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OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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MEMORANDUM

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

FROM: Hon. Sarah S. Vance, Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rules

DATE: May 6, 2026

Introduction

The Civil Rules Advisory Committee met in Charlotte, N.C., on April 14, 2026. Members of the public attended in person, and public online attendance was also provided. Draft Minutes of that meeting are included in this agenda book. For the convenience of Standing Committee members, the entire agenda book for that Advisory Committee meeting may be accessed via the link below. This report will on occasion refer to parts of that agenda book as a source of additional information.

Civil Rules Committee Agenda Book (April 2026)

As authorized by the Standing Committee, proposed amendments to Civil Rules 7.1, 26, 41, 45(b), 45(c), and 81 were published for public comment in August 2025, and a public hearing was held on January 27, 2026. The above link provides access to the summaries of public comments and testimony about the various amendments, and the report below identifies the pages of the Advisory Committee agenda book on which those summaries can be found.

Part I of this agenda book presents the six action items the Advisory Committee is bringing forward—the six rule changes listed above. The Advisory Committee unanimously voted to recommend that all rule changes listed above should be approved for final adoption. Small clarifying changes were made in the Committee Notes for two of the rule changes.

Part II of this report provides a brief update on the rule amendments for which the Advisory Committee unanimously voted to recommend publication for public comment. These amendments are part of coordinated efforts with the Appellate, Bankruptcy, and Criminal Rules Committees to revise their respective rules regarding privacy protections and electronic filing and are addressed in separate reports to the Standing Committee.

Part III of this report provides updates on the work of two subcommittees that are considering whether to propose amendments for public comment.

(a) Remote testimony: During the Standing Committee's January 2026 meeting, members discussed the ongoing work of the Rule 43/45 Subcommittee at some length, and raised some concerns. This subcommittee (chaired by Chief Judge M. Hannah Lauck (E.D. Va.)) held four meetings after the Advisory Committee's Fall 2025 meeting. After hearing about the concerns expressed by Standing Committee members, the subcommittee discussed those concerns and presented them to the full Advisory Committee during its April 2026 meeting. The subcommittee continues to focus on removing the "compelling circumstances" requirement in Rule 43(a) (a term that appears nowhere else in the Civil Rules), but it has significantly recast the committee note explaining the rule change to emphasize the enduring commitment to in-person trial testimony. The subcommittee looks forward to further feedback from Standing Committee members.

(b) Third-party litigation funding (TPLF): For more than a decade, the Advisory Committee has had on its agenda a proposal to amend Rule 26(a)(1)(A) to add a requirement that the parties disclose litigation funding. Many submissions favoring and opposing such an amendment have been submitted during this period, and at least five bills have been introduced in the current Congress as well. The subcommittee continues to gather relevant material and to send representatives to bar gatherings and law school conferences addressing the subject. It welcomes reactions from Standing Committee members about the course forward. The report contains a fairly extensive discussion of the issues raised.

Part IV of this report presents matters that are the subject of ongoing Advisory Committee work though not assigned to any specific subcommittee.

(a) Rule 23 proposals: Important amendments to Rule 23 were made in 2003 and 2018. On each occasion, much effort was involved in evaluating possible rule changes. Recently, the Advisory Committee has received recommendations to consider further amendments dealing with

(1) "service" or "incentive" awards to class representatives; (2) revising the superiority provision in Rule 23(b)(3) to authorize the court to consider whether non-litigation alternatives to a class action might be superior to class certification; and (3) whether Rule 23(e) should be revised to call for court approval of a pre-certification settlement or dismissal of a proposed class action. These issues remain under study. During the Advisory Committee's April 2026 meeting, there were concerns about the potential magnitude of a Rule 23 project, and about whether inaugurating such a project would produce many additional amendment proposals. The Advisory Committee welcomes Standing Committee guidance.

(b) Right to have representative at Rule 35 examinations: Rule 35 authorizes a court order requiring parties to submit to examination by a licensed or certified examiner regarding the party's mental or physical condition when that is relevant to the case. It has been proposed that the rule be amended to provide that the party subject to the examination may have a representative present during the examination or to record the examination. Several states provide such a right. After discussion, the Advisory Committee decided the question should be the subject of further study.

(c) Rule 58 and collateral orders: A submission recommended amending Rule 58 to exclude collateral orders from the Rule's separate document requirement. The interaction of the "separate document" provision of Rule 58 and court orders denying, for example, motions to dismiss on qualified on grounds of immunity, may sometimes present confusing issues on the time for appeal. Though the interaction of Rule 54(a) and Rule 58 may present analytical difficulties, there was limited support for pursuing this proposal for amendment. But it was held on the agenda pending consultation with the Appellate Rules Committee.

Part V of this report briefly identifies a number of other proposals for amending the Civil Rules that the Advisory Committee decided to drop from its agenda. Details regarding these proposals are contained in the agenda book for the Advisory Committee's April 2026 meeting available via the link above.

I. ACTION ITEMS

(a) Rule 7.1—Disclosure Statement

The Rule 7.1 Subcommittee, chaired by Justice Jane Bland of the Supreme Court of Texas, was created in spring 2023 to address concerns that district judges were not being adequately informed of potential financial interests in a proceeding that would require them to recuse. In particular, there was a concern that the current rule's requirement that a party disclose "any parent corporation and any publicly held corporation owning 10% or more of its stock" obscured the identity of a "grandparent" or "great-grandparent" of a party in which a judge might hold a financial interest.

The proposed amendment, which was published in August 2025, changes the rule in two ways: (1) it replaces references to "a corporate party" with the broader term "business organizations"; and (2) it requires disclosure of both "a parent business organization" and "any publicly held business organization that directly or indirectly owns 10% or more" of a party. These changes track guidance issued to federal judges by the Codes of Conduct Committee in February

2024 and language in the committee note of the analogous Federal Rule of Appellate Procedure requiring a similar disclosure, Rule 26.1, which for decades has covered grandparents and great-grandparents.

The public-comment period yielded relatively little reaction: four witnesses at the hearing and eight written submissions, summarized at pages 96-97 of the Advisory Committee's April 2026 agenda book. Although one witness expressed concerns that the definitions of "business organizations" and "indirectly owns" might be confusing, all other comments were supportive and expressed confidence that these amendments are not onerous and will make it easier for judges to determine whether they have any financial interest in the outcome of the litigation that requires them to recuse. The subcommittee reviewed all of the testimony and written comments and unanimously recommended final approval of the rule with no changes to the rule or the note. At its April meeting, the Advisory Committee agreed, unanimously voting to recommend final adoption of the amended rule and note with no changes.

(b) Rule 41(a)—Dismissal Without Prejudice

The Rule 41(a) Subcommittee, chaired by Judge Cathy Bissoon (W.D. Pa.), was created at the March 2022 Advisory Committee meeting to address varying interpretations of the rule permitting voluntary dismissal of "actions." Despite the language of the rule, many courts allow parties to use it to dismiss less than an entire action—for instance, all claims against one of several parties or even one of several claims against an individual party. The reason for this divergence between the language of the rule and its use became clear: in a world where multiparty, multiclaim litigation is far more typical than 1938 (when the current language was drafted) it enhances efficiency to allow the court and parties to narrow the issues involved in a litigation by dismissing individual claims.

After extensive research and outreach, the subcommittee proposed two amendments to the rule for publication: (1) replace references to an "action" to "one or more claims"; and (2) require that only parties who "remain in the action" sign a stipulation of dismissal to solve a different problem involving challenges created by the inability to obtain a signature from a party who has long departed the litigation.

These proposed amendments were published for comment in August 2025. During the public comment period, three witnesses testified, and the Advisory Committee received 28 written comments. All testimony and feedback were in favor of the amendments and are summarized at pages 106-110 of the April 2026 agenda book. Themes emerging from the public comments include praise for the amendments' resolution of the varying interpretations across the circuits of the word "action" and confidence that the amendments will increase efficiency and reduce confusion. There were three suggested minor tweaks to the language of the rule that the subcommittee discussed via email and concluded were unwarranted. The subcommittee therefore recommended final adoption of the amended rule and note at the April Advisory Committee meeting, and the Advisory Committee agreed. It unanimously recommended final approval of the published draft without changes.

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

The preliminary draft of the Rule 45(c) amendment was published for public comment in August 2025, with comment closing in February 2026. On March 11, the Rule 43/45 Subcommittee met to discuss the public comments. Except for a modification of one paragraph of the committee note, the subcommittee saw no need to make other changes. Notes of that meeting are at pages 124-25 of the April 2026 agenda book via the link above.

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

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

The subcommittee's discussion during its March 11 meeting indicated that only one change was needed in the published preliminary draft—refinement of the next-to-last paragraph of the note. There was concern that the wording of the published draft of the note suggests that the Rule 43(a) standard for remote testimony at trial also applies to motion hearings or other proceedings. So the Subcommittee recommended that the next to last paragraph of the committee note be clarified as follows:

> The amendment does not alter the standards for deciding whether to permit in-court remote trial testimony. Instead, it applies to any subpoena for witness testimony. ~~Ordinarily, court approval is required for remote testimony in court.~~ Rule 43(a)~~, for example,~~ authorizes remote trial testimony ~~in trials and hearings~~ but depends on court permission for such testimony. ~~Rule 26(a)(3)(A)(i) requires that the parties disclose the identities of witnesses whose testimony will be presented, without distinguishing between in-person and remote testimony.~~[1] ~~Even remote deposition testimony is authorized only by stipulation or court order. See Rule 30(b)(4).~~

Without this clarification, the published draft note might be read to limit the court's present latitude to hold remote proceedings that are not trials. The basic point of the paragraph is that remote trial testimony—the only thing regulated by Rule 43(a)—requires court approval. Other

[1] After the Advisory Committee's meeting, this sentence (which was not removed when other deletions were made to this paragraph of the committee note during that meeting) was overstricken. It is not about the interpretation of Rule 45(c), and the Rule 26(a)(3) amendment speaks for itself. Removing this sentence shortens the note and avoids any possible confusion including this sentence might cause.

remote activities—court proceedings or depositions—are not affected by this amendment and referring to them might create confusion. This clarification avoids that potential confusion.

The subcommittee and later the full Advisory Committee considered various other proposed wording changes made by some who commented on the rule amendment. The summary of public comments and testimony about this rule appear at pages 126-33 of the Advisory Committee agenda book. Notes of the subcommittee's March 22, 2026, meeting appear at pages 124-25 of the agenda book.

Some who commented did not oppose the Rule 45(c) change, but thought it should not be made until the question of possibly amending Rule 43(a) on remote trial testimony was resolved. But the Ninth Circuit decision has already been invoked to resist subpoenas for pretrial discovery, and there is no necessary link to the ongoing consideration of amending Rule 43(a). There were also some wording changes proposed that are identified at pages 113-15 of the Advisory Committee agenda book accessible via the link above.

After discussion, the Advisory Committee unanimously voted to recommend final adoption of the published rule change with the change noted above to one paragraph of the committee note.

(d) Rule 26(a)(3)(A) Amendment—Disclosure of Intention to Offer Remote Trial Testimony

The Rule 26(a)(3) amendment directs the parties not only to identify the witnesses they intend to call or will call if needed at trial, but also to indicate whether any of these witnesses will offer remote testimony.

The proposed amendment attracted little comment. The summary of the comments appears at pages 141-42 of the Advisory Committee's agenda book for its April 2026 meeting. The clarification amendment makes clear that disclosure of the witnesses a party "expects to present" at trial or that it "may call if the need arises" must specify whether the witness is expected to provide remote testimony. Given the requirement of court approval for remote trial testimony under Rule 43(a), this revision may often ensure notice to the court and the other parties of the need to address that question of court permission for remote testimony.

The Advisory Committee voted unanimously to recommend final adoption of the proposed amendment as published.

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

The proposed amendment sought to clarify what is required to satisfy the current rule's provision that serving a subpoena calls for "delivering a copy to the named person." The current rule has engendered uncertainty about what suffices to serve a subpoena. The proposed amendment borrows service methods authorized for service of the summons and complaint under Rule 4(e)(2)(A) and (B) and adds another authorized method—service by U.S. mail or a commercial-carrier service that provides confirmation of actual receipt. The amendment also explicitly empowers the court to authorize additional methods of service in given cases.

In addition, the amendment provides a 14-day notice period for subpoenas that require the person to appear for a deposition or a trial (absent a court order shortening the period). It also removes the requirement that the witness fee be tendered at the same time the subpoena is served, providing that delivery of the witness fee "at the time and place the person is commanded to appear" would suffice.

This amendment received numerous comments during the public comment period, many from professional process servers who opposed the amendment. A summary of the comments and testimony appears at pages 160-83 of the Advisory Committee's April 2026 agenda book, accessible via the link at the beginning of this report.

After the public comment period closed, the Discovery Subcommittee met and decided that the issues raised during the public comment period did not warrant changes in the published draft. Notes of this meeting appear at pages 154-59 of the Advisory Committee's agenda book.

During the Advisory Committee's April meeting, a number of questions were raised about the amendment. One was about the proposed language of Rule 45(b)(1)(A)(i)—"delivering a copy to the named person personally." Rule 5(b)(2)(A) says "handing it to the person." But Rule 4(e)(2)(A), on which this amendment is based, calls for delivering the summons and complaint "to the individual personally," which the amendment parallels.

Other concerns were raised about the added methods of service added in proposed 45(b)(1)(A)(iii)—by U.S. Mail or commercial carrier. The rule calls for "confirmation of actual receipt." It was pointed out that the committee note mentioned Rule 45(b)(4) regarding proof of service, which calls for a "statement . . . certified by the server." That might prove difficult with U.S. mail or a commercial carrier. An additional concern was raised by Advisory Committee discussion—assuming confirmation of receipt, who must receive the subpoena? The committee note does not clearly answer that question.

The Discovery Subcommittee caucused during the lunch break at the April 14 Advisory Committee meeting and after lunch proposed changes to the third paragraph of the committee note as follows:

> The amendment also adds another option—service by United States mail or commercial carrier to the person's last known address, if the selected method provides confirmation of actual receipt by a person identified in Rule 45(b)(1)(A)(i) or (ii). The rule does not prescribe the exact means of confirmation, but courts should be alert to ensuring that there is reliable confirmation of actual receipt. ~~*Cf.* Rule 45(b)(4) (proving service of subpoena).~~ Experience has shown that this method regularly works and is reliable.

These changes clarify that the person who receives the subpoena is one of those on whom service would be authorized, and also removed the possibly confusing cf. citation to Rule 45(b)(4).

The subcommittee also decided that, given the parallelism between the new provisions in Rule 45(b)(1) and the service provisions from Rule 4(e), the published rule language "delivering a copy to the person personally" was clear.

The Advisory Committee unanimously voted to recommend final adoption of the Rule 45(b)(1) amendment as published for public comment, with the sole revision quoted above to the committee note.

(f) Rule 81(c)(3)—Demand for Jury Trial After Removal

The proposed amendment to Rule 81(c)(3) clarifies the timing of demands for jury trial in removed cases. If a demand has been made before removal, no further demand need be made. But if no demand has been made before removal, the amendment specifies when a demand under Rule 38 must be made within the time limits in that rule.

The amendment eliminates the uncertainty caused by the provision in the current rule that excuses a jury demand if "state law did not require an express demand for jury trial."

The proposed amendment received only a few comments, all but one positive. *See* Agenda Book for Advisory Committee on Civil Rules, April 14, 2026, at 192. It might be noted that one of the comments supporting the rule change came from the presidents of the Trial Lawyers Associations of 48 states and said the proposed rule changes added clarity to the rule by replacing the current rule, which creates confusion.

The Advisory Committee unanimously voted to recommend final adoption of the Rule 81(c) amendment as published for public comment.

II. RULES RECOMMENDED FOR PUBLICATION FOR PUBLIC COMMENT

(a) Rule 5.2—Privacy Protection for Filings Made with the Court

At its April 14, 2026, meeting, the Advisory Committee unanimously recommended publication of amendments to Rule 5.2 concerning privacy protections in court filings. The proposed amendments would require complete redaction of social-security numbers, individual taxpayer-identification numbers, adoption taxpayer-identification numbers, and employer identification numbers; require the use of pseudonyms, rather than initials, to refer to minors; and would apply these requirements to all documents in a court filing, including exhibits and attachments. Note that the proposed amendments do not address how to address the use of a pseudonym for a minor in a court filing once the minor ages out, but public comment may provide insight into whether this is an issue that should be addressed in a rule rather than through protective orders in individual cases.

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

The Advisory Committee also unanimously voted to recommend that amendments to Rule 5 (and a conforming amendment to Rule 6) be published for public comment. The proposed amendments would increase electronic access to court by self-represented litigants. These proposed amendments are presented separately in a report by Professor Catherine T. Struve, Consultant to the Standing Committee, that addresses amendments to the Appellate, Bankruptcy, and Criminal Rules in addition to the Civil Rules.

III. SUBCOMMITTEE REPORTS

(a) Rule 43/45 Subcommittee

During the Standing Committee's January 2026 meeting, there was considerable discussion of the Advisory Committee's ongoing work regarding the limits on remote trial testimony under Rule 43(a). Since that time, the subcommittee has carefully considered the concerns raised by Standing Committee members. In total, it has held four meetings since the Advisory Committee's fall 2025 meeting, three of them after the Standing Committee's January meeting. Notes on these meetings are included below in this agenda book.

Since the January meeting, Sarah Sraders has done research on the interpretation of Rule 43(a), and her research memorandum is included in this agenda book. This research did not identify decisions in which judges said they would authorize remote trial were they not prevented from doing so by the "compelling circumstances" provision in the current rule. But it did show that judges are implementing the 1996 Committee Note and insist that only an unforeseeable, last-minute sort of development preventing in-court trial testimony could satisfy the "compelling circumstances" requirement.

Based on further consideration, and in light of the concerns of some Standing Committee members, the subcommittee substantially recast the committee note that might accompany a preliminary draft for public comment, but continues its work on the topic. The revised note makes clear that the amendment does not retreat from the time-honored centrality of in-person trial testimony. But the rule-amendment proposal is still to remove the "compelling circumstances" requirement for judicial authorization of remote testimony. Notably, the "compelling circumstances" term appears nowhere else in the Civil Rules.

The concerns raised in January by Standing Committee members were also presented to the full Advisory Committee. As presented in the Advisory Committee agenda book, the subcommittee invited reactions on a variety of points:

(1) Retaining the commitment to in-person trials: The hallmark of American trials is that they depend on in-court testimony. The subcommittee is *not* in favor of "fully remote" trials, a point that should be made clear going forward. Authorization for remote testimony depends on an individualized showing regarding a specific witness.

(2) Focusing on the choice between live remote testimony and a deposition substitute: "Fully remote" trials are not the goal, so it appears important to highlight that the choice the subcommittee is addressing is not typically between in-person and remote testimony so much as between remote live testimony and deposition testimony. Relying on depositions can produce many difficulties. The deposition may have occurred before certain facts came to light. And very often much time and expense (including the court's time and energy) can be wasted in resolving disputes about what deposition testimony can be presented at trial, a process that often involves many iterations and a great deal of effort for counsel and the court, and could involve rulings on many objections during the deposition.

(3) Access to justice concerns: For some witnesses or parties, for a variety of reasons, remote testimony may be the only practical option. And relying on depositions may not only require a great deal of extra work by the court and the parties, but also put some parties at a disadvantage if they cannot afford the cost of creating a video deposition and must rely instead on reading from transcripts. Moreover, allowing remote trial testimony may serve Rule 1 purposes ("just, speedy, and inexpensive" determinations) by ensuring effective presentation of key witness testimony.

(4) "Appropriate safeguards": Rule 43(a) says that the court must also be assured that appropriate safeguards are in place to safeguard the reliability of the remote testimony. Since the pandemic, there likely has been much learning on this front. Relying on party agreement and judicial evaluation of individual cases seems workable. It bears noting that the amendment draft leaves this requirement unchanged.

(5) Specifying "approved" safeguard methods: Though there has by now been considerable experience with safeguards that work, whether by party agreement or court direction, it may be difficult to specify what safeguards are effective in given cases. But the subcommittee tried to develop a list of specific safeguards and found that too difficult. For one thing, safeguards that work in other cases may be ill-suited to the current case. Good lawyers recognize that safeguards are context-dependent, and they can work together to craft safeguards for the particular case. Having an "approved" list creates the risk that "approved" safeguards might be urged in cases in which they are not appropriate, and other safeguards that would be appropriate might be opposed on the ground that they are not "approved" under the amended rule. If we are not prepared to be specific about what suffices, we would wisely be prepared to explain why we think trying to do that is ill-advised.

(6) Strictness of "compelling circumstances" standard: The "compelling circumstances" standard was introduced in the amendment to Rule 43(a). It does not appear in any other Civil Rule. It might be argued that this demanding standard is necessary to provide suitable protection for the traditional trial and to provide sufficient flexibility to enable judges to authorize remote testimony when really needed. Library research has not identified decisions that say, "I would authorize remote testimony in this case if the 'compelling safeguards' standard were not in the rule, but because it is there I can't." At least some judges seem to feel constrained. Whether there is a way to evaluate this concern is uncertain; it seems unlikely that many judges would go to the trouble of writing a decision if that were their view. It might be noted that the current draft committee note tries to make it clear that the amendment does not require any judge to authorize remote testimony.

(7) Utility of "good cause" standard: The "good cause" standard permeates the Civil Rules. So far as appears, the "compelling circumstances" standard appears nowhere else in the rules. (Rule 37 does use "compelling," but in the different context of a court order compelling discovery.) The committee note may be able to illuminate the flexibility of the standard while also making clear that it requires a real showing to justify remote trial testimony. Perhaps one source for this topic would be the set of considerations the Texas code has adopted regarding remote proceedings.

(8) Juror preferences: Different concerns have been raised. One suggestion was that jurors may feel put upon if they are required to show up in court while some witnesses are not. And some jurors may think that being able to observe the witnesses in person is an important aid to making credibility determinations. But other reports suggest that jurors sometimes find remote testimony more useful than in-person testimony. For one thing, in some courtrooms the witness may be better seen on a screen. The alternative of relying on depositions not only can require a great deal of extra work for the court and the parties, but also impair juror comprehension. Jurors may have difficulty staying focused on video depositions, and even more difficulty focusing on deposition testimony read from edited transcripts.

(9) Foreseeability issue from 1996 Committee Note: One thing that decided cases do indicate is that the statements in the 1996 Committee Note about whether the witness's inability to come to court was foreseeable should be considered central. The 1996 Note seems to say that the sudden last-minute problem is what the rule is addressing. But in many instances the difficulty could be foreseen from the outset. Whether that should make remote testimony unavailable because it was always foreseeable that the distant witness could not be compelled by subpoena to appear in court may actually be a reason to change the rule. Restricting remote live testimony to the "last-minute emergency" is dubious. Indeed, the pending amendment to Rule 26(a)(3) directing parties to indicate in their pretrial disclosures (due 30 days before trial) whether any witnesses will be offered remotely is not limited to last-minute emergencies.

(10) Apex witness concern: A theme in the commentary from what one might call the plaintiff side is that the large company headquartered far away can require the employees it wants as witnesses to show up to testify at trial, but the other side has no way to compel live testimony from the company employees it wants to testify before the jury. The Rule 45(c) amendment would partly address this question, but the concerns about abusive apex depositions might support caution about trial testimony as well.

As reflected in the minutes of the Advisory Committee's April 2026 meeting (included in this agenda book), the subcommittee's starting point is to respect judicial discretion in making case-by-case decisions about remote trial testimony.

One reaction from an experienced trial lawyer member of the Advisory Committee was always to favor live, in-person testimony from his witnesses, but at the same time to recognize that live remote testimony is superior to relying on a deposition. A judge member agreed that live remote testimony is preferable to trying to rely on a deposition at trial.

But another member of the committee raised concerns about the draft committee note language saying that granting a motion to permit remote testimony is a way for the judge to avoid the chore of resolving disputes about designation of parts of the deposition. A judge noted that, even when the witness is expected to provide live remote testimony, it may sometimes be necessary to go through the designation effort as a backstop—one can never be certain that the remote witness will show up and that the technology will work as it is supposed to work.

Another judge member favored the proposal, in part because there simply are not enough civil trials.

Another concern was that it be made very clear that the choice presented by Rule 43(a) is not between in-person and remote live testimony, but instead between live remote testimony and deposition testimony. It may be that the committee note should be strengthened on that point.

Safeguards were discussed also, although the current draft does not contemplate any change in that rule provision. An attorney member reported never having any trouble working out safeguards with opposing counsel. But the selection of safeguards depends heavily on the nature of the case and the circumstances presented. Another attorney member agreed that safeguard issues get worked out, and also that they are commonplace in arbitrations, which are increasingly common.

Another attorney member pointed out that due to the COVID pandemic there is much more experience now with remote depositions than was true in 1996, when Rule 43(a) was amended to permit remote trial testimony. Depositions are not the same as trials, but the experience gained in remote depositions should assist counsel in designing appropriate safeguards for a given case.

The "apex witness" issue was also addressed -- would adopting this change encourage strategic use of the remote testimony option to pressure an adverse company by seeking testimony from the CEO or other high officers? One view was that a party attempting such a stratagem would have to persuade the judge that testimony from this corporate officer was really essential. Another reaction was that, if the judge nevertheless directs that the officer testify, the company would very much prefer remote to live in-person testimony.

The Advisory Committee would very much appreciate the views of Standing Committee members on the current orientation of its discussions of a possible Rule 43(a) amendment. As noted in footnotes to the current working draft below, there are issues on which the subcommittee continues to focus in light of the comments at the April 2026 meeting

Here is the current working draft:

Rule 43. Taking Testimony

(a) ~~**In Open Court**~~ **At trial.** At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause ~~in compelling circumstances~~ and with appropriate safeguards, the court may permit contemporaneous remote testimony in open court ~~by contemporaneous transmission from a different location~~.

Committee Note

In-person trial testimony has been central from the beginning of the federal court system. It remains critical, particularly to determination of credibility. Relying on face-to-face evaluation of testimony is the time-honored method for evaluating credibility.

This amendment does not in any way represent a retreat from the rules' commitment to the centrality of live in-person witness testimony, which remains true under this amendment. The court is not required to authorize remote trial testimony even if the parties all agree to proceeding in that

manner. Remote testimony should be allowed only from specific trial witnesses when the court finds that a sufficient justification has been offered. The amendment has no effect on any other aspects of trial or the availability of remote testimony under Rule 43(c).

Sometimes critical trial witnesses are simply unable to appear in person in the courtroom, however. In 1996, Rule 43(a) was therefore amended to permit remote trial testimony when good cause was shown and appropriate safeguards were in place. The 1996 amendment also required "compelling circumstances." That very demanding requirement reflected the ongoing centrality of in-person witness testimony. Judges have found this requirement too constricting in some cases.[1]

This amendment removes the "compelling circumstances" requirement, but in no way retreats from the traditional importance of in-person interaction at trial between the finder of fact and the witness and in-person interaction between the witness and the lawyers, particularly the cross-examiner.

Developments since 1996 have prompted reexamination of that requirement at trial. Critically, technology has made important advances. While telephonic testimony may have been the only method available in 1996, 21st century technology offers a substitute much closer to in-person witness testimony. Many people, including jurors, have experience using this technology for business meetings and other important interactions. There are also reports that some jurors find live video a better method than in-person witness testimony. Not all courtrooms enable all jurors a view of an in-person witness that is equal to well-presented remote testimony.

In addition, the 2020-22 pandemic prompted, and sometimes forced, the courts to employ this new technology to manage cases and, sometimes, to receive remote witness testimony at trial. That judicial experience supports removing the "compelling circumstances" constraint. There have been many reports that this flexibility around remote participation has served the goal of Rule 1 to "secure the just, speedy, and inexpensive determination of every action" and also increased access to justice for all litigants, irrespective of their means.

When witnesses cannot attend trial, the choice is not between in-court testimony and remote testimony, but between remote live testimony and depositions taken before trial. When Rule 43(a) was amended in 1996, technology for remote testimony was in its infancy and the Committee Note suggested that deposition testimony would often be superior. Experience has shown that providing witness testimony by deposition at trial often has a negative effect on juror attentiveness. In addition, it may be that the deposition was taken long before trial and the testimony is as a consequence stale. And the task of designating portions of the deposition can prove contentious, often involving the court in time-consuming review that would largely be obviated by live remote testimony.

In making the choice whether to authorize remote trial testimony, the court properly may take account of many factors. A starting point is that witness inconvenience alone is not a reason for excusing in-person testimony. Good cause requires assessment of the circumstances of the

[1] The prior version began by saying "numerous" or "some" judges had felt constrained. Sarah Sraders' research sheds some light on this. Perhaps it is best not to try to quantify.

case, never losing sight of the central importance of in-person testimony. [But the court may consider whether the testimony of this particular witness is central to the case and whether assessment of credibility of this witness's testimony will be important.][2] [It may be that remote testimony raises fewer concerns in court trials than in jury trials.][3]

Technological difficulties may sometimes prove important. When the witness is at a remote location, there could be lapses in technology both at the witness's location and in the courtroom. The proponent of the testimony must satisfy the court that technological impediments will not intrude and that electronic transmission will be secure.

Besides evaluating the justification for relying on remote testimony and potential technological issues, the court must demand appropriate safeguards to protect the reliability of the remote testimony. This requirement has remained unchanged since 1996. Experience gained since 1996 can assist the court in evaluating safeguards, but the burden is on the proponent to satisfy the court that safeguards will be in place. The parties may be able to reach a stipulation on appropriate safeguards for the court's consideration.

When a party wants to provide remote testimony at trial, it must timely obtain court approval for doing so. As amended in 2027, Rule 26(a)(3)(A)(i) should often call attention to this issue well in advance of trial. Court approval is essential to management of remote trial testimony.

[2] This bracketed sentence is designed to highlight something featured in prior drafts of the note and hinted at by the reference in the third paragraph of the draft note to "critical" witnesses. For example, a witness located far away may only be authenticating an exhibit. True, a Rule 36 request for admission could often solve such problems, as could deposition testimony. But having a witness travel across the country for 15 minutes on the stand to authenticate, for example, an exhibit offered only to counter a surprise development at trial seems exceedingly wasteful. Even if the witness could take two days off from work and the cost of last-minute transcontinental travel could be paid, a court might well conclude that under the circumstances good cause has been established to permit this witness to testify remotely.

[3] Is this bracketed sentence worth including?

MEMORANDUM

TO: Rule 43/45 Subcommittee

FROM: Sarah Sraders, Counsel, Rules Committee Staff

DATE: January 28, 2026

RE: "Good Cause in Compelling Circumstances" Under Rule 43(a)

The Rule 43/45 Subcommittee is considering whether and how to amend Federal Rule of Civil Procedure 43(a), which currently allows a court to permit remote testimony at trial "[f]or good cause in compelling circumstances and with appropriate safeguards[.]" This memorandum analyzes how courts have applied this standard, and whether the case law suggests that it has prevented judges from authorizing remote testimony in situations in which such testimony is warranted.

Research did not uncover a wealth of (or even any) cases where judges expressed a desire to allow remote testimony that was thwarted by the current standard in Rule 43(a). (There are cases where the court notes that it is "sympathetic" to the witness's circumstances as it denies the motion, but whether this truly indicates a desire to side with the movant is difficult to say.) However, the case law does show that courts closely follow the guidance in the Advisory Committee Note to the 1996 Amendments to Rule 43 (the 1996 Note) and view this as setting forth the applicable criteria for whether a movant has satisfied the Rule 43(a) standard. A review of these cases may help the Subcommittee determine whether this is still guidance that the Civil Rules Advisory Committee believes should be followed.

I. The 1996 Note

"Courts are guided by the Advisory Committee Notes on the 1996 Amendment to Rule 43 in determining whether a movant has demonstrated good cause and compelling circumstances." *Clowdus v. Am. Airlines, Inc.*, No. 1:21-cv-23155-KMM, 2022 WL 6497311, at *2 (S.D. Fla. Sept. 21, 2022); *see also Halig v. Nat'l Bd. of Examiners of Optometry*, No. 22-2118-BAH, 2025 WL 2661785, at *3 (D. Md. Sept. 17, 2025) ("The Fourth Circuit Court of Appeals has not stated a test for determining what constitutes 'good cause' or 'compelling circumstances,' but the Advisory Committee Notes to the 1996 Amendments to Rule 43(a) provide some guidance.") (quotations omitted); *Barbuto v. Ronquillo-Horton*, No. 22-C-569, 2024 WL 4212857, at *2 (E.D. Wis. Sept. 17, 2024) ("The court concludes from the text of Rule 43(a) and the Advisory Committee's comments that [defendant's] motion should be denied.").

There are several key features in the 1996 Note that are worth exploring in further detail.

A. Foreseeability

The 1996 Note explains that

> [t]he most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place. . . . A party who could reasonably foresee the circumstances offered to justify transmission of testimony will have special difficulty in showing good cause and the compelling nature of the circumstances.

Courts have paid close attention to this statement—the phrase "unexpected reasons, such as accident or illness" appears in more than 100 decisions citing Rule 43. Foreseeability is a driving factor in many courts' Rule 43(a) decisions, and "courts often deny leave to testify remotely when the proponent of the witness has long known of the reasons for its motion yet failed to file it until the eve of trial." *Savinova v. Nova Home Care, LLC*, No. 3:20-cv-01612 (TOF), 2025 WL 1279076, at *3 (D. Conn. May 4, 2025).

Thus, courts have denied motions to testify remotely when the moving party "cannot reasonably argue that they did not know where these witnesses reside and/or work. They do not assert any late-breaking reasons rendering their presence at trial unusually inconvenient or impossible." *J.D. v. Price*, 619 F. Supp. 3d 523, 530 (W.D. Pa. 2022). Conversely, courts tend to allow remote testimony when the motion is based on unforeseen developments. *See, e.g.*, *Gonzalez v. US Human Rights Network*, No. CV-20-00757-PHX-DWL, 2023 WL 5333261, at *2 (D. Ariz. Aug. 18, 2023) (finding good cause in compelling circumstances where witness's "ability to travel to Arizona to testify at trial has been impaired by a late-breaking medical condition").

Some courts have refused to allow witnesses facing immigration or visa difficulties to testify remotely where these issues were long known. In *Goodman v. Goodman*, for example, the court denied the plaintiff's opposed motion to testify at trial by video due to his inability to enter the United States, reasoning in part that "[b]ecause Mr. Goodman has known of his visa difficulties for years, there is nothing 'unexpected' or 'compelling' about the circumstances rendering him unable to testify in-person at trial." No. 1:21-cv-10902-GHW, 2026 WL 18630, at *9 (S.D.N.Y. Jan. 2, 2026); *see also Carvajal v. Mijelum, L.L.C.*, No. EP-23-CV-00245-RFC, 2025 WL 2110013, at *1 (W.D. Tex. July 24, 2025) ("Courts have denied requests for remote testimony in cases where foreseeable visa issues have arisen."); *Mobu Enters. Pty Ltd. v. John Galt Solutions, Inc.*, No. 3:23-cv-617-BN, 2025 WL 1426450, at *2 (N.D. Tex. May 16, 2025) (denying plaintiff's opposed motion for Australia-based witness to testify remotely where plaintiff "offers no facts from which the Court may reasonably infer that [the witness's] inability to travel to the United States is a new or sudden development"); *Li v. Walsh*, No. 9:16-cv-81871-KAM, 2024 WL 6887134, at *2 (S.D. Fla. Mar. 1, 2024) (finding that Chinese and other foreign plaintiffs seeking to testify remotely "have not come close to meeting the 'good cause in compelling circumstances' standard" where they "have had several years to make travel preparations and obtain visas to travel to the United States" but apparently failed to do so); *but see Zamora v. Ljubica Contractors LLC*, No. 18-CV-419 (VSB), 2025 WL 2494271, at *4 (S.D.N.Y. Aug. 29, 2025) ("Courts in this Circuit have found an exception to Rule 43(a) to be proper . . . where [plaintiffs] are unable to legally enter the United States due to their immigration status.") (collecting cases); *Medina v. Angrignon*, No. 15-CV-427-RJA-MWP, 2024 WL 108669, at *3 (W.D.N.Y. Jan. 10, 2024) (allowing plaintiff to testify remotely when he was his sole witness, had been deported to the Dominican Republic, and the parties agreed that he could not re-enter the United States).

B. Mere Inconvenience

Courts also heed the 1996 Note's guidance that contemporaneous remote transmission "cannot be justified merely by showing that it is inconvenient for the witness to attend the trial." This analysis routinely overlaps with the foreseeability concern, as courts denying motions to testify remotely due to distance or other obligations often emphasize that these were known to the movant in advance.

Courts have therefore denied requests for remote testimony where the movant argued that the witness would face professional or personal hardship by having to testify. *See Halig*, 2025 WL 2661785, at *1, *4 (finding no good cause in compelling circumstances where expert witness would be "required to request formal administrative leave [from work] for all days of travel," noting that although the court "is sympathetic to the difficulties presented by travelling to provide trial testimony and any compensation for lost work that may result," this is the case with every trial); *Savinova*, 2025 WL 1279076, at *4 (denying plaintiff's opposed motion to testify remotely at trial where "she provides no authority for the proposition that caregiving responsibilities constitute 'good cause' or 'compelling circumstances'" and had "known about these responsibilities for at least a year"); *Barbuto*, 2024 WL 4212857, at *2 (denying defendant's motion to testify remotely where defendant was unable to take time off from a new job in the U.K., as defendant "should have made arrangements with her new employer to attend the previously scheduled trials"); *Maslic v. ISM Vuzem d.o.o.*, No. 21-cv-02556-BLF, 2024 WL 3279524, at *2 (N.D. Cal. June 14, 2024) (denying motion for witness to testify remotely where he "has an active practice as an orthopedic surgeon," as a "scheduling conflict alone does not constitute good cause," particularly where the case schedule was set two years prior).

On the other hand, some courts have found that such hardships provided the necessary justification given the circumstances of the particular case. *See, e.g.*, *Rock v. Cummings*, No. CV-20-01837-PHX-DWL, 2025 WL 1270748, at *1 (D. Ariz. May 1, 2025) (finding good cause and compelling circumstances to allow remote testimony from disinterested witness who was being compelled to testify by subpoena where he was "scheduled to be on trauma call for a very busy level one trauma center" and failure to do so "would adversely compromise the health and safety of trauma patients"); *Childers v. TTI Consumer Power Tools, Inc.*, No. 3:23-cv-00547-HZ, 2025 WL 392462, at *7-8 (D. Or. Feb. 4, 2025) (denying motion for new trial based on court's decision to allow remote testimony, where witness lived and worked in Michigan, had three children, and the need for his impeachment testimony arose during trial); *Foster v. United States*, No. 6:19-cv-164-REW-HAI, 2024 WL 5683137, at *2 (E.D. Ky. Feb. 23, 2024) (granting plaintiffs' opposed motion for two expert witnesses to testify remotely due to "familial responsibilities" and a "scheduling conflict," respectively, and noting that because the court had already assessed their expert credentials, "their remote testimony does not pose the same credibility concerns as, for example, remote testimony from fact witnesses").

The costs of attendance, whether to the witness or to the party, are also often raised by parties as a ground to allow remote testimony. "[F]inancial hardship isn't the type of unexpected reason that is typically required in a showing of good cause for telephonic testimony." *Gil-Leyva v. Leslie*, 780 Fed. App'x 580, 587 (10th Cir. 2019) (cleaned up); *see Savinova*, 2025 WL 1279076, at *4 (denying motion for two plaintiffs who are "minimum wage earners who do not have the

funds to travel to Connecticut for trial" to testify remotely, noting among other things that they were voluntary parties to the case and could have raised claims of indigence a long time ago); *Monera v. Datis*, No. 24-80958-CIV-CANNON, 2025 WL 3776652, at *1 (S.D. Fla. Feb. 5, 2025) (holding that neither "the costs of foreign travel" nor "the purported difficulty associated with obtaining travel visas for [petitioner's] non-party witnesses" established, on the existing record, compelling circumstances for witnesses to testify remotely); *Halig*, 2025 WL 2661785, at *4 (expressing sympathy that costs of in-person expert witness testimony "present a significant financial hardship for Plaintiff," but noting that "this was obviously a risk known to Plaintiff when she secured [the witness's] services as an expert witness"); *cf. Kanuszewski v. Shah*, 650 F. Supp. 3d 575, 577 (E.D. Mich. 2023) (finding that parties' joint request for remote testimony based on "circumstances that they could reasonably foresee: the witnesses live in other states, and it will cost them money to come to the trial" did not warrant leave to testify remotely, but nonetheless finding "the recent uncertainty of air travel" due to "strange winter conditions and unknown technological issues" to be an unexpected compelling circumstance warranting remote testimony).

On a similar note, parties have also requested permission for remote testimony where witnesses would have to travel a great distance to attend the trial, including internationally. In *High School Servicos Educacionais, LTDA v. Choi*, defendants sought to have two expert witnesses living more than 5,000 miles away in Brazil testify remotely. No. 4:21-cv-00029-DGK, 2023 WL 7346452, at *1 (W.D. Mo. Nov. 7, 2023). The court denied the motion, concluding that "[m]ere inconvenience of travel . . . is not a compelling circumstance . . . The geographic distance between Brazil and Kansas City was neither unknown nor unexpected and cannot support Rule 43(a)'s limited exception to live testimony." *Id.; see also Video Artography LTD v. Champagne Cowgirl, LLC*, No. 3:24-cv-120-BN, 2025 WL 1116864, at *5 (N.D. Tex. Apr. 15, 2025) ("Rule 43(a) is not satisfied by the inconvenience caused by compelling that [plaintiff's owner/officer witnesses who reside in Scotland] travel to Dallas" to testify); *but see Blackmore v. Ramirez*, No. 4:21-cv-00026-AMA-PK, 2025 WL 1311121, at *2 (D. Utah May 6, 2025) (finding good cause in compelling circumstances to allow fact witness in Palau to testify remotely even though his "residence in Palau is certainly not unexpected," noting that travel from Palau to Utah "is not a situation of mere inconvenience"); *Virtual Architecture, Ltd. v. Rick*, 09 Civ. 5866 (SHS), 2012 WL 388507, at *2 (S.D.N.Y. Feb. 7, 2012) (citing cases where courts have found good cause "where the witness would have to face international travel, with its attendant costs of time and money," and allowing witness residing in the Seychelles—8400 miles and a 20 hour and 40 minute flight from New York City—to testify remotely).

C. Preference for Depositions

The 1996 Note also provides that "[o]rdinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena, or of resolving difficulties in scheduling a trial that can be attended by all witnesses." Some courts have also followed this guidance when determining whether to allow remote testimony. *See Mobu Enterprises*, 2025 WL 1426450, at *2 ("As the Advisory Committee Notes to Rule 43 reflect, depositions are ordinarily superior to remote testimony."); *see also Nagel v. Global Growth Holdings, Inc.*, No. 6:23-cv-2256-JSS-UAM, 2025 WL 417969, at *2 (M.D. Fla. Feb. 6, 2025) (noting, when granting motion to introduce deposition transcript in lieu of witness's live testimony, that "[t]he Advisory Committee Notes to Rule 43 express a preference for

deposition transcripts over testimony by remote means"); *but see Foster*, 2024 WL 5683137, at *2 (stating that live video testimony from expert witnesses "is preferable to their deposition testimony," as it "will allow the parties and the Court to obtain proper follow-up or clarity from the experts on technical and complex issues").

II. Other Notable Aspects of Rule 43(a)

There are a few other noteworthy points that came up during this research.

First, several courts have applied the Rule 43(a) standard to non-trial proceedings. In *United States v. Thrift*, No. 2:14-cr-0308 DJC DB P, 2023 WL 5672862, at *1-2 (E.D. Cal. Sept. 1, 2023), the court analyzed whether the requirements of Rule 43(a) applied to an evidentiary hearing in a petitioner's section 2255 proceeding. The petitioner sought to have a witness testify remotely from Germany, and argued that Rule 43(c) applied, which did not necessitate a good cause finding. *Id.* at *1. The court disagreed, reasoning that "the application of subsection (c) is explicitly limited to when a motion relies on facts outside the record. Section (a) of Rule 43, in contrast, applies in open court and 'at trial,' but the court does not find it is necessarily limited to trials as movant argues." *Id.* at *2. The court nonetheless found that the Rule 43(a) standard had been met. *Id.* Other courts have similarly applied Rule 43(a) in non-trial proceedings. *See, e.g.*, *Noshirvan v. Couture*, No. 2:23-cv-1218-JES-KCD, 2025 WL 1374954, at *1 (M.D. Fla. May 13, 2025) (applying Rule 43(a) standard to plaintiff's opposed motion for out-of-state nonparty witnesses to appear remotely for an evidentiary sanctions hearing); *Jefferson Street Holdings, LLC v. Otter Prods., LLC*, No. 1:23-cv-01514-RMR-SBP, 2023 WL 11196897, at *1 (D. Colo. Oct. 27, 2023) ("[a]ssuming that Federal Rule of Civil Procedure 43—concerning the taking of testimony at trial—applies to pretrial hearings with equal weight" and determining whether movant had satisfied Rule 43(a) standard for remote testimony on a motion to disqualify counsel).

Second, several opinions in multi-district litigation (MDL) cases have imposed something of an alternative test for remote testimony, based on factors first set forth in *In re Washington Public Power Supply System Securities Litigation*, No. MDL NO. 551, 1988 WL 525314 (W.D. Wash. Aug. 9, 1988), which predated even the 1996 amendments to Rule 43. These factors, generally known as the "*Vioxx* factors" after their adoption in *In re Vioxx Products Liability Litigation*, are:

> (1) the control exerted over the witness by the defendant; (2) the complex, multi-party, multi-state nature of the litigation; (3) the apparent tactical advantage, as opposed to any real inconvenience to the witness, that the defendant is seeking by not producing the witness voluntarily; (4) the lack of any true prejudice to the defendant; and (5) the flexibility needed to manage a complex multi-district litigation.

439 F. Supp. 2d 640, 643 (E.D. La. 2006). Although courts in MDL cases have found these factors instructive when determining whether good cause exists to allow remote testimony, *see, e.g.*, *In re 3M Combat Arms Earplug Products Liability Litigation*, No. 3:19-md-2885, 2022 WL 504451, at *3 (N.D. Fla. Feb. 18, 2022), other courts have found that they have limited use outside of the MDL context, *see Blue Cross & Blue Shield of Florida, Inc. v. Davita, Inc.*, No. 3:10-cv-574-BJD-

MCR, 2022 WL 18492515, at *2-3 (M.D. Fla. May 27, 2022) ("Other district courts have indicated . . . that the *Vioxx* factors are reserved for Rule 43 motions in multidistrict litigation only. . . [T]his Court instead turns to the advisory notes from Rule 43(a) to determine whether 'good cause in compelling circumstances' exist[.]"). Given the unique circumstances present in MDL cases, it is not clear that these factors reflect trial court considerations in non-complex cases.

Finally, as may be expected given the trial court's discretion concerning remote testimony, research generally did not uncover appellate reversals of trial court decisions permitting or denying remote testimony. *See Gil-Leyva*, 780 Fed. App'x at 587 (finding no error with magistrate judge's decision to deny request to testify remotely, nor with the magistrate judge's subsequent decision to allow remote testimony); *Thomas v. Anderson*, 912 F.3d 971, 977 (7th Cir. 2018) (in case implicating trial court's authority to issue writ of habeas corpus as well as Rule 43(a), holding that trial court's decision to allow inmate witnesses to testify only by video "was well within his discretion"); *Draper v. Rosario*, 836 F.3d 1072, 1082 (9th Cir. 2016) (concluding that district court did not abuse its discretion in denying motion for inmate to testify remotely where court "expressed reasonable concern over [the witness's] ability to testify safely, even by contemporaneous video transmission"); *Eller v. Trans Union, LLC*, 739 F.3d 467, 478 (10th Cir. 2013) (remarking that "[appellant] cites no case in which an appellate court has held that a trial court abused its discretion by *not* allowing remote testimony" and holding that district court did not abuse its discretion by refusing to allow telephonic testimony from two witnesses); *cf. Rodriguez v. Gusman*, 974 F.3d 108, 114 (2d Cir. 2020) (vacating district court's decision to administratively close case after plaintiff was deported to the Dominican Republic, since Rule 43(a) would allow plaintiff to appear remotely).

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

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

* * *

The main discussion focused on the ongoing consideration of possibly amending Rule 43(a). As the Subcommittee is aware, several members of the Standing Committee, including judge members, expressed significant reservations about relaxing the limits on remote trial testimony during the January 2026 Standing Committee meeting.

At the last Advisory Committee meeting, in October 2025, that committee was presented with the then-current discussion of the Subcommittee. The Advisory Committee members were initially receptive to the Subcommittee's approach. But the Advisory Committee members were not aware of the Standing Committee concerns. And the Subcommittee will benefit from a full discussion of these issues during the April Advisory Committee meeting. It is important that the Advisory Committee give full consideration to the concerns raised by members of the Standing Committee.

The Subcommittee's present goal, therefore, is to put before the Advisory Committee the issues that have emerged, including the concerns of the Standing Committee members that expressed reservations. On this score, one thing worth noting is that even though Rule 43(a) was not included in the amendment package published in August 2025 quite a few witnesses addressed it in their testimony.

The remote trial testimony issue is not directly connected to the problem for service of a subpoena created by the Ninth Circuit decision. There might be many instances in which the Ninth Circuit view would make the subpoena effective (because the witness was located within the traditional "subpoena power") but that would not control the decision whether the court would authorize remote trial testimony. As addressed in the committee note paragraph being revised as stated above, the Rule 43(a) standard remains unchanged.

Against that background, the discussion identified a number of issues on which Advisory Committee members might have views, including the following:

Retaining the commitment to in-person trials: The hallmark of American trials is that they depend on in-court testimony. The Subcommittee is *not* in favor of "fully remote" trials, a point that should be made clear going forward. Authorization for remote testimony depends on an individualized showing regarding a specific witness.

Focusing on the choice between live remote testimony and a deposition substitute: "Fully remote" trials are not the goal, so it appears important to highlight that the choice the Subcommittee is addressing is not between in-person and remote testimony so much as between remote live testimony and deposition testimony. Relying on depositions can produce many difficulties. The deposition may have occurred before certain facts came to light. And very often much time and expense (including the court's time and energy) can be wasted in resolving disputes about what deposition testimony can be presented at trial, a process that often involves many iterations and a great deal of effort for counsel and the court.

Access to justice concerns: For some witnesses or parties, for a variety of reasons, remote testimony may be the only practical option. And relying on depositions may not only require a great deal of extra work by the court and the parties, but also put some parties at a disadvantage if they cannot afford the cost of creating a video deposition and must rely instead on reading from transcripts. Moreover, allowing remote trial testimony may serve Rule 1 purposes ("just, speedy, and inexpensive" determinations) by ensuring effective presentation of key witness testimony.

"Appropriate safeguards": Rule 43(a) says that the court must also be assured that appropriate safeguards are in place to safeguard the reliability of the remote testimony. Since the pandemic, there likely has been much learning on this front. Relying on party agreement and judicial evaluation of individual cases seems workable.

Specifying "approved" safeguard methods: Though there has by now been considerable experience with safeguards that work, whether by party agreement or court direction, it may be difficult to specify what safeguards are effective in given cases. But it was noted that the Subcommittee had tried to develop a list of specific safeguards and found that too difficult. For one thing, safeguards that work in other cases may be ill-suited to the current case. Good lawyers recognize that safeguards are context-dependent, and they can work together to craft safeguards for the particular case. Having an "approved" list creates the risk that "approved" safeguards might be urged in cases in which they are not appropriate, and other safeguards that would be appropriate might be opposed on the ground that they are not "approved" under the amended rule. If we are not prepared to be specific about what suffices, we would wisely be prepared to explain why we think trying to do that is ill-advised.

Strictness of "compelling circumstances" standard: The "compelling circumstances" standard was introduced in the amendment to Rule 43(a). It does not appear in any other Civil Rule. At least some Standing Committee members seem to regard this standard as suitably protective of the traditional trial and sufficiently flexible to enable judges to authorize remote testimony when really needed. Library research has not identified decisions that say, "I would authorize remote testimony in this case if the 'compelling safeguards' standard were not in the rule, but because it is there I can't." At least some judges seem to feel shackled. Whether there is a way to evaluate this concern is uncertain; it seems unlikely that many judges would go to the trouble of writing a decision if that were their view. It might be noted that the current draft committee note tries to make it clear that the amendment does not require any judge to authorize remote testimony.

Utility of "good cause" standard: The "good cause" standard permeates the Civil Rules. So far as appears, the "compelling circumstances" standard appears nowhere else in the rules. (Rule 37 does use "compelling," but in the different context of a court order compelling discovery.) The note may be able to illuminate the flexibility of the standard while also making clear that it requires a real showing to justify remote trial testimony. Perhaps one source for this topic would be the set of considerations the Texas code has adopted regarding remote proceedings.

Juror preferences: Different concerns have been raised. There was a suggestion that jurors may feel put upon if they are required to show up in court while some witnesses are not. And some jurors may think that being able to observe the witnesses in person is an important aid to making credibility determinations. But other reports suggest that jurors sometimes find remote testimony more useful than in-person testimony. For one thing, in some courtrooms the witness may be better seen on a screen. The alternative of relying on depositions not only can require a great deal of extra work for the court and the parties, but also impair juror comprehension. Jurors may have difficulty focusing on video depositions, and even more difficulty focusing on deposition testimony read from edited transcripts.

Foreseeability issue from 1996 Committee Note: One thing that decided cases do indicate is that the statements in the 1996 committee note about whether the witness's inability to come to court was foreseeable should be considered central. The 1996 note seems to say that the sudden last-minute problem is what the rule is addressing. But in many instances (e.g., officers of the far-away defendant company), the difficulty could be foreseen from the outset. Whether that should make remote testimony unavailable because it was always foreseeable that the distant witness could not be compelled by subpoena to appear in court may actually be a reason to change the rule. Restricting remote live testimony to the "last minute emergency" is dubious. Indeed, the pending amendment to Rule 26(a)(3) directing parties to indicate in their pretrial disclosures (due 30 days before trial) whether any witnesses will be offered remotely is not limited to last-minute emergencies.

Risk of overuse and burden on courts: Some comments during the public comment period suggest that proponents of remote testimony may advance arguments for excusing in-court testimony in many cases. Though paid expert witnesses may readily be persuaded to travel to testify, others may not. Consider the argument about a treating doctor: "Well, we should not make the surgeon from the opposite coast take three days out of her professional schedule to spend three hours on the stand in court. There are lives on the line." On the other hand, the burden of resolving disputes about the editing of depositions (whether in transcript or video form) may be much greater.

Apex witness concern: A theme in the commentary from what one might call the plaintiff side is that the large company headquartered far away can require the employees it wants as witnesses to show up to testify at trial, but the other side has no way to compel live testimony from the company employees it wants to testify before the jury. The Rule 45(c) amendment would partly address this question, but the concerns about abusive apex depositions might support caution about trial testimony as well.

Changing Rule 43(c) as well: There was early consideration of changing Rule 43(c) as well, but on reflection doing so seems unnecessary and could cause difficulties. Rule 43(a) focuses on trial, which is different from the non-trial proceedings addressed by Rule 43(c). Blending the two could cause problems. Indeed, the Subcommittee has recommended revising the committee note to the pending Rule 45(c) amendment (which is only about subpoenas for remote trial testimony) to avoid possible arguments that Rule 43(a) must be satisfied before remote testimony may be used in a non-trial proceeding.

Notes of Teams Meeting
Rule 43/45 Subcommittee
January 30, 2026

The Rule 43/45 Subcommittee met by Teams on January 30, 2026. Participants included Judge Hannah Lauck (Chair of the Subcommittee), Judge Sarah Vance (Chair of the Advisory Committee), Bankruptcy Judge Benjamin Kahn (liaison to the Bankruptcy Rules Committee), Justice Jane Bland, David Burman, and Jocelyn Larkin. Also participating were Taylor Hall-Debnam, Judge Lauck's law clerk, Reporters Richard Marcus and Andrew Bradt, and Consultant Edward Cooper. Emery Lee represented the Federal Judicial Center. Sarah Sraders represented the Rules Office.

The focus of the meeting was on the revised proposed amendment and committee note circulated after the January 14 meeting of the Subcommittee. (Those materials are attached as an Appendix to these notes.)

Adding "by order" to the rule

The redraft includes "by order" in brackets in the rule. Such an addition might address concerns that have been expressed about (a) ensuring that remote testimony is subject to judicial control, and (b) guarding against over-use of the subpoena power to command witnesses to appear to provide remote testimony. Under the proposed pending amendment to Rule 26(a)(3), any party intending to offer remote witness testimony at trial would have to give notice of that intent in its Rule 26(a)(3) disclosures. And since 1996 there has been the opportunity to use a subpoena to compel witnesses within the court's "subpoena power" to show up for remote testimony, without any particular problem emerging. There seems little risk that a lawyer would expect to be able to walk into court for trial, hold up her cell phone, and announce that a witness would appear in that manner. In addition, the draft committee note says: "When a party wants to provide remote testimony at trial, it must obtain court approval for doing so in advance of trial."

It was noted that one witness during the January 27 hearing on the pending proposed amendment to Rule 45(c) reported that sometimes she would issue a subpoena without first obtaining court approval, but the subpoena would state that it was contingent on getting court approval. The issue is only one of timing. And regarding timing, one might say "in advance of trial," but the last-minute emergencies that the 1996 amendment emphasized can include developments while the trial is proceeding, such as the huge winter storm in the U.S. at the end of January of this year.

In addition, Rule 26(a) requires updating disclosures, which would include the intention to provide a witness by remote means.

The consensus was that "by order" need not be added to the rule.

Deferring Rule 45(c) amendment while 43(a) under consideration

During the January 27 hearing, some witnesses urged that an amendment to Rule 45(c) be held in abeyance until a decision was made about amending Rule 43(a). But the two changes do

not seem to be related. Whether the remote testimony is to come from across town or across the country, Rule 43(a) guides the court in deciding whether to permit remote testimony. The Rule 45(c) issue could arise only in instances in which the court has decided the requisite showing to justify remote testimony has been made but the witness is unwilling to provide it without being subpoenaed. Under *In re Kirkland*, the witness could thus defeat the court's decision to permit remote testimony if the witness were located outside the "subpoena power" of the court. In *Kirkland* itself, the court had already made the Rule 43(a) decision to authorize remote testimony, but the witnesses refused to do so and challenged the subpoena. As the Ninth Circuit majority recognized, a rule change could alter the result it reached. The pending rule change is designed to do that.

Committee Note

The main discussion was about the revised note. A starting point, related to the discussion of "by order" was a revision at lines 160-61 of the draft note:

> When a party wants to provide remote testimony at trial, it must timely obtain court approval for doing so ~~in advance of trial~~.

The discussion focused on other modifications of the new note.

A first point was that the substance of the sixth paragraph of the note should be moved up to the second paragraph, perhaps as follows (with possible revisions discussed during the meeting):

> But the amendment does not in any way represent a retreat from the rules' commitment to the centrality of in-person witness testimony. The default for trials is always live in-court witness testimony. The court is not ~~never~~ required to authorize remote trial testimony, even if the parties all agree to proceeding in that manner. Remote testimony should be allowed only when the court is satisfied it is justified. This rule ~~amendment does not authorize entire remote trials, and~~ relates only to specific witnesses at trial as to whom the court finds that a sufficient justification has been offered, and has no effect on other aspects of trial.

Though using "never" in this paragraph might stress the point, it was also noted that there might actually be circumstances in which it would be an abuse of discretion not to authorize remote testimony. For that reason, "not" may be preferred.

A caution was raised—we might in a sense "play offense" here by stressing the way in which remote testimony (based on a suitable showing) can actually further access to justice. This idea drew support—it would be desirable to work in Rule 1 and access to justice explicitly, and earlier if possible. Another participant noted that for some litigants the cost of the deposition alternative can appear prohibitive, particularly for a video deposition. A written transcript can cost $3,400 per day, and a video deposition may cost $7,500 per day. This point might bear on the 1996 note's seeming endorsement of deposition testimony as superior to remote live testimony.

Attention was drawn to line 147, which says that the proponent of remote testimony "ordinarily" must show that technological difficulties will not impede remote testimony. Does that suggest that sometimes the court should authorize such testimony without such assurance?

Appropriate Safeguards

The note does not try to enumerate techniques to provide safeguards. The explanation was, partly, that the rule has required them since 1996, and did not come with a list of "approved" safeguards then. Trying to provide a list now could be risky. For one thing, anything left off the list might be regarded as "unapproved." For another, technology might develop new safeguards in the future that are not presently known.

A concern was raised. The last sentence of the note paragraph about safeguards says party stipulation "might be important." It would be better to say: "The parties may be able to reach a stipulation on appropriate safeguards for the court's consideration." A reaction was that "the lawyers usually work this out." But another reaction was to make it clear that party stipulation cannot bind the court.

Deposition testimony as an alternative

As noted above, depositions can present significant financial challenges to some litigants. More generally, it was suggested that it may be time to retire the idea in the 1996 note that depositions would be preferable to live remote testimony. That attitude seemed linked to the reality that the 1990s were "the infancy of remote technology," and that more recent developments (and the stimulus of the pandemic) have worked a sea change.

One suggestion was to remove the draft reference to Zoom and Microsoft Teams. Product endorsements do not belong in a committee note, and other providers have already emerged, with more perhaps on the way. The solution is to remove the mention of specific products from the draft note.

Additional points were offered, besides cost. Much experience shows that jurors (and judges) frequently find even video depositions extremely boring to watch. Having a deposition transcript read is even more boring.

Moreover, the task of preparing deposition testimony for presentation at trial can be extremely burdensome for the parties, and often burdensome for the court when the parties cannot agree on the excerpts to be included. It would be useful to try to work these points into the note. Handling the testimony, though remote, "live" at trial may save the parties and the court much effort in addition to helping the jury engage when the trial is before a jury.

Relatedly, there is a loss of comprehension when the testimony is not presented live.

Rule 43(c)

The Subcommittee has been considering whether to recommend that Rule 43(c) be changed to parallel the proposed amendment to Rule 43(a). But an informal research effort turned

up no example of a court finding that current Rule 43(c) restricts it from permitting remote testimony during a motion hearing. The rule affirmatively authorizes use of affidavits, for example, which offer no opportunity to cross-examine.

Discussion supported leaving Rule 43(c) untouched. Rule 43(c) has remained relatively unchanged for a long time. In 1996, Rule 43(a) was amended to authorize remote trial testimony. As our proposal would amend it, Rule 43(a) retains limitations that do not appear in Rule 43(c)—good cause and appropriate safeguards. There is no jury involved in motion proceedings, which do not have to happen in open court.

At the same time, there is a risk that changing Rule 43(c) would support arguments that this amendment package constricts the ability of judges to receive remote testimony under Rule 43(c). One suggestion made was that if we do not propose an amendment to Rule 43(c) our note to the Rule 43(a) amendment can affirm that Rule 43(c) remains unchanged. Perhaps the note could even say that we are not revising Rule 43(c) because it has presented no problems. Another alternative would be to say the amendment to Rule 43(a) has no effect on Rule 43(c). The suggestion was amplified: this amendment "does not affect the continuing availability of remote oral testimony under Rule 43(c)."

APPENDIX
MEMO INTRODUCING JAN. 30 DISCUSSION

Post-January 30 Note drafting

This memo follows up on the material before the Rule 43/45 Subcommittee during the January 14, 2026, meeting. It is principally focused on changes to the draft committee note designed to address concerns raised at the Standing Committee's January meeting.

As a reminder, here is the summary of the January 14 meeting: (1) Except for adding "by order" or "as approved" or something of the sort to the rule-amendment language that should not be changed; (2) Library research would be useful on the reported cases deciding whether to authorize remote testimony—does this shed light on whether the current rule is suitably flexible?; (3) We should flesh out the "why" of our proposal—the Rule 1 aspect, perhaps with state court or bankruptcy court examples; (4) We should try to provide information about the social science evaluation of remote testimony; (5) We can consider whether the note could usefully offer some examples of adequate safeguards. The notes from the January 14 meeting, slightly revised in response to suggestions from Dave Burman and Ed Cooper, should accompany this memo.

Not all those things have been done since January 14. Library research is ongoing. An effort has been made to add an invocation of Rule 1 to the note. To date, we do not have the social science materials, but those probably do not belong in a note anyway. And the question of offering examples of safeguards remains open.

As should be discussed further, there may be reasons to leave Rule 43(c) unchanged. In part, that would avoid the possibility that parallelism with Rule 43(a) might be used to imply that limits on remote trial testimony should also limit the court's use of remote oral testimony during motion proceedings. When Rule 43(a) was amended to authorize remote trial testimony in 1996, no change was made to Rule 43(c), and the word "orally" was removed from Rule 43(a). Here is the explanation in the committee note to the 1996 amendment:

> The requirement that testimony be taken "orally" is deleted. The deletion makes it clear that testimony of a witness may be given in open court by other means if the witness is not able to communicate orally. Writing or sign language are common examples. The development of advanced technology may enable testimony to be given by other means. A witness unable to sign or write by hand may be able to communicate through a computer or similar device.

Intriguing though it may be, this comment seems not to be about remote testimony; perhaps remote testimony by sign language or other means (via "computer or similar device"?) has been done or will be done in the future.

For the present, the reality is that Rule 43(c) still says the court "may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions." Though research may show otherwise, since this rule permits a decision to be based on affidavits or depositions as well as "oral testimony," it does not seem to constrain the court from permitting that oral testimony

to be provided by remote means. Below, the question whether to propose an amendment to Rule 43(c) is discussed.

Meanwhile, the Rule 43(a) amendment proposal remains unchanged except for the possibility of adding "by order," but a revised committee note is presented below that attempts to follow up on the discussion on January 14. For purposes of comparison, this memo also presents the note that was before the Standing Committee and the revisions to that note after our December 15 meeting.

Rule 43(a)

Rule 43. Taking Testimony

(a) ~~**In Open Court**~~ **At trial.** At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause ~~in compelling circumstances~~ and with appropriate safeguards, the court may [by order][4] permit contemporaneous remote testimony in open court ~~by contemporaneous transmission from a different location~~.

COMMITTEE NOTE

In-person trial testimony has been central from the beginning of the federal court system. It remains critical, particularly to determination of credibility. Relying on face-to-face evaluation of testimony is the time-honored method for evaluating credibility.

But sometimes critical witnesses are simply unable to appear in person in the courtroom. In 1996, Rule 43(a) was therefore amended to permit remote trial testimony when good cause was shown and appropriate safeguards were in place. The 1996 amendment also required "compelling circumstances." That very demanding requirement reflected the ongoing centrality of in-person witness testimony. But [numerous] {some} judges have found this requirement too constricting in some cases.[5]

[4] Discussion on January 15 considered whether saying in the rule that an order is required would be a useful addition. It might even say "by prior order," but (as suggested by a bracketed sentence at the end of the revised note) this seems implicit in the entire setup. Another idea was to say something like "as approved by the court" or "with advance approval by the court." Given the Rule 26(a)(3) disclosure requirements regarding witnesses and depositions to be offered at trial, it is somewhat difficult to imagine how this matter could not come to the court's attention well in advance of trial, unless the problem is a last-minute development. The bracketed note language below—"Prior court approval is essential to management of remote trial testimony"—may suffice.

[5] It would likely be good if we had examples to support this assertion. Perhaps it is implicit in the reports from judges we heard from during the July 30, 2025, online conference.

This amendment removes the "compelling circumstances" requirement, but in no way retreats from the traditional importance of in-person interaction between the finder of fact and the witness and in-person interaction between the witness and the lawyers, particularly the cross-examiner. Developments since 1996 have prompted reexamination of that requirement.

Critically, technology has made important advances. While telephonic testimony may have been the only method available in 1996, 21st century technology (from providers such as Zoom, Microsoft Teams, and others) offers a substitute much closer to in-person witness testimony. Many people, including jurors, have gained much experience using this technology for business meetings and other important interactions. There are also reports that some jurors find live video a better method than in-person witness testimony. Not all courtrooms enable all jurors a view of an in-person witness that is equal to well-presented remote testimony.

In addition, the 2020-22 pandemic[6] prompted, and sometimes forced, the courts to employ this new technology to manage cases and, sometimes, to receive remote witness testimony. That judicial experience supports relaxing the "compelling circumstances" constraint. There have been reports that this flexibility about remote participation, in both federal and state courts, has served the goals of Rule 1 and increased access to justice.

But the amendment does not in any way represent a retreat from the rules' commitment to the centrality of in-person witness testimony. The default for trials is always live in-court witness testimony. The court is not ~~never~~ required to authorize remote trial testimony, even if the parties all agree to proceeding in that manner. Remote testimony should be allowed only when the court is satisfied it is justified. This amendment does not authorize entire remote trials, and relates only to specific witnesses as to whom a sufficient justification has been offered.

Often the choice is not, however, between in-court testimony and remote testimony, but between remote live testimony and depositions taken before trial, sometimes long before trial.

In making that choice, the court properly may take account of many factors. A starting point is that witness inconvenience alone is not a reason for excusing in-person testimony. Good cause requires assessment of the circumstances of the case, never losing sight of the central importance of in-person testimony. [It may be that remote testimony raises fewer concerns in court trials than in jury trials.][7]

Technological difficulties may sometimes prove important. When the witness is at a remote location, there could be lapses in technology both at the witness's location and in the courtroom. The proponent of the testimony ordinarily should be expected to satisfy the court that technological impediments will not intrude and that electronic transmission will be secure.

[6] Is this safer than saying COVID? There was some push-back about explicitly mentioning COVID, which our prior Note did.

[7] This idea was raised on January 14. Is it a useful addition?

Besides evaluating the justification for relying on remote testimony and potential technological issues, the court must demand appropriate safeguards to protect the reliability of the remote testimony. This requirement remains unchanged since 1996.[8] Experience gained since 1996 can assist the court in evaluating safeguards, but the burden is on the proponent to satisfy the court that safeguards will be in place.[9] On this score, a stipulation by all parties might be important.

When a party wants to provide remote testimony at trial, it must obtain court approval for doing so in advance of trial. As amended in 2027, Rule 26(a)(3)(A)(i) should call attention to this issue well in advance of trial. [Prior court approval is essential to management of remote trial testimony.][10]

[This is the Note that was before the Standing Committee with our Dec. 15 revisions]

COMMITTEE NOTE

Rule 43(a) was amended in 1996 to permit remote witness testimony at trial, but only if the proponent of the witness presented compelling circumstances why the witness should be permitted to provide remote rather than in-person testimony.

This amendment recognizes that developments since 1996—both in terms of technology and as a result of the Covid pandemic—have provided a basis for relaxing the limits on remote testimony at trial. But the amendment does not in any way represent a retreat from the rules' commitment to the centrality of in-person witness testimony. ~~In this context, the good cause standard has real teeth; a court may authorize remote witness testimony only on finding that the testimony of this witness is essential, or extremely important.~~

A starting point is that the court is not ~~never~~ required to authorize remote trial testimony, even if the parties all agree to proceeding in that manner. Remote testimony should be allowed only when the court is satisfied it is justified.

Many factors bear on the court's decision.[11] ~~One central concern is the importance of receiving testimony from *this* witness. Evidence Rule 403 permits the court to refuse to hear a~~

[8] This point seems worth making. In 1996, there was probably almost zero experience with safeguards. Thirty years later, there ought to be much more.

[9] It seems worth emphasizing that this is another burden the proponent of remote testimony must shoulder, beyond showing good cause.

[10] This sentence might be an alternative to adding the need for a court order or court approval to the rule itself, a possibility suggested in brackets above. The need to get the court's approval before the witness begins to testify flows directly from Rule 43(a), which says that "the court may permit" remote trial testimony. It is also consistent with the pending amendment to Rule 26(a)(3)(i).

[11] This draft avoids getting into details about factors to be considered, preferring to leave that to courts and lawyers. Mentioning some might seem to make them more important than others,

~~witness present in court if that witness's testimony would be "cumulative." The good cause determination under Rule 43(a) might be close to the opposite end of a spectrum -- focusing on whether there is no other witness who can provide in person testimony on an important topic. Similar issues often arise with regard to depositions of high government officials who have no unique knowledge, which may justify a protective order preventing those depositions. Remote trial testimony would be similarly unwarranted in most such cases.~~

On occasion, ~~however,~~ judging the credibility of the remote witness may be critical to the case. Relying on face-to-face evaluation of testimony is the time-honored method for evaluating credibility. That can depend on in-person interaction between the finder of fact and the witness and in-person interaction between the witness and the lawyers, particularly the cross-examiner. ~~Though a video deposition would not afford the finder of fact an opportunity for in-person evaluation of credibility, it would provide an in-person examination by counsel that might be superior to examination via telecommunications of a remote witness. Some states have even recognized a difference between "discovery" depositions and "trial" depositions; something like the latter might be the best choice. If the witness was deposed early in the case, a second deposition might be important.~~[12]

Technological difficulties may sometimes prove important. ~~With a witness testifying in the courtroom, those issues are nonexistent or very rare. But~~ When the witness is at a remote location, there could be lapses in technology both at the witness's location and in the courtroom. The proponent of the testimony ordinarily should be expected to satisfy the court that technological impediments will not intrude and that electronic transmission will be secure.

As recognized in the 1996 amendment, it is also essential that there be appropriate safeguards to protect the reliability of the remote testimony. Experience gained since 1996 can assist the court in evaluating safeguards, but the burden is on the proponent to satisfy the court that safeguards will be in place. On this score, a stipulation by all parties might be important.

When a party wants to provide remote testimony at trial, it must obtain court approval for doing so in advance of trial. As amended in 2027, Rule 26(a)(3)(A)(i) should call attention to this issue well in advance of trial.

The Rule 43(c) question

It is quite uncertain whether there is any need to propose a change to Rule 43(c). Adding the "good cause" and "appropriate safeguards" language to this rule might be questioned, and even suggest that the standard for remote testimony regarding motions is the same as the one for remote trial testimony. It seems to be a consensus that remote testimony on motions should not be so strictly policed as remote trial testimony. Such a wide array of matters can come up on motions,

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and the Standing Committee sometimes objects to committee notes that appear to be "practice manuals."

[12] This deletion avoids the question whether a deposition is better than remote live testimony, as the 1996 committee note seemed to say.

and the reasons why in-person testimony at trial is central do not apply to the wide variety of matters that bear on motions.

The rule already seems implicitly to authorize remote testimony, since it permits reliance on affidavits and on depositions. And adding "adequate safeguards" might be odd, since it is hard to conceive of the safeguards that attend preparation of an affidavit. At a deposition all parties may be represented, which provides a safeguard, but one would think that judges and lawyers could work these matters out.

And putting "good cause" into Rule 43(c) might call for a committee note to the Rule 43(c) change saying that what is good enough cause for remote testimony on a motion is not good enough for remote trial testimony. One might even be tempted to say that Rule 43(a) requires not only "good cause," but "better cause." At some point, we might seem to be counting angels on the head of a pin.

As pointed out on January 14, however, there are a lot more motion proceedings than trials. So we continue to consider this possible amendment. Below is what was before the Subcommittee on January 14.

One possibility would be to add a sentence to Rule 43(c):

> **(c)** ~~**Evidence O**~~**On a Motion.** When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions. With appropriate safeguards, the court may permit [oral testimony by means of] contemporaneous remote testimony.[13]

Another possibility before the Subcommittee on January 14 was to move Rule 43(c) up to follow Rule 43(a) or to be an additional provision in 43(a). One reaction to those possibilities is that they might unhelpfully reinforce the notion that the standards for remote testimony are the same under Rule 43(a) and Rule 43(c). That seems undesirable (and, perhaps, inconsistent with the permission under the Bankruptcy Rules for remote participation in "contested matters").

Alternative 1

Rule 43. Taking Testimony

> **(a)** ~~**In Open Court**~~ **At trial.** At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause ~~in compelling circumstances~~ and with appropriate safeguards, the court may permit contemporaneous remote testimony in open court ~~by contemporaneous transmission from a different location~~.

[13] The bracketed language may be unnecessary, given that our draft for Rule 43(a) refers to "contemporaneous remote testimony" and Rule 43(c) already refers to "oral testimony."

(b) On a Motion. When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions. With appropriate safeguards, the court may permit [oral testimony by means of] contemporaneous remote testimony.

(cb) Affirmation Instead of an Oath. * * * * *

Alternative 2

Rule 43. Taking Testimony

(a) In Open Court Manner of Presentation.

(1) ***At trial.*** At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit contemporaneous remote testimony in open court by contemporaneous transmission from a different location.

(2) ***On a motion.*** When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions. With appropriate safeguards, the court may permit [oral testimony by means of] contemporaneous remote testimony.

* * * * *

(c) Evidence on a Motion. When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.

Notes of Teams Meeting
Rule 43/45 Subcommittee
January 14, 2026

The Rule 43/45 Subcommittee met by Teams on January 14, 2026. Participants included Judge Hannah Lauck (Chair of the Subcommittee), Judge Sarah Vance (Chair of the Advisory Committee), Bankruptcy Judge Benjamin Kahn (liaison to the Bankruptcy Rules Committee), Justice Jane Bland, David Burman, Jocelyn Larkin, and Mark Lanier. Also participating were Taylor Hall-Debnam, Judge Lauck's law clerk; Reporters Richard Marcus and Andrew Bradt; and Consultant Edward Cooper. Sarah Sraders represented the Rules Office.

The meeting began with an introduction about the concerns raised by some Standing Committee members about the Rule 45(c) amendment draft during that committee's January 6 meeting. These are serious and important concerns that the Subcommittee should address. At the same time, it has spent much more time addressing these issues, and it may still conclude that proceeding with an amendment is the best course.

One strand of concern reflected basic doubts about any relaxation of the "compelling circumstances" standard in current Rule 43(a). Additionally, there was concern that such a change would result in a "slippery slope" leading to jury trials regularly held entirely by remote means. Concern was also expressed about safeguards when witnesses testify remotely. Specifics in the committee note might be important on that topic. The possibility that someone is feeding the witness answers to questions calls for safeguards as close to airtight as possible. Another consideration is whether there is an adequate basis for thinking that the standard in the current rule has really prevented judges from authorizing remote testimony in situations in which remote testimony is warranted. Yet another concern was that jurors might react to remote witness testimony by thinking "How come the witness doesn't have to come to court, but I do?"

One summary of the current circumstances is that the concerns expressed by some Standing Committee members were not so much with the framing of the rule amendment but instead with (a) the basic question whether a rule amendment is needed, and (b) if so, how the committee note should explain the goal of the amendment.

Though holding a mini-conference proved impossible, the Subcommittee was able in July 2025 to receive the benefits of an online conference with a number of judges who had very favorable experiences with remote witness participation in trials. The Standing Committee meeting points up a reality that some judges do not think the tethers on remote trial testimony are too constricting. But it may be that a better explanation, perhaps with examples, of situations in which the current rule could limit a judge's latitude in handing trial testimony would be valuable.

While recognizing that these concerns are important, one reaction was that the choice is not usually between live in-person testimony and remote contemporaneous testimony. Instead, it is between contemporaneous testimony and a video or transcript of a deposition taken before trial, sometimes long before trial. Though it is surely true that "mere inconvenience" is not, by itself, sufficient to justify authorizing remote testimony, inconvenience and expense might sometimes support authorizing such testimony. For example, suppose a witness's only role is to authenticate

an exhibit, the work of perhaps fifteen minutes on the stand, but the expense and dislocation of requiring this witness to travel to a distant courtroom would support a finding of real hardship. Should the "compelling circumstances" standard deny the court the latitude to permit the witness to testify remotely?

A judge noted that the "appropriate safeguards" language would remain the same were our draft amendment to go forward. Since that term has been in the rule since 1996, it seems odd to say that it now requires extensive explanation. When it was introduced in 1996, the only thing the committee note said other than that advance notice should be given that there will be remote testimony was as follows:

> Safeguards must be adopted that ensure accurate identification of the witness and that protect against influence by persons present with the witness. Accurate transmission likewise must be assured.

The phrase "appropriate safeguards" does not appear elsewhere in the Civil Rules, or in the Appellate, Bankruptcy, or Criminal Rules.

Whether one could present a series of possible safeguards in a note is uncertain. But the starting point might be that the "good cause" standard itself is flexible, and to justify departing from the traditional insistence on in-person witness testimony at trial requires very good cause. So perhaps a starting point for our Note should be that the default is that witness testimony is presented in person, and that this expectation applies unless the court finds that there is a sufficient reason to depart from it

The Texas experience also involves a variety of considerations that bear on whether to permit remote testimony, including the case type, the sort of proceeding (trial, preliminary injunction, etc.), the number of parties and witnesses, whether it is a jury trial, whether the issues to be addressed by the witness are complex, whether the witness is familiar with the technology necessary for testifying, and the difficulties the witness might need to surmount to appear in court.

Another judge reported about hearing a "gazillion dollar" matter entirely via remote proceedings due to COVID. That is surely not something to do except in extreme circumstances.

Another judge reacted that it seems important to respond to the slippery slope worry. At some point the Subcommittee had before it a list of possible safeguards, but it got pretty long. And even with a long list, there could be difficulties. On the one hand, one might be taken to be saying that in every case any one of them is sufficient all by itself. Say there are a dozen possible safeguards listed in the note. That does not mean that each of them is a sufficient stand-alone safeguard. And if there are a dozen in a committee note, is it not possible that technology change or something else will mean that no. 13 or no. 14 would be more suitable to a given case? A note can try to make clear that the list is merely of examples, but arguments that it is an exclusive list would be likely.

A lawyer agreed that safeguards are important. But based on a dozen or more experiences with remote testimony, the reality is that the safeguards are worked out between the lawyers with reference to the particulars of the actual case. An example: the plaintiff was on his death bed but

wanted to testify remotely. The lawyers for the defendant properly tried to make the arrangements as appropriate as possible. For example, the plaintiff would not be permitted to have the family bible next to him on the hospital bed. But it is unlikely that specifics beyond "adequate safeguards" will really provide much useful guidance.

Another lawyer agreed. Safeguards vary greatly. Other points that have come up also call for a reaction. The 1996 committee note creates something of a presumption in favor of a deposition transcript or video. Given the range of appropriate safeguards, that overlay seems to intrude too far on a judge's discretion. The work done by Judge Fogel, and some social science studies, along with the Texas experience, provide support for flexibility in the rule. There is no evidence that permitting remote testimony in some circumstances leads directly to remote trials. Instead, there is now quite a lot of judicial experience with when to permit remote testimony and how to tailor the safeguards to the specifics of the given case.

A question was raised about whether the proposed amendment adequately demonstrates that prior approval by the court is necessary. Rule 43(a) does not say that a motion is required. Perhaps "as approved by order of the court" could be added to the rule to make that clear. Rule 7 makes it clear that a request to the court for an order must by motion.

On the other hand, there is nothing about that in the current rule. But there is also no indication that anyone has attempted to "call" a witness for testimony in court via electronic means without obtaining prior approval from the court. Moreover, the proposed amendment to Rule 26(a)(3)(A)(i) would direct any party that proposes to present remote testimony at trial to include that fact in its pretrial disclosure. Even if there is a problem in this regard for motion proceedings governed by Rule 43(c), that should ensure adequate notice to everyone about trial testimony. In addition, the risk of technological obstacles to presenting remote testimony practically ensure that advance arrangements will be made. Some courts have local practices that require that all such requests be made a certain number of days before the hearing or trial involved.

But it was noted that not all circumstances justifying leave to present remote testimony can be foreseen. Indeed, one theme of the 1996 committee note was that compelling circumstances would not exist if the need for remote testimony could be foreseen—the sudden emergency such as an accident or illness were the example invoked in 1996. And reported cases provide evidence that courts have invoked delay in requesting leave as a ground for refusing to permit remote testimony. One possible consequence of our amendment would be to permit remote testimony from a witness we always knew would not be able to appear in person.

A judge pointed out that there are often last-minute needs or adjustments during trials.

A summary of the discussion was offered: Except for adding "as ordered by the court" or something like that to the text of the rule amendment, it does not seem like there is a need to consider a revision of the rule amendment. But it seems important to recast the committee note to reflect and address the concerns raised during the Standing Committee meeting. Besides doing that, the main issue is whether changing the rule is a good idea or a bad idea.

On that basic policy choice, it may be desirable to assemble more information for the Advisory Committee and the Standing Committee that we have not previously presented. There is some social science research that bears on how jurors react to in-person testimony and remote testimony.

One point here is that some work shows that jurors prefer remote testimony, even to assess credibility. As we have been told, jurors sometimes are seated far from the witness, and acoustics in courtrooms may vary.

There are a number of academic papers that explore the positive and negative possibilities of remote testimony. This would not so much be committee note material as it would be useful as an introduction in presenting the proposed amendment to the Advisory Committee and the Standing Committee. It might even be possible to provide a bibliography. The point, in part, is that this is not out of the blue. Though the data do not uniformly point in one direction, one point is that given even divided data it makes sense to permit the judge to make a choice about whether to permit remote testimony in a given case.

A suggestion was made: Judicial discretion is key to these issues. We need to be clear that the judge is never required to permit remote testimony, even if all the parties favor that method. So one way of looking at the question is whether the rule should prohibit judges who are persuaded remote testimony from a given witness is justified from authorizing it.

A lawyer sought to push back on resistance to this rule change. There is not a huge amount of remote testimony. Lawyers do not want that if they can present the witness in person before the jury. Indeed, one of the arguments against permitting a subpoena to compel a distant witness to provide remote trial testimony (the subject of our pending Rule 45(c) amendment out for public comment) is that some parties may feel that they have to bring the witness to court lest the jury hold it against the party that the witness did not bother to come to the courthouse to testify in person and insisted on proceeding by remote means. This concern has been mentioned by some attorneys who represent corporate defendants, for example. Moreover, there is little need to provide detailed guidance on safeguards. Lawyers can debate those and propose solutions for their cases.

A judge urged that this is really a Rule 1 issue—allowing judges flexibility on this topic is a way to make justice more accessible. Back when this rule was written 30 years ago, the alternative was testimony by telephone and even remote motion hearings were extremely rare. Now we have technology that has changed the way participation in court proceedings can proceed remotely, and the COVID experience has shown that many judges are comfortable with remote proceedings, or even prefer them. The experience of various state courts, particularly in larger states, confirms that this method can be a cure to an access to justice problem. Particularly with self-represented litigants who cannot readily come to court, being able to participate in a remote manner can be critical.

True, some judges continue to insist on in-person participation even in motion hearings. Nothing in this amendment would direct them to change their preferences.

Another judge agreed. Indeed, it may be that the current rule has not been a huge obstacle for judges only because they are "winking" at the "compelling circumstances" requirement.

A summary was offered: (1) Except for adding "by order" or "as approved" or something of the sort to the rule-amendment language that should not be changed; (2) Library research would be useful on the reported cases deciding whether to authorize remote testimony—does this shed light on whether the current rule is suitably flexible?; (3) We should flesh out the "why" of our proposal—the Rule 1 aspect, perhaps with state court or bankruptcy court examples; (4) We should try to provide information about the social science evaluation of remote testimony; (5) We can consider whether the note could usefully offer some examples of adequate safeguards.

One additional question was raised—how about Rule 43(c)? The draft contains a possible parallel amendment to that rule about remote testimony on motions because the rule does not exactly say that. It might be useful to say that remote testimony is permitted on motions. But it is not clear that any such change is needed. As pointed out by a Standing Committee member during the January 6 meeting, Rule 43(c) permits the court addressing motions to rely on affidavits or depositions or "oral testimony." It does not say that such oral testimony must be delivered by a witness present in the courtroom, and Rule 77(b) draws a distinction between "trial on the merits" and "[a]ny other act or proceeding." The trial must be conducted in open court, but motions may be presented in chambers. Nothing in Rule 77(b) says the witness must be present in chambers to present that oral testimony. And we have not been told that judges that wanted to receive remote witness testimony for hearings have encountered difficulties due to the current rule. Maybe there is no need to change Rule 43(c).

And there may be reasons to leave Rule 43(c) alone to avoid difficulties. One is that inserting "good cause" and "appropriate safeguards" into Rule 43(c) may erect obstacles to use of remote testimony at motion hearings. Another is that suggesting that the standards for remote testimony in the two settings—motion proceedings and trials—are identical disregards the wide range of issues that may come up in a motion proceeding. Replicating the Rule 43(a) language in Rule 43(c) could thus produce negative results. Moreover, trying to draft a committee note for a Rule 43(c) change that somehow says that the standard for permitting remote testimony in motion proceedings is less demanding than the standard in Rule 43(a) for trials—even though they say the same thing—could be challenging.

A lawyer urged that it is important to continue to consider amending Rule 43(c). Trials are rare, and motion hearings are much more plentiful. It might seem that leaving Rule 43(c) untouched is inviting a "Wild West" approach to these issues in motion hearings. Whether there are actually instances of judges going "off the rails" when permitting remote testimony in motion proceedings is unknown.

The resolution for this meeting was that Professor Marcus would try to reflect this discussion in a recast committee note, and try to introduce into the Rule 43(a) amendment a directive that remote testimony can occur only by court order. The Subcommittee would meet again on **January 30 at 11:00 a.m. Eastern** to continue its discussions. The target is to have a proposal (perhaps with alternatives) to present to the Advisory Committee during its April 14

meeting, looking to asking the Standing Committee to approve a preliminary draft for publication for public comment at its June 2026 meeting.

Notes of Teams Meeting
Rule 43/45 Subcommittee
December 15, 2025

The Rule 43/45 Subcommittee met by Teams on December 15, 2025, to discuss possible rule amendments to address remote testimony. Participants included Judge Hannah Lauck (Chair of the Subcommittee), Judge Sarah Vance (Chair of the Advisory Committee), Bankruptcy Judge Benjamin Kahn (liaison to the Bankruptcy Rules Committee), Justice Jane Bland, David Burman, Jocelyn Larkin, and Mark Lanier. Also participating were Taylor Hall-Debnam, Judge Lauck's law clerk; Reporters Richard Marcus and Andrew Bradt; and Consultant Edward Cooper. Emery Lee represented the Federal Judicial Center, and Sarah Sraders represented the Rules Office.

The meeting was introduced with the question whether the reframing proposal from Joseph Sellers, a former member of this Subcommittee, should be pursued. Email exchanges over the past week suggest that doing so could raise unnecessary problems, including trying to prescribe a rule dealing with all "live" testimony, even in motion proceedings, and thereby create possible inconsistency with Rule 77(b). The consensus was that, though Mr. Sellers' approach was very creative, it probably would present difficulties best sidestepped while the subcommittee dealt with the primary issue presented by the "compelling circumstances" requirement in Rule 43(a) for remote trial testimony.

A separate observation was that at present Rule 43 looks like something of "a mess." Some rearrangement might be a good way to clean it up and reorganize things in a user-friendly manner. One way to do that would be to move present Rule 43(c) up before present Rule 43(b), so that the contrast between methods of presenting testimony at trial and methods for presenting factual materials in motion hearings appear immediately after one another.

One possible concern with such rearrangement would be that existing citations to Rule 43(c) would not pop up on a computer-based research effort to locate prior caselaw if the provision were renumbered. On the other hand, that provision was renumbered 43(c) only after the Rule 43 provisions that dealt more extensively with evidence were removed from the Civil Rules when the Evidence Rules were adopted. It was Rule 43(e) before that.

A different consideration was whether current Rule 43(b) could simply be abrogated. There is a statute—28 U.S.C. § 1746—that, at least partly, addresses the oath requirement. If that were abrogated, the revised rule would present 43(c) right after 43(a). But that statute is not really about the same subject as current Rule 43(b). No problems with current Rule 43(b) have been brought to the Advisory Committee's attention.

Another alternative that had been suggested was to combine 43(a) and (c) into a single subdivision (a) and abrogate current 43(c) in favor of that treatment, leaving current 43(b) alone.

Attention turned to the rule language. A question was raised about the first sentence of Rule 43(a). Is this really needed? Rule 77(b) already directs that trials be conducted in open court. Though Rule 77(b) does not single out witness testimony, it would seem to accomplish what the

first sentence of Rule 43(a) does. A reaction was that this sentence is presently in the rule, and there has not been any proposal to change or remove it.

A different concern had been raised in email exchanges leading up to this meeting: Should a rule change include a provision regarding required advance notice of a party's desire to present remote witness testimony? A reaction was that such a requirement could cause problems in some circumstances. For example, suppose the witness were suddenly unable to appear in person, possibly due to a flight cancellation, sudden illness, family emergency, or the like. Should a rule prevent or interfere with remote testimony in such circumstances? That comment prompted the reaction that the committee note to the 1996 amendment to Rule 43(a) suggested that a last-minute emergency was exactly the sort of situation that would constitute a compelling circumstance under the current rule. A notice requirement (say 2 days' notice) in the rule could cause problems.

Discussion shifted to the practicalities involved. Can a lawyer walk into trial and hold up her cell phone, proposing that a witness testify in that manner? Attorney members of the Subcommittee affirmed that lawyers know they must get prior permission from the court. They also know they need to deal with possible technical problems with presenting such testimony. Even when allowed by court order, it can be frustrated by technical problems.

In addition, there is a major practical problem with what might fall under the "appropriate safeguards" heading—Will attorneys be allowed in the room with the witness?; How will exhibits be shown to the witness?; Will the court reporter be in the room?; How will the oath be administered?, etc. It is essential that lawyers alert the court to the need to address these concerns, but it's fair to expect them to do so. And to do so, they will have to raise these concerns in advance unless a sudden development makes that impossible.

On the other hand, with regard to motions (addressed in Rule 43(c)), there is not necessarily the sort of prehearing preparation that is provided by Rule 26(a)(3), which directs the parties to identify the trial witnesses they intend to call and those they may call if needed. Indeed, the Subcommittee's proposed amendment to this rule to call for identifying any witnesses who will provide remote trial testimony is out for public comment now.

A judge noted that procedures for addressing such matters are often the subject of local rules, standing orders, etc. It is reasonable to expect that parties know that they need the court's approval before attempting to present remote testimony. And Rule 7(b) says that a request for a court order must be by motion, though it does not specify notice periods or the like. In that setting, building in special procedures for this issue seems unwarranted. Many courts have required notice periods for ordinary law and motion matters. Those are not prescribed in the national rules.

A consensus emerged that there is no need to include a specified notice period in the rule.

Discussion turned to the rough draft committee note to Rule 43(a) that Professor Marcus circulated before the meeting. A first question was about the second paragraph of that draft note including the following:

> In this context, the good cause standard has real teeth; a court may authorize remote witness testimony only on finding that the testimony of this witness is essential, or extremely important.

The email exchanges included a suggestion that the first clause of this sentence seems unnecessary. Does this sentence suggest that "good cause" in other rules is a standard that lacks real teeth? And discussion indicated that the remainder of the sentence probably overstates the urgency of obtaining this witness's testimony. Removing these sentences seemed wise.

Another observation was that the following paragraph began by saying that the court is "never" required to permit remote testimony. Changing that to "not" was endorsed as preferable. That sufficiently drives home the point that one needs to get prior permission from the court to present remote testimony.

Another comment focused on the sixth paragraph of the draft note, and suggested that drawing a contrast with in-person testimony (which the draft says presents "nonexistent" difficulties) seems unnecessary and, according to what some said during the July 2025 online conference may also be inaccurate. At least on occasion, it seems jurors find a witness presented on screen preferable to an in-person witness seated far away. The suggestion was to revise that paragraph as follows:

> Technological difficulties may sometimes prove important. ~~With a witness testifying in the courtroom, those issues are nonexistent or very rare. But~~ When the witness is at a remote location, there could be lapses in technology both at the witness's location and in the courtroom. The proponent of the testimony ordinarily should be expected to satisfy the court that technological impediments will not intrude and that electronic transmission will be secure.

Attention also focused on the fourth paragraph of the draft, which emphasized that the importance of having *this* witness testify might be important. Though that is a possible antidote to the "apex witness" concern, it was suggested, surely the fact that a given witness is expected only to authenticate a given exhibit would not require a showing that nobody else could provide such authentication.

More generally, the desired focus seems to be on ascertaining whether credibility issues will be important in assessing this witness's testimony.

Attention turned to motion practice, currently covered in Rule 43(c). One question was whether to invoke the good cause standard here as well. That would be parallel to the Rule 43(a) approach. It would also correspond to the new provision for remote participation in "contested matters" under Bankruptcy Rule 9014. But there has been concern about how to explain in a note that "good cause" for Rule 43(c) purposes need not be as "good" as it need be for trial testimony under Rule 43(a).

A semi-consensus emerged to leave "good cause" out of Rule 43(c). The use of "may" authorizes a court order for remote testimony. Adding "appropriate safeguards" in Rule 43(c)

alerts the court and the attorneys to the need to focus on setting guardrails. Party agreement may often suffice to support remote motion testimony.

There was discussion about likely resistance to a change like the one under discussion. One reaction was that, because this is up to the judge, it may be that judges will be comfortable with such a change. There does seem to be a considerable range of views among judges about remote testimony, but this rule does not say any judge who is uncomfortable must permit it.

From among lawyers, there may be strategic reasons for favoring or opposing relaxation of the constraints on remote testimony. The general expectation might be that plaintiff-side lawyers would endorse permission for remote testimony more enthusiastically than defense-side lawyers. But perhaps there could be exceptions. Consider, for example, the CEO of a corporate defendant who can be compelled by subpoena to testify at trial (in the same state, for example, under Rule 45(c)(1)(B)). That CEO might very much prefer to testify remotely rather than appear in person in court. There might even be security issues for the CEO. It may be likely that plaintiff counsel would not agree to remote testimony, but in general it would not seem that the CEO's schedule would take priority over in-person testimony (subject to the court's power under Rule 26(c) to grant a protective order excusing the CEO from testifying).

That prompted attention to a footnote in the draft note under discussion about whether remote testimony or a video deposition is superior. The 1996 committee note evinced a preference for the video deposition, but at a time when the only alternative to in-person testimony was by telephone. Contemporary methods are worlds away from that; hence (as suggested by the introduction to the draft committee note) the current willingness to remove the "compelling circumstances" constraint.

One possibility is that the witness's deposition was taken before discovery produced new evidence the other side would want to use with this witness. That situation would seem to indicate that the deposition is not a suitable substitute. But how about a second deposition, limited (if possible) to evidence that surfaced after the first deposition?

Indeed, some lawyers may forgo deposing an important adverse witness to deny the witness the "practice" that the deposition would provide. That tactic may be particularly important with expert witnesses. And a different problem can arise because ordinarily counsel for the witness does not ask questions during a deposition, but prefers to save direct for trial. What if the witness is incapacitated or otherwise unavailable when the trial date arrives? Should that party be permitted to "supplement" the video deposition with the direct examination that could have but did not occur during the deposition?

The emerging consensus was that getting into these sorts of concerns in a note is probably not wise, though calling attention to safeguards for remote testimony is important for motion proceedings.

The meeting concluded with some discussion of next steps. One is for Professor Marcus to attempt to provide a redraft of the draft under discussion during this meeting, including a committee note for a possible change to Rule 43(c). At the same time, alternatives might be

proposed to move current Rule 43(c) up into (a), which would be subdivided into (a)(1) on trials and (a)(2) on motions.

Going forward, the Subcommittee will try to meet again. Professor Marcus will endeavor to get out a discussion redraft this week, and Judge Lauck will try to identify a date in January that works for all for another meeting. Ideally, that meeting could support a recommendation to the full Advisory Committee for publication for public comment of draft amendments. It is likely that the agenda book for the Spring meeting of the Advisory Committee will be due in early March. If a published preliminary draft goes forward, the Subcommittee will be able to revisit the proposals after the public comment period concludes.

(b) TPLF Subcommittee

The TPLF Subcommittee is continuing its work in considering a disclosure rule. TPLF is currently the subject of at least five bills pending in Congress, and was also the focus of four recent submissions to the Advisory Committee. Copies of these bills and the recent submissions are on pages 299-377 of the agenda book for the Advisory Committee's April meeting, accessible via the link at the beginning of this report.

The current focus for the Civil Rules is on a possible disclosure requirement in Rule 26(a)(1), or perhaps adding some mention of TPLF to the judicial management provisions in Rule 16 or Rule 16.1. Meanwhile, the environment for litigation funding seems to continue to evolve. In at least some states, nonlawyer investment in law firms is now permitted. Meanwhile, push-back may be emerging in other states. In California, for example, a bill has been proposed in the state legislature to forbid investor influence on litigation decisions. *See* Emily Siegel, *Private Equity Control in Law Firms Bill Advances in California*, Bloomberg Law News, Apr. 7, 2026 (reporting on AB 2305).

The original disclosure proposal was made in mid-2014, and the Advisory Committee has been monitoring the evolution of these issues over the years. The TPLF Subcommittee was formed at the Advisory Committee's October 2024 meeting to study the issues. On the day before the Advisory Committee's October 2025 meeting, the George Washington University National Law Center convened a full-day conference on TPLF issues that provided important background for the subcommittee, but also revealed considerable contention about these issues. At the request of the subcommittee, the Federal Judicial Center is studying the experience in the District of New Jersey under its local rule requiring disclosure (described below), which has been in effect for several years.

Though this work is ongoing, it seems safe to offer some initial reactions based on the last decade of discussion of a TPLF disclosure rule including (a) a sense that requiring disclosure of the fact of funding ought not often pose problems; (b) requiring disclosure of all details of the funding arrangement (including communications between counsel and the funder about counsel's request for funding) could raise very serious (opinion) work product problems; and (c) that there remain serious questions about what the court can do with information about funding arrangements.

The Advisory Committee would benefit from the views of Standing Committee members on the topics on which it is focused, and offers the following description:

Existing models

Original rule proposal

The original proposal in 2014 (14-CV-B) was to add the following new (v) to Rule 26(a)(1)(A):

> (v) for inspection and copying as under Rule 34, any agreement under which any person, other than an attorney permitted to charge a contingent fee for representing

> a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise.

The proponents analogized this proposed new provision to the longstanding discovery (and now disclosure) provision about insurance coverage in Rule 26(a)(1)(A)(iv). That analogy is not airtight. For one thing, the insurance disclosure directive is limited to an "insurance agreement" from "an insurance business." It may also be relevant that insurance companies are highly regulated in many places. California, for example, has a pretty substantial Insurance Code.

A second difference that may matter is that the main interest in the insurance policy was probably the indemnity feature, not the insurer's undertaking to provide a defense (which may be somewhat analogous to what a litigation funder provides). It does not seem that litigation funders have indemnified the parties they fund, even as to litigation-related sanctions, and usually the funded party is seeking a money award. Hence the proposal seems not to be directed at finding out about something that plays as prominent a role in resolving the action as the indemnity issue ("settlement for the policy limits"). But the Committee Note accompanying the addition of discovery of insurance coverage in 1970 did mention not only that "insurance is an asset ordinarily created specifically to satisfy a claim," but also that "the insurance company ordinarily controls the litigation."

When it first addressed this proposal in fall 2014, the Advisory Committee did not pursue it, in part because litigation funding was new and was rapidly changing and growing, making its contours and importance unclear.

From 2014 to 2024, there were several further submissions to the Advisory Committee. Some of those urged that the 2014 proposal be adopted. Some funders submitted opposing arguments, occasionally contending that the Advisory Committee's limited fact-gathering constituted "findings" that no action was needed. Some of the submissions and inquiries came from members of Congress.

Rep. Issa Bill

In January 2025, Rep. Issa introduced H.R. 1109, which proposed a new § 1660(a) for the Judicial Code (Title 28) requiring counsel of record to:

> (1) disclose in writing to the court and all other named parties to the civil action the identity of any person (other than counsel of record) that has a right to receive any payment or thing of value that is contingent on the outcome of the civil action or a group of actions of which the civil action is a part; and
>
> (2) produce to the court and to each other named party to the civil action, for inspection and copying, any agreement creating a contingent right referred to in paragraph (1), including any ancillary agreement or document, except as otherwise stipulated or ordered by the court.

This proposal differs from the 2014 submission in several ways. It speaks of receiving "any payment or thing of value that is contingent on the outcome of the civil action." So it might also

apply to a suit for non-monetary relief. That might be even broader. Consider the famous suit by Hulk Hogan against Gawker, which was reportedly funded by Silicon Valley billionaire Peter Thiel. It may be that though Hogan got a money judgment, Thiel had no right to a share of that money. If he was seeking to harm Gawker, that might be the "thing of value" for him. And in a suit for injunctive relief or other non-monetary relief, that might be the "thing of value."

The Issa bill also speaks of a "group of actions of which the civil action is a part." Determining what constitutes a "group of actions" could present problems. This provision sounds like it is partly about multidistrict litigation (MDL) proceedings. But how does that affect state court Roundup actions in relation to the pending MDL in federal court about the same substance? Given the reported emergence of "inventory funding," this might also apply in that sort of situation, though it is less clear how that would work.

The Issa bill also contains a section (b) which would exclude from the disclosure requirement any instance in which the funding agreement entitles the funder to receive only repayment, or repayment plus interest at a relatively modest rate specified in the statute, or for reimbursement of attorney's fees.

This bill also has a section (c), which expressly addresses timing—disclosure must occur within ten days of execution of the funding agreement or at the time of the filing of the action, whichever is later. Finally, in section (d) it requires supplementation or correction of prior disclosures.

Foreign Funding

Also pending in the House is H.R. 2675, the Protecting Our Courts from Foreign Manipulation Act of 2025. This bill would add a different § 1660 to the Judicial Code. It focuses on funding from a "foreign person," as defined in the Foreign Intelligence Surveillance Act of 1978, or a foreign state, or a sovereign wealth fund. It requires disclosure not only to the court and other parties to the action, but also to the Attorney General and the Principal Deputy Assistant Attorney General for National Security of details about the "foreign person" that has "a right to receive any payment that is contingent in any respect on the outcome of the civil action by settlement, judgment, or otherwise."

It requires disclosure also of agreements providing a "right to receive any payment that is contingent in any respect on the outcome of any matter within a portfolio that includes the civil action and involves the same counsel of record." This provision seems to reach the portfolio funding situation but not to address "malign" U.S. litigation brought to disrupt the defendant's activities rather than obtain a money judgment.

Proposed section (c) of this proposed § 1660 (entitled "Prohibition on Third-Party Funding Litigation by Foreign States and Sovereign Wealth Funds") would make it unlawful for any party or counsel of record to enter into a funding agreement with such a "foreign party."

Possible Rule 16 or 16.1 approach

Rule 16 might be a place to add a provision about TPLF. It calls for the court to become involved early on in managing the action. Suggesting that this judicial oversight include consideration of funding arrangements might facilitate a response tailored to the particular case.

Rule 16.1 addresses only MDL proceedings. But at least some who have commented on TPLF issues contend that funding is common in relation to some MDL proceedings. Eight years ago, the Judicial Panel found that transferee judges had not frequently encountered TPLF, but that might be because they were not asking about it. In any event, circumstances may have changed. So another approach might be to try to identify sorts of proceedings in which funding issues often appear and limit a rule to those proceedings. On the other hand, if patent infringement proceedings are also commonplace funding targets, such a "sectoral" approach might not be promising.

District of New Jersey Local Rule

Effective June 21, 2021, the District of New Jersey added its Local Rule 7.1.1, requiring disclosure of Third-Party Funding:

> (a) Within 30 days of filing an initial pleading or transfer of the matter to this district * * * all parties, including intervening parties, shall file a statement (separate from any pleading) containing the following information regarding any person or entity that is not a party and is providing funding for some or all of the attorneys' fees and expenses for the litigation on a non-recourse basis in exchange for (1) a contingent financial interest based upon the results of the litigation or (2) a non-monetary result that is not in the nature of a personal or bank loan, or insurance:
>
> 1. The identity of the funder(s), including the name, address, and if a legal entity, its place of formation;
>
> 2. Whether the funder's approval is necessary for litigation decisions or settlement decisions in the action and if the answer is in the affirmative, the nature of the terms and conditions relating to that approval; and
>
> 3. A brief description of the nature of the financial interest.
>
> (b) The parties may seek additional discovery of the terms of any such agreement upon a showing of good cause that the non-party has authority to make material litigation decisions or settlement decisions, the interests of parties or the class (if applicable) are not being promoted or protected, or conflicts of interest exist, or such other disclosure is necessary to any issue in the case.
>
> (c) Nothing here in precludes the Court form ordering such other relief as may be appropriate.

The adoption of this local rule generated considerable controversy (somewhat along the lines of submissions received by the Advisory Committee). Preliminary inquiry by FJC Research

has not revealed any major problems, however. The main difficulty was that many lawyers thought they had to file "disclosures" saying that they did not have funding. The court eventually issued some sort of notice alerting lawyers that disclosure was unnecessary in the absence of funding.

This provision adheres to the Civil Rules format, but treats this disclosure as akin to Civil Rule 7.1, not part of Rule 26(a)(1)(A). Presumably, that means that the sanctions of Rule 37(c)(1) would not apply to failure to disclose. It is not clear what enforcement mechanism applies to instances of failure to comply with the disclosure requirement.

This provision applies to funding for attorneys' fees and expenses, but would not seem to apply to the "consumer" situation in which the funding is for the party's living expenses.

This provision addresses both a "financial interest" and a "non-monetary result" in the litigation, and therefore could apply in situations in which there is no contemplated pay-out of settlement financial proceeds to the funder. Though it requires a "brief description of the nature of the financial interest," it seems not to require any disclosure of the "non-monetary result."

This provision keys on control of the litigation or settlement of the action. It focuses only influence on "material" decisions, though it's not clear which decisions are not "material."

More detailed information about the actual experience under this rule would be informative. Some questions might be:

1. How frequently are disclosures of funding made? Is it in 30% or 1% of filed cases? (This would exclude the "false negatives" that resulted from early confusion about whether one must affirmatively disclose that there is no funding in a given case.)

2. In what sorts of cases are these disclosures made? (We have heard a lot about patent infringement cases, for example. We have also heard a great deal about mass tort cases, particularly MDL proceedings.)

3. Have there been instances in which the court ordered follow-up discovery in light of the disclosures made? What sorts of showings were offered to justify such follow-up discovery?

4. What kinds of "financial interests" have been disclosed? Has there been any instance of disclosure of an interest in a "non-monetary result"?

5. Did disclosures or follow-up discovery lead to any significant action by the court? Possibilities include sanctions against the attorneys for the funded party or the one pursuing the funding discovery, reference to the state bar, etc.

No doubt additional questions could be pursued. An untutored and informal reaction is that despite the considerable controversy about adopting this local rule, the actual experience over the last four plus years has not caused tumult. The FJC is gathering information about the New Jersey experience.

State court provisions

Several years ago, Wisconsin adopted a funder disclosure requirement as a part of legislative tort reform legislation. An informal effort by the reporter (contacting Wisconsin law professors) did not indicate that this disclosure provision produced waves.

The Chamber of Commerce has lobbied the legislatures in other states to adopt similar provisions, sometimes successfully.

It is quite unclear whether there is a way to get firm information about the results of these state court provisions. The National Center for State Courts might have some information.

ELI/UNIDROIT disclosure approach

It seems useful to include some mention of EU proposals that go beyond disclosure. Regarding disclosure it seems worth mentioning Rule 245(1) of the proposed Model European Rules of Civil Procedure, promulgated by the European Law Institute (modeled on the American Law Institute) and the International Institute for the Unification of Private Law says (UNIDROIT):

> A party who receives funding for the proceedings from a professional third-party funder or from a crowd-funder shall disclose this fact and the identity of the funder to the court and the other party at the commencement of proceedings. The details of such a third-party funding arrangement are, however, not subject to this requirement.

This provision is only a proposal to EU member states. It offers several notable features. First, it focuses on "a professional third-party funder." That would seem to exclude Uncle Fred who supports his niece after her car crash. But it includes "a crowd-funder." It requires disclosure "at the commencement of proceedings," and thus would not seem to include funders who only fund costs on appeal after success in the trial court. It says nothing about litigation control by the funder. It also does not seem to focus on whether the funding is recourse or non-recourse. The NAACP Inc. Fund would seemingly be subject to this disclosure requirement. It calls for disclosure to the opposing party, not just the court. But it excludes the "details of such a third-party funding arrangement" from the disclosure directive, and does not authorize discovery probing for more information. (It bears noting that discovery in EU legal systems is vastly more limited than American discovery. For discussion, *see* Marcus, *Reflections of an Outlier: An American Reaction to the EU Rules on Evidence*, 11 Int'l J. Procedural Law 106 (2021).)

Drafting issues going forward

The introduction above (and the very helpful October 23, 2025, conference at GW Law School) suggest a lot of drafting issues that might first be addressed at the level of determining what we want a rule to do.

Scope—What arrangements must be disclosed?

Except for mass torts, there seems not to be much appetite for disclosure of funding of personal injury claims. An early session on TPLF in Berkeley in about 2016 included a representative of what might be called the funding of "car crash" cases, and that seemed to be a high volume activity in which funder control would not be an issue because the funder would not know enough about all the cases it was funding to exercise control, even over settlement.

Nonetheless, defining what must be disclosed in light of the manifold accusations directed towards TPLF activity is a challenge, and drafting something that is workable, while presenting the usual drafting challenges, begins by deciding what one wants to include. It seems that the definition of what triggers the disclosure requirement is the biggest obstacle. Here are at least some of the issues.

Focus only on funding for attorney fees and litigation expenses: The District of New Jersey rule seems to exclude cases that involve funding for the plaintiff's living expenses—sometimes called "consumer funding"—by focusing on funding for "some or all of the attorney's fees and expenses for the litigation." That would seem to exclude the "Uncle Fred" situation in which Fred loans money to his niece to pay living expenses while her claim progresses, but expects to be paid back if the case pays off.

Exclude funding that does not seem designed to make the funder a profit: Another approach is suggested by Rep. Issa's bill—exclude any instance in which the payout is either only repayment or repayment plus a modest interest add-on. Much "social justice" funding probably would be excluded even though this is funding for litigation costs. Much of the lobbying for disclosure assumes that there is a big profit to be had for the funder; excluding instances in which that is not part of the deal could be a good idea, though figuring out what interest rate or profit is acceptable could get tricky.

Include crowd funding?: There is some indication that this activity has been involved in litigation funding in the U.S. How exactly it works is not clear to this reporter. Mentions of crowd funding in the press usually seem to deal with financial support for people who have suffered catastrophic injuries or other serious harms (including possible eviction). It is not clear how the provider of such funding would seek or obtain repayment of the amount provided.

Address litigation seeking non-monetary relief?: The original proposal seemed only to address the big bucks judgment or settlement. Others have taken account of additional litigation outcomes that would benefit funders in other ways. To the extent, however, that one is concerned about malicious litigants trying to use American litigation to bring down American companies that compete with foreign competition, however, there may be no payout contemplated; the goal could be simply to make trouble, not win money. Whether that really happens in litigation (possibly putting aside Hulk Hogan v. Gawker) is unclear. But maybe a variant could happen if Big Pharma Co. *A* finances patent holder's suit against Big Pharma Co. *B* to achieve a commercial objective by sullying the reputation of Co. *B* or tying it up in court. Similarly, perhaps, environmental litigation might be funded by competitors of the company accused by the "stooge" of environmental violations. In California, for example, litigation under the California Environmental

Quality Act is sometimes characterized as principally designed to hamstring proposed projects in the hope that the developer will eventually give up.

Exclude "social justice" funders?: The NAACP Inc. Fund might be an example of a "social justice" funder. In the present day, there are many groups that seem to fund "cause" litigation. For example, it seems that the Chamber of Commerce funds such litigation, at least at the appellate level. Indeed, that current reality appears to be one reason for considering expanded disclosures in the Appellate Rules with regard to amicus filings in the appellate courts. Probably most or all such funding could be exempted under something like the exclusion in H.R. 1109 for arrangements that do not call for a profit beyond a low percentage rate.

A special rule for patent infringement cases?: This sort of litigation surely has gotten a lot of attention. But the Civil Rules supposedly govern all cases, not only cases of a certain type. About a decade ago, there were stirrings in Congress about legislation to address the problem of "patent trolls." Some of that legislative effort focused directives to the rules process to develop rules to solve the reported problems.

Funding only appeals: In the U.S., some funders focus on appeals mainly or solely. Thus, if plaintiff wins a whopping verdict at trial the funder will provide funding to cover defendant's appeal for a share of the proceeds if the appeal does not wipe out the judgment. But that cannot be known until the trial court litigation is over or nearly over.

Address "portfolio funding"?: Particularly with mass torts, but perhaps with patent infringement cases also, one notion is that funders may not limit themselves to a single case. Instead, they may fund a law firm's portfolio of cases of a certain sort (e.g., Camp Lejeune claims). In the Camp Lejeune example, there have been reports that millions were spent on lobbying Congress to get what claimants' lawyers wanted in the bill that has led to the outburst of claims. Where all that money came from is not clear, but it is difficult to see how a funder could be funding not-yet-existing claims. Ongoing recruitment of claimants for some MDL mega-proceedings (e.g., Roundup and Zantac) are clearly widespread and must pay off in some way.

Including only non-recourse funding: A recurrent feature of the push for disclosure is that the funder gets nothing back unless the litigation is successful. The "portfolio funding" wrinkle is related to this concern. If the funder has provided funding for a share of all Camp Lejeune claims the firm has, and 50% are unsuccessful but the other 50% are successful, is that non-recourse funding or more like a law firm line of credit, in which the firm has pledged all its receivables as collateral. (True, the line of credit might also call for personal guarantees by the partners of the firm, but we are moving closer to a bank line of credit.) The claim that funders fund patent infringement claims hoping for a few big strikes alongside many failures may be similar.

Disclosure of what?

Fact of funding and identity of funder: The District of New Jersey local rule requires disclosure of the fact of funding (however defined) and the identity of the funder. That alone might avoid difficulties. In 2019, for example, a funder so suggested. *See* Michael German, *Sensible Disclosure Rule for Litigation Finance is Right Balance*, U.S. Law Week, Mar. 15, 2019.

Control: The District of New Jersey local rule also requires disclosure of what it defines as control. If one wants to exempt those funding arrangements that do not include such features, one would need a definition (going to the scope of the disclosure obligation). Otherwise, one could insist on disclosure of all covered funding arrangements and add this sort of disclosure feature. But defining what constitutes control could be difficult. Must the funding be a blank check because otherwise the funder can control the litigation by refusing further funding? Presumably the funder could condition further funding on adopting certain litigation tactics. One concern expressed by some proponents of disclosure is that funders will press claimants to settle for less than they could get by persisting in the litigation effort, and that their lawyers would disobey their duty of loyalty to the client to please the funder. On the other hand, the notion that getting funding may be critical to the ability of some claimants to pursue their claims at all suggests that, by definition, there is an element of control—the initial decision whether to provide funding. (Commercial funders say they provide funding in only a small percentage of the applications they receive.) If a disclosure rule keys on control, it may be tricky to define that term.

Additional details?: The District of New Jersey local rule also requires disclosure of "a brief description of the nature of the financial interest." It is not immediately clear what that adds to disclosure of "control." Perhaps it means whether this is non-recourse funding (if that is not a part of the definition of what arrangements must be disclosed). As suggested by the much more aggressive EU ideas on regulating litigation funding (briefly described below), it might also key on whether the funder has the financial wherewithal to provide the promised funding.

Adding Rule 7.1 types of disclosures regarding the funder: The Advisory Committee has recently dealt with expanding the Rule 7.1 disclosure requirements to identify corporate "grandparents," etc. It has often been asserted that disclosure is required to alert judges to the possible need to recuse. Rule 7.1 focuses on parties to litigation, not the funder of those parties. If one regards the recusal issue as important, some disclosure about corporate affiliations of the funder might be in order. There is an undercurrent in some of the writing expressing concern about patent infringement litigation that cleverly contrived and interlocked funders are hiding from sight. Trying to devise a rule that would ferret them out would be a challenge.

The entire funding agreement: The original disclosure provision mirrored the insurance disclosure provision already in the rules and called for the disclosure of the entire agreement. That could pinpoint things about "control" and other things that might justify authorizing further investigation via discovery. But one can say that this disclosure is different from insurance disclosure because, in the insurance situation, one is likely focused on "settlement for the policy limits." That, of course, lies behind tort claims against insurers for bad faith refusal to settle. In the TPLF context, on the other hand, unless litigation funding must be a blank check, disclosure of details may provide the opposing party with a guide to exhausting its opponent's resources (perhaps via expensive discovery forays about funding arrangements).

Communications leading up to execution of the funding agreement: As noted above, funders say they provide funding in response to only a small proportion of the requests for funding they receive. Commercial funders often say they have expert in-house lawyers who can assess the claim and know what to ask of the lawyers requesting funding. That would often include core opinion work product. But eliciting details about the assurances, etc., that led up to the agreement

might also shed light on "control" issues. Thus far, proposals do not seem to call for this sort of disclosure, but it may be that follow-up discovery efforts would target these communications.

Disclosure to whom?

The court alone: There seems to be little question that the court now has authority to direct disclosure on a case-specific basis. The District of New Jersey local rule has not been challenged as violating the strictures of Rule 83 (so far as has been reported to us). So it is not at all clear that a rule saying courts may direct disclosure would add significant authority to what already exists. Perhaps adding this possibility to Rule 16 would be a way to flag the question for the court. If so, one might add it to the laundry list in Rule 26(f) as well.

To other parties: Ordinarily proponents of disclosure insist on disclosure to other parties. They are thinking about the adverse parties, and they claim that disclosure to the court alone is a forbidden "ex parte" communication. Disclosure proponents sometimes say that they can identify topics glossed over in the funding arrangements that the court needs to pursue but may not recognize. On this score, it has not been said, but comes to mind, that funding might be of interest to co-parties. For example, suppose some plaintiffs have funding and others do not. Of course, co-parties are fully free to make disclosures to one another. (Compare the common-interest exception to waiver of privilege when attorney-client or work-product materials are shared among co-parties.) So probably the focus should be on adverse parties, but if disclosure is required to them, it presumably would be made to co-parties as well.

To bar associations, etc.: Proponents of disclosure often suggest that plaintiff attorneys who receive funding may be tempted to breach their duty of loyalty to their clients because they are beholden to the funders. Maybe there are sometimes concerns that would warrant disclosure to regulators of lawyer ethics. To date, despite these intimations from disclosure advocates, this has not been an included ingredient.

Explicitly authorizing further discovery

The District of New Jersey local rule explicitly alerts the judge about possible discovery, but it is seemingly limited to issues of control or a showing of a conflict of interest. Perhaps that expands the scope of discovery on the notion that funding arrangements are not within Rule 26(b)(1). But one might expect that if disclosure to adverse parties is required, they would seek discovery on whatever ground they could devise. For example, in terms of discovery of communications between the funder and the attorney seeking funding, one argument might be that there are Rule 11 issues that call for further revelations. Unless there is some concern that—absent a provision authorizing discovery—courts might consider themselves constrained by the scope of discovery from ordering it in appropriate cases, it is not clear why this sort of provision is needed.

Alternatively, it might be that a rule could explicitly *forbid* certain sorts of discovery. By way of comparison, Rule 26(b)(3)(B), which applies when the court concludes that a party has made a sufficient showing to justify discovery of fact work product, directs that the court "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." *Compare* Cal. Code Civ. Proc.

§ 2018.030(a) ("A writing that reflects an attorney's impressions, conclusion, opinions, or legal research or theories is not discoverable under any circumstances.").

The EU regulatory contrast

The introduction includes the disclosure provision included in the ELI/UNIDROIT Model European Rules of Civil Procedure (2020). The EU has moved on beyond that are discussed in Marcus, *The "Advanced" Systems Grapple With Third Party Litigation Funding*, 29 ZZPInt. 129 (2025). In 2022, the EU Parliament adopted a resolution on "Responsible private funding of litigation." *See* European Parliament resolution of 13 September 2022 with recommendation to the Commission on Responsible private funding of litigation (2020/2130 (INL)). In early 2025, an agency of the EU released a 700-page study entitled Mapping Third Party Litigation Funding. This study does not show that most EU member states have yet taken up the cudgel recommended in the 2022 document. But it may be useful to describe elements of that 2022 set of proposals for purposes of comparison:

Definition of covered activities: The 2022 proposal was that a "litigation funder" be a commercial entity "which has the primary aim of receiving a return on an investment it makes." That might well exclude the deal between Peter Thiel and Hulk Hogan, and funding by malign foreign governments trying to use American litigation to achieve malign purposes but not to make money directly from the litigation. But unless the funder is primarily or solely engaged in litigation funding (as opposed, perhaps, to "hedge funds" looking for profit-making activities of whatever sort), such a definition might not catch some the proponents of disclosure would prefer that a rule identify.

Regulation of funders: The EU 2022 resolution also urges that member states "create a system for the authorisation and monitoring of the activities of litigation funders." This sounds like the way most or all states treat insurers. This regulatory setup would include "an independent supervisory department or authority tasked with granting, suspending, or withdrawing authorisations for litigation funders and supervising the activities of litigation funders."

Registration of funders: The EU resolution also urges that member states provide that funders "conduct their activities through a registered office in a Member State." That is probably true of insurers in the U.S. to some extent, under existing state regulation of insurers.

Adequate financial resources: Member state regulation should require that a funder demonstrate "adequate financial resources to * * * fund all stages of any proceedings they have committed to." Regulatory authorities should ensure that their supervisory authorities can verify the funder's financial capacity, and the regulators should "set up a specific insurance fund to cover all the outstanding costs of claimants * * * in case a litigation funder becomes insolvent."

Acting in the best interests of claimants: The 2022 resolution also proposes that the regulators require funders to adhere to "a fiduciary duty of care requiring them to act in the best interests of a claimant." This recommendation seems to focus on the risk the funder would pressure the lawyer to violate the lawyer's duty of loyalty to the client by imposing a similar duty on the funder.

Contents of funding agreements: The 2022 resolution calls for member states that permit litigation funding to direct that funding agreements not include any provision that gives the funder control. Such agreements may not guarantee the funder a minimum return, and (absent "exceptional circumstances") include anything that would dilute the share paid through to the claimant below 60% of the total award.

Withdrawing funding: Agreements should provide that the funder cannot withdraw funding unless the court has authorized termination of the agreement. It is not entirely clear if this sort of provision would give the recipient of funding a blank check.

Judicial authority to modify the funding agreement: Disclosure to the court is also required, and the court is to be given authority to modify the agreement so that it conforms to the requirements mentioned above. The court would be authorized to determine whether the agreement would give the funder "an unfair, disproportionate or unreasonable share of any award," and to take account of "the value of a litigation funder's financial contribution."

* * * * *

In a sense, one might say that this list of detailed requirements and prohibitions with regard to the funding agreement resembles the sort of regulation states often impose on insurers. It is difficult to imagine that the Enabling Act authorizes the Advisory Committee to propose rules along these lines. This thumbnail description is not offered to suggest that this committee can do these things, but it may provide a context for evaluating what this committee can propose.

Moving forward from here

One conclusion that might be said to flow from various discussions of TPLF disclosure was put into words by litigation funders:

> Neutral bodies attempting to objectively evaluate disclosure proposals are perpetually presented with the diametrically opposed narratives of the defense bar, on the one hand, and the commercial funding industry, on the other.

Dai Wai Chin Feman & William Weisman, *Litigation Funders Seek Transparency in Disclosure Debate*, Law 360, Nov. 23, 2022.

One might say there is a lot of underbrush to clear away to devise a possible rule amendment proposal. Ideally, reviewing all these ideas and assertions will enable choices to be made about what should be included and what need not be included.

IV. ADDITIONAL MATTERS UNDER CONSIDERATION

(a) Rule 23 Issues

As reported during the Standing Committee's January 2026 meeting, the Advisory Committee has received proposals for Rule 23 amendments to address three topics: (1) resolving a circuit split about the legality of "service awards" for class representatives; (2) providing judges

with some authority to review pre-certification settlements in cases filed as putative class actions but not yet certified; and (3) amending Rule 23(b)(3) to permit a court asked to certify a class action to consider not only adjudicatory alternatives but non-adjudicatory alternatives in making the superiority determination the current rule says should be considered.

The Advisory Committee has undertaken Rule 23 projects on three prior occasions. First, in the 1990s it undertook a review of certification provisions leading in 1996 to publication of a preliminary draft of several amendments, including a new Rule 23(f) on interlocutory appellate review of class-certification decisions. After public comment, all the proposed changes except the Rule 23(f) provision were withdrawn. Second, in 2001 a new set of proposed amendments was put out for public comment, about the timing of certification decisions and also a new Rule 23(g) about appointment of class counsel and Rule 23(h) about awards of attorney fees in class actions. These changes went into effect in 2003. Then in 2016, a package of amendments was published for comment, leading to extensive expansion of the settlement approval provisions of Rule 23(e), which went into effect in 2018. The process leading to the 2018 amendments to the rule included extensive consideration of a number of amendment ideas and at least one full-day mini-conference following which many of these amendment ideas were dropped.

At its April 2026 meeting, some members of the Advisory Committee expressed misgivings about inaugurating another class action project. Though the three issues identified above have been presented to the Advisory Committee, a new project would likely attract additional proposals to change the rule. Some members of the Advisory Committee observed that they personally favored pursuing several other amendment ideas rather than the ones raised in the recent submissions. As a possible measure of the prominence of the issues described above, it might be noted that in 2026 the Advisory Committee has received eight more submissions on those issues already raised—mainly in support of the Rule 23(b)(3) superiority change.

The question whether to proceed with work on Rule 23 remains before the Advisory Committee. It would benefit from reactions by Standing Committee members on whether proceeding would be useful.

(b) Rule 35—Presence of Representative of Examined Party and Right to Record Examination

The American Association of Justice (AAJ) has proposed that Rule 35 be amended to authorize the party subject to examination to have a representative present at the court-ordered examination, and also to permit the party to record the examination. The AAJ submission identifies several states that have such provisions for court-ordered examinations. The issues are presented at pages 425-36 of the Advisory Committee's agenda book for the April meeting, accessible via the link the beginning of this report.

Discussion at the April Advisory Committee meeting raised questions about whether this would be a promising idea, but some attorney members urged that it would be an important improvement. The Advisory Committee is undertaking research on the situation, and would benefit learning any views of Standing Committee members.

(c) Rule 58—"Separate Document" Requirement and Collateral Orders

There was a proposal to exempt collateral orders from Rule 58's requirement of a separate document. At the Advisory Committee's April 2026 meeting, there was discussion of the problems resulting from Rule 54(a)'s description of a "judgment" as "any order from which an appeal lies," and the operation of the collateral order doctrine. The entry of a separate document on the docket triggers the running of the 30-day time limit to notice an appeal. But if no separate document is entered on the docket the time to appeal would not start running until 150 days after the entry of the order. Amendments were made to Rule 58 in 2002, but district courts rarely enter a "separate document" on the docket after entering orders that might qualify for collateral order treatment. The main example seems to be orders denying qualified-immunity defenses, but defendants who make motions to dismiss on that ground ordinarily pursue prompt appeals. Ordinarily defendants want to avail themselves of an immediate opportunity to appeal.

The committee note to the 2002 amendment to Rule 58 observed that "[d]rastic surgery on Rules 54(a) and 58 would be required to address this and related issues." The Civil Rules Committee members did not express enthusiasm for embarking on this project. If such an effort were pursued, however, that would inevitably require a joint effort with the Appellate Rules Committee. The matter remains pending.

V. MATTERS DROPPED FROM AGENDA

During its April 2026 meeting, the Advisory Committee also decided to drop a number of matters from its agenda. The following report briefly describes these matters and refers to the pages in the Advisory Committee's April 2026 agenda book where more information can be found:

A rule for FSLA collective actions (pages 420-23)

A rule addressing artificial intelligence "hallucinations" (pages 438-50)

"Algorithmic spoliation" of discoverable material (pages 466-72)

Protective order "templates" (pages 474-96)

Mandatory Assistance for Pro Se Litigants (pages 498-511)

As reflected in the draft Advisory Committee minutes included in this agenda book, the Advisory Committee voted unanimously to drop each of these matters.

DRAFT MINUTES
CIVIL RULES ADVISORY COMMITTEE
Charlotte, NC
April 14, 2026

The Civil Rules Advisory Committee met at the United States District Courthouse for the Western District of North Carolina in Charlotte, North Carolina, on April 14, 2026. The meeting was open to the public. Members present included Judge Sarah Vance, Advisory Committee Chair; Advisory Committee Members Judge Cathy Bissoon, Justice Jane Bland (remotely), David Burman, Judge Annie Christoff, Dean Zachary Clopton, Mark Lanier, Jocelyn Larkin, Judge Hannah M. Lauck, Judge R. David Proctor, Judge Marvin Quattlebaum, Judge Manish Shah (remotely), and David Wright. Professor Richard L. Marcus participated as Reporter, Professor Andrew D. Bradt as Associate Reporter, and Professor Edward H. Cooper as Consultant (remotely). Judge James Dever III, Chair, Professor Edward Hartnett, Reporter, and Professor Catherine Struve, Consultant (remotely), represented the Standing Committee. Judge Catherine P. McEwen participated as liaison for the Bankruptcy Rules Committee. Clerk Liaison Thomas Bruton also participated. The Department of Justice was represented by Joseph Bosen and Betsy Shapiro. Judge Robert Conrad, Director of the Administrative Office of the U.S. Courts (AO), was also in attendance. The Administrative Office was also represented by Carolyn Dubay, Sarah Sraders, and Rakita Johnson. Dr. Emery Lee and Dr. Tim Reagan (remotely) represented the Federal Judicial Center (FJC).

Welcoming Remarks

Judge Vance opened the meeting by welcoming Advisory Committee members, other participants, and observers, and thanking them for their participation and interest in the rulemaking process. Judge Vance noted that several members will be leaving the Advisory Committee before its Fall 2026 meeting. Each of them will be missed.

Judge Godbey chaired the Discovery Subcommittee and shepherded amendments designed to improve the handling of "privilege logging" in compliance with Rule 26(b)(5)(A), now in effect, and (as addressed in the agenda book) revising the method for serving subpoenas in Rule 45(b)(1).

Judge Proctor chaired the Multidistrict Litigation (MDL) Subcommittee, which produced new Rule 16.1, now in effect, and has also chaired the Third-Party Litigation Funding (TPLF) Subcommittee, which has made substantial progress in dealing with possible Civil Rule treatment of this topic.

David Burman may have set a record for subcommittee service, since he actively served on almost all of the subcommittees during his tenure on the Advisory Committee. In particular, he was a member of the Discovery Subcommittee, the MDL Subcommittee, and the Rule 43/45 Subcommittee.

Judge Vance also thanked Chief Judge Martin Reidinger, Clerk of Court Katherine Simon, and the staff of the Western District of North Carolina for their great help in organizing this meeting. In addition, she thanked the hard-working Rules Committee staff members whose arrangements ensured that the Advisory Committee could smoothly address its work.

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Opening Business

Report of the Rules Committee Staff

Carolyn Dubay reported that a new rules amendment package was delivered to the Supreme Court, but also that it did not include any civil rules. Rule 16.1 and the "privilege logging" amendments (shepherded by Judge Godbey's subcommittee) went into effect on December 1, 2025.

Sarah Sraders called attention to the legislative report beginning on page 65 of the agenda book for the meeting and noted that there had been considerable legislative activity regarding TPLF, but that this topic would be taken up in the report of the TPLF Subcommittee.

Before turning to the action items, Judge Vance reported that in January the Standing Committee approved for publication the proposed amendment to Rule 55 on default judgments. Judge Vance congratulated the Advisory Committee on its work on this proposal.

Action Items

Approval of Minutes

The draft minutes of the Advisory Committee's October 2025 meeting were in the agenda book, beginning at page 71. On motion, the Advisory Committee unanimously approved them.

Items for Final Approval

Judge Vance noted that the next six action items recommend that the Advisory Committee seek final approval of the amendments to Rules 7.1, 41(a), 45(c), 26(a)(3)(A), 45(b)(1), and 81(c)(3), all of which were published for public comment in August 2025.

Rule 7.1

The pertinent provisions of the amendment to Rule 7.1 were introduced by Judge Vance. It substitutes "business organization" for "corporation," which appears in the current rule. It also calls for disclosure when such an entity "indirectly" owns more than 10% of a party to the case. This change was a response to the "grandparent" corporation problem that caused concerns under the current rule.

The proposed amendment received few comments during the public comment period, and all but one were favorable. There was a suggestion that disclosure of third-party litigation funding be added to Rule 7.1, but that is the topic of the TPLF Subcommittee. These changes to Rule 7.1 are principally designed to assist judges in determining whether they should consider recusal.

The Rule 7.1 Subcommittee, chaired by Justice Jane Bland, recommended final adoption of preliminary draft as published. On motion, the Advisory Committee voted unanimously to recommend final adoption of the amendments to Rule 7.1 as published for public comment.

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Rule 41(a)

The proposed amendment makes it clear that the rule authorizes timely dismissal without prejudice of one or more claims even if the dismissing party does not dismiss the entire action. In addition, the amendment changes the participation required for stipulated dismissal to require stipulation only by the parties that "have appeared and remain in the action."

Judge Bissoon (Chair of the Rule 41(a) Subcommittee) noted that the rule revision proved very popular during the public comment period. During the public comment period there were, however, a number of suggested tweaks to the amendment. The subcommittee considered these proposed changes and concluded that they were unnecessary and could actually complicate practice under the amended rule. The subcommittee therefore recommended final adoption of preliminary draft as published.

On motion, the Advisory Committee voted unanimously to recommend final adoption of the amendments to Rule 41(a) as published for public comment.

Rule 45(c)

Judge Vance introduced the discussion. The proposed amendments are largely designed to reverse the outcome in the Ninth Circuit decision in *In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023). The amended rule clarifies that a subpoena for remote trial testimony can be served nationwide, so long as the witness is not required to appear at a location farther than the distance authorized in Rule 45(c)(1) to give the remote testimony. The Rule 43/45 Subcommittee recommends only one change to the published amendment proposal, and that only in the note. The note, which appears at lines 69-80 on page 119 of the agenda book, would be revised as follows:

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

Judge Hannah Lauck, Chair of the Rule 43/45 Subcommittee, noted that this small change in the note avoids the risk that the amendment might be read to place new limits on the use of remote testimony for proceedings other than trials. The question whether to revise Rule 43(a)'s current "compelling circumstances" requirement for remote testimony remains before the Rule 43/45 Subcommittee and appears later in the agenda for this meeting.

Judge Lauck outlined the subcommittee's consideration of the public comments on Rule 45(c). Various wording changes were urged, as noted in the agenda book for this meeting at pages 113-15. Except for the revision of one paragraph of the note, the subcommittee did not favor any of these changes.

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One proposal made during public comment was to defer action on this change until after the question whether Rule 43(a) would be revised is finished. Those who favored this delay did not voice opposition to the Rule 45(c) change but thought it should not happen until the Rule 43(a) revision question was resolved. But doing that would be risky and leave open the possibility that the *Kirkland* decision might cause difficulties.

There were also recommendations that the rule itself require advance approval by the court as a precondition for serving a subpoena for remote trial testimony. But that seems unnecessary; remote trial testimony is always subject to the court's approval under Rule 43(a). In addition, the proposed amendment to Rule 26(a)(3) (discussed next) alerts the parties that a party intends to call a trial witness by remote means, which should often call attention to the need for court approval. Though there may be situations in which a last-minute unforeseen problem causes the need for remote testimony (the main focus of current Rule 43(a)), except in that situation the remote trial testimony issue should not be a surprise to the court or the parties.

On motion, the Advisory Committee voted unanimously to recommend final approval of the proposed amendment to Rule 45(c) as published for public comment, with the change noted above to one paragraph of the committee note.

Rule 26(a)(3)(A)

As noted above in regard to the Rule 45(c) amendment, the preliminary draft of proposed amendments included a small change to Rule 26(a)(3)(A)(i) directing each party to specify whether any of the witnesses it "expects to present [at trial] and those it may call if the need arises" will provide remote testimony. Though there may be emergency situations in which this advance notice is impracticable, this change should be useful generally.

The amendment proposal received little comment during the public comment period, most of it favorable.

On motion, the Advisory Committee voted unanimously to recommend final approval of the proposed amendment as published.

Rule 45(b)(1)

Judge Vance introduced the proposed amendment as addressing uncertainty that sometimes resulted from the directive in current Rule 45(b)(1) that a subpoena be "delivered" to the witness. The current rule does not specify how that delivery is to occur. The amendment borrows methods authorized for service of original process under Rule 4(e)(2)(A) and (B) and adds the possibility of service by U.S. mail or commercial carrier, providing that "the selected method provides confirmation of actual receipt." In addition, the amendments would add a 14-day notice requirement (subject to change by the court) and relax the current requirement that the witness fee be tendered at the time of service, offering the alternative of tendering the fee "at the time and place the person is commanded to appear."

Judge Christoff represented the Discovery Subcommittee in the absence of Judge Godbey (who was out of the country). Many comments came from process servers, expressing misgivings about adverse consequences of adopting the amended rule.

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Judge Christoff noted that a number of public comments were considered by the subcommittee but not found to justify changes in the published amendment proposal.

Some comments raised specific issues. Some seemed to find the invocation of the terms in Rule 4(e)(2)(A) and (B) to create uncertainty. One question was whether the proposed amendment directing that "delivering a copy [of the subpoena] to the named person personally" created uncertainty—is that hand delivery or something else? But this locution had been approved by the Standing Committee Style Consultants.

Other comments worried that the term "confirmation of receipt" might cause difficulty under the proposed new Rule 45(b)(1)(A)(iii). But trying to be more specific about what exact method of confirming receipt suffices could fail to anticipate advances in technology or otherwise that would make various new methods of service suitable. (As noted below, other concerns led to a revision of the committee note discussion concerning who must be shown to have received the subpoena via U.S. mail or commercial carrier.)

Some comments expressed misgivings about the relaxation of the current requirement that the witness fee be tendered as part of the process of serving the subpoena. Some worried that—particularly in depositions—serving parties might withhold tender of the fee until satisfied with the witness's testimony. But the amended rule says that, if not tendered at the time of service, the fee must be tendered "at the time and place the person is commanded to appear." Waiting until the end of the deposition would not comply with that directive.

It was also noted that ordinarily parties serving subpoenas want the witness to appear and therefore want to be of assistance in ensuring that happens.

Regarding the 14-day notice period introduced by these amendments, there was one suggestion that the period be increased to 21 days, but the subcommittee did not decide that should be adopted.

A question was raised about the provision of (iii) that the selected method must provide "confirmation of actual receipt"—does that only apply to commercial-carrier delivery, or also to U.S. mail. The answer was that it applies to any method authorized under (iii).

A different concern about (iii) was raised, however—receipt by whom? The answer was that it should be a person on whom service is authorized under (i) or (ii); the goal of the amendment is to offer an alternative means of serving a person who must receive the subpoena under (i) or (ii).

A different question was raised about a citation in the committee note—"*Cf.* Rule 45(b)(4) (proving service of subpoena)." But Rule 45(b)(4) says that proof of service "must be certified by the server." How does that work with FedEx?

Yet another question was raised—Rule 5(b)(2)(A) says service in general involves "handing it to the person." Is that different from the proposed amendment in (i)—"delivering a copy to the named person personally"? One response was that the Rule 45(b)(1) amendments were modeled on Rule 4, not Rule 5, and Rule 4(d)(2)(A) says "delivering a copy * * * to the

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individual personally." This language (approved by the Standing Committee Style Consultants) is parallel.

Another comment raised concerns about the uncertainty about who must receive service under (iii) when done by U.S. mail or commercial carrier.

These concerns prompted the suggestion that the subcommittee caucus during the lunch break and determine how best to proceed.

During the lunch break, the subcommittee met (along with reporters and the Advisory Committee Chair). After the lunch break, Judge Christoff reported the subcommittee's views.

First, given the parallelism with Rule 4, the published rule language "delivering a copy to the person personally" seemed clear, and changing the rule amendment seemed unnecessary.

But with regard to the committee note paragraph at lines 63-71 of the agenda book, the subcommittee believes it should be changed to state explicitly that the person who must receive notice is a person identified in (i) or (ii), and also to delete the unnecessary Cf. reference to Rule 45(b)(4). Accordingly, the subcommittee recommended that paragraph should be revised as follows:

> The amendment also adds another option—service by United States mail or commercial carrier to the person's last known address, if the selected method provides confirmation of actual receipt <u>by a person identified in Rule 45(b)(1)(A)(i) or (ii)</u>. The rule does not prescribe the exact means of confirmation, but courts should be alert to ensuring that there is reliable confirmation of actual receipt. ~~*Cf.* Rule 45(b)(4) (proving service of subpoena).~~ Experience has shown that this method regularly works and is reliable.

On motion, the Advisory Committee voted to unanimously recommend final approval of the amendment as published, with the above revision to the note.

<u>Rule 81(c)(3)</u>

The amendment seeks to clarify the timing and need for a jury demand in removed cases. Presently, unless a jury demand was made before removal, a demand must be made within the time limits of Rule 38 unless "state law did not require an express demand for a jury trial," in which case a demand must be made only if the district court so orders. This provision introduced uncertainty about when a demand is required because there may be uncertainty about whether a given state is one that requires such a demand. Informal inquiry revealed that some very experienced federal judges were not certain whether such a demand is required by the state courts in their states.

The amendment requires a demand in accordance with Rule 38 unless a demand has been made before removal. But as noted in the committee note the court may, under Rule 39(b), order a jury trial even though no timely demand was made.

The proposed amendment attracted few comments, all favorable.

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On motion, the Advisory Committee unanimously voted to recommend final approval of the amendment as published for comment.

Items for Publication for Public Comment

Service and E-filing by Self-Represented Litigants

Judge Vance introduced the next item, which was a proposal that the Advisory Committee recommend for publication proposed amendments to Civil Rules 5 and 6 to address service and electronic filing by self-represented litigants. This proposal parallels proposals to be considered by the other rules committees, which, if approved, would be presented as a package to the Standing Committee in June. The proposed amendment to Civil Rule 5 would flip the default presumption from one of non-access to one of access by self-represented litigants to the court's electronic-filing system. The proposals as set out in the agenda book include bracketed language in two places.

Judge Vance first highlighted bracketed language in the committee note to proposed Civil Rule 5(d)(2)(B), agenda book page 211, lines 220-223, which states an example of a "reasonable exception" to a general rule permitting electronic filing: "For example, local provisions that require unrepresented parties who seek to use the court's electronic-filing system to obtain permission from the judge to whom the case is assigned would count as including reasonable exceptions, so long as such permission is not unreasonably withheld in practice." This language was included in the draft at the suggestion of a member of the Criminal Rules Committee. In essence, it means that a court could prohibit all self-represented parties from using the court's electronic-filing system if the court has a provision requiring self-represented litigants to obtain permission from the presiding judge—so long as that permission is not unreasonably withheld in practice. The language would recognize practices in the many district and appellate courts that now permit self-represented litigants to request permission to use the court's e-filing system. But it has been pointed out it could be difficult for a self-represented litigant to show that a court unreasonably withholds permission as a matter of practice, and it has been suggested that the language could be used to bless denying electronic-filing access to self-represented litigants in general.

Professor Marcus observed that the proposed amendments are the product of years' worth of coordinated work. What is needed at this point is public comment. Picking up on Judge Vance's observation that the proposed amendment to Civil Rule 5 would flip the default presumption from one of non-access to one of access, Professor Marcus observed that the bracketed note language made it sound as though a given judge could decide to flip the default presumption back to one of non-access. If the bracketed language stays in the draft for purposes of public comment, it could draw a lot of fire. It does not sit well with the text of the proposed rule as shown on page 207, lines 80-86. On the other hand, if the bracketed language is removed, people might argue it should be put back. Professor Marcus suggested that ultimately, the Standing Committee would need to make the judgment call.

Judge Vance requested comment on the bracketed note language. The Clerk of Court Representative suggested that the Advisory Committee should delete the bracketed language.

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The text of the rule is clear, but the bracketed note language would cause confusion among clerks of court.

A judge member asked what kind of local rule might be adopted as a prohibition on self-represented litigants' access to the court's electronic-filing system, other than the type of local rule described in the bracketed note language. Professor Marcus observed that the bracketed note language referred to "local provisions"; he said that a local rule would count as a local provision, and he observed that a court could order that a particular self-represented litigant not be allowed to use the electronic-filing system, but he suggested that the rule would not permit an individual judge (in the absence of a local rule) to adopt an individual practice of disallowing use of the electronic-filing system by all self-represented litigants appearing before that judge. Judge Vance noted that the bracketed note language pertained to proposed Civil Rule 5(d)(2)(B)(ii), which would state that

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

The bracketed note language goes to the question of what constitutes a reasonable exception. The judge member who had asked about possible local rules suggested that the note language seemed to be consistent with what the rule text is trying to accomplish.

The academic member observed that, throughout the proposed rule text, there are references to "court order or local rule," except that on page 207, lines 85-86, the proposed rule text says that a self-represented litigant "may be required to file electronically only by order in a case or by a local rule that includes reasonable exceptions." He observed that district courts manage procedure through various means, including court-wide standing orders, individual judge standing orders, and orders in a case. The language at lines 85-86, he noted, seems to permit local rules and orders in a case but not standing orders, and he wondered whether the rule text was intended to exclude the use of standing orders.

Professor Struve responded that the language was intentionally used. The current rule says that a self-represented litigant may be required to file electronically "only by court order, or by a local rule that includes reasonable exceptions." She thought it would be quite unusual for courts to be requiring unrepresented parties to file electronically in federal court, and that is something that the rules have been cautious about for years. Criminal Rule 49 does not even have the provision permitting courts to require self-represented litigants to file electronically. If a court feels that they need to be able to use a general order to require self-represented litigants to file electronically, in order to preserve the spirit of the existing rule it would need to be a general order that includes reasonable exceptions. But, she noted, none of the project participants had hitherto asserted that a court needed more flexibility to be able to compel self-represented litigants to file electronically. The provision is deliberately designed to be protective—that is, if the court is not adopting such a requirement by means of a provision that includes reasonable exceptions, then it can only do so by order in a case. By contrast, the rule text at line 83 refers to

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"a court order or local rule" because—when the question is the court's ability to opt out of the new presumption of access to the electronic-filing system—the rule is designed to afford courts flexibility to comply with the new rule in the way that best fits their circumstances, and in many courts the topic of access to the court's electronic-filing system is addressed in the court's CM/ECF order rather than solely by local rule.

On the general policy choice about whether to include the bracketed note language, Professor Struve noted that the current landscape of district-court practices includes some courts that provide self-represented litigants with access to the electronic-filing system as a matter of course; many courts that say self-represented litigants can use the electronic-filing system if they get permission; and perhaps 15 percent of courts that say self-represented litigants can never use the court's electronic-filing system. So the question is how much of the current landscape the rulemakers wish to alter. If the current note language is retained, it could reassure potential opponents of the overall change by evincing an intent to outlaw only the most extreme practice of saying, "don't even try to apply for access." The thought was that there could be more opposition to the electronic-filing amendments absent this type of reassurance to courts that are currently operating a by-permission system that they can continue using their current practice so long as they, in fact, are in good faith generally giving permission when it seems reasonable to do so. But, Professor Struve noted, the Clerk Representative's prediction that the bracketed note language could cause confusion in clerks' offices should be taken seriously. She noted that either way, there would likely be public comment on this point.

A judge liaison noted that an example of a local rule that she would consider useful would be one that says that a person will lose their right to use the court's electronic-filing system if they use the system to purport to tender payment of a mortgage, or purport to pay fake money through the system, or file a picture of a dead body that has no connection to the case.

A judge member stated that he had no strong feelings about whether to keep the bracketed note language in for purposes of publication. He stated that the language did not directly contradict the text's "reasonable exceptions" language, but that the two were in some tension: If someone were strictly following the rule text, he was not sure that they would arrive at the approach described in the bracketed note language.

Judge Vance pointed out that the draft included one other bracketed item, this one being non-controversial. It was on lines 21-22 on pages 204-05 of the agenda book, and the proposal was to include the bracketed language "by a notice of case activity" in the sentence addressing when service is complete for deadlines that run from the date of service. She asked whether anyone objected to including that language; no objection was raised.

Judge Vance asked whether there was a motion to recommend that the Standing Committee approve for publication and public comment the proposed amendments to Rules 5 and 6 as they appeared on pages 204-211 of the agenda book, including the bracketed language on lines 21-22 on pages 204-205 and including the bracketed language in the committee note on lines 220-223 on page 211 of the agenda book. The motion was made and seconded and passed unanimously.

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Privacy-Related Amendments to Rule 5.2

Judge Vance introduced this inter-committee proposal to publish proposed amendments to Rule 5.2 on privacy protections for court filings. This proposed amendment is expected to correspond with an anticipated proposal from the Criminal Rules Committee regarding Criminal Rule 49.1. Similar to the amendments related to filings by self-represented litigants, these proposals result from a project initiated by the Standing Committee in 2022 to develop updated privacy protections in parallel across the various rule sets. The other rules committees will consider whether to approve their respective privacy proposals at their spring meetings.

Sarah Sraders, Counsel to the Rules Committees, then presented the proposed amendments, which are substantially the same as those that appeared in the agenda book for the Advisory Committee's October 2025 meeting. The main thrust of the amendments is to enhance privacy protections by requiring complete redaction of Social Security numbers (SSNs), Individual Taxpayer Identification Numbers (ITINs), Adoption Taxpayer Identification Numbers (ATINs), and Employer Identification Numbers (EINs). This redaction requirement would also apply to filed exhibits and attachments. The proposed amendments would also require the use of pseudonyms rather than initials for minors. The civil, criminal, and appellate rules committees are all apparently in agreement that these proposals should go forward so that an aligned proposal covering all three rule sets may be considered for publication by the Standing Committee at its upcoming meeting in June.

The Criminal Rules Committee has taken the lead on drafting these amendments, and its subcommittee had just recently resolved a question over whether the redaction requirement should apply to EINs. The DOJ had opposed such redaction, deeming it unnecessary, but the subcommittee was persuaded that inclusion of such numbers in filings could present potential for fraud and concluded that they should be redacted. A lawyer member of the advisory committee sought more information on that decision, noting that disclosure of EINs is often required in various non-litigation settings. Ms. Sraders elaborated that EINs had sometimes been misused in an effort to commit fraud against the government. Chief Counsel to the Rules Committees Carolyn Dubay added that sometimes individuals have EINs they must use when paying household employees, and they are more vulnerable to identity theft than corporations. She added that the Bankruptcy Rules Committee may conclude that redaction of EINs is not necessary. Professor Bradt added that the Criminal Rules subcommittee had also noted that the Social Security Administration and Tax Court have begun requiring full redaction of EINs, suggesting that there may be broader concerns. Mr. Bosen, on behalf of the DOJ, noted the Department's disagreement with the decision to require redaction of the full EIN, but that this disagreement should not stand in the way of moving the proposed amendments toward publication.

A judge member asked whether there had been discussion of how to treat cases where parents bring a case on behalf of a minor, since the minor's name would be easily identifiable under such circumstances even if a pseudonym were used. Ms. Dubay reported that she was unaware of such a discussion but that she would note the issue.

Another judge member suggested making clear in the committee note that the clerks' office is not responsible for correcting a party's failure to redact personal information. Professor

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Marcus noted that failure to redact that information serves to waive the protection under Rule 5.2(h). Any other concerns are likely to come up during the public-comment period.

After a motion, the Advisory Committee unanimously voted to recommend that the Standing Committee approve the amendments for publication.

Information Items

Subcommittee Reports

Rule 43(a) Remote Trial Testimony

Judge Lauck (Chair of the Rule 43/45 Subcommittee) introduced the topic of remote trial testimony by thanking the members of the subcommittee for their untiring work on the project. The subcommittee had met four times since the Advisory Committee's October 2025 meeting and had made substantial progress.

Judge Lauck noted that at first, this project may have seemed like an easy task, since technology has changed dramatically since the current rule was adopted in 1996, when telephone was the likely mode of providing remote testimony. The caution reflected in the rule's current insistence on "compelling circumstances" to justify remote testimony reflects not only the system's central commitment to in-person, in-court testimony at trial, but also the extent to which the use of telephonic means would deprive the jury of critical information needed to evaluate that testimony. This technological state of affairs is even reflected in the dated language used in the current Rule 43(a)—"contemporaneous transmission from a different location." The amendment draft substitutes "contemporaneous remote testimony," reflecting contemporary usage.

But the subcommittee's deliberations focused on how current alternatives to the telephone now offer something much more like in-person witness testimony. And the pandemic beginning in 2020 prompted and in some instances required courts to employ the new technology in situations in which in-court proceedings would have been assumed in the past. This change was particularly notable in non-trial proceedings including motion proceedings governed by Rule 43(c).

So the subcommittee's initial approach, presented at the Advisory Committee's October 2025 meeting, sketched out in its draft committee note an appreciation that the tethers of the "compelling circumstances" standard could be loosened.

At the Standing Committee's January 2026 meeting, several members of that committee voiced serious concerns about the approach the subcommittee had presented to the Advisory Committee during the October 2025 meeting, which was included in the Advisory Committee's report to the Standing Committee. Among the concerns were (1) that the rule change could make entirely remote trials routine or the new norm; (2) that jurors cannot reliably assess credibility based on the image of the witness on a screen; (3) that coaching of the witness could be enabled; (4) that more generally there was an increased risk of improper actions that could not occur in a courtroom; (5) that some jurors might feel put upon if they had to show up in court but the witness did not; and (6) that judges would be besieged with requests for remote testimony.

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Since the Standing Committee meeting, the subcommittee has reflected carefully on these concerns. It continues to favor the same change to the rule but has significantly recast the note. From the start, the note makes clear that the amendment does not represent a retreat from the Rules' commitment to the centrality of live in-person trial testimony. It provides that the decision whether to permit remote trial testimony is entirely up to the court, even if the parties stipulate to permit remote trial testimony. The amendment does not authorize fully remote trials; rather, it provides that remote testimony should be allowed only from specific witnesses when the court finds sufficient justification, and the amendment has no effect on other aspects of trial. The note also makes clear, as was clarified in the revision to the committee note to the Rule 45(c) amendment the Advisory Committee recommended for final adoption, that the requirements of Rule 43(a) do not apply to proceedings governed by Rule 43(c).

It is important also to appreciate that ordinarily the choice between remote trial testimony and in-court trial testimony is not the real choice the court must make. Instead, that choice is between live remote testimony and deposition testimony, either by video means or by reading a transcript of a deposition. And there may be important access to justice issues in making this choice. For some litigants, the cost of a video deposition may be an obstacle in a way that remote testimony would not.

There may be questions on whether the "compelling circumstances" requirement of current Rule 43(a) has caused judges who found good cause for permitting remote trial testimony nevertheless to refuse to permit such testimony. Sarah Sraders did research on the application of that provision of Rule 43(a), and her memo is in the agenda book. She did not find case reports in which judges said the requirement prevented them from permitting remote trial testimony when they would otherwise have done so. But she did find cases in which courts said that remote testimony should not be allowed because the need for it was foreseeable, something stressed in the 1996 committee note. Judge Lauck raised the question of the weight to be given to foreseeability in determining whether to permit remote testimony.

It also bears noting that it appears that "compelling circumstances" are not required anywhere else in the Civil Rules.

The rule's separate requirement of "appropriate safeguards" would be unaffected by the removal of the "compelling circumstances" requirement. That was introduced in 1996, and the courts have now had three decades of employing it. Lawyers report that the parties are often able to agree (subject to the court's approval) on safeguards that would be appropriate in a given case. Judge Lauck reported that the subcommittee considered more than a dozen potential safeguards, only to conclude that safeguards are best determined on a case-by-case basis in light of the particularities of each case. The subcommittee thus opted not to include a list of safeguards in the note.

Judge Lauck reported that the question of juror preferences has not pointed all in one direction or the other. Some jurors may favor in-person testimony to assist them in judging credibility. But some might actually feel they can see the witness better on a screen. And in different courtrooms these factors might play out differently.

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The bottom line is that the focus of the amendment draft is on ensuring judges have discretion to make appropriate case-specific decisions about remote trial testimony. And many have said the relying on depositions as an alternative to remote live testimony—particularly if that involves reading to the jury from a written deposition transcript—is often a "jury attention killer."

The subcommittee then sought reactions from the Advisory Committee members on its recast approach to this amendment idea, particularly in light of the concerns raised by members of the Standing Committee.

An attorney member with broad trial experience reacted that "I always want to present my witnesses live in the courtroom. If the other side wants some other arrangements, I will resist." Video remote testimony is better than relying on a deposition, however. And it may be that jurors are now more comfortable with interactions via Zoom and Teams and similar methods.

A concern was raised: The draft committee note seems to invite the judge to authorize remote testimony as a way to avoid the chore of resolving disputes about what portions of the deposition testimony to admit. Specifically, the draft says that "the task of designating portions of the deposition can prove contentious, often involving the court in time-consuming review that would largely be obviated by live remote testimony." Is this an appropriate observation? The proposed change to the rule should be applauded, but the explanation should be carefully crafted.

A judge member observed that live remote testimony is preferable to trying to rely on a deposition at trial.

Another judge member observed that the proposal is a good one. In part, that is because there are not many civil trials anymore. But there are logistical concerns about safeguards. All the same, it is important to facilitate civil trials. And in-person trials should remain the gold standard. The rule's use of the verb "may" (as in the current rule) may not sufficiently stress that point.

Another concern was whether the draft note adequately makes the point that the main choice is not between in-person testimony and remote testimony, but rather between live remote testimony and relying instead on deposition testimony. That should be stressed in the note.

A judge noted that it may often be necessary to complete the process of designating deposition testimony even when the witness is expected to provide remote testimony. So there may not be that much judicial time or effort saved by authorizing remote testimony. For example, if problems of technology impede or prevent the remote testimony the parties may have to revert to relying on the depositions even though the court had authorized remote testimony.

Regarding safeguards, an attorney member reported never having had any trouble working out safeguards with opposing counsel. But the choice of appropriate safeguards differs vastly depending on the circumstances of a given case. For example, one might ask a number of questions: Should lawyers be in the room? Should the court reporter be in the room? How should the equipment be tested? Can the witness (for example, a treating doctor) be assured that the

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testimony will occur at a specific time (rather than having to wait outside the courtroom until called)?

Another attorney member noted that, due to the COVID experience, many depositions now occur remotely. As a consequence, there is now much more experience with safeguard issues than was true in 1996, although perhaps mainly for depositions. That experience ought to inform the handling of remote trial testimony, even though that is a different creature from a deposition.

Another attorney member observed that these safeguard issues get worked out. Indeed, they are commonplace in arbitrations, which are increasingly popular.

Another concern was raised—the "apex witness" concern. Could this amendment invite strategic use of the remote testimony option to pressure a company or governmental agency with the prospect that the CEO would have to provide remote testimony? An attorney responded that a lawyer seeking to justify such testimony will have to win that battle, and also that if the court is unpersuaded by the company's argument that the testimony ought not be required (i.e., that the subpoena be quashed) the company may "beg" to have to CEO provide the testimony remotely rather than in person in the courtroom.

A final point was that three footnotes in the agenda book call attention to issues on drafting of the note that the subcommittee will continue to ponder as it moves forward. The subcommittee will continue its work.

Third Party Litigation Funding (TPLF)

Judge Proctor (Chair of the TPLF Subcommittee) introduced the topic of third-party litigation funding by thanking Professor Marcus and the subcommittee members, who have been working continuously since the subcommittee was created in October 2024. He specifically cited Dean Clopton's effort at ensuring that a diverse subset of the subcommittee has undertaken a "listening tour" to various conferences, events, and symposia on this subject. Judge Proctor also cited the assistance and support of the Rules Committee staff.

As Judge Proctor noted, to varying degrees, the issue of TPLF has been before the Advisory Committee for over a decade, including in connection with various disclosure rules and multidistrict litigation. Moreover, Congress has remained interested in the topic, though no legislation has yet passed. Some districts have also been experimenting with rules requiring disclosure of TPLF, including the District of New Jersey, whose experience Emery Lee is helping the subcommittee to understand.

For its part, the subcommittee's work has been vigorous and intentional when it comes to developing an understanding of how the funding industry works. One thing it learned is that this industry is constantly and rapidly evolving, and the subcommittee has received helpful assistance from many knowledgeable parties to understand how it operates today and how it might change.

That said, unlike Congress or state legislatures, the Advisory Committee's focus is not on whether TPLF is "good or bad," since such a policy judgment would be beyond its ambit. Rather, the subcommittee has been focused on a potential disclosure rule and what it might look like. As

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the agenda book notes, however, even a disclosure rule presents challenging questions about its scope. Among such questions are: what sorts of agreements should trigger disclosure, what should be disclosed and to whom, and what discovery should be available following such disclosure? The challenge is to draft a rule that accounts for all of the nuances and varying circumstances of TPLF while also anticipating how rapidly the industry is changing. Judge Proctor then turned to subcommittee members for any additional comments.

One lawyer member noted that any rule should be tailored to the real-world problem it seeks to solve. We have heard many different concerns about TPLF, including interference by foreign funders, provisions that wrest control of cases from lawyers and their clients, and whether lawyers reliably have the authority to settle cases when funders are involved. In this member's view, it is important that the Advisory Committee focus on whether a rule will actually facilitate better case management or instead makes a policy judgment about the desirability of TPLF.

An academic member of the subcommittee added a concern about whether a trans-substantive procedural rule can adequately address the particular issues TPLF raises in different kinds of cases. The problem may be different, for instance, in patent versus mass-tort cases.

Professor Marcus then added his observation from both his research and attendance at various conferences that the subcommittee has encountered "diametrically opposed narratives from the defense bar on the one hand and the commercial funding industry on the other. Here we are in the crossfire." He also added that there is activity in state legislatures addressing this problem, including in California.

Judge Proctor then turned to the full Advisory Committee members for their thinking on the subject to assist the subcommittee in developing next steps. One judge member responded that the subcommittee is on the right track and expressed interest in what a disclosure rule might look like but added that anything beyond disclosure is likely beyond the committee's rulemaking authority.

Judge Proctor then sought feedback on a more specific question: under a proposed disclosure rule, to whom should the disclosure be made? To the court, the court and the parties, to the public on the docket? A judge member responded that, in her view, such a disclosure should be to both the court and the parties so everyone can know who the relevant players are when it comes to settlement discussions. Professor Marcus followed up by asking whether the disclosure should lead to discovery related to the evolution of the terms of the funding agreement. The judge responded that this should not be a worry, and if there is a reason the facts surrounding the agreement are relevant, they should be discoverable.

An attorney member then raised a different issue: if the agreement is disclosed, the opposing party may learn how much money is available, knowledge that can provide substantial leverage in settlement negotiations and potential for abuse. A judge member noted, however, that all litigation has potential for an unlevel playing field that could affect results, and it is not the judge's role to try to correct for that.

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A lawyer member noted that a similar dynamic is created by the requirement that insurance contracts be disclosed, though TPLF is somewhat different. One concern, however, is what the judge should be expected to do with the disclosure, as it does not affect the merits of the case and could lead to "picking sides" between the parties.

Judge Vance then inquired whether the committee members could comment on their experience with respect to the allegation that, in mass-tort cases, TPLF leads to the filing of large numbers of unvetted and frivolous claims. An attorney member responded that the landscape was more complex than a funder providing funds for a particular litigation. Rather, a funder might provide an attorney funding for a litigation, but the collateral might be an interest in other litigations in that attorney's portfolio. This creates complexity when it comes to disclosures— in the attorney's cases that serve as the collateral for the funder's loan, must the agreement be disclosed? Must the entire funding scheme for the firm be disclosed?

Judge Proctor recounted a lawyer's anecdote of funders' providing millions to a small firm to file cases in mass tort litigation that the lawyers had no idea how to handle. Judge Proctor said there were situations like that and the control question is one argument for disclosure because judges may not be aware of these issues in their cases.

Another judge member asked whether a disclosure rule would serve as a deterrent from seeking TPLF, and if so, whether that is a proper goal for rulemaking? Judge Proctor responded that encouraging or deterring TPLF has never been the goal of this effort, though either could be an effect of a disclosure rule. Another judge member of the subcommittee added that whether the rule causes more or less TPLF has never been a topic of discussion of the subcommittee.

Professor Marcus then asked whether there is any question that under current law, a judge may require disclosure of a TPLF agreement in an individual case. One judge member responded that it is clear that a judge may order such disclosure because of ethical considerations, and a judge may require a funder to be available for a settlement conference if need be. Judge Proctor agreed that the judge can always ask questions about such agreements.

The subcommittee will continue its efforts and report its progress at the October meeting.

Other Matters Under Consideration

Rule 23—Class Actions

Professor Bradt explained that the reporters had been monitoring developments on the three Rule 23 proposals that the Advisory Committee had discussed at its October 2025 meeting and remain on the agenda: service awards for class representatives, pre-certification approval of settlements by putative class representatives, and whether the superiority requirement of Rule 23(b)(3) should be amended to include explicit consideration of privately administered out-of-court remedies. He added that there had been two developments since the October meeting that the Advisory Committee should be apprised of: the reaction of the Standing Committee to these proposals at its most recent meeting, in January 2026; and the several recent submissions to the Advisory Committee in support of amending the superiority requirement that have been received since the agenda book was published.

With respect to the Standing Committee, Professor Bradt reported that its enthusiasm for these particular projects was limited, in part because members recognize the potential scope of a Rule 23

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project and the time and resources it would consume. It is illustrative that one lawyer member of the Standing Committee who typically represents plaintiffs and another lawyer member who typically represents defendants agreed on this score, while also noting that if the Advisory Committee were to take up Rule 23 each would have several more issues with the rule they considered more important to examine than the three already on the Advisory Committee's agenda. Professor Bradt noted that in light of the continuous debate about Rule 23, which has moved in new directions since the Supreme Court's decision regarding nationwide injunctions in *Trump v. CASA*, it may be difficult to cabin a Rule 23 project to any discrete set of proposals. He also noted, however, that the Advisory Committee had received several suggestions regarding the specific "superiority" question, indicating some momentum in favor of close study of that issue.

In light of these developments, Professor Bradt sought Advisory Committee feedback on its enthusiasm for taking on Rule 23 now, as opposed to continuing to monitor developments on these and other related issues in order to potentially return to them later. Professor Marcus added, as a "caution," that any Rule 23 project would be "work-heavy," but history suggests that such work might not yield significant results. A judge member of the committee noted that if there are other Rule 23 issues that practitioners feel are more important, perhaps the Advisory Committee's time would be better spent on those. A lawyer member agreed. An academic member did, too, adding his view that "I've got five other Rule 23 issues I'd put in front of these."

Another lawyer member cautioned, however, that this is an important area of law that "has significant impacts nationwide" and that class actions should remain on our agenda. But this member also opined that the Advisory Committee should focus on wrapping up its work on third-party litigation funding before tackling Rule 23. Professor Bradt noted that he and Professor Marcus, as co-authors of a casebook on Complex Litigation, would be monitoring the area closely. He added that the new edition of the Manual for Complex Litigation would likely soon be published, and that, too, might provide clarity on the path forward for Rule 23. The reporters will continue to monitor these proposals and will report again at the fall meeting.

Fair Labor Standards Act Collective Actions

Professor Bradt reported on a proposal submitted by former Advisory Committee member Judge Michael Baylson (E.D. Pa.) focused on providing guidance for "hybrid" actions that include collective-action claims brought under the federal Fair Labor Standards Act (FLSA) and class-action claims brought under state law and governed by Rule 23. There are numerous differences between collective actions and class actions that create management challenges, but the most important is that parties to collective actions under the FLSA must "opt in," while members of a class certified under Rule 23(b)(3) are bound unless they timely "opt out." The reporters sought feedback from the committee regarding how much of a challenge these cases create, whether such challenges can be handled using the case-management tools available under Rules 16, 16.1, and 23, and whether a rule-based solution seemed worth investigating. Advisory Committee members did not view such a project as promising at this time, and, after a motion, the Advisory Committee unanimously voted to drop this item from the agenda.

Right of Representative at Rule 35 Examinations

Professor Marcus reported on a proposal from the American Association for Justice that would entitle a party subject to an examination under Rule 35(a) to have a representative present at the examination or to record the examination. Several states have modified their rules in a similar manner, allowing a representative of the examined party to have a representative present who may observe, but not disrupt, the examination, and/or record it. These changes respond to complaints of harassment or bias by

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the examiner selected by the opposing party. Professor Marcus sought feedback from committee members on the importance of the issue and whether to investigate a rule change.

One judge member reported that the issue had never come up in 22 years on the bench; another judge member agreed that the issue had not come up in 33 years. But a lawyer member disagreed, having recently tried a case in California, which allows a lawyer to observe the examination, which is also recorded by a court reporter. This member expressed gratitude for the opportunity to have a lawyer in the room for his client's examination by the opposing party's psychiatrist, who had strategized with counsel for 15 hours, read from a script, and asked leading questions. In this case, the party had been a victim of abuse, and the doctor was "going after her." The member reported that, due to the recording, he was able to use the transcript to cross-examine the doctor and "help rehabilitate the plaintiff on redirect." Another lawyer member added that examinations sometimes happen in state courts "by ambush" without a lawyer present. Judge Vance noted that Rule 35 would prevent such an ambush in a federal case, but the lawyer member responded that for very vulnerable parties, being examined without a lawyer present could be traumatizing and without a recording there is no record.

Professor Bradt noted that any such project would also necessarily require reexamining the provisions of Rule 35(b) addressed to exchange of examiners' reports and the effect on any applicable privilege.

Another lawyer member noted that under the current rule, a judge could make an individualized determination to allow a lawyer to be present or record the examination, so perhaps this would be an example of making a new rule that informs a judge of a power that already exists.

Given the level of interest in this topic, Professor Marcus suggested that the next step would be research on the various approaches taken by the states. Emery Lee of the FJC volunteered to reach out to the National Center for State Courts to see if they have any information. Further research on Rule 35 in the federal courts will be useful, as well. The reporters will further update the committee at the fall meeting.

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Artificial Intelligence Hallucinations

Professor Marcus presented the next item, two proposals to the Advisory Committee addressed to "hallucinations" of cases by Artificial Intelligence (AI) that lawyers erroneously insert into court filings. This has become a widespread issue in these early days of legal AI, and several such incidents have been widely reported (as they have in all sorts of other fields grappling with the introduction of AI technology). Professor Marcus noted that the Evidence Rules Committee had been focusing on AI with respect to its own potential new Rule 707, which remains under study. The basic question for this committee is whether AI hallucinations of nonexistent authority require a new rule, or whether current Rule 11(b)(2), which requires a certification that "after an inquiry reasonable under the circumstances . . . legal contentions are warranted by existing law or by a nonfrivolous argument" for changing the law. Professor Marcus added that after publication of the agenda book, the Fifth Circuit reported that it had considered and declined to adopt a specific rule related to AI on the ground that sanctions for such "hallucinations" are adequately covered by Federal Rule of Appellate Procedure 46(c). *See Fletcher v. Experian Info. Solutions, Inc.*, 168 F.4th 231 (5th Cir. 2026).

The Advisory Committee agreed that rulemaking would not be appropriate at this time, while also recognizing that AI may return to the agenda as warranted. After a motion, the Advisory Committee unanimously voted to drop this item from the agenda.

Rule 58—Separate Document Requirement

Judge Vance then turned to Professor Bradt and Professor Cooper to discuss a proposal to add district-court orders appealable under the collateral-order doctrine to the list of orders exempt from the "separate document" requirement of Rule 58. Professor Bradt noted that this was an especially complex problem that the Advisory Committee had last addressed in 2002 in concert with the Appellate Rules Committee.

In short, the problem is this: Rule 54(a) defines a "judgment" to include "any order from which an appeal lies." In order to avoid confusion about when the 30-day time window for filing a notice of appeal under Appellate Rule 4(a) opens, Rule 58(b) requires that a "separate document" be entered on the docket. For a final judgment after a jury verdict or otherwise disposing of a case, Rule 58(c) is straight-forward—the window for filing a notice of appeal opens when the separate document is entered on the docket. If the district court entirely fails to comply with the separate document requirement, then the 30-day clock to appeal does not start running until 150 days after the entry of the judgment (that is, the appealable order) on the docket.

In 2002, this committee and the Appellate Rules Committee undertook a joint project to deal with what the subsequent committee note referred to as "horridly confused problems" created by the interaction between time limits for post-trial motions, Appellate Rule 4, and the separate document requirement. The result of that multi-year project was amended Rule 58(a), which exempts certain orders from the separate-document requirement, such that the 30-day clock to appeal starts running when these orders are entered on the docket. These exempt orders are those disposing of a motion: for judgment under Rule 50(b); to amend or make additional findings under Rule 52(b); for attorney's fees under Rule 54; for a new trial, or to alter or amend the judgment, under Rule 59; or for relief under Rule 60.

The proposed amendment would add interlocutory orders that are appealable under the collateral-order doctrine to the list of orders exempt from the separate-document requirement. In particular, the concern is with orders denying defendants' dispositive motions asserting a defense of qualified immunity. Although such orders are immediately appealable, district courts rarely file a "separate document" on the docket, meaning it is unclear when the 30-day window to appeal begins to run. The proponent of the amendment brought a circuit split to the Advisory Committee's attention on this question, though Professor Bradt noted that his research had revealed few such cases addressing the issue in the district or circuit courts, perhaps because it is rarely in such a defendant's interest not to appeal immediately in order to capture the benefits of the collateral-order doctrine, including often a stay of the litigation in the district court.

As the committee note to the 2002 amendments to Rule 58 explains, this is not a new problem, and "[d]rastic surgery on Rules 54(a) and 58 would be required to address this and related issues." Professor Cooper then elaborated on his experience as reporter during the effort that resulted in the 2002 amendments. He first noted that any effort to amend Rule 58 must be undertaken with the Appellate Rules Committee, and that any such effort should be based on real-world problems and not the more theoretical issues with the rule, which have long been apparent. Professor Cooper also noted that reopening the Rule 58 question would require

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rethinking questions of forfeiture of such an appeal from a final judgment. All told, Professor Cooper noted, "it's a messy swamp."

Judge Vance then turned to the committee to seek feedback on the degree to which these problems had arisen in practice. One appellate judge member noted that he had not had occasion to address any timeliness questions when it comes to immunity defenses. Professor Hartnett suggested that, in his view, the issues with the rule may be solvable, but the effort is worthwhile only if there is a big enough problem. He suggested reaching out to the reporter of Appellate Rules to solicit his views. Professor Bradt agreed to do so and report back to the Advisory Committee.

Attorney Admissions

Judge Vance then turned to Professors Struve and Bradt for an oral report on the intercommittee subcommittee considering proposals for unified district-court bar admission. Professor Bradt reported that the subcommittee had most recently met in February. He reported that after three years' worth of research, outreach, and deliberation, the subcommittee had unanimously voted to recommend to the Standing Committee that it not move forward with this proposal. Reaction to the proposals in the various advisory committees was mixed at best, and in some cases quite negative. As a result, the subcommittee concluded that the time had come to suggest dropping the proposal from the Standing Committee agenda. A judge member of the Advisory Committee who was also a member of the attorney-admissions subcommittee added her view that this was a "tremendous effort" and that the subcommittee "explored it extremely thoughtfully."

Recommendations to Drop From the Agenda

"Algorithmic Spoliation"

Professor Marcus noted that this proposal focuses on how certain data systems' algorithms might delete or alter data automatically—a kind of spoliation without specific intent. The proposal is vague but appears to suggest changing Rule 37(e) to account for this phenomenon in some way. Professor Marcus noted, however, that current Rule 37(e) and its accompanying committee note were drafted in order to adapt to new technology and currently equip a district judge to respond to this concern in a specific case, should it arise. After a motion, the Advisory Committee unanimously voted to drop this item from the agenda.

Protective Order "Templates"

This proposal raises a concern about templates for protective orders provided by the Northern District of California and other districts intended to assist litigants. The proponent views such forms as coercive and beyond the power of districts to provide. The proponent also raises more familiar concerns about alleged overuse of protective orders generally. One attorney member noted that the template appeared to be both legally accurate and carefully crafted. Professor Marcus agreed and noted that such forms and templates are likely to be especially useful for self-represented litigants. After a motion, the Advisory Committee unanimously voted to drop this item from the agenda.

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Mandatory Assistance for Pro Se Litigants

Professor Marcus presented this proposal, which would create a new Rule 83.1 that would provide mandatory administrative assistance to self-represented litigants in complying with procedural rules and deadlines. Although it may be desirable to improve and increase legal services available to civil litigants who cannot afford an attorney, it would be difficult to fit this proposal within the limits imposed by the Rules Enabling Act and would likely be regarded by district courts as an unfunded mandate. While this proposal does identify a serious problem, it does not seem to be one that this committee can solve through a rule amendment. After a motion, the Advisory Committee unanimously voted to drop this item from the agenda.

Update

Report from the Federal Judicial Center

Tim Reagan, the FJC liaison to the Standing Committee, reported (via Teams) to the Advisory Committee on recent FJC activities. He referred members to the agenda materials but highlighted a forthcoming video on how some district courts facilitate electronic filing by self-represented litigants, whether through CM/ECF or other means. Emery Lee, the FJC liaison to the Advisory Committee, added that the FJC is available to provide assistance or information about materials and programs. Judge Vance thanked the FJC for its important contributions to the Advisory Committee's work.

Judge Vance then adjourned the meeting.

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

Rule 7.1. Disclosure Statement

(a) Who Must File; Contents.

(1) ***Nongovernmental*** ~~***Corporations***~~ ***Business Organizations***. A nongovernmental ~~corporate~~ business organization that is a party or ~~a nongovernmental corporation~~ that seeks to intervene must file a statement that:

(A) identifies any parent ~~corporation~~ business organization and any publicly held ~~corporation~~ business organization ~~owning~~ that directly or indirectly owns 10% or more of ~~its~~ ~~stock~~ it; or

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

(B) states that there is no such ~~corporation~~ business organization.

* * * * *

Committee Note

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

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

Second, the rule is amended to require disclosure of business organizations that "directly or indirectly own 10% or more of" a party, whether or not that ownership interest is formally denominated as stock. Such a direct or indirect owner is presumed to hold a sufficient interest in a party to raise a rebuttable presumption that a judge's financial interest in the owner extends to the party, warranting recusal. *See* U.S. Judicial Conference, Guide to Judiciary Policy § 220, Committee on Codes of Conduct, Advisory Opinion No. 57: Disqualification Based on a Parent-Subsidiary

Relationship (Feb. 2024). Under the amended rule, a party must disclose not only a parent business organization but also any publicly held business organization that is a grandparent, great-grandparent, or other corporate relative that owns 10% or more of a party, whether directly or through another business organization. The requirement to disclose "indirect" owners of 10% or more of a party is a pragmatic effort to better inform judges of circumstances when their financial interests may be affected by a litigation or when further inquiry into the ownership interests in a party is appropriate.

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

Changes Made After Publication and Comment

No changes were made after publication and comment.

Summary of Public Comment

A summary of public comment can be found on pages 96-97 of the April 14, 2026 Agenda Book for the Advisory Committee on Civil Rules.

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

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

* * * * *

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

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

(i) the name and~~,~~ (if not previously provided)~~,~~ the address and telephone number

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of each witness—separately identifying those the party expects to present and those it may call if the need arises, and whether the testimony will be in person or remote;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

* * * * *

Committee Note

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

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

Changes Made After Publication and Comment

No changes were made after publication and comment.

Summary of Public Comment

A summary of public comment can be found on pages 141-142 of the April 14, 2026 Agenda Book for the Advisory Committee on Civil Rules.

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

Rule 41. Dismissal of Actions or Claims

(a) Voluntary Dismissal.

(1) ***By ~~the~~ a Plaintiff.***

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, ~~the~~ a plaintiff may dismiss ~~an~~ its action or one or more of its claims without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have

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appeared and remain in the action.

* * * * *

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

* * * * *

Committee Note

Rule 41 is amended in two ways. First, Rule 41(a) has been amended to add language clarifying that a plaintiff may voluntarily dismiss "one or more of its claims" in a multi-claim case. A plaintiff may accomplish dismissal of either its action or one or more of its claims unilaterally prior to an answer or motion for summary judgment by a party opposing that claim, or by stipulation or court order. Some courts interpreted the previous language to mean that only an entire case, *i.e.* all claims against all defendants, or only all claims against one or more defendants, could be dismissed under this rule. The language suggesting that voluntary dismissal could only be of an entire case has remained unchanged since the 1938 promulgation of the rule. In the intervening years, multi-claim and multi-party cases have become more typical, and courts are now encouraged to both simplify and facilitate settlement of cases. The amended rule is therefore more consistent with widespread practice and the general policy of narrowing the issues during pretrial proceedings. This amendment to Rule 41(a), permitting voluntary dismissal of a claim or claims, does not affect the operation of Rule 41(d), whose applicability is limited to situations when the plaintiff has previously dismissed an entire action.

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

provide both sufficient notice to those actively involved in the case and better facilitate formulating and simplifying the issues and eliminating claims that the parties agree to resolve.

Changes Made After Publication and Comment

No changes were made after publication and comment.

Summary of Public Comment

A summary of public comment can be found on pages 106-110 of the April 14, 2026 Agenda Book for the Advisory Committee on Civil Rules.

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

Rule 45. Subpoena

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(b) Service.

(1) ~~***By Whom and How; Tendering***~~ ***Means; Notice Period;*** ***Fees.***

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

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

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

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suitable age and discretion who resides there;

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

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

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

otherwise, the subpoena must be served at least 14 days before the date on which the person is commanded to attend. In addition, the party serving the subpoena must tender~~ing~~ the fees for 1 day's attendance and the mileage allowed by law at the time of service, or at the time and place the person is commanded to appear. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies.

Committee Note

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

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

The amendment also adds another option—service by United States mail or commercial carrier to the person's last known address, if the selected method provides confirmation of actual receipt by a person identified in Rule 45(b)(1)(A)(i) or (ii). The rule does not prescribe the exact means of confirmation, but courts should be alert to ensuring that there is reliable confirmation of actual receipt. Experience has shown that this method regularly works and is reliable.

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

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

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

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

Changes Made After Publication and Comment

The committee note was revised to clarify who must receive service by United States mail or commercial carrier. The reference to Rule 45(b)(4) in that same paragraph was also removed to avoid confusion as to what Rule 45(b)(4) requires.

Summary of Public Comment

A summary of public comment can be found on pages 160-183 of the April 14, 2026 Agenda Book for the Advisory Committee on Civil Rules.

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

Rule 45. Subpoena

* * * * *

(c) Place of Compliance.

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

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

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

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

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

(ii) is commanded to attend a trial and would not incur substantial expense.

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

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

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

* * * * *

Committee Note

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

Since the 2013 amendments, however, some courts have concluded that they are without authority to command witnesses to provide remote trial testimony because the witnesses are not within the "subpoena power" of the presiding court. *See, e.g., In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023) (holding that a subpoena can compel remote trial testimony from a witness only if the witness resides or transacts business in person within 100 miles of the court or within the state in which the court sits). Questions have also been raised about whether a subpoena can compel a nonparty to provide discovery if the nonparty witness is located outside the geographical scope of the subpoena power to command the witness to appear in court. *See, e.g., York Holding, Inc. v. Waid*, 345 F.R.D. 626 (D. Nev. 2024) (rejecting the argument that a Nevada district court subpoena could not command production of documents within 100 miles of the nonparty's place of business in New Hampshire).

This amendment clarifies that the court's subpoena power for in-court testimony or to provide discovery extends nationwide so long as a subpoena does not command the

witness to travel farther than the distance authorized under Rule 45(c)(1), which provides protections against undue burdens on persons subject to subpoenas. It specifies that, for purposes of Rule 45(c)(1), the witness "attends" at the place where the person must appear to provide the remote testimony. For purposes of Rule 43 and Rule 77(b), such remote testimony occurs in the court where the trial or hearing is conducted.

The amendment does not alter the standards for deciding whether to permit in-court remote trial testimony. Instead, it applies to any subpoena for witness testimony. Rule 43(a) authorizes remote trial testimony but depends on court permission for such testimony.

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

Changes Made After Publication and Comment

The committee note was revised to avoid suggesting that the Rule 43(a) standard for remote testimony at trial applies to motion hearings or other proceedings. A cross-reference to the amendment being made to Rule 26(a)(3)(A)(i) was also removed from the committee note to avoid potential confusion about that amendment. In addition, two words ("or hearing") were mistakenly included in the preliminary draft of Rule 45(c)(1)(B)(ii) that are not in the rule. There was no intention to change the existing provision and the mistake has been corrected.

Summary of Public Comment

A summary of public comment can be found on pages 126-133 of the April 14, 2026 Agenda Book for the Advisory Committee on Civil Rules.

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

Rule 81. Applicability of the Rules in General; Removed Actions

* * * * *

(c) Removed Actions.

(1) ***Applicability***. These rules apply to a civil action after it is removed from a state court.

* * * * *

(3) ***Demand for a Jury Trial.***

(A) *Before Removal* ~~*As Affected by State Law*~~. A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal.

(B) *After Removal.* If no demand has been made before removal, Rule 38(b)

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

governs a demand for a jury trial. If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38(b) must be given one if the party serves a demand within 14 days after:

~~If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.~~

~~**(B)** ***Under Rule 38.*** If all necessary pleadings have been served at the

~~time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 14 days after:~~

(i) it files a notice of removal; or

(ii) it is served with a notice of removal filed by another party.

* * * * *

Committee Note

Rule 81(c) is amended to remove uncertainty about when and whether a party to a removed action must demand a jury trial. Prior to 2007, the rule said no demand was necessary if the state court "does" not require a jury demand to obtain a jury trial. State practice on jury demands varies, and it appears that in at least some state courts no demand need be made, although it is uncertain whether those states actually guarantee a jury trial unless the parties affirmatively waive jury trial. In other state courts, a jury demand is required, but only later in the case than the deadline in Rule 38 for demanding a jury trial. A number of states have rules similar to Rule 38, but time limits for making a jury demand differ from the time limit in Rule 38.

This amendment is designed to remove uncertainty about whether and when a jury demand must be made after

removal. It explicitly preserves the right to jury trial of a party that expressly demanded a jury trial before removal. But otherwise it makes clear that Rule 38 applies to removed cases. If all pleadings have been served at the time of removal, the demand must be made by the removing party within 14 days of the date on which it filed its notice of removal, and by any other party within 14 days of the date on which it was served with a notice of removal. If further pleadings are required, Rule 38(b)(1) applies to the removed case.

When no demand has been made either before removal or in compliance with Rule 38(b), the court has discretion under Rule 39(b), on motion, to order a jury trial on any issue for which a jury trial might have been demanded.

The amendment removes the prior exemption from the jury demand requirement in cases removed from state courts in which an express demand for a jury trial is not required. Courts no longer have to order parties to cases removed from such state courts to make a jury demand; the rule so requires.

Changes Made After Publication and Comment

No changes were made after publication and comment.

Summary of Public Comment

A summary of public comment can be found on page 192 of the April 14, 2026 Agenda Book for the Advisory Committee on Civil Rules.