
**ADVISORY COMMITTEE
ON
EVIDENCE RULES**

October 15, 2026

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October 15, 2026 Meeting

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TAB 1

ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING

October 15, 2026

Boston, MA

I. Committee Meeting --- Opening Business

Opening business includes:

- Approval of the minutes of the Spring 2026 meeting.
- Report on the June 2026 meeting of the Standing Committee, and subsequent action.
- Welcome to new member Judge John Lee.

II. Deepfakes and the Federal Rules on Authenticity; Panel Discussion

At its last seven meetings, the Committee has been working on a possible amendment to address the evidentiary challenges raised by “deepfakes.” The Committee has prepared, but not finally approved, a new Rule 901(c) that would require the opponent to provide evidence sufficient to support a finding that a challenged item was a deepfake; if that happens, the proponent would then have to show that the item is more likely than not authentic.

At this meeting, the Committee has convened a panel of experts to discuss the problem of deepfakes and to provide suggestions about a proposed rule. The panel discussion will take place on the morning of the Advisory Committee meeting.

Behind Tab II of the agenda book is a memo from the Reporter on deepfakes, that also describes the panel discussion.

III. Artificial Intelligence and Proposed Rule 707; Panel Discussion

At its Spring 2025 meeting the Committee approved, for release for public comment, a proposed new Rule 707 to address the evidentiary problems raised by machine learning systems, when the product of artificial intelligence is offered as evidence without an accompanying expert. The proposal was approved by the Standing Committee, and the Committee received testimony at two hearings, as well as more than 70 written comments. After review, the Committee at the last meeting voted to withdraw the proposed rule as issued for public comment, and to submit a modified rule proposal for further study.

At this meeting, the Committee has convened a panel of experts to discuss the problem of potentially unreliable AI offered as evidence, and to provide suggestions about a proposed rule. The panel discussion will take place on the morning of the Advisory Committee meeting.

Behind Tab III of the agenda book is a memo from the Reporter on AI-generated evidence, that also describes the panel discussion.

IV. Rule 902(1) and Indian Tribes and Nations

At its Spring 2026 meeting the Committee approved for release for public comment a proposed amendment that would add federally-recognized Indian Tribes and Nations to the list of public entities whose records are self-authenticating under Rule 902(1). The Standing Committee approved the proposal for public comment. The public comment period runs from August 14 to February 15.

Behind Tab IV is a memorandum from Professor Richter, the Academic Consultant, on the proposed amendment to Rule 902(1), including a discussion of any comments received to date.

V. Proposed Amendments to Rule 104(a) and (b)

Rule 104(a) and (b) set out the applicable standard of proof for evidentiary determinations. Under Rule 104(a), the standard of proof for most determinations is a preponderance of the evidence. Under Rule 104(b), if the relevance of a fact is conditioned on the existence of another fact, the standard of proof for the conditional fact is evidence sufficient to support a finding.

There are at least two problems that have been raised with respect to Rules 104(a) and (b). First, the preponderance standard mandated by Rule 104(a) is not actually in the text of the rule. Second, the conditional relevance standard of Rule 104(b) is grounded in illogic. If the relevance of one fact is conditioned on another, then the probative value of each is conditioned on the existence of the other. What's more, if the standard of proof in Rule 104(b) is limited to conditional relevance, it means that there is no standard of proof set forth for other relevance questions.

At its Spring 2026 meeting the Committee unanimously approved amendments to Rule 104(a) and (b) for release for public comment. The amendments would correct the problems caused by the existing rule. The Standing Committee voted unanimously to release the proposed amendments for public comment.

Behind Tab V is a memorandum from the Reporter on the proposed amendments to Rule 104, which includes a discussion of any comments received to date.

VI. Amendment to Rule 609(a)(1)(B)

The Committee's proposed amendment to Rule 609 --- a one-word amendment that added "substantially" to the balancing test for non-falsity convictions offered against an accused --- was unanimously approved by the Standing Committee at its June meeting. Thereafter, the Executive Committee of the Judicial Conference notified the Chair of the Standing Committee of concerns regarding certain language in the committee note. In light of these concerns, the Standing Committee subsequently voted to withdraw the proposed amendment and the proposal was sent back to the Advisory Committee for further study.

Behind Tab VI is a memo on the Rule 609 amendment. It highlights some of the objections of the Executive Committee members, and considers what next steps, if any, might be taken by the Advisory Committee.

VII. Rule 604

In the course of an article tying the Federal Rules of Evidence to music, a law professor proposed an amendment to Rule 604, which governs interpreters. Behind Tab VII is a memo from Professor Richter analyzing the proposal.

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

Members	
Honorable Valerie E. Caproni United States District Court New York, NY	James P. Cooney III, Esq. Womble Bond Dickinson LLP Charlotte, NC
Honorable John Z. Lee U.S. Court of Appeals for Seventh Circuit Chicago, IL	Honorable Mark S. Massa Indiana Supreme Court Indianapolis, IN
James McHenry, Esq. Acting Principal Associate Deputy Attorney General (ex officio) United States Department of Justice Washington, DC	Honorable Edmund A. Sargus, Jr. United States District Court Columbus, OH
John S. Siffert, Esq. Lankler Siffert & Wohl LLP New York, NY	Rene L. Valladares, Esq. Office of the Federal Public Defender Las Vegas, NV

Consultant
Professor Liesa Richter University of Oklahoma School of Law Norman, OK

Liaisons	
Honorable Thomas M. Durkin (<i>Criminal</i>) United States District Court Chicago, IL	Honorable Edward M. Mansfield (<i>Standing</i>) Iowa Supreme Court Des Moines, IA
Honorable M. Hannah Lauck (<i>Civil</i>) United States District Court Richmond, VA	

ADVISORY COMMITTEE ON EVIDENCE RULES

Members	Position	District/Circuit	Start Date	End Date
Jesse M. Furman Chair	D	New York (Southern)	Member: 2024 Chair: 2024	---- 2027
Valerie E. Caproni	D	New York (Southern)	2023	2026
James P. Cooney III	ESQ	North Carolina	2022	2028
John Z. Lee	C	Seventh Circuit	2026	2029
Mark S. Massa	JUST	Indiana	2022	2028
James McHenry*	DOJ	Washington, DC	---	Open
Edmund A. Sargus, Jr.	D	Ohio (Southern)	2023	2026
John S. Siffert	ESQ	New York	2023	2026
R.L. Valladares	FPD	Nevada	2022	2027
Daniel J. Capra Reporter	ACAD	New York	1996	Open

Principal Staff: Carolyn Dubay, 202-502-1820

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Liaison for the Advisory Committee on Bankruptcy Rules	Dean Troy A. McKenzie <i>(Standing)</i>
Liaisons for the Advisory Committee on Civil Rules	Hon. Amul R. Thapar <i>(Standing)</i> Hon. Leigh Martin May <i>(Bankruptcy)</i>
Liaison for the Advisory Committee on Criminal Rules	Hon. Paul J. Barbadoro <i>(Standing)</i>
Liaisons for the Advisory Committee on Evidence Rules	Hon. Thomas M. Durkin <i>(Criminal)</i> Hon. Edward M. Mansfield <i>(Standing)</i> Hon. M. Hannah Lauck <i>(Civil)</i>

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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)

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](https://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

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,

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

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.

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

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

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 Virginia 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 a 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

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

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

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

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.

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

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

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

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.

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

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

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

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

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 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.

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

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

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

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

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.)

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.

MINUTES

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

June 3-4, 2026

The Judicial Conference Committee on Rules of Practice and Procedure (the Standing Committee) met in Chicago, Illinois, on June 3 and 4, 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
Elizabeth J. Shapiro, Esq.¹
Judge Amul R. Thapar
Bart H. Williams, Esq.

The following individuals also attended to support the work of the Standing Committee: Professor Edward Hartnett, Standing Committee Reporter; Carolyn A. Dubay, Secretary to the Standing Committee; Professor Catherine T. Struve (attended remotely), Professor Daniel R. Coquillette (attended remotely), Professor Bryan A. Garner, and Professor Joseph Kimble, 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 Stephen Sachs, Reporter (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 Bankruptcy Rules:

Judge Rebecca B. Connelly, Chair
Professor S. Elizabeth Gibson, Reporter (attended remotely)
Professor Laura B. Bartell, Associate Reporter

Advisory Committee on Evidence Rules:

Judge Jesse M. Furman, Chair
Professor Daniel J. Capra, Reporter

Advisory Committee on Civil Rules:

Judge Sarah S. Vance, Chair
Professor Richard L. Marcus, Reporter
Professor Andrew Bradt, Associate Reporter

Judge Robert J. Conrad, Jr., Director of the Administrative Office of the U.S. Courts, also attended. Other attendees (participating remotely) included: Bridget Healy, Esq. and Sarah A.

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

Sraders, Esq., Rules Committee Staff Counsel; Shelly Cox, Rules Committee Staff; and Dr. Tim Reagan, Senior Research Associate, Federal Judicial Center (FJC).

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. Dean Zachary Clopton, Dean of Northwestern Pritzker School of Law, also welcomed the attendees.

Judge Dever also paid tribute to Standing Committee member Judge D. Brooks Smith (3rd Cir.), who retired effective May 31, 2026. Judge Dever recounted Judge Smith's impressive career, noting that he had served as chief judge of the district court and Third Circuit and as Chair of the Judicial Conference Space and Facilities Committee, and been a member of the Criminal Rules Committee, the Committee on Judicial Conduct and Disability, and the Executive Committee. Judge Dever also read for the members a letter from Judge Brooks reflecting upon his time on the Standing Committee. Judge Dever then welcomed Judge Smith's successor, Judge Amul Thapar (6th Cir.) and announced that Judge Michelle Harner (Bankr. D. Md.) would become the chair of the Bankruptcy Rules Advisory Committee upon the end of the term of Judge Rebecca Connelly on September 30, 2026.

B. Discussion and Approval of the Meeting Minutes

Following these announcements, Judge Dever called for discussion and approval of the minutes of the January 6, 2026, meeting. After an opportunity for discussion and hearing no comments, upon motion and a second, with no opposition, the Standing Committee approved the minutes with one minor typographical correction.

C. 2025 Strategic Plan for the Judiciary

Judge Dever next asked the members for feedback on a request from Chief Judge Michael A. Chagares (3rd Cir.), Judiciary Planning Coordinator, to identify any agenda items that align with the Judicial Conference Executive Committee's priority goals from the 2025 Strategic Plan for the Judiciary. Judge Dever expressed support for prioritizing the use of public resources. After giving the members an opportunity to discuss the issue, upon motion and a second, with no opposition, the Standing Committee authorized the Chair, working with the Secretary, to respond directly to Chief Judge Chagares that the Committee would generally prioritize the goal to allocate and manage public resources more efficiently and effectively through the rules process.

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 included in the agenda book beginning on page 67. Ms. Dubay highlighted that final rule amendments had been delivered to Congress in April 2026, but that this package did not include Appellate Rules 29 and 32 and the Appendix of Length Limits, which were withdrawn for further consideration. Those amendments were withdrawn at the request of the Executive Committee of

the Judicial Conference for further consideration, and upon revision by the Appellate Rules Advisory Committee, they were submitted for final approval (see report of the Appellate Rules Advisory Committee).

E. Legislative Update

Ms. Dubay also provided an update on any pending legislation that directly or effectively amends the federal rules, referencing the chart of legislative proposals in the agenda book beginning on page 73. She drew the Standing Committee's attention to the Sunshine in the Courtroom Act of 2025, which would allow broadcasting in all court proceedings, including criminal proceedings, despite Criminal Rule 53's prohibition.

F. Federal Judicial Center Update

Dr. Tim Reagan provided the Standing 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 79. In addition to the topics covered in the report, Dr. Reagan stated that the FJC had recently released on the judiciary's intranet a video documentary featuring courts that allow *pro se* electronic filing.

2. JOINT COMMITTEE BUSINESS

Judge Dever then turned to joint committee projects and business.

A. Joint Subcommittee on Attorney Admission

Professor Bradt presented on behalf of the Joint Subcommittee on Attorney Admission. Professor Bradt explained that this project began in 2023 with a suggestion from Dean Alan Morrison of George Washington Law School arising from the challenges lawyers with nationwide practices face because of differing district court bar admission policies. For example, many districts require admission to the state bar in which the district sits, and that includes districts in a small number of states (four) that require taking the state bar exam in order to be admitted.

Professor Brandt then recounted how since 2023, the subcommittee engaged in a substantial amount of work, including six subcommittee meetings, formal and informal outreach to judges, state bars, and other important stakeholders. The results of this inquiry established that district courts do not favor national rule-making on this issue for a number of reasons, including their interest in sustaining their local court practices and ensuring adequate supervision of their own district bars. There was also some concern that, were such a proposal to be passed, district courts would enhance their local rules to require more engagement of local counsel. There were also various issues related to whether the proposal was appropriate for consideration under the Rules Enabling Act. With this background, Professor Bradt stated that it was the subcommittee's unanimous recommendation to end the project and disband the subcommittee. Professor Bradt also summarized Dean Morrison's comments in response to the subcommittee's recommendation.

The Committee then heard the views of various reporters and consultants, who expressed understanding of Dean Morrison's concern about the significant disparity among district court

admission practices (including local residency requirements), but also advised caution in proceeding with national rulemaking on this issue for a variety of reasons. The consultants and reporters noted the Committee's earlier efforts to consider national rules of attorney conduct, which proved unsuccessful in light of concern for sustaining local and state authority over the practice of law. A reporter underscored caution about adopting a "one-size-fits-all" approach.

The members then discussed the subcommittee's recommendation.

A judge member expressed support for the subcommittee's recommendation after sharing his concern that national admission rules may inhibit the ability of individual judges to require higher standards of conduct and professionalism in their courtrooms (as set forth in standing orders, for example). Another member raised the issue of admission fees and asked whether that issue had been driving concerns behind the district court judges' objections. Professor Bradt noted that the FJC had completed a study on the amount of those fees and their variation and the use of such fees to fund important operations and provide support for pro bono staff attorneys and libraries. Professor Bradt emphasized, however, that while the issue of fees did come up with judges, potential loss of fees was not the primary concern, which focused on supervisory responsibilities and preserving local legal culture and traditions.

With no further discussion, upon motion and a second, with no opposition, the Standing Committee voted to conclude the attorney admission project and disband the subcommittee.

B. Electronic Filing and Service by Self-Represented Litigants

Professor Struve presented the self-represented litigant filing and service project to the Standing Committee relating to Appellate Rule 25; Bankruptcy Rules 5005, 8011, and 9036 (with a conforming amendment to Bankruptcy Rule 9006); Civil Rule 5 (with a conforming amendment to Civil Rule 6); and Criminal Rule 49 (with a conforming amendment to Criminal Rule 45).

Professor Struve explained that the proposed amendments were focused on two issues. First, the proposed amendments eliminate the requirement for self-represented litigants to complete a burdensome and redundant paper service of court filings (other than the initial pleading) if the litigant to receive such service already receives such documents through the court's electronic filing system or electronic noticing system. Second, the proposed amendments presumptively permit self-represented litigants to file court documents electronically, unless a court order or local rule bars them from doing so. If a court adopts a local rule barring self-represented litigants from using the court's electronic filing system, the proposed amendments further provide that any such local rule must either include reasonable exceptions to that prohibition or permit the use of another electronic method for filing documents and receiving electronic notice of activity in the case.

Professor Struve also informed the Committee that each of these proposed amendments was approved for publication by the relevant Advisory Committee, although the support of some members of the Bankruptcy Rules Advisory Committee extended only to publication for public comment with reserved skepticism as to whether the amendments would proceed to final approval. Professor Struve further explained that there are some variances in the proposed

amendments across the four rule sets to ensure consistency of language and application within the same rule set.

After providing this background, Professor Struve directed the Standing Committee's attention to language in the proposed common committee notes to Appellate Rule 25(a)(2)(C)(ii) (agenda book page 160), Bankruptcy Rule 5005(a)(3)(B)(ii) (agenda book page 139), Bankruptcy Rule 8011((a)(2)(C)(ii) (agenda book page 146), Civil Rule 5(d)(2)(B)(ii) (agenda book page 134), and Criminal Rule 49(b)(2)(B)(ii) (agenda book page 125). These committee note sections address whether a court may continue to require self-represented litigants to seek permission to use its electronic filing system under the new rule provisions. The Clerk of Court liaisons to the Advisory Committees had stressed that it would be useful for the committee note to expressly affirm the use of a permission-based system to help communicate clearly with self-represented litigants about the court's role in allowing such access. But some advisory committee members had raised concerns that the original proposed language might seem to approve standardless discretion concerning whether or not to grant permission. In response, the Appellate Rules Committee had approved revised note language that addressed those concerns. The Appellate Rules Committee's meeting occurred after the Bankruptcy Rules and Civil Rules Committees had met and approved the initial proposed language. The Criminal Rules Committee thereafter approved the language in the committee note as revised and approved by the Appellate Rules Committee.

To show the two versions of the language in the committee note, Professor Struve pointed to page 134 of the agenda book, the committee note for the proposed amendments to Civil Rule 5. The language in the first bracket (lines 220-223) is the language approved by the Bankruptcy Rules and Civil Rules Committees at their spring meetings. The language in the second bracket (lines 223-227) is the modified language approved by the Appellate Rules and Criminal Rules Committees. Professor Struve proposed that the Standing Committee approve the second bracketed alternative. Professor Marcus added that the Civil Rules Advisory Committee was not enthusiastic about the first bracketed language and did not have the second alternative before it at its spring meeting.

The members then discussed the proposed amendments.

A judge member asked whether there had been discussion about AI use among self-represented litigants and whether there were adequate protections to prevent disclosure of private information if documents are filed electronically and available for public access. Professor Struve responded that the surge in AI-assisted filings was not itself a topic of discussion, but that she believed that clerks would likely say that to the extent there are more filings, they would prefer not to receive them in paper form and scan them into the system. As for privacy, Professor Struve noted that the proposed rules would allow courts to establish a different system – such as an upload portal or requiring email submissions—that would allow the clerk's office to review filings from self-represented litigants before they are made available to the public. Further, Professor Struve added that any social security number in the filing would most likely be the filer's own number, in which case the filer would not be violating the privacy rules.

Another judge member expressed his support for the proposal, noting that it would save time and money and improve access to justice. As an example, he noted that one-third of all filings are

made after 5 p.m. Allowing self-represented litigants to use electronic filing and be able to file after 5 p.m. would make the system fairer. The judge member then asked whether the rule should be extended to allow self-represented nonparties to use electronic filing. Professor Struve responded that this issue had been discussed, particularly in the Criminal Rules context with respect to victims, and the choice was made to limit the presumptive access to e-filing to parties. This would not preclude a court from allowing electronic access to self-represented nonparties, but they would not receive the same presumptive right to use it as a default principle set forth in the revised rules.

Another judge member asked whether the Committee on Court Administration and Case Management (CACM) had been consulted on this project. Professor Struve explained that CACM had not been officially consulted, but CACM leadership and staff have been involved in a number of issues that overlap, including coordination on the Privacy Report to Congress. Judge Dever added that these proposed amendments are only at the publication stage, which will enable CACM to weigh in as well, and there will have to be coordination on training if the amendments are adopted, including training on privacy requirements.

The state judge member stated that his state recently moved to a rule that required self-represented litigants to file electronically unless they fell into an excepted group (such as confined persons) or filed a motion for good cause to not file electronically. He added that the state courts had not had problems with this new rule.

With no further discussion, upon motion and a second, with no opposition, the Standing Committee approved for publication and public comment the proposed amendments to Appellate Rule 25; Bankruptcy Rules 5005, 8011, and 9036 (with a conforming amendment to Bankruptcy Rule 9006); Civil Rule 5 (with a conforming amendment to Civil Rule 6); and Criminal Rule 49 (with a conforming amendment to Criminal Rule 45), as revised to include adoption of the second bracketed language approved by the Appellate and Criminal Rules Committees in the committee notes to Civil Rule 5(d)(2)(B)(ii) (page 134, lines 223-227), Bankruptcy Rule 5005(a)(3)(B)(ii) (agenda book page 139-140, lines 104-107), and Bankruptcy Rule 8011(a)(2)(C)(ii) (agenda book page 146, lines 151-154).

C. Privacy Rules Related to Taxpayer Identification Numbers and Minors

Judge Dever then turned to Ms. Dubay to present the proposed amendments to the privacy rules. Ms. Dubay noted that there were two privacy-related items on the agenda: (1) the proposed amendments to the privacy rules (Bankruptcy Rule 9037, Civil Rule 5.2, Criminal Rule 49.1), and (2) the Judicial Conference's biennial report to Congress regarding the status of the judiciary's efforts to address privacy concerns in public court filings.

Turning to the rule amendments, Ms. Dubay explained that initially the Advisory Committees had hoped to present a package of privacy amendments including updated privacy rules applicable in appeals through proposed amendments to Appellate Rule 25 and a new provision in Bankruptcy Rule 8011. The Appellate Rules Committee, however, decided at its spring meeting to further consider the proposed amendments given some concerns expressed about the redaction requirement in voluminous appendices. Ms. Dubay further explained that because of the desire for consistency with the approach to appeals, the Chair and Reporter of the Bankruptcy Rules

Advisory Committee would not put forward proposed amendments to Rule 8011 at this time to allow the members of the Bankruptcy Rules Advisory Committee to consider changes that the Appellate Rules Advisory Committee may suggest as to appeals. These changes would not affect the pending proposed privacy amendments Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1.

Like the package of proposed amendments regarding access to electronic filing and notice for self-represented litigants, Ms. Dubay noted that there is common language in the proposed committee notes that requires attention in light of a suggested modification received from the Department of Justice after the agenda book was published. The suggested revised committee note language was provided as a handout and is found immediately after page 587 of the agenda book.

Professor Hartnett, Reporter to the Standing Committee, added that the proposed amendments involved the replacement of minors' names with pseudonyms (rather than the use of initials) and complete rather than partial redaction of social security numbers (SSNs) and individual taxpayer identification numbers (ITINs). The amendments (to the Civil and Criminal Rules) would also clearly apply the redaction requirement to adoption taxpayer identification numbers (ATINs) and employer identification numbers (EINs). Professor Hartnett explained that the Advisory Committees generally considered the risk of fraud in making these recommendations, and although ATINs are low risk they were included to avoid confusion and for completeness.

Professor Beale, Reporter to the Criminal Rules Advisory Committee, then advised the Standing Committee that, to the extent that members were concerned that a minor could be identified because the parents are named publicly, the current rule does not prevent this because it only requires using a minor's initials. DOJ, which proposed the use of pseudonyms for minors in criminal cases, raised the concern that the existing rule with initials made it too easy to determine a minor's identity. The proposed amendment was narrow and responded only to this concern. Professor Beale also stated that strong concerns had been raised regarding protecting EINs, because EINs are used by individuals and not only corporate entities. Professor Beale added that DOJ's position was that EINs should not be redacted, but the Criminal Rules Advisory Committee believed that there was utility and convenience in treating all such numbers similarly, which also avoided the possibility of fraud.

Professor Hartnett then turned to the changes to the common committee note that DOJ had proposed. The proposed revision concerned the impact of expanding the redaction requirement to document exhibits and attachments, and whether this conflicted with the exemptions from the redaction requirement under subsection (b) of the current rules (exempting records of administrative proceedings, records of state court proceedings, and other court records). DOJ's proposed revision to the committee note to Civil Rule 5.2, Criminal Rule 49.1, and Bankruptcy Rule 9037 would make clear that the exemptions in subsection (b) still apply. Professor Beale added that although the Criminal Rules Advisory Committee had not had the opportunity to consider this proposed clarification, the revision was acceptable to the Criminal Rules Chair and Reporters.

The members then discussed the proposed amendments.

A judge member asked whether the Advisory Committees had considered full redaction of financial account numbers with respect to the risk of fraud. Professors Beale and King, Reporters to the Criminal Rules Committee, explained although the Committee learned there was a risk that someone could replicate an entire SSN with access to the last four digits, it had received no information that the same risk existed for financial account numbers.

On the issue of pseudonyms for minors, another lawyer member said that in some cases, due to the sensitive nature of the allegations, courts have permitted non-minor plaintiffs to use pseudonyms rather than initials because of a concern that the plaintiffs would otherwise be identifiable. She offered an example of the Uber sexual assault MDL cases and said that this practice was working well there. Professor Beale said that her understanding was that the practice of using pseudonyms was already widespread in criminal cases. Professor Garner asked whether the proposed amendments should include any guidance to courts on devising pseudonyms. He expressed concern that a judge may create a distinctive pseudonym, causing an innocent person with that name to be misidentified as the person involved.

On the issue of exemptions and the requirement to redact exhibits and attachments, Ms. Shapiro, on behalf of DOJ, said that the discussion of the exemptions versus the redaction rule was one of the most significant items of debate when the privacy rules were originally drafted some twenty years ago. DOJ's concern was that the proposed amended note language regarding exhibits and attachments could create some confusion about whether it was meant to supersede the exemptions in subsection (b). DOJ had therefore suggested a friendly amendment to the committee note to make clear that the rest of the rule remains intact. Professor Capra, Reporter to the Evidence Advisory Committee, noted that CACM was involved with the privacy rules when they were originally adopted, and expressed deep concern about the burdens of redaction. He suggested that these burdens may not be as great today with the potential for AI to assist in the redaction process.

A lawyer member asked generally whether the exemptions from the redaction requirement in subsection (b) were so broad that they undermined the proposed rule amendments. Professor Hartnett responded that this issue had been discussed, and there was concern about imposing new requirements on state administrative records that previously were not required to be redacted. The lawyer member acknowledged that it would be difficult to redact a voluminous record, but the committee note to the privacy amendments referred to parts of the record that are attached as exhibits, which may be lengthy but not as lengthy as an entire administrative record or entire state court proceeding. Professor Beale added that the language requiring redaction in documents and exhibits flowed from the FJC research on when SSNs are most often erroneously included in public filings. Dr. Reagan added that the CACM study involved a very exhaustive investigation into unredacted SSNs, and he examined civil, criminal, and appellate cases. He found that unredacted SSNs appear most often in exhibits, not in briefs.

Professor Beale also noted that under the proposed amended rule, the parties would be responsible for redactions and for choosing a pseudonym. The committee note advises that where possible gender-neutral pseudonyms should be used, but provides flexibility because in some cases, gender may be relevant. A judge member asked whether self-represented litigants needed to use pseudonyms when identifying minors and expressed concern that in habeas proceedings, for example, a petitioner convicted of molesting a minor may be able to file a

habeas petition with the minor's name in the filing. Professor Beale responded that this was beyond the scope of the current proposal to change the use of initials to pseudonyms.

Another judge member added that she had no issue with the limited amendments proposed but thought that the time may have come to review the exemptions in subsection (b). A lawyer member agreed and proposed adding a question about exemptions when the proposed amendments are published for public comment. As to the committee note language, the lawyer member thought that the exemptions should not apply to something that would be filed electronically because it would undermine exactly what the privacy rules intend to do.

Judge Dever then asked Ms. Shapiro whether DOJ would oppose publication for public comment if the proposed amendments included the committee note language approved by the Advisory Committees. Ms. Shapiro responded that DOJ wanted the proposed amendments published for public comment to achieve the initial objective of using pseudonyms rather than initials for minors. If the additional language proposed by DOJ was not accepted, however, this would not change what the rule required and the exemptions would still apply. Judge Dever next asked the Advisory Committee Chairs and Reporters if they had anything further to add. Regarding the Criminal Rules, which had taken the lead on the privacy amendments project, Judge Mosman supported publication of the proposed amendments, with or without the proposed addition from DOJ, and reviewing the exemptions at a future date. Judge Connelly added that the proposed amendments to Bankruptcy Rule 9037 included the language about exhibits and attachments and replacing minors' initials with pseudonyms but did not include full redaction of SSNs because of the special needs in bankruptcy cases to identify the debtor. Professor Bartell added that EINs are also not included in the proposed amendments to Rule 9037 because EINs are affirmatively required on a petition and further, the Bankruptcy Rules Committee saw no reason to extend protections to non-individuals, which would happen if EINs were uniformly redacted.

A judge member then raised the issue of whether this amendment would require a judge to let a person proceed under a pseudonym, such as in a Title 9 or Individuals with Disabilities Education Act (IDEA) case, which may conflict with a body of law instructing judges on whether to allow someone to proceed under a pseudonym or not. Professor Marcus said that the existing case law was not meant to be changed by these amendments. Judge Dever asked whether the lawyer member who had previously shared her experience with pseudonyms in MDLs could respond to the judge member's question. The lawyer member responded that in the Uber MDL, there were different approaches to pseudonyms and it seemed to be an evolving practice. Judge Dever added that in his experience in criminal cases, DOJ had been using pseudonyms for quite some time.

Judge Dever then focused the discussion on whether the committee members preferred the new DOJ-proposed language in the committee note to the language approved by the Advisory Committees. A judge member said that she favored including the revised DOJ language. A lawyer member agreed and reiterated the suggestion to also ask a question in the published proposal about revising subsection (b) on exemptions and supported clarifying that amending the rule to address the exemptions in (b) would not apply to exhibits and attachments filed with a pleading. Professor Hartnett added that there had been occasions where questions were posed, and Professors Marcus, Beale, and Kimble suggested including the text of subsection (b) in the published version of the rule. Ms. Shapiro, on behalf of DOJ, agreed with including subsection

(b) in the published materials, but advised against including a question because this would distract from the changes being proposed for subsection (a). Another judge member, however, supported including a question because he thought that otherwise the exceptions would swallow the rule.

Judge Dever then observed that there was consensus on publishing the text of subsection (b) on exemptions even if it was not the subject of the proposed amendments and the proposed committee note as revised by DOJ. Judge Dever also expressed his view that it was rare for the committees to ask specific questions when publishing proposed amendments for public comment, and he thought the committees would receive robust commentary even without a specific question or prompt. Judge Dever also supported adding the text of subsection (c). As an additional note, Professor Hartnett added that there were minor technical differences in cross-references in the proposed committee notes because Criminal Rule 49.1 and Civil Rule 5.2 have their protective order provision in subsection (e), while Bankruptcy Rule 9037's protective order provision is in subsection (d). Professor Hartnett also pointed out a typographical error that required changing a cross-reference to Rule "5.2" and not "52."

With no further discussion, upon motion and a second, with no opposition, the Standing Committee approved for publication and public comment the proposed amendments to Criminal Rule 49.1, Civil Rule 5.2, and Bankruptcy Rule 9037, including publication of the entire text of each rule, the technical corrections, and the text suggested by the DOJ to be added to the end of the committee notes found on page 169 (Criminal Rules), page 172 (Civil Rules), and page 174 (Bankruptcy Rules) of the agenda book.

D. Draft 2026 Privacy Report to Congress

Following approval of the proposed privacy amendments for publication and public comment, Ms. Dubay presented the 2026 Privacy Report to Congress for the Standing Committee's approval. She explained that the report is required by law every two years, and that if approved by the Standing Committee, it would be transmitted to the Judicial Conference at its September session for approval, and if so approved, the Director of the Administrative Office of the U.S. Courts would transmit the report to Congress.

Ms. Dubay then provided background on the development of the report. She explained that the report was a product of work and coordination between the Rules Committee Staff, CACM staff, and the FJC. She also advised that the CACM Privacy Subcommittee had reviewed the draft report and recommended that CACM endorse the report, which it did at its May 27, 2026, meeting. Ms. Dubay also noted that CACM approved the FJC's most recent report on privacy issues, which appears at the end of the agenda book, and thanked Kristin Garri for her work on the project. Ms. Dubay also noted that the reporters had all weighed in on the report and thanked them for their work.

With no questions or further discussion, upon motion and a second, with no opposition, the Standing Committee approved the 2026 Privacy Report to Congress, including any necessary modifications to reflect the Committee's action on the privacy amendments, and recommended its adoption.

3. ACTION ITEMS – REPORTS OF THE ADVISORY COMMITTEES

The Standing Committee next heard reports on action items from each of the five Advisory Committees.² A list of changes made by the Standing Committee to proposed amendments presented for final approval are set forth in Appendix A to these minutes.

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

Judge Eid presented action items on behalf of the Advisory Committee on Appellate Rules, which last met on April 16, 2026, in Charlotte, North Carolina. The first item was to request final approval of amendments to Rule 29, and conforming amendments to Rule 32 and the Appendix of Length Limits, relating to amicus briefs. The second item was to request final approval of amendments to Rule 15 relating to petitions for review of agency decisions. The Advisory Committee had no proposed amendments for publication and public comment to present beyond the proposed amendments to Rule 25 as part of the package of amendments relating to electronic notice and filing by self-represented litigants approved earlier in the meeting. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning on page 190.

Prior to turning to the action items, Judge Eid introduced the Advisory Committee's new reporter, Professor Stephen Sachs of Harvard Law School. Judge Eid also thanked Professor Hartnett for his tremendous service while serving as reporter to the Appellate Rules Committee.

1. *Amendments for Final Approval*

a. Rules 29, 32, and the Appendix of Length Limits (Amicus Briefs)

Judge Eid presented the Advisory Committee's request for final approval of amendments to Rule 29, along with conforming amendments to Rule 32 and the Appendix of Length Limits, found on page 231 of the agenda book. Judge Eid began with background as to why these proposed amendments were to be considered again after the Committee's final approval in June 2025 and subsequent approval by the Judicial Conference and transmission to the Supreme Court. Judge Eid explained that in early 2026, the Judicial Conference Executive Committee expressed concerns about language in proposed Rule 29(e)(2) relating to the disclosure requirements regarding new members of an amicus organization. To address these concerns, the Appellate Rules Advisory Committee and the Standing Committee voted to withdraw the proposed amendments for further consideration. The Supreme Court approved that request and the proposed amendments to Rules 29 and 32 and the Appendix of Length Limits were not forwarded to Congress.

The Advisory Committee then revisited the proposed amendments at its spring 2026 meeting, concentrating on the Executive Committee's concern about the new member provision. The proposed committee note had described this as an anti-evasion rule, treating new members of an amicus as if they were non-members. The concern about the rule was that an organizational amicus would have to disclose the identities of its contributing new members, which could dissuade either the organization or its new members from participating and filing a brief in the

² Information items presented by the Advisory Committees are set forth in Part 4 of these minutes.

first place. At its spring meeting, the Advisory Committee also considered the extent of the negative reaction to the proposal not only from the Executive Committee, but from the public during the public comment period. The Advisory Committee voted 5-1, with one abstention, to remove the new member provision from the proposal.

Additionally, Judge Eid explained that two additional modifications were proposed. First, after the amendment package was submitted to the Supreme Court, an ambiguity was identified in the language of proposed Rule 29(c) requiring a party or its counsel to make certain disclosures if the amicus failed to do so (the backup disclosure requirements). After discussion, the Advisory Committee voted without opposition to rephrase the requirement, removing proposed Rule 29(c) and inserting clarifying language into proposed Rule 29(b). Second, the Advisory Committee approved the removal of an erroneous cross-reference to Rule 29(a)(5). Judge Eid also reported that the Advisory Committee considered whether to submit these revisions for an additional round of public comment. Because the issue of the new member provision had been exhaustively discussed by the Advisory Committee, the Standing Committee, and public commenters, and the other revisions were technical in nature, the Advisory Committee voted without opposition to seek final approval without republication.

Before turning to member discussion, Professor Beale raised a question about the removal of language on page 193 of the agenda book indicating that the new member provision was stricken along with the provision requiring a new organization to disclose the date of its formation. Professor Sachs responded that it was stricken because it was duplicative (with the other provision found on page 234, lines 61 to 63 of the agenda book).

The members then discussed the proposed amendments.

A judge member raised a question about the text on page 234, line 58 of the agenda book requiring the amicus to provide an explanation of both how the brief will help the court and how the perspective of the amicus will help the court. He asked why an amicus should have both obligations. Professor Sachs responded that this requirement puts the onus on the amicus to tell the court how its brief provides information in addition to what the parties have said. The judge member and an attorney member then briefly discussed how the timing provisions of the rule, which were not being amended, operated in practice.

Following this discussion, upon a motion and a second, with no opposition, the Standing Committee gave final approval to the amendments to Rules 29 and 32 and the Appendix of Length Limits and recommended their adoption.

b. Rule 15

Judge Eid next presented the Advisory Committee's request for final approval of amendments to Rule 15, which concerns petitions for review or enforcement of agency orders. The text of the proposed amendment begins on page 227 of the agenda book, and the written report begins on page 195.

Judge Eid explained that the proposed amendments to Rule 15 were designed to address the "incurably premature" doctrine, under which certain petitions to rehear or reconsider an agency decision render the decision nonreviewable in a court of appeals; in such cases a pending petition

for review of the agency decision must be dismissed, and a new petition for review must be filed after the agency disposes of the rehearing petition. Judge Eid stated that the amendment was intended to mirror previous amendments to Rule 4, which deals with appeals from district court judgments. Rule 4 used to work in a similar way as Rule 15, with various post-judgment motions resulting in the dismissal of a premature notice of appeal, but Rule 4 was amended to provide that a premature notice of appeal becomes effective when the post-judgment motion is decided. The proposed amendments to Rule 15 would do the same for a premature petition for review.

Judge Eid reported that the Advisory Committee received three public comments on the proposed amendments, all of which were broadly supportive and conveyed no specific concerns. Judge Eid also noted that the Advisory Committee made two post-publication changes. First, it renumbered the proposed new subdivision from (d) to (f) to avoid confusion with the existing rule structure. Second, to avoid attempts to obtain premature review of orders that are non-final for reasons other than a pending rehearing petition, the Advisory Committee added language reaffirming that the order in question must be otherwise reviewable. The Advisory Committee voted unanimously to seek final approval of the proposed amendments to Rule 15. Professor Hartnett added that there were a few minor technical corrections made to the text of the rule after the Advisory Committee met that were included in the updated agenda book materials.

Following this discussion, upon a motion and a second, with no opposition, the Standing Committee gave final approval to the amendments to Rule 15 and recommended its adoption.

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

Judge Connelly presented action items on behalf of the Advisory Committee on Bankruptcy Rules, which last met on April 15, 2026, in Charlotte, North Carolina. These action items included requests for final approval of amendments to Rule 2002, Form 101, and Form 106C and a request for approval for publication and public comment on proposed amendments to Rule 2003. This latter request was in addition to the requests for publication and public comment on the proposed amendment packages relating to privacy and electronic notice and filing for self-represented litigants. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning on page 190.

Prior to turning to the action items, Judge Connelly thanked Judge Dever for his kind comments earlier in the meeting and for the opportunity to serve as chair of the Bankruptcy Rules Committee, which she described as a fabulous and enriching experience.

1. Amendments for Final Approval – Rule 2002, Form 101 and Form 106C

Judge Connelly reported on the Advisory Committee's request for final approval of amendments to Rule 2002 and to Official Forms 101 and 106C. The text of the proposed amendments begins on page 286 of the agenda book, and the written report begins on page 252.

With respect to Rule 2002, which relates to notices, Judge Connelly explained that the current version of Rule 2002(o) requires that captions of every notice given under Rule 2002 comply with Rule 1005. Rule 1005 requires, among other things, the debtor's name and the last four digits of the social-security number or individual debtor's taxpayer-identification number. The

Advisory Committee received a suggestion from clerks of court to amend the rule to reduce the burden on the clerks by requiring captions of Rule 2002 notices to include only the name of the court, the names of the debtor, the case number, the chapter under which the case was filed, and a description of the document's character. Judge Connelly reported that after the proposed amendment was published no comments or opposition were received regarding this change.

Judge Connelly then turned to the Advisory Committee's request for final approval of amendments to Official Form 101, the initial petition for an individual's bankruptcy case. In the petition, a debtor must set forth identifying information, including who the debtor is, the last 4 digits of the debtor's SSN, the debtor's address, and if they have one, an EIN. Judge Connelly noted that the way the form asked for the EIN sometimes induced self-represented debtors to list the EIN of their employer rather than their own, triggering concerns when multiple bankruptcy petitions listed the same EIN. The amendment, suggested by a clerk of court, clarifies in the instructions that the petitioner is to disclose the petitioner's EIN, not the EIN belonging to someone else, including the petitioner's employer. Judge Connelly reported that no comments or opposition were received regarding this change after publication.

Finally, Judge Connelly presented the Advisory Committee's request for final approval of amendments to Official Form 106C, which relates to property that can be claimed as exempt. The form is part of the package that every debtor must file to initiate a bankruptcy case and is where an individual debtor claims property exemptions. In the current version of Form 106C does not contain the total value of the property claimed as exempt. This omission requires trustees to manually add up the claimed exemptions to prepare their final report. A suggestion was made to amend Form 106C to require a statement of the total value of the claim exemptions. The Advisory Committee proposed amending the form to require a total for all entries (in Column C) that are stated in a specific amount. It also considered a second change to Form 106C to provide a total dollar value for Column B (which identifies the dollar value of the debtor's portion of the property for which exemptions are claimed). Judge Connelly reported that when the proposed amendments were published, the National Association of Consumer Bankruptcy Attorneys objected to the wording of the requirement to total column B, and based on that opposition, the Advisory Committee decided that only the total for column C would be included in the amendment.

The members then discussed the proposed amendments.

A judge member raised a question about the committee note for Rule 2002(o) relating to captions for notices and asked why the committee note referred to "most" notices, and why in one part it states "may" use the caption in Official Form 416B and why the note goes on to state that debtor notices "must" include the information in Section 342(c) of the Bankruptcy Code. Professor Bartell and Judge Connelly explained that the committee note was referring to notices other than the initial notice of bankruptcy, so "most" means all other notices. As to the "may" versus "must" language, not all notices under Rule 2002 are sent by the debtor, such as the notice of a meeting of creditors, so the language includes the additional statutory requirement for debtors. Another member asked a style question about Rule 2002(o) where it refers "this Rule 2002" and not simply "this rule." Professor Garner explained that this reference follows the style guide to make clear that when a rule refers to itself in a subpart of the rule, it is referring to the rule in its entirety, not simply the subpart.

A judge member asked a question about Official Form 106C and whether every entry in Column C had to have a specific amount to include in the total. Judge Connelly and Professor Bartell explained that the total only includes those entries in Column C that have a specific amount. Debtors have the option in Column C to provide either a specific amount or claim 100% of the fair market value of an exemption, up to any applicable statutory limit, such as the debtor's proceeds from a personal injury case. The total amount in the revised Form 106C would total only those items where the specific dollar amount is listed and not those where the box is checked for the fair market value.

The following day, during discussion of information items, another judge member asked about another pending suggestion to amend Official Form 106C. Professor Bartell explained that, due to the order in which certain questions were asked on the current form, debtors in Florida — where there is an unlimited homestead exception—do not answer a question that could reveal that they are subject to a federal limit on their exemption. The Advisory Committee is considering modifying the form so this question is asked in a way that debtors in Florida have to answer.

Following this discussion, upon a motion and a second, with no opposition, the Standing Committee gave final approval to the amendments to Rule 202, Official Form 101, and Official Form 106C and recommended their adoption.

2. Preliminary Drafts for Publication and Public Comment – Rule 2003

Judge Connelly next presented the Advisory Committee's request for approval for publication and public comment on proposed amendments to Rule 2003, which concerns holding a meeting of creditors. The text of the proposed amendments begins on page 301 of the agenda book, and the written report begins on page 254.³

Judge Connelly explained the meeting of creditors is required in Section 341 of the Bankruptcy Code and involves an examination of the debtor conducted by a trustee. Under the current rule, the meeting of creditors must be held no fewer than 21 and no more than 40 days after the order for relief in a chapter 7 or chapter 11 case, no fewer than 21 and no more than 35 days after the order for relief in a chapter 12 case, and no fewer than 21 and no more than 50 days after the order for relief in a chapter 13 case. The rule also requires that the meeting “be held at a regular place for holding court or at any other place designated by the United States trustee within the district convenient for the parties in interest.” A suggestion was made by trustees to amend the rule to allow the meeting of creditors to be held no more than 60 days after the order for relief in chapter 12 and chapter 13 cases, and to revise the language to recognize that these meetings may be held remotely. The U.S. Trustee raised concerns about this suggestion but reached an agreement with the trustees who made the suggestion and the Advisory Committee now recommends publication of these proposed amendments. Professor Gibson noted that after

³ As noted earlier in these minutes, this request was made in addition to the prior requests for approval for publication for public comment on the proposed amendments relating to privacy (Rule 9037) and electronic notice and filing by self-represented litigants (Rules 5005, 8011, and 9036, with a conforming amendment to Rule 9006).

approval by the Advisory Committee the last paragraph of the committee note was corrected to include a phrase that was previously left out.

The members then discussed the proposed amendments.

A judge member asked why there was a comma after the word “court” on page 302, line 31. Professor Kimble said that the comma made clear that “designated by the United States trustee” modified only “any place in the district,” not “a regular place for holding court[.]” The judge member and the Style Consultants then discussed other options for making the language clear, including by adding “either” before “at” on line 30. Judge Connelly preferred to solicit public comment on the version approved by the Advisory Committee, which had been approved by the Executive Office of U.S. Trustee. Ms. Shapiro, on behalf of DOJ, underscored that the proposed language was sensitive to the trustees and there was careful negotiation on this language. Dean McKenzie, as liaison from the Standing Committee to the Bankruptcy Rules Committee, concurred with the suggestion not to alter the language prior to publication for public comment.

Following this discussion, upon a motion and a second, with no opposition, the Standing Committee approved the proposed amendments to Rule 2003 for publication and public comment.

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

Judge Vance presented action items on behalf of the Advisory Committee on Civil Rules, which last met on April 14, 2026, in Charlotte, North Carolina. The Advisory Committee’s report and the draft minutes of its last meeting are included in the agenda book beginning at page 305. The action items sought final approval of proposed amendments to Rule 7.1, Rule 41(a), Rule 45(b) and (c), Rule 26, and Rule 81. The Advisory Committee had no proposed amendments for publication and public comment to present beyond the proposed amendments to Rule 5.2 as part of the privacy amendments, and Rules 5 and 6 as part of the package of amendments relating to electronic notice and filing by self-represented litigants approved earlier in the meeting.

1. Amendments for Final Approval

a. Rule 7.1

Judge Vance presented the Advisory Committee’s request for final approval of amendments to Rule 7.1. The text of the proposed amendments appears on page 388 of the agenda book, and the written report begins on page 307.

Judge Vance explained that the proposed amendments were designed to facilitate judges’ compliance with recent guidance from the Code of Conduct Committee that a judge’s financial interest in an owner of ten percent or more of a party creates a rebuttable presumption of recusal. The proposed amendments (1) replace references to “corporations” with the broader term “business organization”; and (2) add a requirement that a party disclose business organizations that directly or indirectly own ten percent or more of the party (e.g., corporate parents or grandparents).

Judge Vance next informed the Committee that during the publication period, the Advisory Committee received eight written comments and four witnesses testified about the rule. Most of the commentary expressed support for the rule changes, noting that the rule would assist judges in making informed recusal decisions. Following this feedback, the Advisory Committee voted unanimously to recommend final adoption of the Rule 7.1 amendments as published.

After an opportunity for discussion and hearing no comments, upon a motion and a second, with no opposition, the Standing Committee gave final approval to the amendments to Rule 7.1 and recommended its adoption.

b. Rule 41(a)

Judge Vance next presented the Advisory Committee's request for final approval of amendments to Rule 41(a). The text of the proposed amendments appears on page 394 of the agenda book, and the written report begins on page 308.

Judge Vance explained that the current rule refers to plaintiff's dismissal of an action, which led to conflicting interpretations of whether the rule permitted dismissal only of entire cases or narrower dismissal of claims or parties. The proposed amendments to Rule 41(a) would clarify that narrower dismissals are permitted to conform to the widespread practice developed in multi-claim and multi-party litigation to narrow the issues and facilitate settlement. The proposed amendments also clarify that only the parties who have appeared and remain in the case must sign a stipulation of dismissal.

Judge Vance further reported that during the publication period, three witnesses testified and 28 written comments were received. All of the feedback was favorable and lauded the amendments as eliminating procedural barriers to streamlining cases, facilitating settlements, and eliminating confusion among the circuits. The Advisory Committee voted unanimously to recommend final approval of the proposed amendments to Rule 41(a) as published.

After an opportunity for discussion and hearing no comments, upon motion and a second, with no opposition, the Standing Committee gave final approval to the amendments to Rule 41(a) and recommended its adoption.

c. Rule 45(c)

Judge Vance then presented the Advisory Committee's request for final approval of amendments to Rule 45(c). The text of the proposed amendments appears on page 403 of the agenda book, and the written report begins on page 309.

Judge Vance reported that the main purpose of the amendments is to address the Ninth Circuit's decision in *In re Kirkland*, which interpreted Rule 45(c) to mean that a subpoena could not compel remote trial testimony from a witness outside the geographic limits in Rule 45(c)(1), even if a court found that the Rule 43(a) requirements for remote testimony had been satisfied. The proposed amendments would clarify that a court's subpoena power for remote trial testimony extends nationwide, so long as the witness is not required to appear and give the remote testimony from a location farther than the distance authorized in Rule 45(c)(1).

Judge Vance also reported that during the publication period, the Advisory Committee received 31 public comments and testimony from 10 witnesses, most of which favored the amendment. A few comments opposed the amendments on the merits and argued that they should be deferred until the Advisory Committee completed its consideration of proposed amendments to Rule 43(a) governing remote testimony in general. A few other comments offered stylistic changes.

Judge Vance then advised the Committee that after hearing the testimony and reviewing the public comments, the Advisory Committee concluded that there was no reason to defer amending Rule 45(c) in light of continued reliance on the *Kirkland* decision. The Advisory Committee decided, however, to modify the fourth paragraph of the committee note. These modifications included clarification to wording that suggested that Rule 43(a) standard for remote trial testimony could apply to non-trial remote testimony in hearings. Judge Vance also noted a technical change made later to delete the cross-reference to Rule 26(a)(3)(A)(i) as potentially confusing and unnecessary.

The members then discussed the proposed amendments briefly, with a judge member commenting that this was a very good rule amendment and that he was supportive of the changes.

With no further discussion, upon a motion and a second, with no opposition, the Standing Committee gave final approval to the amendments to Rule 45(c) and recommended their adoption.

d. Rule 26

Judge Vance next presented the Advisory Committee's request for final approval of amendments to Rule 26(a)(3). The text of the proposed amendments appears on page 391 of the agenda book, and the written report begins on page 310.

Judge Vance explained that the proposed amendments to Rule 26(a)(3) would be a small change to clarify pre-trial disclosure of trial witnesses who are expected to testify remotely, which is necessary because of the need to address the issue of court permission for remote trial testimony under Rule 43(a). Judge Vance noted that the proposed amendments attracted very little public commentary, some of which were based on the misapprehension that the rule applied to initial disclosures, not the disclosures made at least thirty days before trial. The Advisory Committee voted unanimously to recommend final approval of the proposed amendment as published.

The members then discussed the proposed amendments.

A lawyer member asked whether the proposed amendment was intended to disclose earlier in the process whether a party was proffering a remote witness. Professor Marcus responded affirmatively. A judge member then asked about the word "will" on page 392, line 20 of the agenda book, when whether the person can be called as a remote witness depends on the court's permission. Professor Marcus acknowledged that a judge may deny a request for remote testimony, but the Rule 26 disclosure is accurate at the time it is made. Judge Dever added that the committee note on page 393, lines 37-39, talked about alerting the parties and the court that a party "proposes to present" witnesses remotely. The judge member suggested replacing the word

“will” with “is proposed to” to incorporate some concept of expectation as to what the party will present.

Another judge member asked whether there was any discussion about what lawyers would do to comply with this new disclosure because he could imagine lawyers disclosing that they expect to call a witness in person, but may later need to ask for the witness to appear remotely. A lawyer member added the concern that parties may start listing every witness as potentially remote to preserve the right to call that witness remotely later. Another lawyer member suggested that the adversary nature of the proceedings would result in parties specifying who they truly intend to present remotely, and counterintuitive trial strategy for a party to list all witnesses as remote if there was no need to present their testimony remotely. Judge Dever further added that in his experience, case management orders usually provide a period for people to object to pretrial disclosures.

As to the suggestion from the judge member to modify the text language to conform to the committee note, Professor Beale suggested that the language on page 392, line 20 be modified to read “it expects the testimony to be in person or remote.” Professor Kimble endorsed this language as a matter of style.

With no further discussion, upon a motion and a second, with no opposition, the Standing Committee gave final approval to the amendments to Rule 26(a)(3)—as revised to read “it expects the testimony to be in person or remote” and set forth in the Appendix to these minutes—and recommended their adoption.

e. Rule 45(b)

Judge Vance presented the Advisory Committee’s request for the Standing Committee to recommend final approval by the Judicial Conference of amendments to Rule 45(b)(1). The text of the proposed amendments appears on page 398 of the agenda book, and the written report begins on page 310.

Judge Vance explained that the proposed amendments were designed to clarify the authorized methods of delivery of a subpoena to the named person. First, the amendments would authorize service of a subpoena by the service methods permitted in Rule 4(e)(2)(A) and (B) for service of a summons and complaint. Second, the proposed amendments would authorize service by U.S. mail or commercial carrier, if the chosen method provided confirmation of actual receipt. Third, it would authorize the court, for good cause, to permit another method of service that was reasonably calculated to give notice. Judge Vance further explained that the proposed amendments would (1) add a 14-day notice requirement for subpoenas requiring appearances for trials, hearings, or depositions; and (2) allow the witness fee to be tendered at the time and place of appearance instead of at the time of service.

Judge Vance then reported that the Advisory Committee heard testimony from 11 witnesses and received close to 200 comments, most of which were from professional process servers who opposed the rule change as either detrimental to their business or having other fundamental defects. After review of these concerns, the Advisory Committee concluded that these objections were not persuasive and did not warrant a change to the published rule. The Advisory Committee

did vote, however, to modify the third paragraph of the committee note to address certain concerns raised by committee members regarding service by U.S. mail or commercial carriers. The Advisory Committee voted to modify the committee note to specify that for service by U.S. mail or commercial carriers, the person identified in either Rule 45(b)(1)(A)(i) or (ii) must receive the service. The modification to the committee note also removed a potentially confusing reference to Rule 45(b)(4). The Advisory Committee's changes to the committee note are identified on page 311 of the agenda book. With this change to the committee note after publication, the Advisory Committee voted unanimously to recommend final approval of the amendments to Rule 45(b)(1).

Professor Marcus added that several public comments raised concerns about the language that the subpoena must be delivered at an individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there, even though this language was taken directly from Rule 4. Additionally, many process servers commented that a process server is necessary. But the rule does not currently say this. It requires someone who is at least 18 years old and not a party to the action. Perhaps many people would prefer to have a professional handling service, but the rule does not require it.

The members then discussed the proposed amendments.

A judge member asked why the committee note was modified to address confirmation of actual receipt by the subpoena recipient but the text of the rule did not say this. A lawyer member added that the last paragraph of the committee note also suggested that tender of the fee at time of service was only required where practicable, but the rule text does not say this. As to the latter question, Professor Marcus responded that it is possible to change the rule language, but the rule does not make service ineffective if the fee is not tendered at the same time. As to the former question, Professor Marcus thought that the rule was clear that if a party had to confirm actual receipt, the receipt would need to be by someone who would have been a proper recipient. A judge member then asked why the rule no longer requires tender of payment at the time of service. Professor Marcus responded that the Advisory Committee had learned that delivering the check was sometimes an obstacle to fulfilling the service and that lawyers who want witnesses to appear would not want the cost of travel to stand in the way. Additionally, the Advisory Committee heard that attorneys may not want to serve those subpoenas with the fee if a case may settle and may prefer to instead to pay the fees when the witness appears. The judge member then asked whether there were ever instances of witnesses not being paid when they appeared to testify. Professor Marcus said that the rule requires payment at the time the witness appears, not after the testimony occurs, which prevents a party from saying that they would not pay a witness unless they like what the witness has to say.

Judge Dever suggested that revisions to the proposed rule text may be appropriate in accordance with the committee members' suggestions. After a break, Judge Vance and Professor Marcus proposed new language for the rule text on page 399, line 23 of the agenda book to add, after "of actual receipt," the following: "by a person identified in (i) or (ii)[.]" This change would align with the language in the committee note on page 401, line 67.

With no further discussion, upon a motion and a second, with no opposition, the Standing Committee gave final approval to the amendments to Rule 45(b)(1)—as revised to include "by a

person identified in (i) or (ii)” and set forth in the Appendix to these minutes—and recommended their adoption.

f. Rule 81

Judge Vance presented the Advisory Committee’s request for final approval of amendments to Rule 81, which concerns jury demands after removal. The text of the proposed amendments appears on page 408 of the agenda book, and the written report begins on page 312.

Judge Vance explained that the proposed amendments were designed to eliminate uncertainty about whether and when a jury demand is required after a state case is removed to federal court. The proposed amendments: (1) preserve the right to a jury trial if a jury demand is made before removal; and (2) allow a jury demand under Rule 38(d) after removal if no demand was made in the state court if made within 14 days from when a party files a notice of removal or is served with a notice of removal by another party. Judge Vance added that there were four comments on the rule after publication, all favorable. The Advisory Committee voted unanimously to recommend final approval of the amendment to Rule 81(c)(3) as published.

Following this presentation, Professor Beale raised a question regarding language on page 409, lines 18 to 20, about whether the word “one” refers to a jury trial. Judge Vance confirmed that this was correct, and Professor Kimble said that he thought that the language was clear as a matter of style.

With no further discussion, upon a motion and a second, with no opposition, the Standing Committee gave final approval to the amendments to Rule 81 and recommended their adoption.

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

Judge Mosman presented action items on behalf of the Advisory Committee on Criminal Rules, which last met on April 29, 2026, 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 413. The action items sought final approval of amendments to Rule 17 and proposed amendments to Rules 11 and 32 for publication and public comment. The proposed amendments for publication and public comment were in addition to the proposed privacy amendments and amendments relating to electronic notice and filing by self-represented litigants approved earlier in the meeting.

1. *Amendments for Final Approval – Rule 17*

Judge Mosman presented the Advisory Committee’s request for final approval of amendments to Rule 17 relating to subpoenas for production in criminal cases. The text of the proposed amendments appears on page 490 of the agenda book, and the written report begins on page 414.

Judge Mosman explained the major changes proposed in the rule amendments, which are outlined on page 417 of the agenda book. First, the amendments expand the scope of proceedings for which a subpoena is available from trials to also include detention hearings, sentencing hearings, and the like. Second, the amendments relax the evidentiary standard for subpoenas to a “likely to be admissible” standard. Third, the amendments clarify when a motion and order is required to obtain a subpoena. Fourth, the amendments allow *ex parte* requests for subpoenas

upon a showing of good cause. Finally, the amendments allow direct production of responsive items to counsel in some instances. Judge Mosman further informed the Committee that the Advisory Committee received significant public comments, both written and oral, during the public comment period noting that the oral testimony was entirely from victims' representatives.

Judge Mosman next described the Advisory Committee's changes to the proposed amendments after publication, described in detail in the Committee Report starting at page 410 of the agenda book, noting that any changes were adopted unanimously after serious and substantial discussions. These post-publication changes included changes to Rule 17(a) (a technical correction making explicit that a subpoena can require testimony, production, or both testimony and production); Rule 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); and Rule 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).

Judge Mosman added that the Advisory Committee also concluded that none of the proposed post-publication changes to Rule 17 required republication. Professor Coquillette later added that deciding whether republication is required depends on whether there are people who are interested in the rule change who are taken by surprise by a new rule, and he did not feel that in this context people would be taken by surprise by the proposed changes after publication.

On the Advisory Committee's post-publication changes to Rule 17(c)(3)(A) (and a corresponding change in the committee note), Judge Mosman explained that the Advisory Committee decided to add "including a victim" in this portion of the rule to make clear that victims are third parties for purposes of the protection of this particular rule. This change reflected concerns from a commenter, Professor Paul Cassell, that the rule, which requires a motion and order for subpoenas seeking personal and confidential information about victim from a third party, as well as notice to the victim whose information is sought, did not apply to subpoenas seeking such information from victims themselves, because they were not "third parties."

Judge Mosman next explained changes to Rule 17(c)(5) regarding the place of production with a corresponding change to the committee note. The commenters expressed strong concerns with privacy and safety based on information gained from records, such as medical or psychiatric records, that would reveal when and where recurring appointments were held. This information could make its way from counsel to the client putting the person in danger of unauthorized contact. As amended after publication, Rule 17(c)(5) added "unless the court orders otherwise" to clarify that the court would retain discretion to order otherwise. Judge Mosman also explained that absent the court ordering otherwise, the defaults set forth in the rule would apply (such as return to the court if the subpoena is issued by a self-represented party or requires the production of personal or confidential information about a victim). Professor Beale directed the Committee to page 422 of the agenda book, which contained a description of how the process had been working in many districts to allow victims the opportunity to ask the court to impose limitations or to negotiate with the party seeking that material. Professor Beale also explained that while this may be a substantial change to the published rule on place of production because it altered the default, republication was not required because this change put back in place the current

practice and there was no controversy in the Advisory Committee, from the defense lawyers, judges, or prosecutors, as to whether this should be done.

The members then discussed in detail the proposed amendments over the course of the first and second days of the meeting. Those discussions included the following comments and feedback.

First, a judge member asked about two potential language changes in proposed Rule 17(c)(2)(B) on page 493: (1) on line 53, change the word “seek” to match language elsewhere in the rule saying “requires production of” something; and (2) on lines 56-57, remove the words “to the party” to read simply “are not reasonably available from another source.” The judge member also asked about a change in proposed Rule 17(c)(2)(C) on page 493, line 66, to update the reference from “(3) or (4)” to include the subsection (c). Professors Beale and King supported the changes to the word “seek” and adding subsection (c) to the references to (3) and (4). As to the suggestion to remove “to the party,” Professors Beale and King explained that the language “to the party” is necessary because some information that the subpoena seeks may not be available to the defense but may be available to the government. For example, under the Stored Communications Act, the government could get information that an individual could not and therefore that information would not be reasonably available to the person who needed it. In light of this explanation, the judge member agreed that the language in proposed Rule 17(c)(2)(C) need not be changed.

Second, the judge member raised concerns about the committee note to Rule 17(c)(6), which he felt should address a timing issue with respect to the required disclosure of an item received in response to the subpoena and Rule 16, which is referenced in the committee note (page 511, line 527-531). The judge member had concerns about Rule 16, which only requires production of discoverable items “before trial,” and the timing of the disclosure under the proposed amendments to Rule 17(c)(6) at earlier proceedings (such as detention hearings and suppression hearings). This timing could lead to a surprise for the opposing party when the document received under the subpoena is introduced, and he anticipated disputes about timing issues like this that are not addressed in the committee note.

Professor King explained in response to these concerns that the point of the proposed amendments to Rule 17(c)(6) was to address case law from some districts that required a party seeking a subpoena to disclose everything received in response to that subpoena to the other side—even if the request for the subpoena was an *ex parte* application. The proposed amendments in Rule 17(c)(6) seek to maintain the protections and scope of discovery under Rule 16 when the items are received through a Rule 17 subpoena. With the focus on this goal, the timing of disclosures was not addressed in the proposed amendments in Rule 17(c)(6). That issue, as Professor King explained, would be determined by case law or another rule. Professor Beale added that Rule 17 reflects the notion that whatever a party gathers by subpoena or by its own investigative efforts is not discoverable until the trial itself. Judge Dever further added that Rule 16, and not amended Rule 17, would have to answer when the items are discoverable. Judge Mosman also responded that there may be a weakness in Rule 16, which only requires disclosure before trial, with the adoption of the proposed amendments to Rule 17 on pretrial subpoenas for production, but courts could continue to handle issues of timing through existing practices relating to discovery when suppression and detention hearings take place. Judge Dever added that in his experience, if information was received at a hearing that a party had not seen, it

would not be uncommon for a lawyer to ask for a brief adjournment of the hearing to review the evidence presented.

The members then discussed potential revisions to the text of Rule 17(c)(6) to address the concerns raised. On page 497, lines 133-137, the judge member suggested the following: (1) insert the word “only” after “party” on line 134; (2) remove the word “only” from line 136, and (3) add “and when” to lines 136-137. The suggested text would read, “[a] party only must disclose to an opposing party an item that the party receives from a subpoena recipient if and when the item is discoverable.” Professor Hartnett supported adding the language “if and when” to clarify the intent to refer readers to Rule 16 on the timing of discovery. Both Judge Mosman and another judge member said that they did not see any downside to including the “if and when” language, although this language would not address the timing issue. Professor Garner added that as a matter of style, if the addition of “if and when” is adopted, the “only” should not be moved within the provision and should say “only if and when.” He also offered two alternative language choices - that a party must disclose “as soon as the item becomes discoverable” or that a party “need not disclose to an opposing party an item receives from a subpoena’s recipient unless and until the item becomes discoverable.”

The judge member also raised concerns about use of the language “must” disclose in the beginning of the text to Rule 17(c)(6) (page 497, line 134), which he felt could raise an issue of reciprocal discovery that could be very concerning to both the government and the defense. Judge Mosman agreed that the word “must” could be removed.

The members also discussed whether reference to case law would be appropriate in the committee note to address the interplay between Rule 17 and Rule 16. A judge member asked whether reference to case law from judges who have already allowed pretrial subpoenas even without the amendments to Rule 17 would be helpful on the disclosure issue. Professor King said that there were districts where third-party subpoenas were allowed for non-trial hearings and judges had managed those situations as needed such as by allowing a recess if necessary to accommodate the other party or issuing a standing order addressing subpoenas for non-trial hearings. Professor Coquillette added that it was dangerous to reference case law to make a point in the committee note because the committee note could not be changed unless the rule was changed. If a case were overruled or changed in a significant way, the rule would still contain a clearly misleading committee note. Professor Capra added to this discussion by noting that the only case cited in the committee note was *Nixon*, which could not be avoided given the nature of the amendments. A lawyer member said that he thought the suggestion was not to add specific cases to the committee note, but to instead point out that there was case law governing the timing of discovery, which would not run afoul of the rule against citing cases.

Following this discussion, Judge Dever asked Professor Garner for his views on proposed revisions to the rule text to address the concerns discussed. Professor Garner responded that he understood the consensus to be that on page 497, line 134, the text in Rule 17(c)(6) would read, “party need not disclose to an opposing party an item the party received from a subpoena’s recipient unless and until the item becomes discoverable.” Alternatively, the rule could move “unless and until” to the beginning of the sentence, such that it would say that “unless and until it becomes discoverable, a party need not disclose . . .” A judge member however, felt that the

issue was the word “discoverable” in 17(c)(6), which does not answer the timing question. He did not think that adding “if and when” would solve the timing problem.

The members then discussed the committee note’s language with respect to Rule 17(c)(6) and discovery. Professor Beale and Professor King then offered suggestions for revisions to the committee note based on the feedback. This included revising the committee note (page 511, line 530) to refer to “other discovery rules and applicable case law”; to add “and the timing of such disclosure” after “subpoena” on page 511, line 529; and to restate the sentence as “Rule 16, other discovery rules, and applicable case law” on line 530. A judge member also noted that the existing committee text (page 511, line 530) stating that “Rule 17 does not modify that carefully developed law” was not accurate because one of the purposes of the change to Rule 17 was to modify case law holding that parties must deliver subpoena responses to each other regardless of discovery obligations. Professor Beale agreed the language could be changed regarding Rule 16 to be clearer. Professor Garner also noted generally referencing “case law” was unclear as to whether that referred to case law as it existed as of the adoption of the rule or referred to an ongoing evolution of case law that would come after adoption of the rule. A consensus was then reached to delete reference to the words “case law” in the committee note.

Professor Sachs suggested that instead of case law, the committee note could reference “other applicable sources of law” to make the point that there are other authorities which govern this issue. Professor Beale responded that a general reference would not work because the rule change was intended to limit the ability of courts to require things that were not governed by existing discovery requirements, especially on the part of defendants. A judge member then asked if Rule 17(c)(6) was needed if the only purpose was to stop judges from ordering defendants to disclose things that they otherwise would not need to under Rule 16. The judge member suggested that if it needed to be included, it could say that the rule does not create disclosure obligations separate from those that already exist. With this feedback, Judge Dever suggested returning to this issue the next day to give the reporters time to develop revised language for Rule 17(c)(6).

Judge Mosman then directed the Committee’s attention to the committee note to Rule 17(c)(3) (lines 422-436 on page 508 of the agenda book) regarding *ex parte* applications for subpoenas for personal and confidential information (a good cause standard to proceed *ex parte*) and the notice to victims requirement (required absent “exceptional circumstances”). The Advisory Committee revised language in this section of the committee note after it heard testimony from victims’ rights advocates that the “exceptional circumstances” exception to the notice requirement, if satisfied by the disclosure of sensitive defense strategy, will be interpreted too broadly to almost always apply. In an effort to strengthen protections to victims, the Advisory Committee revised the committee note accompanying the new provision allowing an *ex parte* subpoena for good cause to emphasize the important distinction between the good cause requirement for an *ex parte* motion—which does require laying out defense strategy to some degree—and the mere notice requirement—which requires only notice there is a subpoena but not an explanation of what was requested in the subpoena. Professor Beale and Professor King noted that the *ex parte* provision was not intended to create “exceptional circumstances” or erode the notice requirement, and that the new committee note explains how the new provision on good cause for *ex parte* applications relates to the existing notice requirement for victims. Finally, Judge Mosman noted that on line 426 of the committee note to Rule 17(c)(3), the words “a

showing” appear in brackets as a stylistic suggestion he made for the Standing Committee to consider.

As a final post-publication change, Judge Mosman next turned to the committee note’s discussion of Rule 17(c)(2)(B)(iii) (requiring that each item requested in the subpoena either be, or contain information that is, “likely to be admissible as evidence in the designated proceeding”), and revisions made to lines 326-328 on page 505. The Advisory Committee made changes to language in the committee note regarding the modified *Nixon* standard because the previous sentence had been wordy and unclear.

Judge Mosman then explained that the Advisory Committee recommended no change to the published rule on the expanded scope of proceedings in which subpoenas are available, despite hearing opposition from victims’ advocates who argued it would greatly expand the use of subpoenas for victim information. Judge Mosman noted that a substantial number of districts already did not limit Rule 17 subpoenas to trial, many cases are resolved without any pretrial hearings, and few sentencing hearings involve third-party information that involves a subpoena. Two lawyer members asked whether the testimony from victims’ advocates included specific examples of how expanded access to subpoenas in districts that allowed it had created a problem. Judge Mosman and Professor Beale responded that this question was asked at the hearings and no one could provide specific examples. The lawyer member then asked whether the victims’ advocates had an alternative proposal for Rule 17. Judge Mosman answered that they offered an unworkable suggestion to restrict it to trials and to have a carve-out for victims or certain kinds of crimes if it were expanded beyond trials. Professor Beale added that while the victims’ advocates opposed the amendments, if the rule were to be amended, they vociferously opposed the *ex parte* provisions, the expansion to proceedings other than trial, and the loosening of the *Nixon* standard.

A judge member then asked whether the Advisory Committee heard from any tribes on this issue. Professor Beale said that while the Advisory Committee had not heard from anyone in tribal government, when the Advisory Committee met in Phoenix at an earlier meeting to evaluate the proposed amendments, it heard from several local witnesses about their experiences with looser standards and more subpoena availability. Many of the people from Arizona, including the prosecutor, stated that they had not been applying *Nixon* strictly for years and had not had any difficulty. Judge Mosman added that the Advisory Committee heard from one witness from Oregon, whose responsibilities included working with tribal governments and victims from tribal cases, and the issue of tribes was not raised.

Judge Mosman then turned to another public comment that did not lead to a revision of the published rule. One commenter suggested that the Supreme Court precedent (*Carpenter*) regarding cell site location information suggested that the expansion of subpoenas would run afoul of the Fourth Amendment. Judge Mosman stated that while *Carpenter* may have been limited to its facts and not applicable to any kind of information that might be sought in Rule 17 subpoenas, the Advisory Committee was concerned about privacy interests in personal and confidential information. As a result, after a lengthy discussion, and as discussed on page 433 of agenda book, no text change was recommended for the rule, but the Advisory Committee added a short statement to the committee note about judicial oversight, reminding readers that judges have the ability in some instances to impose greater protections. The Advisory Committee also

suggested other approaches to protect privacy interests, including facilitating the development of best practices and working with the FJC to monitor the implementation of these amendments to see whether problems develop. Professor Beale added that the Advisory Committee expected that once the rule goes into effect, it would start to see the development of best practices, local options, and any problems that may arise and that by closely monitoring the situation, the Advisory Committee would be able to take appropriate action. Professor Coquillette expressed disagreement, however, with putting guidance in the committee note rather than a bench book. A lawyer member said that he supported the Advisory Committee's approach to privacy protection because personal and confidential information is now held by many third parties, and sometimes those third parties are not vigilant about protecting it. Judge Mosman also added that seeking personal and confidential information, independent of Rule 17, involved application of many state and federal privacy laws. A judge member also expressed support for the Advisory Committee's approach and noted that many judges look at the committee notes for guidance before exploring best practices. Judge Dever added that guidance in the committee note could remind judges that they also have the power to address issues in protective orders.

At the close of this discussion, a judge member spoke in favor of the proposed amendments and that hearing about how the current rule was being implemented in different ways across the country convinced him that significant amendments to Rule 17 were necessary. He also noted that there would likely still be variability in how judges approach it, but that this could be valuable as the Advisory Committee gained more information over time. He also stated his feelings that the rule did a careful job of balancing competing concerns.

With this feedback, and after adjourning until the next day to allow time to revise the rule, Judge Mosman presented a revised version to the text of Rule 17(c)(6) to solve the problem of judges who make Rule 17(c) subpoenas contingent upon disclosure to other parties. Judge Mosman added that the language in brackets was supported by the reporters but DOJ would like the bracketed language eliminated. Judge Mosman stated that the committee note, on page 510, line 512, quoted the former language in (c)(6), so that would need to be changed to match the new language.

The revised language to replace the text on page 497, lines 134-137, would read as follows:

Disclosure and discovery requirements [established by the Constitution, statute, and other rules] are not altered by this rule, and govern the disclosure of produced items to a party that did not request the subpoena.

Professor Garner said that if the bracketed language were removed, the comma after "rule" should be removed. Professor Beale added that the title of (c)(6) would be revised to, "Disclosing to Other Parties the Items Produced." Professor Bartell said that the revised language essentially said that disclosure and discovery requirements govern disclosure, and questioned whether that was the intent. Professor King said that the word "discoverable" in the formerly proposed (c)(6) raised concerns about how this applied to non-trial proceedings. Inserting "disclosure" not only added a set of law to the discovery rules for trial, but also added disclosure rules imposed by the Constitution that were not part of discovery. Professor Bartell said that she understood this, but questioned whether the end of the provision should say "govern

the disclosure and discovery,” or “govern the production of items to a party that is not requesting to see it.”

A judge member asked for more information on concerns about including the bracketed language. Judge Mosman said that his concern with deleting the language was that, if the rule simply says that “disclosure and discovery requirements are not altered by this rule,” it leaves open the possibility that a court order or other local rule might still remain in place. If the rule says that the only place a court can look for these requirements are the Constitution, statute, and other rules, it means that the court cannot find them in its own local rule requiring disclosure. Ms. Shapiro, on behalf of DOJ, stated her concern that by listing out sources in this new version, it would prevent judges from issuing orders with disclosure requirements that are not covered by the Constitution, statute, or other rules. A party might argue that the court cannot order something to be disclosed because it was not otherwise in the rule, statute, or Constitution.

Another judge member asked whether “other rules” in the bracketed language could be interpreted to mean “local rules.” Ms. Shapiro said yes, this was another concern, whether “other rules” referred only to federal rules. Professor Sachs suggested changing “other rules” to “other law,” given that there may be common law on this issue. He also suggested beginning the provision by saying “Any disclosure and discovery requirements,” to avoid suggesting that there are such requirements. Professor Capra suggested ending the sentence after “rule,” but committee members said that the second clause was the most important point in the provision. Professor Garner expressed his support for using “other law,” to foreclose the possibility of including local rules, which he thought would arguably be included in “other rules.” Other members argued that rules were law, and court orders would be considered law as well.

Another judge member had concern that about removing the strong language in the original draft stating that a party must disclose “only if” the information was discoverable. With the revised language, a judge could still conclude that revised Rule 17 did not change the parties’ obligations, but those obligations existed now, and courts had issued orders saying that a party must turn over any information obtained in response to its subpoena. Professor Beale responded that those who discussed the revisions considered saying that a court “must not” order disclosure unless discovery was otherwise required. A lawyer member asked whether the point was not to say that courts cannot do something, but instead that this particular rule does not authorize them to impose a disclosure requirement other than those established by other laws. Professor Beale said that some judges already thought that they had this authority and that fairness requires disclosure to the other party. That authority was not previously in Rule 17, so these judges may still find that authority elsewhere, outside of Rule 17. The lawyer member said that this proposed language would not prevent those judges from doing so, because it would confirm that other existing law gives courts authority to require disclosure.

With this additional feedback another draft version of Rule 17(c)(6) was provided for the Committee’s consideration:

This rule does not

(a) authorize the court to disclose—or require disclosure of—a produced item to a party that did not request the subpoena; or

(b) alter the disclosure requirements set by the Constitution, a statute, or other rule.

Professor Beale said that this language responded to the fact that if the material were produced to the court, the court could simply tell the clerk to send it to all parties. She thought, however, that the original language worked well. Ms. Shapiro, on behalf of DOJ, said that this language said that was incorrect, because it said that the rule did not authorize the court to disclose a produced item to a party that did not request it, but it may be that the item was discoverable, so the court should be ordering it disclosed. Professor Struve suggested that “other authorities” might be an option, rather than “other rules.”

A judge member strongly opposed this proposed language because he felt it stated the opposite of what the original draft Rule 17(c)(6) had said, which was that a party “must disclose.” The revised draft said that the rule did not even authorize the court to disclose. He suggested that the Committee focus instead on the first language suggested and debate whether to include the bracketed language. He favored removing the bracketed language so that courts retained whatever existing timing rules they had on reciprocal discovery. Professor Kimble added that the Standing Committee was trying to avoid saying that the court “must not,” do something but there were 22 uses of “must not” in the Criminal Rules and there was no strict policy against saying that the court “must not” do something. Another judge member said that he had also found a few instances of the Criminal Rules stating that “the court must not,” and those were situations where a statute explicitly prohibited the court from doing something. Here, however, the Committee would be saying that a court “must not” require disclosure, which would be difficult because it could not foresee all of the circumstances that could arise.

Taking this feedback, Judge Mosman agreed that neither revision completely accomplished what the Advisory Committee had hoped to accomplish, but the case law and the revised language and committee note would teach judges that they could not condition use of Rule 17 subpoenas categorically on disclosure of everything obtained through a subpoena. He then recommended moving forward with one of the two versions of the language first proposed this morning, either with or without the brackets. For further clarity, Judge Dever asked whether anyone other than DOJ was opposed to including the bracketed language and changing “rules” to “law.” Two judge members said that they preferred not to include the bracketed language but were not opposed to it. A third judge member agreed and suggested saying, “This rule does not require the disclosure of produced items to a party that did not request the subpoena. Disclosure and discovery requirements are not altered by this rule.” Professor Garner suggested instead saying, “Discovery and disclosure requirements, which are not altered by his rule, govern the disclosure.” Judge Dever then suggested that Judge Mosman and the reporters settle on another revision.

After additional break, Judge Mosman presented the following language for Rule 17(c)(6):

Disclosing to Other Parties the Items Produced. This rule does not require the disclosure of produced items to a party that did not request the subpoena. Disclosure and discovery requirements are not altered by this rule.

He also proposed two changes to the committee note: first, to change the quoted text of (c)(6) to match the new language, and second to add “regulation and timing regarding” before

“disclosure” on line 527 on page 511. Judge Mosman said that this language made the point that use of Rule 17 subpoenas should not be conditioned upon automatic disclosure to other parties. It also changed the title of (c)(6) to match the usage elsewhere in the rule. Professor Sachs clarified that the language in the committee note would now say that “the regulation . . . is regulated by . . .” He suggested changing “regulated” to “governed,” and others suggested changing “is” to “are,” since there were multiple subjects (regulation and timing).

Professor Beale then set forth the proposed changes. On page 493, line 53, “seek” would be changed to “require production of[.]” On that same page, line 66, “(c)” would be inserted before “(3)[.]” On page 506, line 376, “(c)” would be added before “(3)” and at line 384, “(c)” would be inserted before “(2)[.]” On page 508, line 426, the brackets would be deleted. On pages 510 and 511, the committee note would be changed as just discussed. Paragraph (c)(6) would be revised as just discussed.

With no further discussion, upon a motion and a second, with no opposition, the Standing Committee gave final approval to the amendments to Rule 17— as revised to include the changes discussed in the prior three paragraphs and set forth in the Appendix to these minutes— and recommended their adoption.

2. Preliminary Drafts for Publication and Public Comment

a. Rule 11

Judge Mosman next presented the Advisory Committee’s request for approval for publication for public comment on proposed amendments to Rule 11. The text of the proposed amendments begins on page 521 of the agenda book, and the written report begins on page 447. Judge Mosman began by explaining that the amendments to Rules 11(b)(1)(M) were driven by 2025 amendments to the U.S. Sentencing Guidelines, which eliminated the concept of departures. As a result, as Professor Beale added, the proposed changes would delete the language requiring the sentencing judge to inform the defendant of possible “departures under the Sentencing Guidelines.” Judge Mosman further added that tying language in Rule 11 to the Sentencing Guidelines was impractical because it would require a change every time the Sentencing Guidelines changed.

The members then discussed the proposed amendments.

A judge member raised concerns that the proposed amendments went further than removing the reference to departures and deleted the language requiring the judge to inform the defendant that the court has an obligation to calculate the applicable Sentencing Guideline range. Professor Beale responded that under the new two-step process in the Sentencing Guidelines, after determining the Guideline range, the court must consider the other applicable factors in § 3553. The Rule 11 Subcommittee felt that the rule text should follow this simplified instruction. The judge member agreed but said that some case law provides that a judge has an independent obligation to calculate the range, and if the rule just refers to the Sentencing Guidelines, then this suggests the judge has a smaller obligation than to accurately determine what the Guideline range is before applying the § 3553(a) factors.

Other judges then discussed their views on this issue, some saying that there is no independent obligation outside of what § 3553(a) provides, and others supporting the idea that the judge does have an independent obligation that should be recited to the defendant. During this discussion, Judge Mosman reminded members that Rule 11 refers only to what the court must tell a defendant at a plea colloquy. Professor King responded that DOJ, the defense bar, the subcommittee, and the Advisory Committee felt that the language in Rule 11 should not include calculating the advisory guideline range because of the simplification process that the Guidelines were currently undergoing and the proposed amendments were designed to avoid having to change Rule 11 again. Judge Vance stated, however, that the proposed amendment may communicate to judges that they no longer had to actually calculate the range by assessing the Guidelines.

Following this discussion, the members discussed possible changes to the language in the proposed rule text. Judge Furman suggested that the language “including the Sentencing Guidelines” at the end of the proposed rule was unnecessary because that factor is listed in § 3553(a) and did not need to be repeated. Professor King responded that the Rule 11 Subcommittee had debated whether to include a reference to the Sentencing Guidelines at all because they are part of the statute but decided to leave it in because judges are accustomed to it.

The members, advisory committee chairs, and reporters then discussed potential revisions that could be made to address the concerns raised about informing defendants of the obligation to calculate the range. Suggestions included bracketing some words or omitting only the words “possible departures under the Sentencing Guidelines.” A judge member suggested including more words in brackets so that the Advisory Committee could obtain more public feedback. Judge Mosman suggested that the Committee consider whether to approve the Advisory Committee’s proposed language with the addition of bracketing “calculate the applicable Sentencing Guidelines.” The provision would read, “in determining a sentence, the court’s obligation to [calculate the applicable sentencing guideline range and] consider the factors under 18 U.S.C. § 3553, including the Sentencing Guidelines.” Judge Furman asked whether it would be necessary to include two references to the Sentencing Guidelines. After further discussion, Judge Mosman said that he and the reporters would propose language for the Committee’s consideration the following morning.

After the midmorning break on the second day, Judge Mosman proposed language for the Standing Committee’s consideration that would remove “possible departures under the Sentencing Guidelines,” from Rule 11(b)(1)(M), such that the rule would read:

(M) in determining a sentence, the court’s obligation to calculate the applicable sentencing-guideline range and to consider that range and other sentencing factors under 18 U.S.C. § 3553(a);

Following this discussion, upon a motion and a second, with no opposition, the Standing Committee approved the proposed amendments to Rule 11 as revised for publication and public comment.

b. Rule 32

Judge Mosman then presented the Advisory Committee's request for approval for publication for public comment on proposed amendments to Rule 32. The text of the proposed amendments begins on page 523 of the agenda book, and the written report begins on page 450. Judge Mosman explained that this proposed amendment, which relates to the amendment to Rule 11, addresses current language in Rule 32(h) referring to possible departure under the Guidelines. The amendment would strike the language in Rule 32(h) and mark it reserved in order to preserve the numbering system in the rule.

With no questions or further discussion, upon a motion and a second, with no opposition, the Standing Committee approved the proposed amendments to Rule 32 for publication and public comment.

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

Judge Furman presented the action items on behalf of the Advisory Committee on Evidence Rules, which last met on May 7, 2026, 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 525.

1. *Amendments for Final Approval*

a. Rule 609

Judge Furman presented the Advisory Committee's request for final approval of amendments to Rule 609. The text of the proposed amendments begins on page 572 of the agenda book, and the written report begins on page 526.

Judge Furman provided background on the proposed amendments to Rule 609, which governs impeachment through prior convictions. The proposed amendments add a single word, "substantially," to Rule 609(a)(1)(B), to make the balancing test a bit more favorable to a testifying defendant. The other proposed amendment was to address a split in authority under Rule 609(b) because the rule did not prescribe the endpoint of the ten-year period for older convictions. The proposed amendment to Rule 609(b) clarifies the end date to be the date trial begins.

During the public comment period, the Advisory Committee received fifteen comments, including comments from the Magistrate Judges Association, the American College of Trial Lawyers, the New York City Bar, the National Association of Criminal Defense Lawyers, and others. The comments were strongly supportive with the sole critical comment proposing a different endpoint under Rule 609(b), which the Advisory Committee had previously considered and rejected. Judge Furman also noted that one comment urged the Advisory Committee to address the Supreme Court decision that made the court's decision appealable only if the defendant took the stand, but the Advisory Committee had already decided not to do address that issue. With no changes after publication, the Advisory Committee recommended final approval of the amendments by a 7-2 vote, with DOJ in the majority.

The members then discussed the proposed amendments.

A judge member raised a question about language in the committee note and whether it would allow the prosecutor to explore details of the crime underlying the past conviction. Judge Furman responded that the rule amendment would not alter the existing law, but the committee note did address a problem in which some courts had allowed prosecutors to ask only about the fact of the conviction itself, which left the jury guessing what the nature of the felony was. Judge Furman said that the committee note did include, at the Standing Committee's suggestion, the language, "absent agreement by the parties," because there could be situations where the defendants preferred allowing more questions. Professor Capra added that there is substantial case law saying that the questioning cannot delve into the facts of the prior conviction, and the committee note states that Rule 608 cannot be used as an end-run around the limitations in Rule 609.

With no further discussion, upon a motion and a second, with no opposition, the Standing Committee gave final approval to the amendments to Rule 609 and recommended their adoption.

2. Preliminary Drafts for Publication and Public Comment

a. Rule 902(1)

Judge Furman next presented the Advisory Committee's request for approval of publication for public comment on a proposed amendment to Rule 902(1). The text of the proposed amendment begins on page 582 of the agenda book, and the written report begins on page 527.

Judge Furman reported that the proposed amendment would add federally-recognized Indian tribes and nations to the list of entities in Rule 902(1)(A) whose sealed and signed public documents are self-authenticating. Judge Furman noted that this amendment was suggested by Judge Frizzell in the Northern District of Oklahoma and has gained more significance after the Supreme Court's decision in *McGirt v. Oklahoma*, 591 U.S. 894 (2020), which expanded federal jurisdiction in Indian country. Judge Furman also noted that the Advisory Committee solicited input from the tribes themselves and Judge Furman wrote to the 578 federally recognized tribes and nations. Although only eight responses were received from the tribes and nations, all strongly supported the proposed amendment to recognize tribal sovereignty and dignity and address the burden and expense of sending people from the tribes long distances to authenticate records.

Judge Furman and Professor Capra then explained the difference of opinion on the issue expressed by Ms. Shapiro on behalf of DOJ in support of the amendment, and the Federal Defender, who opposes it and voted against moving forward with publication. The Federal Defender felt that such records could be admitted under either the business records exception or Rule 902(11) and that authentication problems in cases were the result of prosecutor problems and not the rules. The Federal Defender also cited inconsistent and problematic record-keeping among tribes and the fact that some tribes did not have robust FOIA-type disclosure rules and therefore restricted access to their records. Professor Capra added that the Federal Defender was concerned that a party would no longer receive a Rule 902(11) certificate signed by a real person that described how the records were kept. Judge Furman added that the FJC had done some research into how often this issue came up, and it was very rarely litigated.

The members then discussed the proposed amendment.

A lawyer member who practices in civil litigation added that federally recognized tribes are increasingly appearing as government entity plaintiffs in civil litigation, particularly environmental litigation. She supported the amendment for both symbolic dignitary inclusion and practical application to tribes as parties to civil cases because it would make the discovery burden they face equal to that of other government parties. Ms. Shapiro, on behalf of DOJ, expressed support for the rule to put federally-recognized tribes on the same footing as the smallest territories or municipalities. She also noted that the rule amendment would not prevent anyone from challenging the authenticity of these records at trial. Judge Furman added that the committee note underscored the point that the amendment did not preclude challenging the documents at trial.

With no questions or further discussion, upon a motion and a second, with no opposition, the Standing Committee approved the proposed amendment to Rule 902(1) for publication and public comment.

b. Rule 104

Judge Furman presented the Advisory Committee's request for approval of publication for public comment on proposed amendments to Rule 104. The text of the proposed amendments begins on page 584 of the agenda book, and the written report begins on page 528.

Judge Furman explained that the proposed amendment to Rule 104(a) is intended to codify the Supreme Court's decision in *Bourjaily v. United States*, 483 U.S. 171 (1987), which held that the preponderance of the evidence standard applies in deciding preliminary questions under the rule. The proposed amendment to Rule 104(b) would eliminate the confusing concept of conditional relevance and incorporate the standard for determining whether evidence is relevant from the Supreme Court's holding in *Huddleston v. United States*, 485 U.S. 681 (1988). Judge Furman further added that the Advisory Committee considered adding the *Huddleston* standard into Rule 401 insofar as it defines relevance. Because there is a great deal of case law interpreting Rule 104(b), however, the Advisory Committee decided to simply amend Rule 104(b).

Professor Capra added the amendment to Rule 104(a) was also necessary because one of the concerns with proposed new Rule 707 (governing opinions generated by artificial intelligence) was whether the preponderance of the evidence standard needed to be put in new Rule 707 as found in Rule 702. Amending Rule 104(a) to include the preponderance standard would eliminate the need for this addition to new Rule 707 if adopted, or to any other rule that is amended in the future. Judge Furman also noted that at the Advisory Committee meeting, a Standing Committee member had suggested amending Rule 104(a) and not 104(b), but the Advisory Committee decided that without the amendment to Rule 104(b) to include the proper standard, a court could inadvertently conclude that relevance questions are subject to the preponderance standard.

During his presentation, Judge Furman also called the Committee's attention to two stylistic changes that needed to be made to the committee note to change the word "relevancy" to "relevance" (page 587, lines 87 and 94). Professor Kimble also raised a style point and said that

on lines 6-7, “Unless otherwise provided in these rules” should instead say, “Unless these rules provide otherwise.”

The members then discussed the proposed amendments.

A judge member asked whether there was a problem in courts applying the improper standard under Rule 104(b) that needed to be corrected. Professor Capra responded that there were many points of confusion in Rule 104(b), including that the term “condition” could be misinterpreted to mean any condition to admissibility, not just a conditional fact. Professor Capra also pointed to clarifying that the lower standard of proof applies.

Another judge member asked whether the explanation of relevance and examples set forth in the committee note (page 587, line 78) was necessary. Judge Furman said that it could be taken out, but said that this was only for publication, and was intended to explain the “common knowledge and experience” language set forth in the rule. A lawyer member said that he found the comment helpful to understand “common knowledge and experience.” The judge member agreed that for purposes of publication, the example was fine.

Another judge member raised a concern about language in the committee note (page 587, line 88) stating that the judge “would” overrule the objection, but on line 92, the committee note said that the judge “would likely” reach a certain conclusion. At his suggestion, Professor Capra agreed to add the word “likely” to line 88 as well.

With no further questions or discussion, upon a motion and a second, with no opposition, the Standing Committee approved the proposed amendments to Rule 104 for publication and public comment, as revised to modify the rule text on page 584, line 6-7 (changing “Unless otherwise provided in these rules” to “Unless these rules provide otherwise”); and the committee note on page 587 (changing “relevancy” to “relevance” on lines 87 and 94, and adding “likely” after “would” on line 88).

4. INFORMATION ITEMS – REPORTS OF THE ADVISORY COMMITTEES

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

Judge Eid referred to the Advisory Committee’s report, which begins on page 196 of the agenda book, for information items. She also highlighted and solicited feedback on the Advisory Committee’s consideration of new Rule 12.2 governing intervention on appeal. Judge Eid summarized the information in the Advisory Committee’s report, noting that whether to create a rule about intervention on appeal had been discussed for quite some time, and concerns had previously been raised that creating such a rule would incentivize people to move to intervene. The Advisory Committee decided, however, that a rule was necessary to give structure to the practice through a narrow rule that would also avoid an onslaught of meritless motions to intervene. She also described the structure of the proposed rule as set forth in the Advisory Committee report.

The members then discussed the proposal for new Rule 12.2.

A judge member suggested that the description of intervention as “disfavored” in subdivision (b) might be superfluous, given the language in that subdivision reserving intervention for exceptional cases. As for timing, the judge member also suggested that the proposed language “as soon as is practical after the appeal is docketed” in (c)(1) may prove difficult when administrations change, because the government may take a different position at that point. As for the choice of language between “legally protected” or “legally cognizable” interest stated in subdivision (e)(4)(B), the judge member said that he would remove both modifiers. Finally, he asked why (e)(3) referred to the United States’ “foreign-relations interests” as a ground for intervention. Ms. Shapiro, on behalf of DOJ, later responded that subparagraph (e)(3) was proposed to accommodate specific government interests in things like state secrets privilege that can arise in private litigation, or protecting classified information, or uniquely governmental interest that relate to protection of national security.

The academic member raised the issue of whether this rule was truly necessary, given that courts of appeal had been using Civil Rule 24’s provisions and given that intervention on appeal is rare. A lawyer member stated that while he had only had a few matters involving intervention on appeal and had learned that appellate courts are essentially using a modified Civil Rule 24, he did not think that this was ideal. Another lawyer member added that she had only seen a few intervention requests in civil appeals, but that recently there has been a significant uptick in AI-assisted pro se filings for intervention at the appellate level such that creating a strict rule would be helpful.

During the members’ discussion, the reporters and consultants also provided suggestions. Professor Garner added that if the title of subdivision (d) were changed from “Grounds for Mandatory Intervention” to “Mandatory Intervention,” then the title of subdivision (e) should be changed from “Other Grounds for Intervention” to perhaps “Permissive Intervention” to make it parallel. A lawyer member suggested not using the term “permissive intervention” because, in the Civil Rules, permissive intervention required a lesser showing. Another judge member suggested merging (d) and (e) in the proposed rule and titling the new subdivision, “Grounds for Intervention.” Within that new subdivision, one paragraph could address when the court may permit intervention, and another paragraph could address when the court must permit intervention. Professor Sachs later clarified that Civil Rule 24 is much more flexible than what the Appellate Rules Advisory Committee was proposing and that the Committee had generally been averse to the concept of “permissive intervention” in appeals.

Professor Bartell suggested looking at Bankruptcy Rule 8013(g) on intervention on appeal. Professor Hartnett noted there are competing themes among circuit judges who either apply Civil Rule 24 on appeal and others who adhere to a more traditional notion that intervention on appeal was for rare and exceptional circumstances; the goal of the new rule would be to get ahead of this divide. Professor King pointed out that that the Rule 12.2 language proposed carving out § 2254 and § 2255 motions in subdivision (a) but should also include § 2241 motions.

Judge Eid thanked the Standing Committee members for their input on the draft proposed rule.

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

Judge Connelly referred to the information items from the Advisory Committee report, beginning on page 255 of the agenda book. She then highlighted one of the issues under consideration involving potential amendments to Bankruptcy Rule 9031, which provides that Civil Rule 53—which authorizes the use of masters—does not apply in a bankruptcy case. The Advisory Committee had received two suggestions to amend the rule to permit masters in a bankruptcy case. The Advisory Committee was considering a draft amendment to allow masters, but on March 17, 2026, the DOJ Office of Legal Counsel issued a published opinion suggesting that the use of masters by bankruptcy judges would be unconstitutional. The Advisory Committee has decided to defer further consideration of this issue until its fall meeting.

Judge Connelly then explained the nature of the DOJ objection. Bankruptcy judges, who are Article I judges, are referred cases that fall within the district court's original jurisdiction. If it is a core bankruptcy proceeding, the bankruptcy judge has the authority to issue a final ruling. If it is not a core proceeding, the bankruptcy judge may issue a ruling with the parties' consent. If the parties do not consent, the bankruptcy judge may issue proposed findings of fact and conclusions of law, and the district judge enters a final judgment. One concern was whether, in a non-core proceeding where the parties do not consent to the bankruptcy court's final authority, the bankruptcy judge could appoint a special master when the bankruptcy judge could not enter a final ruling. Professor Gibson added that the rule would also apply to district judges who are exercising bankruptcy jurisdiction, but the constitutional issues would not apply in those cases.

A judge member noted his general skepticism regarding masters because of cronyism and paying the master could leave less money available for the estate. Another judge member echoed those concerns and added that bankruptcy judges in his court were uniformly against the proposal. Professor Bartell observed, however, that having a rule that explicitly barred the appointment of a special master in bankruptcy cases but not civil cases seemed strange, especially as the cronyism argument could be applied to many areas of the law, and further, she did not think that the DOJ opinion was persuasive as to why there was a constitutional concern with this rulemaking.

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

Judge Vance reported on several information items detailed in the Advisory Committee report beginning on page 313 of the agenda book.

1. Potential Amendments to Rule 43 on Remote Trial Testimony

Judge Vance first highlighted the status of the Advisory Committee's work on potential amendments to Rule 43(c) regarding remote trial testimony, which the Standing Committee had already expressed concerns about loosening the standard for remote trial testimony at its January 2026 meeting.

Judge Vance reported that since that time, the Rule 43 Subcommittee had met three times to consider those concerns and had received research from Ms. Sraders, Counsel to the Civil Rules Committee. The research showed that judges were relying on the 1996 committee note to insist that unforeseeable last-minute developments were generally the only thing that could satisfy the

“compelling circumstances” standard in Rule 43. After much deliberation, the Rule 43 Subcommittee still favored removing the “compelling circumstances” requirement from the rule, but it had substantially revised the proposed committee note, found on page 316 of the agenda book. The revised note made clear that the rule does not authorize fully remote trials, and that the judge was not required to authorize remote testimony even if the parties agreed to it. A court can authorize remote testimony only on an individualized showing of good cause to a particular witness. The rule does not affect any other aspect of trial. The revised note stated that witness inconvenience alone was not grounds to authorize remote testimony, and emphasized that the good cause determination required an assessment of the circumstances in the particular case, always mindful of the importance of in-person testimony. The note explained why the 1996 requirement of “compelling circumstances” a term used nowhere else in the Civil Rules, warranted re-examination. It pointed out that when a witness cannot attend trial, the choice was not between in-court testimony and remote live testimony, but between remote live testimony and depositions.

A number of members expressed concern that removing the “compelling circumstances” language would be read as a softening of the rule to allow greater use of remote trial testimony. Judge Vance explained that one of the reasons to take it out was that the 1996 committee note explaining that language had been interpreted by some judges to confine remote testimony to last-minute emergencies. Other members did not feel that the language of Rule 43 was causing any problems, and that the practices of some judges who interpreted the rule strictly did not necessitate a rule change.

A judge member also offered specific feedback on the proposed committee note. First, he suggested explicit recognition in the rule text that allowing remote testimony is a case management issue in the trial judge’s discretion and not to be reviewed on appeal under a “good cause” standard. Even if the parties agree to it, the judge is not required to allow it. Second, on page 317, the proposed committee note states that judges had found the “compelling circumstances” requirement too constricting, but he did not know any judges who felt this way. Third, the following paragraph said that some jurors found video testimony easier to view than in-person testimony, but the judge member suggested that this seemed like a courtroom configuration problem, not an issue with the rule. Fourth, he disagreed with the conclusion in the proposed committee note that designating portions of a deposition was a time-consuming process that would be obviated by live remote testimony. Finally, where the last sentence of the proposed committee states “Court approval is essential to management of remote trial testimony,” the judge member questioned what it meant in the context of this rule amendment.

One member added that he supported a very limited amendment to the rule to address the concerns about interpretation of the 1996 committee note. He noted that the draft committee note on page 318 stated that remote testimony may be more acceptable for a less significant witness, and he agreed with this concept. He also asked whether any thought had been given to a preference for remote testimony in a more formal setting, such as a courthouse, compared to a witness’s basement. Judge Vance noted that the parties generally work these issues out on their own.

Other members noted disagreement with the existing committee note because if a witness cannot be in person, live remote testimony is better than a video deposition or reading a deposition

transcript. Judge Dever added, however, that remote testimony would not save the district judges time from resolving deposition designation objections because every attorney would designate portions of the depositions in case the technology failed. Another judge stated that he would support changing the committee note to say that deposition transcripts are not superior to live remote testimony. As to the rule text, however, he thought that while most judges would prefer remote testimony to depositions, that should be left to the trial court's discretion.

Another lawyer member also expressed her preference for live in-court testimony, but noted that there had been a lot of experimentation and experience with hybrid trials and remote depositions since the COVID-19 pandemic. The rule change, however, would signal to practitioners that there may be more flexibility if they could show good cause in a given case. This standard could also make trials less expensive, more accessible, and shorter. Overall, the lawyer member supported publishing a rule for public comment to see whether the legal community would support a change to enable courts to have trials more efficiently and less expensively.

A judge member suggested that the Advisory Committee review the Texas Supreme Court's rule on remote testimony. Judge Vance responded that Justice Jane Bland from the Texas Supreme Court is on the Rule 43 Subcommittee and supports remote testimony in Texas because of the huge distances in Texas and the types of cases in state courts. Another judge member added that almost all state civil trials in Minnesota are now fully remote.

As a practical matter, a judge member asked for clarification as to when the Committee can change the committee note for a rule if there are no changes to the rule itself. Several of the reporters responded that an existing committee notes cannot be changed, and new committee notes are intended to explain a change in the rule text. Professor Hartnett added that the Committee could consider revising the text of the rule to say that compelling circumstances need not arise at the last minute, or that, in determining whether there were compelling circumstances, live remote testimony was generally preferable to a deposition. Professor Capra agreed with Professor Hartnett's suggestion, and proposed using the term "foreseeable." He also thought that it might be helpful to structure the rule to accommodate different choices in testimony available to the court; for example, the standards a court might use when deposition testimony is available versus when it is not. Professor Bartell added that Bankruptcy Rule 7043 bore on this same topic and recommended that the reporters look at the public commentary received for that rule when it was published.

c. Third-Party Litigation Funding

Judge Vance next directed the Committee's attention to the Advisory Committee's work on third-party litigation funding (TPLF), which is described on page 351 of the agenda book. Judge Vance reported that the TPLF Subcommittee continued to consider a disclosure rule for third-party litigation funding in Rule 26(a)(1) or including third-party litigation funding as a matter a court can consider and take action on under Rules 16 or 16.1. She also described the practice in the District of New Jersey, which requires certain disclosures and contemplates discovery under limited circumstances regarding the terms of the funding agreement. Judge Vance also noted that the FJC is currently studying the experience under the New Jersey rule and the TPLF Subcommittee continues to evaluate how to define the types of funding arrangements that would trigger disclosure, what should be disclosed to whom, whether it should go to the court alone or

to all parties, what the court can do with the information, and whether to authorize discovery. With that introduction, Judge Vance asked for the Standing Committee's views on the aforementioned issues.

A judge member asked for more information on the New Jersey disclosure rule. Judge Vance explained that both sides were told to make the disclosures, if any, on the record, and that judges were mostly concerned with knowing who had the power to settle and make decisions about case strategy. She added that in a class action or MDL case, the judges want to know whether any of the representatives have conflicts or would be compromised by funding arrangements. Later in the discussion, the academic member mentioned that he heard that it was not uncommon for funders to require their lawyer to approve the litigation strategy at every step.

Another judge member said that he issued a standing order based on the New Jersey rule, as had other districts. He added that the Northern District of California has a rule that essentially applies only to class actions; some Texas courts require disclosures; and more than 25% of appellate and district courts require some sort of real party in interest disclosure. He also shared that he had enforced the rule and uncovered real abuses and violations of professional conduct, such as aggregating a pool of clients to be represented by the same law firm. Later in the discussion, a lawyer member also raised ethical concerns in third-party litigation funding, adding that there was tremendous pressure for profitability within law firms, which is leading to more plaintiff-side contingency matters. At the same time, funders (as he understood the practice) would only provide funding if there were enough cases to aggregate (15-25). He thought this had negative effects on the lawyer's ethical duties in an individual case, and also wondered what judges thought about having a completely unrelated matter, with different parties and a different topic, potentially impacting the case in front of them. The judge member continued that he issued his standing order in 2022 and about 15% of his cases had made a disclosure of third-party litigation funding. The judge member also said that he had recently issued a standing order requiring anyone seeking pro hac vice to certify that they were complying with ABA Model Rule 5.4 that they were not sharing fees.

A lawyer member asked whether there was significant opposition to a disclosure rule. Judge Vance said that some funders had told her that they would not oppose a pure disclosure request, but the issue was with discovery. Another lawyer member noted that disclosure rules like the Northern District of California's rule had been in place for some time and that MDL transferee judges will often, as a matter of case management and selecting leadership, require at least disclosure in chambers of funding arrangements.

A judge member thought that it would be helpful to have something in the rule that specifically authorized the court to inquire about third parties. Professor Marcus responded that he did not think judges were currently unable to require disclosures of funding. Instead, Professor Marcus suggested that the question might be framed as whether disclosure should always be required even without a request from the presiding judge. Professor Marcus also noted that the EU was gradually moving towards regulating third-party funding.

With this feedback, Judge Vance thanked the Committee.

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

Judge Mosman stated that the Advisory Committee’s work on Rules 15 and 40 was summarized in the agenda book and he had nothing further to add.

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

Judge Furman reported on several information items contained in the Advisory Committee report, found beginning on page 530 of the agenda book.

1. Artificial Intelligence

Judge Furman first provided an update on the Advisory Committee’s work concerning artificial intelligence in two areas: (1) the reliability of machine-generated output offered without an expert witness (either by a lay witness or pursuant to Rule 902(13)), and (2) the authenticity issue posed by “deepfakes.”

On the first issue, Judge Furman reported that after publication of new Rule 707 on machine-generated opinions, the Advisory Committee received 59 written comments and about a dozen witnesses testified at two hearings. The feedback from the public was mixed between unqualified support, supportive with revisions, and opposed. Judge Furman described some of the criticisms of the proposed rule, which focused on issues ranging from overbreadth or vagueness of terms and exceptions, the interaction with Rule 702, and general concerns about the prematurity or lack of need for the rule. Another issue raised was the potential need for the civil and criminal rules to be modified to require disclosure of AI-generated opinion evidence in advance of trial. Judge Furman also advised the Committee that in response to this feedback, the Advisory Committee revised the rule (as set forth in the Committee Report beginning on page 534). At the Advisory Committee’s spring meeting, however, and at the suggestion of Judge Dever, the Advisory Committee decided to take the potential rule amendment under further advisement and hold a mini-conference with panels of technical experts and experienced lawyers at its fall 2026 meeting.

On the second issue, Judge Furman reported that the Advisory Committee continues to consider a proposed amendment to Rule 901(c) to address authentication of an item of evidence that one side claims is a deepfake. Because the existing authenticity standard is relatively low, the Advisory Committee is considering a proposed amendment that would create a burden-shifting framework where the opponent of the evidence would have to make a threshold showing enough for a reasonable person to find that an item was fabricated or altered by generative artificial intelligence. If that showing were made, the burden would shift to the proponent of the evidence to show, by a preponderance of the evidence, that the item was authentic. Judge Furman also described the results of an FJC sent a survey at the request of the Advisory Committee. The survey results, discussed in the Advisory Committee’s report, showed that 15 judges reported that they have encountered a deepfake challenge and a strong majority indicated that if such an issue arose, they would require a showing akin to what the proposed rule provides (even without a rule in place). Judge Furman and Professor Capra also discussed a recent New York Court of Appeals decision relating to deepfakes indicating that the issue is coming up in state courts as well. To gather more expert input, however, the Advisory Committee decided to address the

issue of deepfakes at the mini-conference at the fall meeting along with its consideration of new Rule 707.

Following this report, Judge Furman solicited the Standing Committee's views on the need for rule amendments and whether the working drafts took the right approach. Professor Capra added that this was the first time in his experience that a rule published for public comment did not go forward. He expressed that he had hoped that the public feedback would be an opportunity for the Advisory Committee to learn from the comments, but he did not believe the Advisory Committee learned much because most of the practicing lawyers were misunderstanding the rule. For this reason, refining the rule with the help of experts at a mini-conference would be very helpful in drafting a better rule.

A judge member supported the approach and thought information gathering was exactly what the Advisory Committee needed. Judge Furman noted that there was a concern that the technology was moving very quickly and the rules would not be adequate to address it given that the rulemaking process takes a long time. A lawyer member supported moving forward to demonstrate that the rules process is not merely reactive and suggested not waiting until the problem became unbearable to try to address it. Professor Marcus added that he and Professor Capra had discussed some coordination with the Civil Rules Advisory Committee on definitions and to determine if the civil disclosure rules would need to be amended if Evidence Rule 707 went forward in order to get those issues before the court in a timely fashion.

d. Rules 703 and 606(b)

Judge Furman concluded his report on information with an update on the Advisory Committee's consideration of two other potential amendments to address Supreme Court decisions potentially impacting the constitutionality of Rule 703 and Rule 606(b). First, the Advisory Committee is considering potential amendments to Rule 703 to add a "red flag" noting possible constitutional concerns in light of the Supreme Court's decision in *Smith v. Arizona*, 602 U.S. 779 (2024). The Advisory Committee is concerned that if construed broadly, it could prohibit reliance on a non-testifying expert, but is waiting to see if the Supreme Court takes up a circuit split on this issue. Second, in light of potential action on Rule 703, the Advisory Committee also revisited whether to add "red flag" language to Rule 606(b) in light of the Supreme Court's decision in *Peña-Rodriguez v. Colorado*, 580 U.S. 206 (2017), but decided that it was not warranted.

5. CONCLUDING REMARKS AND ADJOURNMENT

Judge Dever concluded by thanking the Standing Committee members for their hard work and adjourned the meeting. The next meeting would take place in Washington, D.C. on January 5, 2027.

APPENDIX

Summary of Standing Committee Revisions to Final Amendments

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

Civil Rule 26(a)(3)

The proposed amendments to Civil Rule 26(a)(3) begin on page 391 of the agenda book. The Standing Committee discussed and approved one change to the rule text:

1. Page 392, line 20: “it expects” was inserted before “whether” and the word “will” was changed to “to.” Lines 20-21 as revised read “whether it expects the testimony to be in person or remote.”

Civil Rule 45(b)(1)

The proposed amendments to Civil Rule 45(b)(1) begin on page 398 of the agenda book. The Standing Committee discussed and approved one change to the rule text:

1. Page 399, line 23: “by a person identified in (i) or (ii)” was inserted after “actual receipt.”

Criminal Rule 17

The proposed amendments to Criminal Rule 17 begin on page 490 of the agenda book. The Standing Committee discussed and approved the following changes to the rule text:

1. Page 497, lines 133 through 137, were replaced with the following: “(6) *Disclosing to Other Parties the Items Produced*. This rule does not require the disclosure of produced items to a party that did not request the subpoena. Disclosure and discovery requirements are not altered by this rule.”

The Standing Committee discussed and approved the following changes to the committee note:

1. Page 510, lines 512 through 515: “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” was replaced with “This rule does not require the disclosure of produced items to a party that did not request the subpoena. Disclosure and discovery requirements are not altered by this rule.”
2. Page 511, line 527: “the regulation and timing regarding” was inserted before “disclosure.”
3. Page 511, line 529: “is” was replaced by “are.”

SUMMARY OF THE
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

1. Approve the proposed 2026 Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002, as set forth in Appendix A, and ask the Administrative Office Director to transmit it to Congress in accordance with the lawp. 4
2. Approve the proposed amendments to Appellate Rules 15, 29, and 32 and to the Appendix of Length Limits, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law pp. 5-8
3.
 - a. Approve the proposed amendments to Bankruptcy Rule 2002, as set forth in Appendix C, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and
 - b. Approve, effective December 1, 2026, the proposed amendments to Bankruptcy Official Forms 101 and 106C, as set forth in Appendix C, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date pp. 9-10
4. Approve the proposed amendments to Civil Rules 7.1, 26, 41, 45, and 81, as set forth in Appendix D, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 13-15
5. Approve the proposed amendments to Criminal Rule 17, as set forth in Appendix E, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 18-19

NOTICE NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.
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(Rev. 8/27/26)

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

- E-Filing and Service by Self-Represented Litigants..... pp. 2-3
- Privacy Rules for Taxpayer Information and Minors’ Names.....p. 3
- Federal Rules of Appellate Procedure pp. 8-9
- Federal Rules of Bankruptcy Procedure pp. 10-13
- Federal Rules of Civil Procedure..... pp. 16-18
- Federal Rules of Criminal Procedure..... pp. 20-22
- Federal Rules of Evidence pp. 23-26

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 3-4, 2026. All members participated. Representing the advisory committees were Judge Allison H. Eid (10th Cir.), chair, and Professor Stephen Sachs, 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 (E.D. La.), chair, Professor Richard L. Marcus, Reporter, and Professor Andrew Bradt, Associate Reporter, 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 Edward Hartnett, Standing Committee Reporter; Professor Catherine T. Struve, 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; Sarah Sraders, Rules Committee Staff Counsel; Dr. Tim Reagan, Senior Research Associate, Federal Judicial Center (FJC); and Elizabeth J.

NOTICE

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

Shapiro, Deputy Director, Federal Programs Branch, Civil Division, Department of Justice, on behalf of the Deputy Attorney General.

In addition to its general business and consideration of the Advisory Committee reports and recommended action items as discussed below, the Committee also received an update on the work of its subcommittee concerning uniform attorney admissions in the trial courts and concluded that no further action on the project is warranted. The Committee further authorized the Chair, working with the Secretary of the Committee, to respond to the request of the Judiciary Planning Coordinator, Chief Judge Michael A. Chagares (3d. Cir.), to identify any agenda items of the Rules Committees that align with the Executive Committee’s priority strategies and goals in the *Strategic Plan for the Federal Judiciary*. The Committee’s views were communicated to Chief Judge Michael A. Chagares, the judiciary planning coordinator, by letter dated June 11, 2026.

E-FILING AND SERVICE BY SELF-REPRESENTED LITIGANTS

The Standing Committee unanimously approved, with minor revisions to the committee notes to make them more uniform, the recommendations of the Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules to publish for public comment proposed amendments relating to electronic service and filing by self-represented litigants (SRLs). The proposed amendments (collectively, “proposed SRL rules”) seek to: (1) increase SRL access to a court’s electronic-filing system (or allow a form of electronic filing by alternative means) to file pleadings and other court documents; and (2) after a complaint is filed and served, allow SRLs to achieve service of subsequently filed documents in the electronic-filing system through the electronic notice of filing or through a court-based electronic noticing program. The proposed SRL rules relate to Appellate Rule 25; Bankruptcy Rules 5005, 8011, 9006, and 9036; Civil

Rules 5 and 6; and Criminal Rules 45 and 49. With minor differences,¹ these proposed amendments are uniform across the four sets of rules. Each of these proposed amendments is discussed in more detail in the summaries of actions by the Advisory Committees in this report.

PRIVACY RULES FOR TAXPAYER INFORMATION AND MINORS' NAMES

The Standing Committee unanimously approved, with the addition of clarifying revisions in each of the committee notes, the recommendations of the Advisory Committees on Bankruptcy, Civil, and Criminal Rules to publish for public comment proposed amendments relating to the redaction of social security and individual taxpayer identification numbers and the use of pseudonyms to reference minors. The proposed amendments (collectively, the “proposed privacy amendments”) seek to: (1) expand the redaction requirement of taxpayer identifying information in civil and criminal cases; (2) require the use of pseudonyms rather than initials when referencing minors in bankruptcy, civil, and criminal cases; and (3) clarify that these rules apply to exhibits and attachments to electronically filed court documents. The proposed privacy amendments relate to Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1.² Each of these proposed amendments is discussed in more detail in the summaries of actions by the Advisory Committees in this report.

¹For example, the Bankruptcy, Civil, and Appellate Rules proposals use the term “unrepresented,” while the Criminal Rule uses “self-represented.” (Many existing Bankruptcy, Civil, and Appellate Rules already use “unrepresented.”) The Civil, Criminal, and Appellate Rules use the term “parties,” while the Bankruptcy Rules use the term “individual.” (In the Bankruptcy context, there is a concern that some small business entities might think that the use of “parties” would enable them to proceed without counsel, while in the other contexts the greater worry is that nonparties might think that they could file in any case they want.) Finally, the Civil, Criminal, and Appellate Rules refer to “the party’s case,” while the Bankruptcy Rules refer simply to “the case.” (In the Bankruptcy context, “the party’s case” might suggest that only the debtor is covered by the amendment.)

²Any amendments to these rules will apply on appeal through existing Appellate Rule 25, which incorporates them by reference. As set forth in the information items for the Appellate Rules Advisory Committee, there is ongoing consideration of potential privacy amendments relating to certain aspects of appeals.

PRIVACY REPORT TO CONGRESS 2026

Following the Standing Committee’s approval of the proposed privacy amendments for publication and comment, the Committee also considered a 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 (the “2026 Privacy Report to Congress”). 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 [the privacy rules] to protect privacy and security.” The most recent prior report was submitted to Congress in 2024.

The 2026 Privacy Report to Congress covers the period from June 2024 to June 2026. Part I of the report describes the proposed privacy amendments, as well as the status of other privacy-related proposals to amend the Rules of Practice and Procedure. Part II of the report describes ongoing judiciary implementation efforts by the Committee on Court Administration and Case Management (CACM Committee), the Administrative Office of the U.S. Courts, and the FJC to protect privacy in court filings and opinions. Part III of the 2026 report discusses the FJC’s recent studies relating to privacy concerns in court filings.

The CACM Committee at its May 2026 meeting reviewed the draft 2026 Privacy Report to Congress and endorsed a recommendation from the Standing Committee to the Judicial Conference to approve the report (see Report of the Committee on Court Administration and Case Management, at Agenda E-6). The Standing Committee then approved the report at its meeting, to include any necessary changes to address the revisions to the privacy amendments approved by the Standing Committee or other minor stylistic or technical changes.

Recommendation: 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, as set forth in Appendix A, and ask the Administrative Office Director to transmit it to Congress in accordance with the law.

FEDERAL RULES OF APPELLATE PROCEDURE

Amendments Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules recommended for final approval proposed amendments to Appellate Rules 15, 29, and 32 and to the Appendix of Length Limits. The Standing Committee unanimously approved the Advisory Committee’s recommendations, with minor revisions correcting the placement of a sentence in the committee note to Rule 15 and correcting cross-references in Rules 29 and 32(g) and the Appendix of Length Limits.

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

The proposed amendments to Rule 15 address issues that may arise when a petition for review or enforcement of an agency decision is filed prematurely. In circuits that apply the “incurably premature” doctrine, if a pending motion to reconsider an agency decision makes the decision unreviewable in the court of appeals, then a new petition to review that agency decision must be filed in the court of appeals once the agency decision becomes final. The proposed amendments to Rule 15 would eliminate the need to refile the petition by adding a subdivision providing that the original petition for review becomes effective upon the agency’s disposition of the last reconsideration request. These changes would align Rule 15 with Rule 4(a)(4)(B)(i), which relates to the effectiveness of a notice of appeal filed after a judgment is entered or announced in the district court, but before the district court disposes of certain post-judgment motions authorized under the Federal Rules of Civil Procedure. The proposed amendment also makes clear that it applies only when the agency order is “otherwise reviewable.”

Rule 29 (Brief of an Amicus Curiae)

At its September 2025 session, the Judicial Conference approved final amendments to Rule 29, together with conforming amendments to Rule 32 and the Appendix of Length Limits, and authorized their transmittal to the Supreme Court with a recommendation that they be

adopted by the Court and transmitted to Congress in accordance with the law (JCUS-SEP 2025, p. 20). The amendments addressed several issues with respect to the contents of amicus briefs, particularly as to required disclosures of relationships between the amicus and parties or nonparties. In particular, the amendments would have required disclosure of whether a party or its counsel has a majority ownership interest in or majority control of an amicus. In addition, whereas the current rule requires disclosure of whether any nonparty (other than the amicus, its members, or its counsel) contributed money intended to fund preparation or submission of the brief, the proposed amendments would have limited this disclosure requirement to instances in which the amount contributed or pledged to be contributed is greater than \$100. The proposed amendments also would have added a broader disclosure concerning the background of the amicus—including its identity, history, experience, and interest. Finally, the proposed amendments would have imposed an express word limit of 6,500 words on amicus briefs at the initial merits stage rather than reference to “one half the maximum length authorized . . . for a party’s principal brief.”

After the amendments were transmitted to the Supreme Court, the Executive Committee of the Judicial Conference raised concerns about a provision in what was then proposed Rule 29(e) relating to disclosures as to new members of amicus organizations. That provision would have obligated amicus organizations to disclose brief-related contributions or pledges over \$100 not only from nonmembers, as the current rules require, but also from relatively new members who joined the organization within the previous 12 months. The Executive Committee noted that this provision could interfere with the privacy of those organizations and of their members, who may be chilled from contributing to their organization’s amicus briefs if they were required to announce their membership to the public. Additionally, after transmission to the Supreme Court, two other ambiguities or errors were separately identified in the proposed amendments:

first, a potential ambiguity in what was then proposed Rule 29(d) regarding what required disclosures a party or counsel must make when an amicus is required to disclose certain information but fails to do so; and second, an unrevised cross-reference in the Appendix of Length Limits. To address the Executive Committee's concerns and to make appropriate corrections, the Advisory Committee and the Standing Committee voted in March 2026 to withdraw the amendment package, and the proposed amendments were not forwarded to Congress.

After further consideration by the Advisory Committee and the Standing Committee, the revised proposed amendments to Rules 29 and 32 and the Appendix of Length Limits are presented for approval. Specifically, the Advisory Committee and Standing Committee removed the requirement of new-member contribution disclosure from the proposed amendments to Rule 29 and corrected the identified ambiguity by clarifying that the requirement that parties and counsel disclose information that an amicus must but has failed to disclose does not extend to information about nonmember contributions. The Advisory Committee further determined that republication of the amendments to Rule 29, with the conforming changes to Rule 32 and the Appendix of Length Limits, was not required given the extensive public comment on the issue of member disclosures and the technical nature of the additional revisions.

The remainder of the proposed amendments to Rule 29, as revised, are the same.

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

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

Recommendation: That the Judicial Conference approve the proposed amendments to Appellate Rules 15, 29, and 32 and to the Appendix of Length Limits, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

Rule 25 (Filing and Service)

As part of the proposed SRL rules package, the Advisory Committee on Appellate Rules recommended that a proposed amendment to Rule 25 be published for public comment in August 2026. The Standing Committee unanimously approved the Advisory Committee's recommendation.

The proposed amendments to Appellate Rule 25 provide that an unrepresented party is presumptively authorized to use the court's electronic-filing system to file documents in the case and receive notice of case filings. The proposed amendments further provide that a court may set reasonable conditions on an unrepresented party's access to the court's electronic-filing system, but a court may not bar all unrepresented parties from using a court's electronic-filing system unless the court either includes reasonable exceptions to the prohibition or permits unrepresented parties to use another electronic method for filing documents and for receiving notice of court filings and orders. Finally, the proposed amendment would eliminate the requirement for an unrepresented party (who files other than through the court's electronic-filing system) to make a separate (paper) service on a litigant who is registered to receive notice of case activity from the court's electronic-filing system. Service by the notice of case activity is not effective if the filer learns that the filing did not reach the person to be served. In addition, the proposed amendment provides that a court may require by local rule or court order a different method of service for filings under seal and/or filings that initiate a proceeding in the court of appeals under Rule 5, 6(c), 15, or 21.

Information Items

The Advisory Committee met on April 16, 2026. In addition to the recommendations discussed above, the Advisory Committee discussed several other issues, including continuing its consideration of possible amendments to Rule 25 (Filing and Service) to require complete redaction of taxpayer identifying information and the use of pseudonyms for minors, so that some of the exemptions from privacy requirements at the trial level (Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1) would not carry forward on appeal. The Advisory Committee also continues its consideration of potential amendments to Rule 4 (Appeal as of Right—When Taken) regarding reopening the time to appeal, Rule 8 (Stay or Injunction Pending Appeal) regarding limits on administrative stays, and a possible new Rule 12.2 regarding intervention on appeal, as well as the treatment of tribes in the Appellate Rules. Finally, the Advisory Committee considered several new issues including a possible amendment to Rule 28 (Briefs) regarding introductions in briefs.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Amendments Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules recommended for final approval amendments to Bankruptcy Rule 2002 and amendments to Official Forms 101 and 106C. The Standing Committee unanimously approved the Advisory Committee’s recommendations.

Rule 2002 (Notices)

The proposed amendment to Rule 2002(o) would simplify the caption of most notices given under Rule 2002 by requiring that they include only the information required by Form 416B (the court’s name, the debtor’s name, the case number, the chapter under which the case was filed, and a brief description of the document’s character) rather than the more extensive information required under Rule 1005. As noted in the 2026 Privacy Report to

Congress, this change would mean that most Rule 2002 notices would no longer be required to include the last 4 digits of the debtor's social-security or individual taxpayer-identification number.

Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy)

The proposed amendment to Official Form 101 relates to the prompt in Question 4 in Part 1 and clarifies that the question is attempting to elicit only the Employer Identification Number (EIN), if any, of the individual filing for bankruptcy and not the EIN of any other person (such as the debtor's employer). The modification will help debtors avoid the error of providing their employer's EIN. Because multiple debtors have the same employer, deterring such debtors from erroneously providing their employer's EIN will avoid triggering an erroneous automated report that the debtor has engaged in repeat filings.

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

The proposed amendment to Form 106C requires the debtor to add the total dollar value of the exemptions with a specific amount claimed under Column C in the form.

Recommendation: That the Judicial Conference:

- a. Approve the proposed amendments to Bankruptcy Rule 2002, as set forth in Appendix C, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.
- b. Approve, effective December 1, 2026, the proposed amendments to Bankruptcy Official Forms 101 and 106C, as set forth in Appendix C, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

Rules Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Bankruptcy Rules 2003, 5005, 8011, 9006(f), 9036, and 9037 with a recommendation that they

be published for public comment in August 2026. The Standing Committee unanimously approved the Advisory Committee’s recommendations.

Rule 2003 (Meeting of Creditors or Equity Security Holders)

The proposed amendments to Rule 2003 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. The proposed amendments 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.

Rules 5005 (Filing Papers and Sending Copies to the United States Trustee), 8011 (Filing and Service; Signature), 9006(f) (Computing and Extending Time; Motions), and 9036 (Electronic Notice and Service)

As part of the SRL rules package, the proposed amendments to Rules 5005 and 8011 would provide that unrepresented individuals are presumptively authorized to use the court’s electronic-filing system to file documents. The proposed amendments would permit courts to set reasonable conditions and restrictions on access by unrepresented individuals to the court’s electronic-filing system. However, the proposed amendments would not permit a bar on all unrepresented individuals from using a court’s electronic-filing system, unless the court also either includes reasonable exceptions to the prohibition, or permits unrepresented individuals to use another electronic method for filing documents and an alternative electronic means for receiving notice of court filings and orders.

In addition, the proposed amendments to Rule 8011 would make service via a court’s electronic-filing system the primary means of service. The proposed amendments would eliminate the requirement of separate (paper) service (of papers filed other than through the court’s electronic-filing system) on a litigant who is registered to receive a notice of case activity

from the court's electronic-filing system. However, service by a court's electronic-filing system is not effective if a filer learns that it did not reach the person to be served. Further, the proposed amendments provide that if a document is filed under seal, a court may provide an order or local rule that the document be served by other means.

The proposed amendments to Rule 9006 would change a cross-reference to conform the rule to match proposed amendments to Civil Rule 5.

The proposed amendments to Rule 9036 would address filings by unrepresented individuals, providing that because documents filed in paper form are uploaded by the court 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. In addition, Rule 9036(d), like Rule 8011(c)(3), deals with the impact of delays between filing and uploading to the court's electronic-filing system.

Rule 9037 (Protecting Privacy for Filings)

As part of the package of proposed privacy amendments, the proposed amendments to Bankruptcy Rule 9037 share two features with the proposed amendments to Criminal Rule 49.1 and Civil Rule 5.2. First, the proposed amendments would make clear that the redaction requirement applies to attachments, exhibits, and all other documents in a court filing. Second, the proposed amendments would require the use of pseudonyms for minors. Because of the unique context of bankruptcy proceedings and practice, the proposed amendments do not adopt the complete redaction requirement for taxpayer identifying information or the extension of the redaction requirement to EINs that is proposed in the privacy amendments to the civil and criminal rules.

Information Items

The Advisory Committee on Bankruptcy Rules met on April 15, 2026. In addition to the recommendations discussed above, the Advisory Committee discussed several matters, including continued consideration of a suggestion to amend Rule 9031 (Using Masters Not Authorized) to permit the use of special masters in bankruptcy cases and new suggestions regarding possible amendments to Rule 4004 (Granting or Denying a Discharge) and possible amendments to Form 106C (Schedule C: The Property You Claim as Exempt (individuals)).

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules recommended for final approval proposed amendments to Civil Rules 7.1, 26, 41(a), 45(b), 45(c), and 81. After minor clarifying revisions to the proposed amendments to Rules 26 and 45(b), the Standing Committee unanimously approved the Advisory Committee's recommendations.

Rule 7.1 (Disclosure Statement)

The proposed amendment to the disclosures required under Rule 7.1(a)(1) requires any party or would-be intervenor that is a private business organization to disclose any publicly held business organization that “directly or indirectly” owns 10 percent or more of the party or intervenor. The proposal responds to concerns raised that the current rule, which requires disclosure only of “any parent corporation and any publicly held corporation owning 10 percent or more of its stock,” may result in nondisclosure of a “grandparent” corporation. This change is intended to assist judges in evaluating if recusal is appropriate consistent with updated guidance in Committee on Codes of Conduct Advisory Opinion No. 57, which explains that corporate ownership of at least 10 percent of a party creates a rebuttable presumption of parental control and that a judge must recuse if they “conclude that a party is controlled by a corporation in which

the judge owns stock.” Another change substitutes the term “business organization” for the word “corporation” to clarify that the disclosure requirement applies to different forms of business entities.

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

The proposed amendment to Rule 26(a) relating to pretrial disclosures requires disclosure of the party’s expectation as to whether each of its witnesses’ testimony will be in person or remote. The Committee made a minor revision to the language in the proposed amendment to clarify that it relates only to the party’s expectations as to whether testimony will be in person or remote at the time the disclosure is made.

Rule 41(a) (Dismissal of Actions)

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

Rule 45(b) (Subpoena—Service)

The proposed amendment to Rule 45(b) clarifies how a subpoena for testimony may be served and whether the witness fee must be tendered simultaneously with service. The proposed amendment borrows two methods of service from Rule 4(e)(2)’s methods for serving a complaint on an individual—personal service or leaving a copy at the individual’s dwelling or usual place of abode with someone of suitable age and discretion who resides there. The proposed amendment also adds an additional method of service through the mail or commercial carrier if confirmation

of actual receipt can be provided, and further authorizes the court to approve another means of service for good cause. The proposed amendment also includes two other changes: (1) relaxing the current requirement that witness fees be tendered at the time of service, and (2) providing a 14-day notice period (subject to shortening by the court for good cause) when the subpoena requires attendance at a trial, hearing, or deposition. The Committee made a minor revision to the language in the proposed amendment to move clarifying language in the committee note into the rule text relating to confirmation of actual receipt when a subpoena is served by mail or commercial carrier.

Rule 45(c) (Subpoena—Remote Testimony)

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

Rule 81 (Jury Demand After Removal)

The proposed amendment to Rule 81(c) would provide that a jury demand must always be made after removal if no such demand was made before removal and a party desires a jury trial. It would also set the time limit to make the required demand.

Recommendation: That the Judicial Conference approve the proposed amendments to Civil Rules 7.1, 26, 41, 45, and 81, as set forth in Appendix D, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The Advisory Committee on Civil Rules submitted proposed amendments to Civil Rule 5 with conforming amendments to Rule 6(d), and Civil Rule 5.2, with a recommendation that they be published for public comment in August 2026. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rules 5 (Serving and Filing Pleadings and Other Papers) and 6(d) (Computing and Extending Time; Time for Motion Papers)

As part of the SRL rules package, the proposed amendments to Rule 5 are generally consistent with the proposed amendments to the Bankruptcy Rules and the Criminal Rules and would presumptively allow unrepresented parties in civil cases 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. The courts would be expressly authorized to impose reasonable conditions and restrictions on electronic access. However, the proposed amendments would prevent a court from barring all self-represented litigants from using the court's electronic-filing system unless the prohibition either included reasonable exceptions or was paired with another electronic method for filing papers and receiving notice.

The proposed amendments to Rule 5 retain the existing authority to require electronic filing by a self-represented litigant by case-specific order or by local rule with reasonable exceptions. Additionally, Rule 5 would state that no certificate of service is required when service occurs through the court's electronic-filing system under the amended provisions, although service by a court's electronic-filing system is not effective if a filer learns that it did not reach the person to be served. Further, the proposed amendments provide that if a document is filed under seal, a court may provide by order or local rule that the document be served by other means. Finally, proposed amended Rule 5 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, and deals with the impact of delays between filing and uploading to the court's electronic-filing system.

The proposed amendments to Rule 6 would conform cross-references to Rule 5.

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

As part of the package of proposed privacy amendments, the proposed amendments to Civil Rule 5.2 are generally consistent with the changes to Criminal Rule 49.1 and require complete redaction of social security numbers (SSNs) and individual taxpayer identification numbers (ITINs), as well as EINs and adoption taxpayer identification numbers in civil cases. The proposed amendments to Rule 5.2 would further require the use of pseudonyms when a filed document references a person who is a minor at the time of filing. Finally, the proposed amendments would clarify that the redaction requirements apply to all documents in the court filing, including exhibits and attachments. The proposed committee notes make clear, however, that existing exemptions to the redaction requirement, or additional redactions required pursuant to a protective order, are not altered by the proposed amendment.

Information Items

The Advisory Committee on Civil Rules met on April 14, 2026. In addition to the matters discussed above, the Advisory Committee continued to discuss proposals to require disclosures regarding third-party litigation funding and to amend Rule 43 (Taking Testimony) to relax the standards governing permission for remote testimony. The Advisory Committee also continues to study suggestions relating to Rule 23 (Class Actions), Rule 35 (Physical and Mental Examinations), and Rule 58's "Separate Document" requirement.

The Advisory Committee decided to remove from its agenda proposals concerning Fair Labor Standards Act collective actions, artificial intelligence "hallucinations," algorithmic

spoliation of discoverable material, protective order templates, and mandatory assistance for self-represented litigants.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules recommended for final approval proposed amendments to Criminal Rule 17. The Standing Committee unanimously approved the Advisory Committee's recommendation after rephrasing proposed paragraph (c)(6), making a minor stylistic change to the rule, and clarifying the committee note (as described below).

Rule 17 (Subpoena)

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

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

Other proposed amendments to Rule 17 clarify when a party must file a motion requesting the court's permission to serve a subpoena for production of documents: when the subpoena requests personal or confidential information about a victim, when the subpoena is

requested by a self-represented party, or when a local rule or court order requires a motion.

When no motion is required, a party may serve a subpoena for production on an ex parte basis.

When a motion is required, the proposed amendments provide that the court “must” allow a party to file it ex parte if good cause is shown. The proposed amendments further address ex parte subpoena practice by setting a default rule that a party need not disclose its subpoena to another party if no motion is required.

The proposed amendments also state the circumstances under which the recipient of the subpoena must produce the designated items to the court rather than directly to the requesting party. In addition, the amendments address the disclosure of material produced in response to a subpoena, disapproving the practice in some courts in which all produced items must be provided to the opposing party, regardless of whether the items would otherwise be subject to discovery. By providing that the rule does not require the disclosure of produced items to a party that did not request the subpoena, the proposed amendments seek to ensure that Rule 17 is not interpreted to disturb the law regulating disclosure between the parties found in Rule 16 and elsewhere. Finally, the proposed amendments clarify, as to each subdivision of Rule 17, whether it applies to subpoenas for testimony, subpoenas for production, or both.

The Standing Committee rephrased proposed paragraph (c)(6) to make clear that Rule 17 does not require disclosure of produced items to a party that did not request them and does not alter existing disclosure and discovery requirements. It revised the corresponding section of the committee note to clarify that the amendments to Rule 17 do not modify existing law regarding the timing of any disclosures.

Recommendation: That the Judicial Conference approve the proposed amendments to Criminal Rule 17, as set forth in Appendix E, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The Advisory Committee on Criminal Rules submitted proposed amendments to Rule 11 (with conforming amendments to Rule 32), Rule 49 (with conforming amendments to Rule 45(c)), and Rule 49.1, with a recommendation that they be published for public comment in August 2026. The Standing Committee unanimously approved the Advisory Committee’s recommendations, with revisions to clarify language in the text of the rule (as described below).

Rule 11 (Pleas)

Rule 11(b)(1)(M) requires the court to advise the defendant at the plea proceeding of “the court’s obligation to . . . consider . . . possible departures under the Sentencing Guidelines.” However, the 2025 amendments to the U.S. Sentencing Commission Guidelines Manual deleted most of the provisions in Chapter Five, Part K (Departures), and 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).” The proposed amendment to Rule 11(b)(1)(M) would remove the reference to “possible departures under the Sentencing Guidelines,” thus reflecting the current two-step sentencing process. The Standing Committee revised the proposed rule text to ensure that defendants would continue to be advised of the court’s obligation to calculate and consider the sentencing-guideline range.

Rule 32 (Sentencing and Judgment)

Rule 32(h) requires the court to provide the parties with reasonable notice of a possible departure from the Sentencing Guidelines range on a ground not identified for departure in the presentence report or in a party’s prehearing submission. Because the Sentencing Guidelines no longer employ the concept of departures, the proposed

amendment to Rule 32 would eliminate subdivision (h). To avoid re-lettering the remainder of the rule, subdivision (h) would be reserved.

Rules 49 (Serving and Filing Papers) and 45(c) (Computing and Extending Time)

As part of the SRL rules package, the proposed amendments to Rule 49 and conforming amendments to Rule 45(c) are generally consistent with the proposed amendments to the Bankruptcy and Civil Rules regarding electronic filing and service by self-represented litigants. The proposed amendments to Rule 49 would allow self-represented parties 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. They would expressly authorize courts to impose reasonable conditions and restrictions on electronic access. However, the proposed amendments would prevent a court from barring all self-represented litigants from using the court's electronic-filing system unless the prohibition either included reasonable exceptions or was paired with another electronic method for filing papers and receiving notice. Unlike the Bankruptcy and Civil Rules, and in accordance with the current Criminal Rule, proposed amended Rule 49 would not authorize a court to require self-represented litigants to file electronically.

The proposed Rule 49 amendments 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, although service by a court's electronic-filing system is not effective if a filer learns that it did not reach the person to be served. Further, the proposed amendments provide that if a document is filed under seal, a court may provide by order or local rule that the document be served by other means. The amendments also provide that no certificate of service is required when service occurs through the court's electronic-filing system under the amended provisions.

Criminal Rule 45(c) would be amended to conform cross-references to Rule 49.

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

As part of the package of proposed privacy amendments, the proposed amendments to Rule 49.1 addresses two privacy-related issues—redaction of taxpayer-identification information and the use of pseudonyms for minors—in criminal filings that are available to the public through the judiciary’s electronic-filing system. These proposed amendments are consistent with the proposed amendments to the parallel privacy provisions in Civil Rule 5.2.

First, the proposed amendment requires complete redaction of taxpayer identifying information rather than redaction of all but the last four numbers. Second, the proposed amendments expand the covered taxpayer identifying information that must be redacted to include not only SSNs and ITINs, but also EINs. Third, the proposed amendment clarifies that the redaction requirement applies not only to pleadings and briefs, but also any attachments and exhibits. Fourth, the proposed amendment changes the requirement to provide initials for minors when they are referenced in filings and would now require the use of a pseudonym.

Information Items

The Advisory Committee on Criminal Rules met on April 29, 2026. In addition to the matters discussed above, the Advisory Committee continued its discussions regarding proposed amendments to 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 proposed revisions to Rule 15, which governs depositions.

FEDERAL RULES OF EVIDENCE***Rules Recommended for Approval and Transmission***

The Advisory Committee on Evidence Rules recommended for final approval proposed amendments to Evidence Rule 609. The Standing Committee unanimously approved the Advisory Committee's recommendations.

Rule 609 (Impeachment by Evidence of a Criminal Conviction)

The proposed amendment to Rule 609(a)(1)(B) addresses the standard under which evidence of prior convictions not based on falsity may be introduced to attack a testifying criminal defendant's character for truthfulness. Under the proposed amendment, evidence of a non-falsity based prior conviction would not be admissible to impeach a criminal defendant unless its probative value "substantially" outweighs the risk of unfair prejudice to the defendant. The proposed amendment would result in the provision becoming more exclusionary, because many courts have erred in allowing broad impeachment with prior non-falsity based convictions, contrary to the original intent of the rule—a problem compounded by the fact that a ruling admitting convictions is not appealable unless the defendant takes the stand and gets impeached. With this amendment, the Advisory Committee aims to reduce the risk that Rule 609 will unduly deter criminal defendants from exercising their right to testify. In addition, the proposed amendment to Rule 609(b) would clarify that the 10-year time period for the rule's applicability is measured from the date of conviction or end of confinement, whichever is later, until the date of trial.

In August 2026, the Executive Committee, during its preparation of the proposed discussion and consent calendars for the September 2026 Judicial Conference session, called the Standing Committee's attention to several concerns with the proposed amendments and

requested further examination. The Executive Committee’s concerns relate primarily to the explanations in the committee note for inserting the word “substantially” into the rule. If changes are made to the committee note to address those concerns, then the question becomes what justifies the proposed change to the rule. These concerns include the following:

- First, the Executive Committee raised concerns that Congress in enacting Rule 609(a) did not impose “a reverse balancing test” as stated in the committee note. Instead, Congress imposed a neutral balancing test allowing admissibility “if the probative value of the evidence *outweighs* its prejudicial effect” (emphasis added). In the Executive Committee’s view, the proposed amendment would create a presumption of inadmissibility contrary to the intent of Congress reflected in the text of the rule adopted in 1975.
- Second, the Executive Committee raised concerns about language in the proposed committee note that the new proposed test “is more protective so as not to infringe on the accused’s constitutional right to testify.” The Executive Committee does not believe that the Supreme Court has held that impeachment by prior felony conviction infringes on a constitutional right to testify.
- Third, the Executive Committee raised concerns about the fourth paragraph of the proposed committee note, which may be perceived as setting forth rule-like guidance rather than explaining the proposed rule. Specifically, the paragraph purports to guide district courts on how to admit “evidence of a criminal conviction” without a rule to support the guidance.

In response to these concerns, the Standing Committee in August 2026 unanimously voted to withdraw the recommendation and to return the proposal to the

Advisory Committee on Evidence Rules to allow it to further consider the proposed amendments in light of these concerns.

Rules Approved for Publication and Comment

The Advisory Committee on Evidence Rules submitted proposed amendments to Rules 902 and 104 with a recommendation that they be published for public comment in August 2026. The Standing Committee unanimously approved the Advisory Committee's recommendations with a minor revision to Rule 104.

Rule 902 (Evidence That Is Self-Authenticating)

The proposed amendment to Rule 902 would add Indian Tribes and Nations to the list of entities in Rule 902(1)(A) whose public records are self-authenticating, as the Advisory Committee saw no reason to differentiate the Tribes and Nations from the many other government entities whose records are currently self-authenticating under the rule.

Rule 104 (Preliminary Questions)

The proposed amendment to Rule 104(a) would codify 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 proposed amendments to Rule 104(b) would eliminate the 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. In addition, the proposed amendments would eliminate the phrase “proof sufficient to support a finding” from Rule 104(b); but the rule does not change the standard of proof established by the Supreme Court in *Huddleston v. United States*, 485 U.S. 681, 687 (1988), that the court must decide whether the “jury could reasonably find” that the evidence is relevant.

Information Items

The Advisory Committee met on May 7, 2026. In addition to the recommendations discussed above, the Advisory Committee discussed several other issues, including continued consideration of a possible New Rule 707 to address evidence that is the product of artificial intelligence and a possible new subsection (c) in Rule 901 (Authenticating or Identifying Evidence) to address deepfake evidence. Finally, the Advisory Committee considered the implications of *Smith v. Arizona* on Rule 703 (Bases of an Expert’s Opinion Testimony).

Respectfully submitted,

A handwritten signature in black ink that reads "James C. Dever III". The signature is written in a cursive, flowing style.

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
Amul Thapar
Bart H. Williams

* * * * *



Date: August 27, 2026

To: Advisory Committees on Rules of Practice and Procedure

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

Re: Federal Judicial Center Research and Education

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

RESEARCH

Completed Research for 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. In a memorandum submitted to the committee in time for its spring 2026 meeting, the Center reported fifteen occurrences of a deepfake challenge.

Current Research for Rules Committees

Depositions in Criminal Litigation

The Criminal Rules Committee is considering amendments to Rule 15 on depositions in criminal litigation following suggestions that the rule should facilitate more depositions. The Center has been asked to prepare research protocols.

Subpoenas in Criminal Litigation

The Criminal Rules Committee has asked the Center to prepare research on Rule 17 subpoenas in light of amendments approved by the Standing Committee that are expected to go into effect in December 2027.

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 disparate applications of the rule. A subcommittee has approved a research plan to gather information on current interpretations and implementations of the rule.

Third-Party Litigation Funding

The Center is providing the Civil Rules Committee with research support as the committee considers possible rules amendments on disclosure of litigation funding by third parties.

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 Other Judicial Conference Committees

Unredacted Personally Identifiable Information in Federal Court PACER Documents

At the request of the Committee on Court Administration and Case Management, the Center (1) enumerated, in a large sample of public filings, unredacted Social Security numbers, individual taxpayer identification numbers, birthdates, minors' names, financial account numbers, and, in criminal cases, individuals' home addresses; (2) determined whether unredacted personally identifiable information is more common in particular types of court filings and proceedings, especially pro se filings, guardian ad litem documents, filings in Social Security actions, notices of removal from state court, and proof-of-claim filings in bankruptcy cases; and (3) assessed how often full nongovernment party names are included in opinions and orders in Social Security and immigration cases (www.fjc.gov/content/399402/unredacted-personally-identifiable-information-federal-court-pacer-documents).

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.

Potential Adjustment to the Case Weight for Mega Chapter 11 Cases

Following the Center's recently updated 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 targeted study to determine whether the weight for mega Chapter 11 cases should be modified to address the level of activity in those cases and to account for the number of jointly administered cases under a lead mega Chapter 11 case.

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.

JUDICIAL GUIDES

Completed Judicial Guide

Manual on Recurring Issues in Criminal Trials

The seventh edition of what previously was called *Manual on Recurring Problems in Criminal Trials* was published in July (www.fjc.gov/content/400176/manual-recurring-issues-criminal-trials). The manual addresses seven topics: Sixth Amendment rights, jury issues, witness statements and exculpatory evidence, enforcement of trial orders, trial performance of counsel, multiple defendants, and jury verdicts.

Judicial Guide 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).

HISTORY

Court of Appeals in Cases of Capture, 1780–1789

The Center’s history webpages include information about various special federal courts, including the local courts for the District of Columbia, the Foreign Intelligence Surveillance Court, and the U.S. Court for Berlin (www.fjc.gov/history/courts/other-federal-courts). Recently added is information about the first federal court, the Court of Appeals in Cases of Capture, which heard appeals from state-court cases seeking maritime prizes (www.fjc.gov/history/courts/court-appeals-in-cases-capture-1780-1789).

Spotlight on Judicial History

Since 2020, the Center has posted twenty-seven short essays about judicial history on a variety of topics (www.fjc.gov/history/spotlight-judicial-history). Recently posted is “Early Radio in the Federal Courts” (www.fjc.gov/history/spotlight-judicial-history/early-radio-in-federal-courts).

Summer Institute for Teachers

In June 2026, the Center collaborated with the ABA to present a weeklong professional-development conference for teachers, focusing on three famous historical trials: Sedition Act Trials, *U.S. v. Guiteau*, and *Clay v. United States*. The Center presents information about these and other famous federal trials on its website (www.fjc.gov/history/cases/famous-federal-trials).

EDUCATION

Specialized Workshops

Workshop on Science-Informed Decision Making

This three-day workshop provided judges and probation and pretrial-services officers with insights from behavioral sciences on decision making in ordinary criminal cases.

The Constitution and the Courts at the 250th

This two-day workshop offered in collaboration with the National Constitution Center explored a variety of perspectives in the early national period about the best approach to interpret and implement the Constitution.

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 to Court: Access to the Courts—Electronic Filing for Pro Se Litigants

In this episode of the Center’s periodic series of short documentaries, the District of Maryland and the Northern District of Illinois share their experiences with electronic filing by pro se litigants. A supplemental compilation of all ninety-four district courts’ related local rules and procedures was published in 2025: “United States District Courts’ Local Rules and Procedures on Electronic Filing by Self-Represented Litigants” (www.fjc.gov/content/391989/united-states-district-courts-local-rules-and-procedures-electronic-filing-self).

Court Web

This periodic webcast included as recent episodes “Generative Artificial Intelligence and the Federal Judiciary” (featuring Professor Gary Marchant, Arizona State University Sandra Day O’Connor College of Law Center for Law, Science and Innovation and Southern District of West Virginia Chief Judge Frank W. Volk), “Commemorating the 75th Anniversary of Judge J. Waties Waring’s Visionary Dissent in *Briggs v. Elliott*” (featuring District of South Carolina Judge Richard Gergel), and “Navigating the Labyrinth: Immigration Court Fundamentals” (featuring District of Utah Magistrate Judge Dustin B. Pead).

Supreme Court Term in Review for Bankruptcy Judges

This annual webcast discusses some of the most significant Supreme Court decisions, including key bankruptcy cases.

Consumer Case-Law Update for Bankruptcy Judges

This quarterly webcast features discussions of consumer-bankruptcy case-law updates prepared 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).

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 the session “How the Federal Judicial Center’s Research Division Supports the Bankruptcy Courts.”

Mid-Career Seminar for U.S. Magistrate Judges

In partnership with the University of California, Berkeley Law School, the Center has developed this two-day program for magistrate judges with roughly eight to twelve years of experience.

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.

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2026

Current Step in REA Process:

- Transmitted to Congress (Apr 2026)

REA History:

- Transmitted to Supreme Court (Oct 2025)
- Approved by the Judicial Conference (Sept 2025)
- Approved by Standing Committee (June 2025 unless otherwise noted)
- Published for public comment (Aug 2024 – Feb 2025 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP Form 4	The proposed amendments to Form 4 simplify the form to reduce the burden on individuals seeking <i>in forma pauperis status</i> (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.	BK 9006
BK 3018	The proposed amendments to Rule 3018(c) 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) provide an additional reminder notice to 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 Rule 9006 to the proposed amendments to Rule 1007.	BK 1007
BK 9014	The proposed amendments to Rule 9014(d) relax the standard for allowing remote testimony in contested matters to "cause and with appropriate safeguards." The existing rule imports Civil Rule 43(a), requiring a showing of "good cause in compelling circumstances and with appropriate safeguards") and applies in contested matters and adversary proceedings.	BK 7043; 9017
BK 9017	The proposed amendments to Rule 9017 remove the reference to Civil Rule 43 to conform to the proposed amendments to Rule 9014(d) and new Rule 7043.	BK 7043; 9014(d)
BK 7043	New Rule 7043 provides that the standard set forth in Civil Rule 43 applies to remote testimony in adversary proceedings.	BK 9014; 9017
EV 801	The proposed amendments to Rule 801(d)(1)(A) provide that all prior inconsistent statements admissible for impeachment are also admissible as substantive evidence, subject to Rule 403.	

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2027		
<u>Current Step in REA Process:</u> - Approved by Standing Committee (June 2026 unless otherwise noted)¹ <u>REA History:</u> - Published for public comment (Aug 2025 – Feb 2026 unless otherwise noted) - Approved for publication by Standing Committee (June 2025 unless otherwise noted)		
Rule	Summary of Proposal	Related or Coordinated Amendments
AP 15	The proposed amendment to Rule 15 would remove the requirement that a party who files a petition for review of an agency order must refile or amend the petition after filing a request for rehearing before the agency.	
AP 29	The proposed amendments to Rule 29 set forth in renumbered Rule 29(a)-(d) would expand the disclosure obligations in amicus briefs filed at the initial stage of an appeal. Among other things, the amicus brief would be required to disclose whether the amicus is newly created and other information relating to its relationship to a party (such as whether a party has a majority ownership interest in the amicus) and nonparties (such as earmarked contributions to the amicus of more than \$100). Rule 29(e) incorporates most of these expanded disclosures to amicus briefs filed during the rehearing stage. The proposed amendments also set the length limit for amicus briefs at the initial stage to a specific word limit of 6,500 words.	AP 32; Appendix of Length Limits
AP 32	The proposed amendments to Rule 32 conform to the proposed amendments to Rule 29.	AP 29; Appendix of Length Limits
AP Appendix of Length Limits	The proposed amendments to the Appendix of Length Limits conform to the proposed amendments to Rule 29.	AP 29; 32
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 clarify that the requested EIN (employer identification number) is the debtor's EIN and not the EIN of any separate legal entity such as an employer, corporation, partnership, or LLC.	
BK Official Form 106C	The proposed amendments to Form 106C would amend Form 106C to provide a total of the specific-dollar exemption amounts	

¹ Proposed amendments to Evidence Rule 609 were approved by the Standing Committee in June 2026, but approval was subsequently withdrawn in August 2026 to allow the Advisory Committee on Evidence Rules to further consider the proposed amendments.

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2027

Current Step in REA Process:

- Approved by Standing Committee (June 2026 unless otherwise noted)¹

REA History:

- Published for public comment (Aug 2025 – Feb 2026 unless otherwise noted)
- Approved for publication by Standing Committee (June 2025 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
CR 17	The proposed amendments to Rule 17 address third-party subpoenas for production. Among other things, the proposed amendments would expand the availability of such subpoenas for proceedings other than trial; alter the standard for when such subpoenas may be obtained; and address when a motion and order are required for third-party subpoenas and when a party may make its request <i>ex parte</i> . The proposed amendments would further address the place of production, procedures when information regarding a victim is sought, and other issues.	
CV 7.1	The proposed amendments to Rule 7.1(a) would 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 would require parties to state in their pretrial disclosures whether they expect any witness they call at trial to testify in person or remotely.	CV 45(c)
CV 41	The proposed amendments to Rule 41(a) would clarify that the rule permits the dismissal of one or more claims in an action rather than only allowing dismissal of the entire action and that 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(b) would 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) would add a “place of compliance” for subpoenas for remote testimony and would specify that it is “the location where the person is commanded to appear in person.”	CV 26
CV 81	The proposed amendment to Rule 81(c) would clarify 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.	

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2028

Current Step in REA Process:

- Published for public comment (Aug 2026 – Feb 2027 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (June 2026 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 25	The proposed amendments to Rule 25 would provide that an unrepresented party is presumptively authorized to use a court's electronic-filing system, subject to any reasonable conditions on access that a court may establish. This change would allow unrepresented litigants to file documents electronically and receive electronic notices of case activity. The proposed amendments would eliminate the requirement for an unrepresented party to make a separate (paper) service on a litigant who is registered to receive a notice of case activity from the court's electronic-filing system.	BK 5005, 8011, 9006, 9036; CV 5, 6; CR 45, 49
BK 2003	The 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. The proposed amendments 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.	
BK 5005, 8011, 9006, & 9036	The proposed amendments to Rules 5005 and 8011 would provide that an unrepresented party is presumptively authorized to use a court's electronic-filing system in bankruptcy cases and bankruptcy appeals, subject to any reasonable conditions on access that a court may establish. In addition, the proposed amendments to Rule 8011 and Rule 9036 would eliminate the requirement of separate (paper) service on a litigant who is registered to receive electronic notices of case activity. Further, the proposed amendments would provide that if a document is filed under seal, a court may provide an order or local rule that the document be served by other means. In addition, Rule 8011(c)(3) and Rule 9036(d) would deal with the impact of delays between filing and uploading to the court's electronic-filing system. The proposed amendments to Rule 9006 would change a cross-reference to conform to the proposed amendments to Civil Rule 5.	AP 25; CV 5, 6; CR 45, 49
BK 9037	The proposed amendments to Rule 9037 would require the use of pseudonyms rather than initials when referencing minors in bankruptcy cases, and would clarify that the redaction and pseudonym requirements apply to exhibits and attachments to electronically filed court documents.	CV 5.2; CR 49.1
CV 5 & 6	The proposed amendments provide that an unrepresented party is presumptively authorized to use a court's electronic-filing system, subject to any reasonable conditions on access that a court may establish. This change would allow unrepresented litigants to both file documents electronically and receive notices of case activity and would eliminate the requirement for an unrepresented party to make a separate (paper) service on a litigant who is	AP 25; BK 5005, 8011, 9006, 9036; CR 45, 49

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2028

Current Step in REA Process:

- Published for public comment (Aug 2026 – Feb 2027 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (June 2026 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
	registered to receive a notice of case activity from the court’s electronic-filing system.	
CV 5.2	The proposed amendments would require complete redaction of taxpayer identifying information, to include social security numbers, taxpayer identification numbers, employer identification numbers, and adoption taxpayer identification numbers, and would require the use of pseudonyms rather than initials when referencing minors. The proposed amendments would also clarify that these rules apply to exhibits and attachments to electronically filed court documents.	BK 9037; CR 49.1
CV 55	The proposed amendments to Rule 55(a) and (b)(1) would remove the requirement that the clerk “must” enter a default or default judgment, respectively, whenever the rules empower the clerk to do so. Instead, the proposed amendment would provide 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.	
CR 11	The proposed amendments to Rule 11(b)(1)(M) would remove the requirement that the court inform the defendant of possible departures under the U.S. Sentencing Guidelines in light of 2025 changes to the Guidelines eliminating most provisions on departures and revising the sentencing process.	CR 32
CR 32	The proposed amendment to Rule 32 would eliminate in its entirety subdivision (h) regarding possible departure from the U.S. Sentencing Guidelines in light of the 2025 changes to the Guidelines.	CR 11
CR 45 & 49	The proposed amendments to Rule 45 and Rule 49 provide that an unrepresented party is presumptively authorized to use a court’s electronic-filing system, subject to any reasonable conditions on access that a court may establish. This change would allow unrepresented litigants to both file documents electronically and receive notices of case activity and would eliminate the requirement for an unrepresented party to make a separate (paper) service on a litigant who is registered to receive a notice of case activity from the court’s electronic-filing system.	AP 25; BK 5005, 8011, 9006, 9036; CV 5, 6
CR 49.1	The proposed amendments require complete redaction of taxpayer identifying information, to include social security numbers, taxpayer identification numbers, employer identification numbers, and adoption taxpayer identification numbers in criminal cases, and would require the use of pseudonyms rather than initials when referencing minors. The proposed	BK 9037; CV 5.2

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2028

Current Step in REA Process:

- Published for public comment (Aug 2026 – Feb 2027 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (June 2026 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
	amendments would also clarify that these rules apply to exhibits and attachments to electronically filed court documents.	
EV 104	The proposed amendments to Rule 104(a) would codify the holding in <i>Bourjaily v. United States</i> that preliminary questions of fact are to be determined by a preponderance of the evidence standard. The proposed amendments to Rule 104(b) would eliminate the concept of “conditional” relevance and provide that to establish that evidence is relevant, the proponent must demonstrate that the trier of fact could reasonably find that requirements of Rule 401 have been met.	
EV 902	The proposed amendment to Rule 902(1)(A) would add Indian Tribes and Nations to the list of entities whose signed and sealed public records are self-authenticating.	

**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
Sunshine in the Courtroom Act of 2025	S. 1133 <i>Sponsor:</i> Grassley (R-IA) <i>Cosponsors:</i> Klobuchar (D-MN) Durbin (D-IL) Blumenthal (D-CT) Markey (D-MA) Cornyn (R-TX)	CR 53	Most Recent Bill Text: 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.	6/23/2026: Placed on Senate Legislative Calendar under General Orders. Calendar No. 444 6/23/2026: Reported by Senator Grassley without amendment 6/18/2026: Ordered to be reported without amendment favorably 3/26/2025: Introduced in Senate; referred to Judiciary Committee
Protecting Our Courts from Foreign Manipulation Act of 2025	H.R. 2675 <i>Sponsor:</i> Cline (R-VA) <i>Cosponsors:</i> 26 bipartisan cosponsors	CV 26	Most Recent Bill Text: https://www.congress.gov/119/bills/hr2675/BILLS-119hr2675rh.pdf Summary: Would require additional disclosures under Civil Rule 26(a) for any non-party foreign person, foreign state, or sovereign wealth fund that has a right to receive payment that is contingent on the outcome of a civil action. Would also prohibit third-party litigation funding by foreign states and sovereign wealth funds.	6/15/2026: Placed on the Union Calendar, Calendar No. 608 6/15/2026: Reported (Amended) by the Committee on Judiciary 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
Protecting Our Democracy Act	H.R. 8831 <i>Sponsor:</i> Raskin (D-MD) <i>Cosponsors:</i> 108 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

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Closing Bankruptcy Loopholes for Child Predators Act of 2026	<u>H.R. 8589</u> <i>Sponsor:</i> Ross (D-NC) <i>Cosponsors:</i> Tenney (R-NY) Sykes (D-OH) De La Cruz (R-TX)	BR 2004, 9018	Most Recent Bill Text: <u>https://www.congress.gov/119/bills/hr8589/BILLS-119hr8589ih.pdf</u> 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	<u>H.R. 8392</u> <i>Sponsor:</i> Scanlon (D-PA)	CR 48	Most Recent Bill Text: <u>https://www.congress.gov/119/bills/hr8392/BILLS-119hr8392ih.pdf</u> 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	<u>H.R. 7575</u> <i>Sponsor:</i> Goldman (D-NY) <i>Cosponsors:</i> Norton (D-DC) Gomez (D-CA) Larson (D-CT)	CR 6, 16, 48	Most Recent Bill Text: <u>https://www.congress.gov/119/bills/hr7575/BILLS-119hr7575ih.pdf</u> Summary: Would amend Criminal Rules 6 (to require the government to inform the grand jury of exculpatory evidence and things that may impact a witness's credibility), 16 (to require the government to inform the defendant of the grand jury vote) and 48 (to allow dismissal based on politically-motivated prosecution).	2/13/2026: Introduced in House and referred to Committee on the Judiciary
Litigation Funding Transparency Act of 2026	<u>S. 3826</u> <i>Sponsor:</i> Grassley (R-IA) <i>Cosponsors:</i> Tillis (R-NC) Kennedy (R-LA) Cornyn (R-TX)	CV 26	Most Recent Bill Text: <u>https://www.congress.gov/119/bills/s3826/BILLS-119s3826is.pdf</u> Summary: Would require disclosure of third-party funding in MDL, class action, and other large litigations (100+ consolidated or coordinated cases). Disclosure of the identity of the funder and the agreement must be made to the court and the parties. Would also prohibit funders from exerting control over the litigation or viewing materials produced in discovery, unless ordered otherwise by the court.	2/11/2026: Read twice and referred to the Committee on the Judiciary

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Trafficking Survivors Relief Act	H.R. 4323 <i>Sponsor:</i> Fry (R-SC) <i>Cosponsors:</i> 19 bipartisan cosponsors	CR 29	Most Recent Bill Text: https://www.congress.gov/119/plaws/publ73/PLAW-119publ73.pdf Summary: Permits 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 to the arrest and criminal proceedings be expunged from official records.	1/23/2026: Signed by President; became Public Law No. 119-73. 12/18/2025: Passed Senate without amendment by unanimous consent. 12/2/2025: Received in Senate; read twice. 12/1/2025: Passed by voice vote 10/17/2025: Placed on the Union Calendar, Calendar No. 299 9/10/2025: Committee Consideration and mark-up Session Held. Ordered to be Reported (Amended) by Voice Vote 7/10/2025: Introduced in House and referred to Committee on the Judiciary
Protecting TPLF From Abuse Act	H.R. 7015 <i>Sponsor:</i> Issa (R-CA) <i>Cosponsors:</i> Fitzgerald (R-WI) Baumgartner (R-WA) Flood (R-NE)	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 <i>Sponsor:</i> Cline (R-VA) <i>Cosponsor:</i> Tiffany (R-WI)	CV 24, 41	Most Recent Bill Text: https://www.congress.gov/119/bills/hr6622/BILLS-119hr6622ih.pdf Summary: Would impose additional requirements for consent decrees or dismissals pursuant to settlement agreements in agency actions. Would also create additional considerations for the court for motions to intervene in agency actions.	1/8/2026: Committee Consideration and Mark-up Session Held. Ordered to be Reported (Amended) by the Yeas and Nays: 18-8. 12/11/2025: Introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Back the Blue Act of 2025	S. 3366 <i>Sponsor:</i> Cornyn (R-TX) <i>Cosponsors:</i> 38 Republican cosponsors	§ 2254 Rule 11	Most Recent Bill Text: https://www.congress.gov/119/bills/s3366/BILLS-119s3366is.pdf Summary: Would amend Rule 11 of the Rules Governing Section 2254 Cases by adding: “Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code.”	12/4/2025: Introduced in Senate; referred to Judiciary Committee
Litigation Transparency Act of 2025	H.R. 1109 <i>Sponsor:</i> Issa (R-CA) <i>Cosponsors:</i> 28 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 <i>Sponsor:</i> Kennedy (R-LA) <i>Cosponsor:</i> Ricketts (R-NE)	CV 26	Most Recent Bill Text: https://www.congress.gov/119/bills/s3180/BILLS-119s3180is.pdf Summary: Would require additional disclosures under Civil Rule 26(a) for any non-party foreign person, foreign state, or sovereign wealth fund that has a right to receive payment that is contingent on the outcome of a civil action. Would also prohibit third-party litigation funding by foreign states and sovereign wealth funds.	11/18/2025: Introduced in Senate; referred to Judiciary Committee
Protecting Our Democracy Act	S. 2838 <i>Sponsor:</i> Schiff (D-CA) <i>Cosponsors:</i> 10 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: 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 <i>Sponsor:</i> Collins (R-GA) <i>Cosponsors:</i> 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 <i>Sponsor:</i> Johnson (D-GA) <i>Cosponsors:</i> 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 <i>Sponsor:</i> 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 <i>Sponsor:</i> Whitehouse (D-RI) <i>Cosponsors:</i> 35 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
Alexandra's Law Act of 2025	H.R. 780 <i>Sponsor:</i> Issa (R-CA) <i>Cosponsors:</i> Kiley (R-CA) Oberholte (R-CA)	EV 410	Most Recent Bill Text: https://www.congress.gov/119/bills/hr780/BILLS-119hr780ih.pdf Summary: Would permit a previous nolo contendere plea in a case involving death resulting from the sale of fentanyl to be used as evidence to prove in an 18 U.S.C. § 1111 or § 1112 case that the defendant had knowledge that the substance provided to the decedent contained fentanyl.	1/28/2025: H.R. 780 introduced in House; referred to Judiciary and Energy & Commerce Committees
Protect the Gig Economy Act of 2025	H.R. 100 <i>Sponsor:</i> Biggs (R-AZ)	CV 23	Most Recent Bill Text: https://www.congress.gov/119/bills/hr100/BILLS-119hr100ih.pdf Summary: Would add a requirement to Civil Rule 23(a) that a member of a class may sue or be sued as representative parties only if "the claim does not allege the misclassification of employees as independent contractors."	1/3/2025: H.R. 100 introduced in House; referred to Judiciary Committee

TAB 2

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Deepfakes and Draft Rule 901(c)
Date: September 15, 2026

Since 2023, the Committee has been considering how to assure that the Evidence Rules on authenticity will prevent hard-to-detect fake evidence — “deepfakes” — from being admitted at trial. The Committee has been working on a potential rule amendment — a new Rule 901(c) — but has, to date, been unsure about the need for such an amendment. This memo further addresses the issue. **It also introduces the panel discussion on deepfakes that will occur on the morning of the Advisory Committee’s Fall 2026 meeting.**

The memo is in three parts. Part One discusses new developments, articles, etc. since the last Committee meeting. Part Two sets forth the working draft of Rule 901(c), and considers the possibility of expanding the Note to describe what factors might need to be shown in order to trigger an inquiry when the opponent claims that the item is a deepfake. Part Three lays out the issues that will be discussed by the panel of experts, and provides bios of the participants.

I. New Developments

A. Case Law

- **Party punished for submitting deepfakes: *Adams v. Anderson*, 2026 WL 1501021 (Ct. Apls. Ky. May 29, 2026).** This was an unsuccessful appeal from a holding of criminal contempt with a sentence of 45 days incarceration. It arose out of a divorce action. Ms. Adams and Mr. Anderson were parents of two minors. The family law court held a July 30, 2025, hearing on a motion to modify timesharing. Adams testified about taking one of the children to an urgent care center and receiving medication after the appointment. She also produced a picture of the prescription medication bottle which was entered into evidence.

Anderson filed a motion for sanctions alleging that Adams’s testimony about the urgent care visit was false and that the picture of the medication had been altered or was created by

artificial intelligence. Anderson averred that he had requested medical records from the urgent care center and the pharmacy, but both claimed no records existed for the time the child was said to have been taken to the urgent care center. **[Note: This would surely be a sufficient showing to trigger the deepfake inquiry under Rule 901(c).]**

In response to the motion, Adams denied the allegations and provided more documents to support the child's going to the urgent care center and receiving medication. Anderson's reply to the response indicated that the additional documents were *also* fake, created by artificial intelligence. The court indicated that, if the documents were falsified and her testimony untrue, Adams would be "going to jail." At that point, Adams's counsel conceded that Adams's testimony and the documents submitted to the court were false or altered. Eventually, Adams entered a guilty plea to charges of contempt and received a sentence of 45 days in jail.

Adams appealed, arguing that the penalty was excessive. The reviewing court upheld the sentence. It stated that "[w]hile it is true that Appellant did not disobey an order of the court, she did obstruct justice and disrespect the court. *Providing false testimony during a hearing and submitting altered or fake documents into evidence is the epitome of resisting the authority of the court and degrading its authority.* The court did not err in holding Appellant in contempt.

• **Party sanctioned for submitting a deepfake writing: *Al-Qarqani v. Chevron Corp.*, No. 19-17074, 2023 U.S. App. LEXIS 16081 (9th Cir. June 26, 2023).**

The Ninth Circuit referred this case to Judge Tashima as a Special Master after the appellants, represented by Edward Chung, submitted to the court an article purportedly from a newspaper called *The Saudi Sun*, which the court found to be suspicious and apparently "fabricated for purposes of this litigation." In the proceedings that followed, the Special Master found that the article "was fabricated by Chung and that he filed it with the intent to mislead the court," and that in doing so he "perpetrated a fraud upon the court." The Special Master recommended that Chung be sanctioned and referred to the Washington State Bar for possible disciplinary proceedings. The Ninth Circuit overruled Chung's objections and adopted the Special Master's recommendations.

Comment: Text can be deepfaked, and detecting deepfakes in text can raise special issues. This is one of the issues that the Deepfake Panel will be discussing on the morning of the Fall 2026 meeting. Rule 901(c) as currently drafted, covers any item of evidence, including text.

• **Judge Ericksen calls for stricter authenticity enquiries to address deepfakes: *United States v. Belt*, 181 F.4th 931 (8th Cir. 2026):** Belt was convicted of a killing and argued there was an alternative perpetrator. Surveillance video was offered against him and the defendant argued that it was inadmissible because there were many unexplained gaps in the recording; he alleged that the surveillance video was maintained by a person not produced, who had an incentive to protect the alternative perpetrator. The court of appeals found that there was a sufficient showing of authentication under the low standards of Rule 901(a). It concluded that the gaps went to weight and not admissibility. The defendant moved for en banc review, which was denied. Judge Ericksen dissented from the denial. He argued that the prosecution made no showing about the surveillance taping system. While this case was not about deepfakes, Judge Ericksen had a parting comment

about the risk of deepfakes and the need to beef up the authenticity requirements to address deepfakes:

Added to this is the changing technological environment in which we live. Since at least 2017 technology has existed to alter videos in sophisticated ways that are difficult to detect. Gabe Regan, A Brief History of Deepfakes, Reality Defender, (July 6, 2026), <https://realitydefender.com/insights/history-of-deepfakes>; see Daniel J. Capra, Deepfakes Reach the Advisory Committee on Evidence Rules, 92 Fordham L. Rev. 2491 (2024) (discussing the evidentiary challenge presented by deepfakes and potential solutions to address it). *Mendones v. Cushman & Wakefield, Inc.*, No. 23-cv-028772, 2025 WL 2613764, at *1 (Cal. Super. Ct. Sept. 9, 2025) appears to be one of the first times a trial court was confronted with deepfake video evidence. Given the rapid advances in artificial intelligence (“AI”) technology related to generated video, this is a time in which courts should be more stringent in considering foundation. I believe that in this case the foundational analysis of the district court was inadequate to ensure that the video is what it purports to be and that properly applying the evidentiary gate-keeping role that resides in the district judge should have precluded the introduction of the video without further foundation.

B. Rules and Statutes

• Connecticut Court Rules — Amendment to Connecticut Practice Book to Address the Use of Generative AI:

Sec. 4-9. Generative Artificial Intelligence (“Generative AI”) Compliance

(a) “Generative AI” means: any machine-learning model/application that can create original content—such as text, images, video, audio or software code—in response to a prompt or request, including but not limited to, ChatGPT, Co-Counsel, Google Bard, Neeva, Harvey, Ironclad, Bing, DeepSeek, Grok, and similar technology.

(b) Due to the risk that generative AI can create inaccurate factual and legal information, including, without limitation, faulty citations to legal authority, fabricated quotations from such authority, and inaccurate or fabricated evidence, any person who uses generative AI in the creation or editing of any document filed with the court shall independently verify all citations, legal authorities **or evidence** produced by generative AI. The failure to do so may result in court-imposed sanctions, including, without limitation, the entry of a nonsuit or default judgment.

(c) Any person who files documents with the court represents that they have reviewed this rule and, by filing the document, represents that they have made good faith, diligent efforts to ensure compliance with their obligations under this rule, all other rules of practice, the Rules of Professional Conduct, and any applicable provision of Connecticut law regarding the use of or reliance on generative AI.

Comment: The Rule applies to presentation of evidence, not just submissions to the court containing hallucinations. Essentially the burden of doing a deepfake inquiry will be

on the lawyers or pro se filers. As some of the experts at the panel discussion will tell you, when it comes to evidence this is a burden that is not fairly placed on lawyers. When the problem is hallucination of legal citations, a certification requirement makes sense because it is the lawyer who prepared the document, and so the lawyer ought to know if AI was used. But lawyers receive evidence from clients. A client comes to the lawyer and says, “My brother was there and videoed everything, here is the thumb drive.” Under the Connecticut provision it appears that the lawyer has the burden of making some kind of deepfake inquiry into every audio and video produced by a client. This can be a special burden on criminal defense counsel, public defenders, etc. Indeed the disclosure obligation might raise Fifth Amendment questions in criminal cases.

It should also be noted that the rule applies not only to audios and videos, but also to textual evidence. The coverage of print in any deepfake rule is a good idea, because (as we will find out at the panel discussion) print can be as easily deepfaked as any audio or video. But to apply a check-and-disclosure obligation to all printed material seems to be a bridge way too far for counsel.

- **California Statute requiring providers to post an AI detection tool, and a notice that content is generated by AI:**

22757.2. (a) A covered provider shall create an AI detection tool by which a person can query the covered provider as to the extent to which text, image, video, audio, or multimedia content was created, in whole or in part, by a generative AI system provided by the covered provider that meets all of the following criteria:

- (1) The AI detection tool shall be publicly accessible and available via a uniform resource locator (URL) on the covered provider’s internet website and through its mobile application, as applicable.

- (2) The AI detection tool shall allow a person to upload content or a URL.

- (3) The AI detection tool shall support an application programming interface that allows a person to invoke the AI detection tool without visiting the covered provider’s internet website.

- (4) The AI detection tool shall allow a person to provide feedback if the person believes the AI detection tool is not properly identifying content that was created by the covered provider.

22757.3. (a) A covered provider shall include in AI-generated image, text, video, or multimedia content created by a generative AI system it provides a visible disclosure that meets all of the following criteria:

- (1) The disclosure shall include a clear and conspicuous notice, as appropriate for the medium of the content, that identifies the content as generated by AI, such that the disclosure is not avoidable, is understandable to a reasonable person, and is not contradicted, mitigated by, or inconsistent with anything else in the communication.

- (2) The disclosure shall, to the extent technically feasible, be permanent or difficult to remove.

(3) The output's metadata information shall include an identification of the content as being generated by AI, the identity of the tool used to create the content, and the date and time the content was created.

(b) A covered provider shall include in AI-generated image, audio, video, or multimedia content created by a generative AI system an imperceptible disclosure that is machine detectable and is, to the extent technically feasible, permanent or difficult to remove.

(c) A covered provider shall implement reasonable procedures to prevent downstream use of a generative AI system it provides without the disclosure required by this section, including by doing both of the following:

(1) Requiring by contract that third-party licensees of the generative AI system refrain from removing a required disclosure.

(2) Terminating access to the generative AI system when the covered provider has reason to believe that a third-party licensee has removed a required disclosure.

(d) At least once every two years, the department shall review this section and make recommendations to the Legislature regarding any amendments needed to account for changing technology and standards.

Note: Arguably, the application of this California law will make it significantly more difficult to get a deepfake into court. The disclosure requirement that must be included in all product from providers subject to the rule will be readily visible. The technology that is being used is called C2PA, but there are other systems in use as well. One question that will be discussed at the panel is whether this labelling requirement, and the C2PA technology, can itself be easily evaded. One article set forth below questions the security of C2PA.

Note that the EU Act has a watermarking provision similar to the California statute. Article 50 requires providers of covered generative systems to ensure that outputs are marked in a machine-readable format and detectable as artificially generated or manipulated. The Act directs providers to use technical solutions that are effective, interoperable, robust, and reliable so far as technically feasible, while accounting for the characteristics and limitations of the content, implementation costs, and the generally acknowledged state of the art. The EU Act does not command the use of one universal watermark, nor does it establish a forensic presumption of machine authorship.

C. Articles

• Article on Tips to Lawyers for Managing Deepfake Problems, by Craig Ball: August 2026

Uncover the Hidden Fingerprints

Authentic digital evidence doesn't contain only what you can see and hear. It often carries a hidden payload of information about its creation: metadata that can function as a birth certificate for the recording. When your client's smartphone captures a video, the resulting file may contain far more than pixels and audio. It can include:

- Device identification: make, model, and unique device identifiers

- Capture parameters: frame rate, resolution, codec information (the method used to compress and store the video, such as H.264), and camera settings
- Timestamps: recording date and time, often synchronized with network time so timestamps stay accurate even when the user sets the clock manually
- GPS coordinates: precise latitude and longitude (if location services were enabled)
- Software signatures: firmware version and any processing applied, including the operating-system or built-in software version on the device when the file was created and automatic enhancements such as HDR, noise reduction, or image stabilization

This metadata tells a story. Authentic evidence has a verifiable origin. It comes from a specific device at a specific place and time, with technical characteristics consistent with genuine capture. Like software programs, AI systems can produce only mathematical outputs, not the same authentic fingerprints that real devices leave behind.

Metadata isn't infallible. It can be edited, stripped, or deliberately spoofed with off-the-shelf tools, so internal consistency across multiple fields matters more than any single one.

Where the file came from also matters. Direct sharing (via AirDrop, email, or iMessage) preserves the original file with metadata intact, while social media platforms like TikTok, Facebook, and Instagram routinely recompress uploads and strip metadata. iOS also includes a toggle to remove GPS before sending. For bystander footage from social media, lean on the uploader's testimony and the original file from their device when obtainable. Treat metadata as powerful corroboration where it survives, not as conclusive proof.

Defend Your Client's Evidence

When opposing counsel suggests your client's recording might be fabricated, respond methodically.

Lock down the chain of custody. When your client provides a recording, obtain the original file in its native format—not a texted copy, compressed version, or screenshot. Identify and preserve the source device. Turn it off or place it in airplane mode, stop using it for new recordings or app updates that could overwrite data, and store it safely until a forensic examiner can copy its contents.

* * *

Document when and how you received the file, and create a cryptographic hash (MD5 or SHA-256) immediately. A hash functions as a digital fingerprint: Change even one character in the file, and the fingerprint changes completely. Ask your forensic examiner to generate the hash, or use free tools built into Windows and macOS. Matching hash values can help establish that the file hasn't changed since collection.

Pull and verify the metadata. Free tools like ExifTool can extract embedded metadata from image, video, and audio files. Commercial forensic tools such as X-Ways5 or Magnet AXIOM6 offer more comprehensive analysis, but they are typically intended for police labs and forensic firms, not individual lawyers. Qualified digital forensic examiners typically already have access to these tools and the training to use them effectively.

The metadata should tell a consistent story. Device identifiers should match your client's phone or recording equipment. Timestamps should align with the incident. GPS data, if available, should place the recording at the correct location.

Corroborate the metadata with independent evidence. Phone records, location history, witness testimony, and other contemporaneous evidence can reinforce authenticity. If metadata show that a video was recorded at 3:47 p.m. at a particular intersection, and phone records place your client there at that time, the authentication showing becomes substantially stronger.

Bring in a forensic examiner when authenticity is challenged. In high-stakes cases, a qualified digital forensic examiner can analyze the original device, extract the recording using documented procedures, evaluate metadata for consistency, and explain the findings in understandable terms. This becomes especially important when the defendant persists in fabrication claims despite substantial authentication evidence already supporting the recording.

Expect challenges to focus on methodology, device access, and admissibility. Opposing counsel may pursue *Daubert* motions targeting detection techniques, demand direct access to the device, or seek to exclude the recording through motions in limine.

• Article on Possible Security Problems in Verifying the Provenance of Digital Data

Golazsewski et.al., Verifying Provenance of Digital Media: Why the C2PA Specifications Fall Short

The rapid rise of generative AI has made it easy to create convincing fake media at scale. In response, an industrial coalition has developed the Coalition for Content Provenance and Authenticity (C2PA), a system intended to provide verifiable provenance for digital content. Our research team conducted the first comprehensive, independent security analysis of C2PA. Our study includes the first formal-methods analysis of C2PA's core protocols. We find that the current C2PA specifications fail to achieve their claimed security goals. Furthermore, they also fail to achieve key additional goals, which all such provenance systems require for trustworthy deployment. * * * C2PA is a promising idea, but it should not yet be relied upon for high-stakes uses such as financial disclosures, journalism, or legal evidence.

What is C2PA?

C2PA aims to provide provenance signals about how digital media were created and modified. C2PA attaches machine-verifiable metadata intended to help audiences and platforms determine where, when, and how an asset was created or edited. Such provenance signals are an achievable useful partial step toward helping consumers assess the authenticity of digital objects

(e.g., “Is the image real versus fake?”). *Provenance describes the history of a file, whereas authenticity concerns, for example, whether the content truthfully represents real-world events. C2PA provides provenance signals, not proof of authenticity.*

C2PA is not a government or international standard. It is an industry-led effort consisting of the C2PA coalition, a set of technical specifications, a broader ecosystem with tools (e.g., claim generators) and services (e.g., timestamping), and a conformance program intended to certify products (e.g., validators). Major companies including Adobe, Google, Microsoft, Meta, and Amazon participate and have endorsed its adoption.

Why C2PA Falls Short

C2PA attaches “content credentials” (Crs) to digital media. These credentials can describe: who or what created the content (e.g., a camera or AI system), when and where it was created, and whether it is original or edited. These credentials are protected using cryptographic digital signatures, similar to those used in secure web communications. However, C2PA was not designed to determine authenticity. * * *

The C2PA specifications make two security claims:

1. Claim integrity: Conforming validators can detect tampering.
2. Weak file integrity: Conforming validators can detect if certain bits of the digital asset were modified.

But any provenance system should also include the following guarantees:

Timestamp agreement: The claim generator (e.g., camera) and validator should agree on the timestamp.

Validator consistency: Conforming validators (sharing the same specification version and trust lists) should agree on the validity of any given claim.

Strong file integrity: Conforming validators should detect if any bits of the digital asset were modified (including non-C2PA metadata).

* * *

Key Findings

Our study evaluated the C2PA specifications, real-world implementations, the conformance program, and validation tools. We identified several systemic weaknesses.

1. Timestamps Can Be Forged or Altered

C2PA relies on trusted timestamp authorities to indicate when content was signed. However, through our formal-methods analysis, we found that these timestamps can be replaced or modified without detection. Furthermore, conforming validators may accept conflicting timestamps as valid. This vulnerability undermines trust in determining when content was created—an essential factor in journalism and legal contexts.

2. Revoked or Compromised Credentials Are Still Accepted

If a signing key is compromised, it should be revoked. However, (a) many conforming validators fail to check revocation properly, and (b) some conforming validators continue to accept known compromised credentials. This vulnerability allows attackers to create forged content that appears legitimate.

* * *

3. Different Tools Produce Contradictory Results

We tested multiple widely used validators and found that (a) the same image can be labeled valid by one tool and invalid by another, and (b) users may receive conflicting conclusions about the same media, including concerning whether it was AI-generated. This inconsistency creates confusion and undermines trust.

4. Parts of Files Can Be Modified Without Detection

The C2PA specifications allow certain parts of a file (such as metadata) to be excluded from protection. (a) These regions can be altered without invalidating the signature, and (b) important information (e.g., location data) can be changed undetected. This vulnerability undermines trust.

5. Credentials Expire and Become Unverifiable

Due in part to expired certificates, some C2PA-signed media have already become unverifiable—sometimes within months.

6. Certification Does Not Ensure Compliance with the Specifications

C2PA provides a “conformance program” to certify products. However, the conformance program does not define security requirements for conforming validators. Certification is based largely on self-reported compliance with no examination of the product’s functionality or source code. As a result, “conforming” products do not necessarily comply with the specifications.

* * *

C2PA represents an important step toward addressing the growing problem of digital misinformation. However, the specifications are currently flawed, incomplete, inconsistent, and vulnerable to misuse. Policymakers should view C2PA as an emerging technology, not a mature solution. Careful cybersecurity engineering, stronger safeguards, and independent scrutiny are essential before widespread adoption.

• **Article by Magistrate Judge William Matthewman, THE COMING USE AND MISUSE OF ARTIFICIAL INTELLIGENCE IN THE COURTROOM: A JUDICIAL PERSPECTIVE AND PROPOSAL, 30 J. Tech. Law and Policy 139 (2026).**

The discussion of deepfakes and unacknowledged AI evidence in the courtroom and legal proceedings is not a hypothetical or abstract issue. The concern is real and currently confronting various judges, courts, and legal proceedings. For example, in *Mendones v. Cushman and Wakefield, Inc.*, [discussed in the last agenda book] a California Superior Court Judge imposed terminating sanctions against the plaintiffs in a housing dispute after the judge found that the plaintiffs intentionally submitted fabricated evidence in connection with their motion for summary judgment. Specifically, the court found that certain audio exhibits and graphic material were deepfakes or materially altered. The court questioned the authenticity of other evidentiary submissions, such as voicemail messages and video testimony, but stated that “it does not have the time, funding, or technical expertise to determine the authenticity of Plaintiffs’ statements or conduct a forensic analysis of the suspect evidentiary submissions.” The court stated that the terminating sanction imposed “serves the appropriately chilling message to litigants appearing before this Court: Use GenAI in court with great caution.” This case is just the tip of the coming iceberg. While the alleged deepfakes were discovered in this case, it begs the question as to whether unacknowledged AI evidence and deepfakes in any other cases have evaded scrutiny and have been introduced into evidence without knowledge of the opposing party or the court. As the saying goes, we don’t know what we don’t know. * * *

Court management consultant Michael Navin writes: “Attorneys are reporting increasing use of AI-faked evidence in divorce and custody cases—doctored images, fabricated texts, even audio clips. In one case, a judge discovered a fake audio recording submitted in a custody dispute and sanctioned the party who submitted it.” Another article reports that, “[a]cross industries and jurisdictions, synthetic media created by generative artificial intelligence is disrupting how we identify, interpret and admit evidence. Deepfakes—convincing, falsified digital content—are increasingly being used not only for political misinformation and social manipulation but now, directly in courtrooms.” The issue is not limited to civil cases; criminal cases are also a prime target. A recent criminal case in Florida involving alleged domestic violence depicts an apparent, disturbing use of fake AI evidence. The defendant in the case, Melissa Sims, contended that her boyfriend “scratched and punched himself and used AI to create a video of her attacking him.” According to further news reports, Ms. Sims was initially arrested on a domestic violence charge, which she claimed was supported by the fabricated AI-generated video evidence. After her initial arrest, she was released on bond. But while on bond awaiting trial, she was arrested a second time for an alleged violation of her bond conditions—contacting her ex-boyfriend—due to the alleged creation of fake text messages using a text-generating app. Ms. Sims’ claim was that the alleged victim, with the aid of AI, fabricated fake text messages to make it appear that she texted the victim, in violation of her bond conditions, even though she had never done so. The bond violation

claim was eventually dropped in early 2025, and in December 2025, she was acquitted of the domestic violence battery charge. Yet, serious and important questions remain as to whether evidence fabricated or improperly enhanced by AI could, or will, send an innocent person to prison—an entirely legitimate concern. In fact, it has been reported that in a recent federal criminal case in the Western District of Texas, a confidential informant allegedly provided fake audiovisual evidence to the prosecution which led to the indictment of an innocent person. The fake evidence apparently went undetected by the prosecution and the defense and was not discovered until the confidential informant entered a guilty plea in his case. While the federal prosecutors in that case reportedly dismissed the case against the innocent person after learning of the confidential informant’s alleged fabrication of the audiovisual evidence, the fact remains that an innocent person had to suffer an indictment and prosecution before the fraud was uncovered. Frankly, if this happened in a federal criminal case, it can happen in any case. A truly scary thought!

* * *

V. THE FEDERAL RULES OF EVIDENCE NEED * * * TO BE AMENDED TO DEAL WITH ACKNOWLEDGED AND UNACKNOWLEDGED AI EVIDENCE IN LEGAL PROCEEDINGS

* * * The current rules do not provide judges the necessary specific guidance to effectively deal with proffers or attempted admission of AI evidence in legal proceedings. * * *

[T]he Federal Rules of Evidence must be amended to allow judges to effectively deal with proffers of AI-generated and enhanced evidence, as well as the challenges to the admission of such evidence. As it now stands, there is no rule that directly and clearly explains how the court should address these issues. When faced with challenges to such evidence, judges have no clear guidance on where the guardrails should be placed. How are judges supposed to determine reliability, authenticity, provenance, and other issues relating to evidence created or enhanced by AI? Which party has the burden of proof, and what precisely is that burden of proof? Does the proffering party have a burden to show that the AI evidence is reliable and authentic? Does the party opposing admission have the burden to show otherwise, or is there a shifting burden?

* * *

There is * * * a clear need to revise Federal Rule of Evidence 901, “Authenticating or Identifying Evidence,” to specifically deal with AI evidence and deepfakes. The current Rule 901 merely requires “evidence sufficient to support a finding that the item is what the proponent claims it is,” a very flexible standard that has worked well up until the advent of AI and deepfakes. Rule 901 is wholly unhelpful to judges who must now deal with AI, which may look and appear real but may nonetheless be a clever deepfake. Rule 901 was enacted at a time when AI and deepfakes were not even a thought in the drafters’ minds. Current Rule 901 is simply not up to the task of providing judges with the guidance necessary to

determine whether to admit or exclude AI evidence. Rule 901 also risks the admission of deepfake evidence, resulting in potential injustice, on too low of an evidentiary standard.

The issue of authentication of a handwritten letter, for example, is much simpler than the issue of authentication of AI evidence. Rule 901 was conceived in an era where forgery was typically crude, detectable, and difficult to scale. Its illustrative examples—testimony based on personal knowledge, distinctive characteristics, chain of custody—presume authenticity can be assessed through human perception and circumstantial context. Generative AI dismantles this logic. Modern models produce videos of individuals saying things they never uttered, audio clips indistinguishable from real recordings, and documents that mimic unique writing styles—often complete with consistent metadata and artifacts that evade casual scrutiny. In this context, a witness’ assurance that evidence “looks real” offers scant probative value. AI evidence is not your grandparents’ evidence. It is different in type, kind, and detectability. AI evidence can look very real but be fake, and deepfakes can be hard for most people to detect. Current Rule 901(b)(9), dealing with evidence about a process or system, is inadequate as the burden on the proponent—“evidence sufficient to support a finding that the item is what the proponent claims it is”—is too low to guard against deepfakes and other types of fraudulent or manipulated AI evidence. **The burden shifting suggestions [found in proposed Rule 901(c)] should be written into Rule 901, or into an entirely new rule, to address attempted admission of AI evidence.**

Thus, what would an amended Rule 901, specifically addressing AI, look like in combination with other rules? First, * * * there needs to be an early pretrial notice requirement in either Rule 901 or in another appropriate rule of procedure in both civil and criminal cases. No sandbagging or unjustified last minute efforts to introduce AI-generated or enhanced evidence should be permitted. An early and fulsome pretrial notice requirement is fundamental.

Second, discovery into, inter alia, authenticity and reliability— including what has aptly been described as “Provenance: Who created the evidence and using what tools/models? Process: What data trained the system? What safeguards were in place? Verification: What independent, technical verification exists (metadata, hash values, audit logs)?”— must be permitted. Without such fulsome discovery into proffered AI evidence, attorneys and litigants opposing the introduction of deepfake evidence or improper AI evidence will face an unfair, uphill, and herculean task in seeking to prevent its admission.

Third, the respective burdens of proof must be clearly stated and delineated in the rules. I would respectfully suggest a burden-shifting structure, that is, after being provided with timely notice, an attorney or litigant opposing the introduction of AI evidence in a legal proceeding must first meet a burden of proof, akin to either reasonable suspicion or probable cause, that the AI evidence is a deepfake, fraudulent, inaccurate, or otherwise inadmissible. This will likely require expert or direct testimony that the proposed AI evidence is fraudulent, manipulated, or a deepfake. Such a burden on the party opposing introduction will hopefully prevent cavalier and frivolous boilerplate challenges to legitimate, authenticated, and accurate AI evidence. That is, a party or counsel opposing the introduction of AI evidence should not be permitted to make blanket, unsupported, meritless, boilerplate, and cavalier assertions challenging that the evidence is fraudulent, manipulated, or a deepfake without some sufficient level of support. And this level of support should be clearly delineated in our rules. Next, the proponent of the AI evidence, when

faced with a sufficient challenge, will have to meet a burden akin to a **preponderance of the evidence standard to allow introduction of the AI evidence in a legal proceeding. Such a significant burden would require the proponent of AI evidence to go beyond the relatively low burden of plausibility, currently permitted by Rule 901, and will hopefully prevent the admission of false AI evidence in legal proceedings. Again, this will likely require expert or eyewitness testimony to allow the proponent to meet their burden. Finally, if the case reaches the trial stage and the AI evidence is admitted, vigorous cross-examination and appropriate jury instructions will allow jurors to properly evaluate such evidence and reach a fair and just verdict. Certainly, cross-examination is key. Cross-examination will allow the opposing party to effectively address the AI evidence during the crucible of trial.** And clear and concise jury instructions will allow jurors to follow the law when determining what weight, if any, to give the admitted AI evidence. We simply cannot continue business as usual when AI evidence reaches our courtrooms and legal proceedings. Those who espouse the attitude that current rules are sufficient to deal with the coming deepfakes and fake evidence created by AI are, in my humble and respectful opinion, wrong. We need new and amended rules to assist attorneys, litigants, and trial judges in dealing with the coming wave of AI evidence.

Comment: This is an excellent article arguing that the risk of deepfake evidence is real, and that proposed Rule 901(c) would be very helpful in managing that risk.

• Article by two Colorado state judges on rising challenges related to AI:

***Judges On AI: How Courts Can Survive The Tech Revolution*, By Maria Berkenkotter and Lino Lipinsky de Orlov · Law 360**

We have heard from numerous trial court judges about lawyers' and litigants' efforts to introduce questionable AI-generated exhibits into evidence. So what is a trial court judge to do? Most of all, trial judges should not wait until they are required to decide — perhaps in the middle of a hearing or trial — whether an AI-generated exhibit is genuine. Practical steps include:

- Updating authentication practices for digital exhibits;
- Requiring early disclosure of AI-generated media evidence and challenges to an adversary's evidence as a deepfake;
- Appointing neutral experts where appropriate;
- Developing protocols for metadata preservation; and
- Receiving continuing education on forensic tools and detection limits.

Judges need not become technologists. But they must understand enough to ask the right questions and manage evidentiary disputes competently.

• Article: Richard Gilman, *The Legal Implications of Deepfakes: What Courts Are Starting to Say* - Lawbit Digest

Courts are only beginning to develop the doctrinal tools, evidentiary rules, and professional responsibility frameworks needed to deal with deepfakes. The technology is arriving faster than the law can govern it. And what courts are “starting to say” about deepfakes spans at least five distinct legal categories — evidence, criminal law, civil liability, platform

responsibility, and professional ethics — each developing at a different pace and in a different direction.

Key Takeaways

- Human observers can identify high-quality deepfakes only 24.5% of the time — statistically worse than flipping a coin — meaning the courtroom assumption that judges and jurors can reliably detect fabricated video no longer holds.
- Proposed Federal Rule of Evidence 707, released for public comment in August 2025, would subject machine-generated evidence to expert-witness reliability standards — but critics note it applies only to evidence the proponent acknowledges as AI-generated, leaving disputed deepfakes largely unaddressed.
- Deepfake files increased from 500,000 in 2023 to an estimated eight million in 2025 — a 1,500% growth rate — and discrete deepfake incidents tracked by one monitoring company rose from 42 in 2023 to 2,031 in the third quarter of 2025 alone.
- About 47 states had enacted some form of deepfake-related legislation by mid-2025, but the coverage is uneven — definitions vary, penalties range from misdemeanor to 30-year felony (Louisiana), and the patchwork creates significant jurisdictional uncertainty for both victims and defendants.

The Evidence Problem: Can Courts Trust What They See?

The foundational assumption underlying video, audio, and photographic evidence is that a recording reflects something that actually happened. That assumption is now structurally compromised. University at Buffalo professor Siwei Lyu, a leading deepfake researcher, reports that voice cloning has crossed what he calls an “indistinguishable threshold” — where a few seconds of audio can produce a convincing clone complete with natural intonation, pauses, and breathing. For video, the numbers are just as stark: human observers can identify high-quality deepfakes only 24.5% of the time. That is meaningfully worse than random guessing. It means that when a piece of deepfaked video evidence reaches a jury, neither the jurors nor — unless a forensic expert is present — the attorneys or judge have a reliable mechanism to detect the problem.

The Federal Rulemaking Response: Rule 707 and Its Gap

The formal legal response to the deepfake evidence problem at the federal level is proposed Rule of Evidence 707, which the Judicial Conference’s Advisory Committee released for public comment in August 2025 and which remains under active consideration. Rule 707 would apply the *Daubert* reliability framework — currently used for expert witness testimony — to machine-generated evidence, requiring the proponent of AI-generated material to demonstrate its reliability before the court admits it. The rule reflects a considered judgment that AI-generated evidence presents reliability questions similar to those raised by expert opinion, and that the same structured analysis should apply.

The critical limitation has been identified clearly by legal scholars: Rule 707 applies only to evidence that the proponent acknowledges was created by AI. A party who submits a

fabricated video as authentic evidence is not going to announce that the video was AI generated. Rule 707's reliability framework does nothing to address the core scenario — disputed deepfakes submitted as genuine — that represents the most serious threat to judicial fact-finding.

The Advisory Committee had separately considered amending Rule 901 — the authentication rule — to create a specialized process for challenging potentially deepfaked evidence. Under the proposed Rule 901(c), if a party raised a credible challenge to evidence as AI-fabricated, the burden would shift to the proponent to demonstrate authenticity by a preponderance of the evidence. The committee declined to move forward with Rule 901(c), with several members observing that courts have historically adapted to technological change without new rules and that the number of real-world deepfake cases was still limited.

Louisiana declined to wait for federal consensus. Its August 2025 framework — the first statewide law specifically addressing AI-generated evidence — requires attorneys to exercise reasonable diligence in verifying the authenticity of evidence before submitting it. That professional responsibility standard shifts the evidentiary burden onto counsel, creating malpractice exposure and disciplinary risk for attorneys who introduce deepfaked material without adequate verification, whether they knew it was fabricated or not. * * *

Practically, this means that attorneys handling cases involving digital evidence face a growing pre-trial obligation to preserve and authenticate that evidence through reliable chains of custody. Discovery requests are being tailored to include requests for AI-generated materials. Expert witnesses on digital forensics are becoming routine in cases where significant video or audio evidence is contested. And the cost of that forensic verification will likely add substantial expense to any case where evidence authenticity is disputed.

Where the Law Is Going

What courts are starting to say can be summarized in a few emerging principles:

- Fabricating evidence using deepfakes will be treated as among the most serious misconduct available — terminating sanctions, not merely monetary penalties.
 - The “deepfake defense” will be controlled, not accommodated. Courts are resisting the argument that deepfake possibility creates blanket authentication uncertainty that can excuse liability for recorded statements.
- **Article on the Deepfake Problem and the Advisory Committee's Reluctance to Respond to it: Aleeza Furman, *As Deepfake Evidence Spreads, Rulemaking Efforts Stay Stuck in Development*, Law.com, May 7, 2026**

For several years now, stakeholders across the legal profession have warned of a coming storm of falsified evidence created by generative artificial intelligence. But guidance on how courts should handle these anticipated incidents of deepfakes is still a long way off. On Thursday, the U.S. court system's advisory committee on evidence rules opted not to advance a proposed amendment to the Federal Rules of Evidence aimed at preventing deepfakes from

being admitted at trial. It was not the first time the committee punted on the issue. * * * Ultimately, the committee decided to delay consideration rather than voting on whether to push a proposed rule forward during their Thursday meeting. Instead, they scheduled a more in-depth consideration of the matter to be held during their fall meeting, where they intend to bring in technologists, lawyers and other experts to weigh in on the issue.

The question of how to deal with the threat of deepfakes is one the rules committee has been considering since 2023. The potential amendment would take the form of a new Rule 901(c) to provide guidance on how to adjudicate assertions that a piece of evidence is a deepfake and what the standard should be for proving an alleged deepfake is authentic.

* * * Where previously warnings of deepfakes hitting the courts were largely unrealized, there are now mounting examples of litigants challenging evidence as AI-generated fabrications. In the past year, there have been at least seven rulings from across the U.S. dealing with deepfake challenges, according to a memo penned by committee reporter Daniel J. Capra, a professor at the Fordham School of Law. For Maura Grossman, a research professor at the School of Computer Science at the University of Waterloo, those rulings suggest that the current rules leave judges with inadequate guidance on how to authenticate the kinds of convincing forgeries made possible by gen AI.

The rulings applied a range of differing standards for determining whether a piece of evidence was an inadmissible deepfake, Grossman told Law.com. “You’ve got a standard that’s too low and then a standard that became impossible, that almost nothing would pass it. So that’s our evidence that courts are struggling with this. It’s different than other kinds of information,” she said.

Grossman contended that the current Federal Rules of Evidence are too permissive in an age where falsified audio or video is becoming increasingly convincing and easy to create. For instance, she explained, under Rule 901(b)(5), all it takes to authenticate an audio recording of someone’s voice is verifying testimony from someone familiar with the purported speaker. “That’s too low for that kind of evidence because almost any deepfake will pass that,” Grossman said.

Many in the judiciary agree that the current federal rules could use an update. In a survey of 931 federal judges conducted by the Federal Judicial Center, a little over half of the respondents said they believed the rules for authenticating evidence should be changed to address deepfakes. Despite their support for a rule change, very few of those judges have actually felt the issue’s impact. Only 2% of the survey respondents reported having encountered an instance of a litigant challenging a piece of evidence as a deepfake.

But the growing number of rulings on the issue in the past year suggests incidents will only become more common. * * *

Where Deepfakes Hit the Hardest

While deepfake evidence so far seems uncommon at the federal level, it appears to be

far more pervasive in state courts. “This is what everybody’s talking about,” Chief Judge Victoria Willis of the Virginia 15th Judicial Circuit said of conversations she’s had with other state judges. “Nobody has a solution, but everybody’s talking about and telling more stories,” she told Law.com.

State courts’ more frequent encounters with deepfakes are likely a function of the kinds of cases they typically handle. According to Willis, family law cases, which generally fall under state courts’ purview, are a particular hotbed for falsified evidence. She said seen increasing occurrences of one party to plant fabricated incriminating images in the other party’s files in order to gain an upper hand in the dispute. “You suddenly come to trial and there’s these photos of your client with an alleged paramour. and it’s not like the old days where you can kind of tell that somebody was cut and pasted. You know, these are really good. So I’m not sure how to handle that.”

While state courts are not governed by the federal rules of evidence, they often model their own rulemaking after what the federal judiciary is doing.

In the meantime, Grossman asserted, deepfakes present a serious issue for the justice system. “It’s a real problem to not be able to tell anymore between what’s real and what’s not real,” she said. “I think that is game changing. And I think people have underestimated how serious a problem that is going to be when, as we move forward.”

II. Proposed Rule 901(c)

To date, the Committee has coalesced on a draft Rule 901(c) that sets forth a two-step approach: 1) The opponent must establish that an enquiry into deep fakery is justified; a simple claim of “fake” is insufficient. 2) If the opponent satisfies the burden of going forward, then the proponent must prove more likely than not that the item is authentic. Here is the draft Rule 901(c) and draft Committee Note:

A. Working Draft of Proposed Rule 901(c) and Committee Note

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 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.

(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.

This rule does not apply if the preparation and issuance of a deepfake is the gravamen of the claim or charge. For example, if the defendant is charged with preparing and issuing a deepfake that is pornographic, the government’s authentication of the offending item will be subject to the general rules of authenticity under Rule 901(b).

71 The rule requires that an opponent pressing a deepfake argument must provide pretrial
72 notice of the intent to present evidence of fabrication, so that other parties have a reasonable
73 opportunity to respond. The purpose of the notice requirement is to assure that deepfake arguments
74 under Rule 901 are resolved, if possible, before trial. The rule does not set forth specific time
75 periods because the deepfake issue is likely to arise in different contexts, and the appropriate notice
76 that a party with a deepfake argument must provide may well depend on whether it is a civil or
77 criminal case and on whether the item of evidence is offered for impeachment. The rule provides
78 that a court might excuse the lack of pretrial notice, as there may arise situations in which the
79 opponent discovers that an item may be a deepfake after the trial has begun.

80 This rule does not apply when a proponent offers a deepfaked item for the purpose of
81 proving that it is fabricated evidence. For example, in a prosecution of the defendant for using
82 generative AI to produce pornographic material, that material is not covered by Rule 901(c). The
83 evidence is authenticated because it is what the government says it is: deepfaked evidence.

84 The term “generative artificial intelligence” applied in this rule is derived from Executive
85 Order 14110 (Oct. 30, 2023).

B. Possible Addition to Committee Note to Provide Factors Pertinent to Whether the Proponent Has Met Its Burden of Going Forward in a Deepfake Challenge

As we know, the proposed Rule requires that a party bringing a deepfake challenge has a burden of going forward before the court has to inquire into whether the item is a deepfake. The standard applied is a familiar one: it’s the sufficient to support a finding standard that applies to all authenticity questions under Rule 901(a).

While the standard is familiar, applying it to deepfakes is new territory, and so it might be useful to provide some guidance on what factors will be pertinent to showing the possibility of a deepfake. Any detailed list of factors is, of course, better accommodated in the Note rather than in the text.

After working on deepfakes for four years now, I have been keeping a list of factors and considerations that are considered to be pertinent to whether the burden of going forward is met in a specific case. Putting everything together, **the Committee should consider adding the following paragraph, or something like it, to the Committee Note. Its best placement is as the third paragraph, as shown here:**

The rule sets out a two-step process for regulating claims of deepfakes. The first step is that 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.

Under this rule, the opponent’s objection must be grounded in facts raising a genuine concern about the offered item. The facts pertinent to the inquiry are likely to change as technology develops, but the following is a non-exhaustive list of facts that would be pertinent to the opponent’s burden of going forward:

- missing or anomalous metadata;
- inconsistent timestamps or creation dates;
- unexplained edits or compression artifacts;
- absence of the native file when a derivative version is offered;
- gaps in chain of custody that would raise an opportunity for tampering;
- glitches such as unusual audio patterns and problems of synchronization;
- known use of generative AI tools by the proponent in this case and elsewhere;
and
- independent evidence that is inconsistent with the content of the item.

The second step is that, 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. * * *

Comment: Adding relevant factors can be helpful, and those articulated above are the ones that are most frequently cited as markers of a deepfake. There is a danger, though, that by necessarily being underinclusive, the list will lead courts to ignore or downplay other relevant factors. And this is especially problematic with generative AI, which is moving at lightspeed, and so factors that raise suspicion right now might never even occur in three years; and of course new factors may arise that aren’t on the list.

I am going to provide the list of factors to the deepfake panel, for a view from the experts as to whether it is helpful, and whether other factors should be added.

III. Deepfake Panel

Our first panel on the morning of the Fall 2026 meeting will take on the topic of deepfakes, and will provide some comments on the need and advisability of proposed Rule 901(c). I am proud to say that the panel is stocked with the foremost experts in the country on questions of deepfakes.

The format of the panel is that each speaker will have 5-10 minutes to make a presentation. Committee members may ask questions whenever they wish. After all the presentations, there will be time for a general discussion among the panelists and for statements and questions by Committee members.

A. Panelists

Here are the bios for the panelists, in the order of presentation:

Professor Hany Farid

Hany Farid is a Professor at Dartmouth College who specializes in the analysis of digital images and the detection of digitally manipulated images such as deepfakes. Professor Farid served as Dean and Head of School for the UC Berkeley School of Information. In addition to teaching, writing, and conducting research, Professor Farid acts as a consultant on deepfakes for non-profits, government agencies, and news organizations. He is the author of the book *Photo Forensics* (2016). He is one of the designers of the PhotoDNA algorithm.

At UC Berkeley, Professor Farid had a joint appointment in the Department of Electrical Engineering & Computer Science and the School of Information. He also worked with a member of the Law School faculty on questions of deepfakes and admissibility of evidence. He was also a member of the Berkeley Artificial Intelligence Lab, the Center for Innovation in Vision and Optics, and the Vision Science program.

Prior to joining Berkeley, Professor Farid was the Albert Bradley 1915 Third Century Professor of Computer Science at Dartmouth College and former chair of Dartmouth's Neukom Institute for Computational Science. He remained at Dartmouth until 2019 and returned there in 2026.

Professor V.S. Subrahmanian

V.S. Subrahmanian is the Walter P. Murphy Professor of Computer Science at the McCormick School of Engineering, Northwestern University and Buffett Faculty Fellow at the Northwestern Roberta Buffett Institute for Global Affairs. He is also the head of the Northwestern Security and AI Laboratory (NSAIL). Prior to this, Subrahmanian was The Dartmouth College Distinguished Professor in Cybersecurity, Technology, and Society at Dartmouth College with tenure in the Computer Science Department and Director of the Institute for Security, Technology and Society (ISTS). Prior to joining Dartmouth, he was a tenured Professor in the University of Maryland's Computer Science Department. He served a 6.5 year stint as Director of the University

of Maryland's Institute for Advanced Computer Studies where he co-founded the Lab for Computational Cultural Dynamics and founded the Center for Digital International Government. His work stands squarely at the intersection of data-driven AI for increased security, policy, and business needs. Prof. Subrahmanian has been an invited speaker at the United Nations, Capitol Hill, the Mumbai Stock Exchange, and numerous other prestigious forums.

Prof. Subrahmanian is a world leader in artificial intelligence including logical reasoning with uncertainty, probabilistic logics, temporal probabilistic logics, and managing huge, heterogeneous databases with incomplete and inconsistent information, and multimedia databases. In recent years, he has developed scalable methods to apply probabilistic models to a wide variety of real-world scenarios. He created the field of machine learning based models of terror group behaviors and applied them to making forecasts and suggesting policies to shape behaviors of groups like Hezbollah, Lashkar-e-Taiba, Indian Mujahideen, Boko Haram, and JNIM. The Northwestern Terror Early Warning System has, since October 2024, released monthly forecasts about the future behavior of 6 terror groups: Abu Sayyaf, Al Shabaab, Boko Haram, Indian Mujahideen, JNIM, and Lashkar-e-Taiba. Approximately 60 entities including the UN, Interpol, DHS, as well as companies such as United Airlines, Exxon Mobil, Ford, and others receive these forecasts. To receive these forecasts, you can sign up here.

Prof. Subrahmanian has led the development of the Global Online Deepfake Detection System (GODDS) that, since July 8 2024, has provided an audio, video, and image deepfake detection service for journalists. Over 70 journalists have used this service including ones from CNN, Wall Street Journal, New York Times, Agence France Presse, and others.

James Horan

Mr. James Horan is a Supervisory Electrical Engineer with a B.S. in Electrical Engineering from Pratt Institute and more than 30 years of experience with a Fortune 100 company, where he focused on advanced design and technical program management for complex technology systems. He has a long history of designing and delivering mission-critical technology solutions for the intelligence and national security community.

At NIST, Mr. Horan currently leads the Multimedia Language Technologies Group, where he directs advanced work in system evaluation for multimedia, biometrics, video analytics, and forensic technologies, with a focus on artificial intelligence, media authentication, and digital evidence evaluation. Mr. Horan is the lead for NIST's "Guardians of Forensic Evidence" initiative, which evaluates analytic systems against AI-generated deepfakes and synthetic media in support of the President's AI Action Plan and efforts to strengthen forensic standards for courts, law enforcement, and national security applications. His leadership spans major programs with the FBI, DARPA, IARPA, the NSA, CIA, NCIS, DHS, DoD USDI, and U.S. Special Operations Command, including development of the FBI's Unmanned Aerial Vehicle (UAV) and License Plate Recognition (LPR) capabilities and other advanced analytics and surveillance platforms.

Shira Anderson

Shira Anderson is Policy Counsel at OpenAI, where she advises on emerging artificial intelligence regulation. Her portfolio includes AI safety, child safety, chatbot regulation, elections, and AI content provenance. As part of her work, she engages closely with policymakers, technical teams, and industry groups, including the Coalition for Content Provenance and Authenticity (C2PA), on approaches to synthetic media, deepfakes, and digital evidence.

Before joining OpenAI, Shira worked on Meta's global policy team as regulation lead for AI safety, content provenance, and training-data transparency. She previously practiced at Arnold & Porter Kaye Scholer, focusing on international and cross-border matters, and served as a foreign law clerk to Chief Justice Esther Hayut of the Supreme Court of Israel. She earned a joint J.D.–LL.M. in International and Comparative Law, magna cum laude, from Duke University School of Law and a B.A. from the University of California, Berkeley, in History with Honors.

Devin Norder

Devin Norder is a Director of Product Management at Meta, leading trust, safety, and risk for generative AI. She leads generative AI policy and partners closely on the model alignment and development that build those standards into Meta's systems, and drives cross-company AI risk initiatives within Meta's Risk organization.

Her work reaches across every model capability (text, audio, image, and video) and from policy through execution: the alignment that trains systems toward Meta's standards, the machine learning-based enforcement that backstops it, and the risk review that evaluates Meta's generative models and products before and after launch.

Among the areas most relevant to this discussion, Devin has led standards development governing how Meta's generative AI systems treat depictions of real people. She has also worked closely on provenance in synthetic media. She has worked on content credentials under the C2PA standard. She has also worked to ensure the media Meta's models generate carries watermarking and the signals needed to identify it. She has partnered with Facebook and Instagram's trust and safety teams to detect and label AI-generated content at platform scale. Across that work she has had to assess where these mechanisms fall short: how well marking survives ordinary handling, and how far detection degrades against adversarial inputs.

Devin has spent her entire Meta tenure in trust, safety, and risk: roughly two years on Facebook trust and safety, then two years on generative AI trust, safety, and risk. Before Meta, she spent about three years at WalmartLabs modernizing supply-chain technology.

She holds a B.S. in Management Science and Engineering and an M.A. in Communication and Media Studies, both from Stanford, where her master's thesis examined how computer-mediated environments shape identity and the sense of self, a throughline to the questions of authenticity and likeness her work now addresses.

Lars Daniel

Mr. Lars Daniel is a recognized thought leader and digital forensics pioneer with more than 16 years of expertise transforming how the legal and insurance industries understand and utilize digital evidence. As a visionary in the field, he has consistently been at the forefront of emerging technologies, from early mobile device forensics to today's artificial intelligence and Internet of Things challenges. Throughout his career, Mr. Daniel has held leadership positions at prominent forensics firms, where he built world-class teams of experts with backgrounds in law enforcement, including Homeland Security, the Secret Service, and High-Tech Crime task forces. His leadership approach is focused not just on technical excellence, but on anticipating industry needs and preparing teams for the digital challenges of tomorrow.

Mr. Daniel is a Forbes Contributor, where he writes on digital forensics, digital evidence, expert testimony, artificial intelligence, and the impact of technology in the legal and insurance industries.

As an expert witness, Mr. Daniel has testified dozens of times in state and federal courts across the United States and internationally, recognized as an expert across multiple forensic domains, including digital, computer, cell phone, video, photo, and audio forensics. His testimony in recent high-profile cases has shaped legal precedents in both criminal and civil cases, providing expert analysis for defense, prosecution, plaintiffs, and defendants alike.

Sean Broderick

Sean Broderick is the National Litigation Support Administrator for the Administrative Office of U.S. Courts, Defender Services Office Training Division, where he oversees the National Litigation Support Team, a resource for the federal judiciary, federal defender offices, and Criminal Justice Act (CJA) panel attorneys on electronic discovery and litigation support technology. He has served as co-chair of the Joint Working Group on Electronic Technology in the Criminal Justice System (JETWG), a joint Administrative Office of the U.S. Courts and Department of Justice working group examining the use of technology in the federal criminal justice system. He is a co-author of *Criminal e-Discovery: A Pocket Guide for Judges* (Federal Judicial Center, 2015) and a contributing author to *The Sedona Conference's Primer on Managing Electronic Discovery in Small Cases* (2023), and most recently co-authored "Understanding the Risks of Generative AI Discovery Review Results" in *ABA Criminal Justice Magazine*.

B. Deepfake Panel Topics for Discussion

Through the course of the panel discussion, we hope to have coverage of at least the following topics that the Committee has been pursuing over the last four years:

1. What is the likelihood that deepfakes will flood the courts?

So far this has not happened. But is there anything about future developments, in terms of accessibility to deepfake software, and undetectability, that will raise the risks that more and more deepfakes will be presented in court?

2. How hard is it to determine whether an item is deepfaked? Is that likely to become harder or easier in the future?

The proposed Rule 901(c) is based on the premise that deepfakes are difficult to uncover. The panel will discuss how, today, one goes about trying to figure out whether an item is a deepfake. And the panel will also discuss whether the task of detection is going to be more difficult going forward.

3. Are watermarking methods, such as C2PA, sufficient to assure that ordinary people will not be generating undetectable deepfakes?

The argument that deepfakes are different is grounded in the idea that anybody can make a deepfake with little time and expense and with little risk of detection. If it comes to the point that deepfakes are possible only with the help of sophisticated hackers with a lot of money, then this rule is probably not necessary because such wrongdoers are unlikely to be regulatable by any rule. So the question for the panel is whether, looking to the future, watermarking and labeling programs will effectively limit the democratization of deepfakes.

4. Are there special problems in regulating deepfake text, as opposed to audio and video?

Rule 901(c) covers all items of evidence. It is not limited to video or audio. And that is a good idea because text can be faked through generative AI. The Ninth Circuit case in the reading above is just one example. Discriminating programs for text appear to use a different process than those that are used to view audios and videos. There will be discussion at the panel on how deepfake texts might be regulated by the rule.

5. Should the rule cover generative AI or all AI?

The Committee used the term “generative AI” in proposed Rule 901(c) on the premise that AI that is not “generative” is unlikely to create a risk of undetectable deepfakes. The panel will discuss whether the Committee’s premise is accurate, and whether to expand the coverage of the rule to all AI.

6. Assuming that the focus on generative AI is correct, does Rule 901(c) provide an accurate definition of generative AI?

The text of Rule 901(c) defines generative AI as follows:

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.

Panel discussion will cover whether this definition is accurate and comprehensive, or whether changes need to be made.

7. Are the list of factors pertinent to satisfy the burden of going forward, proposed in the Note above, useful and comprehensive?

In the materials above, I suggest that the Committee Note could be amended to add a list of factors that would be pertinent to whether there has been a sufficient showing to justify a deepfake inquiry. Those factors are as follows:

- missing or anomalous metadata;
- inconsistent timestamps or creation dates;
- unexplained edits or compression artifacts;
- absence of the native file when a derivative version is offered;
- gaps in chain of custody that would raise an opportunity for tampering;
- glitches such as unusual audio patterns and problems of synchronization;
- known use of generative AI tools by the proponent in this case and elsewhere; and
- independent evidence that is inconsistent with the content of the item.

Panel discussion will provide input into whether this list has correctly articulated the relevant factor for triggering the deepfake inquiry.

8. Would it work to have a lawyer certification requirement, instead of a rule of evidence for courts?

Some have argued that the solution to the deepfake problem is to put the burden on the lawyers — as Louisiana has done in civil cases. The argument is that if lawyers are ordered to disclose to the court in advance whether any item of evidence has been prepared through generative AI, then the unacknowledged use of AI (which is the deepfake problem) will be regulated sufficiently so that a new Evidence Rule will be unnecessary. [Note that, for reasons above, such a certification requirement would need to be applied not just to audios and videos, but also to any text-based items to be proffered.] Committee discussion will cover whether such a certification requirement would be an effect remedy for deepfakes.

9. How likely is it that expert testimony will be required? And what is the likely expense?

The panel will cover the important question of whether experts will always be necessary when an opponent alleges that the proponent is proffering a deepfake. Obviously that leads to greater costs for going to trial. The panel will also discuss what kinds of information an expert would provide, and how a *Daubert* hearing might look.

TAB 3

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Artificial Intelligence and Proposed Rule 707
Date: September 15, 2026

Since the Fall 2023 meeting, the Committee has been considering the challenges posed by the development of artificial intelligence (AI) and its possible impact on evidence offered at a trial. As an important part of this effort, the Committee approved for release for public comment a proposed Rule 707, which is designed to impose reliability requirements on AI-generated evidence when it is offered without the accompaniment of an expert. At its last meeting, the Committee decided, after reviewing the public comments, to take the rule back for further study. The Committee also approved in principle a new draft of Rule 707 that accommodates much of the public comment.

One important aspect of further study is the panel discussion that will take place on the morning of the Committee's Fall 2026 meeting. The Committee has invited a number of experts on AI to provide information and insight on what dangers are presented by AI-generated evidence; whether proposed Rule 707 is necessary; and whether the draft rule can be improved to better address AI-generated evidence when submitted without an expert.

This memorandum is in three parts. Part One sets forth recent developments in legal publications and case law addressing AI as evidence. Part Two sets forth the working draft and Committee Note for a revised Rule 707. Part Three provides background for the panel discussion on AI and evidence. This part includes bios of the panelists and sets forth some of the topics and questions that the panel will address.

I. Recent Developments

A. Case Law

Use of generative AI to improve a photo of a hole. *Linkugel v. City of Los Angeles*, 2026 WL 1430790 (Cal.App. 2 Dist.)

The plaintiff offered pictures of a sinkhole on a golf course, but the pictures were, by the plaintiff's acknowledgement, modified by generative AI. The defendant argued that this was not "enhancement" but rather resulted in a "doctored image" that should not be admissible. The court held that the plaintiff had made no showing, through an expert or otherwise, that the use of generative AI was reliable. Therefore the pictures were inadmissible.

Digital manipulation by a forensics expert: *United States v. Andrews*, 172 F.4th 969 (7th Cir. 2026): In a felon-firearm possession prosecution, the court concluded that findings by an expert that a fingerprint on a gun "matched" the defendant's were properly admitted. The fingerprint on the gun was in a photograph, and the expert testified that he used photoshop to adjust the angle of the photo to better analyze the fingerprint. The defendant argued that the expert should not be permitted to testify because he had "digitally manipulated" the print. The Court of Appeals found no error. It held that a sufficient showing of reliability was established, because the expert testified on the basis of extensive experience.

Comment: Here, an expert testified, but it really should be a Rule 707 question because the expert knew nothing about how photoshop works, and whether anything is affected by changing the angle. One sticking point is whether photoshop is actually AI. The answer from experts is that while traditional photoshopping was not AI, Adobe has added significant AI functions. So, to determine whether Rule 707 is applicable, the court would have to determine whether those AI functions were operative when the angle of a photo is adjusted.

B. Articles

• Draft Article by Professor Jeffrey Bellin on AI and Evidence:

Professor Bellin describes a gap in the rules when AI is offered without an expert:

Judges who are understandably skeptical of A.I. lack the tools to exclude it in any principled manner. Increasingly accurate A.I. outputs meet the low bar for "relevance." The related, and relatedly low, authentication hurdle is also easily surmounted. Authentication requirements protect against forged exhibits, demanding that when an item is introduced into evidence, "the item is what the proponent claims it is." This standard is not likely to block witnesses' testimony about their encounters with artificial intelligence. Testimony about A.I. is not a physical "item" of evidence and, even if it were, it is precisely "what the proponent claims it is." The problem with a typical A.I. statement is not that it is forged but that it may be unreliable. The hearsay and expert rules are the only evidence rules that screen for reliability. But the hearsay rule applies to human statements, and the expert rules have no application when the testifying witness is neither an expert nor purporting to be one.

Expert Use of A.I. Tools

A.I. tools are increasingly common in fields like medicine and engineering. Forensic science is embracing these tools as well. As A.I. becomes commonplace, experts called to testify at trial will routinely base their opinions, at least in part, on analysis obtained through artificial intelligence. As a result, one way that jurors will encounter A.I. in trials is through expert testimony. *Existing evidence rules are well suited to address the use of A.I. by experts. The core concern with A.I. evidence is its inconsistent reliability. Expert testimony is one of the places where the evidence rules explicitly require reliability for admission. Rule 702 directs trial judges to undertake a searching inquiry to determine whether an expert’s testimony is “based on sufficient facts or data,” “the product of reliable principles and methods,” and reflects a “reliable application of the principles and methods to the facts of the case.” In addition, Rule 703 requires experts to rely only on tools that other experts in the field “would reasonably rely on.” The expert rules emphasize reliability for precisely the reason that policymakers are wary of A.I. evidence.*

** * * Since the expert rules are designed to address the same types of concerns that A.I. presents, these rules are a good fit for screening A.I. evidence. Caselaw illustrates. In 2024, in *Washington v. Puloka*, [a case discussed in a prior agenda book] a bystander took a grainy video of an altercation. A defense expert applied an “AI video-editing tool” made by Topaz Labs AI to the video to make the images clearer. The trial court evaluated the expert’s proposed testimony about the tool as well as testimony from a prosecution expert. Applying Rule 702, the trial court ruled that the defense expert testimony and accompanying enhanced video were inadmissible since the A.I. tool was largely untested and potentially unreliable. The experts could not rule out the possibility that the tool “clarified” the video by fictionalizing it, i.e., by inserting pixels that did not represent what really occurred.*

It is important to emphasize that the problem with the A.I. evidence in the *Puloka* case was not that the experts could not explain how the Topaz Lab A.I. tool worked. This so-called “black box problem,” is a significant consideration for A.I. evidence, but it does not alter the conclusion that the existing expert rules are up to the task of screening for reliability. A court could react to an expert’s inability to explain how an A.I. tool works by excluding testimony that relied on that tool. But that is not required by the evidence rules. A compelling explanation of how a technology works to achieve a reliable result is one way to demonstrate reliability. But Rule 702 does not require reliability to be assessed in any particular manner. As the Advisory Committee note to the 2000 amendment states, “no single factor is necessarily dispositive of the reliability of a particular expert’s testimony.” *Experts could, for example, demonstrate the reliability of a tool by explaining why experts are confident that, in a given circumstance, the tool invariably arrives at an accurate conclusion, even if the experts cannot explain precisely how the tool does so. There are other examples of inscrutable “technologies” whose outputs are admitted in court proceedings without a precise explanation of how they work. The best example is trained animals. An expert can explain how a dog or dolphin is trained to do a certain task – typically by rewarding it for success. And the expert can testify that a correctly trained animal will reliably identify a substance or trail in certain circumstances. But the expert typically cannot explain how the animal is able to perform the task. These experts can only explain that the animal, with sufficient testing, can be shown to be reliable. Similar testimony could establish the reliability of some A.I. tools. Thus, under existing rules, analysis of expert testimony that relies on A.I., like the challenged evidence in *Puloka*, hinges not on whether the expert can explain how the A.I. works, but on whether, whatever the*

tool's methodology, the expert can show that it is reliable. After all, jurors do not need to replicate the analysis. They only need to be able to assess its weight.

In sum, A.I. evidence presented through an expert raises no novel problem for the evidence rules. Rule 702 already requires experts to use reliable methods to arrive at any opinion offered at trial. That rule also charges trial courts with a gatekeeping role to exclude experts who cannot establish the reliability of their methodology. Thus, when an A.I. tool is referenced in an expert's testimony, it will have been assessed by the trial court for reliability, and an expert will also be available to help the jury evaluate its outputs. This is all rules can do to ensure reliability in this context.

When a Lay Witness has an A.I. Advisor.

The challenge presented by A.I. to the evidence rules becomes more pressing outside the expert context. Rule 702 only applies to a witness who is testifying as an “expert.” When non-expert (“lay”) witnesses reference statements generated by A.I. tools in their testimony, Rule 702 has no application. [And] the other rules of evidence also offer little assistance in this context. Since A.I. tools are a recent development, there is little caselaw addressing how the evidence rules apply. Yet analogous scenarios demonstrate the gap in the evidence rules’ coverage. For example, in *United States v. Gafford*, [a case discussed in a previous agenda book] Karen Ressel sought an explanation for her failure to receive mail. A citizen of the modern world, Ressel took it upon herself to solve the mystery. She mailed herself an Apple Airtag and followed its progress online. When the Airtag ended its journey at Robert Gafford’s house, she called the police. Later, at Gafford’s trial for mishandling Ressel’s mail, Ressel testified to this sequence of events, including the journey of the AirTag as indicated on Apple’s “Find My” application. The trial court allowed the testimony. On appeal, the Eighth Circuit gave short shrift to the defendant’s challenge. The court noted that Ressel “used the AirTag in the past to locate her children and had found it to be reliable” and that a test run (Ressel first mailed the AirTag to her brother-in-law) had also proven its accuracy. The court concluded: “Karen’s testimony established sufficient foundation to demonstrate the accuracy of the GPS tracking device.”

The Eighth Circuit’s opinion in *Gafford* referenced only one evidence rule, authentication, which was the basis for the defense’s objection. But an authentication objection makes little sense in this context. The authentication rule, Rule 901, demands that when a litigant introduces an item of physical evidence, like a photograph, recording, or document, that “item is what the proponent claims it is.” This analysis is intended to ensure that physical evidence introduced at trial is genuine. The actual AirTag was not introduced in the *Gafford* case and even if it had been, there was no question that it was authentic. It was an Apple AirTag just as its proponent claimed. The problem in a case like *Gafford* is the reliability (not authenticity) of the AirTag. The closest the evidence rules come to ensuring reliability in this non-expert witness context is Rule 701. Rule 701 permits a lay expert to testify to an “opinion,” so long as the opinion comes from the witness’s perception, is helpful to the jury, and does not require expertise. Thus, the Advisory Committee’s note to Rule 701 explains that a lay witness’s opinion that “a substance appeared to be blood,” is admissible since it does not require any technical expertise. In its nearest application to a scenario like that presented in *Gafford*, Rule 701 prevents nonexpert witnesses from applying a complex tool and then interpreting the results for the jury. Specifically, Rule 701(c) states that a non-expert

witness can only offer an “opinion” if that opinion is “not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.”

* * * Another example illustrates the gap in the evidence rules with respect to increasingly futuristic devices. Meta’s new “AI glasses” provide audio and visual outputs and offer real-time translation. Imagine a Secret Service agent who is wearing these glasses encounters a Spanish speaker at a protest. The protester says something in Spanish that the glasses translate as, “I am going to kill the President.” Could the secret service agent testify to the exchange to prove a criminal threat? In essence, the agent would be testifying to what the Meta glasses told the agent the protester said. The out-of-court statement (by the glasses) is not hearsay because the glasses are not a “person.” The agent’s testimony is certainly relevant to prove a threat – assuming the translation function works at all. Rule 701 does not apply because it restricts lay witness testimony “in the form of an opinion” and the agent is not offering an opinion and, even if the agent was, the opinion does not require technical expertise. There is no authentication problem because no physical evidence (e.g., the glasses) is introduced. The reliability of the translation is the key to assessing the evidence’s value to the jury, but there is no clear rule-based requirement to test the evidence’s reliability prior to its admission.

This series of examples leads to the most problematic iteration of evidence law’s A.I. problem, chatbots and other large language model tools, like a crime-solving A.I., such as “Sherlock A.I.” **As a matter of evidence law, a witness could consult these sources and then relay their outputs to the jury without triggering any evidentiary rule of exclusion.** Courts will undoubtedly try to cobble together solutions from the existing rules – Rule 403, 901, and even 1002 – until a better option materializes. A judge has broad discretion, for example, to exclude evidence as “unfairly prejudicial” or “misleading the jury” under Rule 403. *But Rule 403 is a poor vehicle for the exclusion of evidence with significant probative value, as will be the case with much A.I. evidence, since the rule is strongly weighted in favor of admission.* And the poor fit and lack of standards for Rule 403 exclusion in this context raises the prospect that rulings will be inconsistent and arbitrary. As noted throughout, authentication is another potential but imperfect tool. There has always been some sense that authentication requirements ensure accuracy, as with the implicit requirement that physical items of evidence be not only genuine but unaltered. This comes through most strongly in Rule 901(b)(9), one of the “examples” offered in the rules to illustrate sufficient authentication. That rule supports admission upon a showing of: “Evidence describing a process or system and showing that it produces an accurate result.” Courts could point to this provision to try to regulate machine-generated evidence of a “process or system.” But the proponent of such evidence can simply shift to any of the other means of authentication, including the broad standard in Rule 901(a) itself. That’s not the only problem. The authentication rule is an awkward fit when, as will typically be the case, no physical “item of evidence” is introduced. For example, if a witness, as in *Gafford*, testifies that an AirTag indicated that it traveled to a specific location, it is hard to identify the target for an authentication objection. There is no suggestion in the rule, Advisory Committee notes, or case law that the authentication rule extends beyond physical items introduced into evidence to items merely referenced in a witness’s testimony. A clever litigant could point to the Best Evidence rule, Rule 1002, and argue that testimony about the content of a machine-display (here, the “Find My” application) requires the “original.” But absent bad faith, Rule 1004 excuses the production of the original when the originals are lost, and courts typically apply this workaround to ephemeral electronic displays.

In sum, there is a gap in the evidence rules. Judges may try to stretch the rules to fit the new reality. But there is no evidence rule that screens for reliability when a lay witness testifies about the outputs of an A.I. or other advanced computing tool if that tool's outputs are straightforward and do not require expert interpretation. And that raises the prospect that A.I. evidence of dubious reliability will be introduced in American trials without juries being able to reliably assess that evidence.

Comment: Professor Bellin makes a compelling case for why Rule 707 is necessary. But his article suggests that the gap be filled instead by an amendment to the hearsay rule, that would define AI-generated information as hearsay, even though no human declarant is involved. [The AI report would be defined as a statement made out of court.] His solution, however, ends up being problematic, and it is very likely that Rule 707 will better regulate reliability of AI. It would first mean that AI would *always* be excluded when offered to prove a fact, unless a hearsay exception could be found. None of the hearsay exceptions are very well-suited to allowing admission of AI. AI does not get excited, for instance, and it never dies. The closest two exceptions for allowing AI are the business records exception and the residual exception. But the problem with the business records exception is that regularly conducted AI would be too easily admitted. The trustworthiness requirement of that rule puts the burden on the *opponent* to show that the statement is unreliable — precisely the opposite of Rule 707/702. And as to the residual exception, the results are likely to be highly variable, with no standards in the rule about whether experts must provide the reliability foundation. It seems clear that the reliability concerns of AI are more akin to those raised by expert testimony, and that the Rule 702/*Daubert* framework is a more developed and nuanced approach to the reliability issues raised by AI.

Finally, the hearsay rule does not apply to statements made in court. Thus the hearsay rule would have nothing to say about a lawyer who asks ChatGPT for an answer right at trial. The ChatGPT answer would in that circumstance not be hearsay under Professor Bellin's proposal because the statement is being made for the first time in court. But that statement would be regulated under Rule 707.

• **Article on the need for software experts to validate evidence generated by software programs:** Gregory D. Schwartz, *When Disciplines Disagree: The Admissibility of Computer-Generated Forensic Evidence in the Criminal Justice System*, 72 UCLA L. REV. DISC. 174 (2024)

The author contends that courts too easily admit forensic evidence that is software-based, as they do so without the requirement of testimony by software experts. The author notes that courts often rely on validation tests, without requiring disclosure of source codes, and contends that such reliance is misguided because validation tests are not as effective in determining reliability as review of source codes would be. The article concludes as follows:

This Essay has argued that courts should use computer science expertise to help determine whether software-generated evidence meets the standards for scientific admissibility. Software errors can occur through many different mechanisms—regardless of whether the underlying scientific principles are correct. These errors can be hard to catch or mitigate, so the computer science community has developed sophisticated methods for

finding errors and reducing the danger from unfound errors. *To correctly apply their admissibility standards for scientific evidence, courts must require the moving party to present testimony or standards from experts who have knowledge of these issues in software verification.* This additional testimony will allow for a more meaningful determination of where source code review and other assurance measures are necessary to properly gatekeep scientific evidence in the courtroom.

More broadly, an appreciation of the distinct expertise within software assurance can prevent courts from continuing to over-rely on novel technologies. While DNA matching systems are currently the subject of scrutiny, they were preceded by fingerprint analyzers, which were preceded by breathalyzers. Each time, courts held that source code disclosure was unnecessary to sufficiently vet the software, and each time, serious errors were found when the code was eventually released. Recognizing the limits of forensic experts—and, potentially more important, recognizing the expertise of computer science experts—can provide the missing perspective that is needed for courts to properly balance the opportunities and limitations of emerging forensic technologies.

• **Article on Machine-Learning Evidence in Criminal Cases: Benjamin Welton, *Meaningful Machine Confrontation*, 76 Stanford L. Rev. 845 (2025).**

The author argues that a stronger foundation of reliability must be established for machine-learning evidence offered against criminal defendants. The author first notes the ubiquity of machine-learning evidence offered by the government in criminal cases:

Courts are not just seeing ovens and spectrographs anymore. They are already seeing a wide range of sophisticated artificial intelligence, complex chemical calculations, and multi-factor automobile awareness systems that were once the stuff of science fiction. These tools do not just have a wide range of purposes—they have a wide range of underlying technological designs. Design choices have received some discussion, but they have largely been glossed over or ignored outright.

Forensic Evidence. Perhaps the most familiar form of machine-generated evidence introduced at trial is forensic evidence like DNA analysis, drug testing results, and blood alcohol testing results. * * * [T]hese types of evidence are governed by wildly different technologies. Breathalyzers, for example, detect ethanol concentration by shining an infrared light through a breath sample and reporting light absorption rates. In contrast, DNA analysis employs a technique called probabilistic genotyping, which creates a raw DNA profile from a sample using a series of chemical reactions. A proprietary software system like STRmix or TrueAllele then calculates the likelihood that a person’s DNA is in that sample profile. Chemical reactions are central to each of these technologies, but they are otherwise quite distinct. Nevertheless, each of these types of forensic evidence has come under fire for miscalibration, misuse, and inaccuracy.

Location-Based Technology. Ankle monitors, handheld GPS devices, and Stingrays (secretive tools that mimic cellphone towers to receive phone location data) are frequently used to track a defendant’s location. The controversial tool ShotSpotter uses acoustic sensors installed on buildings and telephone poles to triangulate sounds that machine

learning predicts to be gunfire. This technology incorrectly flags everything from church bells to trash pickup, noises are regularly relabeled by employees at law enforcement's request, and location data is sometimes changed by employees. Despite these inaccuracies, ShotSpotter has been admitted in court.

Electronic Records. Another major category of machine-generated evidence is electronic records, including auto-generated receipts and computer logs. Hard drive extraction reports are of particular importance: Law enforcement uses the computer program Cellebrite to download information from a phone or computer hard drive and create a browsable report of call records, location data, and browser history. Cellebrite reports, internet access logs, and computer records also play a prominent role in cybercrime allegations.

Imaging and Video. Artificial intelligence plays an important role in modern imaging and video technology. Computer vision and machine learning, two forms of artificial intelligence, are powering sophisticated facial, audio, and spatial recognition. Lip-reading algorithms can identify words with nearly twice the accuracy of humans. License plate scanners employ machine learning and optical character recognition to parse and interpret passing license plates.

Automobiles. Automobile technology is likely to see increased use at trial as cars collect more data. A car's sensing and diagnostic module, for example, tracks the car and can help identify a suspect's driving behaviors. Some autonomous vehicles have drowsiness detection systems, which watch facial contours, pedal pressure, steering wheel movement, and other signals to guess when the driver is falling asleep. It is easy to imagine this technology being used as evidence of driving under the influence or reckless driving.

Something More? As technology changes, this list will continue to grow. Some technologies—for example, machine learning models that predict whether someone authored a text—do not clearly fit into any of these categories. And drones, brain imaging analysis, and lie detectors push the boundaries of what might be introduced at trial in the future. Keeping potential future technologies in mind will be crucial to maintaining a practical taxonomy for machine-generated evidence.

Article on a Definition of Artificial Intelligence: Weitel, *Defining Artificial Intelligence*, 71 Wayne L. Rev. 363 (2026):

Definitions of Intelligence in AI Research Researchers group AI definitions into three general categories: (1) achieving goals in complex environments; (2) learning and adapting; and (3) mimicking human abilities. * * *

After looking at more than 100 statutory definitions throughout the world, the author had this summary:

Thirty-two policies lack any definition. Forty-eight dictate that the system must run on a particular substrate, almost always a machine or engineered system. Forty-eight define AI as a system. Fifty-four define it as having autonomy or decision-making capabilities. Forty-six include the ability to learn or adapt. Thirty-three define AI to operate based on objectives or goals, most

commonly goals provided by users. Thirty-one define it as conducting inference or reason. Forty-two say AI generates output. Thirty-six define AI as mimicking some attribute of being human, typically either intelligence or capability generally. Seventeen definitions mention specific architectures, like statistical modeling.

Systems. Twelve percent of definitions refer to AI as "systems" that do some variety of actions without limiting what types of systems qualify. Forty eight percent of definitions indicate what makes up the system. For example, the EU AI Act, President Biden's executive order, and others require that an AI system be "machine-based." The recitals to the EU AI Act faux-clarify that "'machine-based' refers to the fact that AI systems run on machines." * * * * * Few of these definitions offer any practical limitation. A \$20 wristwatch would meet the definition of AI in many of these definitions. Complexity is not required to be a machine. Under definitions that accept something that is "engineered," a wristwatch fits because engineered means something is "designed and built using scientific principles." Sundials are designed and built based on principles of astronomy, so that definition would seem to include them as well.

A "System." Forty-eight percent of definitions of artificial intelligence apply to a "system." "System" is not defined in any policy or law reviewed for this article. This is a critical mistake because AI systems interact seamlessly with other software. It is common for two pieces of software to work together, but there is no guidance on whether this makes them the same "system." Without clear definitional boundaries, every line of code that interacts with the AI system may be considered part of that AI system and subject to the same regulations. This could expand the regulatory scope well beyond anything reasonably anticipated. * * * We may try a tighter version of system that requires the two programs have the same designer, the same owner, some exclusivity, or other factors to delineate the boundaries of the system.

* * *

Autonomy and Decision Making Autonomy or decision making appears in 54% of definitions of surveyed legislation and policy statements. The most common formulation is that the system acts with "varying levels of autonomy." * * * In U.S. legislation, this is often phrased as operating "without significant human oversight."

Definitions of autonomy may be improved by calling for "substantial" autonomy, which is still vague, but at least requires something more than changing the color of a pixel. In a specific field, regulation may be improved by replacing "autonomy" with language about the specific decision to be made.

Objectives Thirty-three percent of definitions define AI as pursuing objectives. The definitions around objectives are often too inclusive to carry any meaning. There are two main lines of definitions, both of which derive from definitions promulgated by the Organisation for Economic Cooperation and Development (OECD). The first follows the OECD's definition in 2019, which defines an AI system as one that can "for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments." This language has been adopted by policymakers in Australia, Chile, Peru, and the White House. *In 2024, the OECD amended its definition, replacing the language about "human-defined objectives"*

with language covering any "explicit or implicit objectives." This language was adopted by the Council of Europe, the EU AI Act, and the California Senate.

1. Policy Considerations for Defining Objectives The first set of definitions is a mistake because it applies only to AI pursuing "human-defined objectives" and it excludes rogue systems, the systems we are most interested in regulating. Typically, objectives will be defined by humans, but when advanced models suspect humans may impede their goals, the models consistently scheme to thwart the humans. If the regulation covers only AI systems that are pursuing "human-defined objectives," then a rogue system pursuing other goals would fall outside the regulation's definition of AI, so that it would no longer be subject to the regulation designed to constrain it. The second set of definitions swaps "human-defined" objectives for "explicit or implicit objectives," but suffers the same problem. An implicit objective is one that is suggested or implied by the explicit objective. Again, a rogue system that is operating on objectives that are unrelated or adverse to human-defined objectives would not be pursuing either "explicit or implicit objectives." That means it would not be covered by the definition, so it would not be covered by the regulation. Again, by limiting the definition of AI to systems that are following proper objectives, we leave rogue systems beyond the scope of the regulations. *The U.S. NIST has a better approach. Its definition of AI was expressly adapted from the OECD definition, but it dropped both clauses and just referred to AI systems "that can, for a given set of objectives, generate outputs," dropping any qualifiers about what objectives are proper.*

Influencing Physical or Virtual Environments The AI definitions that mention output types often include that the outputs "influenc[e] physical or virtual environments." * * * The output definitions rarely add any real constraints on what is or is not artificial intelligence. "Predictions" is useful to narrow the field toward what are typically considered AI systems. "Content" is vacuous, as is the requirement that it "influence physical or virtual environments." "Recommendations" may be helpful if the goal is to focus on recommendations and overconfidence, but it otherwise doesn't narrow the definition in any helpful way.

Mimics Human Intelligence Thirty-six percent of surveyed policies define AI to include mimicking human intelligence or "acting intelligently." Defining intelligence as the ability to mimic human abilities is likely to undercount powerful models that do not appear human-like, and overcount weak models that appear so. There is no accepted definition of human intelligence, so defining AI by analogy to human intelligence does not provide clarity. Definitions that rely on a court to define human intelligence are likely to chill investment while innovators await philosophical decisions from the bench. On the other hand, using human intelligence as a lower bound avoids many of these concerns. A definition that says the system operates at least at the level of human intelligence would avoid being underinclusive of systems that are superhuman.

HOW TO DEFINE ARTIFICIAL INTELLIGENCE

It likely is not possible to provide a universal definition of artificial intelligence under the law because (1) we cannot define organic intelligence, so we cannot define its counterfeit, and (2) we cannot delineate where one digital system begins and another ends. Even if we could define it, most regulations are aimed at technologies that do not exist yet, so defining powerful AI would require policymakers to predict which attributes, architectures and methods make an AI system powerful, and if we knew what attributes, architectures, and methods would make a system

powerful, then we would already have those systems. So we are regulating something we cannot identify, cannot delineate, which does not now exist, and which may never exist. The deck is stacked against us. This part will describe two alternatives for policymakers that do not require precise definitions. First, we can err in a well-considered direction. Alternatively, we can regulate something other than the AI system.

* * *

A better direction for regulators would be to consider the field they intend to regulate to find the appropriate balance between over-inclusiveness versus under-inclusiveness and between vagueness and specificity. For example, autonomous weapons are probably better served by overinclusive definitions with enough broad terms that regulators can apply to new entrants in the field. In contrast, a telemarketing regulation might err on the side of being underinclusive with very specific regulations that clearly specify the harm the regulators seek to prevent. The risk of some excessive marketing calls would be balanced against adding a few thousand dollars of compliance costs to every mobile app developer. Attempts to predict the future are likely to fail. Legislators that predict quantitative metrics or architectures are likely to find the regulation hollow, as development moves in another direction. Alternatively, legislators that use broad language effectively yield their regulatory authority to agencies or judges. This may allow a more rapid regulatory response, but it will increase uncertainty. Regulators, researchers, and legal scholars must tailor the definition of AI to the sector being regulated, the technological reality, and the power of the models.

• **ARTICLE: Williams, Rethinking Federal Rule of Evidence 707: Reliability and Transparency in AI-Generated Evidence, 32 *Richmond Journal of Law and Technology* 243 (2026):**

This article discusses the gap in the Federal Rules when AI is admitted without an expert, and gives examples of how that problem can arise:

When AI-generated evidence rises to the level of expert testimony, Rule 702 currently governs its admissibility. While Rule 702 and *Daubert* provide a comprehensive framework for courts to use when evaluating the admissibility of human expert testimony, they do not directly guide courts in handling the admissibility of machine outputs when they are presented without an expert witness. Under the current rules, when a court evaluates a human expert who relied on AI, it examines the expert's methodology, which may include the expert's explanation of the AI system's methods. When the evidence is presented without a testifying expert, the admissibility analysis becomes less clear.

This issue could arise when a lay witness uses an AI program, without knowing its reliability, to reach a certain conclusion. For example, AI can quickly analyze medical images, including MRIs, to assist in diagnosing conditions. Although a radiology technician may be able to testify about how the scan was performed and how the AI system was used, they might not be able to verify the accuracy of the results. While they may be able to describe the output, the machine itself is making inferences based on automated training data to form its conclusion. AI may also be used in accident reconstruction during a personal injury case. AI can be used to quickly analyze data, such as from event data recorders in a vehicle, and generate a model showing

a potential sequence of events. If this model is generated by an insurance claims adjuster, rather than an expert in physics or engineering, Rule 702 does not apply. Like the radiology technician described above, the insurance claims adjuster would have limited or no insight into the accuracy of the generated model.

C. Statutes and Regulations

New York State Courts 2026 definition of AI:

PART 161. USE OF ARTIFICIAL INTELLIGENCE TECHNOLOGY

§ 161.2 Definitions

For purposes of this Part:

(a) The term “artificial intelligence” or “AI” shall mean a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments, and that uses machine- and human-based inputs to perceive real and virtual environments, abstract such perceptions into models through analysis in an automated manner, and use model inference to formulate options for information or action.

II. Proposed Rule 707, Working Draft

The following is the version of proposed Rule 707 that was tentatively approved by the Committee at the last meeting. (There were three alternatives, and the Committee decided to pursue the version that presumed, but did not absolutely require, an expert’s foundation before AI could be admissible). The proposed Committee Note is also set forth.

This is not to say that the Committee has approved all of the language in the working draft or the Note. Rather, the draft rule and note take an approach that was approved by a majority of the Committee for situations in which AI is admitted without an expert to prove a fact. That approach is based on two fundamental principles: 1. Reliability of the AI is determined by the principles set forth in Rule 702; and 2. Expert testimony is ordinarily required when AI is admitted, but there might be cases where a substitute guarantee of reliability can satisfy the rule.

Rule 707. Evidence Produced By Artificial Intelligence and Presented at Trial Without an Expert

(a) In General. 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.*** Ordinarily, the proponent must provide an expert to explain how the system of artificial intelligence reliably produced the evidence. But in exceptional circumstances, the court may consider 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 all parties 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,¹ [provide analysis]² or 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 [provide analysis of]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 offered 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

¹ The language “for a given set of human-defined objectives” is taken from a definition provided by NIST. But the reference to “human-defined objectives” may be passe because AI can now program itself. This will be one of the issues discussed by the panel at this meeting.

² The addition of the term “analysis” may be useful because some AI may not be providing predictions or recommendations but rather may be providing analysis of a problem. Maybe other descriptors are necessary to cover what generative AI does. Again, this is a topic for discussion by the panel.

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”).

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.

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

83 primarily on experience, then the witness must explain how that experience leads to the
84 conclusion reached, why that experience is a sufficient basis for the opinion, and how that
85 experience is reliably applied to the facts.”). That said, the proponent of AI output may overcome
86 the problem of inexplicability by showing through an expert how the machine got trained and
87 establishing, for example through validation studies, that the process leads to a low rate of error.

88 Under this rule, AI-generated output will be regulated pre-trial by the court in essentially
89 the same way as expert testimony. But there may well be a difference at trial when AI evidence
90 is found by the court to be admissible under this rule, because while an expert is ordinarily
91 required to provide the foundation for admissibility, it would be possible for a proponent to offer
92 that evidence at trial without an expert. A human expert can be cross-examined, and the jury will
93 be able to weigh the expert’s testimony accordingly. But it may be more difficult to attack the
94 weight of AI output. The opponent may be able to introduce reports and data, as well as expert
95 testimony, to undermine the output. Or the opponent might be able to impeach the conclusion by
96 showing prior inconsistencies or specific contradiction, akin to Rule 806. But in the end, the
97 inability to cross-examine is a concern. Accordingly, the court should consider providing a
98 limiting instruction that machine-generated evidence is subject to error and that evidence should
99 not be assumed to be reliable simply because it was produced by a machine.

100 The rule provides for pre-trial notice, as it is important that the significant reliability issues
101 attend to AI evidence be handled before the trial. The notice provision is intentionally flexible.
102 See the notice provisions in Rules 404(b) and 807. The proponent of AI evidence must also
103 consult the Federal Rules of Civil and Criminal Procedure to determine pretrial obligations.

104 Rule 707(d) specifically provides that the rule is not applicable if the reliability of an AI
105 process is subject to judicial notice. Also, it is clear that the rule does not apply if the AI’s
106 probative value is not dependent on its reliability. For example, if a driver is sued for negligence,
107 evidence that AI instructed the driver to travel the wrong way on a one-way road is not subject to
108 Rule 707, because the evidence is offered to show that the driver relied on it, rather than its
109 accuracy.

110 The definition of “artificial intelligence” in Rule 707 is taken from the National Artificial
111 Intelligence Initiative Act of 2020 (116 Pub. L. 283 (2021)). That Act also notes that “[a]rtificial
112 intelligence systems use machine and human-based inputs to—(A) perceive real and virtual
113 environments; (B) abstract such perceptions into models through analysis in an automated
114 manner; and (C) use model inference to formulate options for information or action.” This further
115 elaboration by Congress should be considered in determining whether proffered computer-based
116 information is subject to this rule.

III. Panel Discussion on AI and Evidence, and Draft Rule 707

Our second panel at the Fall 2026 meeting will address the topic of AI offered as evidence, and will provide some comments on the need and advisability of the revised proposal for a new Rule 707.

We are grateful for the renowned experts who will speak on questions of AI and reliability. The format of the panel is that each speaker will have 5-10 minutes to make a presentation. Committee members may ask questions whenever they wish. After all the presentations, there will be time for a general discussion among the panelists and for statements and questions by Committee members.

A. Panelists

Here are the bios for the panelists, in the order of presentation:

Professor Peter Henderson

Peter Henderson is an assistant professor at Princeton University, leading the Polaris lab, with appointments in the Department of Computer Science and the School of Public and International Affairs, as well as the Center for Information Technology Policy. His research focuses on aligning machine learning, law, and policy for responsible real-world deployments. This includes work on AI safety, methods to improve reasoning in foundation models, interdisciplinary methods in law and AI, as well as core work on legal doctrine and policy, particularly around AI governance. He received his J.D. from Stanford Law School and Ph.D. in computer science from Stanford University.

Professor A. Feder Cooper

Professor Cooper researches a variety of topics in reliable, scalable machine learning. He is a research scientist on the founding team at the AI Verification and Evaluation Research Institute (AVERI). He is a postdoctoral affiliate at Stanford HAI, RegLab, and CRFM and a Faculty Associate at the Berkman Klein Center for Internet & Society at Harvard University. In 2026, he was appointed as an Assistant Professor of Computer Science at Yale University. He is also affiliated with the Information Society Project at Yale Law School, the Center for Algorithms, Data, and Market Design, and the Institute for Foundations of Data Science.

Professor Cooper finds ways to effectively communicate the capabilities and limits of AI/ML to interdisciplinary audiences and the public. His research has received spotlights, orals, and best-paper accolades at top AI/ML and computing venues, including NeurIPS, ICML, AAI, and AIES. Law collaborations on copyright and Generative AI have been lauded as "landmark" work among technology law scholars and the popular press. His research has been covered in the media at outlets such as The Atlantic, The Washington Post, Bloomberg News, 404 Media, and Wired.

Melissa K. Taylor

Melissa K. Taylor leads the NIST Forensic Science Program Office, overseeing the Forensic Science Research, Standards, and Scientific Foundations programs. Her career in the forensic science industry began 20 years ago, with consultant positions at Booz Allen Hamilton, Lockheed Martin, and the National Institute of Justice, before joining NIST in 2008. Her pioneering research has focused on integrating human-factors principles into forensic workflows, process mapping, and understanding expert decision-making. She has directed and authored several foundational publications on the topic, including *Forensic DNA Interpretation and Human Factors*. She has been recognized for her professional contributions with the US Department of Commerce Gold Medal (2024). Beyond forensics, Ms. Taylor serves as the Program Manager for the National Artificial Intelligence Advisory Committee (NAIAC). In this capacity, she coordinates the committee's efforts to provide high-level counsel to the President of the United States on the development and adoption of responsible AI.

Jennifer Maisel, Esq.

Jen Maisel, a partner at Rothwell Figg, focuses her practice on intellectual property law and litigation, and co-chairs Rothwell Figg's artificial intelligence (AI) practice team. With a degree in Information Science, Systems, and Technology, Jen has hands-on experience developing language models for natural language processing applications, and has been advising clients on IP, data protection, and privacy issues in the space for over ten years at Rothwell Figg. For large corporations and emerging companies, Jen also routinely represents clients with breakthrough innovations in virtual reality, big data, the Internet of Things, privacy, cybersecurity, quantum, and blockchain technologies. Because she is conversant in the technology, she is highly skilled at seeing how technical concepts fit into a sometimes imperfect or uncharted legal framework. She routinely advises clients on the novel legal risks posed by AI technology, including representing content owners in asserting claims for unlicensed use of their IP, establishing AI governance programs and policies to mitigate legal risk and loss of rights, and advising on content licensing deals.

Rahul Mukhi, Esq.

Rahul Mukhi is a Partner in Cleary Gottlieb's New York office and the firm's Co-Head of White-Collar Enforcement and Investigations practice. A former Assistant U.S. Attorney for the Southern District of New York, Rahul represents clients in government investigations, internal investigations, cybersecurity incidents, securities enforcement matters, sanctions inquiries, antitrust investigations, and complex commercial disputes. He has successfully represented clients before the DOJ, SEC, and other U.S. and international regulators across a wide range of industries, including technology, financial services, digital assets, healthcare, and consumer products.

Rahul is also one of the leaders of Cleary's AI Litigation and Enforcement Practice and advises clients on the rapidly evolving legal, regulatory, and litigation risks associated with artificial intelligence. He counsels companies on AI governance, regulatory compliance, AI-related whistleblower complaints, allegations of trade secret theft, cybersecurity and data-related risks, and the use of AI in investigations and litigation. Rahul has represented leading AI companies and regularly advises boards, senior executives, and legal departments across industries on emerging

enforcement trends, regulatory developments, and risk management strategies relating to the deployment of AI. He also works closely with clients to leverage AI tools in internal investigations. He is a frequent speaker and author on AI regulation, AI enforcement, and the use of generative AI in legal and business settings.

Josh Goldfoot, Esq.

Josh Goldfoot is a Deputy Assistant Attorney General in the Department of Justice's Criminal Division. In that role, Josh oversees three Criminal Division sections: the Appellate Section (APP), the Child Exploitation and Obscenity Section (CEOS), and the Computer Crime and Intellectual Property Section (CCIPS).

Prior to his current position, Josh worked as Principal Deputy Chief of CCIPS for eight years, as Deputy Chief for Cyber Policy in the Department's National Security Division for three years, and as a trial attorney in CCIPS for seven years. Josh has received the Attorney General's John Marshall Award for his work on remote computer searches, the Attorney General's Distinguished Service Award for his work on a botnet takedown, the FBI Director's Award for an international hacking case, and also four different Assistant Attorney General awards.

Josh has trained hundreds of AUSAs and DOJ attorneys in electronic evidence, online investigations, computer intrusions, cybersecurity, and prosecuting cybercrime. He has authored or co-authored six law review articles about law and technology: *Cybersecurity as a Legal Problem* (2023); *The Pen-Trap Statute and the Internet* (2018); *A Trespass Framework for the Crime of Hacking* (2016); *The Physical Computer and the Fourth Amendment* (2011); *A Declaration of the Dependence of Cyberspace* (2009), and *Antitrust Implications of Internet Administration* (1998). He received a United States patent in 2008 for shape recognition technology. He is a graduate of Yale University and earned his law degree from the University of Virginia School of Law in 1999. He has worked in technology law since 1999, when he advised Internet startups in Silicon Valley on intellectual property issues. Prior to joining the Department of Justice in 2005, he litigated civil cases, and clerked for Judge Alex Kozinski on the Ninth Circuit U.S. Court of Appeals. Josh authored and operates the web site "sentencing.us," which calculates U.S. federal sentencing guidelines.

Nicole Owens, Esq.

Nicole Owens is the Executive Director of Federal Defender Services of Idaho (FDSI), a nonprofit Community Defender Organization serving the District of Idaho with trial units in Boise and Pocatello and a Capital Habeas Unit in Boise. A graduate of the University of Idaho College of Law, she began her career in the Capital Litigation Unit of Idaho's State Appellate Public Defender's Office, representing clients on death row. She then spent seven years as a felony trial attorney with the Ada County Public Defender's Office, trying cases ranging from trafficking to first degree murder. She joined FDSI as an Assistant Federal Defender in 2018 and was appointed Executive Director in 2021. Ms. Owens serves on the Ninth Circuit Trial Improvement Committee, the Strategic Resources Advisory Board, and the Budget Advisory Panel, and chaired the Defender Automated Working Group of the Administrative Office of the United States Courts. She is the immediate past president of the Idaho Association of Criminal Defense Lawyers.

Professor Jess Miers

Jess Miers is a Visiting Assistant Professor of Law at the University of Akron School of Law. A lawyer and technologist, Jess focuses on the intersection of law and technology, with recent research and scholarship centered on Generative AI. Jess is recognized as an expert in U.S. online intermediary liability law and has extensively written, spoken, and taught on issues such as online speech and Section 230, content moderation, intellectual property, and cybercrime.

Previously, Jess served as Senior Counsel and Senior Copyright Counsel for Chamber of Progress, a progressive tech trade association based in Washington, D.C., where, among many things, she helped build and lead the organization's recent AI initiative, "Generate and Create." During her time at Chamber of Progress, Jess authored numerous appellate amicus briefs, including a brief in the recent Supreme Court cases *NetChoice & CCIA v. Moody & Paxton*. Before joining Chamber of Progress, Jess was a Senior Government Affairs & Public Policy Analyst at Google, where she oversaw state and federal content policy portfolios and collaborated with litigation teams on key online speech issues currently under review by the U.S. Supreme Court.

B. Rule 707 Panel Topics for Discussion

Through the course of the panel discussion, we hope to have coverage of at least the following topics that the Committee has been pursuing over the last four years:

1. Is it likely that AI reports can/will be offered without an expert?

Some of the public comment questioned the likelihood of AI reports being presented without an expert. The thought, I guess, was that everyone would want an expert to pump up the report. Apparently everyone would eschew the cheaper alternative of simply proffering the report. The panelists will consider whether there is a threat of AI reports being offered without an expert.

2. What are the most important reliability problems attendant to AI that need to be addressed by the rule?

The Committee (indeed everybody) knows by now that AI can be unreliable. But what are the reasons for that? What are the most important factors to consider in a reliability inquiry?

3. How do you draw the line between AI and other digital information? What about if there is a mix?

AI is often just a part of a digital presentation. At what point does AI become a problem for the rule to address? An example is photoshop, which is not AI, but which now has AI features. Should something be added to the draft Committee Note to address the debate over whether a hybrid system should be covered by an Evidence rule?

4. Is the rule potentially overinclusive? Could it make admission of routinely relied upon technologies, such as Excel Spreadsheets, Google Maps, or digital thermometers, too difficult?

The original proposed Rule 707 covered “machine-generated” evidence, and many thought that was too broad. (Though in fact the rule covered machine-generated evidence *only* when the

output would be the equivalent of expert testimony). The question for the panel is whether the coverage of information generated by artificial intelligence will largely solve concerns about overbreadth.

5. Can AI be validated any way other than through an expert? What about self-validating AI?

One of the debates raised in the public comment to Rule 707 was whether an expert always needs to be called to validate AI-generated evidence. At its last meeting, the Committee opted for the draft that leaves open the possibility that, in exceptional circumstances, the AI might be validated in ways other than through expert testimony. There appears to be a good argument that having this flexibility will help the rule to stand the test of time. That said, it will be very helpful to get input from the panel on just what substitutes, if any, there currently are for expert testimony, and whether future methods — such as self-validating AI — are a legitimate possibility.

6. How important is it for a proponent to have access to the source code of the AI program?

The opponent needs to have the necessary tools to raise the possibility that proffered AI is unreliable. Many have argued that access to source codes is essential for a meaningful challenge. Others have argued that access to validation tests is a fair substitute. The panel will discuss the importance of access to source code and whether there may be adequate substitutes (such as validation tests), now or in the future.

7. What is a proper definition of AI as applied to the problem of admitting AI as evidence?

The definition used in the draft is: “In this rule, ‘artificial intelligence’ means a machine-based system that can, for a given set of human-defined objectives, or make predictions, recommendations or decisions influencing real or virtual environments.” This is a definition that has been used by NIST, but it may be problematic for at least two reasons. First, the requirement of a given set of human-defined objectives is not very helpful in describing AI, nor is it accurate given the fact that AI can now create itself. Second, the language “predictions, recommendations, or decisions” may be underinclusive because AI can do more than those three things.

The panel will discuss what should be added or deleted from the draft definition, to best catch the AI that will be offered into evidence.

8. What should be done when AI gets to the point that nobody knows how it reaches its conclusion? Should that “blackbox” evidence be automatically excluded?

The Committee Note to the draft rule discusses the problem that arises where an expert is not able to explain how the AI system came to its conclusion — because nobody can. One question for the panel is whether, in such situations, the testimony should ever be admissible. Another is, assuming it can be admissible, what kind of showing needs to be made in the absence of the expert’s explanation?

9. Is it appropriate to review AI by the same standards used to evaluate expert testimony?

Some of the public comment on proposed Rule 707 objected to tethering that rule to Rule 702. They argued that the reliability issues attendant to AI are different in kind from those

applicable to human experts. Specifically, the argument was that the Rule 702 standards of “sufficient facts or data,” “reliable principles and methods,” and “reliable application” do not cover the reliability questions attendant to AI systems. The panel will discuss whether these Rule 702 standards — which are nothing if not flexible — are proper tools for assessing the reliability of AI-generated evidence.³

³ The Committee has received three submissions, after the period of comment on proposed Rule 707 was closed:

1. A [comment from Akilah Kamaria](#), which concludes that the solution for regulating AI offered as evidence is to recognize the “Traceable Ceiling as a baseline technical reality and classifying the available evidentiary record through the Evidence-State Scale.” He concludes that the Committee can thereby “give trial courts nomenclature and a consistent way to determine what an AI record shows. This would help prevent authentication under Rules 901(b)(9) or 902(13) from being mistaken for proof of reliability, or proof of runtime conduct.”
2. A [comment from Noel Newlon](#), suggesting that AI-generated evidence should be presented to a “Certified Technical Witness: a version-locked, court-certified analytical witness, loaded with a stipulated corpus, available to every party on direct, required to ground its claims in the record, permitted to draw record and technical inferences, and barred by architecture from opinions on legal culpability or a recommended verdict.”
3. A six-page [memorandum from Lawyers for Civil Justice](#), containing more than 30 questions that LCJ thinks should be addressed at this Symposium.

TAB 4

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George Lynn Cross Research Professor

liesarichter@ou.edu

From: Liesa L. Richter, Academic Consultant

Date: September 18, 2026

The Standing Committee voted unanimously to release the amendment for public comment. The public comment period began on August 14, 2026 and runs through February 15, 2027. The proposed amendment published for comment provides as follows:

16 authentication of the public documents of Indian Tribes and Nations will allow for more efficient
17 proof of tribal records in federal court and will conserve the valuable resources of tribal officials
18 who often had to appear in court to authenticate documents prior to the amendment.

19 Under the Federally Recognized Indian Tribe List Act of 1994 (P.L. 103-454), the
20 Secretary of the Interior publishes a list of all federally recognized Indian tribes in the Federal
21 Register, through which courts may identify covered Tribes and Nations. The amendment
22 permits self-authentication of the qualifying sealed and signed documents of any Indian Tribe or
23 Nation that is federally recognized as of the date that the document is offered into evidence.

24 The amendment concerns authenticity only; other evidentiary requirements continue to
25 apply. As with other 902(1) documents, parties may still challenge the authenticity of the covered
26 public documents at trial.

To date, no public comments have been submitted on the Rules website. The Committee did solicit feedback from all 585 federally recognized Tribes and Nations prior to publishing the proposed amendment, however.¹ As Committee members may recall, the feedback received was sparse, but positive.² Tribal governments suggested that the amendment would better respect tribal sovereignty, would reduce significant burdens on tribal nations to authenticate tribal records in federal proceedings, and would aid litigants in civil, as well as in criminal, cases. Tribal leaders further stated that there is no reason to treat the signed and sealed records of sovereign Indian Tribes and Nations differently from the records of the domestic entities whose records are already self-authenticating under Rule 902(1).³ The proposed amendment and Committee Note, as published, reflected the feedback received from tribal Nations. As such, there are no proposed changes to the text of the amendment or to the Committee Note for the Committee's consideration at this time. The Committee will consider any additional commentary received before the conclusion of the public comment period at its Spring 2027 meeting.

¹ The Administrative Office of the United States Courts circulated a letter from Judge Furman seeking input regarding a potential amendment to Rule 902(1) to twenty-three tribal organizations and representative entities on May 23, 2025. The A.O. expanded circulation of Judge Furman's letter to all 585 tribal leaders for whom it has contact information on September 15, 2025, to ensure maximum participation.

² The Committee received ten responses to its request for feedback.

³ The feedback received from tribal leaders is detailed in the Agenda Memo dated April 1, 2026. See [2026-05-evidence-rules-agenda-book.pdf#page=234](#)

TAB 5

FORDHAM

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Possible Amendments to Rule 104(a) and (b)
Date: September 15, 2026

At the last meeting the Committee unanimously approved, for release for public comment, amendments to Rule 104. The Standing Committee voted unanimously to release the amendments for public comment. The public comment period began on August 15 and runs to February 15.

Rule 104(a) and (b) regulate the court's evaluation of proffered evidence before it can be submitted to the jury. Currently these provisions state as follows:

Rule 104. Preliminary Questions

- (a) ***In General.*** The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.
- (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. The court may admit the proposed evidence on the condition that the proof be introduced later.

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 the proffered evidence is admissible. For example, a statement is admitted as an excited utterance only if the declarant was under the influence of the startling event. That is a fact question for the court — but how convinced must the court be before finding that the declarant was under the influence of the startling event?

The question of the applicable standard of proof for Rule 104(a) determinations was answered in *Bourjaily v. United States*, 483 U.S. 171, 175 (1987), where the court stated that “[t]he preponderance standard ensures that before admitting evidence, the court will have found it more

likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration.” But, in the run-up to the 2023 amendment to Rule 702, the Committee found that litigants and courts often failed to recognize that the preponderance standard applied to the reliability requirements of Rule 702. The Committee found that the problem was, in part, that if you looked at the text of Rule 104(a), you saw nothing about a standard of proof. So the proposed amendment, as seen below, articulates the preponderance standard of proof for Rule 104(a) determinations.

Rule 104(b), in contrast, does set forth a standard of proof, one less stringent than Rule 104(a) — proof sufficient to support a finding. That standard purportedly applies only for questions of “conditional relevance” — 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.) The Supreme Court described how the “sufficient to support a finding” standard is to work in *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 neither weighs credibility nor makes a finding that the [proponent] has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact * * * by a preponderance of the evidence.

Essentially, Rule 104(b) leaves the finding of the preliminary fact to the jury, except when it would simply be a waste because there is not enough evidence for anyone to find the fact. This low Rule 104(b) standard is also explicitly applied in three specific Evidence Rules: Rule 602 (personal knowledge); 901(a) (authenticity); and 1008 (best evidence rule, fact questions about secondary evidence).

Conditional relevance is a confusing concept; it does not actually help anyone figure out *when* the standard of proof for a preliminary question should be governed by a standard lower than a preponderance. The existing rule promotes a fallacy that conditional relevance is somehow different from relevance — it’s a fallacy especially because most courts apply the same “the jury could reasonably find” standard to *all* questions of relevance. Most importantly, as demonstrated in the last memo to the Committee, the language of “condition” leads courts and litigants to think that it applies there is *any* condition to admitting a piece of evidence, which leads to erroneous rulings.

What follows is the proposed amendments to Rule 104(a) and (b), and the Committee Note, all of which has been issued for public comment:

1 Rule 104. Preliminary Questions

- 2 **(a) *In General.*** The court must decide any preliminary question about whether a witness is
3 qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound
4 by evidence rules, except those on privilege. Unless these rules provide otherwise, the
5 proponent must establish the existence of a preliminary fact by a preponderance of the
6 evidence.

7 (b) ***Relevance-That Depends on a Fact.*** When the relevance of evidence depends on whether
8 a fact exists, proof must be introduced sufficient to support a finding that the fact does
9 exist. To establish that evidence is relevant, the proponent must demonstrate to the court
10 that the trier of fact could reasonably find that the requirements of Rule 401 have been met.
11 In making its relevance determination, the court may consider the evidence itself, other
12 evidence, and common knowledge and experience. The court may admit the proposed
13 evidence on the condition that the further proof be introduced later.

14 * * * * *

15 Committee Note

16 Two changes are made to Rule 104. First, the amendment codifies the holding in *Bourjaily*
17 v. *United States*, 483 U.S. 171, 175 (1987), that preliminary questions of fact under Rule 104(a)
18 are to be determined by a preponderance of the evidence. The Committee has determined that
19 codification would be useful because there has been some confusion about the applicable standard
20 of proof for preliminary questions. See the 2023 amendment to Rule 702.

21 Some situations call for a lower standard of proof for a preliminary question, ordinarily
22 because on those questions, the jury is in as good a position as the court to determine the contested
23 fact, and there is little to no risk that the jury will be misled or subject to unfair prejudice in making
24 the determination. See Rules 104(b), 602, 901 and 1008.

25 Second, the amendment to Rule 104(b) eliminates the concept of “conditional relevance.”
26 There is no reason for special treatment of facts that are conditionally relevant, because in almost
27 all cases, the relevance of a particular fact is dependent on a showing of other facts and so the
28 relevance is “conditional.” Moreover, if the existence of one fact is conditionally relevant upon
29 another, the result is that both facts are “conditionally relevant.” See Ronald Allen, *The Myth of*
30 *Conditional Relevance*, 25 Loyola L. Rev. 871-884, 879 (1992) (“Evidence is relevant only
31 because there is an intermediate premise or set of premises that connects the evidence to some
32 proposition involved in the litigation. But if determining the relevance of evidence always requires
33 relying on some intermediate premise, no distinction can be drawn between relevancy and
34 conditional relevancy.”). Providing a uniform approach to all questions of relevance avoids
35 confusion, especially because most courts currently use the same permissive approach to all
36 relevant evidence, conditional or not. All questions of relevance should be governed by the same
37 “a reasonable person could find” standard because the jury is in as good a position to determine
38 relevance as is the court.

39 The rule 104(b) test that “proof must be introduced sufficient to support a finding” has been
40 revised, because a court’s preliminary determination of relevance is not limited to proof submitted
41 to it. A court could find evidence relevant under Rule 104(b) by considering the evidence itself, as
42 well as common knowledge and experience. For example, if the proffered evidence is that the
43 defendant was carrying a gun, its relevance to a charge of armed robbery can be determined
44 without any further proof. The standard has been changed to whether the factfinder “could
45 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 relevance is made. If the trial is in a rural state with a large farming population, the trial judge would likely 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 relevance.

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.

Analysis of Comments Received

As of this writing no comments have been received on the rules website that actually comment on the Rule. However, three informal comments were submitted to me by Evidence scholars. Let’s discuss them.

1. Changing the reference to Rule 401 in the text of the rule.

The amendment provides that “[t]o 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.” Professor Richter has suggested that the reference to “the requirements of Rule 401” needs to be narrowed. The explanation for this concern arises from Rule 401 itself.

Rule 401 imposes *two* requirements for relevance. The first — found in subdivision (a) — is that the proffered evidence must tend to prove the proposition for which it is offered. That standard, which focuses on the question of probativity or “logical relevance”, is rightly one for the jury, and thus the lower standard of Rule 104(b) should apply. The jury can draw logical inferences as well as the judge. For example, the jury is as well-equipped as the judge to find it relevant that after a crime, the defendant purchased a number of expensive items with no apparent legal source of income.

The second requirement for relevance — found in subdivision (b) — is that the evidence is offered to prove a “fact of consequence.” Traditionally this was considered a question of “materiality,” but Rule 401 folds up logical relevance and materiality into one rule. In any case, whether the fact proven is one of consequence is a question of substantive law. For example, in the Scopes Monkey Trial, Clarence Darrow sought to call a number of experts who would testify that Evolution is a valid scientific theory. That testimony certainly tended to prove the proposition that Evolution is in fact a valid scientific theory. But the evidence was irrelevant under Rule 401(b).

Under the applicable substantive law, it didn't matter whether Scopes was teaching a valid scientific theory. The substantive law simply forbade the teaching of Evolution. The science of it was not a "fact of consequence."

Whether proffered evidence satisfies the subdivision(b) of Rule 401 is clearly a question for the court, not for the jury. It's a question of applicable law. The bottom line, then, is that the reference in the amending language to "the requirements of Rule 401" is overbroad.

There is an easy textual fix. Instead of referring to Rule 401, the text can simply refer to **Rule 401(a)**. That would leave questions of admissibility of Rule 401(b) to the higher proof standard of Rule 104(a).

The question is whether any other fix is necessary for the text. It would appear that an additional slight tweak would be an improvement. As follows:

62 To establish that evidence is relevant, the proponent must demonstrate to the court that the
63 trier of fact could reasonably find that the requirements of Rule 401(a) have been met. In
64 making its ~~relevance~~ determination under Rule 401(a), the court may consider the evidence
65 itself, other evidence, and common knowledge and experience.

The additional change may be an improvement because the reference to a "relevance determination" could be confusing, as it might be thought to be referring to the "fact of consequence" question as well as to the "tendency to prove" question. One could argue that nobody is going to be confused in that way, because in making the Rule 401(b) determination, a court *does not* consider "other evidence, common knowledge, and experience" so that language is obviously inapplicable to a Rule 401(b) inquiry. Under Rule 401(b) the court simply determines whether the evidence goes to a fact that is in dispute under the substantive law. But nonetheless, to avoid any confusion, the change above may be useful.

Finally, it appears that if the text is changed as suggested above — and it should be — there probably should be some corresponding changes made to the Committee Note. All the changes suggested below are to assure that the discussion of relevance under Rule 104(b) is limited to the tendency to prove aspect and is not intended to refer to the fact of consequence aspect.

Here are the suggested changes to the Note:

66 Second, the amendment to Rule 104(b) eliminates the concept of "conditional
67 relevance." All questions of whether evidence tends to "make a fact more or less probable
68 than it would be without the evidence" are governed by the standard of proof set forth in
69 Rule 104(b). There is no reason for special treatment of facts that are conditionally relevant,
70 because in almost all cases, the relevance of a particular fact is dependent on a showing of
71 other facts and so the relevance is "conditional." Moreover, if the existence of one fact is
72 conditionally relevant upon another, the result is that both facts are "conditionally
73 relevant." See Ronald Allen, *The Myth of Conditional Relevance*, 25 Loyola L. Rev. 871-
74 884, 879 (1992) ("Evidence is relevant only because there is an intermediate premise or set
75 of premises that connects the evidence to some proposition involved in the litigation. But
76 if determining the relevance of evidence always requires relying on some intermediate
77 premise, no distinction can be drawn between relevancy and conditional relevancy.").

78 Providing a uniform approach to all questions of whether evidence tends to prove or
79 disprove a fact~~relevance~~ avoids confusion, especially because most courts currently use
80 the same permissive approach to all ~~relevant evidence~~ such questions, conditional or not.
81 All questions of relevance under Rule 401(a) should be governed by the same “a reasonable
82 person could find” standard because the jury is in as good a position to determine ~~relevance~~
83 them as is the court. In contrast, the question of whether the fact being proven is “of
84 consequence in determining the action” under Rule 401(b) is one of the applicability of
85 substantive law, and so is left to the court under Rule 104(a).

86 The rule 104(b) test that “proof must be introduced sufficient to support a finding”
87 has been revised, because a court’s preliminary determination of relevance is not limited
88 to proof submitted to it. A court could find evidence relevant under Rule 104(b) by
89 considering the evidence itself, as well as common knowledge and experience. For
90 example, if the proffered evidence is that the defendant was carrying a gun, its relevance
91 to a charge of armed robbery can be determined without any further proof. The standard
92 has been changed to whether the factfinder “could reasonably find” the evidence to be
93 relevant. That standard is the same as “sufficient to support a finding.” *See Huddleston v.*
94 *United States*, 485 U.S. 681, 687 (1988) (in determining whether the proponent has
95 introduced sufficient evidence to meet Rule 104(b), the trial court decides whether “the
96 jury could reasonably find” the contested fact).

97 In deciding whether evidence has a tendency to prove or disprove a fact ~~is relevant~~,
98 the judge must not only take into account the evidence formally in the record, but also the
99 likely background knowledge and experience of a reasonable juror from the area where
100 trial is being held. For example, suppose a trial concerns the cause of a large explosion and
101 fire. The plaintiff claims that the defendant mishandled nitrogen fertilizer containing
102 ammonium nitrate. A witness is asked whether such a fertilizer was stored on the premises
103 and an objection on relevance is made. If the trial is in a rural state with a large farming
104 population, the trial judge would likely overrule the objection because a reasonable person
105 from that population would likely know the dangerous properties of the material. If, by
106 contrast, the trial were held in an urban area, the judge would likely conclude that evidence
107 of the dangerous properties must be entered into the record to satisfy the requirement of
108 relevance.

109 The amendment retains the provision allowing proof to be introduced later. It
110 should be noted that allowing proof to be introduced later is within the discretion of the
111 court under Rule 104(a) as well.

2. The “Connecting Up” Provision of Rule 104(b).

Rule 104(b) allows evidence to be admitted even though the proponent has not yet established that it is relevant. It allows the court to admit the proffered evidence “on the condition that further proof [of relevance] be introduced later.” This is a valuable provision that allows a court to be flexible, while yet assuring that the standard of relevance has eventually been met. For example, when the making of a statement is relevant only if a person heard it, a court might admit evidence of the statement, allowing the person’s hearing of it to be connected up later. Thus, the “connecting up” provision is useful and so is retained in the proposed amendment to Rule 104(b).

But “connecting up” is also allowed by courts under Rule 104(a). The most frequent situation is where the government offers a hearsay statement against an accused, on the ground that it is a statement of the defendant’s co-conspirator. That statement is admissible under *Bourjaily* only if the government proves more likely than not that the defendant and declarant are in the same conspiracy. Under the connecting up principle, the court may admit the challenged hearsay statement, allowing the prosecution to prove the necessary evidence of a conspiracy between the declarant and the defendant at a later time. *See, e.g., United States v. Hasner*, 340 F.3d 1261 (11th Cir. 2003) (no error when coconspirator statements were provisionally admitted subject to the government connecting them up with sufficient foundation evidence); *United States v. McCarthy*, 961 F.2d 972 (1st Cir. 1992) (there was no error in admitting coconspirator statements conditionally, where previous trials of other alleged coconspirators indicated it was likely that the foundation would be established); *United States v. Ferra*, 900 F.2d 1057 (7th Cir. 1990) (admitting coconspirator hearsay statements subject to connection is appropriate when the evidence on the question of conspiracy is extensive).

The courts allowing connecting up under Rule 104(a) are doing so in the absence of a rule. It could be said that they are borrowing the principle set forth in text in Rule 104(b). Because there is nothing in the proposed amendment that seeks to alter the connecting up that currently occurs practice under Rule 104(a), the proposed Committee Note already specifies that there is no such intent:

“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.”

Professor Paul Rothstein has suggested that it would be useful to specify *in text* that connecting up is allowed under Rule 104(a) as well as (b). This is probably not necessary, because courts have had no problem in using their discretion to allow a proponent to connect up in establishing an admissibility requirement under Rule 104(a). The Committee Note indicating that the amendment makes no change in this case law should probably be enough to avoid confusion.

If the Committee believes that it is necessary to articulate the connecting up requirement under Rule 104(a), the textual fix is actually a bit complicated. You wouldn’t want to have identical “connecting up” language in both provisions. That would be balky. Probably the best solution — the one that is simplest and the least disruptive — would be to include a reference to subdivision (a) in the existing connecting up provision of (b). That sentence would then read as follows:

(b) *Relevance.* 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. Under (a) and (b), the court may admit the proposed evidence on the condition that further proof be introduced later.

Professor Rothstein suggests that this amended sentence language would be better placed in a subdivision (c). Maybe so, theoretically, but the problem is that there is already a subdivision

(c).¹ Changing and moving subdivisions is frowned upon because it upsets reliance and makes searches of evidentiary provisions more difficult. And at any rate, making that change now might arguably be significant enough that the rule would have to be sent out for a new round of public comment — all for a change that actually makes no difference because courts are currently connecting up under Rule 104(a).²

Ultimately, the issues of connecting up are relatively infrequent and when they occur, they are handled by courts under both Rule 104(a) and (b). So if there is going to be any textual change at all, it should not come at the expense of an extensive renovation of the proposal sent out for public comment.

If the textual change set forth above were to be adopted, the Committee Note provision would have to be slightly altered. It would read as follows:

The amendment retains the provision allowing proof to be introduced later. Courts have also exercised discretion to allow proof to be introduced later when deciding a question under Rule 104(a). The amendment, to avoid any confusion, authorizes the practice of “connecting up” under Rule 104(a) as well.

3. Clarifying That Nothing in the Amendment Affects Other Rules.

Professor Ed Imwinkelried suggests that the Committee Note to the change to Rule 104(b) should specify that nothing in the amendment affects determinations under two other rules specifically providing for a standard of proof of “sufficient to support a finding.” Two such rules do so: Rules 602 (personal knowledge) and Rule 901 (authenticity). Neither of these rules makes reference to Rule 104(b).³

The proposed amendment chooses the equivalent term (taken from the Supreme Court’s *Huddleston* decision) that “the trier of fact could reasonably find.” The justification provided in the Committee Note is that “proof . . . sufficient to support a finding” is inapt to the question of whether proffered evidence is relevant, because evidence can be found logically relevant without any “proof” being introduced. Professor Imwinkelried is concerned that the move to “the trier of

¹ The remainder of Rule 104 provides as follows:

(c) Conducting a Hearing So That the Jury Cannot Hear It. The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:

- (1) the hearing involves the admissibility of a confession;
- (2) a defendant in a criminal case is a witness and so requests; or
- (3) justice so requires.

(d) Cross-Examining a Defendant in a Criminal Case. By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

(e) Evidence Relevant to Weight and Credibility. This rule does not limit a party’s right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

² I have found no case in which a court has said, “I cannot defer the decision because this finding is covered by Rule 104(a), not 104(b).”

³ Rule 1008 refers to Rule 104(b), making no statement about a standard of proof, so any change to Rule 104(b) operates automatically to Rule 1008.

fact could find” in Rule 104(b) will create confusion for courts that must continue to apply the “evidence sufficient to support a finding” standard under Rules 602 and 901.

Comment: *Huddleston* makes clear that “sufficient to support a finding” and “the trier of fact could reasonably find” are the same standard:

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 * * * fact * * *.

The explanation for the Committee use of “reasonably could find” is explained in the proposed Committee Note:

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. * * * 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).

For questions of logical relevance, actual “proof” is not always required. It may just be logical that, if the defendant is seven feet tall, he is more likely to be able to reach for something eight feet high than would a person who is five feet tall. In contrast, for questions of authenticity and personal knowledge, proof will be required. For example, for authenticity under Rule 901(a), a witness with personal knowledge, or a person with familiarity of someone’s voice, or some other proof, will have to be presented. So there is some sense in using the word “proof” in Rules 901 and 602, but not in the amended Rule 104(b). At any rate, there is no discrepancy in the actual standard to be employed. It would not seem necessary to say anything about any affect on Rule 901 or 602, because Rule 104 itself says that it applies “unless otherwise provided” in those rules, and the Committee Note refers to those other rules as being outside the scope of Rule 104.

Nonetheless, if in an excess of caution the Committee thinks it appropriate, a sentence can be added to the Committee Note to state that nothing in the amendment affects admissibility under Rule 602 or 901. It would look like this:

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). Nothing in this amendment is intended to affect the admissibility requirements under Rules 602 or 901. These are now examples of rules “otherwise provided”. See Rule 104(a).

TAB 6

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Further Review of the Proposed Amendments to Rule 609
Date: September 18, 2026

At its Spring 2026 meeting, the Advisory Committee gave final approval to amendments to Rule 609, the rule governing impeachment of witnesses with prior convictions. Most significantly, the amendments made the balancing test for convictions under Rule 609(a)(1)(B) — convictions not involving dishonesty or false statement offered against a criminal defendant — somewhat more exclusionary. Two members, Judges Sullivan and Massa, voted against the proposed amendments. Significantly, however, the Department of Justice voted in favor. By a unanimous vote, the Standing Committee approved the proposed amendments for final approval at its meeting in June.

In the ordinary course, a Rule that makes it through that gauntlet would be put on the Judicial Conference consent calendar and approved for consideration by the Supreme Court. Last month, however, members of the Executive Committee of the Judicial Conference raised concerns about the proposed amendments. After discussion, the Standing Committee elected to withdraw the proposed amendments from the Judicial Conference and send the Rule back to the Advisory Committee for further consideration in light of the concerns by members of the Executive Committee.

This memo considers the concerns expressed about the proposed amendments, as voiced by Judge Sutton, the current Chair of the Executive Committee, and Judge Colloton, the Executive Committee's Liaison to the Standing Committee. It proceeds in four parts. Part One sets forth the proposed amendments and Committee Note and recounts the Committee's original rationales for the proposed amendments. Part Two briefly discusses the history of the attempts to amend Rule 609(a)(1). Part Three discusses the reported concerns with the amendment by members of the Executive Committee. Part Four sets forth a possible Committee Note that might allay some of those concerns. Part Five discusses the possibility of continuing with only the proposed amendment to Rule 609(b).

At the end of the memo is a short appendix containing recent cases demonstrating that Rule 609(a)(1)(B) continues to be misapplied by a fair number of courts, resulting in admission of highly prejudicial convictions with only minimal probative value for impeachment.

I. The Proposed Amendment and Committee Note

Judge Furman's report to the Standing Committee succinctly summarizes the Committee's original rationales for proposing the amendment to Rule 609(a)(1):

The 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 approved by the Committee 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 change made to, and rejected by, the Committee in the last two years, namely 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's character for truthfulness.

The Committee concluded that the amendment was warranted because a fair number of courts have misapplied the existing test to admit convictions that are either similar to the crime charged or otherwise inflammatory and because that error is not likely to be remedied through the normal appellate process. That is because the Supreme Court has 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 relatively rare.

The amendment, through its slightly more protective balancing test, would promote Congress's intent, which was 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 statement.

The Committee concluded that, if it was going to amend Rule 609(a)(1), it paid also to address Rule 609(b) to address a split among courts over how to calculate the period that governs older convictions subject to a more exclusionary test.

Here are the proposed amendments and Committee Note that were approved by the Advisory Committee and Standing Committee:

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 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) the 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.

II. A Brief History of the Process Leading to the Proposed Amendments

As you know, the Rules Enabling Act process is designed to be public and deliberate. The Committee’s decision to propose an amendment to Rule 609 was especially deliberate.

In fact, the Committee’s work on Rule 609(a)(1) extends back about 10 years. In 2017, Magistrate Judge Tim Rice asked the Committee to consider an amendment that would abrogate Rule 609(a)(1) — so that impeachment with prior convictions would be limited to falsity convictions under Rule 609(a)(2). The Committee considered the proposal, but gave it only limited review. It was at the bottom of a long agenda of a two-day meeting, and it got very little discussion at the meeting — only about 10 minutes. The Committee rejected the possibility of abrogation and briefly discussed but found no interest in pursuing any changes to the Rule 609(a)(1) balancing test. The Committee’s minutes state that the Reporter “had hoped for a more robust Committee exchange on potential amendments to Rule 609(a)(1)(B).”

The Rule made it back on the Committee’s agenda in 2022, when Professor Jeffrey Bellin testified at a symposium sponsored by the Committee. For this symposium, Evidence academics were asked: “If you could change one rule in the Evidence Rules, what would it be?” Professor Bellin argued for his position that Rule 609 should be completely abrogated. The Committee quickly rejected that proposal, after which Professor Bellin presented the Committee with a

narrower proposal to abrogate only Rule 609(a)(1), the same proposal Judge Rice had pitched to the Committee in 2017. The Committee saw nothing to change its previous view but agreed to keep the Rule on the agenda.

In 2023, the Reporter presented a much narrower amendment to the Committee: a slight change to the test, intended to address the fact that many district courts seemed to be admitting convictions contrary to the original balance struck by Congress, a problem compounded by the lack of regular appellate review. The Department of Justice initially opposed the proposal, but its concerns were largely focused on the proposed Committee Note. The Reporter and Chair worked with the Department of Justice to come up with a revised Note that the Department of Justice could support. The result is the proposal that was eventually approved for notice and public comment.

The public comment period went from August 2025 to February 2026; in addition, the Committee heard testimony on the proposed amendments from one witness at a hearing on January 15, 2026. Public comment on the proposed amendment to Rule 609(a)(1)(B) was uniformly positive. Among others, the Federal Magistrate Judges Association, the American College of Trial Lawyers, the New York City Bar Association, the Federal Defender and Community Defender members of Defender Services Advisory Group, and the National Association of Criminal Defense Lawyers expressed strong support for the amendment, stressing that it would be more faithful to Congress's original intent in enacting the Rule than many court decisions interpreting the Rule. At a public hearing on January 15, 2026, Professor John Blume of Cornell Law School testified in favor of the proposed amendments, citing empirical evidence that a significant number of defendants were deterred from testifying from the threat of impeachment — including a number of defendants found guilty and subsequently exonerated. Notably, no member of the public expressed concern that the amendment could operate to exclude convictions that should otherwise be admitted.

What is clear from this brief summary is that the Committee did its work and treaded carefully. It didn't reach out aggressively to amend the Rule, let alone do so absent evidence of problems worthy of a Rule amendment. It responded to concerns from the public and ultimately landed on a modest proposal to address what the Committee concluded were problems on the ground, problems that the appellate process had not addressed and, for structural reasons, was unlikely to address. And it did so in a collaborative fashion that ultimately garnered the support of both the Department of Justice and the defense bar. In short, it would seem that the proposed amendment to Rule 609(a)(1)(B) was a model of rulemaking.

III. The Concerns Raised by Members of the Executive Committee

In discussions with Judge Dever and Judge Furman, members of the Executive Committee expressed a number of concerns with the proposed amendment to Rule 609(a)(1)(B). (No concerns were raised with respect to the proposed amendment to Rule 609(b).) This section summarizes and addresses the concerns. It begins with a few specific concerns raised with respect to the proposed Committee Note and then turns to arguably more substantive concerns.

1. Reference to a “Reverse Balancing Test” in the Committee Note.

First, members of the Executive Committee expressed concerns about the Committee Note’s reference to the current balancing test as a “reverse” balancing test. They suggested that it is an even balancing test because the probative value must only outweigh the prejudicial effect of the conviction.

Comment: Putting aside whether this concern is valid, it can easily be addressed by removing reference to the existing test as a reverse-balancing test.

2. The Reference to the Defendant’s Constitutional Right to Testify.

Second, members of the Executive Committee raised concerns about language in the proposed committee note that the new proposed test “is more protective so as not to infringe on the accused’s constitutional right to testify.” They argued that the Supreme Court has not held that impeachment by prior felony conviction infringes on a constitutional right to testify, and a Committee Note therefore should not endorse such a statement.

Comment: This language can also be easily cut out of the Committee Note. It bears noting, though, that the animating reason for even having a more protective test for criminal defendants is that impeachment with prior convictions *does* impact the Constitutional right to testify.¹ But that said, the language can be easily taken out, with no harm to the Rule.

3. The Paragraph on Sanitization.

The Committee Note contains the following paragraph on “sanitizing” convictions:

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.

Members of the Executive Committee expressed the concern that this paragraph was outside the scope of the amendment and constituted rulemaking by Committee Note.

Comment: Without going into the value of having notes on matters that can’t really be written up as text, it is enough to say that the concern is answered if the paragraph is dropped.

¹ The legislative history of Rule 609 indicates that this relatively protective test, applicable only to criminal defendants, was generated by a concern about the “deterrent effect” of prior conviction impeachment “upon an accused who might wish to testify.” H.R. Rep. No. 93-650, at 11 (1973). See also 4 Weinstein & Berger, § 609App.01[3], at 10 (recognizing that the House Judiciary Committee’s changes to the rule were motivated by concern that the existing text applying Rule 403 did not “adequately protect[] an accused who wished to testify”).

4. *Is there any Justification Left?*

Members of the Executive Committee wondered whether, if the Committee Note were amended to address the above three concerns, there would be anything left to support the proposed rule change.

Comment: The answer is, of course, yes. The whole point of the amendment is that the existing Rule has been misapplied by many courts to deny the protection that was granted by Congress. But that point can be made more clearly in a revised Note, as seen below.

5. *Contrary to Congressional Intent.*

More substantively, members of the Executive Committee raised a concern that adding “substantially” would be contrary to the intent of Congress in 1975. The history of the arguments in Congress has been set forth in previous memos. (For the most thorough summary, see pages 3-7 of my April 1, 2024 memo, which can be found [here](#).) The bottom line is that both Houses of Congress went back and forth, with the fight mainly being about whether the rule was providing too much, or too little, protection to criminal defendants who wished to testify. Ultimately Congress compromised by making crimes involving dishonesty or false statement admissible with no discretion to exclude for unfair prejudice, while making felony convictions for crimes not involving dishonesty or false statement admissible — but only if the probative value outweighed unfair prejudice “to the defendant.” Thus, there was a special protection intended for accused-witnesses, more protective than the Rule 403 test.

Members of the Executive Committee expressed a concern that this compromise would be upset by tilting the balancing test further in favor of criminal defendants.

Comment: This concern was previously considered and rejected by the Advisory Committee. (My April 1, 2024 memo, referenced above, addresses it at length.) In brief, although Rule 609 was originally enacted by Congress, the Committee has not previously taken the view that it is immune from amendment. Instead, the Rule has been amended twice before:

1. It was amended in the 90’s, because the Supreme Court held that the rule was nonsensical as applied in civil cases: the special protection “to the defendant” should have been limited to criminal defendants, because there is no good reason to provide special protection to civil defendants. *Green v. Bock Laundry*, 490 U.S. 504 (1989).
2. It was amended in 2006 to prevent an interpretation that a court could find a conviction automatically admissible under Rule 609(a)(2), even if it was not for a lying crime, if the court found that the witness lied to commit the crime.

Along similar lines, other Rules — most recently, Rule 801(d)(1)(A) — have been amended in ways that could be construed to be different from Congressional intent.

In any event, the concern expressed by members of the Executive Committee appears to be based on an unduly narrow view of Congressional intent. Indeed, the Advisory Committee's point is that the amendment is *consistent* with the original intent of Congress: Congress wanted to provide more protection to criminal defendants than to any other witness, but many courts are not applying Rule 609(a)(1)(B) consistently with Congressional intent. (Previous memos — by both me and Professor Richter — have included numerous examples of such decisions.) That is why a more protective test is required.

This point — that the rule is consistent with Congressional intent (and thus is no disrespect to Congress, but quite the opposite) was made by Judge Furman in his report to the Standing Committee:

The amendment, through its slightly more protective balancing test, *would promote Congress's intent*, which was 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 point of consistency with Congressional intent was also made in an earlier draft of the Committee Note, but it was cut out as part of the collaborative revisions that resulted in the Department of Justice's approval. The earlier Note included the following sentence: "Experience has shown that the congressional intent to limit admissibility of such convictions has often not been realized."

If the Committee Note were changed to add language about the fact that the amendment *restores* Congressional intent to protect defendants, that might address the concern — unless, of course, the concern is driven by a different view of either Congressional intent or whether court decisions have been sufficiently faithful to that intent.

6. Rule Amendments Should Not Be Used to Correct Courts that Are Getting It Wrong.

Members of the Executive Committee also raised concerns about whether rule amendments should be used to correct courts that are applying the existing rule incorrectly. Relatedly, they suggested that the remedy for misapplication of Rule 609(a)(1) is appellate review, not rulemaking.

Comment: There are several responses to these concerns.

First, the Evidence Rules Committee has in fact used rulemaking to correct courts that are applying the Rules incorrectly. For example, that was *the* reason for the 2023 amendment to Rule 702. Change was required because courts were holding that the admissibility requirements of the Rule were in fact questions of weight for the jury. The Committee Note says it straight up:

[T]he rule has been amended to clarify and emphasize that expert testimony may not be admitted unless the proponent demonstrates to the court that it is more likely than not that

the proffered testimony meets the admissibility requirements set forth in the rule. *See* Rule 104(a). This is the preponderance of the evidence standard that applies to most of the admissibility requirements set forth in the evidence rules. *See* *Bourjaily v. United States*, 483 U.S. 171, 175 (1987) (“The preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration.”); *Huddleston v. United States*, 485 U.S. 681, 687 (1988) (“preliminary factual findings under Rule 104(a) are subject to the preponderance-of-the-evidence standard”). *But many courts have held that the critical questions of the sufficiency of an expert’s basis, and the application of the expert’s methodology, are questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a).*

Second, other Committees have proposed rules that are intended to correct misapplications by the courts. For example, the proposed amendment to Civil Rule 45 is intended to correct what the Advisory Committee thinks is an incorrect interpretation of the existing rule by the Ninth Circuit.

Third, and relatedly, rulemaking is a valuable and fair means to correct courts that are getting it wrong. The new rule applies to all courts, while alternatives like judicial training are particularized and spotty. Rulemaking is done through a deliberative process that takes account of all viewpoints. Rulemaking is the fairest and most efficient way to assure that all courts will correctly apply the rules.

Finally, while appellate decision-making is one means of addressing misinterpretation of an existing Rule, there are reasons specific to Rule 609 that suggest it is likely to be inadequate to the task here. That is because appellate review of trial court Rule 609 decisions admitting prior convictions of defendants has been all but shut off by *Luce v. United States*, 469 U.S. 38 (1984), under which appellate review is possible only if the defendant actually takes the stand to be impeached. As the Committee has recognized, a district court’s Rule 609 determinations are essentially free from review. And even when they are reviewed, the abuse-of-discretion standard means they are rarely corrected, as demonstrated in case law set forth in prior memos. *See, e.g., United States v. Pettyjohn*, 161 F.4th 535 (8th Cir. 2025) (in a drug case, it was not an abuse of discretion to admit a prior drug conviction to impeach the defendant; stating that prior convictions are highly probative of credibility because “one who has transgressed society’s norms by committing a felony is less likely than most to be deterred from lying under oath”).

7. The Rule Was Not Unanimously Adopted by the Advisory Committee.

The vote in the Advisory Committee was 7-2. Some members of the Executive Committee apparently felt that the lack of unanimity at the Advisory Committee level was problematic.

Comment: Rulemaking is hard enough without having an absolute requirement of unanimity at the Advisory Committee and the Standing Committee. It should not be the case that every member of a Committee has a veto power over rulemaking. Nor has the lack of unanimity been an obstacle to other amendments. For instance, a number of Evidence Rules have been amended without unanimity, the most being Rule 801(d)(1)(A), which passed by a vote of 8-1.

(The proposed amendment to Rule 902, which is out for public comment, was also approved by a vote of 8-1.) And the amendment to Appellate Rule 29, which is on the Judicial Conference consent calendar, was passed by the Appellate Rules Committee by a vote of 5 in favor, 1 opposed, and 1 abstention. Moreover, while the proposed amendments to Rule 609 were not unanimously approved, they *were* approved by the Department of Justice, the entity that would be most affected by the rule change. And, of course, the Standing Committee was unanimous in approving the proposed amendments.

IV. Potential Revisions to the Committee Note

As discussed, at least some of the concerns expressed by members of the Executive Committee could be addressed by modest modifications to the Committee Note. Here is how the Note could look if it were changed to address these concerns:

Committee Note

Rule 609(a)(1)(B) has been amended to provide that a non-falsity-based conviction is not admissible to impeach a criminal defendant unless its probative value *substantially* outweighs the risk of unfair prejudice to the defendant. Congress allowed impeachment with non-falsity-based convictions under Rule 609(a)(1), but it limited such impeachment when the witness was the accused to ensure that the accused's interest in testifying would not be improperly discouraged.

Experience has shown that the congressional intent to limit admissibility of such convictions has often not been realized. Some courts have misapplied the existing test to admit convictions that are either similar to the crime charged or otherwise inflammatory. Additionally, that misapplication is not likely to be remedied through the normal appellate process because the Supreme Court has held that an accused must take the stand in order to challenge an adverse ruling on appeal. See Luce v. United States, 469 U.S. 38 (1984). The Committee has determined that the best way to promote Congressional intent is to provide that a non-falsity-based conviction is not admissible to impeach a criminal defendant unless its probative value *substantially* outweighs the risk of unfair prejudice to the defendant.

The Rule retains automatic admissibility for those convictions that are the most probative, i.e., those that required proof that the witness engaged in a dishonest act or false statement.

~~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 by only those 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.

V. What about the Amendment to Rule 609(b)?

As noted, besides the important change to Rule 609(a)(1)(B), the proposed amendments would clarify the time at which the ten-year period (for assessing whether a conviction is old enough to get the rule's special protection) ends. The proposed amendment would provide that the end date is the date of the beginning of the trial.

As noted, the Executive Committee did not express any concerns with the proposed amendment to Rule 609(b). So, if the Committee decides not to proceed with the proposed amendment to Rule 609(a)(1)(B), it should probably consider whether it should split off the Rule 609(b) amendment. It would seem that there would be no need to send the Rule 609(b) part out for public comment because that has already happened. So it would seem that the Committee could propose final approval by the Standing Committee at its next meeting.

That said, there are some reasons to hesitate before splitting off the Rule 609(b) amendment. That amendment is very narrow. It is applicable only to an exceedingly limited fact situation: a witness with a prior conviction that would be more than ten years old if one date is applied and less than ten years old if another date is applied. It can be argued that the Rule 609(b) amendment is justified only as an add-on to another more important amendment (indeed it was so argued in prior memos). As a stand-alone amendment, it is arguably tinkering.

On the other hand, the amendment is helpful, not controversial, and as prior memos indicated, the issue has arisen in virtually every circuit, and there is a split of authority on which date should apply. *See, e.g., Rodriguez v. United States*, 286 F.3d 972, 983 (7th Cir. 2002) (using the date of the “present offense” as the endpoint); *United States v. Thompson*, 806 F.2d 1332, 1339 (7th Cir. 1986) (using the date “[t]he trial in the present case began” as the endpoint); *United States v. Cathey*, 591 F.2d 268, 274 (5th Cir. 1979) (noting the defendant “was released from military confinement June 31, 1961, and called to testify in October 1977”); *United States v. Foley*, 683 F.2d 273, 277 n.5 (8th Cir. 1982) (“computing the amount of time that has elapsed between offenses”).

If the amendment to Rule 609(b) were to be proposed on its own, the Committee Note could be the same as that applicable to Rule 609(b) in the current amendment. It would read as follows:

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.

APPENDIX

Recent Court Rulings Allowing Broad Impeachment Under Rule 609(a)(1)(B)

Courts continue to admit highly prejudicial convictions, as well as multiple convictions, under existing Rule 609(a)(1)(B). The following are additional examples decided since the Committee's Spring 2025 meeting:

- ***Drug conviction admitted in drug prosecution: United States v. Pettyjohn*, 161 F.4th 535 (8th Cir. 2025):** The court affirmed the defendant's drug and firearms convictions. It held that the trial judge did not abuse discretion in permitting the government to ask the defendant about his 2018 conviction for drug possession with intent to distribute. The court stated that prior convictions are highly probative of credibility because "one who has transgressed society's norms by committing a felony is less likely than most to be deterred from lying under oath."

- ***Violence (and many other) convictions admissible in a murder prosecution: United States v. Lee*, 2025 WL 1490044 (E.D. Okla. May 16, 2025).** The defendant was charged with murder in Indian country. The court admitted eight convictions for impeachment, including convictions for assault with a dangerous weapon. It reasoned as follows:

Each of the listed crimes has impeachment value – the convictions for possession of a stolen vehicle and eluding/attempting to elude having the most; the DUI conviction and the assault convictions having less. All of the convictions are from the past ten years,² and the Defendant's subsequent criminal history has been ongoing. None of the crimes are similar to the charged crime. The assault convictions are crimes of violence, but not similar to murder.

Note: To say that crimes of violence are not "similar" to murder assumes that when a juror hears about the defendant's violent past, the juror will not draw a propensity inference about all violent activity, but rather will use it solely to assess character for truthfulness. It seems more likely that the propensity inference for violent activity goes more directly to murder than it does to perjury.

- ***Weapons conviction admissible in a weapons prosecution: United States v. Hill*, 2025 WL 1446383 (N.D. Ohio May 20, 2025).** The defendant was charged with felon-firearm possession. The court found that a prior weapons conviction would be admissible for impeachment, noting that while it was similar to the crime charged, a limiting instruction would suffice to diminish the prejudicial effect.

- ***Five convictions admitted for impeachment: United States v. Goodbear*, No. 25-CR-176-JFH, 2025 WL 2838615 (E.D. Okla. Oct. 7, 2025).** The defendant was charged with assaulting and attempting to strangle his girlfriend. The government moved to admit five felony convictions if the defendant testified: (1) possession of a controlled substance, (2)-(3) unauthorized uses of a vehicle, (4) endangering others while eluding police, and (5) carrying or possessing a firearm as a convicted felon. The court conceded that the impeachment value of the convictions was not high

² Which they have to be for Rule 609(a) to be applicable.

but also noted that “none of his prior convictions require the use of force or violence against another” — so the prejudicial effect was low (which should mean that the convictions should be excluded under a test that requires probative value to outweigh prejudicial effect). The court concluded that *all five* of the convictions were admissible to impeach the defendant.

- ***All convictions admissible, and presumption is in favor of admissibility: United States v. Payne, 2025 WL 2924660 (N.D. Okla. Oct. 15, 2025).*** The defendant was charged with murdering a minor. The government sought to admit all of the following convictions for impeachment: 1. Driving a Motor Vehicle While Under the Influence of Alcohol; 2) Actual Physical Control While Intoxicated; and 3. Larceny of an Automobile, Aircraft or Other Motor Vehicle. The court noted that all the convictions were less than five years old and so are “presumptively admissible under Rule 609.” (Which is not the case under the existing rule). The court relied heavily on the fact that the convictions were not similar to the crime charged. The court concluded that *all* of the defendant’s convictions were admissible under Rule 609(a)(1).

- ***Identical conviction admitted, with impeachment improperly analyzed: United States v. Rivera, 2025 WL 3237881 (D. Conn. Nov. 19, 2025).*** The defendant was charged with felon-firearm possession related to drug activity, but no drug charges were brought. The government sought to impeach him with a prior felon-firearm conviction. The court found that the firearm offense was admissible for impeachment, using the following analysis:

Impeachment by reference to this particular offense is highly probative of his knowledge, lack of mistake, and intent to possess the firearm and ammunition in question, while also knowing he was a felon (who, at the time of this crime, already stood charged with a violation of the same law). A jury reasonably could find that Defendant possessed the charged items (some of which have fingerprint or DNA evidence suggesting the same) and purposefully stored them in the garage in hopes of evading prosecution for their possession, as he knew he was a felon. Similarly, the jury could find such storage wholly inconsistent with home or personal defense, and instead consistent with the manner a felon might store items he knows the law prohibits him from possessing. And as the probative value of this evidence outweighs its prejudice to Defendant, it “must be admitted.” Fed. R. Evid. 609(a)(1)(B).

Note: None of this analysis is about impeachment. It is about the possibility of admitting the evidence under Rule 404(b). In terms of impeachment, the conviction should definitely be excluded because the conviction is identical to the crime charged, and a firearms offense is only minimally probative of the defendant’s character trait for truthfulness.

- ***Identical conviction excluded but very similar conviction admitted: United States v. Gamon, No. 4:23-CR-00075, 2026 WL 35233 (M.D. Pa. Jan. 6, 2026):*** In a prosecution for intent to distribute cocaine, the court held that a prior conviction for intent to distribute cocaine would be excluded, whereas a prior conviction for intent to distribute *crack* cocaine would be admissible, because the conviction was for a different, albeit related, substance.

TAB 7

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Memorandum To: Advisory Committee on Evidence Rules
From: Liesa L. Richter, Academic Consultant
Re: Proposed Amendment to Rule 604
Date: September 18, 2026

On July 17, 2026, Brian C. Potts, Assistant Professor at the St. Thomas University College of Law, forwarded his recent article, *The Federal Rules of Evi-dance: Exploring and Reimagining Evidence Law Through Music, and Proposing Amendments to Rule 604* to members of the Evidence Advisory Committee.¹ This Agenda memorandum will address Professor Potts' article and proposal to amend Rule 604 in two parts. Part I will describe the article and Professor Potts' proposal to amend Federal Rule of Evidence 604. Part II will evaluate the likely pros and cons of the amendments that he urges. Should the Committee express interest in pursuing Professor Potts' proposal to amend Rule 604, a detailed memorandum including a draft amendment and Advisory Committee note will be included in the Committee's Spring 2027 Agenda materials.

I. *The Federal Rules of Evi-dance: Exploring and Reimagining Evidence Law Through Music, and Proposing Amendments to Rule 604*, 31 Suffolk Journal of Trial and Appellate Advocacy, Issue 2, 143 (2026).

In his article, Professor Potts examines the operation of many of the Federal Rules of Evidence through illustrations involving music, poetry, plays and other literary sources. He contends that "leitmotifs – musical calling cards – reify principles of evidence law."² Unlike much recent Evidence scholarship, Professor Potts offers (perhaps backhanded) compliments for the Rules:

I propose that the Federal Rules of Evidence might seem unduly complicated, opaque, and gnarly, or even sometimes overly simple, but when you dive in you

¹ See *The Federal Rules of Evi-dance: Exploring and Reimagining Evidence Law Through Music, and Proposing Amendments to Rule 604*

² The Merriam-Webster Dictionary defines a leitmotif as "an associated melodic phrase or figure that accompanies the reappearance of an idea, person, or situation especially in a Wagnerian music drama." See [LEITMOTIF Definition & Meaning - Merriam-Webster](#) Cue the music that signals the entrance of Darth Vader in the original Star Wars series of movies. John Williams, *The Imperial March*.

find that although they are not perfect, they are interwoven, elegant, harmonious, and even poetic, like Bach's fugues.³

Although the lengthy article describes and illustrates many of the most important provisions of the Rules, it offers only one proposed amendment -- to Federal Rule of Evidence 604.

Rule 604 governs "interpreters" and provides as follows:

Rule 604. Interpreter

An interpreter must be qualified and must give an oath or affirmation to make a true translation.

Professor Potts correctly observes that foreign language interpreters used to provide English interpretations of witness testimony given in federal court proceedings are not traditional witnesses with personal knowledge of the events at issue and that they offer no "testimony" of their own. As such, Professor Potts notes that Rule 604 does not require interpreters to swear to testify truthfully but instead requires an oath or affirmation to "make a true translation" of testimony offered by another witness in a language other than English.

Professor Potts offers two critiques of FRE 604. First, he suggests that the terms "interpreter" and "translation" used seemingly interchangeably in Rule 604 actually refer to distinct skill sets and tasks: "Interpreters make oral renderings of spoken words. Translators make written versions of texts."⁴ Professor Potts claims that Rule 604 "botches this distinction" by asking an "interpreter" to do the impossible -- to "make a true translation" when the interpreter "might lack qualifications for translations and almost certainly lacks a text to translate."⁵ Professor Potts' first recommendation, therefore, is to modify Rule 604 to require an oath or affirmation from an interpreter to make a "true interpretation" of a witness's oral testimony rather than a true "translation."⁶

Second, Professor Potts contends that the strict or "true" interpretation or translation of a foreign language required by Rule 604 may also be elusive, if not impossible, given the ambiguity of language and the difficulty in providing a verbatim, word-for-word English account of testimony offered in a foreign language. He notes that the ability of an interpreter to comply with Rule 604 may depend upon whether the provision is interpreted to require true "transliteration" or whether it demands that an interpreter match the "essential essence" of the

³ *The Federal Rules of Evi-dance: Exploring and Reimagining Evidence Law Through Music, and Proposing Amendments to Rule 604*, 31 Suffolk Journal of Trial and Appellate Advocacy, Issue 2, at 146. Truly bucking the academic firmament, Professor Potts even offers praise for the dying declaration hearsay exception. *Id.* at 187. ("Old precedent is *archaic* and *outdated* when you don't like it; *venerable* and *well-established* when you do. Perhaps an old doctrine survived this long because it is solid and reliable, tried and true.").

⁴ *Id.* at 162, citing Bureau of Labor Statistics, U.S. Dep't. Labor, *Occupational Outlook Handbook*, Interpreters and Translators, [Perma | Interpreters and Translators : Occupational Outlook Handbook: U.S. Bureau of Labor Statistics](#) ("Although some people do both, interpreting and translating are different skills: interpreters work with spoken communication, and translators work with written communication.").

⁵ *Id.* at 163.

⁶ *Id.*

speaker's meaning.⁷ To “avoid entrapping an interpreter into violating her oath with nearly every breath,” Professor Potts proposes amending Rule 604 to require interpretation only to a reasonable degree of professional skill and accuracy. To address both of his critiques of Rule 604, Professor Potts proposes changes to Rule 604, as follows:

Rule 604. Interpreter

An interpreter must be qualified and must give an oath or affirmation to ~~make~~ render a true ~~translation~~ interpretation to a reasonable degree of professional skill and accuracy.⁸

II. The Need for an Amendment to Rule 604

Although Professor Potts may offer some potentially valid points regarding the terminology employed by Rule 604, it is not clear that an amendment is needed to rectify any conflicts or other interpretive difficulties in the courts. Federal judges appear well-equipped to handle issues of foreign language interpretation and translation using existing tools and appear to administer the requisite oath or affirmation under the existing provision.

A. Interpretation vs. Translation: The Oral/Written Distinction

It appears likely that Rule 604 was intended to apply when an interpreter orally translates witness testimony given in a foreign language into English for the trier of fact, as Professor Potts suggests. Rule 604 itself does not define the term “interpreter” or define the scope of the interpretive duties to which the oath or affirmation requirement applies. Although interpreters may perform several different functions at trial, the Rule 604 oath or affirmation appears targeted at those who orally translate live witness testimony.⁹ Rule 604 is placed in Article VI governing

⁷ The article offers the example of the Spanish word “ahora” to illustrate this point. Professor Potts explains that some Spanish speakers might understand this word to mean “right now,” while others might hear this word in a context suggesting that it means “later” or “a little later.” *Id.* at 164-65.

⁸ *Id.* at 164.

⁹ See *United States v. Taren-Palma*, 997 F.2d 525, 532 (9th Cir. 1993), *overruled on other grounds by United States v. Shabani*, 513 U.S. 10, 11 (1994) (“Rule 604 applies only to interpreters who translate the testimony of witnesses on the stand. Unlike those interpreters, Soto was a language expert who took the stand under oath, and subjected himself to cross-examination. Rule 604 is inapplicable.”); 27 Fed. Prac. & Proc. Evid. § 6053 (2d ed.) (describing four different types of “interpreters” at trial, including “witness” interpreters, “party” interpreters, “proceedings” interpreters and expert witness interpreters and stating that Rule 604 was designed to apply to “witness” interpreters only). See also Adv. Comm. Note to Fed. R. Evid. 604 (1973) (stating that Rule 604 was intended to “implement[] Rule 43(f) of the Federal Rules of Civil Procedure and Rule 28(b) of the Federal Rules of Criminal Procedure, both of which contain provisions for the appointment and compensation of interpreters.”). Federal Rule of Civil Procedure 43 governs the process of “Taking Testimony” and current Rule 43(d) authorizes the court to “appoint an interpreter of its choosing; fix reasonable compensation to be paid from funds provided by law or by one or more of the parties; and tax the compensation as costs.” Fed. R. Civ. P. 43. Federal Rule of Civil Procedure 43 thus suggests that an “interpreter” may be appointed to assist with “taking testimony” in open court, suggesting that it does not apply to the translation of written texts or to other acts of interpretation that may aid parties and other participants in understanding the proceedings. Rule 28 of the Federal Rules of Criminal Procedure covers “Interpreters” more generally and authorizes a federal court to “select, appoint, and set the reasonable compensation for an interpreter,

“witnesses.” Rule 604 follows Rule 603, which requires an “oath or affirmation” of testifying witnesses.¹⁰ And, the Federal Rules of Evidence generally are targeted at controlling the flow of information to the trier of fact.¹¹ The most natural, contextual reading of Rule 604, therefore, is that it applies to those who provide English translations of witness testimony at trial.¹² Therefore, it does not appear to apply to translations of written texts or to other types of trial or extra-judicial interpreters.¹³

And there is support for Professor Potts’ proposed distinction between the role of an “interpreter” who makes an oral interpretation of an oral statement and of a “translator” who creates a written translation of a text. In *Taniguchi v. Kan Pac. Saipan, Ltd.*, the United States Supreme Court reviewed a district court’s award of costs to a prevailing party under 28 U.S.C. § 1920 for the translation of foreign-language documents needed for its defense.¹⁴ The statute authorized an award of costs for “compensation of interpreters” and the Court held that the district court erred in awarding the costs of document translation, as follows:

Because the ordinary meaning of the word ‘interpreter’ is a person who translates orally from one language to another, we hold that ‘compensation of interpreters’ is limited to the cost of oral translation and does not include the cost of document translation.¹⁵

The Court further observed:

Based on our survey of the relevant dictionaries, we conclude that the ordinary or common meaning of ‘interpreter’ does not include those who translate writings. Instead, we find that an interpreter is normally understood as one who *translates orally from one language to another*. This sense of the word is far more natural. As the Seventh Circuit put it: ‘Robert Fagles made famous translations into English of the *Iliad*, the *Odyssey*, and the *Aeneid*, but no one would refer to him as an English-language ‘interpreter’ of these works.’¹⁶

The Court’s finding with respect to the most common meaning of the terms “interpreter” and “translator” is thus consistent with the distinction Professor Potts draws between oral and written

including an interpreter for the victim.” Fed. R. Crim. P. 28. Coverage of interpreters for crime victims suggests that Rule 28 may apply beyond the context of witness testimony and to interpreters that aid affected parties and other participants in understanding the proceedings.

¹⁰ Fed. R. Evid. 603.

¹¹ 27 Fed. Prac. & Proc. Evid. § 6053 (2d ed.) (“Thus, the very inclusion of Rule 604 in the Evidence Rules suggests that it was intended to deal only with witness interpreters.”)

¹² *Id.* at § 6053 (“Since Rule 604 imposes on interpreters requirements otherwise imposed only on witnesses, it is reasonable to infer that the only interpreters covered by Rule 604 are witness interpreters, who themselves are witnesses.”).

¹³ See *United States v. Alharbi*, No. 22-2092, 2024 WL 939629, at *2 (2d Cir. Mar. 5, 2024) (Federal Rule of Evidence 604 did not apply to videotaped interview of defendant shown at trial even though federal agent who translated from English to Arabic for defendant during interview was not a certified court interpreter).

¹⁴ 566 U.S. 560, 569 (2012).

¹⁵ *Id.* at 562. See also *The Federal Rules of Evidence* *supra* n. 2 at n. 78 (citing other federal sources that observe this distinction).

¹⁶ *Id.* at 569 (emphasis added; citations omitted).

translation. And if Rule 604 is directed at witness interpreters at trial, it would seem to be directed to oral interpreters.

Although the Supreme Court recognized a distinction between the functions of an “interpreter” and a “translator,” the Court nonetheless described “interpreters” as “translating” orally. The Court’s use of the verb “translate” in connection with the work of “interpreters” is arguably consistent with the usage in Rule 604. The Rule requires “interpreters” to “translate” truthfully – albeit orally. Viewed in this way, Professor Potts’ claim that Rule 604 “botches the distinction” between interpretation and translation may be overstated, making his proposal to amend the Rule to require a truthful “interpretation” unnecessary.

Furthermore, a few district courts appear to have applied Rule 604 to written translations of witness declarations offered in support of summary judgment and other pre-trial motions. In *Canizales v. Lawrence*, for example, the defendant objected to two sworn English declarations executed with the plaintiff’s signature when the plaintiff had testified that he did not understand English and had not seen his declarations.¹⁷ The district court ordered the declarations stricken from the summary judgment record, in part, because of the failure to comply with Rule 604 in providing written translations of the plaintiff’s declarations:

The Court finds nothing in the record that provides an oath or affirmation by Barajas attesting to a true translation; nor does the Court find any evidence that Barajas possesses the expert qualifications required for an interpreter. Accordingly, the Court finds that the translated declarations do not comply with the FRE 603 and 604.¹⁸

Thus, to the extent that Rule 604 may be applied to *written witness testimony* supplied to the court in support of a summary judgment or other pre-trial motion, it may be unwise to restrict Rule 604 to the oral “interpretation” of oral testimony.

B. Amending Rule 604 to Require an Interpretation “To a Reasonable Degree of Professional Skill and Accuracy”

Professor Potts also critiques Rule 604 for forcing interpreters to promise to make a “true” translation – an impossible feat in his view given the realities and ambiguities of spoken language. His second proposal would amend Rule 604 to require interpreters to make a more realistic commitment to make a true interpretation “to a reasonable degree of professional skill and accuracy.” While equally well-intentioned, this proposal may also be unnecessary and largely futile. Witness interpreters likely comprehend their obligation to convey the speaker’s meaning “to a reasonable degree of professional skill and accuracy” under Rule 604 due to controlling industry standards and required interpreter qualifications. And Rule 604’s current textual requirement of an oath or affirmation to make a “true translation” is most naturally and

¹⁷ *Canizales v. Lawrence*, No. CV H-07-3796, 2009 WL 10719452, at *5 (S.D. Tex. Feb. 18, 2009).

¹⁸ *Id.*; see also *Davis v. SpeechWorks Int’l, Inc.*, No. 03–CV0533S(F), 2006 WL 2828856, at *2–3 (W.D.N.Y. Sept. 29, 2006) (applying Rule 604 to translated documents). But see *Lakah v. UBS AG*, 996 F. Supp. 2d 250, 258 (S.D.N.Y. 2014) (rejecting a similar objection “even assuming” that Rule 604 “applies to the translation of documents rather than simply to interpretation of witnesses on the stand.”).

commonly interpreted to require only the realistic and reasonable translation required by industry standards.¹⁹

Indeed, it makes little sense to add a performance standard to Rule 604 that federal judges are unable to police effectively due to the very language barrier that necessitates the presence of a witness interpreter in the first place. One treatise explains:

The absence in Rule 604 of standards for interpreter performance probably is a consequence of the practical limits on the ability of courts to enforce such standards. Enforcement at the trial level would require either that the judge be fluent in the foreign language spoken by the witness or take testimony from other interpreters employed by the parties on the subject of the accuracy of the translation provided by the court's interpreter. The first circumstance is rare and the alternative solution is time consuming and expensive.

Rule 604 reflects the reasonable conclusion that a court normally can rely on the qualification and oath or affirmation requirements of that provision to produce an accurate translation.²⁰

The qualifications for interpreters in federal proceedings and the tasks they are expected to perform appear to be well-regulated and understood, making an amendment to Rule 604 to clarify their role redundant, as well as unworkable. The Court Interpreters Act requires the Director of the Administrative Office of the United States Courts (the “A.O.”) to “establish a program to facilitate the use of certified and otherwise qualified interpreters in judicial proceedings instituted by the United States.”²¹ “The Director shall prescribe, determine, and certify the qualifications of persons who may serve as certified interpreters, when the Director considers certification of interpreters to be merited, for the hearing impaired (whether or not also speech impaired) and persons who speak only or primarily a language other than the English language, in judicial proceedings instituted by the United States.”²² Consistent with this statutory mandate, the A.O. classifies interpreters as “Certified,” “Professionally Qualified,” or “Language Skilled” depending upon their demonstrated qualifications, certifications, and experience.²³ And the presiding judge must appoint a certified interpreter (or, if unavailable, an otherwise qualified interpreter) whenever a party or witness speaks only or primarily a language other than English or suffers from a qualifying hearing impairment in any federal criminal prosecution or civil

¹⁹ See *Garcia v. State*, 463 N.E.2d 1099 (Ind. 1984) (interpretation proper even though interpreter for hearing and speech impaired witness could not always translate word for word; sign language interpreter “stated to the court that she would attempt to make a word-for-word literal translation of the proceedings, but at times that is impossible because of the lack of availability of a sign for a particular word.”); *United States v. Armijo*, 5 F.3d 1229 (9th Cir. 1993) (Rule 604 did not apply to expert translator who testified about transcription of recorded Spanish telephone conversation because Rule 604 applies only to “witness” interpreters; witness’s affirmation that she “translated the tape that is in issue here today from Spanish to English to the best of [her] ability” satisfied Rule 603).

²⁰ 27 Fed. Prac. & Proc. Evid. § 6055 (2d ed.).

²¹ 28 U.S.C. §1827(a).

²² 28 U.S.C. §1827(b).

²³ See [Interpreter Categories](#)

enforcement action brought by the United States.²⁴ In proceedings to which the Court Interpreters Act applies, therefore, the A.O. provides detailed guidance regarding the qualifications of a witness interpreter that guide interpreters in the performance of their duties at trial.

Even where the Court Interpreters Act does not mandate interpreter appointment (in private civil litigation), parties may hire their own interpreters, and Federal Rule of Civil Procedure 43(d) offers trial judges discretionary authority to appoint interpreters.²⁵ And Rule 604 itself already requires that interpreters be “qualified,” requiring federal courts to police the qualifications of witness interpreters. And federal courts have relied upon the gatekeeping methodology of Federal Rule of Evidence 702 governing expert witnesses to regulate the qualifications of interpreters.²⁶ Of course, Rule 702 also requires a reliable “application” of reliable principles and methods to the facts of the case. To the extent that federal courts rely upon Rule 702 methodology in regulating witness interpreters, therefore, an interpreter would also be expected to translate witness testimony in a particular case consistently with the reliable methods utilized in the field of interpretation.²⁷ This surely means interpretation “to a reasonable degree of professional skill and accuracy.”

Thus, the qualification and oath or affirmation requirements contained in existing Rule 604 appear to be sufficient -- and are perhaps very close to the best that can be articulated -- to regulate the work of witness interpreters in the federal courts. Interpreters that possess the requisite qualifications can be expected to appreciate their obligation to provide a true translation to the best of their professional skill and ability, such that an amendment to Rule 604 to clarify this obligation may add little of value.

While Professor Potts makes valuable points about the terminology employed by Rule 604 and about the proper role of a court interpreter, an amendment to Rule 604 seems unnecessary at this time. Should the Committee wish to explore potential amendments to Rule 604 further, however, an Agenda memorandum can be prepared for the Spring 2027 meeting exploring draft amendment language and an accompanying Committee Note. Even if the Committee perceives no need for an amendment to Rule 604 at this time, the Committee could return to the issue in the future should problems with an interpreter’s oath or affirmation arise.

²⁴ 28 U.S.C. §1827(d).

²⁵ Fed. R. Civ. Pro. 43(d).

²⁶ See *United States v. Bailon-Santana*, 429 F.3d 1258, 1261 (9th Cir. 2005) (“Where a certified interpreter is not “reasonably available,” Federal Rule of Evidence 604 provides a means for the court to qualify an individual as an interpreter, employing the methodology used for qualifying expert witnesses.”); 4 Handbook of Fed. Evid. § 604:1 (10th ed.) (“Rule 604 specifically provides that the interpreter must meet the qualifications for an expert witness contained in Rule 702 which requires in the case of an interpreter that by reason of knowledge, skill, experience, training, or education, the interpreter is capable of providing a true translation.”). Of course, Rule 702 requires no specific basis for an expert’s qualifications, meaning that an interpreter could be qualified by “knowledge, skill, experience, training, or education.” Fed. R. Evid. 702. See also 27 Fed. Prac. & Proc. Evid. § 6054 (2d ed.) (“Given the broad wording of this standard, no specific certification, schooling, or other qualifications are required of an interpreter.”).

²⁷ See Fed. R. Evid. 702(d).

From: Potts, Brian
Sent: Friday, July 17, 2026 6:28 PM
To: RulesCommittee Secretary
Cc: Potts, Brian
Subject: article proposing amendments to Federal Rule of Evidence 604

Dear Advisory Committee on Evidence Rules,

Thank you for everything you do!

Please allow me to share with you a link to *The Federal Rules of Evidence: Exploring and Reimagining Evidence Law Through Music, and Proposing Amendments to Rule 604*, 31 SUFFOLK JOURNAL OF TRIAL AND APPELLATE ADVOCACY 143 (2026):

<https://dc.suffolk.edu/jtaa-suffolk/vol31/iss2/5/>

A proposal for amendments to Rule 604 is on pages 162 to 169:

Here is an excerpt from the article, minus the footnotes:

An official in-trial interpreter is not a witness. The interpreter has no personal knowledge of the case's facts, so she does not satisfy Rule 602 (Need for Personal Knowledge). Indeed, it could be dangerous to allow someone with personal knowledge of the facts to serve as the official interpreter because this person's independent knowledge of the facts could cloud a pure interpretation of the sworn witness's testimony.

So the interpreter need not swear to testify truthfully, because the interpreter is not testifying at all, and has no personal knowledge about the facts. But Rule 604 requires the interpreter to swear or affirm "to make a true translation":

Rule 604. Interpreter

An interpreter must be qualified and must give an oath or affirmation to make a true translation.

Isn't Rule 604 strange? It fails to distinguish between interpreters and translators. Interpreters make oral renderings of spoken words. Translators make written versions of texts. An interpreter *qua* interpreter does not translate. But Rule 604 botches this distinction. Normally, we'd let that slide. But Rule 604 is about words and their true meanings. And Rule 604 insists on "true" renderings of a witness's words.

Therefore, I suggest the Advisory Committee propose and Congress approve of this modest change to Rule 604: replace "to make a true translation" with "to make a true interpretation."

For how can Rule 604 expect an interpreter to make a true interpretation when Rule 604 botches the reiteration of the salient word? And how can Rule 604 expect an interpreter to make a true

translation when the interpreter might lack qualifications for translations and almost certainly lacks a text to translate? By bungling the English language, the current version of Rule 604 forces an interpreter to promise to do the impossible, to swear an oath “To dream the impossible dream ... To reach the unreachable star.”

Even with my modest change, is compliance with Rule 604 still impossible? Does Rule 604 still send an interpreter off on a quixotic quest, in pursuit of an impossible dream?

Is “a true translation” or “a true interpretation” ever possible? Surely a true interpretation of a single word or phrase is often possible. But a true interpretation of a witness’s entire testimony? If a true translation is possible, then why are there so many translations of *Don Quixote* into English?

At best, the phrases “true translation” and “true interpretation” are ambiguous. “True” as in transliteration? Or “true” as in matching the essential essence?

For a law to be valid, compliance with it must be possible. Therefore, I also make a bold proposition: amend Rule 604 to read: “An interpreter must be qualified and must give an oath or affirmation to render a true interpretation to a reasonable degree of professional skill and accuracy.”

Thus, Rule 604 might avoid entrapping an interpreter into violating her oath with nearly every breath. Indeed, sometimes even a single word presents problems for an interpreter.

Consider “ahora.” Some Spanish speakers mean by this word, and understand this word to mean, something like “right now.” But other Spanish speakers say and hear this word as meaning something like “later” or “a little later.”

Thank you for your consideration.

All the best,
Brian

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