and an appropriate notice provision. The Reporter added that the public comments to Rule 707 provided a number of helpful insights from the Innocence Project and other government groups, and suggested that it is important for the Committee to start addressing deepfakes.

One Committee member then pushed back on the premise that the deepfake issue is unprecedented and cannot be handled using existing rules. He noted that forgeries have long been difficult to detect and that trial judges have ample experience using the existing Federal Rules of Evidence to address such concerns. He opined that the Committee is not political and that there is no need to propose a rule addressing deepfakes in response to some voices clamoring for it. The Committee member emphasized that it is a crime to present deepfake evidence, that there are other laws that regulate in this arena, and that the Committee should wait to see how these issues appear in federal court before proposing a new rule. The Federal Public Defender disagreed, opining that this problem is coming for the federal court system and that the Committee should get ahead of it by publishing Rule 901(c), especially if the Committee decides to republish Rule 707 for additional public comment.

A Committee member followed up on whether federal judges could handle deepfake claims under existing rules. He queried whether the same burden-shifting approach embodied in Rule

901(c) could be applied to regulate claims of deepfake evidence without an amendment. Another Committee member pointed out that the current authentication rules require only a showing "sufficient for a jury to find" an item authentic – the low prima facie standard of Rule 104(b). Under the proposed Rule 901(c) draft, a trial judge would have to find an item of evidence authentic by a preponderance of the evidence before passing it on to the jury (once a credible deepfake showing is made by the opponent of the evidence). Rule 901(c) would thus make the trial judge the gatekeeper and raise the standard of proof above the existing standard. The Reporter added that, under current law, if there's a credible charge of a deepfake video, for example, the proponent could simply respond with a witness who testifies that he "recognizes" the people in the video and that this would be sufficient to authenticate and send the potentially fabricated video to the jury. Under the Rule 901(c) proposal, the judge would determine, using the more likely than not standard, that the item is authentic before sending it to the jury. And a witness who recognizes people in the video would be insufficient to defeat a credible deepfake claim under that standard of proof. Judge Furman agreed, noting that the jury would not be able to discern whether the hypothetical video was a deepfake based on a witness's testimony that he recognizes the people depicted in the video.

The Chair next turned to Ms. Shapiro to report on efforts by the DOJ to evaluate AI issues. Ms. Shapiro introduced Ms. Kira Antell from the Office of Legal Policy to discuss the issue. Ms. Antell explained that a beta version of a survey had been sent to the administrative law judge (ALJ) community to determine the importance of the type of technology used to create fake evidence. DOJ is working on the survey with the Bureau of Justice Statistics, and they are working through the Institutional Review Board. The goal is to receive results back in September. The survey covers a broad array of evidence and surveys ALJs regarding their needs in handling potentially fabricated evidence, whether it be a rule or additional training. A Committee member asked why the DOJ is surveying ALJs, rather than the litigating federal lawyers who deal with the presentation of evidence. Ms. Antell explained that the directive under the American Action Plan was to talk to the ALJ community and potentially to issue guidance to ALJs. The ALJ community deals with many unrepresented individuals and there is aa question as to whether forged documents are coming from these parties or even from represented parties. For example, many people are looking for SSI benefits or veterans' benefits and may use AI or just traditional Microsoft Word to create fake reports or fake results. The goal of the survey is to better understand what ALJs are experiencing and does the mode of creation of the fake evidence matter to judges. Ms. Antell agreed that a useful follow-up to the ALJ survey would be one directed at litigators.

The Reporter suggested that the surveys and work being done by the DOJ would not help trial judges resolve claims of fabricated evidence. He explained that the unique undetectability of fabrications created by generative AI was the justification for Rule 901(c). He reminded the Committee that even the technology companies that develop AI tools cannot find a reliable discriminator that can detect fabrications created by generative AI. Ms. Antell asked whether the proposed rule would cover only audio/visual evidence or whether it would apply to other types of evidence. She cautioned that the rule as drafted may produce different outcomes depending on the type of evidence allegedly fabricated. For example, she suggested that an allegation about a forged signature created by ChatGPT may not be covered by Rule 901(c) if it is limited to "audio/visual" forgeries only. The Reporter responded that the rule as written applies to any item of evidence

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created by generative AI and would not be limited to audio/visual evidence. Ms. Shapiro queried how an opponent could ever make the prima facie showing of fabrication required to trigger the higher preponderance standard under Rule 901(c) if deepfakes created by generative AI are completely undetectable. The Reporter acknowledged this difficulty but suggested that there are certain indicia of fakery that could satisfy the prima facie standard – such as the origin of the evidence on a particular device, or its placement among other genuine items. In any event, he explained that lay jurors are not equipped to detect deepfakes and that the draft rule would put trial judges, who are repeat players and who will gain experience, in charge of the authentication determination when a credible deepfake claim is made.

Judge Dever suggested that the Committee should consider first whether there is a problem that needs to be addressed by the proposed rule, whether the rule needs to include this burden shifting framework, and if so, why the burden shifting framework should be applicable only to fakes allegedly made with generative AI as opposed to all alleged forgeries. The Reporter answered that deepfakes created by generative AI are becoming much more prevalent and are easier to generate and much harder to detect than traditional forgeries. Another Committee member added that the premise of Rule 901(c) is that deepfakes created by generative AI present a question akin to expert testimony where the trial judge needs to act as the gatekeeper before sending the evidence to the jury. Another Committee member responded that he remained unconvinced that the issues presented by alleged deepfakes in the courtroom are materially different from the issues presented by more traditional forgeries. He suggested that litigants have had to call experts to authenticate signatures after claims of forgery and that such issues were not simply handed off to juries to decide unassisted under current law. Another Committee member strongly disagreed, arguing that generative AI is here now with people creating fabricated content every day. He suggested that publishing a rule on deepfakes would not be a public relations exercise but an important step toward protecting the integrity of the justice system given the inevitability of this content reaching the courtroom. The Committee member opined that it would be a mistake for the Committee not to be vigilant.

The Chair acknowledged the point that courts have capably handled claims of forgery under current law. Still, he suggested that there is something fundamentally different about AI-generated deepfakes because: 1) they are very easy to create; 2) they are very difficult to detect; and 3) they can have an outsized impact on the jury when they are in audio/visual form. For example, if a jury sees or hears a recording of a defendant doing something, this is very impactful evidence that is difficult to disregard. He queried whether it may make sense to broaden the rule to cover all claims of fakery and not just generative AI, which would have the added benefit of eliminating the need for a definition of "generative AI." The Reporter responded that the Committee could consider broadening Rule 901(c) but expressed reservations. He noted that such a change would alter the law in many settled areas, including authentication of social media evidence. The Reporter also explained that the justification for Rule 901(c) is the special problem presented by generative AI that calls for a change to authentication standards.

A Committee member asked whether an opponent of evidence under Rule 901(c) would still be permitted to present evidence of deepfakery to the jury once the trial judge evaluates the allegation and determines under the preponderance standard that the evidence is authentic and

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admits it. The Reporter responded that this would be permitted and is allowed in connection with authenticity disputes even under current rules. The Chair agreed, noting that it would be similar to the handling of allegedly coerced confessions, where the court plays a gatekeeping role but a defendant may argue coercion before the jury. The Committee member queried whether it would make sense to apply Rule 901(c)'s burden shifting framework more broadly beyond just generative artificial intelligence. The Reporter responded that the distinct question with respect to generative AI is whether you need the trial judge to act as a gatekeeper before the evidence is sent to the jury. Once it gets past the gatekeeper, the opponent would remain free to present evidence on authenticity as can be done with respect to other evidence.

Another Committee member pointed to a case identified in the Reporter's memorandum in which a criminal defendant argued that a video of him committing a sexual assault was simply a deepfake. The Committee member suggested that the government might benefit from the notice provision and the threshold showing required by Rule 901(c) in such circumstances. The Reporter noted that the court in that case held that the defendant's deepfake allegation was a question of weight and not admissibility, and that Rule 901(c) would require a finding of authenticity by a preponderance if the defendant made a prima facie showing of deepfakery. Another Committee member pointed out that Criminal Rule 16(b) has a notice provision already that should provide the DOJ with appropriate notice in criminal cases. The Chair responded that, to DOJ's point, notice is not always enforced as rigorously against criminal defendants as it is against the Government.

Ms. Shapiro suggested that a criminal defendant might raise a deepfake allegation at the last minute, forcing the Government to stop trial to come up with an expert. The Reporter countered that the Government would have only the burden of presenting prima facie evidence of authenticity unless the defendant first made the requisite showing of deepfakery – enough evidence for a reasonable person to believe the Government's evidence is a deepfake. A bare defense allegation of a deepfake would not suffice. Judge Furman suggested that it might be fairly easy for a defendant to make the requisite showing to shift the burden to the Government. For example, the defendant could produce a sworn statement or affidavit that he was not the person depicted in a Government video. The Reporter suggested that the judge would have to find such evidence sufficient under Rule 104(b), but a simple claim deepfake would not shift the burden.

Ms. Shapiro added that the FJC survey results show that judges are dealing with deepfake issues in the absence of a bespoke rule. She suggested that Rule 901(c) might also encourage parties to raise deepfake claims, which will delay trials and force the Government to retain experts routinely. She suggested that having the trial judge act as gatekeeper may not improve the situation with respect to generative AI deepfakes given that they are so difficult to detect. She further emphasized that AI might be in a new and presently unforeseeable place in two years' time given the race between content generators and content detectors and urged the Committee to await more technological development before taking action. The Federal Defender countered that he did not see the harm in going forward with publication for public comment that could add a lot of beneficial information for the rulemaking process.

The Chair then asked the Committee to consider the threshold question of whether to proceed with publication and public comment on Rule 901(c). Although the Committee may not

be ready to propose an amendment at this time, he suggested that public comment might provide important data on what is happening in the court system and from technological experts that could advance the Committee's work on a deepfake rule. One Committee member expressed concern about publication for the purpose of gathering data. He noted that the Committee's practice has traditionally been to publish a proposal when it is ready to propose a rule change. The Committee member opined that a decision to publish to gather data may not match public expectations surrounding publication of an amendment proposal. He suggested that there are other avenues for obtaining information other than the public comment process. Judge Furman noted that, according to Judge Dever, the Criminal Rules Committee had hosted a mini-conference that included subject-matter experts to aid its work on Criminal Rule 17. Judge Furman suggested that such a conference could assist in formulating a deepfake rule. He added that if the decision was to not proceed with publication today, the Committee could devote time at its Fall meeting to such a mini-conference to delve further into these issues. He suggested thinking carefully about whom to bring, to include both litigators and technical experts to discuss the reality on the ground and how a rule could help. Judge Dever explained that the Criminal Rules Committee held a mini-conference after creating a workable draft of Rule 17 because concerns still existed. The Criminal Rules Committee used the mini-conference to explore the language of the working draft before publication. Judge Dever noted that while this takes a little longer, deliberation is a feature and not a bug of this whole process as we try to get it right.

The Reporter reminded Committee members that they had hosted two symposia on the problems of AI (one in Minneapolis and one in Washington DC), and that legal and technological experts had reported that generative AI is a real problem that needs to be addressed. One Committee member expressed support for the idea of another mini-conference, explaining that the earlier symposia had focused on understanding the world of AI, particularly for those who did not use it, and that a mini-conference in Fall 2026 could include input from lawyers to ask if AI presents a problem in the courtroom and how they encounter it. Judge Furman agreed that the earlier symposia were more educational and noted that a Fall 2026 symposia could provide concrete feedback on the Rule 901(c) working draft. He also noted that ChatGPT was introduced in 2023 and that there has been much progress since these earlier symposia. The DOJ expressed support for a mini-conference and Ms. Shapiro said she could assist with finding panelists.

Judge Furman suggested that, in light of the amount of disagreement on the Committee, and notwithstanding the fact that it would mean a delay of another year, the better course would be to have a mini-conference at the Fall 2026 meeting. Judge Furman stated that there would be no need for a Committee vote regarding public comment now given that plan, and that the issue of deepfakes would remain on the agenda. A mini-conference will allow for a deeper dive concerning the prevalence of deepfake issues, the need for a rule regulating those issues, and the merits of draft Rule 901(c). The Reporter suggested that the mini-conference would take place during the morning session of the Fall 2026 meeting and would involve two panels. The first panel would include AI experts who can opine as to the evolving operation of AI and the optimal terminology to be used in a rule regulating deepfake evidence. A second panel would include both criminal and civil litigators regarding their experience with deepfake issues in the courtroom. The Committee would then discuss the feedback and data received in the afternoon session. One Committee member expressed support for this plan of action, urging the Committee to include the

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plaintiff's bar in civil cases. The Federal Public Defender urged the Committee to keep the issue of deepfakes on the agenda, and emphasized the importance of including practitioners as part of a mini-conference.

Judge Furman stated that the issue of deepfakes would be kept on the agenda and that hearing no opposition, the Committee would host a mini-conference focused on this issue at the fall meeting. He then invited suggestions concerning the optimal structure for the mini-conference and regarding participants, including a mix of tech people and litigators in both civil and criminal cases.

IV. Artificial Intelligence and Proposed Rule 707

The Chair next directed the Committee's attention to Tab 3 of the agenda book and a proposal to create new Federal Rule of Evidence 707, which is designed to impose reliability requirements on AI-generated evidence when it is offered without the testimony of an expert. Judge Furman stated that this proposed new rule would typically be considered for final approval because it had been through the publication and public comment process. But Judge Furman explained that, in contrast to the favorable comments received regarding the proposed amendment to Rule 609, the comments concerning proposed Rule 707 provided some cause to potentially hold off on final approval of Rule 707. He noted that the Committee could choose to revise and republish it now or could choose to combine consideration of Rule 707 with the deepfake draft and reevaluate both together at the Fall 2026 meeting.

To briefly recap the Committee's work on proposed new Rule 707, Judge Furman recounted that the Committee had approved proposed Rule 707 for public comment at the Spring 2025 meeting. The rule would apply the Rule 702 reliability requirements on AI-generated evidence offered without an accompanying expert witness. The Standing Committee approved Rule 707 for public comment in 2025, and the comment period closed on February 16, 2026. There were two public hearings concerning the proposal and the Committee received 59 written comments by the deadline. The comments were mixed: only 3 comments expressed unqualified support; 27 supported the rule subject to revisions; and 27 opposed it. Themes among the criticisms included the overbreadth of the term "machine-generated evidence" utilized in the proposed provision, the vagueness of the "simple scientific instruments" exception, and the possibility that the rule would provide a pathway to admit AI-generated evidence without an expert. There were also some objections to tethering Rule 707 to the Rule 702 requirement, and there were a number of objections that the rule is premature. The Reporter's memorandum addresses each of the major criticisms and concludes that the criticisms do not warrant abandonment of the rule.

Judge Furman then explained potential changes to the published version of Rule 707 based on the public comments. These included the suggestion to use the term "artificial intelligence" instead of "machine-generated" to describe the coverage of the rule to be more precise and to make clear that the provision does not cover things like faxes, emails, cellphone extractions, and the like. A second change would be to delete the "simple scientific instruments" exception altogether. The third would add a notice requirement to the rule text. The issue of notice had previously been discussed only in the Committee note, based on concerns expressed by the DOJ and others. A

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revision of proposed Rule 707 completed before the meeting included a flexible notice provision modeled on Rules 404 and 807. Although there were some suggestions that Rule 707 should be untethered from Rule 702 and that distinct standards should be applied to AI evidence, the Reporter recommended no change based upon these suggestions. He explained that applying different standards to expert opinion testimony and to AI-generated conclusions would be problematic because in many instances this evidence would be presented with an expert, making expert testimony based upon AI-generated information subject to two distinct standards. The Reporter acknowledged that it could be helpful to incorporate the relevant language from Rule 702 directly into Rule 707 rather than simply cross-referencing it. He explained that one big question remaining is whether an expert should be required to present this evidence to the jury or, at least, for purposes of demonstrating reliability to the trial judge.

Judge Furman then directed the Committee's attention to the Reporter's memorandum at page 170 of the agenda book, explaining that it included three different versions of a revised rule 707 for the Committee's consideration. Version One would require an expert to establish reliability and therefore admissibility. Version Two would ordinarily require an expert to establish admissibility, but it would allow for exceptional circumstances in which the court could rely upon another source to show reliability, such as convincing validation studies that establish the foundation for the AI opinion. Version Three would require an expert, not only for admissibility, but also at trial to ensure there is a witness subject to cross-examination. This version would effectively collapse Rule 707 into Rule 702 insofar as it would require an expert in all cases.

The Reporter added that the issue of expert foundation was the most important reason for offering the Committee three versions of a revised Rule 707. He explained that there were a number of public comments that advocated for an expert witness requirement, at least for the foundation for AI-produced evidence. The Reporter noted that there might be ways to ensure that AI-generated evidence is reliable without having to produce an expert, such as validation tests, unbiased studies, and the like. As things proceed technologically, it may be more likely that an expert is not necessary to establish the reliability of some AI output. He explained that Version Two, on page 173 of the agenda book, offers a middle ground on this issue by providing that admissibility is ordinarily established through an expert but doesn't necessarily need to be. He explained that the notice requirement in the revised draft was taken from Rule 807, and that the draft included a carve-out for AI that can be judicially noticed. He offered the example of evidence of distances through Google Maps that is already judicially noticed by courts under Rule 201. Finally, he explained that the revised drafts include a definition of "artificial intelligence" taken from a statute.

The Chair then thanked those who submitted public comments and testified at the hearings and noted that he found it quite helpful. As all agreed that the changes to proposed Rule 707 made after public comment were substantial, Judge Furman explained that the question for the Committee was whether to republish a revised version of Rule 707 for additional public comment, or to table further consideration of Rule 707 for now and make the Fall 2026 meeting focused on both AI rules together. Judge Furman acknowledged that Version Two of the revised Rule 707 was likely the leading contender for republication if the Committee chose to take that route.

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The Chair invited Ms. Shapiro, on behalf of the DOJ, and Ms. Nicole Owens, on behalf of the Federal Defenders, to offer their thoughts. He also sought feedback from Professor Roth, who has been involved in developing Rule 707 from the beginning. Ms. Shapiro explained that some of the DOJ's concerns detailed in its letter regarding Rule 707 persist despite the revisions. She expressed concern about how Rule 707 would function in practice, as well as concern about the coverage of many machine-generated technologies commonly used in court that may depend upon some combination of AI and other technology. She further noted that the statutorily derived definition of "artificial intelligence" in the revised rule differs from the definition used by the DOJ. Ms. Shapiro appreciated the carve-out for judicially noticed artificial intelligence in the revised draft but opined that judicial notice is very subjective and not a reliable mechanism for exempting accepted technologies from Rule 707. The Reporter asked whether the DOJ would prefer nothing in the Rule to exempt reliable technologies. Ms. Shapiro stated that the DOJ would rather have no Rule 707 at all and suggested that trial judges currently are capable of regulating the need for experts and other information as a condition to presenting AI evidence under Rule 611. Ms. Shapiro explained that the DOJ believes that the issue of litigants presenting AI evidence in the absence of an expert witness remains an anticipatory problem that has yet to materialize in court. She stated that the DOJ favors consideration of Rule 707 at the Fall 2026 meeting alongside draft Rule 901(c).

Ms. Owens offered a different perspective, stating that a rule covering AI-generated evidence offered without an accompanying expert witness is not premature. She explained that federal defenders are already seeing this kind of evidence coming into cases. She cited examples of such evidence described in the Reporter's memorandum. Ms. Owens acknowledged that computers can assist in investigations and that certain machine-generated evidence may require no expert foundation. Still, she explained that concerns arise when generative AI is doing the work and analysis that normally an expert would do and that these concerns need to be addressed by a rule. Ms. Owens noted that a Cellebrite extraction that is simply a mirror of a phone or other device may not require an expert foundation. But she explained that, if the extracted information is fed into an AI tool to identify patterns or infer relationships, then this opinion output should be subject to a different analysis. For that reason, Ms. Owens opined that utilizing the Rule 702 reliability requirements, and allowing courts to require expert foundation for such output, is absolutely appropriate.

Professor Roth thanked the Committee for its work, stated that the revised versions of Rule 707 nicely addressed feedback received during public comment, and shared several observations. She first addressed the use of Cellebrite, and echoed Ms. Owens' comments that its admissibility depends upon whether it is simply being used to extract data from a phone or is instead being used to analyze information, for example, to determine who's a key contact and who's not. Second, Professor Roth observed that under the status quo, a judge could admit an analytical conclusion by Cellebrite technology through a lay witness without any Rule 702 scrutiny. As to the subjectivity of a judicial notice carve-out in Rule 707, Professor Roth predicted that there would be a period of transition in which courts would coalesce around technologies appropriate for judicial notice. But she opined that the option of admitting analytical AI input without Rule 702 scrutiny is untenable. Professor Roth also suggested that the notice provision in Rule 707 should include a good cause exception akin to those in Rules 404 and 807 because defendants, either civil or

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criminal, may not know prior to trial that they are going to need to call an expert. Finally, Professor Roth noted that Version Two of revised Rule 707 talks about "providing" an expert. She explained her assumption that this language was chosen deliberately and would not require that an expert would need to testify in all circumstances. She noted that litigants may offer an expert's conclusions through an affidavit in current *Daubert* hearings.

After hearing these perspectives, the Chair invited discussion of next steps. He explained that the Committee could either republish one of the revised versions of Rule 707 for another round of public comment or fold further consideration of Rule 707 into the Fall 2026 meeting. Committee members expressed a preference for Version 2 of revised Rule 707 and agreed that they would appreciate receiving additional feedback on that draft at the Fall meeting. Committee members expressed an interest in feedback from technological experts with respect to an appropriate definition of "artificial intelligence, as well as a desire for additional information about how litigants may demonstrate the reliability of AI-generated conclusions. The Chair of the Standing Committee also supported further study to obtain additional feedback on the revised draft of Rule 707 from both AI experts and practicing lawyers. Committee members then unanimously agreed that discussions regarding Rule 707 should continue at the Fall 2026 mini-conference with a focus on Version 2 of revised Rule 707. The Chair concluded the discussion, stating that Rule 707 would be taken up at the Fall 2026 mini-conference. He noted that combining the consideration of Rules 707 and 901(c) would create helpful synergy and would allow for potential publication of both proposed AI rules together.

V. Rule 902(1) and Indian Tribes and Nations

The Chair next directed the Committee's attention to Tab 6 of the agenda book and the proposal to amend Federal Rule of Evidence 902(1), the provision that allows self-authentication of the signed and sealed records of enumerated domestic government entities. The proposal would add federally recognized Indian Tribes and Nations to the list of entities whose sealed and signed documents are self-authenticating. Judge Furman provided a brief recap of the proposal's history, noting that it was originally made by Judge Frizzell of the Northern District of Oklahoma and was briefly taken up by the Committee in the Fall of 2024. The Committee deferred consideration of the issue pending input from the DOJ. At the Spring 2025 meeting, the DOJ formally proposed amending Rule 902(1) to add federally recognized Indian Tribes and Nations to the list of covered entities. Judge Furman also noted that the Federal Public Defender community has consistently opposed the amendment and that both the DOJ's and the Federal Defender's memoranda have done an excellent job of squarely presenting the issues for the Committee's consideration. After extensive discussion of the proposal at the last two meetings, the Committee solicited input from the Tribes on this issue. Judge Furman sent a letter to all federally recognized Indian Tribes and Nations, as well as to other representative groups and entities, explaining the proposal and seeking input. Judge Furman explained that a summary of the responses received were included in the agenda book. Judge Furman commented that the responses received were relatively small in number but were very supportive of amending the rule to add Indian Tribes and Nations.

The Chair then directed Committee members to the Consultant's memorandum prepared by Professor Richter at page 253 of the agenda book, which summarized the issues for the

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Committee's consideration. He then asked Professor Richter to offer remarks. Professor Richter thanked Judge Furman and focused on the feedback received from the Indian Tribes. She stated, as Judge Furman noted, that while sparse, the feedback was unanimously supportive and identified some additional factors supporting an amendment to Rule 902(1). Professor Richter explained that tribal leaders emphasized the value of self-authentication in civil litigation, as well as in the criminal context previously explored by the Committee. She informed the Committee that tribal leaders also emphasized the burdens on tribal governments in supporting and cooperating with criminal prosecutions as a result of the lack of self-authentication. Professor Richter explained that the responding Indian Tribes and Nations also emphasized the importance of tribal sovereignty and dignity and of allowing their records to be self-authenticating along with the records of other government entities.

Professor Richter reported that she also evaluated the impact of the proposed amendment on criminal prosecutions. She concluded that the amendment would allow the Government to present a sealed and signed tribal record to prove the Indian status of either a defendant or a victim without any accompanying witness or certification, so long as the record satisfied a hearsay exception. The Government would not need to provide a live witness to authenticate tribal records. Nor would the Government need to provide a certification under Rule 902(11), the business records certification, if it were to rely on a different hearsay exception such as the public records exception. Thus, Professor Richter explained that an amendment would alter the status quo by allowing a tribal record alone to establish Indian status in a criminal case. Lastly, Professor Richter reviewed the open records statutes and codes of tribal Nations and governments discussed in her agenda memorandum. Professor Richter explained that she was unable to perform a comprehensive review of the open records acts of all 578 federally recognized Indian Tribes and Nations, but that she did locate sophisticated open records acts in several tribal Nations. She described the common features of the open records laws she reviewed, explaining that the Navajo Nation and the Cherokee Nation, for example, do not provide access to any information about individual members without their consent, and provide little access to other tribal records to non-tribal members. Judge Furman also flagged the portion of the memorandum noting that five states have already changed their self-authentication rules or statutes to include Indian Tribes and Nations (Arizona, New Mexico, Wyoming, Oregon, and Washington). He noted that the proposed amendment to Rule 902(1) appeared on page 253 of the agenda book, along with a helpful Committee note on page 254.

The Chair then asked the DOJ to offer comments on the proposal. Ms. Shapiro thanked Professor Richter for her fantastic memorandum and noted that the DOJ has written extensively on this issue and believes that an amendment is long overdue to respect tribal sovereignty and to treat the records of federally recognized Indian Tribes and Nations like the records of other government entities already included in Rule 902(1). She argued that there is no reason to require tribal records to surmount the many hurdles necessary to establish reliability under the business records exception to the hearsay rule. In addition, Ms. Shapiro noted that issues of Indian status are arising much more frequently now that Indian land covers much of the State of Oklahoma. She suggested that the amendment would also help Indian defendants who want to be tried by their Tribes, by making it easier for them to prove Indian blood. Ms. Shapiro further suggested that certifications satisfying Rule 902(11) that are currently utilized to authenticate tribal records may

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present confrontation clause issues in criminal cases. The Reporter replied that every Circuit has rejected a confrontation clause challenge to Rule 902(11) certifications and that there is no confrontation problem for such certifications that do no more than authenticate an existing record.

The Chair then invited Jami Johnson, Assistant Federal Public Defender for the District of Arizona, to offer feedback on the proposed amendment. Ms. Johnson thanked the Committee for the opportunity to speak and informed the Committee that, in addition to being an Assistant Federal Public Defender, she is an enrolled citizen of the Choctaw Nation of Oklahoma. Ms. Johnson raised a concern about the DOJ's potential misunderstanding of the relevant statutes and stated that an amendment to Rule 902(1) would in no way help Indian defendants. For example, Ms. Johnson noted that the DOJ's letter in support of the amendment stated that an Indian defendant potentially would need to prove the status of a victim to have a criminal case moved to tribal court and away from federal court. Ms. Johnson stated that this is incorrect because an Indian defendant may always be tried in tribal court for crimes committed on federal land, regardless of whether the victim is Indian or not Indian. Only where there is a non-Indian victim and the case does not involve a major crime, as defined by the Major Crimes Act, would there be a need for such proof. Ms. Johnson also noted that in her 11 years practicing federal criminal law in Indian country, she had never seen the federal Government attempt to charge a non-major crime committed on federal land, regardless of whether the victim was Indian or non-Indian. Even if this type of case did occur where the victim's Indian blood was at issue, Ms. Johnson stated that there may be difficulty in accessing the records, whether self-authenticating or not. Based on this experience, Ms. Johnson did not see a benefit to this rule for Indian defendants.

On the other hand, Ms. Johnson reported significant downsides with respect to criminal defendants' ability to identify witnesses who may be called at trial to challenge tribal records that establish an element of the offense. For example, she noted that once the federal Government presents a tribal record with a signature and a seal, that essentially will end the inquiry into Indian status in most instances due to the lack of open records laws and the inapplicability of FOIA to the tribal Nations. Ms. Johnson emphasized that allowing tribal records alone to establish federal criminal jurisdiction would be particularly significant in Oklahoma, where many individuals with mixed tribal status live on reservations. Ms. Johnson also added that the status quo on authentication does not impair the Government's ability to prove its cases and at the same time maintains important safeguards for the rights of criminal defendants.

With regard to the supportive feedback received from some Tribes, Ms. Johnson also expressed concern about the very limited response rate regarding the proposed amendment. She noted that, while every one of the eight responding Tribes is a sovereign nation worthy of dignity and respect, only one of the respondents is a large Tribe: the Navajo Nation. She further noted that the Chickasaw Nation was the only medium-sized Tribe to respond to the Committee's request for feedback. She explained that all other responding Tribes are small, having fewer than 10,000 members with some having fewer than 1,000 members. Given that feedback was solicited from 578 Tribes, Ms. Johnson emphasized that the positive response received was very limited in nature. She further suggested that a Tribe may be reluctant to express opposition to a proposal rooted in respect for tribal sovereignty even if it had concerns about its application.

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Judge Furman thanked Ms. Johnson for her comments and invited Committee members to ask questions. One Committee member asked Ms. Johnson for clarification regarding the significance of mixed occupancy of tribal land for the accuracy of tribal records. Ms. Johnson explained that such mixed occupancy does not affect the accuracy of tribal records but sweeps more criminal defendants and victims into federal court whose status is unclear or ambiguous. She explained that when a party's identity is an element of an offense, it becomes much more important to adequately investigate and produce evidence of status when that status is unclear or ambiguous. Judge Furman asked whether this status element is more likely to be contested or potentially contested in those circumstances. Ms. Johnson responded that uncertainty may not lead to a contest if there was adequate investigation on the front end. For example, she noted that defendants do not contest status in the large majority of these cases currently, because the defender has access to reliable documents and can interview custodians if necessary. She suggested that allowing these documents to be self-authenticating could increase instances in which a defender has legitimate doubts concerning Indian status but has no avenue to dispel those doubts in advance of trial.

Judge Furman then asked about the certification that the Government currently must present under Rule 902(11) to self-authenticate tribal records as business records. He suggested that, in his experience, the Government obtains this certification relatively close to trial. Judge Furman asked when defendants typically receive those certifications, and what kind of investigation is typically conducted in that scenario. Ms. Johnson explained that timing depends on the circumstance, and that in the vast majority of these cases, there's no dispute regarding Indian status that requires an investigation. She suggested that there is no consistent timing for receiving these certifications but that they are typically received a week before trial, which allows defense counsel to interview the tribal custodian to understand the recordkeeping practices and to subpoena the tribal custodian to testify if there are genuine concerns.

A Committee member then asked Ms. Johnson whether she was suggesting that the Committee should infer that tribal Nations are critical of the proposed amendment from the low rate of response to the request for feedback. Ms. Johnson responded that she did not intend to suggest that Tribes are critical of the proposed change based on the lack of widespread response. Still, she suggested that tribal Nations that harbored concerns about the proposal could reasonably conclude that abstaining from comment was superior to offering affirmative criticism of a proposal grounded in tribal sovereignty. She wanted to highlight for the Committee that 98% of tribal Nations offered no response and that the positive feedback received did not reveal a groundswell of support from tribal leaders. Ms. Johnson added that she does not view self-authentication as a matter of dignity or sovereignty, but as a matter of forgery. She suggested that there is nothing respectful or dignified about having inauthentic documents purporting to emanate from your Tribe admitted into evidence.

Ms. Shapiro highlighted for the Committee many instances in which self-authenticating documents currently are used to establish an element of a criminal offense and explained that allowing self-authenticating tribal records to establish the necessary status element of a criminal offense would be no different. Moreover, she emphasized that a defendant may always challenge authenticity, even if a tribal record is admitted. Ms. Shapiro reiterated that there is no rational reason for allowing the many entities already listed in Rule 902(1) to present self-authenticating

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documents while denying the same treatment to sovereign Tribes. One Committee member asked whether it was appropriate for the Committee to determine the status of tribal documents given the treaties that govern relationships with tribal Nations. He asked whether the sovereign Tribes should retain full control over the status of their own records. The Chair noted that only records that a Tribe chose to sign and seal would become self-authenticating under an amended rule. The Committee member agreed that the Tribes could prevent self-authentication by declining to sign or seal particular records and was satisfied that the Tribes would retain control over the status of their own records even under an amended Rule 902(1).

The Chair then called the Committee's attention to the draft of the proposed amendment and Committee note on pages 253 and 254 of the agenda book. He suggested two separate Committee votes: 1) regarding approval of the rule text and 2) regarding the content of the Committee note. The Committee first voted to approve publication of the text of Rule 902(1) for public comment, with only the Federal Public Defender opposing.

The Committee next considered the language of the proposed Committee note. Professor Richter explained two bracketed items in the proposed Committee note for the Committee to consider. She directed the Committee's attention to the first bracketed item appearing on lines 14 through 17 on page 253 of the agenda book that contained a reference to Federal Rule of Criminal Procedure 6(e) that the DOJ included in its original Rule 902(1) proposal. Professor Richter reminded the Committee that it had previously discussed whether Rule 6(e) – which addresses the disclosure of grand jury information to tribal officials – offers an apt comparison for Rule 902(1) (which addresses the admissibility of tribal records). She noted that the draft Committee note utilized a "cf.*"* cite to indicate that Rule 6(e) offers a distinct but helpful analogy. Professor Richter noted that the second bracketed section appeared on page 254 of the agenda memo at lines 27 through 30. She explained that this bracketed material was added as a result of tribal feedback and emphasizes that the amendment concerns authenticity only, that other evidentiary requirements continue to apply (such as hearsay rules, relevance, and Rule 403), and that parties may still challenge the authenticity of the covered public documents at trial if there is a genuine dispute. The Reporter suggested that the second bracketed section should be its own paragraph and that he favored cutting out the final five words ("where authenticity is generally disputed"). He noted that a defendant can always challenge authenticity, and the Committee note should not appear to add a condition for doing so. With that change, the Reporter stated his support for including the material in the second bracketed section. Judge Furman recognized those suggestions as friendly amendments with respect to the second bracketed section on page 254, making the section a new paragraph, and striking the words "where authenticity is genuinely disputed."

As to the first bracket, the Reporter stated that using a "cf." signal to indicate the distinction between Criminal Rule 6(e) and Rule 902(1) was helpful. Judge Furman offered that he did not think the reference was necessary but saw no harm in it. Judge Furman suggested that the points made by the second bracketed section should go without saying because Rule 902(1) covers only authentication, but stated that he saw no harm in including the language and some potential benefit in underscoring the point that authenticity can be challenged at trial even if tribal records are admitted. Ms. Shapiro questioned whether the "cf." suggestion in the first bracket came from the DOJ, and Professor Richter stated that it was included in the draft Committee note accompanying

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the DOJ's original proposal in May 2025 to show that tribal sovereignty was otherwise recognized within the Federal Rules. Ms. Shapiro opined that this was intended as a point of argument, and that the citation did not need to be included in the Committee note. The Chair recognized this as a friendly amendment to remove the first bracketed citation, which was accepted by the Committee. Ms. Shapiro confirmed that the DOJ was fine with including the second bracketed section, as modified by the Committee's discussion.

Judge Furman then called for a vote regarding approval of the proposed Committee note for publication, as amended to remove the first bracketed section with the "cf." citation and with the second bracketed section modified in the two ways proposed by the Reporter. Upon a motion and second, the Committee voted to accept the changes to the Committee note and to publish it for publication, with one objection.

VI. *Smith v. Arizona* and Rule 703/ *Peña-Rodriguez* and Rule 606(b)

The Chair next raised the issue of the Supreme Court's decision in *Smith v. Arizona* and whether amendments to Rule 703 are needed to reflect that decision. He referred members to Professor Richter's excellent memorandum on this issue, found at Tab 6 of the agenda book, at page 295.

Judge Furman provided the Committee with a recap of the issue, stating that in *Smith,* the Supreme Court held that a prosecution expert's testimony violated the confrontation clause of the Sixth Amendment when the expert conveyed the testimonial statements of an absent forensic analyst to support the testifying witness' opinion. The question for the Committee is whether that decision warrants an amendment of Rule 703, which permits experts to rely on otherwise inadmissible information in forming an opinion, and in certain circumstances, subject to a stringent balancing test, to disclose that information to the jury. Thus far, the Committee has been of the view that an amendment to Rule 703 is not needed in the event that *Smith* is construed to prohibit only the disclosure of testimonial hearsay by an expert because Rule 703 already prohibits such disclosure absent satisfaction of a stringent balancing test. On the other hand, Judge Furman noted that if *Smith* is interpreted more broadly to prohibit expert reliance on testimonial hearsay as well, that would pose a bigger problem for Rule 703, which authorizes expert reliance on inadmissible information when other experts would reasonably rely upon the information. Judge Furman observed that there is an emerging and deepening split on the issue of whether *Smith* regulates expert reliance on testimonial hearsay, and that many courts have construed the ruling to reach expert reliance upon testimonial hearsay, as well as disclosure of that information to the jury.

In light of that developing case law, Judge Furman reminded the Committee that it had requested a Reporter's memo proposing a "red flag" amendment to Rule 703 that would at least signal that inadmissible basis information may not be relied upon or disclosed under to Rule 703 when doing so would violate the Constitution. He acknowledged that the rules can never be applied in a way that violates the Constitution, but noted the concern that an unwary litigant or court might apply Rule 703 in an unconstitutional manner. Judge Furman also emphasized, as set forth in Professor Richter's memorandum, that there had been 88 decisions citing *Smith* in the six-month period between the Committee's last meeting and the completion of the agenda memorandum. He

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highlighted that the Massachusetts Supreme Court held that its state law counterpart to Rule 703 "no longer comports with the right of confrontation." Judge Furman also noted that in light of the deepening split, it seems very likely that the Supreme Court will return to this issue in the near future and resolve the question of whether *Smith* applies beyond disclosure to expert reliance on testimonial hearsay. If the Supreme Court were to extend *Smith* to prohibit all reliance on testimonial hearsay, Judge Furman stated that the argument in favor of amending Rule 703 would be much stronger. Conversely, he noted that there would be a weaker case for an amendment if the Court were to clarify that the holding forecloses only the disclosure of testimonial hearsay.

Judge Furman reminded the Committee that it had also decided to reconsider whether to amend Rule 606, which prohibits post-verdict juror testimony regarding jury deliberations, to add a constitutional exception reflecting the Supreme Court's 2017 decision in *Peña-Rodriguez*. In *Peña-Rodriguez*, the Court held that the Sixth Amendment right to a fair and impartial jury requires post-verdict juror testimony when a juror makes a clear statement indicating that racial animus was a significant motivating factor in the decision to convict. Judge Furman noted that Rule 606 clearly conflicts with *Peña-Rodriguez* as written because it prohibits post-verdict juror testimony to impeach a verdict and offers no exception for such racially biased statements. Judge Furman also commented that most courts have narrowly construed *Peña-Rodriguez* to be limited to circumstances where there are clear statements of racial or ethnic animus. He explained that the argument for amending Rule 606(b) to include a constitutional "red flag" would be similar to the argument for amending Rule 703. On the other hand, Judge Furman emphasized that Rule 606 applies to a post-verdict situation in which courts generally are not having to make snap judgments about admissibility. He further noted that courts and litigants appear to be pretty familiar with the law in this area. Judge Furman concluded his introduction by noting that if the Committee is going to amend Rule 703 to provide a constitutional red flag, there's an argument for doing the same with respect to Rule 606.

Professor Richter added that Rules 606(b) and 703 stand on slightly different footing because it is clear that Rule 606(b)(1) as drafted is inconsistent with the Constitution as interpreted in *Peña-Rodriguez*. She noted that the extent to which Rule 703 may be capable of unconstitutional application in a criminal case remains unclear. She echoed Judge Furman, noting that most courts have narrowly construed the *Peña-Rodriguez* exception to Rule 606(b)'s no impeachment rule. She highlighted one notable exception — a Sixth Circuit opinion that extended the ruling to the civil context. Professor Richter directed the Committee's attention to one proposed amendment alternative for the Committee's consideration that appeared on pages 309 and 310 of the agenda book that would track the language in *Peña-Rodriguez* specifically to avoid any potential expansion of the constitutional exception through rulemaking. She noted that concerns about the unintended expansion of the constitutional exception to the no-impeachment rule through rulemaking was a significant factor in the Committee's decision to table a Rule 606(b) constitutional amendment in 2018. Given that the case law has not shown any significant expansion of the exception in the nine years since *Peña-Rodriguez* was decided and given that three states have amended their versions of Rule 606 to include specific language tracking *Peña-Rodriguez*, Professor Richter explained that the Committee may wish to consider this narrow amendment alternative. She explained that a second, more generic, amendment alternative was also provided on pages 313 and 314 of the agenda book for the Committee's consideration. She

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explained that this generic alternative would offer more flexibility in case of future expansion of the constitutional exception to the no impeachment rule.

Judge Furman then opened the issue up for discussion. One Committee member supported the Rule 606(b) narrow fix but expressed the view that Rule 703 was not ripe for amendment. Judge Dever added that he believed that the Supreme Court would grant review on the Rule 703 issue. Judge Dever noted that the Standing Committee was generally skeptical of red flags in the rules. He offered examples, such as Rule 16 of the Federal Rules of Criminal Procedure that does not address *Brady* and *Giglio* and Rule 47 of the Civil Procedure Rules that does not mention *Batson* challenges. He opined that judges and lawyers are well aware of the constitutional issues underlying these rules despite the lack of red flags in rule text. As to Rule 606, Judge Dever also noted that there is no indication in the case law that judges are misapplying Rule 606 to exclude testimony required by *Peña-Rodriguez*. He also emphasized the Supreme Court's lengthy defense of the no-impeachment rule in *Peña-Rodriguez* and the policy choice that Congress made to prohibit post-verdict juror testimony in most circumstances. Judge Dever also opined that the proposed language in the narrow amendment alternative did not accurately track the holding in *Peña-Rodriguez.* He cautioned that the broader, more flexible amendment alternative would broadly expand the decision in a way that is inconsistent with the policy choice that Congress made. Judge Dever noted a similar issue that came up with respect to Criminal Rule 23 at the height of COVID regarding the defendant's ability to ask for a bench trial over the government's objection. He stated that he believed that the Committee was wise nine years ago in tabling amendments to Rule 606, and that there had been no problems in applying Rule 606(b) in the intervening nine years that warranted any fix.

Professor Richter agreed with Judge Dever that there was no indication in the case law that that judges or lawyers are missing the *Peña-Rodriguez* issue. She further acknowledged the difficulty in drafting an amendment that tracks the decision exactly. For example, she noted that the draft on page 310 of the agenda book would apply in the civil context because it covers "verdicts" and not only "convictions" and that the holding in *Peña-Rodriguez* applied only in the criminal context.

The Reporter then commented that the idea of the red flag is not that judges are unaware of the law, but that unschooled defense attorneys might not know that there is a constitutional argument out there because the Rule does not address it. He explained that it is also suboptimal to have a rule of evidence that is unconstitutional when applied as written and that this amendment would resolve that problem. But the Reporter also agreed that a line has to be drawn because there's a potential constitutional argument in every single case, and where to draw that line is difficult. Judge Furman noted that if the Committee were drafting Rule 606 today, it may proceed differently, but the question for the Committee is whether to revisit the issue nine years later.

Judge Furman then returned to consideration of potential amendments to Rule 703 and asked if anyone was aware of any cert petitions on the proper interpretation of *Smith*. Ms. Shapiro responded that she had not checked but that in all likelihood, one would be filed soon. With that context, Judge Furman then suggested that the Committee hold off on addressing Rule 703 to await a decision by the Supreme Court.

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After hearing no objection to holding off on amendments to Rule 703 until the Supreme Court weighs in, Judge Furman then asked for the Committee's thoughts on moving forward with an amendment to Rule 606. On the one hand, he noted that there is an argument for an amendment because the rule on its face is unconstitutional. On the other hand, he acknowledged that an amendment may be a solution in search of a problem. Judge Dever then reiterated the concern that the Standing Committee might wish to see a much stronger argument for revisiting Rule 606, especially because many rules may have case law that calls their application into question and because tracking the language, as Professor Richter noted, would be very difficult to do in the rule. Judge Dever also emphasized that a Rule 606 inquiry comes after trial, and that the Court in *Peña-Rodriguez* described the many mechanisms in place to prevent juror issues during a trial, such as voir dire, juror misconduct being reported during a trial, and polling.

The Reporter also commented that an amendment may sometimes be appropriate after a Supreme Court decision to make a rule operable, such as the amendments to Rule 803(10) that Professor Richter noted in her memorandum. He offered that this change was not a red flag because it was necessary to make the rule operable. Judge Dever agreed that Rule 803(10) was a good example of a needed amendment. Judge Furman also agreed, remarking that if there were an easy way to conform Rule 606(b) to the Constitution, as was done with Rule 803(10), then there would be a stronger argument for an amendment. But he acknowledged that even the narrow approach proposed for Rule 606 could not be completely coextensive with *Peña-Rodriguez*.

Following this discussion, the Chair asked the Committee to vote on whether to keep Rule 606 on the agenda, noting that the Committee would continue to monitor Rule 703 to see if the Supreme Court weighs in. Judge Furman suggested that, unless there's a strong argument for revisiting it, Rule 606 should be removed from the agenda. One Committee member asked if the Standing Committee would oppose an amendment to Rule 606, and Judge Dever responded that he spoke only for himself but rested on the issues he raised. Another Committee member also asked if an amendment with general introductory language such as "unless otherwise provided" would be helpful, and Judge Dever again suggested that the Standing Committee may have the same concerns. With no more comments, and upon a motion and second, and with no opposition, Rule 606 was removed from the agenda.

VII. Possible Changes to Rules 104(a) and (b)

The Chair next addressed the last issue on the agenda, potential amendments to Rule 104. He directed the Committee's attention to the Reporter's memorandum found behind Tab 7, starting at page 333 of the agenda book. Judge Furman explained that Rule 104 governs the court's role in deciding preliminary questions about the admissibility of evidence. The first provision for the Committee's consideration is Rule 104(a), which provides that the court must decide preliminary questions about whether evidence is admissible. This rule, however, does not actually specify the standard of proof that the court must apply. Judge Furman explained that the Supreme Court held in the *Bourjaily* case that the standard for admissibility is preponderance of the evidence, but that standard does not appear in the rule. Judge Furman then explained that the Committee is also considering amendments to Rule 104(b), which governs "conditional relevance," that is, when the

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relevance of certain evidence depends on whether a fact exists, then proof must be introduced sufficient to support a finding that the fact does exist. He explained that some commentators, most notably Professor Allen who was an invited guest at the meeting, have criticized the idea of conditional relevance as distinct from relevance generally. In the *Huddleston* case, the Supreme Court construed the Rule 104(b) standard to require sufficient evidence for a reasonable juror to find that a conditional fact exists.

Judge Furman then summarized the two recommended amendments, noting that if the Committee were drafting the rules in the first instance, it could do better than the existing rules. The first recommended change would be to add the preponderance-of-the-evidence standard explicitly to Rule 104(a), thus codifying the Supreme Court's holding in *Bourjaily*. The second recommended change would be to eliminate the concept of conditional relevance in Rule 104(b) and replace it with a uniform standard applicable to all relevance questions.

Judge Furman noted that one of the principal questions was whether to proceed with any amendment at all, with the case for amending Rule 104(a) fairly straightforward. Judge Furman observed that this issue arose in connection with the amendment of Rule 702 in 2023. In addition, one of the comments in connection with proposed Rule 707 also flagged that that rule contained no reference to the standard of proof. Judge Furman noted that the absence of an express burden of proof can also cause problems, as the Reporter's memo indicated with respect to the standard applicable to party opponent statements under Rule 801(d)(2)(A). Judge Furman added that while widespread evidence of problems may not exist, there are salutary reasons for an amendment to clear up the rule. The Reporter added that part of the reason to amend Rule 104(a) to add the standard of proof is to cut off potential arguments that its absence is significant where other rules address it. Adding the standard of proof would also be helpful to the unschooled lawyer because there is no way to discern the standard without legal research.

As to Rule 104(b), Judge Furman stated that he would give Professor Allen an opportunity to speak as one of the leading experts on the issue of conditional relevance, noting that there is an argument that the whole notion of conditional relevance is incoherent, unnecessary, and complicated. He reminded the Committee that it had discussed whether this rule is causing problems at its Fall 2025 meeting, which he explained was certainly something that should be considered in deciding whether to proceed. Judge Furman also pointed out that the Reporter's memo catalogued cases showing that courts have been confused by the concept of conditional relevance, most notably a 10th Circuit case from just this last year, which made the observation that conditional relevance is "very blurry and that a savvy lawyer can basically turn any question of relevance into a 104(b) conditional relevance question." Having said that, Judge Furman also commented that one question that he would like to address to Professor Allen and the Reporter is whether the confusion is impacting outcomes in cases.

Professor Allen then thanked the Committee for inviting him to speak and began his remarks by acknowledging the influence of the Federal Rules of Evidence. That said, Professor Allen opined that some mistakes were made in the original drafting of the Rules and that the understanding of certain issues had changed since the original enactment. Professor Allen then explained that part of the problem with Rule 104(b) is that the Rules as written suggest a difference

between relevancy under Rule 401 and conditional relevancy under Rule 104(b). But he noted that there is always a reason why evidence is relevant, whether that reason is found in the record itself, or simply in the mind of the decision-maker. For example, Professor Allen explained that if you try a case in Iowa involving nitrogen fertilizer, you don't need to put in evidence that nitrogen fertilizer is a dangerous commodity because jurors in Iowa are well aware of the properties of nitrogen fertilizer. In New York, you do. As another example, Professor Allen referenced a case in his casebook about a prison fight in which the disputed issue was who was the first aggressor. The defendant wanted to introduce evidence that when the guards came to his cell, they were putting on leather gloves. This prison was in a town where the prison was the main employer, and everybody knew that when the guards went to a cell putting on gloves, they intended to have a fight. The evidence of the gloves obviously increases the probability that the defendant was acting in self-defense. But if you try that case in New York or Chicago, people don't know that custom or practice in the prison. The only difference in these cases is the source of the knowledge necessary to connect this evidence by a chain of logic to the consequence. The evidence connecting the facts may be in the record or may be general knowledge already in the mind of the decision-maker.

Professor Allen characterized Rule 104 as a "mess" for all the reasons the Reporter described in his agenda memo and argued that forcing litigants and courts to distinguish between Rule 401 and Rule 104(b) relevance was a waste of resources. Professor Allen acknowledged that the issue of whether Rule 104(b) is worth changing is up to the Committee, and that the conceptual mess as he described it may not be a sufficient reason to amend the rule. Still, Professor Allen opined that all of the litigation efforts currently required to address Rule 104(b) issues could be avoided if the rule provided a simple, straightforward, reasonableness determination about the relevancy of evidence. Professor Allen also drew from personal experience as a consultant to law firms in complex cases and described a tremendous amount of effort and resources used to evaluate these questions. He explained that a reasonableness inquiry under Rule 104(b) would allow the trial judge to determine if a reasonable factfinder could see the connection between the evidence and the fact of consequence, and, if not, the judge could tell the litigants that they have to produce evidence. Professor Allen concluded his remarks by expressing the hope that the Committee would take this issue further and dig into the real transaction costs created by Rule 104(b) that are hidden by the cases.

Judge Furman thanked Professor Allen for his presentation and noted that the Reporter had identified Rule 104(b) as the worst rule in the Federal Rules of Evidence and the one he would most like to change. Judge Furman then directed Committee members to the proposal to amend Rule 104 on page 353 of the agenda book. Judge Furman explained that when he presented this issue to the Standing Committee at the January 2026 meeting, he had suggested that it would be a question of whether to proceed with both amendments or neither. He reported that there was some sentiment on the Standing Committee that there would be some virtue in continuing to move forward with Rule 104(a) even if the Committee decided not to address Rule 104(b). He explained that adding the preponderance standard to Rule 104(a) would be helpful for lawyers unfamiliar with *Bourjaily* and, further, that the Committee would likely include a standard of proof if it were writing Rule 104 today. The Reporter supported the idea of seeking Committee feedback and then

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holding a vote regarding Rule 104(a) first. He also noted that the case law indicates problems applying Rules 104(a) and 104(b) that amendments could address.

The members then discussed the proposed amendment to Rule 104(a) to add the preponderance standard of proof. One Committee member commented that he had always found the distinction between Rule 104(a) and (b) and the necessary standards of proof in various circumstance unnecessarily confusing. Ms. Shapiro added that the DOJ supports the change to Rule 104(a) to add the standard of proof.

Based on this feedback, and with no other comments, Judge Furman called the question about whether to approve the amendments to Rule 104(a) for publication and public comment. This would involve the proposed language on page 353 of the agenda book and would add a sentence "Unless otherwise provided in these rules, the proponent must establish the existence of a preliminary fact by a preponderance of the evidence." Upon a motion and a second, and with no objection, the Committee approved the amendment to Rule 104(a) for publication and public comment, along with the draft Committee note.

Judge Furman then moved on to consideration of amendments to Rule 104(b), the so-called conditional relevance rule, calling the Committee's attention to the proposed amendments on page 253 of the agenda book. The Reporter explained the benefits of eliminating the concept of dependency created by the concept of "conditional relevance." He explained that this concept is problematic and confusing because the relevance of every item of evidence is dependent upon everything else. Another benefit of the proposed amendment is that it would no longer require "proof" that must be introduced sufficient to support a finding. This is helpful where the relevance question is not only about "proof" of relevance but also about logic and experience — somebody can determine that evidence is relevant without "proof." Under the new formulation, the Reporter explained that evidence would be relevant if the court determines the trier of fact could reasonably find that the requirements of Rule 401 have been met. In making that determination, the amendment would allow the court to consider "the evidence itself, other evidence, and common knowledge and experience." The Reporter opined that this new language would also be helpful because Rule 401 currently contains no standard of proof.

Committee members then discussed the proposed amendments to Rule 104(b). One Committee member expressed support for the new language in the first sentence of the proposed amendment, arguing that it tracks the argument that lawyers must make to the judge on relevance issues. He expressed some concern about the "common knowledge and experience" language in the second sentence — suggesting that jurors are already reminded to rely upon common sense in their instructions and that it would be odd for an Evidence rule to direct a judge to use common sense. Another Committee member did not fully support the changes because judges routinely consider the issue of relevance with no problems. The Reporter explained that the change would address the standard of proof that the judge must apply in determining a relevance question, language that could also be added to Rule 401. The Committee member responded that this change is not needed in either place. Another Committee member expressed concern that the proposed amendment appears to define relevance in a slightly different manner than Rule 401. In addition, the Committee member observed that the proposed amendment would seem to change the purpose

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of Rule 104(b), which could lead to more confusion. The Reporter responded that the amendments were not intended to change Rule 401, only to provide guidance for a judge in determining whether the standards of 401 have been met. Judge Furman interjected that the Committee might have added the amended language to Rule 401 if it were drafting from scratch, but that it was important to preserve the architecture of the existing rules in crafting amendments and that placement in Rule 104(b) would make more sense at this point in the history of the Rules.

Another Committee member asked whether Rule 104(a) would apply to all preliminary questions of admissibility except relevance under the proposed amendments, with Rule 104(b) covering only questions of relevance and deferring to the jury in appropriate circumstances. The Reporter agreed, explaining that the reason for that allocation is the idea that judges are no better at determining relevancy than juries are, but that judges are superior arbiters of other admissibility requirements, such as whether an expert's testimony is reliable. Another Committee member asked if the problem with the current rule is that it generates confusion between the concepts of "conditional relevancy" and "conditional admissibility." The Reporter agreed, explaining that courts sometimes apply the lower Rule 104(b) standard of proof to questions of conditional admissibility — such as the coconspirator exception — when those questions do not raise relevancy concerns and should be handled by the higher preponderance standard of proof. The Reporter opined that an amendment would alleviate some of this confusion, though it would need to retain language about "connecting up" admissibility requirements with later proof.

The Chair then referenced Professor Allen's remarks that substantial resources are wasted in trying to figure out the concept of conditional relevance and the necessary "conditions." He asked if trial judges or litigators were seeing resources wasted on litigating some of these issues or experiencing the confusion that we see in some of these cases. One Committee member responded that she had not seen problems with these rules in all the time she has litigated and presided over trials and sees the proposed amendment as a fix in search of a problem. She opined that people understand the idea that A is relevant only if B also can be proven. The Reporter noted that the cases did not reveal problems with judges so much as the parties who misconceive conditional relevance, although some cases did indicate that judges had made mistakes in this regard as well. Another Committee member argued that the amendment would be helpful because it would give the litigator language to explain to the judge why evidence should, or should not, be admitted. And while judges can instinctively make relevance decisions, this language has been missing from the dialogue and arguments in court. Ms. Shapiro added that DOJ practitioners do not seem to have a problem with this although it does come up. She added that the proposed amendments set out two different standards, a preponderance standard for preliminary questions of admissibility, and a lower sufficiency standard for relevance. She suggested that the way in which the amended rule would divide these concepts could be confusing and suggested a general preponderance standard for admissibility determinations with an "exception" for relevance determinations all in Rule 104(a). The Reporter responded that the Committee could not eliminate Rule 104(b) altogether without damaging the architecture of the Rules.

Although the Committee had been considering the amendment to Rule 104(b) separately from the previously approved amendment to Rule 104(a), Judge Furman asked whether both Rules 104(a) and 104(b) have to be amended together to avoid making Rule 401 questions subject to a

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preponderance standard under an amended Rule 104(a). The Reporter agreed that an amendment to Rule 104(a) without a corresponding change to Rule 104(b) could be read to impose a preponderance standard for all relevance determinations that are not "conditional." The Federal Public Defender opined that both provisions should be amended because the concept of conditional relevance is extremely confusing and unnecessary.

Based on this discussion, Judge Dever made some suggested changes to the proposed Rule 104(b) language. To avoid any conflict with Rule 401, he suggested that Rule 104(b) could be amended to read that: in deciding relevance, "the court determines whether the trier of fact could reasonably find that the requirements of Rule 401 have been met." The Reporter noted this change as a friendly amendment. Another Committee member offered another friendly amendment to structure Rule 104(b) in exactly the same way as subsection (a). This would add language providing that to establish that evidence is relevant, "the proponent must demonstrate to the court that a trier of fact could reasonably find . . ." The Reporter suggested that Judge Dever's language was more direct and stated that it was not clear how this change was structured like (a). The Committee member explained that (a) says "the proponent must establish the existence of a preliminary fact by a preponderance of the evidence" and that (b) could also say that "the proponent must demonstrate, et cetera" to establish that evidence is relevant. At this point, the Chair suggested a break to coalesce around proposed changes to the draft amendments to Rule 104(b). Committee members then offered feedback on the changes and the Federal Public Defender member noted that he had to leave the meeting but would vote to move forward to publication and public comment for amendments to both (a) and (b) as a package.

Following the break, the Chair reconvened the meeting to share a revised version of the proposed changes to Rule 104(b) for discussion. This included a change to the first sentence in Rule 104(b) so that it reads: "To establish that evidence is relevant, the proponent must demonstrate to the court that the trier of fact could reasonably find that the requirements of Rule 401 have been met." Ms. Shapiro confirmed that she had withdrawn an earlier suggested revision to include the word "information" as foundation for a relevance finding because a jury could consider only "evidence" and not outside information available only to the judge in determining relevance. With these changes to the draft amendment, the Chair asked the Committee to vote on whether to amend Rule 104(a) and (b) together, or do nothing at all. Another Committee member suggested that the language in the second sentence of the proposed amendment to Rule 104(b) that read "In making its determination" was awkward because the first sentence no longer discussed the court making a determination. The reporter agreed and asked whether modifying the second sentence to read: "In making its relevance determination, the court may…" All agreed that this was a good fix. With this change, and upon a motion and a second, and with no opposition, the Committee voted to recommend amendments to Rule 104(a) and (b) to be published for public comment. (The Chair confirmed with the Federal Public Defender member after the meeting that he too supported the proposal as modified.)

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VIII. Closing Matters

The Chair closed the meeting by inviting Committee members and liaisons to offer suggestions for panelists to participate in the Fall 2026 mini-conference regarding draft Rules 707 and 901(c), which will include a panel of technical experts to help the Committee understand the technology and refine definitions, and a panel of judges and practitioners to address the AI issues they are confronting and to comment on whether the proposed rules would provide a solution.

Judge Furman then thanked Judge Sullivan again for his service on the Committee and observed that the work of the Rules Committees shows government at its best. Although the rule-making process can be lengthy, he noted that it is a sign that the Committee is being appropriately cautious and considerate. Judge Furman also thanked the members of the Rules Committee Staff for their assistance and reminded the members that the next meeting will be in Boston, Massachusetts on October 15, 2026. The meeting was then adjourned.

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TAB 27

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 609. Impeachment by Evidence of a Criminal Conviction

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence

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

substantially outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed ~~since~~ between the witness's conviction or release from confinement for it~~,~~ (whichever is later) and the date that the trial begins. Evidence of the conviction is admissible only if:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

* * * * *

Committee Note

Rule 609(a)(1)(B) has been amended to provide that a non-falsity-based conviction should not be admissible to impeach a criminal defendant unless its probative value *substantially* outweighs the risk of unfair prejudice to the defendant. Congress allowed such impeachment with non-falsity-based convictions under Rule 609(a)(1), but imposed a reverse balancing test when the witness was the accused. That test is more protective so as not to infringe on the accused's constitutional right to testify. The amendment underscores the importance of applying a protective balance. The amendment also makes the balancing test consistent with that in Rule 703. Courts are familiar with the formulation "substantially outweighs" as the same phrase is used throughout the rules of evidence to describe various balancing tests. Cf. Rule 403.

If a conviction is inadmissible under this rule, it is inappropriate to allow a party, under Rule 608(b), to inquire into the specific instances of conduct underlying that conviction. Rule 608 permits impeachment only by specific acts that have not resulted in a criminal conviction. Evidence relating to impeachment by way of criminal conviction is treated exclusively under Rule 609.

Nothing in this rule prohibits the use of convictions to impeach by way of contradiction. Such impeachment is governed by Rule 403. So for example, if the witness affirmatively testifies that he has never had anything to do with illegal drugs, a prior drug conviction may be admissible for purposes of contradiction even if not admissible under Rule 609. *See United States v. Castillo*, 181 F.3d 1129 (9th Cir. 1999) (unequivocal denial of involvement with drugs on direct examination warranted admission of the witness's drug activity under Rule 403).

A number of courts have, in a kind of compromise, admitted only the fact of a conviction to impeach a defendant in a criminal case. Thus the jury hears only that the defendant was convicted of a felony, not what the crime was. Absent agreement by the parties, that solution is problematic because convictions falling within Rule 609(a)(1) have varying probative value, and admitting only the fact of conviction deprives the jury of the opportunity to properly weigh the conviction's effect on the witness's character for truthfulness.

In addition, Rule 609(b) has been amended to set an endpoint by which the rule's 10-year period is to be measured. The lack of such an endpoint in the original rule has led courts to apply various endpoints, including the date of the charged offense, the date of indictment, the date of trial, and the date the witness testifies. The rule provides for the date that trial begins as the endpoint, as that is a clear and objective date and it is the time at which the factfinder begins to analyze the truthfulness of witnesses.

Changes Made After Publication and Comment

The Committee Note was slightly altered to emphasize the prejudice that may occur if a court allows the jury to hear that the accused committed a felony, but not tell the jury what the felony was.

Summary of Public Comment

Bobby Levine, Esq., (USC-RULES-EV-2025-0034-0003) objects to the proposed amendment to Rule 609(b), contending that the date of indictment is preferable to the date of trial for assessing whether the conviction falls within the rule.

Melody Brannon, Esq., (USC-RULES-EV-2025-0034-0004), writing on behalf of the Federal Defender and Community Defender members of Defender Services Advisory Group ("DSAG") strongly supports the proposed amendment to Rule 609(a)(1)(B). She states that "this Committee must amend the rule to address the judicial misapplication of the test, which is due in part to the appellate courts' standards of reviewing Rule 609 issues and evidence issues more broadly." She also states that the prevailing application of the current test "violates defendants' constitutional rights by chilling the right to testify" and that "social science does not support the proposition that impeachment by prior convictions contributes to the truthseeking goal it seeks to serve."

Aspen Griffing, Esq. (USC-RULES-EV-2025-0034-0005) states that "[a]dding the necessity of evidence under 609(a)(1)(b) to be substantially more probative than prejudicial provides a much needed safeguard on

defendants' rights" but that "the rule should calculate the time frame under 609(b) to extend to the date the defendant offers testimony."

Leah Brown, Esq. (USC-RULES-EV-2025-0034-0008) supports the proposed amendment to Rule 609(a)(1)(B) because it "better safeguards a defendant's right to testify." She notes that the risk of impeachment "discourages defendants from sharing their side of the story, even when their testimony is crucial for a fair trial." Ms. Brown also agrees with the proposed endpoint in Rule 609(b), contending that "lack of clarity regarding the ten years creates unnecessary uncertainty for both defendants and their attorneys." She concludes that "[t]ogether, these revisions promote consistency, fairness, and transparency. Most importantly, they uphold the broader goals of the criminal justice system by ensuring that defendants feel empowered to testify without being unfairly burdened by convictions that do not accurately reflect their honesty."

Elliot Ashley, Esq., (USC-RULES-EV-2025-0034-0010) approves of the amendment but argues that the term "substantially" must be "better defined for the rule to have its intended effect."

Elizabeth Schultz, Esq., (USC-RULES-EV-0034-0011) approves of both proposed changes to Rule 609. As to the amendment to Rule 609(a)(1)(B), she states that the addition of the word "substantially" is "necessary because it gives more appropriate weight to the stakes involved when a defendant testifies in a criminal case, and it removes existing inconsistency within the Rules." Ms. Schultz argues that the amendment "will encourage more careful judicial analysis and promote fairer trial outcomes for defendants." As to the proposed amendment to Rule 609(b), Ms. Schultz states that the "clarification is a welcome improvement" and that "[b]y

explicitly defining the relevant time frame and anchoring it to the trial date, which is a clear and unambiguous endpoint, the amendment promotes uniformity and predictability in the measurement application."

The Federal Magistrate Judges Association, (USC-RULES-EV-2025-0034-0017), supports the proposed amendment to Rule 609 providing for more protection of criminal defendants from impeachment with prior convictions. The Association states: "The proposed addition of 'substantially' is likely to have the effect of courts considering more carefully the admission of such evidence. The FMJA endorses this change because it minimizes the potential for prejudice to criminal defendants and focuses the jury on the conduct at issue in the trial rather than the individual's past conduct."

The American College of Trial Lawyers, (USC-RULES-EV-2025-0034-0030), supports the proposed changes to Rule 609. As to Rule 609(a)(1)(B), the College states that the amendment "will help effectuate Congress' intent to provide robust, but fair, protections for criminal defendants." As to the proposed amendment to Rule 609(b), the College "agrees with the Committee that the date of trial is the date that is most easily administered, the least susceptible to manipulation, and that it is a proper date for determining the credibility of a witness who is going to testify at the trial."

The New York City Bar Association, (USC-RULES-EV-2025-0034-0046), strongly supports the proposed amendment to Rule 609(a)(1)(B). It states that, as currently applied by courts, "Rule 609(a)(1) imposes an unwarranted burden on criminal defendants' right to testify and, ultimately, to a fair trial." It concludes that "[t]he proposal to raise the standard that must be satisfied before

the admission of a prior conviction for the purpose of impeaching a defendant-witness's credibility will help reduce this burden, bring the rule in line with its original intent, and promote a fairer adversarial process." The Association concludes that the amendment "will hopefully restore the intended balance that Congress meant to strike when Rule 609 was enacted."

The National Association of Criminal Defense Lawyers, (USC-RULES-EV-2025-0034-0052), strongly supports the proposed amendment to Rule 609(a)(1)(B). It states that the amendment "marks an important step toward enhancing the fairness and integrity of our judicial system. By strengthening the threshold governing the admissibility of prior convictions for the purpose of impeaching a defendant-witness's credibility, we move closer to ensuring that every defendant receives a fair trial."

The American Association for Justice, (USC-RULES-EV-2025-0034-0057), supports the proposed amendment to Rule 609 "as a small step toward greater fairness."

The Coalition for Prior Impeachment Reform, (USC-RULES-EV-2025-0034-0059), supports the proposed amendment to Rule 609(a)(1). It states that "[w]e know from our research and efforts that change is hard to achieve in the prior conviction impeachment sphere. We therefore express our appreciation for the fact that after years of work . . . a proposal has reached this stage." The Coalition concludes that the proposed amendment "has the potential to limit the extent to which Federal Rule of Evidence 609(a)(1)(B) detracts from ascertaining the truth."

University of Connecticut Law School Students, (USC-RULES-EV-2025-0034-0066), "write to express our

strong support for adding the word 'substantially' to Federal Rules of Evidence 609(a)(1)(B)'s balancing test." The students state that the current rule "derails Congress' intention to offer strong protections for defendants and serves to deter defendants with prior convictions from testifying." They conclude that "[t]he addition of the word "substantially" will serve as a promising first step in creating a judicial system that protects defendants' rights and furthers the purpose of the Federal Rules of Evidence." The students go further and ask the Committee to propose abrogation of Rule 609, and state that "[j]ust as the 2020 amendment to Rule 404(b) became a barrier to meaningful reform of that Rule, we are concerned the 2026 Rule 609 amendment will become a barrier to true reform or elimination of the Rule."

The New York Council of Defense Lawyers, (USC-RULES-EV-2025-0034-0075), strongly supports the proposed amendment to Rule 609(a)(1)(B). The Council states that there is a "wide disparity" in the case law in applying the balancing test of the rule, with some courts applying it carefully "while others almost routinely admit prior convictions as impeachment evidence." The Council believes that the amendment "will not materially affect courts in the former category; it will signal to the latter courts that the Rule's balancing test is not to be taken lightly, with the result that fewer convictions that have little to do with a defendant's character for truthfulness are admitted."

TAB 28

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 902. Evidence That Is Self-Authenticating

* * * * *

(1) ***Domestic Public Documents That Are Sealed and Signed.*** A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; a federally recognized Indian Tribe or Nation; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

[1] New material is underlined in red.

(B) a signature purporting to be an execution or attestation.

* * * * *

Committee Note

The rule has been amended to provide that a sealed and signed document from a federally recognized Indian Tribe or Nation is entitled to the same presumption of authenticity as a comparable document from the government entities currently listed in Rule 902(1)(A). The amendment thus recognizes the sovereignty of Indian Tribes and Nations. Furthermore, self-authentication of the public documents of Indian Tribes and Nations will allow for more efficient proof of tribal records in federal court and will conserve the valuable resources of tribal officials who often had to appear in court to authenticate documents prior to the amendment.

Under the Federally Recognized Indian Tribe List Act of 1994 (P.L. 103-454), the Secretary of the Interior publishes a list of all federally recognized Indian tribes in the Federal Register, through which courts may identify covered Tribes and Nations. The amendment permits self-authentication of the qualifying sealed and signed documents of any Indian Tribe or Nation that is federally recognized as of the date that the document is offered into evidence.

The amendment concerns authenticity only; other evidentiary requirements continue to apply. As with other 902(1) documents, parties may still challenge the authenticity of the covered public documents at trial.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 104. Preliminary Questions

(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege. Unless otherwise provided in these rules, the proponent must establish the existence of a preliminary fact by a preponderance of the evidence.

(b) Relevance ~~That Depends on a Fact~~. ~~When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist.~~ To establish that evidence is relevant, the proponent must demonstrate

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

to the court that the trier of fact could reasonably find that the requirements of Rule 401 have been met. In making its relevance determination, the court may consider the evidence itself, other evidence, and common knowledge and experience. The court may admit the proposed evidence on the condition that ~~the~~ further proof be introduced later.

* * * * *

Committee Note

Two changes are made to Rule 104. First, the amendment codifies the holding in *Bourjaily v. United States,* 483 U.S. 171, 175 (1987), that preliminary questions of fact under Rule 104(a) are to be determined by a preponderance of the evidence. The Committee has determined that codification would be useful because there has been some confusion about the applicable standard of proof for preliminary questions. See the 2023 amendment to Rule 702.

Some situations call for a lower standard of proof for a preliminary question, ordinarily because on those questions, the jury is in as good a position as the court to determine the contested fact, and there is little to no risk that the jury will be misled or subject to unfair prejudice in making the determination. See Rules 104(b), 602, 901 and 1008.

Second, the amendment to Rule 104(b) eliminates the concept of "conditional relevance." There is no reason for special treatment of facts that are conditionally relevant, because in almost all cases, the relevance of a particular fact is dependent on a showing of other facts and so the relevance is "conditional." Moreover, if the existence of one fact is conditionally relevant upon another, the result is that both facts are "conditionally relevant." See Ronald Allen, *The Myth of Conditional Relevance,* 25 Loyola L. Rev. 871-884, 879 (1992) ("Evidence is relevant only because there is an intermediate premise or set of premises that connects the evidence to some proposition involved in the litigation. But if determining the relevance of evidence always requires relying on some intermediate premise, no distinction can be drawn between relevancy and conditional relevancy."). Providing a uniform approach to all questions of relevance avoids confusion, especially because most courts currently use the same permissive approach to all relevant evidence, conditional or not. All questions of relevance should be governed by the same "a reasonable person could find" standard because the jury is in as good a position to determine relevance as is the court.

The rule 104(b) test that "proof must be introduced sufficient to support a finding" has been revised, because a court's preliminary determination of relevance is not limited to proof submitted to it. A court could find evidence relevant under Rule 104(b) by considering the evidence itself, as well as common knowledge and experience. For example, if the proffered evidence is that the defendant was carrying a gun, its relevance to a charge of armed robbery can be determined without any further proof. The standard has been changed to whether the factfinder "could reasonably find" the evidence to be relevant. That standard is the same as "sufficient to support a finding." *See Huddleston v. United States,* 485 U.S. 681, 687 (1988) (in determining whether the proponent

has introduced sufficient evidence to meet Rule 104(b), the trial court decides whether "the jury could reasonably find" the contested fact).

In deciding whether evidence is relevant, the judge must not only take into account the evidence formally in the record, but also the likely background knowledge and experience of a reasonable juror from the area where trial is being held. For example, suppose a trial concerns the cause of a large explosion and fire. The plaintiff claims that the defendant mishandled nitrogen fertilizer containing ammonium nitrate. A witness is asked whether such a fertilizer was stored on the premises and an objection on relevancy is made. If the trial is in a rural state with a large farming population, the trial judge would overrule the objection because a reasonable person from that population would likely know the dangerous properties of the material. If, by contrast, the trial were held in an urban area, the judge would likely conclude that evidence of the dangerous properties must be entered into the record to satisfy the requirement of relevancy.

The amendment retains the provision allowing proof to be introduced later. It should be noted that allowing proof to be introduced later is within the discretion of the court under Rule 104(a) as well.