COMMITTEE ON
RULES OF PRACTICE AND PROCEDURE

June 10, 2025

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

June 10, 2025

AGENDA

1. Opening Business

A. Welcome and Opening Remarks – Judge John D. Bates, Chair

B. **ACTION:** The Committee will be asked to approve the minutes of the January 2025 Committee meeting.

C. **ACTION:** Strategic Planning. This agenda item asks the Committee to identify any suggested edits to the draft Strategic Plan for the Federal Judiciary for 2025-2030 before it is submitted to the Judicial Conference for consideration at its September 2025 session.

2. Action Items – Reports of the Advisory Committees

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

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

- Rule 801(d)(1)(A) (Definitions That Apply to This Article; Exclusions from Hearsay) regarding hearsay exemption for prior inconsistent statements

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

- Rule 609(a)(1)(B) (Impeachment by Evidence of a Criminal Conviction) regarding impeachment of witnesses with prior convictions.
- New Rule 707 regarding artificial-intelligence, machine-learning, and the admissibility of evidence.

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

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

- Rule 29 (Brief of an Amicus Curiae).
- Rule 32 (Form of Briefs, Appendices, and Other Papers).
- Appendix on Length Limits.

- Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis).

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

- Rule 15 (Review or Enforcement of Agency Order).

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

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

- Rule 3018 (Chapter 9 or 11—Accepting or Rejecting a Plan).
- Rules 9014 (Contested Matters), 9017 (Evidence), and New Rule 7043 (Taking Testimony).
- Rules 1007(c) (Time to File), 5009 (Closing a Chapter 7, 12, 13, or 15 Case; Declaring Liens Satisfied), and 9006 (Computing and Extending Time; Motions).
- Rule 2007.1 (Appointing a Trustee or Examiner in a Chapter 11 Case)
- Rule 3001 (Proof of Claim).
- Official Form 410S1 regarding notice of mortgage payment change.

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

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

D. **Advisory Committee on Civil Rules** – Judge Robin L. Rosenberg, Chair

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

- Rule 7.1 (Disclosure Statement).
- Rule 45(b)(1) (Service of Subpoena).
- Rule 45(c) (Subpoena); Clarification to Rule 26(a)(3)(A)(i) (Pretrial Disclosures).
- Rule 41(a) (Dismissal of Actions).

June 10, 2025

AGENDA

E. **Advisory Committee on Criminal Rules** – Judge James C. Dever III, Chair

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

- Rule 17 (Subpoena).

3. Information Items – Reports of the Advisory Committees

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

- Report regarding consideration of Rule 901(c), to govern the admissibility of evidence generated by artificial intelligence.
- Report regarding consideration of suggestion for proposed amendments to Rule 801(d)(2)(E) (Definitions That Apply to This Article; Exclusions from Hearsay).
- Report on suggestions to amend Rule 902 (Evidence That Is Self-Authenticating) to add a reference to federally-recognized Indian tribes.

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

- Report on research regarding intervention on appeal.
- Report on suggestion to amend Rule 4 (Appeal as of Right – When Taken) regarding reopening time to appeal.
- Report on suggestion to amend Rule 15 (Review or Enforcement of Agency Order) regarding review of agency actions.
- Report on suggestion to amend Rule 8 (Stay or Injunction Pending Appeal) to address administrative stays.
- Report regarding suggestion to amend Rule 26 (Computing and Extending Time) concerning time computation.

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

- Report regarding withdrawal of proposed amendment to Rule 1007(h).
- Report regarding two suggestions to allow masters to be used in bankruptcy cases and proceedings.

D. **Advisory Committee on Civil Rules** – Judge Robin L. Rosenberg, Chair

- Report on possible national standard or rule regarding filing under seal.
- Report on Rules 43 and 45 and the criteria for permitting remote testimony.

- Report on third party litigation funding suggestions.
- Consideration of issues related to cross border discovery.
- Report on Rule 55 default and default judgment practices.
- Report on random case assignment and monitoring local court changes related to recent Judicial Conference guidance.

E. **Advisory Committee on Criminal Rules** – Judge James C. Dever III, Chair

- Report on suggestion to amend Rule 49.1 (Privacy Protection For Filings Made with the Court) regarding reference to minors by pseudonyms.
- Report on suggestions to amend Rule 40 (Arrest for Failing to Appear in Another District or Violating Conditions of Release Set in Another District).
- Report on suggestion to amend Rule 43 (Defendant's Presence) to expand use of video conferencing.
- Report on suggestions to amend Rule 15 (Depositions).

4. Joint Committee Business

- Report on electronic filing by self-represented litigants.
- Report of joint subcommittee on attorney admission.
- Report on privacy rule issues.

5. Other Committee Business

A. Status of Rules Amendments

- Report on rules adopted by the Supreme Court and transmitted to Congress on April 24, 2025 (potential effective date of December 1, 2025).

B. Legislative Update.

C. Next Meeting – January 6, 2026.

RULES COMMITTEES — CHAIRS AND REPORTERS

Committee on Rules of Practice and Procedure
(Standing Committee)

Chair	Reporter
Honorable John D. Bates United States District Court Washington, DC	Professor Catherine T. Struve University of Pennsylvania Law School Philadelphia, PA

Secretary to the Standing Committee

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

Advisory Committee on Appellate Rules

Chair	Reporter
Honorable Allison H. Eid United States Court of Appeals Denver, CO	Professor Edward Hartnett Seton Hall University School of Law Newark, NJ

Advisory Committee on Bankruptcy Rules

Chair	Reporter
Honorable Rebecca B. Connelly United States Bankruptcy Court Harrisonburg, VA	Professor S. Elizabeth Gibson University of North Carolina at Chapel Hill Chapel Hill, NC

Associate Reporter

Professor Laura B. Bartell
Wayne State University Law School
Detroit, MI

Advisory Committee on Civil Rules

Chair	Reporter
Honorable Robin L. Rosenberg United States District Court West Palm Beach, FL	Professor Richard L. Marcus University of California College of the Law, San Francisco San Francisco, CA
	Associate Reporter
	Professor Andrew Bradt University of California, Berkeley Berkeley, CA

Advisory Committee on Criminal Rules

Chair	Reporter
Honorable James C. Dever III United States District Court Raleigh, NC	Professor Sara Sun Beale Duke University School of Law Durham, NC
	Associate Reporter
	Professor Nancy J. King Vanderbilt University Law School Nashville, TN

Advisory Committee on Evidence Rules

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

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
(Standing Committee)

Chair	Reporter
Honorable John D. Bates United States District Court Washington, DC	Professor Catherine T. Struve University of Pennsylvania Law School Philadelphia, PA

Members

Honorable Paul J. Barbadoro United States District Court Concord, NH	Elizabeth J. Cabraser, Esq. Lieff Cabraser Heimann & Bernstein, LLP San Francisco, CA
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Honorable Joan N. Ericksen United States District Court Minneapolis, MN	Honorable Stephen A. Higginson United States Court of Appeals New Orleans, LA
Honorable Edward M. Mansfield Iowa Supreme Court Des Moines, IA	Dean Troy A. McKenzie New York University School of Law New York, NY
Honorable Patricia A. Millett United States Court of Appeals Washington, DC	Andrew J. Pincus, Esq. Mayer Brown LLP Washington, DC
Honorable D. Brooks Smith United States Court of Appeals Duncansville, PA	Kosta Stojilkovic, Esq. Wilkinson Stekloff LLP Washington, DC
Honorable Jennifer G. Zipps United States District Court Tucson, AZ	

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Washington, DC

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
(Standing Committee)

Members	Position	District/Circuit	Start Date		End Date
John D. Bates Chair	D	District of Columbia	Member: Chair:	2020 2020	---- 2025
Paul Barbadoro	D	New Hampshire		2023	2025
Elizabeth J. Cabraser	ESQ	California		2021	2027
Louis A. Chaiten	ESQ	Ohio		2023	2026
Deputy Attorney General (ex-officio)	DOJ	Washington, DC		----	Open
Joan N. Ericksen	D	Minnesota		2024	2027
Stephen A. Higginson	C	Fifth Circuit		2024	2027
Edward M. Mansfield	JUST	Iowa		2023	2026
Troy A. McKenzie	ACAD	New York		2021	2027
Patricia A. Millett	C	DC Circuit		2020	2025
Andrew J. Pincus	ESQ	Washington, DC		2022	2025
D. Brooks Smith	C	Third Circuit		2022	2025
Kosta Stojilkovic	ESQ	Washington, DC		2019	2025
Jennifer G. Zipps	D	Arizona		2019	2025
Catherine T. Struve Reporter	ACAD	Pennsylvania		2019	2026

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Marie Leary, J.D.
Senior Research Associate

Elizabeth Wiggins, Ph.D., J.D. (alternate)
Division Director

Bankruptcy Rules Committee

Carly Giffin, Ph.D., J.D.
Research Associate

Elizabeth Wiggins, Ph.D., J.D. (alternate)
Division Director

Civil Rules Committee

Emery G. Lee, Ph.D., J.D.
Senior Research Associate

Elizabeth Wiggins, Ph.D., J.D. (alternate)
Division Director

Criminal Rules Committee

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

Evidence Rules Committee

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

Timothy Lau, Ph.D., J.D. (alternate)
Research Associate

Standing Committee

Tim Reagan, Ph.D., J.D.
Senior Research Associate

Elizabeth Wiggins, Ph.D., J.D. (alternate)
Division Director

TAB 1

TAB 1A

TAB 1B

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

January 7, 2025

The Judicial Conference Committee on Rules of Practice and Procedure (the Standing Committee) met in a hybrid in-person and virtual session in San Diego, California, on January 7, 2025. The following members attended:

Judge John D. Bates, Chair
Judge Paul J. Barbadoro
Elizabeth J. Cabraser, Esq.
Louis A. Chaiten, Esq.
Judge Stephen Higginson
Justice Edward M. Mansfield
Dean Troy A. McKenzie
Judge Patricia A. Millett
Hon. Lisa O. Monaco, Esq.*
Andrew J. Pincus, Esq.
Judge D. Brooks Smith
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipps

The following attended on behalf of the Advisory Committees:

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

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

Advisory Committee on Civil Rules –
Judge Robin L. Rosenberg, Chair
Professor Richard L. Marcus, Reporter
Professor Andrew Bradt, Associate Reporter
Professor Edward H. Cooper, Consultant

Advisory Committee on Criminal Rules –
Judge James C. Dever III, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

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

Others who provided support to the Standing Committee, in person or remotely, included Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; H. Thomas Byron III, Esq., Secretary to the Standing Committee; Bridget M. Healy, Esq., Rules Committee Staff Counsel; Shelly Cox and Rakita Johnson, Rules Committee Staff; Kyle Brinker, Law Clerk to the Standing Committee; John S. Cooke, Director, Federal Judicial Center (FJC); and Dr. Tim Reagan, Senior Research Associate, FJC.

* Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Lisa O. Monaco.

OPENING BUSINESS

Judge John D. Bates, Chair of the Standing Committee, called the meeting to order and welcomed everyone, including Standing and advisory committee members, reporters, and consultants who were attending remotely. Judge Bates gave a special welcome to Judges Stephen Higginson and Joan Ericksen as the new Standing Committee members, although Judge Ericksen was unable to attend the meeting due to a scheduling conflict. Judge Bates also noted that Lisa Monaco was unable to attend the meeting.

Judge Bates informed the Committee that Thomas Byron, Secretary to the Standing Committee, would soon leave his position for a new career opportunity and thanked him for his invaluable contributions that helped guide the rules process over the prior several years. Professor Catherine Struve, reporter to the Standing Committee, also thanked Mr. Byron for his excellence as Secretary and recalled his dedication, insight, and collegiality when he served as the Department of Justice (DOJ) representative to the Appellate Rules Committee.

Judge Bates notified the Committee that Professors Bryan Garner and Joseph Kimble, consultants to the Standing Committee, authored a new book entitled Essentials for Drafting Clear Legal Rules. The book reflects lessons from the rules restyling project over the last 30 years and is an update on Professor Garner's previous publication on the same subject. The book is available for free download from the Rules Committees' style resources page on the uscourts.gov website, and the Administrative Office printed copies for the use of the Rules Committee members and reporters. Judge Bates added that Professors Garner and Kimble provided essential counsel to the rules committees during the restyling project as did Joseph Spaniol, who previously served as Secretary to the Standing Committee and as Deputy Director of the Administrative Office and Secretary of the Judicial Conference before his appointment as Clerk of the Supreme Court. Mr. Spaniol retired as Clerk in 1991 but has served as consultant to the rules committees.

Judge Bates also welcomed members of the public and press who were observing the meeting in person or remotely.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the minutes of the June 4, 2024, meeting** with a correction that deleted the words "conducted a survey and" on page 23 of the minutes.

Mr. Byron reported that the latest set of proposed rule amendments took effect on December 1, 2024. A list of the rule amendments is included in the agenda book beginning on page 50. Mr. Byron also reported that the latest proposed rule amendments approved in the Standing Committee's June meeting are pending before the Supreme Court and, if approved, will be transmitted to Congress. Those amendments are on track to take effect on December 1, 2025, in the absence of congressional action. A list of the proposed rule amendments is included in the agenda book beginning on page 52.

Judge Bates noted that a December 2024 report on FJC research projects begins on page 79 of the agenda book. Dr. Tim Reagan explained that the FJC in November 2023 restarted its reports to the rules committees about work the FJC does. Because he has heard during meetings that education can be a useful alternative to rule amendments, these periodic reports now include

information about education as well as research conducted by the FJC. He also explained that the report does not discuss ongoing research for other Judicial Conference committees, but descriptions of such research will be included once the FJC completes the research and publishes the findings. Judge Bates thanked Dr. Reagan for the FJC's excellent work.

JOINT COMMITTEE BUSINESS

Electronic Filing by Self-Represented Litigants

Professor Struve reported on this item and explained that the item has two parts.

The first part relates to paper service by a self-represented litigant. The current rules appear to say that self-represented litigants who file documents in paper form must effect traditional service of those papers on others in the case even if the other litigants also receive electronic copies through CM/ECF or its equivalent. The point of this first part would be to eliminate this duplicative and burdensome requirement for papers subsequent to the complaint.

The second part relates to access to a court's electronic filing system by self-represented litigants. The rules currently set a presumption that self-represented litigants lack access to the court's system unless the court acts to provide it. This part of the project would increase access for self-represented litigants by flipping the presumption: allowing self-represented litigants access unless the court acts to prohibit access. The proposal would also require a court to provide a reasonable alternative if the court acts in a general way to prohibit self-represented litigants from accessing the court's electronic-filing system. The proposal would allow a court to set reasonable exceptions and conditions on access.

Professor Struve noted that the Standing and advisory committees had been discussing this item for several meetings. The Appellate, Civil, and Criminal Rules Committees appeared open to proceeding toward recommending both parts for publication for public comment. On the other hand, the Bankruptcy Rules Committee supported the goals of the project but was skeptical about proceeding forward. One reason was that access for self-represented litigants to electronic filing systems is currently least prevalent in bankruptcy courts. Regarding the service component, bankruptcy practice is more likely to feature multiple self-represented litigants in one matter than practice in other levels of court. Self-represented litigants in bankruptcy court may include the debtor, small creditors, and some Chapter 5 trustees.

When there are multiple self-represented litigants, a self-represented filer who is not on the electronic filing system or receiving electronic notices will not be able to know which other litigants are also not receiving electronic notices and therefore require paper service. Because practice before district courts and courts of appeals is much less likely to feature multiple self-represented litigants in the same matter, this problem is not likely to afflict these courts. Accordingly, Professor Struve suggested that it might be prudent for the Bankruptcy Rules to take a different approach than the Appellate, Civil, and Criminal Rules. She asked the Standing Committee if it would be open to approving publication of a package of amendments to the Appellate, Civil, and Criminal Rules without similar proposals for amending the Bankruptcy Rules. Professor Struve noted that if this approach were taken, a question would arise as to how

courts would treat self-represented litigants when a bankruptcy matter is appealed to a district court or court of appeals.

Judge Connelly stated that the Bankruptcy Rules Committee supported the project's goals but that it had practical concerns. She indicated that if the other rules committees further explored the item, it could provide the Bankruptcy Rules Committee valuable guidance for future discussion.

Judge Bates asked whether the Committee would support approving publication of an amendment package that would effect these changes for the Appellate, Civil, and Criminal Rules without changing the service and filing approaches for self-represented litigants under the Bankruptcy Rules. He also asked whether it was necessary to discuss how to handle service and filing issues for self-represented litigants in bankruptcy appeals.

Professor Struve observed that some courts in bankruptcy appeals already allow self-represented litigants to access their electronic filing systems and exempt them from effecting paper service. She said that it does not appear that the courts in these instances are experiencing substantial difficulty, and if there are problems, the Committee has several options to resolve them.

Judge Bates commented that the Committee could set aside the bankruptcy appeals question and asked Professor Struve if a vote by the Standing Committee was needed. Professor Struve responded that she would like to hear any concerns that Committee members may have with the project.

A judge member thought that the Bankruptcy Rules taking a separate path did not raise a significant issue. He had discussed the proposal with the clerk of his court, who highlighted two features of the proposed amendments as crucial—namely, the provision permitting a court to use alternative means of providing electronic access for self-represented litigants and the provision recognizing the court's authority to withdraw a person's access to the electronic filing system. The clerk also pointed out the potential cost savings by eliminating the need to mail thousands of hardcopy letters to self-represented litigants. And he observed that as a court provides greater electronic access for self-represented litigants, the court's help desk grows in importance. The judge member turned the Committee's attention to draft Civil Rule 5(b)(3)(E)'s statement that electronic service under that provision is not effective if the sender learns that it did not reach the person to be served, and asked if this provision would require the sender to monitor the court's site.

Professor Struve commented that the member's question is a larger one that applies to the current rule. She observed that current Rule 5(b)(3)(E) is the provision that allows users of the court's electronic-filing system to rely on that system for making service, and that the provision seems to be working.

The judge member also pointed out that draft Rule 5(d)(3)(B)(iv) (authorizing the court to withdraw a person's access to the electronic filing system) appeared to be limited to self-represented litigants, and asked whether that was intended to suggest that the court lacked authority to withdraw a noncompliant lawyer's access to the system. Professor Struve acknowledged that subsection (B) is about self-represented litigants but stated that there was no intent to limit the

court's authority to withdraw a noncompliant lawyer's access; she noted that the working group could discuss ways to ensure that this provision did not give rise to a negative inference.

The judge member identified the National Center for State Courts as a source of helpful information about access to justice for self-represented litigants. Professor Struve agreed about the NCSC's expertise and invited Committee members to let her know if they thought that the NCSC should be consulted while the rule is in the development stage rather than waiting until the public comment period.

A judge member said that she supported moving forward with a proposed change to the Appellate, Civil, and Criminal Rules for the reasons previously stated.

Professor King asked whether the discussion of a different approach for the Bankruptcy Rules assumed that total uniformity (concerning service and filing) would be imposed as between the Civil and Criminal Rules. Professor Struve assured her that the project was not intended to achieve total uniformity among the service and filing provisions in the Civil, Criminal, and Appellate Rules; differences already exist among those provisions, and this project does not seek to eliminate them. Rather, the goal in preparing for the spring advisory committee meetings will be to transpose the key features shown in the Civil Rule 5 sketch into the relevant Appellate and Criminal Rules. Professor Marcus highlighted the question of how to treat appeals from a bankruptcy court. Professor Struve observed that appeals from bankruptcy courts to district courts are currently addressed by Bankruptcy Rule 8011, and she also noted that technical amendments to the Bankruptcy Rules will be required if the draft Civil Rule 5 is approved.

Joint Subcommittee on Attorney Admission

Professor Struve reported on this item, the report for which begins on page 113 of the agenda book. Professor Struve recalled that this item originated from an observation by Dean Alan Morrison and others that the district courts have varying approaches to attorney admission. To be admitted to the district court, some districts require attorneys to be admitted to the bar of the state that encompasses the district, and some of those states require attorneys to take their bar exam in order to be admitted to the state bar. The Subcommittee has been discussing possible ways to address this issue. One possible solution would be to follow the approach in Appellate Rule 46, which does not require admission to the bar of a state within the relevant circuit.

The Subcommittee has also heard a number of concerns from the Standing Committee and advisory committees. District courts regulate admission to protect the quality of practice in their districts, which is linked to concerns about protecting the interests of clients. State bar authorities and state courts might also have concerns with a national rule along these lines. In addition, the Subcommittee has discussed how a rule might interact with local counsel requirements.

Professor Struve thanked Professor Coquillette and Dr. Reagan for their research and expertise. She noted that a survey of circuit clerks was recently completed, which found that the clerks generally feel that Appellate Rule 46 works well for the courts of appeals. Professor Struve recognized, however, that practice before the courts of appeals differs from practice before the district courts. A request for input was posted on the website of the National Organization of Bar Counsel, but the Subcommittee did not receive any responses.

Professor Struve said that the Subcommittee was proposing a research program based on what Subcommittee members said would be helpful going forward, including consultation with chief district judges in select districts. One type of district on which these inquiries would focus would be districts that require admission to the bar of the encompassing state. Possible questions may include: why do you have this approach? How would you react to a national rule setting a more permissive standard for admission? And are there other measures that could address barriers to access? Inquiries to district courts that do not require in-state bar admission might ask whether their approach to attorney admission has caused any problems. Dean Morrison suggested also inquiring of judges who have handled multidistrict litigation (MDL) proceedings. Outreach to state bar authorities and practitioners could also be helpful.

Professor Coquillette recalled the history of the Standing Committee's study of a DOJ proposal for national rules governing attorney conduct in federal courts. After a question was raised about whether such a project would exceed the existing rulemaking authority under the Rules Enabling Act, Senator Leahy proposed a bill to give the Standing Committee the authority to promulgate rules of attorney conduct. State bar authorities opposed the idea of such national rules, and the Standing Committee decided not to promulgate rules of attorney conduct (other than rules like Civil Rule 11). Judge Bates commented that, consistent with Professor Coquillette's observations, the Committee likely will need to research its authority to regulate attorney admission.

A practitioner member recommended speaking to districts that require attorneys (even some attorneys who are admitted to the district court's bar) to associate with local counsel; such requirements, this member observed, may undermine a national admission rule. The member also recommended researching the Committee's authority to craft a rule regarding local counsel requirements. Professor Struve responded that the Subcommittee shared this concern and would continue to consider whether it could draft an effective admission rule without also addressing local counsel requirements.

A judge member commented that a Military Spouse J.D. Network analysis found that state bar rule changes have made it somewhat easier for military spouses to become state bar members. But the member cautioned that the provisions for military spouses vary widely among states and some rules are difficult to navigate. The member also identified fees as a barrier to access for military spouses because they relocate and join bar associations at a higher rate than other lawyers. The member wondered whether the Committee could make suggestions or provide guidance concerning measures such as fee waivers if it determines that it does not have authority to regulate attorney admission.

Judge Bates responded that the judiciary could offer suggestions, but the Judicial Conference would be better equipped and able to provide suggestions or guidance to district courts generally. The district courts may then adopt or not adopt a suggestion offered. Professor Struve observed that informal suggestions historically have varied by committee. For example, the chair of the Appellate Rules Committee has sent letters to chief circuit judges with some success. However, Professor Struve noted that this would likely be more difficult at the district level.

A judge member questioned whether the Committee should proceed any further on this item without first determining the Committee's rulemaking authority. Judge Bates responded that

the initial suggestion that gave rise to this item sketched multiple approaches, some broad and some narrow. Because a narrow approach might raise fewer rulemaking questions, the thinking was first to determine which approaches were potentially desirable before considering the question of authority to adopt those approaches. Professor Struve agreed that if the Subcommittee were to decide not to recommend rulemaking, it would obviate the need to delve into the question of the Committee's rulemaking authority.

Professor Coquillette noted that almost all district courts have already adopted rules governing attorney conduct (often by incorporating by reference the attorney conduct rules of the state in which the district court is located). Professor Struve observed that while Civil Rule 83 *cabins* local rulemaking authority, the local rules are adopted pursuant to a separate statutory provision (28 U.S.C. § 2071), such that an analysis of the authority for making national rules under 28 U.S.C. § 2072 would not necessarily call into question local rules regulating attorney conduct. Professor Coquillette agreed. Professor Bradt commented that research on the question of rulemaking authority is ongoing.

A judge member thought that the considerations differ depending on the area of law. For example, an attorney handling a federal criminal case need not know state law. In contrast, a civil attorney admitted to a federal district court but not the state encompassing that district court might have an incentive to steer the case toward federal court. He also raised concern about situations where a state-law claim is asserted in federal court (for example, in supplemental jurisdiction) but then dismissed (for instance, if the federal claim that supported subject-matter jurisdiction was dismissed); if the claimant's lawyer is not admitted to practice in the relevant state, then the federal-court dismissal leaves the client without a lawyer. Lastly, the member pointed out that the states fund their bar regulators by means of fees paid by the lawyers who are admitted to the state bar. Admitting out-of-state lawyers to practice in federal district courts within the state could increase the workload of state regulators without providing the funding to sustain that work. The member recommended reaching out to the Conference of Chief Justices or a similar body to receive the views of state regulatory authorities.

A practitioner member asked if input has been sought from MDL transferee judges, whose perspective could be beneficial because they frequently see lawyers from elsewhere who are not required to have local counsel and often are not admitted pro hac vice. Judge Bates agreed that the Subcommittee should consider making inquiries to MDL transferee judges; he observed that issues of attorney admission may differ as between leadership counsel and non-leadership counsel.

A judge member observed that federal district courts regularly refer attorney discipline issues to state bar authorities, and it would be important to receive the views of chief judges about this relationship.

Professor Marcus pointed out that the motivation and effect of the proposals currently under consideration differed in an important way from the ill-fated project on national rules of attorney conduct. In the national rules on attorney conduct project, the DOJ was seeking adoption of national rules that would override particular state attorney-conduct obligations in criminal cases that the DOJ did not like. The proposals currently being considered would not do that, and this distinction sheds important light on the question of rulemaking authority and illustrates the types of things that the rulemakers should stay away from. Professor Coquillette agreed.

Judge Bates thanked the Subcommittee and reporters for their work.

Potential Issues Related to the Privacy Rules

Mr. Byron reported on several privacy issues, the materials for which begin on page 150 in the agenda book. The project began in 2022 following a suggestion by Senator Ron Wyden to require the redaction of the complete social security number in public filings rather than only the redaction of the first five digits. A sketch of a proposed amendment (to Civil Rule 5.2) implementing this suggestion appears on page 155 of the agenda book. That potential amendment has been held pending consideration of additional privacy-related suggestions pending before the advisory committees.

Mr. Byron, working with the reporters, had also discussed other possible privacy-related issues (which had been identified based on a review of the history and functioning of the privacy rules). These issues included possible ambiguity and overlap in exemptions, the scope of waivers by self-represented litigants who fail to comply with redaction requirements, additional categories of protected information that could be subjected to redaction, and possible protection of other sensitive information. The working group's recommendation—that no rule amendments were warranted with respect to these other topics—was discussed at the fall 2024 meetings of the Bankruptcy, Civil, Criminal, and Appellate Rules Committees. The advisory committees generally thought that the issues did not raise a real-world problem demanding a rule amendment. Accordingly, the advisory committees determined not to add any of these issues to their agendas. In the fall 2024 Appellate Rules Committee meeting, however, the question was raised whether rulemaking should always be reactive or whether it should sometimes be preventive—that is, whether rulemaking is sometimes warranted to prevent real-world harm from ever occurring, in instances where the harm in question would be sufficiently serious to warrant the preventive approach.

A practitioner member observed that filings by self-represented litigants often include information that should not be on a public docket, such as their own social security numbers. This member suggested that there should be coordination between broadening access to electronic filing systems for self-represented litigants and protecting the privacy of personal information because self-represented litigants may unintentionally disclose their own personal information. Professor Struve asked if, currently, court staff screen paper filings submitted by self-represented litigants before the court staff uploads the filings into the electronic system. The member did not know whether court staff screen paper filings, but has seen filings several times this year that include personal information.

Returning to the question that had been voiced in the Appellate Rules Committee, Professor Hartnett noted that most rules concern the processing of cases and so the focus is on how the rules affect litigation itself. In these circumstances, it makes sense to be generally reluctant to amend the rules if courts and parties are able to resolve issues under the current rules. But the privacy rules are about avoiding collateral harm from the litigation system. For that reason, perhaps the mindset should be different regarding the need to identify a demonstrated harm.

A judge member agreed with the practitioner member's comments that allowing self-represented litigants greater access to electronic filing systems could lead to greater privacy

concerns. He also noted that this is an area where artificial intelligence could be helpful, yet privacy concerns are difficult to fully resolve post-filing because some entities review filings minutes after they are made public. This member also mentioned a different issue concerning filings under seal. Local circuit practices concerning sealed filings vary widely. The member thought that privacy concerns are most acute in criminal matters, particularly when the case involves cooperating defendants. If the district court accepts a guilty plea from a cooperating defendant and this is reflected in a sealed filing, it could be catastrophic for a local practice (for instance, of automatically unsealing a filing after a certain time period) to divulge that document.

Mr. Byron responded that the member highlighted an example of a concern that would be included in the fourth category of other sensitive information beyond the current scope of the privacy rules. The current privacy requirements are fairly targeted to narrow redaction requirements for information like home addresses. He emphasized that he was not discouraging discussion of protecting other information. Rather, those ideas are simply in a separate category.

Professor Beale noted that redactions for social security numbers and privacy protections for minors were on the Committee's agenda for discussion later in the meeting.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Furman and Professor Capra presented the report of the Advisory Committee on Evidence Rules, which last met on November 8, 2024, in New York, NY. The Advisory Committee presented several information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 160.

Information Items

Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay). Judge Furman noted a proposed amendment to Rule 801(d)(1)(A) was out for public comment. The proposed amendment would provide that all prior inconsistent statements by a testifying witness are admissible over a hearsay objection. Two comments had been submitted thus far, including a comment by the Federal Magistrate Judges Association that supports the proposed amendment. The FMJA supported the proposal on the grounds that it would make the rule consistent with Rule 801(d)(1)(B) and would reduce confusion.

Rule 609 (Impeachment by Evidence of a Criminal Conviction). Judge Furman reported that the Advisory Committee continues to consider a proposal to amend Rule 609(a)(1)(B). Rule 609(a)(1) addresses the impeachment use of evidence of a witness's prior felony conviction. Rule 609(a)(1)(A) addresses cases in which the witness is not a criminal defendant. Rule 609(a)(1)(B) addresses criminal cases in which the witness is a defendant and allows admission of the evidence if its probative value outweighs its prejudicial effect. The Advisory Committee previously rejected a proposal to abrogate Rule 609(a)(1) altogether. In the wake of that decision, the Advisory Committee agreed to consider a more modest amendment that would alter Rule 609(a)(1)(B)'s balancing test to make it less likely that courts would admit highly prejudicial and minimally probative evidence of convictions against criminal defendants.

Specifically, the proposal being discussed would add the word "substantially" before the word "outweighs" in Rule 609(a)(1)(B). The Advisory Committee members who were present at

the November meeting were evenly divided on whether to further consider the proposal. One member was absent. The proposal was supported by the federal public defender representative and opposed by the DOJ. There was a general acknowledgement that some courts are admitting highly inflammatory prior convictions similar to the charged crime, contrary to what was intended by the rule, but there was disagreement about the magnitude of that problem. The magnitude of the problem could be difficult to identify because this often does not get further than a district court ruling, which may not be in writing or reported. There is also some evidence that decisions in this area deter defendants from taking the stand.

The FJC identified research approaches to further examine this question but concluded that the only fruitful approach may be sending a nationwide questionnaire to defense counsel. The Advisory Committee agreed unanimously not to use that approach given the low probability that it would yield useful data.

The Advisory Committee agreed to discuss the proposed amendment again at its Spring meeting. The member who was absent at the Fall meeting had previously voted in favor of abrogating Rule 609(a)(1) altogether and supported proceeding with the Rule 609(a)(1)(B) amendment.

Artificial Intelligence (AI) and Deepfakes. In the fall of 2023, the Advisory Committee began considering challenges posed by the development of AI, and the Advisory Committee is focusing on two issues. The first issue is authenticity and the problem of deepfakes. The second issue is reliability when machine learning evidence is admitted without supporting expert testimony.

At the November meeting, informed by an excellent memorandum by Professor Capra, the Advisory Committee considered whether and how to proceed with potential rulemaking to address these concerns. There was a consensus that AI presents real issues of concern for the Rules of Evidence and that there are strong arguments for taking a hard look at the rules. At the same time, there was concern that the development of AI could outpace the rulemaking process. It was also noted that the rules have already shown the flexibility to meet the challenges of evolving technology in other instances, for example with respect to social media.

The Advisory Committee discussed a number of proposals and agreed that two paths warrant further consideration. First, regarding reliability, the Advisory Committee tentatively agreed on a proposed amendment that would create a new rule, Rule 707, that would essentially apply the Rule 702 standard to evidence that is the product of machine learning. The proposal is set out on page 162 of the agenda book. The rule would exempt the output of basic scientific instruments or routinely relied upon commercial software. The Advisory Committee is considering whether to further explain the scope of the exemptions. The Advisory Committee rejected proposals to instead address the reliability issue in Chapter 9 of the rules, which concern authentication.

A judge member expressed support for taking up the topic of machine-generated evidence and agreed that the key admissibility question is reliability. He stressed the need for careful attention to the exemptions in the proposed draft rule. He queried whether DNA and blood testing would fall under an exemption and asked if Professor Roth was assisting the Advisory Committee

because she authored an excellent article about safeguards in this area. Professor Capra and Judge Furman said that she was. Professor Capra noted that Professor Roth had made a presentation on AI to the Committee and assisted in drafting the sketch of Rule 707 and its accompanying committee note. Professor Capra said that he and Professor Roth agreed that the commercial software exception may be too broad, and they are working on language that the Advisory Committee can consider at its next meeting. He also questioned whether an exception in the text is necessary to prevent courts from holding hearings on evidence related to common instruments such as thermometers.

Judge Bates noted the statement in the agenda book that disclosure issues relating to machine learning were better addressed in either the Civil or Criminal Rules, not the Evidence Rules, and that the issue should be brought to the attention of those respective Advisory Committees for their parallel consideration. He asked about the plan moving forward and any coordination among the committees.

Professor Capra said that he and Professor Beale had discussed the topic; the major issue concerns disclosure of source codes and trade secrets. These, he and Judge Furman said, are disclosure questions rather than evidence questions. But, Professor Capra reported, the discussions are at the preliminary stage.

Judge Bates noted that if coordination is important, then the discussions should progress beyond the preliminary stage. Professor Capra and Judge Furman agreed. Professor Beale said that the Criminal Rules Committee has not yet considered the issue.

Professor Marcus observed that the Civil Rules Committee, likewise, has not yet considered the issue. He noted the practice of using technology-assisted review when responding to discovery requests under Civil Rule 34. There has been a debate about whether a responding party must disclose the details of such technology-assisted review.

Judge Furman said that the Advisory Committee intends to come back to the Standing Committee seeking permission to publish the proposed new Rule 707 for public comment.

Second, regarding deepfakes, the Advisory Committee agreed that this is an important issue but is not sure that it requires a rule amendment at this time. At bottom, deepfakes are a sophisticated form of video or audio generated by AI. So they are a form of forgery, and forgery is a problem that courts have long had to confront—even if the means of creating the forgery and the sophistication of the forged evidence are now different. The Advisory Committee thus generally thought that courts have the tools to address the problem, as courts demonstrated when first confronting the authenticity of social media posts.

That said, the Advisory Committee also thought that it should take steps to develop an amendment it could consider in the event that courts are suddenly confronted with significant deepfake problems that the existing tools cannot adequately address. Accordingly, the Advisory Committee intends further work on the proposed rule found in the agenda book at page 163. This proposed Rule 901(c) would place the burden on the opponent of evidence to make an initial showing that a reasonable person could find that the evidence is fabricated. After such an initial

showing, the burden would shift to the proponent to show by a preponderance of the evidence that the evidence was not fabricated.

The Advisory Committee will continue to monitor developments to assess the need for rulemaking and think about definitional issues, such as what would be subject to the rule. Some proposals submitted would apply this kind of rule to all visual evidence whether or not it was generated by AI, but the Advisory Committee generally agreed that such proposals were too broad.

Judge Bates asked for confirmation that the Advisory Committee's plan is to consider an approach similar to the draft Rule 901(c) but not yet seek the Standing Committee's approval for publication. Judge Furman said that was correct.

Judge Furman said that the Advisory Committee also discussed the "liar's dividend" – that is, a situation where counsel objects to genuine evidence, attempting to create a reasonable doubt in a criminal case and arguing that the evidence may have been faked. Ultimately, the Advisory Committee thought that this was not an issue for the Rules of Evidence.

A judge member commented that the memorandum (in discussing the sketch of the possible Rule 901(c)) first mentions that the opponent of AI evidence must make an initial showing that there is something suspicious about the item, which seems like a reasonable suspicion or probable cause standard; but then the memo goes on to say the showing must be enough for a reasonable person to find that the evidence is fabricated, which sounds instead like a preponderance standard. The member stated that these two formulations are in tension and questioned whether it would be possible for someone to meet the preponderance test without more information or discovery. Judge Furman said that the Advisory Committee will take the member's comment under advisement.

False Accusations. Judge Furman reported that, prompted by a suggestion, the Advisory Committee considered whether to propose a rule amendment to address false accusations of sexual misconduct, either by an amendment to Evidence Rule 412 or a new Rule 416. As between these alternatives, the Advisory Committee agreed that a new rule would be preferable, but the Advisory Committee ultimately decided not to pursue an amendment and to take the issue off its agenda. These issues more often occur in state and military courts—which would be unlikely to adopt a federal model and which have existing tools adequate to address the issue.

Rule 404 (Character Evidence; Other Crimes, Wrongs, or Acts). Judge Furman reported that this item was prompted by a suggestion asserting that courts are admitting evidence of uncharged acts of misconduct even where the probative value of the act depends on a propensity inference. The Advisory Committee considered amending Rule 404(b) to require the government to show that the probative value of the other act evidence does not depend on such an inference. Over the objection of the federal public defender representative, the Advisory Committee decided not to pursue an amendment and to remove this item from its agenda.

Members noted that Rule 404(b)'s notice requirement was amended in 2020 to require the government to articulate a non-propensity purpose for bad act evidence, and the Advisory Committee thought that it should wait to see how courts apply the new amendment. Some Advisory Committee members also thought that some examples cited by the suggestion were

proper applications of Rule 404(b). In addition, the DOJ strongly opposed an amendment because, it argued, the 2020 amendment was the product of substantial work and compromise.

Judge Furman said that the Advisory Committee will continue to monitor developments in this area.

Rule 702 and Peer Review. Judge Furman reported that the Advisory Committee considered a suggestion to amend Rule 702 to address the role of peer review as set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993), and Rule 702's 2000 committee note. Under *Daubert* and the committee note, the existence of peer-review is relevant to a court's determination of the reliability of an expert's methodology, and thus the admissibility of expert testimony. The attorneys argued that this is problematic because many studies cannot be replicated.

The Advisory Committee decided not to pursue an amendment and to remove the item from the agenda. The consensus of committee members was that Rule 702 is general: it does not mention particular factors. The Advisory Committee thought that singling out a particular factor in the text would be awkward and potentially problematic. Moreover, courts have exercised appropriate discretion in connection with the peer review factor and there is not a problem warranting an amendment.

***The Supreme Court's Decisions in* Diaz v. United States *and* Smith v. Arizona.** Judge Furman stated that the Advisory Committee discussed two recent Supreme Court decisions pertaining to the Rules of Evidence. First, in *Diaz v. United States*, 602 U.S. 526 (2024), the Court addressed whether Rule 704(b) prohibited expert testimony in a drug smuggling case that "most people" who transport drugs across the border do so knowingly. The Court found no error because the expert's testimony was based on probability and not certainty. The Advisory Committee determined that the case did not warrant an amendment to the rule and that the Court's result was consistent with the language and intent of the rule.

Second, in *Smith v. Arizona*, 602 U.S. 779 (2024), a forensic expert testified to a positive drug test by relying on the testimonial hearsay of another analyst, and the other analyst's findings were disclosed to the jury. The Court held that the expert's disclosure to the jury of testimonial hearsay violated the defendant's right to confrontation, even if the purpose of the disclosure was purportedly to illustrate the basis of the testifying expert's opinion. Here, too, the Advisory Committee determined that an amendment is not presently necessary. There was some concern about whether the case could be construed to apply to reliance in addition to disclosure. If there were a constitutional bar on an expert's reliance on other experts' findings, an amendment to Rule 703 to prohibit reliance on testimonial hearsay in a criminal case would likely be necessary. Judge Furman said that the Advisory Committee will continue to monitor developments and how the case is applied in the lower courts.

Rule 902 and Tribal Certificates. Judge Furman reported that the Advisory Committee received a suggestion to consider adding federally recognized Indian tribes to the list of entities in Evidence Rule 902(1), which provides that domestic public records that are sealed and signed are self-authenticating. The list does not include Indian tribes, which means that a party who seeks to offer a record from a federally recognized Indian tribe must use another route to authenticate such evidence.

The Advisory Committee previously considered the issue and did not take action, but recent developments have arguably made this a live issue again, most notably, the Supreme Court's decision in *McGirt v. Oklahoma*, 591 U.S. 894 (2020). In addition, at least two recent decisions by courts of appeals held that the prosecution unsuccessfully attempted to establish Indian status through the business records exception.

At the fall 2024 Advisory Committee meeting, some members thought that this is not a problem with the rules but rather a failure by prosecutors to do what they must to authenticate the documents under existing rules, such as properly lay a foundation for the business records exception. In addition, there was a concern about whether all federally recognized tribes have resources and recordkeeping akin to those of the entities currently encompassed in Rule 902(1). The Advisory Committee will discuss these issues at its Spring meeting with further input from the DOJ.

Judge Bates thanked Judge Furman and Professor Capra for their report.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Eid and Professor Hartnett presented the report of the Advisory Committee on Appellate Rules, which last met on October 9, 2024, in Washington, DC. The Advisory Committee presented several information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 193.

Information Items

Proposed amendments to Rule 29, dealing with amicus briefs, along with conforming amendments to Rule 32 and the Appendix of Length Limits, and proposed amendments to Form 4, the form used for applications to proceed in forma pauperis (IFP), were published for public comment in August 2024. The public comment period closes February 17. The Advisory Committee will be holding a hearing on the issues on February 14, where 16 witnesses are expected to testify.

Proposed Amendment to Form 4 (Affidavit Accompanying Motion for Permission to Appeal IFP). Judge Eid commented that the amended Form 4 is similar to, but less intrusive than, the existing form. She observed that only one comment had been submitted on the proposal (that comment is favorable), and five people are expected to testify about the proposal at the hearing. After considering comments and testimony and making any necessary changes, the Advisory Committee expects to present the proposed amended Form 4 for final approval in June.

Proposed Amendment to Rule 29 (Brief of an Amicus Curiae). Judge Eid reported that the Advisory Committee had received over a dozen comments on the Rule 29 proposal and at least 11 people are expected to testify about the proposal at the February hearing. Judge Eid explained that the proposal makes two main changes.

The first change relates to disclosures. Under the proposal, an amicus would have to disclose whether a party to the case provides it with 25% or more of the amicus's annual revenue. In addition, the current rule requires an amicus to disclose whether a nonmember made

contributions earmarked for a that brief. The proposal would extend this requirement to someone who recently became a member.

The second change relates to a motion requirement. The current rule permits an amicus to file a brief at the initial stage either by consent or by motion. The Advisory Committee's proposal would remove the consent option. Judge Eid noted that, at the Standing Committee's June 2024 meeting, members expressed concern that this proposal would create more work for judges by generating unnecessary motions. Judge Eid and Professor Hartnett reported these concerns to the Advisory Committee at its fall 2024 meeting; at that meeting, the Advisory Committee also heard that the Second, Ninth, and Tenth Circuits supported requiring a motion.

Judge Eid explained the second change's interaction with recusals. She explained that, in some circuits, filing an amicus brief by consent can block a case from being assigned to a judge and that this could occur without any judicial intervention (before the case is assigned to a panel). In such circuits, imposing a motion requirement would provide the opportunity for a judge to decide whether to disallow the brief because it would cause a recusal. Judge Eid noted that there is a tradeoff: imposing a motion requirement creates extra work but it creates the opportunity for judicial intervention. The Advisory Committee has asked its Clerk representative to survey the circuit clerks about their circuits' practices. The Advisory Committee is likely to consider proposing a rule that would eliminate the consent option unless a circuit opts to permit filings on consent.

A judge member asked Judge Bates whether the rules can allow circuits to opt out. Judge Bates, Judge Eid, and Professor Struve responded that it is not always an option but that in appropriate circumstances the rules can allow circuits to opt out.

Judge Bates noted that the question of changing this feature of the current rule initially arose because the Supreme Court changed its practice. The Supreme Court, though, accepts amicus briefs without any requirement. He observed that the proposed change to Rule 29 goes in the opposite direction.

A practitioner member supported setting a rule with which all circuits would be comfortable. He suggested a default rule requiring a motion but allowing circuits to permit filing by consent. Judge Eid responded that the Advisory Committee will consider that approach.

Professor Hartnett asked a judge member if she would be comfortable with a rule that includes an opt-out provision for circuits, given her concerns expressed at the last meeting. The judge member responded that an opt out would be a reasonable approach because courts may have different issues with the proposed rule and some courts receive more amicus briefs than others.

Rule 15 and the "Incurably Premature" Doctrine. Judge Eid reported that this item stems from a suggestion to fix a potential trap for the unwary. Under the incurably premature doctrine, if a motion to reconsider an agency decision makes that decision unreviewable in the court of appeals, then a petition to review that agency decision is not just held in the court of appeals awaiting the agency's decision on the motion to reconsider. Rather, the petition for review is dismissed, and a new petition for review must be filed after the agency decides the motion to reconsider. Judge Eid observed that Appellate Rule 4 used to work in a similar fashion, but it was

amended to provide that such a premature notice of appeal becomes effective when the post-judgment motion is decided.

Judge Eid reported that the Advisory Committee is considering whether to make a similar amendment to Rule 15. She noted that the Advisory Committee had previously studied such a proposal but that the earlier proposal had been opposed by the D.C. Circuit. Judge Eid predicted that the Advisory Committee might seek permission, at the Standing Committee's June meeting, to publish such a proposal for comment.

A judge member noted that a difference between Rule 4 and Rule 15 is that statutory jurisdictional provisions govern court review of the decisions of some agencies. She wondered whether a court could defer consideration of a petition that the court had no jurisdiction to decide when the petition was filed. In addition, based on the volume of petitions her court receives, this could be a burden on the clerk's office. She offered to raise the issue with her colleagues. Judge Eid thanked the member and invited her to ask her colleagues about the topic.

Intervention on Appeal. Judge Eid noted that the discussion of this item appears in the agenda book beginning on page 196. She observed that members of the Advisory Committee thought it would be helpful to have a rule addressing intervention on appeal, but that they also had concerns that adopting such a rule might increase the volume of requests to intervene on appeal. Judge Eid suggested that intervention does not typically pose difficult issues in connection with petitions in the court of appeals for review of agency determinations. Instead, problems have manifested in some cases where a plaintiff sues to challenge a government policy and then there is a subsequent change in administration of the government whose policy is under challenge. Problems have also arisen in some cases where a plaintiff seeks a "universal" remedy, that is, one that would benefit nonparties as well as parties. She said that the Advisory Committee continues to monitor developments and that the FJC is conducting research to help inform the Advisory Committee.

Judge Eid commented that the Advisory Committee thought it might be able to craft a rule that would structure the analysis, provide guidance, and limit the range of debates on the issue. Ultimately, a rule could make clear that intervention on appeal should be rare. The Advisory Committee is waiting for the FJC's research and may take up this item next year. A judge member noted the current lack of guidance for attorneys; this member suggested that a rule could usefully say: "intervention on appeal should be rare, requests must be timely, and intervening on appeal is not a substitute for amicus participation."

A member stated that he did not like the idea of avoiding rulemaking on a topic merely to discourage the practice that the potential rule would address. He suggested that it would be better to adopt a rule that would provide more guidance on the issue while including the caveat that intervention on appeal should be rarely used.

Rule 4 and Reopening Time to Appeal. Judge Eid reported that the Advisory Committee has begun considering a suggestion to address various issues involving reopening the time to appeal under Rule 4(a)(6). The suggestion seeks to clarify whether a single document can serve as a motion to reopen the time to appeal and then (once the motion is granted) as the notice of appeal. Relatedly, the suggestion seeks to clarify whether a notice of appeal must be filed after a motion

to reopen the time to appeal has been granted. Judge Eid said that the Advisory Committee has just begun to look at this issue.

Rule 8 and Administrative Stays. Judge Eid reported that the Advisory Committee is in the preliminary stages of considering a suggestion to amend Rule 8. A proposed rule could make clear the purpose and proper duration of an administrative stay.

A judge member recommended receiving input from chief circuit judges on the topic. He commented that Professor Rachel Bayefsky authored a superb article on administrative stays.

Other Items. Judge Eid reported that the Advisory Committee decided to remove several items from its agenda, including a suggestion to prohibit the use of all capital letters for the names of persons, a suggestion to move common local rules to national rules, a suggestion to create a set of common national rules that would collect the provisions that are the same across the different sets of national rules, a suggestion to standardize page equivalents for word limits, and a suggestion regarding standards of review.

Judge Bates thanked Judge Eid and Professor Hartnett for their report.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Connelly and Professors Gibson and Bartell presented the report of the Advisory Committee on Bankruptcy Rules, which last met on September 12, 2024, in Washington, DC. The Advisory Committee presented action items for publication of one rule and one official form, as well as four information items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 223.

Action Items

Publication of Proposed Amendment to Rule 2002 (Notices). Judge Connelly reported on this item. The text of the proposed amendment begins on page 229 of the agenda book, and the written report begins on page 224. Rule 2002 requires the clerk to provide notice of an extensive list of items or actions that occur in every bankruptcy case. Rule 2002(o) provides that the caption of the notices under this rule shall comply with Rule 1005, which governs the caption of the petition that initiates a bankruptcy case. Rule 1005 requires the petition's caption to include information such as the debtor's name, other names the debtor has used, and the last four digits of the debtor's social security number or taxpayer-identification number. By incorporating Rule 1005's requirements, Rule 2002(o) requires that Rule 2002 notices include this information also. Judge Connelly stated that including this information in such notices is onerous and exposes sensitive information.

The proposed amendment would change Rule 2002(o) to eliminate the cross-reference to Rule 1005 and instead require that the caption comply with Official Form 416B. The result would be to require an ordinary short title caption consisting of the name, case number, chapter of bankruptcy, and the title of item being noticed.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 2002 for public comment.**

Publication of Proposed Amendment to Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy). Judge Connelly reported on this item. The text of the proposed amendment begins on page 231 of the agenda book, and the written report begins on page 225. Form 101 is the initial form for filing a bankruptcy case. The form currently has a field for disclosing the debtor's employer identification number, requesting "Your Employer Identification Number (EIN), if any." Commonly, pro se filers are mistakenly providing the EIN of their employers. When multiple debtors file petitions listing the same EIN, the system erroneously flags them as repeat filers.

The proposed amendment would change the language in Form 101 to say: "EIN (Employer Identification Number) issued to you, if any. Do NOT list the EIN of any separate legal entity such as your employer, a corporation, partnership, or LLC that is not filing this petition."

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Official Form 101 for public comment.**

Information Items

Judge Connelly reported on four topics being considered by the Advisory Committee. The written report begins on page 225 of the agenda book.

Suggestion to Require Full Redaction of Social Security Numbers in Court Filings. Judge Connelly reported that the Advisory Committee has been studying whether the Bankruptcy Rules should continue to provide for disclosure of the last four digits of social security numbers in bankruptcy filings but has decided not to take action at this time. Judge Connelly noted the invaluable work of the FJC, which conducted an extensive study on the disclosure of social security numbers in federal court filings.

The Advisory Committee also conducted its own study by identifying the official bankruptcy forms that disclose the last four digits of social security numbers. Currently, several official forms require the disclosure of these last four digits. The FJC surveyed stakeholders, asking for input about the possible impact of eliminating the last four digits on the forms. Judge Connelly said that it may be critical to obtain this information to precisely determine the individuals who are or have been in bankruptcy because this allows creditors to accurately file claims, know to take no action on debts due to the automatic stay, or know that a debt has been discharged. Indeed, the stakeholders surveyed said that the last four digits on the official forms are essential. The numbers on some forms were essential to all stakeholders, and the numbers on all forms were essential to some stakeholders. Judge Connelly observed that there does not appear to be an effective means for identifying individuals without the last four digits of social security numbers, since it is not uncommon for multiple individuals with the same name to file for bankruptcy.

The Advisory Committee thus decided not to take action because it did not identify a real-world harm from disclosure of the last four digits in bankruptcy cases but did identify a harm in not disclosing this information. Although the FJC study did find disclosures of some full social security numbers in bankruptcy cases, those disclosures occurred despite the current rules, so rule amendments would not address that issue. Judge Connelly commented that the Advisory Committee will monitor developments in the other advisory committees and may revisit the issue if a time comes when stakeholders can effectively identify debtors without the need for the last four social security number digits.

Suggestion to Propose a Rule Requiring Random Assignment of Mega Bankruptcy Cases Within a District. Judge Connelly reported that the Advisory Committee received suggestions for a rule to require random assignment of bankruptcy cases designated as mega bankruptcy cases. She noted that the Committee on the Administration of the Bankruptcy System and the Committee on Court Administration and Case Management are considering similar issues. Accordingly, the Advisory Committee will defer any action on this item until it receives guidance from the other committees.

Suggestions to Allow Appointment of Masters in Bankruptcy Cases and Proceedings. Judge Connelly observed that under Bankruptcy Rule 9031, special masters cannot be appointed by a bankruptcy court. Two suggestions propose an amendment to Rule 9031 to allow for the appointment of masters in bankruptcy cases. She recalled that the Advisory Committee has considered, and rejected, many similar suggestions in previous decades. The Advisory Committee continues to consider the issue with this history in mind. Judge Connelly also noted that the FJC will survey bankruptcy judges to help identify the need and potential use for masters. The Advisory Committee should have the survey results by the June meeting.

Judge Connelly said that one issue raised was whether bankruptcy judges, being non-Article-III judges, would have the authority to appoint masters.

Recommendation Concerning Proposed Amendment to Official Form 318 (Discharge of Debtor in a Chapter 7 Case) and Director's Forms 3180W (Chapter 13 Discharge) and 3180WH (Chapter 13 Hardship Discharge). Judge Connelly reported that the Advisory Committee received a suggestion for an amendment to the bankruptcy form Order of Discharge. The form establishes that a debtor has been discharged of its debts. The suggestion proposes adding language to the form that would notify the recipient that there may be unclaimed funds and that they can check the Unclaimed Funds Locator to ascertain whether they are entitled to any.

Currently, unclaimed funds are paid into the Treasury and kept until the claimant retrieves the funds. Judge Connelly acknowledged that this is a problem that needs to be addressed, but that the Advisory Committee decided to take no action on this particular suggestion. The Advisory Committee had several reasons, one of which is a timing issue. A bankruptcy discharge order is issued once the debtor is eligible for a discharge, but the unclaimed funds are not paid into the Treasury until a trustee's disbursements have gone stale. In a Chapter 7 case, this could be years after the debtor receives their personal discharge. In a Chapter 13 case, it could still be six months after the debtor's last payment to the trustee. In either event, there likely are not unclaimed funds available when the discharge order is issued. Thus, the proposed notice would be confusing or misleading.

Judge Bates thanked Judge Connelly and the Advisory Committee.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenberg and Professors Marcus and Bradt presented the report of the Advisory Committee on Civil Rules, which last met on October 10, 2024, in Washington, DC. The Advisory Committee presented two action items and several information items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 268.

Judge Rosenberg reported that the Judicial Conference approved the proposed amendments to Rules 16 and 26 and the proposed new Rule 16.1. The Judicial Conference sent the proposals to the Supreme Court. If the Supreme Court approves the proposals and forwards them to Congress, the proposals will be on track to take effect on December 1, 2025, absent contrary action by Congress.

Action Items

Publication of Proposed Amendment to Rule 81(c) Concerning Jury-Trial Demands in Removed Actions. Judge Rosenberg reported on this item. The text of the proposed amendment begins on page 292 of the agenda book, and the written report begins on page 271. Before 2007, Rule 81(c) said: "If state law does 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." This excused a jury demand only when the case was removed from a state court that never requires a jury demand. But in the 2007 restyling, the verb "does" was changed to "did." This restyling could produce confusion when a case is removed from a state court that has a jury demand requirement but permits that demand later in the litigation. Accordingly, the Advisory Committee considered amendment to remove any uncertainty about whether and when a jury demand must be made after removal.

At the Advisory Committee's October meeting, it recommended a proposed amendment to require a jury demand in all removed cases by the deadline set forth in Rule 38. A point made during that meeting was that even when a party fails to meet the Rule 38 deadline, the court may nevertheless order a jury trial under Rule 39(b).

The Advisory Committee unanimously voted to recommend for publication the draft amendment to Rule 81(c) and its accompanying committee note. The Advisory Committee rejected the alternative proposal to return to the language in place before the 2007 change.

Professor Marcus observed that the existing rule creates uncertainty about when a jury demand is required and said that this proposed amendment removes that uncertainty by requiring a jury demand in accordance with Rule 38. Professor Cooper agreed and clarified that a party need not make a jury demand after removal if the party already made a demand before removal.

A practitioner member asked if the first line in the proposed Rule 81(c)(3)(B) should be in the past tense ("If no demand was made") rather than the current draft language ("If no demand is made"). Professor Garner's initial response was that the phrase should be in the present perfect

tense ("has been made") because it refers to the present status of something that has occurred. The practitioner member noted that using the present perfect tense would match the following sentence.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 81 for public comment**, with the change on page 292, line 14 in the agenda materials from "is" to "has been."

Publication of Proposed Amendment to Rule 41 (Dismissal of Actions). Judge Rosenberg reported on this item. The text of the proposed amendment begins on page 288 of the agenda book, and the written report begins on page 274. However, during the meeting a restyled version of the proposed amendment was displayed on the screen, reflecting input of the style consultants subsequent to the publication of the agenda book. Judge Rosenberg reported that courts widely disagreed on the interpretation of Rule 41(a). Although the rule is titled "Dismissal of Actions" and describes when a plaintiff may dismiss an action, many courts use the rule to dismiss less than an entire action. After several years of study, feedback, and deliberation, the Advisory Committee determined that the rule should be amended to permit dismissal of one or more claims in a case rather than permitting the dismissal of only the entire action. The Advisory Committee also concluded that the rule should be clarified to require that only current parties to the litigation must sign a stipulation of dismissal of a claim.

During the Subcommittee's outreach, there was no opposition to such an amendment, and the proposed change would provide nationwide uniformity and conform to the practice of most courts. Further, the proposed amendment would help simplify complex cases and support judicial case management. Accordingly, the Advisory Committee unanimously recommended for publication the proposed amendment to Rule 41.

Judge Rosenberg said that the proposed rule amendment differs slightly from the draft shown in the agenda book. Where the agenda book draft language refers to "a claim or claims" in lines 7-8, 19, and 41-42 (pages 288-90), the restyled amendment proposal refers instead to "one or more claims."

Professor Bradt said that a concern was raised regarding the use of the term "opposing party" in Rule 41(a)(1)(A)(i). The concern was that the term could be ambiguous with respect to who would be the party whose service of an answer or a motion for summary judgment would trigger the end of the period in which one could unilaterally dismiss a claim. The Advisory Committee ultimately declined to change this language because of its common use in other rules, all of which have a fairly clear definition of opposing party as being the party against whom the claim is asserted.

Judge Bates asked whether it would be inconsistent to use instead the term "opposing party on the claim." Professor Bradt recalled that the Advisory Committee discussed similar suggestions at its October meeting. The Advisory Committee agreed that adding such language would not introduce any problems but that the additional language would be redundant. Professor Kimble emphasized the importance of using consistent language in the rules.

Judge Rosenberg asked about adding language in the committee note to make clear that the rule refers to the opposing party to the claim. Professor Kimble responded that he would not have

a similar concern if the additional language were placed in the committee note. Professor Bradt said that the Advisory Committee declined to add the additional language to promote consistent usage in the rules and noted that no responses to the Advisory Committee's outreach expressed any confusion. He said that the Advisory Committee could learn about confusion during the public comment period. Professor Cooper opposed adding the additional language to the rule text but suggested using "party opposing the claim" if the Advisory Committee decides to address the matter in the committee note.

Judge Rosenberg asked Judge Bates if he thought an additional sentence for the committee note should be drafted. Judge Bates saw no reason not to draft the additional language for the committee note if Judge Rosenberg, Professor Marcus, and Professor Bradt thought the addition would be beneficial.

A practitioner member asked about the conforming change in Rule 41(d). He observed that term "action" still appears in the rule. He thought that "of that previous action" in Rule 41(d)(1) was unclear (because it is intended to refer to the initial phrase in Rule 41(d), which as amended would now say "a claim" rather than "an action") and suggested that Rule 41(d) could instead use the phrase "of the previous action where the claim was raised." In addition, he observed that the draft committee note stated that references to action have been replaced and suggested that this language be adjusted if the rule retains some references to actions.

Professor Bradt responded that it was intentional to retain "action" in Rule 41(d) to make clear that the rule refers to a new case being filed. He said that the member's suggested additional language would not cause harm and offered instead "of that previous action in which one or more claims was voluntarily dismissed." Professor Bradt asked the member if this would clarify the rule. The member said that he was not devoted to any specific language but thought some clarification would be helpful and added that "the previous action" may be preferable to "that previous action."

Professor Kimble suggested "that previous action in which the claim was voluntarily dismissed." Professor Bradt and the member agreed. Professor Garner asked if the party would become responsible for all the costs of the action if one claim were dropped. Professor Bradt responded that ordinarily the party would only be responsible for the cost associated with the dismissed claim, but the court would retain the ability to impose the costs of the entire action. Professor Garner said that, as a style matter, "the" is preferable to "that." This would yield the phrase "of the previous action in which a claim was voluntarily dismissed."

Judge Bates questioned whether "voluntarily" would be appropriate to use in Rule 41(d). Professor Bradt responded that Rule 41(d) applies to voluntary dismissals but not involuntary dismissals and said that the proposed amendment does not seek to change that feature of Rule 41(d). Professor Cooper agreed that Rule 41(d) covers all dismissals under Rule 41(a), even if the plaintiff needs a court order, but Rule 41(d) does not include involuntary dismissals under Rule 41(b). Judge Bates observed that the headings of Rule 41(a)(1) and (2) distinguish between voluntary dismissals "By the Plaintiff" (Rule 41(a)(1)) and voluntary dismissals "By Court Order" (Rule 41(a)(2)).

Professors Cooper and Kimble commented that "previous" is unnecessary. To clarify the committee note, Professor Bradt suggested one additional word: adding "some" before "references

to 'action.'" He asked if this would clarify that the proposed change does not eliminate all references to action. Professor Capra disagreed with adding "some" to the committee note and suggested that it refer to the provisions actually changed.

Professor King suggested working on the proposal further and seeking publication at the Standing Committee's June meeting. Professor Capra agreed with Professor King. Professor Kimble also agreed and said that the style consultants would like to take more time to consider the proposed language. Judge Bates observed that the Standing Committee could consider the proposal with updated language at its June meeting for publication in August. Judge Rosenberg and Professor Bradt agreed with this plan.

Professor Bradt summarized the items that the Advisory Committee will work on. First, revising the committee note to clarify that some but not all references to "action" are being replaced. Second, considering the addition of rule text or a sentence in the committee note to clarify what is meant by "opposing party" in Rule 41(a)(1)(A)(i). Third, revising the proposed amendment to Rule 41(d)(1) to clarify its application to voluntary dismissals with or without court orders and to make clear the court's authority in the subsequent action to require the plaintiff to pay all or part of the costs related to the prior action in which they voluntarily dismissed the claim.

Professor Hartnett wondered how "and remain in the action" in the proposed Rule 41(a)(1)(A)(ii) interacts with Rule 54(b). For example, consider a situation where a plaintiff sues two defendants, and the court grants one defendant's motion to dismiss the claims against it. Absent a Rule 54(b) certification, that defendant remains in the action – for purposes of the application of the final-judgment requirement for taking an appeal – until the disposition of the claims against the remaining defendant. However, Professor Hartnett thought, the Advisory Committee appears to intend "remain in the action" to mean something different in Rule 41. Professor Hartnett expressed concern that this could cause confusion.

Professor Bradt asked if Professor Harnett had a proposal to solve this issue. Professor Hartnett said his initial reaction was to drop the proposed additional language. Professor Marcus explained that the proposal was in response to cases where parties no longer involved in the case refused to stipulate to a dismissal. Professor Bradt added that a problem also arises where a party no longer involved in the case cannot be found to obtain their signature for a dismissal.

Professor Bradt said that the Advisory Committee will continue to work on the proposed amendment and will present a revised proposal at the Standing Committee's June meeting. Judge Rosenberg agreed.

Information Items

Judge Rosenberg reported on the work of the Advisory Committee's subcommittees as well as a few other information items. These items are described in the written report beginning on page 276 of the agenda book.

Rule 45(b) and the Manner of Service of Subpoenas. Judge Rosenberg reported that the Discovery Subcommittee continues to consider the problems that can result from Rule 45(b)(1)'s directive that service of a subpoena depends on "delivering a copy to the named person." As to

potential alternative methods of service, the Subcommittee determined to leave the decision of what to employ for a given witness to the presiding judge.

The Subcommittee is also considering the requirement that when a subpoena requires attendance by the person served, the witness fees and mileage be "tendered" to the witness. The Subcommittee is studying two options. The first option is retaining the obligation to tender fees but not as part of service. The second option is eliminating the obligation to tender the fees.

Judge Rosenberg invited feedback on the issues of tendering fees at time of service and also whether the rule should be amended to require that the subpoena be served at least 14 days before the date on which the person is commanded to attend. Professor Marcus noted that the Subcommittee will also be looking at filing under seal.

Professor King observed that Rule 45(b) is similar to Criminal Rule 17(d) (on service of subpoenas in criminal cases). She suggested that the committees coordinate during the drafting process. However, she acknowledged that different considerations may affect the criminal and civil service rules.

Rule 45(c) and Subpoenas for Remote Testimony. Judge Rosenberg reported that the Advisory Committee received a suggestion to relax the constraints on the use of remote testimony. The Advisory Committee will monitor comments submitted on the proposed bankruptcy rule amendments that would permit the use of remote testimony for contested matters in bankruptcy court.

Judge Rosenberg said that the Advisory Committee will continue to consider an amendment to Rule 45(c) to clarify that a court can use its subpoena power to require a distant witness to provide testimony once it determines that remote testimony is justified under the rules. This issue came to the Advisory Committee's attention because of a Ninth Circuit ruling, *In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023), holding that current Rule 45 does not permit a court that finds remote testimony justified under Rule 43 to compel a distant witness to provide that testimony by subpoena. The Subcommittee is inclined to recommend an amendment that would provide that when a witness is directed to provide remote testimony, the place of attendance is the place the witness must go to provide that testimony.

Judge Bates observed that no public comments had been submitted so far on the bankruptcy rule amendment relating to remote testimony in contested matters.

A judge member said that he disagreed with the Ninth Circuit's decision but that given the ruling, he thought an amendment to the rule is necessary. He asked how an amendment might affect the definition of unavailability in Rule 32 (concerning use of depositions). Professor Marcus responded that the Committee is discussing the issue of unavailability under Rule 32 as well as under Evidence Rule 804 (concerning the hearsay exception for unavailability). He explained that the Committee did not intend the change to Rule 45 to affect the interpretation of unavailability under Rules 32 or 804 and suggested that the committee note could make that clear.

Another judge member commented that even if no comments are received on the bankruptcy rule, many others are experimenting with remote proceedings, such as state courts and immigration courts. He suggested that there was no good reason to delay in moving ahead with

remote proceedings. Judge Rosenberg responded that the Subcommittee initially considered proposing changes to Rule 45 and Rule 43 together but now thinks it will take more time to discuss changes to Rule 43 because a proposed change to Rule 43 would be more controversial. The Advisory Committee was in the process of gathering other perspectives on remote testimony, like those from the American Association for Justice and the Lawyers for Civil Justice. Professor Marcus emphasized that the Committee is not delaying consideration of remote testimony but rather the Committee feels urgency to move forward with an amendment to address *In re Kirkland*.

A member cautioned against overreading the lack of comments received so far for the bankruptcy rule amendment, since the amendment relates only to contested matters and not adversary proceedings. Further, bankruptcy courts have comfortably used remote technology for a long time. The bankruptcy responses therefore provide little guidance on a possible reaction to remote proceedings in non-bankruptcy civil cases. Professor Marcus agreed. Judge Connelly said that although no comments had been submitted yet, the Bankruptcy Rules Committee expects comments before the end of the notice period. Judge Connelly also noted that the bankruptcy rule amendments may have limited impact because contested matters are often akin to motion practice in district court.

Judge Bates observed that the Advisory Committee was considering issues across Rules 43 and 45. And because remote testimony is a broader issue than the issue regarding subpoenas, he urged the Advisory Committee to be cognizant of that and not let the subpoena consideration drive the analysis.

Rule 55 and the Use of the Verb "Must" with Regard to Action by Clerk. Judge Rosenberg reported that Rule 55(a) says that if the plaintiff can show that the defendant has failed to plead or otherwise defend, "the clerk must enter the party's default." Rule 55(b)(1) says that if "the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk … must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing." The Advisory Committee had found that the command in Rule 55(a) does not correspond to what is happening in many districts. FJC research shows wide variations among district courts in how they handle applications for entry of default or default judgment.

The Advisory Committee discussed whether to amend Rule 55. Some members favored changing "must" to "may" to protect clerks from pressure when there are serious questions about whether entry is appropriate. However, some members thought that "may" would create ambiguity. Judge Rosenberg said that the Advisory Committee is in the early stages of discussing this issue. Professor Marcus added that this command that some clerks find unnerving has been in the rule since 1938.

A judge member thought that there are two separate issues: the pressure on clerks to make a decision they feel uncomfortable making and whether entry should be mandatory. Professor Marcus responded that a number of districts have provisions allowing the clerk to act or refer the matter to the court.

At this point in the Civil Rules Committee's report, the discussion was paused in order to allow the Criminal Rules Committee to make its report (described below). The Civil Rules Committee's presentation resumed thereafter with the discussion of third party litigation funding.

Third Party Litigation Funding. Judge Rosenberg reported that a subcommittee was recently appointed to study the topic. Third party litigation funding first appeared on the Advisory Committee's agenda in 2014, primarily in the context of multidistrict litigation. Since then, litigation funding activity has increased and evolved. The Subcommittee has met once so far to plan its examination of the topic. It will examine, among other things, the model in place in the District of New Jersey, which adopted a local rule calling for disclosure. The Wisconsin legislature included a disclosure rule in its tort reform discovery package. The Subcommittee is only studying and monitoring the issue and does not anticipate making any proposals in the near future.

A practitioner member noted that disclosures have been required by some judge-made rules in Delaware courts, and also suggested that it may be helpful to examine arbitration practices, where mandatory disclosure of third-party litigation funding is the norm. Judge Rosenberg asked if discovery ensues after such disclosures and whether the disclosures are ex parte. The member replied that he did not know about discovery, but he thought that the disclosures are not ex parte because they are designed to provide information for conflict-of-interest purposes.

Another practitioner member observed that in his practice, he often wonders if there is a funder involved and it is very difficult to get discovery about that information. He commented that there may be reasons why information on funding should never be disclosed to a jury, but he expressed concern that funders exercise control over claims. The attorney may even be associated with the funder before the attorney is associated with their client. The member said that funders can make resolving a case more difficult. He recounted a case where a funder loaned a company a large sum of money secured by existing and future claims, caused the company to file claims, and then prevented the company from settling their claims. He thought that some sort of discovery into the funder relationship should be permitted.

Judge Rosenberg invited the member to share persons or organizations with whom it would be helpful to speak. She said that the Subcommittee is eager to learn how pervasive funding is, what constitutes litigation funding, how it could be defined, and what, if anything, the rulemakers should do about it. The Subcommittee knows that funding can be problematic from a recusal standpoint and a control standpoint, but it needs to understand the breadth and pervasiveness of the problem.

Professor Marcus observed that a court presumably could order discovery on funding even without a new rule on point and he asked why they do not always do so. As to recusal, Professor Marcus recalled a judge during a prior discussion stating that not very many judges invest in hedge funds. He asked what a judge is supposed to do upon learning of funding. A practitioner member replied that the Subcommittee should look into the breadth of litigation funders because he suspected that litigation funders include not only hedge funds, but also other entities such as insurance companies. Thus, the member said, funding does pose potential recusal issues. He also said that in his experience the trend is generally not to allow discovery on the issue unless a party can come forward with some specific reason to believe that something untoward is going on.

Another practitioner member agreed. He said that an objection is often made arguing that funding arrangements are matters between the funder and client, and the opposing party should not receive the information even if it is needed to determine whether the court should recuse. The member framed this as a chicken and egg problem: the opposing party may be able to articulate a

basis for funding concerns only after receiving information about the funding arrangement. He repeated that most courts do not allow discovery into the issue because it is seen as a fishing expedition.

Professor Hartnett commented on the disclosure rule in the District of New Jersey. He said that he is a member of the Lawyers' Advisory Committee that developed and drafted the rule ultimately promulgated by the district. He offered to facilitate a meeting with the Lawyers' Advisory Committee. Judge Rosenberg said that the FJC has been in touch with the district's Clerk of Court to learn the types of disclosures being made under the local rule and how judges use the information disclosed.

Professor Coquillette observed that this is another area where a rules committee's work overlaps with another rulemaking system because this issue is covered by state disciplinary rules, particularly when lawyers and their clients have differing interests.

A member cautioned that the term third party litigation funding captures a broad and varied set of arrangements. It may be on the plaintiff or defense side, it may be framed as insurance, and parties offering funding can include hedge funds and private equity firms. To craft a rule, even if it relates only to disclosures, one must determine what the funding device is and what type of concern it raises. If the concern is about control, the member agreed with Professor Coquillette that there could be other ways of addressing that concern or that any rulemaking could be narrow and targeted. But he thought that unless a disclosure rule was limited to seeking a very narrow set of information about control, it could be difficult to craft a rule that would be both meaningful and long-lasting. Judge Bates recalled that the scope of third-party litigation funding was an initial question that the Advisory Committee confronted many years ago. The member also noted that some states have abolished champerty as an operative doctrine, while other states still enforce champerty restrictions.

Cross-Border Discovery Subcommittee. Judge Rosenberg reported that the Subcommittee was formed in response to a proposal urging study of cross-border discovery with an eye toward possible rule changes to improve the process. The Subcommittee is focused on foreign discovery under 28 U.S.C. § 1781 and the Hague Convention from litigants that are parties to U.S. litigation. The Subcommittee has met with bar groups, and Subcommittee members will attend the Sedona Conference Working Group 6, which focuses on cross-border discovery issues. The Subcommittee will continue to reach out to groups and participate in relevant meetings, though it does not anticipate making any proposals in the near future. Professor Marcus confirmed that he will attend the Sedona Conference meeting and said that it is not clear whether there is widespread support for rulemaking in this area.

Rule 7.1 Subcommittee. Judge Rosenberg reported that the Subcommittee is considering whether to expand the disclosures required of nongovernmental corporations. She said that the current rule, which requires that nongovernmental corporations disclose any parent corporation and any publicly held corporation owning 10% or more of its stock, does not provide enough information for judges to evaluate their statutory obligations in all cases. The Subcommittee seeks to ensure that any proposed rule helps judges evaluate their obligations and is consistent with recently issued Codes of Conduct Committee guidance. The guidance indicates that a judge has a

financial interest requiring recusal if the judge has a financial interest in a parent that "controls" a party. The current rule likely requires disclosure of most such circumstances but not all.

Judge Rosenberg said that the Subcommittee is considering an amendment requiring disclosure based on a financial interest. In addition to the current disclosure requirements, the amendment would also require corporate parties to disclose any publicly held business organization that directly or indirectly controls the party. The Subcommittee hopes to present a proposed amendment and committee note for Advisory Committee consideration at the Advisory Committee's April meeting. Professor Bradt added that the Subcommittee continues outreach to likely affected parties, including organizations of general counsel.

Use of the Term "Master" in the Rules. Judge Rosenberg reported that the American Bar Association had submitted a suggestion to remove the word "master" from Rule 53 and other places. The Academy of Court-Appointed Neutrals and the American Association for Justice submitted supporting suggestions. At its October meeting, the Advisory Committee decided to keep the matter on its agenda for monitoring, but it does not anticipate making any proposals in the near future.

Professor Marcus noted that "master" appears in many rules. It appears in Rule 53, at least six other Civil Rules, the Supreme Court's rules, and several federal statutes. Professor Marcus asked whether the term should be removed from the Civil Rules, and if so, what should replace it. The Academy of Court-Appointed Neutrals suggested "court-appointed neutral," but this does not seem to describe persons who can do the many things that Rule 53 masters can do, such as make rulings.

Professor Garner commented that there are about 12 or 13 different contexts in which master historically has been used. He thought that the suggestions may be focusing on one historical use of the term. Professor Garner authored an article on the topic and offered to share it with the Advisory Committee.

A judge member commented that the issue is whether the term should be used or not. This member thought that if there are many appropriate uses of the term, then that would be a reason not to make a change. But if the term has become offensive, then the Advisory Committee should amend the rules. A practitioner member agreed that this should be the focus. This member stressed that it is important to look for a replacement term that would have the same utility: the term "master" has become a term of art with a particular meaning in litigation that terms like "neutral" do not capture. The member said that the term "master" is obsolete but that it is difficult to think of a replacement.

Another judge member asked whether states continue to use the term and, if not, what terms they have replaced it with. Professor Marcus recalled that a submission referred to recent changes elsewhere and noted that the Academy of Court-Appointed Neutrals was previously called the Academy of Court-Appointed Masters. He also said that the AAJ suggestion did not suggest a proposed substitute term. Professor Marcus suggested one possibility is waiting to see what term becomes familiar and recognized in litigation.

Professor Coquillette noted that treatises exist in online databases that use Boolean search operators. Changing key terms will complicate the use of these word retrieval systems.

A judge member also noted that the Supreme Court uses the term, and the Court's usage would not be altered by changes to the national rules for the lower federal courts.

Professor Capra said that recent changes include New Jersey now using the term "special adjudicator," and New York using "referee."

Random Case Assignment. Judge Rosenberg reported that the Advisory Committee has received several proposals to require random district judge assignment in certain types of cases. In March 2024, the Judicial Conference issued guidance to all districts concerning civil actions that seek to bar or mandate statewide enforcement of a state law or nationwide enforcement of a federal law, whether by declaratory judgment or injunctive relief. In such cases, judges would be assigned by a district-wide random selection. Judge Rosenberg stated that the Advisory Committee is monitoring the implementation of the guidance, but that it is premature to make any rule proposals in the near future.

Judge Bates thanked Judge Rosenberg and the reporters for their report.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Dever and Professors Beale and King presented the report of the Advisory Committee on Criminal Rules, which last met on November 6-7, 2024, in New York, NY. The Advisory Committee presented several information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 320.

Information Items

Rule 53 and Broadcasting Criminal Proceedings. Judge Dever noted that Rule 53 provides that "[e]xcept as otherwise provided by a statute or these rules, the court must not permit … the broadcasting of judicial proceedings from the courtroom." The Rule 53 Subcommittee previously considered but did not act on a suggestion from some members of Congress suggesting that a clause be added excluding from the rule any trial involving Donald J. Trump. Subsequently, a consortium of media organizations proposed that Rule 53 be revised to permit the broadcasting of criminal proceedings, or to at least create an "extraordinary case" exception to the prohibition on broadcasting. A subcommittee was formed to consider that suggestion.

The Subcommittee met a number of times and gathered information about Judicial Conference Policy § 420(b), which permits the court to permit broadcasting of civil and bankruptcy non-trial proceedings in which no testimony will be taken. The Subcommittee also received an excellent FJC survey on state practices related to broadcasting and attempted to find empirical studies on the effect of broadcasting on criminal proceedings. Ultimately, the Subcommittee unanimously recommended no change to Rule 53, citing concerns about due process, fairness, privacy, and security. With one dissenting vote, the Advisory Committee decided not to propose amending Rule 53.

Professor King noted that, after the agenda book for the Advisory Committee's fall meeting was published, the Advisory Committee received an additional two submissions related to broadcasting. Professor Beale noted that one of those submissions was from the proponent of the original Rule 53 proposal. She noted that the Advisory Committee welcomed comments on the topic.

A judge member expressed interest in the FJC's research on remote public access to court proceedings. This judge member expressed skepticism about the assertion that the risks of broadcasting are somehow greater in federal court proceedings than in state court proceedings (where the risks seem to have been overcome). The member also wondered why the DOJ had abstained from voting on whether to remove the Rule 53 proposal from the Committee's study agenda.

Rule 17 Subpoena Authority. Judge Dever reported that the Advisory Committee was continuing to consider a proposal from the New York City Bar Association to amend Rule 17. The Rule 17 Subcommittee has learned of a wide range of practices under Rule 17 and associated caselaw. The Subcommittee will continue to meet and will present further information at the Advisory Committee's April meeting.

References to Minors by Pseudonyms and Full Redaction of Social Security Numbers. Judge Dever noted that Rule 49.1(a)(3) currently requires filings referring to a minor to include only that minor's initials unless the court orders otherwise. Rule 49.1(a) also provides that only the last four digits of a social security number may appear in public filings. The DOJ and two bar groups have proposed amending the rule to require that minors be referred to by a pseudonym rather than initials in order to provide greater protection of their privacy. Meanwhile, Senator Wyden has suggested amending the rule with respect to social security numbers. The relevant Subcommittee expects to present a proposal to the Advisory Committee at its April meeting.

Professor Beale noted that if Rule 49.1 is amended to require use of pseudonyms for minors, this would create disuniformity unless the other privacy rules are similarly amended. She noted that DOJ policy is to use pseudonyms, and federal defenders said they mostly use pseudonyms already as well. Professor Beale thought that the rules should reflect this practice. Given that the Criminal Rules Committee would consider this proposal at its Spring meeting, she expressed a hope that the other advisory committees would do so as well.

As to Senator Wyden's concern about the inclusion of the last four digits of social security numbers in court filings, Judge Dever stated that disclosure of the last four digits can impact a person's privacy interests. He recognized that different issues arise with respect to the Bankruptcy Rules; but the Criminal Rules Committee thought that, outside that context, removing the last four digits from public filings makes sense.

Professor Beale said that the Advisory Committee received feedback from federal defenders, the DOJ, and the Clerk of Court liaison, none of whom see a need for the last four digits in public filings. Where reference to a social security number is actually necessary (for example, in a fraud case), it can be filed under seal. Professor Beale acknowledged that references to social security numbers can be necessary in bankruptcy cases. But for the other rule sets, she suggested,

the time has come to re-examine the risks of disclosing the last four digits of the social security number.

Summing up, Judge Bates noted that the Criminal Rules Committee will be considering the privacy issues related to pseudonyms for minors and full redaction of social security numbers and encouraged the Appellate and Civil Rules Committees to consider the issues as well.

Professor Marcus noted that in civil proceedings permitting a party to proceed anonymously is controversial. He wondered whether the considerations are different for minors. Judge Bates clarified that the issue before the Criminal Rules Committee is not as to a party; it would be very rare for a minor to be a defendant in a federal prosecution.

Ambiguities and Gaps in Rule 40. Judge Dever reported that a Subcommittee was established to address possible ambiguities in Rule 40, which relates to arrests for violating conditions of release set in another district. Magistrate Judge Bolitho raised this issue, and the Magistrate Judges Advisory Group submitted a detailed letter expressing its concerns. Judge Harvey was appointed to chair the Subcommittee.

Rule 43 and Extending the Authority to Use Videoconferencing. Judge Dever recalled that, over the years, the Advisory Committee has considered many suggestions submitted by district judges concerning the use of videoconference technology in Rule 11 proceedings, sentencings, and hearings on revocation of probation or supervised release. By contrast, neither the National Association of Criminal Defense Lawyers nor the DOJ had submitted such suggestions.

During the discussion at the Advisory Committee's last meeting, the members generally did not support changing the rules for Rule 11 or sentencing proceedings, although one member noted the long distances that participants must travel in some districts.

A Subcommittee has been appointed to study the topic. The Subcommittee intends to explore the universe of proceedings that the rules do not already cover, since the rules already permit videoconferencing for some proceedings, like initial appearances, arraignments, and Rule 40 hearings.

A judge member supported considerably relaxing Rule 43. He thought that videoconferencing should be available for noncritical proceedings if the defendant consents but not for trials, guilty pleas, or sentencings. Judge Dever responded that Rule 43(b)(3) already permits hearings involving only a question of law to proceed without the defendant present. The Subcommittee will discuss other types of proceedings.

Contempt proceedings. Judge Dever reported that the Advisory Committee received a proposal to substantially change Criminal Rule 42 concerning contempt proceedings. The proposal also advocated revisions to various federal statutes. The Advisory Committee removed the proposal from its agenda.

Judge Bates thanked Judge Dever for the report.

OTHER COMMITTEE BUSINESS

The legislation tracking chart begins on page 378 of the agenda book. The Rules Law Clerk provided a legislative update, noting that the 118th legislative session ended shortly before the Standing Committee's meeting.

Action Item

Judiciary Strategic Planning. As at prior meetings, Judge Bates asked the Standing Committee to authorize him to work with Rules Committee Staff to respond to the Judicial Conference of the United States regarding strategic planning. Without objection, the Standing Committee authorized Judge Bates to work with Rules Committee Staff to submit a response regarding strategic planning on behalf of the Standing Committee.

CONCLUDING REMARKS

Judge Bates thanked the Standing Committee members and other attendees. The Standing Committee will next convene on June 10, 2025, in Washington, DC.

TAB 1C

Agenda Item
June 2025
Action

Judiciary Strategic Planning

Issue

This item requests that the Committee review the draft 2025 Strategic Plan for the Federal Judiciary (Plan) and advise if any further changes are recommended before it is submitted to the Judicial Conference for consideration at its September 2025 session.

Background

Strategic planning is among the oversight and policy advisory functions of Judicial Conference committees. The Executive Committee, which facilitates and coordinates planning efforts, designated Chief Judge Michael A. Chagares as the Judiciary Planning Coordinator.

The Plan, first approved by the Judicial Conference in September 2010 and updated every five years, identifies strategies and goals to address judiciary trends, issues, challenges, and opportunities (JCUS-SEP 2010, pp. 5-6; JCUS-SEP 2015, pp. 5-6; JCUS-SEP 2020, pp. 13-14).

After feedback is considered over the summer, a Plan will be submitted to the Executive Committee for review at its August 2025 meeting and to the Judicial Conference for consideration at its September 2025 session.

Discussion

Chief Judge Chagares requests that committees submit via letter to him, by June 30, 2025, recommendations for any edits to the draft Plan. Proposed edits should include a thorough explanation of the rationale for the changes, along with redlined language. Letters should copy Neal Allen, Strategic Planning Officer.

Recommendation: That the Committee review the draft Strategic Plan for the Federal Judiciary and advise if further changes are recommended before it is submitted to the Judicial Conference for consideration at its September 2025 session.

TAB 2

TAB 2A

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

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Jesse M. Furman, Chair
Advisory Committee on Evidence Rules

RE: Report of the Advisory Committee on Evidence Rules

DATE: May 15, 2025

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on May 2, 2025, at the Administrative Office in Washington, D.C. The Committee reviewed a proposal for an amendment to Rule 801(d)(1)(A) that had been released for public comment and considered five other proposed amendments to the Evidence Rules. The Committee recommends final approval of the proposed amendment to Rule 801(d)(1)(A) and recommends that two proposed amendments be released for public comment: an amendment to Rule 609 and a new Rule 707 to regulate machine-generated evidence.

A full description of the Committee's discussion can be found in the draft minutes of the Committee meeting, which are attached to this Report.

II. Action Items

A. Proposed Amendment to Rule 801(d)(1)(A) for Final Approval

The Committee recommends final approval of a proposed amendment to Rule 801(d)(1)(A). Currently, Rule 801(d)(1)(A) provides for a very limited exemption from the hearsay rule for prior inconsistent statements of a testifying witness: The prior statement is admissible over a hearsay objection only when it is made under oath at a formal proceeding. Thus, while all prior inconsistent statements are admissible for impeachment purposes, very few are admissible as substantive evidence. It follows that, in the typical case, a court upon request has to instruct the jury that a prior inconsistent statement may be used to impeach the witness's credibility but may not be used as proof of a fact.

The amendment as released for public comment would provide that all prior inconsistent statements admissible for impeachment are also admissible over a hearsay objection. Exclusion is still possible under Rule 403. The amendment tracks the 2014 change to Rule 801(d)(1)(B), which provides that all prior consistent statements admissible to rehabilitate a witness are also admissible as substantive evidence (again, subject to Rule 403). This convergence of substantive and credibility use dispenses with the need for confusing limiting instructions with respect to all prior statements of a testifying witness.

The amendment adopts the position of the original Advisory Committee, which proposed that all prior inconsistent statements would be admissible over a hearsay objection. As the original Advisory Committee noted, the dangers of hearsay are "largely nonexistent" for such statements because the declarant is in court and can be cross-examined about the prior statement and the underlying subject matter. That is, the trier of fact "has the declarant before it and can observe the demeanor and the nature of his testimony as he denies it or tries to explain away the inconsistency." Adv. Comm. Note to Rule 801(d)(1)(A) (quoting California Law Revision Commission). The amendment is consistent with the practice of many states, including California.

The Committee received eight public comments on the proposed amendment to Rule 801(d)(1)(A). The comments were largely very positive. Comments from the Federal Magistrate Judges' Association, the American College of Trial Lawyers, and the National Association of Criminal Defense Lawyers were all in favor of the proposed amendment.

At its meeting, the Committee considered the public comments and, by a vote of 8-1, recommended final approval of the proposed amendment to Rule 801(d)(1)(A). The Department of Justice, which had abstained on whether to release the proposed amendment for public comment, voted in favor of final approval of the rule amendment.

The Committee recommends final approval of the proposed amendment, and the accompanying Committee Note—which are attached to this Report.

B. Proposed Amendments to Rule 609 for Release for Public Comment

The Committee recommended publication for public comment a modest proposed amendment to Rule 609(a)(1)(B), which currently allows for impeachment of criminal defendant witnesses with convictions not involving dishonesty or false statement if the probative value of the conviction in proving the witness's character for truthfulness outweighs the prejudicial effect. The proposed amendment approved by the Committee would result in the provision becoming somewhat more exclusionary. To be admitted, the probative value of the conviction would have to *substantially* outweigh its prejudicial effect. The amendment is narrower than other suggestions for change made to, and rejected by, the Committee in the last two years, namely a proposal to eliminate Rule 609 entirely and a proposal to delete Rule 609(a)(1), which would have meant that all convictions not involving falsity would be inadmissible to impeach a witness's character for truthfulness.

The Committee concluded that the amendment was warranted because a fair number of courts have misapplied the existing test to admit convictions that are either similar to the crime charged or otherwise inflammatory and because that error is not likely to be remedied through the normal appellate process. That is because the Supreme Court has held that a defendant may appeal an adverse Rule 609 ruling only if he or she takes the stand at trial, so appeals by defendants of adverse Rule 609 rulings are relatively rare.

The amendment, through its slightly more protective balancing test, would promote Congress's intent, which was to provide more protection to criminal defendants so that they would not be unduly deterred from exercising their rights to testify. The Committee believes that the tweak to the applicable balancing test would encourage courts to more carefully assess the probative value and prejudicial effect of convictions that are similar or identical to the crime charged, or that are otherwise inflammatory or less probative because they involve acts of violence. The proposal leaves intact Rule 609(a)(2), which governs admissibility of convictions involving dishonesty or false statement.

In addition, the Committee proposes a slight change to Rule 609(b), which covers older convictions. The rule is triggered when a conviction is over ten years old. That ten-year period begins running from the date of conviction or release from confinement, whichever is later. But the current rule does not specify the end date of the ten-year period. The absence of any guidance in the rule has led courts to apply varying dates, including the date of indictment for the trial at issue, the date that trial begins, and the date that the witness to be impeached actually testifies. The Committee approved a change to Rule 609(b) that would end the ten-year period on the date that the relevant trial begins. The Committee determined that the date of trial is the date that is most easily administered, the least amenable to manipulation, and that it is a proper date for determining the credibility of a witness who is going to testify at the trial.

At its meeting, the Committee, by a vote of 8-1, recommended the proposed amendments to Rule 609 for release for public comment. The Department of Justice voted in favor of the proposal.

The Committee recommends that the proposed amendments to Rule 609, and the accompanying Committee Note—which are attached to this Report—be released for public comment.

C. Proposed New Rule 707 to Regulate Machine-Generated Evidence for Release for Public Comment

For the past three years, the Committee has been researching and investigating whether the existing Evidence Rules are sufficient to assure that evidence created by artificial intelligence ("AI") will be properly regulated for reliability and authenticity. The Committee has determined that there are two evidentiary challenges raised by AI: (1) evidence that is a product of machine learning, which would be subject to Rule 702 if propounded by witness; and (2) audiovisual evidence that is not authentic because it is a difficult-to-detect deepfake.

At its Fall meeting, the Committee considered proposals to amend the Evidence Rules to regulate machine learning and deepfakes. As to machine learning, the concern is that it might be unreliable, and yet the unreliability will be buried in the program and difficult to detect. The hearsay rule is likely to be inapplicable because the solution to hearsay is cross-examination, and a machine cannot be cross-examined. The Committee determined that the reliability issues attendant to machine output are akin to those raised by experts under Rule 702. Indeed, Rule 702 would be applicable to machine-learning if it was used by a testifying expert to reach her conclusion. But Rule 702 is not clearly applicable if the machine output is admitted without any expert testimony – either directly or by way of a lay witness.

After extensive discussion, the Committee has determined that a new rule of evidence may be appropriate to regulate the admissibility of machine evidence that is introduced without the testimony of any expert. The Committee concluded that amending Rule 702 itself would not be workable, for two reasons: (1) that Rule was just amended in 2023; (2) it is a rule of general applicability, and a separate subdivision dealing with machine evidence would be inappropriately specific and difficult to draft. The Committee's solution was to draft a new Rule 707 providing that if machine-generated evidence is introduced without an expert witness, and it would be considered expert testimony if presented by a witness, then the standards of Rule 702(a)-(d) are applicable to that output. Examples of such possibilities include machine output analyzing stock trading patterns to establish causation; analysis of digital data to determine whether two works are substantially similar in copyright litigation; and machine learning that assesses the complexity of software programs to determine the likelihood that code was misappropriated. In all these examples, it is possible that the machine output may be offered through a lay witness, or directly

with a certification of authenticity under Rule 902(13). The Committee is of the opinion that, in such instances, a showing of reliability must be made akin to that required under Rule 702.

The rule provides that it does not apply to the output of basic scientific instruments, and the Committee Note provides examples of such instruments, such as a mercury-based thermometer, an electronic scale, or a battery-operated digital thermometer. The Committee concluded that such an exception is warranted to avoid litigation over the output of instruments that can be presumed reliable but that, given the wide range of potential instruments and technological change, it is better to leave it to judges to determine whether a particular instrument falls within the exception than to try to be more specific in the rule. The Committee Note also provides that the rule not apply to output that can be judicially noticed as reliable.

The Committee agreed that disclosure issues relating to machine learning would be better addressed in the Civil and Criminal Rules, not the Evidence Rules. General language about the importance of advance notice before offering machine-generated evidence was added to the Committee Note.

At its meeting, the Committee, by a vote of 8-1, recommended the proposal to add a new Rule 707 for release for public comment. The Department of Justice voted against the proposal.

The Committee recommends that the proposed new Rule 707, and the accompanying Committee Note—which are attached to this Report—be released for public comment.

It is important to note that the Committee is not treating release for public comment as a presumption that the rule should be enacted. The Committee believes that it will receive critically important information during the public comment period about the need for this new rule and that it will get input from experts on the kinds of machine-generated information that should be subject to the rule or that should be exempt from the rule. Given the fast-developing field of AI, and the limits of the Committee's expertise on matters of technology, the Committee believes that the best way to obtain the necessary information to support or reject the rule is through public comment—which is sure to be extensive.

III. Information Items

A. Deepfakes

As discussed above, one of the problems of AI is that deepfakes are easy to generate and difficult to detect. As a matter of evidence, deepfakes raise a problem of authenticity, which traditionally is governed by a low standard of admissibility under Rule 901(a): evidence sufficient to support a finding that the item is what the proponent says it is.

The Committee is of the view that, at least for now, an amendment to Rule 901 to address deepfakes is not warranted. This is because, despite extensive commentary on the subject, very

few examples exist of courts having to address the possibility of deepfakes. Moreover, in the few cases where deepfake issues have arisen, courts have generally been able to address them under the existing rules governing authenticity.

That said, the Committee is working to develop rule language that could be employed to assist courts in reviewing deepfake claims in the event that the Committee concludes that the existing rules are not adequate. The working rule is based on two agreed-upon principles. The first is that an opponent should not have the right to an inquiry into whether an item is a deepfake merely by claiming that it is a deepfake. Some initial showing of a reason to think the item is a deepfake should be required. The second principle is that, if the opponent does make an evidentiary showing that the item may be a deepfake, then the opponent must prove authenticity under a higher evidentiary standard than the prima facie standard ordinarily applied under Rule 901. Mindful that technology develops quickly and the rule-making process is slow, the Committee's objective is to fine tune a possible amendment to hold in abeyance until such time that it concludes an amendment is warranted, at which point the rule would be ready to go without delay.

The working draft of a new Rule 901(c), to address deepfakes, provides as follows:

Rule 901. Authenticating or Identifying Evidence

* * * * *

(c) Potentially Fabricated Evidence Created by Artificial Intelligence.

(1) ***Showing Required Before an Inquiry into Fabrication.*** A party challenging the authenticity of an item of evidence on the ground that it has been fabricated, in whole or in part, by generative artificial intelligence must present evidence sufficient to support a finding of such fabrication to warrant an inquiry by the court.

(2) ***Showing Required by the Proponent.*** If the opponent meets the requirement of (1), the item of evidence will be admissible only if the proponent demonstrates to the court that it is more likely than not authentic.

(3) ***Applicability.*** This rule applies to items offered under either Rule 901 or 902.

Committee Note

This new subdivision is intended to set forth guidance and standards when a party opponent alleges that an item of evidence is a "deepfake" --- i.e., that it has been altered by generative artificial intelligence so that it is not what the proponent says it is.

The term "artificial intelligence" can have several meanings, and it is not a static term. In this rule, "artificial intelligence" means software used to perform tasks or produce output previously thought to require human intelligence. "Generative artificial intelligence" is used in this rule to cover technology that can produce various types of content, including text, imagery, audio and synthetic data. Generative artificial intelligence creates new content in response to a wide variety of user inputs.

The rule sets out a two-step process for regulating claims of deepfakes. First, the opponent must set forth enough information for a reasonable person to find that the item has been fabricated in whole or part by the use of generative artificial intelligence. Thus, a broad claim of "deepfake" is not enough to put the court and the proponent to the time and expense of showing that the item has not been manipulated by generative artificial intelligence. Second, assuming that the opponent has shown enough to merit the inquiry, the proponent must show to the court that the item is more likely than not authentic. While that Rule 104(a) standard is higher than ordinarily required for a showing of authenticity, it is justified given that any member of the public now has the capacity to make a deepfake, with little effort and expense, and deepfakes have become more difficult to detect by jurors. It is therefore reasonable for the court to require a showing, by a preponderance of the evidence, that the item is not a deepfake, once the opponent has met its burden of going forward.

This amendment covers specific proffered items as to which the opponent has presented a sufficient foundation of fabrication. It does not directly address another possible consequence --- that because of the background risk of deepfakes, juries might be led to think that no evidence can be trusted. This phenomenon has been called the "liar's dividend." But rules are in place to combat claims that "you can't believe anything you see." To the extent evidence of such a broad point is proffered, it is subject to Rule 403. And to the extent the point is expressed by lawyers in argument, it is subject to the court's inherent authority to regulate lawyer argument that is made without foundation in the evidence.

The requirements of the rule apply to authentication under either Rule 901 or 902. The risk of deepfakes extends to many of the items designated in Rule 902 as self-authenticating --- most obviously newspapers and publications.

> Courts are encouraged to exercise their discretion over case management to establish notice requirements in order to limit the possibility that a battle of experts on admissibility of evidence under the rule will occur during a trial. The rule does not set forth notice requirements because the deepfake issue is likely to arise in different contexts, and the appropriate notice may well depend on whether it is a civil or criminal case and on whether the item of evidence is offered or used for impeachment.

The Committee intends to (1) continue to monitor the case law and commentary to determine whether a new rule is necessary to treat the deepfake problem and (2) refine and discuss a potential rule and Committee Note.

B. Rule 902(1) and Indian Tribes

Just before the Fall 2024 meeting, Judge Frizzell asked the Committee to consider whether federally recognized Indian tribes should be added to Rule 902(1), which provides that domestic public records that are sealed and signed are self-authenticating. Because Rule 902(1) does not list Indian tribes, the government must use another route to authenticate proof of a defendant's Indian status in federal prosecutions brought for crimes occurring in Indian country. There have been at least two recent cases in which the prosecution failed to prove Indian status by attempting, unsuccessfully, to meet the requirements of the business records exception or authentication under Rule 902(11). Additionally, the issue has arguably taken on more importance in light of the increase in relevant federal cases following the Supreme Court's decision in *McGirt v. Oklahoma*.

At the Spring 2025 meeting, the Committee considered a submission by the Department of Justice supporting Judge Frizzell's proposal and a submission by the Federal Defender opposing it. The Department's position is that a change would recognize the dignity and sovereignty of Indian tribes and nations and would avoid the burden and expense of tribal officials traveling long distances to qualify tribal records. The Federal Defender's position is that it is relatively simple to qualify a tribal record through a certification under Rule 902(11) (meaning that the failures of proof in the recent cases were attributable to the Department of Justice not to the rules) and that recordkeeping among Indian tribes may not be uniform.

The Committee determined that it would be appropriate, under the circumstances, to hear from the Native American community on the significance of, and the need for, the proposed change. The Committee will engage in outreach and consider the proposed amendment at its next meeting.

C. Rule 801(d)(2)(E)

The Committee considered and rejected a suggestion from Sai that Rule 801(d)(2)(E) ("was made by the party's coconspirator during and in furtherance of the conspiracy") be amended by adding two commas. The Committee concluded that an amendment was unnecessary based on input from the stylists and the absence of any demonstrated problem.

IV. Minutes of the Spring 2025 Meeting

A draft of the minutes of the Committee's Spring 2025 meeting is attached to this Report. These minutes have not yet been approved by the Committee.

Attachments:

Proposed amendment to Evidence Rule 801(d)(1)(A), with the recommendation for final approval.

Proposed amendments to Rule 609, with the recommendation that they be approved for release for public comment.

Proposed new Rule 707, with the recommendation that it be approved for released for public comment.

Draft Minutes of the Spring 2025 meeting of the Advisory Committee on Evidence Rules.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

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(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony ~~and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition~~;

(B) is consistent with the declarant's testimony and is offered:

[1] Matter to be omitted is lined through.

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier.

* * * * *

Committee Note

The amendment provides that a prior inconsistent statement by a witness subject to cross-examination is admissible over a hearsay exception, even where the prior statement was not given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition. The Committee has determined, as have a number of states, that delayed cross-examination under oath is sufficient to allay the concerns addressed by the hearsay rule. As the original

Advisory Committee noted, the dangers of hearsay are "largely nonexistent" because the declarant is in court and can be cross-examined about the prior statement and the underlying subject matter, and the trier of fact "has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency." Adv. Comm. Note to Rule 801(d)(1)(A) (quoting California Law Revision Commission). A major advantage of the amendment is that it avoids the need to give a confusing jury instruction that seeks to distinguish between substantive and impeachment uses for prior inconsistent statements. The amendment also eliminates the distinction that currently exists between prior inconsistent and prior consistent statements. For both types of statements, if they are admissible for purposes of proving the witness's credibility, they are admissible as substantive proof.

The original rule, requiring that the prior statement be made under oath at a formal hearing, is unduly narrow and has generally been of use only to prosecutors, where witnesses testify at the grand jury and then testify inconsistently at trial. The original rule was based on three premises. The first was that a prior statement under oath is more reliable than a prior statement that is not. While this is probably so, the ground of substantive admissibility is that the prior statement was made by the very person who is produced at trial and subject to cross examination about it, under oath. Thus any concerns about reliability are well addressed by cross-examination and the factfinder's ability to view the demeanor of the person who made the statement. The second premise was a concern that statements not made at formal proceedings could be difficult to prove. But there is no reason to think that an unrecorded prior inconsistent statement is any more difficult to prove than any other unrecorded fact. And any difficulties in proof can be taken into account by the court under Rule 403. See the Committee

Note to the 2023 amendment to Rule 106. The third premise was that if a witness denies making the prior statement, then cross-examination becomes difficult. But there is effective cross-examination in the very denial. *See* Nelson v. O'Neil, 402 U.S. 622, 629 (1971) (noting that the declarant's denial of the prior statement "was more favorable to the respondent than any that cross-examination by counsel could possibly have produced, had [the declarant] affirmed the statement as his").

Nothing in the amendment mandates that a prior inconsistent statement is sufficient evidence of a claim or defense. The rule governs admissibility, not sufficiency.

The amendment does not change the Rule 613(b) requirements for introducing extrinsic evidence of a prior inconsistent statement.

Changes Made After Publication and Comment

The Committee Note was altered to emphasize that the amendment provides uniform treatment for prior consistent and inconsistent statements, and to underscore that the rule governs admissibility, not sufficiency. Other minor changes were made to the Committee Note.

Summary of Public Comment

Michael Ravnitsky, Esq. (Rules-EV-2024-0003) states that the proposed amendment "aims to streamline the use of prior inconsistent statements and eliminate confusing jury instructions." He is in favor of those ends, but suggests that language be added to the text of the amendment to require the court to consider whether the prior statement is being taken out of context.

The Federal Magistrate Judges' Association (Rules-EV-2024-004) supports the proposed amendment to Rule 801(d)(1)(A). The Magistrate Judges note that "the change would make Rule 801(d)(1)(A) consistent with Rule 801(d)(1)(B), which was similarly amended in 2014" and that "this change will helpfully eliminate the need for what is often a confusing limiting jury instruction related to the prior statement's use in jury deliberations."

The American College of Trial Lawyers (Rules-EV-2024-007) supports the proposed amendment. The College observes that the proposed Amendment "will revise FRE 801(d)(1)(A) so that it is consistent with FRE 801(d)(1)(B), which was similarly amended in 2014." The College "agrees that it will be beneficial to synthesize the substantive and credibility uses of prior inconsistent statements to dispense with the need for confusing limiting jury instructions regarding prior statements of a testifying witness."

Professor Michael Graham (Rules-EV-2024-008) supports the proposed amendment. He asked himself "what is different today from 1975 that supports simply having all prior inconsistent statements admissible as substantive evidence." His answer is that today, prior statements are almost always recorded and therefore the dispute about whether they were even made is very unlikely. He states that another advantage of the rule is that a court no longer has to determine whether a party is introducing a prior inconsistent statement solely to impeach a witness that the party calls. Professor Graham says that removing that risk of abuse is "a major step forward."

Chris Corzo Injury Attorneys (Rules-EV-2024-009) understand the benefit of the amendment, stating that "even the clearest instruction from the trial court will not allow most jurors in deliberation to distinguish" between

impeachment and substantive use. But the firm nonetheless opposes the amendment on the ground that some purported prior inconsistent statements will likely be deepfakes. According to the firm, the risk of deepfakes should cause the Advisory Committee to reject the benefits of the amendment.

Professor Colin Miller (Rules-EV-2024-010) opposes the amendment on the ground that a defendant could be convicted solely on the basis of a witness statement that the witness herself does not stand by.

Marisol Garcia (Rules-EV-2024-011), a law student, states that the proposed amendment "represents a positive step towards improving the fairness and efficiency of trials by expanding the admissibility of prior inconsistent statements as substantive evidence." She believes that the amendment "will contribute to a more equitable judicial process." She notes that the amendment "seeks to eliminate the need for confusing jury instructions that differentiate between substantive and impeachment uses of prior inconsistent statements" and that "[s]implifying these instructions can help jurors better understand and evaluate the evidence presented." She observes that "[t]he amendment aligns Rule 801(d)(1)(A) with Rule 801(d)(1)(B), which already allows prior consistent statements to be used substantively" and that "[t]his consistency promotes a more streamlined and logical application of the hearsay exceptions." Finally, she notes that "[t]here is no significant reason to believe that unrecorded prior inconsistent statements are more difficult to prove than other unrecorded facts. Rule 403 can account for any potential difficulties."

The National Association of Criminal Defense Attorneys (NACDL) (Rules-EV-2024-0012) "strongly supports" the proposed amendment to Rule 801(d)(1)(A). NACDL declares that the dangers presented by hearsay are "largely nonexistent" when the declarant of the out-of-court statement is present and can be examined about its contents. NACDL agrees with the Advisory Committee's analysis that the "premises for the present rule disallowing unsworn prior inconsistent statements as substantive evidence are not persuasive." NACDL is "unaware of any support for the proposition that unsworn prior inconsistent statements are any less reliable than unsworn prior consistent statements, which have long been admitted as substantive evidence when offered for rehabilitation of the witness." NACDL notes that the perceived difficulty of proving unsworn prior inconsistent statements "provides scant support for the rule as currently framed" because many unsworn prior inconsistent statements "are contained in police reports or other writings" or "contained in written or recorded statements taken from witnesses." But "even when the prior inconsistent statement is not recorded anywhere, it is no harder to prove its content than that of any other unrecorded fact." NACDL concludes that "[t]here is no principled basis on which to allow some unrecorded statements to come in as substantive evidence, while barring others." NACDL also critiques the contention that a witness who denies that a statement is ever made is difficult to cross-examine. It notes that any such difficulty exists under the current rule, which allows impeachment but denies substantive effect. NACDL states that "[n]either the current rule nor the proposed amendment has any effect on the difficulty of a given cross examination."

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 609. Impeachment by Evidence of a Criminal Conviction

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence

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

substantially outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed ~~since~~ between the witness's conviction or release from confinement for it~~,~~ (whichever is later) and the date of trial. Evidence of the conviction is admissible only if:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

* * * * *

Committee Note

Rule 609(a)(1)(B) has been amended to provide that a non-falsity-based conviction should not be admissible to impeach a criminal defendant unless its probative value *substantially* outweighs the risk of unfair prejudice to the defendant. Congress allowed such impeachment with non-falsity-based convictions under Rule 609(a)(1), but imposed a reverse balancing test when the witness was the accused. That test is more protective so as not to infringe on the accused's constitutional right to testify. The amendment underscores the importance of applying a protective balance. The amendment also makes the balancing test consistent with that in Rule 703. Courts are familiar with the formulation "substantially outweighs" as the same phrase is used throughout the rules of evidence to describe various balancing tests. Cf. Rule 403.

If a conviction is inadmissible under this rule, it is inappropriate to allow a party, under Rule 608(b), to inquire into the bad acts underlying that conviction. Rule 608 permits impeachment only by specific acts that have not resulted in a criminal conviction. Evidence relating to impeachment by way of criminal conviction is treated exclusively under Rule 609.

Nothing in this rule prohibits the use of convictions to impeach by way of contradiction. Such impeachment is governed by Rule 403. So for example, if the witness affirmatively testifies that he has never had anything to do with illegal drugs, a prior drug conviction may be admissible for purposes of contradiction even if not admissible under Rule 609. *See* United States v. Castillo, 181 F.3d 1129 (9th Cir. 1999) (unequivocal denial of involvement with drugs on direct examination warranted admission of the witness's drug activity under Rule 403).

A number of courts have, in a kind of compromise, admitted only the fact of a conviction to impeach a defendant in a criminal case. Thus the jury hears only that the defendant was convicted of a felony, not what the crime was. That solution is problematic, because convictions falling within Rule 609(a)(1) have varying probative value, and admitting only the fact of conviction deprives the jury of the opportunity to properly weigh the conviction's effect on the witness's character of truthfulness.

In addition, Rule 609(b) has been amended to set an endpoint by which the rule's 10-year period is to be measured. The lack of such an endpoint in the original rule has led courts to apply various endpoints, including the date of the charged offense, the date of indictment, the date of trial, and the date the witness testifies. The rule provides for the date of trial as the endpoint, as that is a clear and objective date and it is the time at which the factfinder begins to analyze the truthfulness of witnesses.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 707. Machine-Generated Evidence

When machine-generated evidence is offered without an expert witness and would be subject to Rule 702 if testified to by a witness, the court may admit the evidence only it if satisfies the requirements of Rule 702 (a)-(d). This rule does not apply to the output of basic scientific instruments.

Committee Note

Expert testimony in modern trials increasingly relies on software- or other machine-based conveyances of information. Machine-generated evidence can involve the use of a computer-based process or system to make predictions or draw inferences from existing data. When a machine draws inferences and makes predictions, there are concerns about the reliability of that process, akin to the reliability concerns about expert witnesses. Problems include using the process for purposes that were not intended (function creep); analytical error or incompleteness; inaccuracy or bias built into the underlying data or formulas; and lack of interpretability of the machine's process. Where a testifying expert relies on such a method, that method – and the expert's reliance on it – will be scrutinized under

[1] New material is underlined in red.

Rule 702. But if machine or software output is presented without the accompaniment of a human expert (for example through a witness who applied the program but knows little or nothing about its reliability), Rule 702 is not obviously applicable. Yet it cannot be that a proponent can evade the reliability requirements of Rule 702 by offering machine output directly, where the output would be subject to Rule 702 if rendered as an opinion by a human expert. Therefore, new Rule 707 provides that if machine output is offered without the accompaniment of an expert, and where the output would be treated as expert testimony if coming from a human expert, its admissibility is subject to the requirements of Rule 702 (a)-(d).

The rule applies when machine-generated evidence is entered directly, but also when it is accompanied by lay testimony. For example, the technician who enters a question and prints out the answer might have no expertise on the validity of the output. Rule 707 would require the proponent to make the same kind of showing of reliability as would be required when an expert testifies on the basis of machine-generated information.

If the machine output is the equivalent of expert testimony, it is not enough that it is authenticated under Rule 902(13). That rule covers authenticity, but does not assure reliability under the preponderance of the evidence standard applicable to expert testimony.

The rule is not intended to encourage parties to opt for machine-generated evidence over live expert witnesses. Indeed the point of the rule is to provide reliability-based protections when a party chooses to proffer machine evidence instead of a live expert.

It is anticipated that a Rule 707 analysis will usually involve the following, among other things:

- Considering whether the inputs into the process are sufficient for purposes of ensuring the validity of the resulting output. For example, the court should consider whether the training data for a machine learning process is sufficiently representative to render an accurate output for the population involved in the case at hand.

- Considering whether the process has been validated in circumstances sufficiently similar to the case at hand.

The final sentence of the rule is intended to give trial courts sufficient latitude to avoid unnecessary litigation over the output from simple scientific instruments that are relied upon in everyday life. Examples might include the results of a mercury-based thermometer, an electronic scale, or a battery-operated digital thermometer. Moreover, the rule does not apply when the court can take judicial notice that the machine output is reliable. *See* Rule 201.

The Rule 702(b) requirement of sufficient facts and data, as applied to machine-generated evidence, should focus on the information entered into the process or system that leads to the output offered into evidence.

Because Rule 707 applies the requirements of admitting expert testimony under Rule 702 to machine-generated output, the notice principles applicable to expert opinion testimony should be applied to output offered under this rule.

Advisory Committee on Evidence Rules

Minutes of the Meeting of May 2, 2025
Thurgood Marshall Federal Judiciary Building
Washington D.C.

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on May 2, 2025, at the Thurgood Marshall Federal Judiciary Building in Washington, D.C.

The following members of the Committee were present:
Hon. Jesse M. Furman, Chair
Hon. Valerie E. Caproni
Hon. Mark S. Massa
Hon. Edmund A. Sargus, Jr.
John S. Siffert, Esq.
James P. Cooney III, Esq.
Rene L. Valladares, Esq., Federal Public Defender
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:
Hon. John D. Bates, Chair of the Committee on Rules of Practice and Procedure
Professor Catherine T. Struve, Reporter to the Standing Committee
Hon. Edward M. Mansfield, Liaison from the Standing Committee
Hon. Michael W. Mosman, Liaison from the Criminal Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Liesa L. Richter, Academic Consultant to the Committee
JoAnn Kintz, Esq., Department of Justice
Elizabeth Wiggins, Esq., Federal Judicial Center
Timothy Lau, Esq., Federal Judicial Center
Carolyn Dubay, Esq., Chief Counsel, Rules Committee Staff
Bridget M. Healy, Esq., Counsel, Rules Committee Staff
Shelly Cox, Management Analyst, Rules Committee Staff
Rakita Johnson, Administrative Analyst, Rules Committee Staff
Kyle Brinker, Esq., Rules Law Clerk
Samantha C. Smith, Esq., Supreme Court Fellow, Federal Judicial Center
Ebise Bayisa, Esq., Assistant Federal Public Defender
Kaiya Lyons, American Association for Justice
Susan Steinman, American Association for Justice

Present Via Microsoft Teams
Hon. Richard J. Sullivan, Member Evidence Advisory Committee
Professor Daniel R. Coquillette, Consultant to the Standing Committee
Tim Reagan, Esq., Federal Judicial Center
Alex Dahl, Lawyers for Civil Justice
Edith Beerdsen, Professor, Temple University School of Law
Jeffrey Bellin, Professor, William & Mary Law School

Sarah Brown-Schmidt, Professor, Vanderbilt University
Susan Provenzano, Professor, Georgia State University College of Law
Anna Roberts, Professor, Brooklyn Law School
Eileen Scallen, Professor, UCLA School of Law
Maggie Wittlin, Professor, Fordham Law School
John G. McCarthy, Federal Bar Association
Suzanne Monyak, Bloomberg Law
Jacqueline Thomsen, Bloomberg Law
Nate Raymond, Reuters
Sam Rahall
Sai

I. Welcome and Opening Business

Judge Furman opened the meeting by welcoming the Committee and other participants and attendees. He welcomed Judge Sullivan, who was participating remotely, and congratulated him on receipt of the Federal Bar Council's Learned Hand Medal the previous night and thanked him for his important work on judicial security. The Chair noted that Professor Coquillette was also participating remotely. He explained that Judge Lauck would not be participating due to attendance at a funeral and expressed condolences.

Judge Furman next welcomed Judge Bates, noting that this would be Judge Bates's last meeting as Chair of the Standing Committee. Judge Furman thanked Judge Bates for his extraordinary leadership and his many contributions to the federal judiciary. Judge Furman explained that it had been a great honor to work with Judge Bates and that he had learned a great deal from Judge Bates' excellent work on behalf of the Standing Committee. Judge Bates thanked Judge Furman and stated that it had been an honor and privilege to work with the Evidence Advisory Committee and all of its Chairs. He noted that the Committee had been extremely productive and had completed an amazing amount of work in the past 6-8 years. He thanked the Reporter and Academic Consultant for their many excellent agenda memos.

Judge Furman next welcomed Carolyn Dubay, the Rules Committees' Chief Counsel and expressed that the Committee was looking forward to working with her in her new role. He noted that Scott Myers, who staffs the Bankruptcy Procedure Advisory Committee, would be retiring in June. Lastly, Judge Furman welcomed members of the public in attendance and thanked them for their interest in the work of the Committee.

Next, Judge Furman asked if there was a motion to approve the Minutes of the Committee's Fall 2024 meeting. A motion was made and seconded and the minutes were unanimously approved. Judge Furman thanked the Academic Consultant for her work in preparing the minutes. Judge Furman noted that the Committee had only informational items before the Standing Committee at the January 2025 Standing Committee meeting and that the Committee had not received substantive feedback. Finally, the Chair directed the Committee's attention to the Rules Enabling Act and legislative updates behind Tabs 1.D. and 1.E. of the Agenda materials, noting

that proposed Federal Rule of Evidence 801(d)(1)(A) was in the pipeline to take effect on December 1, 2026, pending final approvals and transmission to Congress.

II. Proposed Amendment to Rule 801(d)(1)(A)

The Chair directed the Committee's attention to Tab 2 of the Agenda book (page 100 of the materials) and to the proposed amendment to Federal Rule of Evidence 801(d)(1)(A) that would make the prior inconsistent statements of all testifying witnesses admissible over a hearsay objection. He explained that the public comment period had closed on February 15, 2025, that the Committee had received 8 total comments, and that the comments were overwhelmingly positive. He noted that the comments, including ones from the Federal Magistrate Judges' Association, the American College of Trial Lawyers, and the National Association of Criminal Defense Attorneys were summarized in the Agenda memo. The Chair explained that comments in favor of the proposed amendment noted that the amendment would eliminate the need for confusing limiting instructions regarding the limited admissibility of prior inconsistent statements, would bring inconsistent statements into alignment with prior consistent statements offered to rehabilitate, and would correct an arguable imbalance favoring the prosecution. In light of the favorable public comment, Judge Furman expressed his opinion that there was no need to modify the proposed amendment. He proposed minor edits to the draft Committee note on page 125 of the Agenda materials to change the word "thus" to "also" in the penultimate sentence of the first paragraph, to remove the hyphen in "well-addressed" in the second paragraph, and to add a sentence to the third paragraph reading: "The rule governs admissibility not sufficiency."

The Reporter then noted that the Department of Justice had abstained from voting on the publication of the amendment for notice and comment but had decided to vote in favor of the Rule. He thanked Betsy Shapiro for her work in obtaining support for the amendment. The Reporter then explained that 22 state jurisdictions have rules regarding the substantive admissibility of prior inconsistent statements that are broader than existing Federal Rule of Evidence 801(d)(1)(A). He noted that this is an unusual degree of variation from the federal model and explained that state practice further supports the amendment of the federal provision. He explained that some edits were made to the draft Committee note to respond to matters raised in public comment and directed the Committee's attention to a red-lined version of the note in the Agenda materials at page 26-27 of the Rule 801(d)(1)(A) memo.

First, the Reporter explained that he had re-inserted the modifier "confusing" in describing limiting instructions in the first paragraph of the note, due to multiple public comments emphasizing the confusing nature of the limiting instructions given under the current rule. Second, several public comments noted that the amendment would bring consistency to the treatment of both inconsistent and consistent witness statements used at trial to impeach and rehabilitate, and the Reporter explained that he had added two sentences to the end of the first paragraph of the Committee note to highlight this point. Lastly, the Reporter explained that public comment had raised the issue of evaluating whether a prior witness statement is truly inconsistent with trial testimony and that, at the suggestion of the Chair, he had added a sentence to the very end of the Committee note explaining that inconsistency depends upon context and that the issue is for the court.

The Chair reminded the Committee that the proposed amendment to Rule 801(d)(1)(A) was an action item and that they would be voting on whether to advance the proposal to the Standing Committee. He then opened the floor for discussion of the proposed amendment.

One Committee member suggested that most courts treat the question of whether a witness's prior statement is actually inconsistent with her trial testimony as one for the jury. He queried whether adding the new sentence to the end of the Committee note, stating that the question of inconsistency is for the trial judge, would shift the burden to the trial judge to decide *before* cross-examination whether a particular witness statement is inconsistent. The Reporter explained that there is case law reviewing a trial judge's determination that a witness's statement constituted a prior inconsistent statement for error. He suggested that there was no need to invite a problem with the addition to the Committee note if there is already case law regulating this area. The Committee member responded that there should not be a system in which the trial judge has to review all witness statements prior to cross-examination to determine inconsistency. According to this Committee member, the prevailing practice is to allow the lawyer to utilize the statement during cross and then to allow the jury to decide whether it is inconsistent with the trial testimony. The Reporter suggested deleting the portion of the final sentence of the Committee note after the word "context," such that it would simply read: "As under Rule 613(b), the determination of whether a prior statement is actually inconsistent with the witness's trial testimony is dependent on context." This would eliminate any reference to the role of the trial judge.

The Chair asked whether any of the state evidence rules governing prior inconsistencies deal with the issue of context. The Reporter explained that the proposed amendment does not alter the nature or degree of any inconsistency. Rather it takes the statements that are already deemed to be "inconsistent" under existing law and renders them admissible for their truth whenever the witness is subject to cross concerning the statement. The Chair explained that he typically reviews witness statements before they are used to impeach to determine whether they are inconsistent. Another participant commented that the proposed addition at the end of the Committee note set forth only half the process surrounding prior inconsistent statements. He explained that *first*, the trial judge decides if a particular statement is sufficiently inconsistent for impeachment and then *second*, the jury evaluates the statement for inconsistency. This participant expressed concern that the suggested addition to the Committee note highlights only the judge's role and omits the role that the jury plays. Judge Bates noted that the difference was between the admissibility of a statement and its weight. He asked whether the Committee note could capture that the trial judge evaluates only admissibility and has no role in how the statement is ultimately weighed. The Chair queried whether it made sense to add a sentence to the note emphasizing that it is "ultimately up to the jury to weigh the statement." The Reporter reiterated his suggestion to end the final sentence at the word "context" and to eliminate any reference to the roles of the judge or jury. The Chair asked the Committee whether that edit would resolve concerns regarding the inconsistency determination.

Another Committee member opined that the note could have the unintended consequence of changing the approach to prior inconsistent statements and that it should expressly state that "no change" is intended. The Reporter noted that the very first sentence of the final paragraph of the

Committee note expressly states that the amendment "does not change the Rule 613(b) requirements." Another Committee member expressed the view that there would be no harm in referencing the role that the trial judge plays in assessing inconsistency and that there was no need to delete the part of the final sentence referring to the trial judge's discretion. Another Committee member agreed. Another Committee member asked whether the final (second) sentence of the last paragraph of the note was necessary at all. The Committee member argued that the first sentence of the final paragraph of the note was very clear that there would be no change in the existing practices around admitting prior inconsistencies and advocated for deleting the entire second sentence regarding context and judicial discretion. The Reporter agreed that deleting the entire final sentence would be optimal. The Chair noted that the concern about statements being taken out of context came from public comment. The Reporter responded that such concerns already exist and are handled by courts, and that the proposed amendment does nothing to affect those concerns.

The Committee member who originally raised a concern about the addition to the Committee note stated that deleting the final sentence of the proposed Committee note would alleviate that concern about the allocation of responsibility between judge and jury. The Chair noted the proposal to delete the final sentence of the draft Committee note and solicited Committee feedback. There were no objections from the Committee to deleting the final sentence.

Ms. Shapiro next stated that the Department of Justice has long viewed the proposed amendment as a close call, noting concerns that cross-examination delayed is not equivalent to contemporaneous cross-examination and about witnesses who deny having made a prior inconsistent statement. She further noted that the NACDL had changed its position since the Committee last considered an amendment to Rule 801(d)(1)(A) in 2018 and was supporting the proposal. She explained that the Department of Justice would accept the proposed amendment and would vote in favor of it.

The Chair solicited additional discussion on the proposal and another Committee member noted disapproval. That Committee member stated that he was not persuaded of the need for the amendment and that he expected defense counsel would come to regret supporting it. Although he views the amendment as problematic, he stated that he would not rehash old arguments. A motion was made and seconded to advance proposed Rule 801(d)(1)(A) to the Standing Committee for final approval with the friendly amendments to the Committee note and the Chair called for a vote. Eight members of the Committee voted in favor of advancing the proposal and one member voted against the proposed amendment.

III. Proposed Amendment to Rule 609

The Chair next directed the Committee's attention to Tab 4 of the Agenda materials and to the proposal to amend Federal Rule of Evidence 609. He noted that the Committee had been considering an amendment to Rule 609 for a number of years and that the Committee's consideration began with a presentation by Professor Jeff Bellin proposing the complete abrogation of Rule 609. The Chair explained that the Committee had rejected that proposal but was now considering a more modest amendment to add the single word "substantially" to the

balancing test applicable in Rule 609(a)(1)(B) to impeachment of a criminal defendant with convictions not involving dishonesty or false statement, in order to make that test more protective. He explained that this amendment was designed to correct cases in which inflammatory offenses or offenses very similar to the charged offense were being admitted to impeach testifying criminal defendants contrary to the intent expressed by Congress when it enacted Rule 609. The Chair explained that the Committee vote at the Fall 2024 meeting regarding retaining Rule 609 on the agenda was tied (with one member absent from the prior meeting voting to continue consideration of Rule 609) and that the proposal was now ripe for consideration. He called the Committee's attention to new Rule 609 cases decided since the Fall 2024 meeting and the summary of data regarding impeachment of criminal defendants with convictions in the Agenda memo behind Tab 4. The Chair noted the difficulty in obtaining any additional, meaningful data regarding Rule 609 impeachment.

The Chair explained that there were some concerns regarding the level of detail in the Committee note originally circulated by the Reporter and that the draft note had been significantly pared down with the help of the Justice Department. He called the Committee's attention to red-lined and clean versions of the modified draft Committee note that were circulated at the meeting. The Chair explained that the Department of Justice would support the proposed addition of the word "substantially" to the text of Rule 609 accompanied by the note as modified.

The Chair next explained that the Reporter had suggested that the Committee should also consider adding an end point to the 10-year limit on the use of convictions for impeachment under Rule 609(b). The Chair noted that Rule 609(b) contains an explicit starting date for assessing the age of convictions but includes no end date. He remarked that federal courts differ as to the ending point they utilize for measuring the age of Rule 609 convictions. The Chair explained that the Reporter had prepared two alternatives of a proposed amendment to Rule 609(b) to add an express ending point, one that uses the date upon which trial starts as the ending point and the other that uses the date of a witness's testimony. The Chair remarked that it would not make sense to propose an amendment to Rule 609 solely to include an ending point for Rule 609(b) but that it would make sense to include this as an add-on proposal if the Committee chose to propose an amendment to Rule 609(a). He called the Committee's attention to the two draft proposals for amending Rule 609(b) on page 246 of the Agenda materials, noting that the question before the Committee was whether to approve an amendment to Rule 609 for publication for notice and comment.

The Reporter informed the Committee that the changes to the draft Committee note proposed by the Department of Justice were acceptable to the Chair and to the Reporter and that they would recommend approval of the amendment with the note as edited by the Department of Justice. The Reporter raised the issue of trial judges admitting "sanitized" convictions through Rule 609 that withhold the nature of the conviction from the jury. He noted that the original draft Committee note included commentary on this practice but that the edited version says simply that sanitization is a "questionable practice." He suggested that this simplified reference would serve as a signal to trial judges to exercise caution in this area. He also noted that lawyers could try to use the acts underlying a conviction, that is itself inadmissible under Rule 609, to impeach a testifying defendant under Rule 608(b). Although the text of Rules 608(b) and 609 should be clear

that Rule 609 is the sole provision that regulates the use of conviction conduct to impeach, the draft Committee note emphasizes that point and helps to harmonize Rules 608(b) and 609.

The Chair pointed out that the draft of the proposed amendment to Rule 609 circulated at the meeting was the alternative that selected the date upon which trial begins as the ending point for measuring convictions offered as impeachment through Rule 609(b). He noted that the draft could be adjusted if the Committee wanted to choose a different date as the end point. One Committee member noted that a trial date might be set and later adjourned and inquired whether the proposed amendment to Rule 609(b) would maintain any flexibility for the trial judge to "freeze" the ending date for impeaching convictions in deciding to adjourn or continue a trial date. The Reporter explained that the risk of gamesmanship is inherent in any date selected as the end point for Rule 609(b). The Chair noted that the difference between the start of trial and any witness's actual date of testimony is not great in most cases and agreed that all dates are subject to some strategic manipulation. He suggested that the date that trial starts is the superior ending point because it is the only one that puts the timing squarely in the hands of the trial judge. The Committee member queried whether the trial judge could change the Rule 609(b) date when deciding to change a trial date. The Reporter acknowledged that the Committee could add text to the proposed rule to allow for this but opined that the problem was such a narrow one that it did not justify a change. The Committee member suggested adding something to the Committee note giving the trial judge discretion to freeze the Rule 609(b) ending point for adjournments of trial. The Reporter reminded the Committee that it would be voting to publish the proposed amendment for public comment and that it could be helpful to wait and see what feedback is received on this point before adding anything to the rule text or Committee note. The Committee member agreed, remarking on the amazing work of the Committee in addressing Rule 609, on the collaboration from the Department of Justice, and on the creativity and perseverance of the Reporter with respect to the project.

Another Committee member agreed, noting that an amendment to Rule 609 was long overdue. He asked whether any thought had been given to modifying the starting point for measuring convictions under Rule 609(b) which currently begins at the "release from confinement." He noted that some defendants may be impeached with a crime committed fifteen years earlier given the "bone-crushing" sentences handed down in federal court and queried whether a new starting point should be considered as well. The Reporter responded that modification of the starting point had not been considered because Rule 609(b) currently contains a clear starting point and that there is, therefore, no disagreement in the courts to be resolved on that issue. He opined that it would be a heavy lift to reconsider the express starting point in the rule at this point in the amendment process. Another Committee member suggested that public comment on the existing proposal might generate feedback on the starting date, as well as the ending point.

The Chair then thanked the Department of Justice and Ms. Shapiro for the collaboration with the Committee and the Reporter. Ms. Shapiro thanked Judge Furman and noted that the Justice Department had been opposed to a Rule 609 amendment since it first appeared on the Committee's agenda in 2018 and noted its strong opposition to the proposal to abrogate Rule 609. She explained that the original draft Committee note had been the most problematic component of

the proposal currently before the Committee to add the word "substantially" to Rule 609(a)(1)(B). She expressed appreciation for the modified, pared-down draft Committee note that does not suggest to the many trial judges handling Rule 609 impeachment correctly that they have to change. She further noted the importance of reminding federal courts through the modified note that they are familiar with balancing tests utilizing the "substantially outweighs" language being added to the text of Rule 609(a)(1)(B). Ms. Shapiro commented that she did not think that the Department of Justice could support tinkering with the start date already embodied in Rule 609(b) and that a proposal to do so could throw a wrench into the amendment process. She also emphasized that the Department prefers the start of trial as the ending date for Rule 609(b).

The Chair then reiterated his support for the start of trial as the appropriate end point for measuring convictions under Rule 609(b) because it is the date best controlled by the trial judge. He proposed publishing the amendment proposal utilizing that date for notice and comment. The Chair then asked whether there was a motion to approve the proposed amendment to Rule 609 using the trial date as the end point under Rule 609(b) for publication. Ms. Shapiro offered a friendly addition to the first paragraph of the Committee note to add a reference to Rule 107 as another provision with a balancing test. The Reporter opined that Rule 107 would not be a good reference point because it deals with the use of illustrative aids that are not evidence. Another Committee member noted that the Committee note currently references Rule 703 as containing the same balancing test proposed for Rule 609 and noted that Rule 412(b) also contains a similar balancing test for use in civil cases. The Reporter explained that the reference to Rule 703 was an example and opined that the note did not need to list all possible balancing tests. He further suggested that adding Rule 412 would be problematic because that balance differs from others by incorporating harm to a victim as a unique factor.

The Chair then called for a vote on the proposal to approve for publication the amendment to Rule 609 described as "Alternative 2" using the trial date as the Rule 609(b) end point, along with the revised Committee note. Eight Committee members voted in favor of the proposal, and one voted against it. The Committee member who did not support the proposal opined that there is a desire to abrogate Rule 609, and that this amendment is simply part of a two-step process toward that end. Because the concerns and objections of this Committee member had not been refuted, the Committee member could not support the proposal. The Chair stated that the proposal would be forwarded to the Standing Committee to approve publication.

IV. Adding Commas to Rule 801(d)(2)(E)

The Chair noted the proposal received from Sai to add two commas to the coconspirator exemption from the hearsay rule embodied in Rule 801(d)(2)(E) and called the Committee's attention to Tab 5 of the Agenda materials. The Chair informed the Committee that the stylists had opined that the two commas were unnecessary. The Chair noted that the federal courts are having no difficulty applying the coconspirator exception in the absence of the commas. The Committee unanimously voted to remove Rule 801(d)(2)(E) from the agenda.

V. Suggestion to Add Tribes to Rule 902(1)

The Chair next directed the Committee's attention to Tab VI of the Agenda materials and a proposal to amend Federal Rule of Evidence 902(1), the provision that allows self-authentication of the signed and sealed records of enumerated government entities. He reminded the Committee that it had received a recommendation to consider an amendment that would add "federally recognized tribes" to the list of enumerated government entities whose records are self-authenticating from Judge Frizzell of the Northern District of Oklahoma on the eve of the Fall 2024 meeting in New York. The Chair noted that a similar proposal had been on the Committee's agenda over a decade ago and that no action had been taken on the matter at that time. He explained that the Committee had deferred consideration of the proposal in Fall 2024 pending input from the Department of Justice. He reminded the Committee that members had expressed an interest in evaluating whether such an amendment is necessary or whether there are alternate avenues for authenticating tribal records within existing Federal Rules of Evidence. Further, he noted that the Committee wished to consider whether adding tribes to Rule 902(1) would require an assessment of the rigor of tribal record-keeping across various tribes. The Chair then called the Committee's attention to a memorandum in support of the amendment by the Department of Justice on page 296 of the Agenda materials. The Department's draft amendment language on page 302 of the Agenda proposed adding "federally-recognized Indian tribe" to the list of enumerated entities whose records are self-authenticating. The Chair noted friendly amendments to add "or Nation" to the description and to remove the hyphen from the language. The Chair also noted that five federal district court judges with experience in tribal cases had submitted a letter in support of the amendment that had been shared with the Committee by email. He also noted that the Federal Public Defender had submitted a letter in opposition to the amendment at page 310 of the Agenda materials. The Chair then recognized Ms. Shapiro of the Department of Justice to explain the rationale for the proposed amendment to Rule 902(1).

Ms. Shapiro began by noting that defense counsel opposes the proposed amendment because the fact of Indian blood and tribal affiliation are part of the government's burden of proof in criminal cases and that it is defense counsel's obligation to favor obstacles to conviction because it is beneficial to their clients. She next noted that she had researched the Guam Sunshine Act (which was referenced in the Federal Public Defender's letter) and found that it was not enacted until 1999, many years after the records of Guam became self-authenticating pursuant to Rule 902(1). She explained that the government's ability to authenticate tribal records with a certificate under Rule 902(11) represented the most substantial argument against the amendment, but she argued that authentication under Rule 902(11) is substantially more difficult and can prove problematic. First, she noted that Rule 902(11) contains a pretrial notice requirement that can lead to reversal of a conviction even where there is no challenge to the authenticity of the tribal records. Second, she explained that use of Rule 902(11) ties to use of the business records exception to the hearsay rule in Rule 803(6) and that Rule 803(6) requires records made "at or near the time" of the events recorded and records that are routinely maintained as part of a regularly conducted activity. She explained that all of these elements of Rule 803(6) are being challenged by defendants with respect to tribal records. She further noted that the authenticity of tribal records was routinely subject to a stipulation prior to the Supreme Court's decision in *McGirt*, but that stipulations have become rare and challenges more frequent in the wake of that decision.

Further, Ms. Shapiro noted that all records from entities such as Guam are self-authenticating under Rule 902(1) but that the records of sovereign tribes are not afforded the same treatment. She argued that there is no rational reason to treat tribal records differently. She described the burden that the lack of self-authentication imposes on tribal governments, which have to send witnesses hundreds of miles to provide a few minutes of authenticating testimony for tribal records. She closed by arguing that the Committee need not conduct a review of the reliability of tribal record-keeping to propose addition of tribal governments to Rule 902(1) because hundreds of municipalities and other entities are already included in the provision despite variations in their record-keeping practices and absent any review of the reliability of those practices.

The Chair noted that the letter in support of the amendment sent by the district court judges also mentioned the burden of needless travel on tribal officials. The Chair asked how often a witness is required to authenticate tribal records under existing rules and how frequently Rule 902(11) certificates are being used for authentication. Ms. Shapiro explained that witnesses are being used to authenticate tribal records most of the time because tribal officials actually carry the requisite records into court and because the records include information about the defendant's Indian blood and tribal affiliation, facts which may not be recorded "at or near the time" of underlying events as required by Rule 803(6) and hence Rule 902(11). The Reporter asked whether the "events" to be recorded would occur at birth or the time of enrollment, and so would be entered at or near the time of the relevant event. Ms. Shapiro suggested that she was unsure as to when the information would ultimately be recorded by tribal officials but that the time of enrollment would be most probable – which may or may not be close in time to a tribal member's birth. Ms. Kintz, the Deputy Director of the Office of Tribal Justice of the DOJ, explained that citizenship is rarely recorded at birth and that additional steps need to be taken to establish citizenship. The Reporter queried whether the obstacles to admissibility under the hearsay exception in Rule 803(6) are separate from the problem of authentication that would be solved by adding tribes to Rule 902(1). Ms. Shapiro responded that some cases admit tribal records and some currently reject them.

The Chair next asked how often the facts of Indian blood and tribal affiliation are genuinely in dispute in a criminal case and how frequently these issues represent a box-checking exercise for the government. Ms. Shapiro suggested that these issues mostly create a box-checking exercise because defendants are not contesting their requisite tribal affiliation but are simply refusing to stipulate to it, thus putting the government to its proof and then increasingly objecting to that proof. She suggested that the prosecution is being forced to authenticate tribal records in a complex manner inapplicable to the records of other government entities.

The Chair then recognized the Federal Public Defender to offer thoughts on the proposed amendment. Mr. Valladares thanked the Chair and told the Committee that his colleague Ebise Bayisa was in attendance and could answer any Committee questions about the letter submitted by the Federal Public Defender in opposition to the proposed amendment. He explained that the issue of proving a defendant's requisite tribal affiliation for purposes of criminal jurisdiction has been around for many years and is one that has been proven routinely by the government under existing evidence rules without any problems. He suggested that the few recent cases in which this issue

had arisen represented a very localized problem that is not occurring more broadly throughout the country. Further, he opined that approval of the proposed amendment for publication would be premature given that the Committee was considering the issue for the first time. He suggested that the Committee host a symposium at its Fall 2025 meeting on the issue and invite judges and lawyers experienced in handling these cases to assess the need for an amendment to Rule 902(1).

A Committee liaison explained that he had volunteered in both Tulsa and Oregon to assist with these cases and has experience with the issue of proving tribal affiliation. He agreed that the prosecution is able to prove these points under existing rules but offered that witnesses from tribes were forced to drive 200 miles over the mountains to appear in court to satisfy the government's burden of proof. He explained that the government can establish the requisite tribal affiliation but that it is unusually difficult.

A Committee member remarked that he understood the issues but was unsure what problem the proposed amendment would be solving. He questioned whether a rule change was truly needed and opined that the Committee lacked the data it would need to propose an amendment to Rule 902(1). Ms. Shapiro responded that there is no need for the government to have to jump over burdensome hurdles in proving largely undisputed points and that the omission of tribal government records from Rule 902(1) failed to afford tribes the requisite dignity consistent with their sovereign status. The Committee member responded that he was sensitive to the dignitary issues but queried whether tribal governments would support the change to Rule 902(1) in the name of sovereignty. The Committee member suggested that the Reporter or a subcommittee could invite input from affected tribes to ascertain tribal support for the proposal. Ms. Shapiro responded that the issue was not very complex and that the Department of Justice could obtain letters from tribal organizations supporting the amendment. She argued that the Committee would receive significant input from affected constituencies if it approved the proposed amendment for publication.

The Chair stated that the issue was a very local one that may not merit a national symposium. He suggested that publication could encourage tribes to submit commentary that would be helpful to the Committee. A Committee liaison noted that there is great variability in record-keeping across different tribal governments but that the same variation also exists across the municipalities currently recognized under Rule 902(1). Another Committee member agreed that record-keeping practices across the thousands of municipalities covered by existing Rule 902(1) is extremely variable. The Committee member opined that there is no rational explanation for excluding tribal records on the basis of record-keeping practices.

Mr. Lau of the FJC suggested that it would be relatively simple to collect data regarding how often the facts of Indian blood and tribal enrollment are actually disputed in federal criminal cases by looking at jury instructions in such cases. He noted that those instructions would reveal any stipulations as to those issues. The Chair explained that the question was not so much the frequency of stipulations but the percentage of prosecutions in which these issues are "genuinely disputed" with defendants arguing that they do not, in fact, have the requisite tribal connection to support criminal jurisdiction. He questioned whether a review of cases could answer that inquiry

and noted that these issues may be submitted to the jury even where the defendant does not actively contest the requisite tribal affiliation.

Ms. Kintz explained that the issue was one of respecting tribal governments and their relationship with the federal government. She argued that there is no valid reason that tribal governments should not be afforded the same respect as municipalities. She further noted that tribal citizenship is a matter that is crucial to the operation of tribes and that there is no reason to question the reliability of tribal records on this critical point. Finally, she opined that the burden being placed on tribal governments to provide this testimony in support of federal prosecutions is unjustified and substantial.

Mr. Valladares commented that he has the utmost respect for tribal sovereignty but that one of the authors of the letter in opposition to the proposed amendment is an enrolled member of the Choctaw Nation of Oklahoma. He suggested that she could speak to the issues raised by the government at a symposium and demonstrate that problems have arisen in only a couple of bad cases where the government could have successfully authenticated the tribal records at issue under existing rules. He argued that bad outcomes in a handful of cases should not justify a rule change and that no harm would be done by pausing any decision on publication to allow experts in the field to offer valuable input.

Judge Bates stated that he was interested to know the view of tribes with respect to the proposal. He questioned whether it is optimal to have the Department of Justice speak for tribes in light of the long history of the federal government taking action in connection with tribes without their input or consent. He suggested that it would benefit the Committee to have the views of the tribal governments themselves in the record given the tribal sovereignty and dignity rationale for the proposed amendment. Judge Bates opined that a symposium would not be necessary and that letters from tribal representatives would be sufficient but that the Committee should obtain tribal government input prior to recommending an amendment for publication. FJC representatives offered their support in obtaining tribal input on the proposal. Ms. Shapiro further noted that the Office of Tribal Justice has important relationships and could reach out for letters regarding the proposed amendment.

The Chair asked whether the Department of Justice was withdrawing its proposal to vote to publish the proposed amendment for notice and comment pending the solicitation of tribal input. Ms. Shapiro responded that the Department wished to advance the proposal for a vote to publish to obtain public comment and to develop tribal feedback for the record during and as part of the public comment process. A Committee member stated that the only issue to be decided is whether tribes should be treated like other government entities for purposes of Rule 902(1). He suggested that the Committee should not make that determination without first hearing from affected tribes.

The Chair noted that all Committee members were in agreement that the Committee should obtain input and feedback from tribes but that the open question was when to obtain that feedback – before publication of a proposed amendment to Rule 902(1) or during the public comment period following publication. One Committee member predicted that tribes would overwhelmingly favor the amendment and suggested publishing it for notice and comment with the option to pull back

from the proposed amendment if there proved to be inadequate tribal support. The Chair then raised two points about the draft proposal. First, he noted that Federal Rule of Criminal Procedure 6(i) contains a definition of "Indian Tribe" in connection with the disclosure of grand jury information and questioned whether a reference needed to be included in the text of the proposed rule or could be included in a Committee Note. The Reporter opined that a Committee Note would be appropriate. The Chair then noted an issue raised in the memorandum submitted by the Federal Public Defender regarding the dates upon which certain tribes are "federally recognized." Committee members agreed that an amended Rule 902(1) would apply to the records of all tribes currently federally recognized regardless of the date of recognition. Ms. Shapiro agreed that the amendment would self-authenticate the records of tribes federally recognized on the date of trial.

The Reporter to the Standing Committee pointed out that the question of affording tribal governments sovereign dignity under Rule 902(1) arises in the unique context of federal criminal jurisdiction. While all tribes might agree on the general desire for dignity and sovereignty writ large, there could be varying views on tribal recognition for purposes of creating federal criminal jurisdiction. She suggested that the question of tribal dignity in this unique context is complicated and momentous. A Committee member agreed, opining that the Committee should take additional time to collect data before proceeding to publish a proposed amendment to Rule 902(1) for public comment. He suggested that the Committee would be rushing if it approved the proposal without obtaining more feedback and data and stated that he would have to vote against publication at this point out of respect for process. A representative from the FJC agreed that the implications for federal criminal jurisdiction could lead to differing views among tribes. She suggested reaching out to the National Congress of American Indians advocacy group to explain the issue and seek feedback.

The Reporter emphasized the importance of asking the right questions in order to get meaningful feedback. The Chair stated that it would be appropriate to ask tribal governments for their views before proceeding to publish a proposed amendment and suggested that proceeding without asking could be perceived as paternalistic. Mr. Valladares reiterated that an important issue remains how frequently problems of proof are actually occurring in federal trials and how significant the burden is on tribal governments to address proof problems. He noted that the issue is elemental for criminal defendants, that the Committee had not yet received a memorandum from the Reporter on the issue, and that there was no reason to rush through the amendment process.

The Chair then expressed his view that the Committee should hear from tribal governments before proceeding with publication if tribal dignity is an animating rationale for the proposal. He suggested that the Committee discuss with the FJC the ability to gather data regarding the proof problems in the cases, solicit the views of the tribes, and revisit the proposal at the Fall 2025 meeting. Ms. Shapiro stated that the Department would reach out to tribes and solicit feedback such that the proposal could be an action item for the Fall 2025 meeting. The Reporter suggested that it would be superior to include the proposal as an action item for the Spring 2026 meeting to align with the notice and comment period that runs from August through February. He suggested that the Department work with the Academic Consultant to develop a protocol for soliciting tribal input. Committee members agreed to maintain the Rule 902(1) proposal on the agenda and to await feedback and data before proceeding.

VI. Report on Federal Rule of Evidence 706 and Court-Appointed Experts

The Chair next recognized Samantha Smith, the Supreme Court Fellow at the FJC, to describe her study of Federal Rule of Evidence 706 and court-appointed expert witnesses. Ms. Smith thanked the Chair and the Committee for making time for her on the agenda. She explained that her interest in Rule 706 emanated from her time as a law clerk and in private practice where she saw expertise inaccurately relayed to the court on multiple occasions and questioned what could be done to better translate expertise to courts. Although Rule 706 authorizes federal judges to appoint expert witnesses, Ms. Smith explained that the literature on the provision suggests that this tool has little value because very few judges make such appointments and because such appointments are seen as posing threats to the adversarial process. Nonetheless, Ms. Smith noted that court-appointed experts can assist in the search for truth that is at the heart of the trial process.

Ms. Smith explained that she undertook an update of a 1993 FJC study on Rule 706 through surveying and interviewing active and senior district court judges regarding their use of Rule 706. Ms. Smith found that the usage of court-appointed experts had declined since 1993, with 20% of surveyed judges reporting use of court-appointed experts in 1993 compared to only 10% today. She also noted that the judges who reported making appointments under Rule 706 had not asked them to testify and had deployed them as advisors akin to technical advisors and special masters. She explained that Rule 706 offered a more streamlined procedure for accessing such advisory support than Federal Rule of Civil Procedure 53 that requires a more complicated process for appointing a special master. Ms. Smith further noted that trial judges utilizing Rule 706 did not compensate court-appointed experts as set forth in Rule 706. She explained that most courts had used court funds rather than party funds to compensate court-appointed experts even though Rule 706 does not provide for use of court funds in civil cases. Finally, Ms. Smith stated that the majority of federal judges who had not used a court-appointed expert cited concerns regarding the adversarial process as a rationale for avoiding an appointment. Judges expressed reluctance to interfere with party autonomy and were loath to be perceived as placing a thumb on the scale of one side or the other and risk reversal.

As a result of her research, Ms. Smith offered ideas about amendments to Rule 706 that might be explored to promote the use of court-appointed experts. First, she suggested that Rule 706 might be updated to expressly authorize use of bench and bar funds to support court-appointed experts for judges who are reluctant to charge the parties. Due to the infrequent utilization of the tool, Ms. Smith predicted that this would not overtax funding or drive up the use of Rule 706 to a significant degree. She further suggested that a Committee Note to any Rule 706 amendment might highlight for trial judges other mechanisms for obtaining expertise such as technical advisors and special masters. Ms. Smith also opined that Rule 611 might be amended to provide a concrete source of authority for the use of concurrent expert proceedings (also known as "hot-tubbing" the experts). She noted that federal judges expressed significant interest in such proceedings but wanted clear authority for them.

The Chair queried whether an amendment to Rule 706 was necessary to allow for use of court funds to compensate court-appointed experts where some judges already reported such use under the existing provision. Ms. Smith responded that some trial judges reported a reluctance to authorize use of court funds where Rule 706 does not appear to permit such use in civil cases. The Chair then inquired whether issues with Rule 706 were ones that could be resolved through improved judicial education as opposed to rulemaking. He suggested that it may be appropriate for the FJC to offer more training around Rule 706. Ms. Smith agreed that education was important and expressed her hope that her study had served an educational, as well as a research function. That said, Ms. Smith noted that several of the judges she surveyed reported looking directly to Rule 706 to determine their authority such that rulemaking might also serve an important function. Judge Furman thanked Ms. Smith for her research and for sharing it with the Committee.

VII. Proposed Amendments to Address Machine-Generated Evidence and Artificial Intelligence

The Chair directed the Committee's attention to Tab 3 of the Agenda materials and to the final issues for consideration – the authentication and admissibility of machine-generated and AI evidence. He reminded the Committee that these issues had been on the Committee's agenda since 2023 and that the Committee had been evaluating two concerns. First, the Committee had been exploring the deepfake problem and the issues around authenticating information that might be generated by artificial intelligence. Second, the Committee had been evaluating concerns regarding the admission of machine-generated evidence. The Chair reminded the Committee that members had agreed to consider a new Federal Rule of Evidence 707 regarding the admissibility of machine-generated evidence for publication. He also reminded the Committee of their agreement not to publish proposed Rule 901(c) regarding authentication of evidence potentially generated by AI but to continue developing an appropriate provision in case an emergent need arises to add a rule to keep pace with evolving technology in the courtroom. The Chair commended the Reporter for his Agenda memorandum on these subjects which he described as another tour de force. The Chair noted that the Committee had been criticized for not moving quickly enough on AI and opined that the Committee was proceeding with appropriate care and actually leading the charge on the development of rules around this challenging technology. The Chair noted that no state is as far along in the development of provisions to respond to AI.

The Chair directed the Committee's attention to page 198 of the Agenda materials and to the proposed new Rule 707 that would require "machine-generated" evidence to satisfy the requirements of Rule 702. He noted that an alternate, narrower version of Rule 707 that would regulate only "machine-learning" evidence appeared on page 202 of the Agenda materials. The Chair noted that the proposed rule regulating machine-generated evidence originally exempted "the output of basic scientific instruments or routinely relied upon commercial software" from coverage. The Chair explained that the draft rule had been altered since the Committee last reviewed it to eliminate an exception for "routinely relied upon commercial software" for fear that it was too broad an exclusion that could exempt even Chat GPT output from coverage. He noted that the draft Committee note had also been sharpened to address concerns raised by the Department of Justice.

The Reporter pointed to two additional changes to the Committee note in a handout circulated to the Committee at the meeting: 1) a new sentence acknowledging that Rule 707 would not apply in circumstances in which the court can take judicial notice of the reliability of machine-generated evidence; and 2) a new sentence at the conclusion of the note providing that parties should adhere to notice requirements for expert testimony in admitting machine-generated evidence. The Reporter explained that notice of machine-generated evidence would be important but noted that fashioning a notice provision in rule text could prove problematic as it did in the Rule 107 rulemaking process. He opined that a Committee note reminding parties of the existing notice obligations around expert witnesses would better serve courts and litigants. The Reporter explained that the challenge in drafting Rule 707 was to demand reliability for important machine-generated evidence without being overinclusive and needlessly slowing the trial process. The Reporter predicted that federal trial judges would exercise good common sense in demanding the requisite showing in appropriate cases without requiring *Daubert* hearings for well-accepted and understood machine output.

Ms. Shapiro stated that she had conferred with many Department of Justice experts regarding electronic evidence and artificial intelligence. She reported universal concerns about a new Rule 707. First, she noted that Rule 707 would be necessary only when machine-generated evidence is offered in the absence of an expert witness. If an expert witness testifies based upon machine-generated output, that testimony would be subject to Rule 702 and Rule 707 would be unnecessary. The only time Rule 707 would serve an important function would be when such output was proffered without an accompanying witness. She noted that DOJ experts questioned when and how machine-generated data would be conveyed to a jury in the absence of a trial witness. The Reporter responded that it can happen frequently through the use of a Rule 902(13) certification. Another Committee member suggested that a summary offered as evidence through Rule 1006 might summarize voluminous machine-generated data. The Chair suggested that such evidence may be accompanied by a lay witness but could be offered without an expert on the stand. The Reporter agreed that it was probable and not just possible. Ms. Shapiro stated that Department practice is to utilize an expert witness and expressed concern that an expert conveying machine-generated data would have to satisfy both Rules 702 and 707, requiring a two-step admissibility inquiry. The Reporter suggested that only one step would be required where proposed Rule 707 simply incorporates the requirements of Rule 702. Another Committee member suggested a hypothetical in which a lay witness, such as a government agent, might testify about using facial recognition software to identify a defendant who was captured on video during a crime. He noted that this would be a lay witness relying upon AI to support his testimony.

Ms. Shapiro stated that it is the Department's view that Rule 702 already covers the use of machine-generated evidence and that proposed Rule 707 seeks to anticipate and regulate future needs. She further noted concerns that Rule 707 is overly broad and could require a Rule 702 showing for almost anything. Department experts sought to categorize output as "machine generated" or "AI" and had difficulty drawing clear lines. Ms. Shapiro noted that people are not always aware that certain devices (such as cell phones) rely upon machine learning to generate output. She argued that a rule covering all machine-generated evidence would extend beyond the AI concerns that generated the project. She noted that the DNA examples provided in the draft Committee note do not rely upon AI.

The Chair explained that the intent of Rule 707 would be to address the circumstance in which machine-generated, expert-like conclusions are offered without an accompanying expert witness. He queried whether adding language to the text of the proposed provision to expressly state that it applies only when the output is "offered without an expert witness" would alleviate some of the concerns around the proposal. Ms. Shapiro responded that such an addition would be an improvement but would be inadequate to address all of the Department's concerns. The Reporter explained that there is significant expertise in the scientific community regarding machine-generated output and that the question for the Committee was how best to access that expertise to improve the proposed provision. He reminded the Committee that it had already hosted two symposia on these issues. He suggested that the Committee could invite more speakers to share their expertise but that it would be more productive to publish proposed Rule 707 for public comment and obtain expert feedback.

A Committee member asked that the Reporter help the Committee understand the concern to be addressed by the proposed provision. This Committee member reported never having seen machine-generated output offered without an accompanying witness and asked for concrete examples. The Reporter posited a trial in which the defense disputes what is portrayed on a video and applies artificial intelligence to alter the focus of the video but applies an AI tool that is not appropriate to the task. He suggested that this would constitute unreliable machine output that would be regulated by Rule 707. Ms. Shapiro asked whether that hypothetical posed a problem of authenticity. The Reporter replied that the issue would not be one of authenticity because the proffered video would be exactly what the defense claims it to be – an augmented version of the video. The question, the Reporter explained, would be about the reliability of the method of augmentation. The Chair noted that an article summarized by the Reporter on page 16 of the Agenda memo offered four examples of how machine-generated evidence might be offered at trial without a testifying expert.

Judge Bates noted that the draft of Rule 707 covered output that would be subject to Rule 702 if testified to by a "human" witness. He questioned whether the provision meant to cover circumstances where there is no "expert witness" and whether the word human could be replaced with the word "expert" to better capture the intent of the Rule. Second, Judge Bates noted that the title of proposed Rule 707 is "Machine-generated Evidence" but that the text of the provision does not utilize the term "machine-generated evidence" and that the Evidence Rules never provide a title that is not used in the text of the rule. Ms. Shapiro queried whether the title of the provision might be changed to "Expert-like Machine-Generated Evidence" but the Reporter noted that this terminology did not appear in the rule text either. The Chair commented that Rule 807 is titled the "Residual Exception" even though that terminology appears nowhere in the text of the rule.

The Chair then noted that he had not yet seen this type of evidence being used in his courtroom in the absence of an accompanying expert but that it was likely that he would soon. Ms. Shapiro reported that a defendant in a Florida stand-your-ground state prosecution had offered virtual-reality evidence of the underlying events from the defendant's perspective and that the trial judge had taken admissibility under advisement after experiencing the virtual-reality presentation.

She noted that the judge was deciding whether to admit the evidence using existing evidentiary rules.

Another Committee member asked whether Rule 707 ought to demand "accuracy" as opposed to the "reliability" required by Rule 702. He noted that the defendant in the virtual reality scenario may or may not be using a "reliable method" to create his virtual reality but that the question for the jury was whether it revealed an "accurate" depiction of the underlying events. The Reporter responded that the issues with machine-generated output mirror those under Rule 702 which requires reliability. Another Committee member opined that the Committee would need to address machine-generated evidence in the future but that a new rule was still premature. He noted that parties are building large language models that can be asked to identify, for example, the circumstances that correlate with bad outcomes for labor and delivery. He suggested that such large language models are capable of identifying "shift changes" or even certain personnel with bad outcomes. This Committee member predicted that litigants would try to admit such evidence in the future and that machines could very well be asked to "testify." He suggested that the Committee should continue developing a rule to regulate such evidence, but that adoption of a rule needed to await future developments.

The Reporter responded that the Committee needed to craft a provision that would be sufficiently general to accommodate future developments and opined that the Rule 707 proposal to incorporate the Rule 702 standard could achieve that. The Chair agreed that rulemaking is challenging in this space because technology develops at lightning speed and rulemaking proceeds very slowly. He suggested that it would take several years to launch a helpful rule if the Committee waits to take action. The Reporter emphasized the importance of obtaining public comment on the proposal. Another Committee member expressed concern about machine-generated output offered by a lay witness who cannot explain the process followed to generate the output. He opined that the Rule 707 proposal addresses that concern by applying Rule 702 to evidence that otherwise might slip through. The Reporter also reminded the Committee that a decision to publish the provision would generate public hearings as well as public comment. He predicted that the Committee would receive significant, helpful information from subject matter experts in the course of public hearings. Professor Coquillette remarked that he had never seen a rulemaking issue as important or difficult or a better Agenda memorandum. He strongly suggested approval of the draft to obtain public comment.

Judge Bates then inquired about the interaction between Rule 902(13) and proposed Rule 707, asking whether a litigant would have to satisfy both provisions to admit machine-generated evidence. The Reporter answered that litigants would have to satisfy both. Judge Bates then opined that the Committee note to proposed Rule 707 should address that interaction. The Chair suggested adding commentary to the note regarding application of Rule 707 when machine-generated output is introduced without a witness through Rule 902(13). Another Committee member noted that Rule 902(13) is often used to prove a defendant's Google search terms or the like without resort to any AI. Judge Bates expressed concern that any litigant seeking to utilize Rule 902(13) would need to satisfy Rule 707 even though the litigant is not using an expert. The Chair clarified that Rule 707 would apply to machine-generated output certified through Rule 902(13) only if that output would constitute expert testimony if testified to by an expert witness. The Reporter agreed and noted that

Rule 707 would distinguish the Rule 104(a) reliability standard from the Rule 104(b) authenticity standard. Ms. Shapiro called attention to the exemption from Rule 707 for "basic scientific instruments" and expressed concern about the ambiguity of that exemption and about *Daubert* hearings for every piece of machine-generated evidence. The Reporter responded that there will be problems of designation that will need to be worked out under the provision, that trial judges are unlikely to hold *Daubert* hearings to assess the admissibility of thermometer readings, and that obtaining public comment on the proposal is critical for that line-drawing to be done right.

A Committee member expressed concern that the proposed addition to the Committee note to suggest that Rule 707 applies when a Rule 902(13) certification is used will subject output that is not expert in nature to Rule 707. Another Committee member asked whether it would help to modify the note to specify that Rule 707 applies to only a subset of Rule 902(13) certifications where the output is expert-like. Judge Bates then asked whether a reference to Rule 702 is the best way to regulate machine output that effectively is acting as an expert witness. He expressed continuing concern that Rule 707 could have the unintended consequence of regulating all Google search results certified under Rule 902(13). Another Committee member agreed, noting that a defendant may search "where can I buy a gun?" and the fact of the search is admitted through Rule 902(13). The Reporter stated that Rule 707 would not govern because such output would not be expert in nature. Another Committee member agreed that Rule 707 would not cover such output because it would regulate machines offering opinions that cannot be cross-examined and would not apply to the fact that a particular internet search was conducted. The Reporter proposed a new paragraph for the Committee note to address the interaction with Rule 902(13) that would read: "If the machine output is the equivalent of expert testimony, it is not enough that it is authenticated under Rule 902(13). That rule covers authenticity but does not assure reliability under the preponderance of the evidence standard applicable to expert testimony."

Judge Furman then noted that the draft text of Rule 707 had been modified to require Rule 702 to be satisfied whenever output is offered "that would be subject to Rule 702 if testified to by an expert witness." He noted the tautological problem of requiring Rule 702 to be satisfied whenever an expert would have to satisfy its requirements because *all* expert witnesses have to satisfy Rule 702. Judge Bates agreed that *everything* an expert witness testifies to is subject to Rule 702. The Reporter queried whether the text should be modified to govern when machine-generated output "yields an opinion" that would be subject to Rule 702. Ms. Shapiro asked whether the rule would regulate only AI and machine learning since only AI can offer an "opinion."

The Reporter reiterated the importance of obtaining public comment on the proposal and argued that the addition of the word "expert" in place of the word "human" had created the tautology in the rule text. He suggested that simply removing the word "expert" such that the rule would regulate output that "would be subject to Rule 702 if testified to by a witness" would resolve any difficulty. The Reporter suggested that the relationship between Rule 707 and 902(13) could be addressed by the addition of the language previously discussed to the committee note.

The Chair then asked whether there was a motion to publish Rule 707 with an assumption that the provision is not necessarily proceeding to final approval due to many remaining questions. He added that the Committee would not be committing itself to adding Rule 707 to the Federal

Rules of Evidence by publishing it for notice and comment. A Committee member commented that the public would likely perceive Rule 707 as on track for final approval despite those Committee assumptions. Another Committee member asked whether it would be helpful to replace the words "output of a process or system" in rule text with "machine-generated evidence" to signal that Rule 707 would be narrower than Rule 902(13). Judge Bates asked whether the text should also be clarified to state that it applies when machine-generated evidence is offered without any witness. The Chair responded that it should apply whenever machine-generated evidence is offered without an "expert witness" because such output could be offered through a lay witness. Committee members agreed that Rule 707 would be improved by modifying it to read:

> Rule 707. Machine-Generated Evidence
>
> Where machine-generated evidence is offered without an expert witness and would be subject to Rule 702 if testified to by a witness, the court must find that the evidence satisfies the requirements of Rule 702(a)-(d). This rule does not apply to the output of basic scientific instruments.

Ms. Shapiro then asked whether the bullet point in the draft Committee note on page 74 of the Agenda materials offering DNA software as an example could be deleted. Committee members agreed. The Chair then asked if there was a motion to publish Rule 707 as edited, along with new note material on Rule 902(13) and with the bullet point about DNA software deleted. Eight members of the Committee voted in favor of a motion to publish, and the Department of Justice representative voted against the proposal. One Committee member stated that his vote in favor was to publish the draft to invite comment but not for ultimate adoption. The Chair commented that that was true for his vote as well. The Reporter stated that the Committee's report to the Standing Committee would highlight the provisional nature of the proposal.

The Chair next turned to the issue of deepfake evidence and the draft Rule 901(c) that the Committee had developed but had decided not to publish for notice and comment. The Chair asked Committee members whether the intention to hold Rule 901(c) for consideration remained, whether the Committee wished to propose publication of that provision alongside Rule 707, or whether the Committee wished to remove the deepfake issue from its agenda. The Chair also noted that the Reporter's Agenda memo described a new, but similar proposal regarding deepfakes submitted by Professor Delfino. He pointed the Committee to the proposal on page 180 of the Agenda materials and noted that the Reporter preferred Professor Delfino's use of the term "generative AI" in Rule 901(c) and had drafted an updated version of Rule 901(c) appearing on page 196 of the Agenda materials.

The Reporter agreed that the term "generative AI" better captured the concerns regarding deepfakes because it is generative AI that is capable of creating such fake evidence. Therefore, the new draft eliminates the reference to "electronic evidence" and tailors the draft provision to an "item of evidence" that has been fabricated by "generative artificial intelligence." The Reporter also explained that the problem of the "liar's dividend" (or arguments about deepfake evidence targeted to genuine evidence) could be addressed effectively in the Committee note given the existing mechanisms for preventing unfounded arguments about deepfakery. He also noted that

unfounded generic demonstrations about the creation of deepfake evidence could also be excluded through Rule 403. The Reporter also explained that the deepfake problem could apply to evidence that is self-authenticating under Rule 902 and pointed out that text was added to draft Rule 901(c) to clarify its application to self-authenticating evidence under Rule 902. The Reporter reminded the Committee that proposed Rule 901(c) utilizes a burden-shifting mechanism that requires the *opponent* of evidence to provide sufficient information for a reasonable jury to find fabrication under Rule 104(b) before shifting the burden to the *proponent* of the evidence to show that it is genuine by a preponderance of the evidence pursuant to Rule 104(a). The Reporter explained that there had not been much development in the caselaw since the Fall 2024 meeting and that most courts reject deepfake claims made without support.

The Chair thanked the Reporter and identified several questions for the Committee's consideration. First, he asked Committee members whether a flood of deepfake evidence was on the horizon since that flood had yet to arrive. Second, he queried whether the existing rules are adequate to address the problem of deepfakes given that trial judges appear to be handling the deepfake claims that have been made capably. Finally, he sought the Committee's input as to whether to continue developing Rule 901(c) as a draft to keep in reserve in the event that deepfake evidence or arguments begin flooding the courts, or whether to publish the proposal for comment along with Rule 707. The Reporter distinguished proposed Rule 707 and proposed Rule 901(c), explaining that the Committee had a great deal to learn about the use of machine-generated evidence but that there was not a great deal more to examine regarding the problem of deepfakes. He suggested that there was less need to invite public comment on the deepfake issue and that the Committee had developed a useful provision it could deploy quickly if a problem were to arise. One Committee member commented that he liked the burden-shifting aspect of proposed Rule 901(c) and would like to see it published for comment. Another Committee member opined that the Reporter had offered a helpful procedural framework but that he did not think publication was necessary. He advocated for holding the rule in abeyance until a problem arises that necessitates rulemaking.

Another Committee member agreed that holding the rule in abeyance made sense but asked why the draft proposal requires the opponent to demonstrate to the court "that a jury reasonably could find" an item of evidence fabricated. The Committee member suggested that the language seemed needlessly clunky. The Reporter explained that the Rule 104(b) standard is evidence "sufficient to support a finding" and that this might be a reasonable alternative. Ms. Shapiro also noted that the burden-shifting approach of the proposed rule would require extrinsic evidence and likely expertise. She suggested that a notice requirement would be necessary to avoid disrupting trials with such objections. The Reporter asked whether the notice would come from opponents of evidence who are advancing deepfake challenges. Ms. Shapiro responded in the affirmative, explaining that it should be pretrial notice of the intent to make a deepfake allegation. She argued that exhibits would be exchanged by a certain date, facilitating such notice. The Reporter promised to work on an appropriate notice provision to hold in abeyance with the draft rule.

Ms. Shapiro further asked if Rule 901(c) would require the proponent's intent to fabricate evidence. She noted that evidence in a child pornography case could consist of materials in a defendant's possession that had been generated or created by AI. If the government offered that

evidence, it would be "generated" or "created" by AI but not fabricated within the meaning of the rule. The Reporter promised to think through those issues as well. He noted that publishing both Rules 707 and 901(c) would generate a veritable tsunami of public comment and that it would make sense for the Committee to hold off on publication of Rule 901(c) to consider these issues and to better evaluate the comment generated by Rule 707. Another Committee member asked the Reporter to consider referencing the Rule 901(a) standard in a Committee note, suggesting that the burden-shifting mechanism of Rule 901(c) would not necessarily apply when a witness will confirm events related by evidence claimed to be a deepfake.

The Chair then asked whether Committee members wanted to publish proposed Rule 901(c) alongside proposed Rule 707. He noted that the likely flood of public comment might militate against publication of both but that the economies of scale achieved by publishing both rules together could be beneficial. The Chair then noted that the Committee consensus was to hold off on publishing Rule 901(c). The Chair then asked the Reporter to work on a notice provision akin to those in Rules 404(b) and 807 for the bullpen Rule 901(c) proposal. A Committee member stated that a notice provision could prove constitutionally problematic if it required a criminal defendant to show his hand with respect to impeachment of deepfake evidence before trial. Ms. Shapiro suggested that a notice requirement could be excused for "good cause." The Committee agreed to keep proposed Rule 901(c) on the agenda for the Fall 2025 meeting.

VIII. Closing Matters

The Chair thanked the Committee and all participants for a productive session. He announced that the Fall 2025 meeting would be held on either November 6th or 7th and that Committee members would be notified of the date as soon as it could be finalized. The Chair reported that the Committee could consider inviting experienced federal and state practitioners for a symposium at the Fall meeting to share insights about evidentiary provisions that are problematic or could be helpful. He solicited thoughts and ideas from Committee members for such a panel, as well as other ideas or interests. The meeting was then adjourned.

Respectfully submitted,
Liesa L. Richter

TAB 2B

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

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

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

RE: Report of the Advisory Committee on Appellate Rules

DATE: May 16, 2025

I. Introduction

The Advisory Committee on Appellate Rules met on Wednesday, April 2, 2025, in Atlanta, Georgia. The draft minutes from the meeting accompany this report.

The Advisory Committee has several action items for the June 2025 meeting.

It seeks final approval of amendments to Rule 29, dealing with amicus briefs, along with conforming amendments to Rule 32 and the Appendix of Length Limits.

It also seeks final approval of amendments to Form 4, the form used by applicants for in forma pauperis (IFP) status. (Part II of this report.)

In addition, the Advisory Committee asks the Standing Committee to publish for public comment proposed amendments to Rule 15, dealing with review of administrative agency decisions. (Part III of this report.)

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

- creating a rule dealing with intervention on appeal;
- addressing issues concerning reopening of the time to appeal under Rule 4(a)(6);
- amending Rule 8 to provide limits on administrative stays;
- providing greater protection for Social Security numbers in court filings; and
- expanding electronic filing by self-represented litigants.

The Committee also considered a new suggestion to change the way time is calculated under Rule 26 for motions and removed it from the Committee's agenda (Part V of this report).

II. Items for Final Approval

A. Amicus Briefs—Rule 29 (21-AP-C; 21-AP-G; 21-AP-H; 22-AP-A; 23-AP-B; 23-AP-I; 23-AP-K)

The proposed amendments to Rule 29 published for public comment addressed two major areas. First, they addressed disclosures by amici, proposing additional disclosure requirements. Second, they addressed the requirements for filing an amicus brief, proposing the elimination of filing amicus briefs on consent and requiring all nongovernmental entities to make a motion for leave to file an amicus brief at a court's initial consideration of a case.

The Advisory Committee received hundreds of written comments and about two dozen witnesses testified at a hearing.

Over the many years of work on the disclosure requirements, the Standing Committee has provided considerable encouragement and guidance. By contrast, it has been skeptical from the (more recent) start of the proposed elimination of the

consent option. Accordingly, the public was specifically invited to comment on this aspect of the proposal.

The public spoke with one voice about the proposed elimination of the consent option: Don't do it. The existing system works well, with a culture of consent. Requiring a motion would increase work for lawyers and judges and threaten to change the culture by inviting parties to oppose motions. And adding a motion requirement to the initial hearing stage was not a particularly good solution to the recusal problem.

The Advisory Committee heard and heeded. It unanimously decided to leave well enough alone.[1] The proposal for which it seeks final approval leaves Rule 29, in this respect, as it is: At the initial hearing stage, a nongovernmental entity may file an amicus brief with either the consent of the parties or the permission of the court. Current and Proposed Rule 29(a)(2). At the rehearing stage, a motion is required for a nongovernmental entity. Current Rule 29(b)(2); Proposed Rule 29(f)(2).

Closely related to the concerns about the motion requirement were concerns about the proposed statement of the purpose of an amicus brief. As published for public comment, Rule 29(a)(2) included the following:

> An amicus curiae brief that brings to the court's attention relevant matter not already mentioned by the parties may help the court. An amicus brief that does not serve this purpose—or that is redundant with another amicus brief—is disfavored.

Commenters were concerned that this language was too restrictive and that avoiding redundancy among amicus briefs could pose serious practical problems. Most of these concerns were tied to the motion requirement, with commenters fearing that motions would be opposed and denied on the grounds that the proposed amicus brief addressed matters already mentioned by the parties or was redundant with another amicus brief. These concerns are considerably diminished with the retention of the consent option.

The Advisory Committee took these points. Accordingly, it revised the statement of purpose to closely track the one used by the Supreme Court and moved

[1] It also declined to act at this time on a comment suggesting that tribes be included in the government exception provision, thinking that the treatment of tribes cuts across a number of rules and would be better addressed in general rather than piecemeal.

the mention of redundancy to the Committee Note. As proposed for final approval, the relevant portion of Rule 29(a)(2) now states:

> An amicus brief that brings to the court's attention relevant matter not already brought to its attention by the parties may help the court. An amicus brief that does not serve this purpose burdens the court, and its filing is disfavored.[2]

The Committee Note adds, "Where feasible, avoiding redundancy among amicus briefs can also be helpful."

The public did not speak with one voice about the disclosure requirements. There was considerable opposition, but also notable support. To the extent that the comments focused on any particular provision, that provision was proposed Rule 29 (b)(4), which, as published, would require an amicus to disclose whether:

> a party, its counsel, or any combination of parties, their counsel, or both has, during the 12 months before the brief was filed, contributed or pledged to contribute an amount equal to 25% or more of the total revenue of the amicus curiae for its prior fiscal year.

Notably, this proposal would not require the disclosure of all contributors to an amicus. It would not require the disclosure of all major contributors to an amicus. It would not require the disclosure of all contributions by parties to an amicus. It would require the disclosure only of major contributions by parties to an amicus.

Critics charged that this would interfere with associational rights and discourage amicus participation. Proponents viewed it as an important step in determining party influence on an amicus, with some arguing that the 25% level was too high and should be 10% instead.

The Advisory Committee typically acts by consensus. But on this issue, it was closely divided. The subcommittee divided 2-1, with the majority thinking that there is reason to believe that an amicus with that level of funding from a party would be biased toward that party. The minority of the subcommittee concluded that there is

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[2] Supreme Court Rule 37.1 provides:

> An amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favored.

not a sufficient problem to warrant moving forward over such broad opposition and that it would be evaded anyway.

The full Advisory Committee was similarly divided, but in the other direction, voting 5-4 to delete proposed (b)(4).[3] The majority pointed to the burden of compliance (including determining whether a contributor falls just on one side or the other of the 25% line), the lack of a significant problem, the considerable opposition, and that other parts of the proposed rule deal with the concern that an entity was created for the purpose of an amicus filing. The minority on the full Advisory Committee was not terribly impressed by arguments against disclosure by people who would have to make disclosures. It is not surprising that they would oppose disclosure. The point of getting this information is to benefit the public and the judges. It is about public trust, trust that is hurt when such ties are later revealed.

Reflecting the majority decision, the Advisory Committee seeks final approval of Rule 29 without proposed 29(b)(4).

The other proposed disclosure requirement that received considerable attention was proposed Rule 29(e), dealing with earmarked contributions by nonparties. As published, it provided:

> **Disclosing a Relationship Between an Amicus and a Nonparty**. An amicus brief must name any person—other than the amicus or its counsel—who contributed or pledged to contribute more than $100 intended to pay for preparing, drafting, or submitting the brief, unless the person has been a member of the amicus for the prior 12 months. If an amicus has existed for less than 12 months, an amicus brief need not disclose contributing members, but must disclose the date the amicus was created.

Much of the critical public comment did not reflect awareness that the existing rule currently requires the disclosure of earmarked contributions by nonparties. Perhaps that is because current Rule 29(a)(4)(E)(iii) is (as the citation suggests) buried deep in an item under a subparagraph. Or perhaps it is because it treats both earmarked contributions by a party and earmarked contributions by a nonparty in a single item even though the rest of the subparagraph deals only with parties and their counsel. That current rule requires a statement that indicates whether:

[3] While there was discussion of a 50% threshold rather than a 25% threshold, that idea never came to a vote.

> a *person*—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person.

(emphasis added).

One virtue of the proposed amendment to Rule 29 is that it separates—and therefore clarifies—the disclosure obligations regarding parties and the disclosure obligations regarding nonparties. But this virtue may have led some commenters to notice something that they had not noticed before and miss that it is in the existing rule.

The proposed rule as published, then, is not a major expansion of the disclosure requirements. In one respect, it *reduces* the current disclosure requirements: by setting a $100 de minimis threshold, it eliminates the need to disclose modest earmarked contributions that currently must be disclosed.

It does, however, expand the disclosure requirements in one respect. The current rule does not require the disclosure of earmarked contributions by members of the amicus, even if they joined the same day they made the contribution to avoid disclosure. The proposed amendment blocks this easy evasion.

One commenter noted that requiring that a person be a member "for the prior 12 months" ran the risk that a longtime member who had recently allowed his membership to lapse would lose the protection of the membership exception. To deal with this possibility, the Advisory Committee rephrased this provision to extend the member protection to a member of the amicus who "first became a member at least 12 months earlier." The Advisory Committee also rephrased Rule 29(e) to require the brief to "disclose whether"—as Rule 29(b) does—so that a statement one way or another is required. It also rearranged Rule 29(e) for clarity:

> **Disclosing a Relationship Between an Amicus and a Nonparty.**
>
> (1) An amicus brief must disclose whether any person contributed or pledged to contribute more than $100 intended to pay for preparing, drafting, or submitting the brief and, if so, must identify each such person. But disclosure is not required if the person is:
>
> - the amicus;
> - its counsel; or
> - a member of the amicus who first became a member at least 12 months earlier.

(2) If an amicus has existed for less than 12 months, an amicus brief need not disclose contributing members but must disclose the date the amicus was created.

The Advisory Committee unanimously approved of Rule 29(e) as amended, with one opponent of Rule 29(b)(4) noting that this is a modest tweak to an existing rule: It is a good change that reduces the burden on crowd funding an amicus brief and does not allow evasion of an existing requirement.

The Advisory Committee also wanted to avoid having the expanded disclosure requirements count against a party's word limit. To achieve this, by consensus, it changed Rule 29(a)(4) to refer to the "disclosure statement," thereby triggering Rule 32(f)'s exclusion of "disclosure statement" from the word count.

By a vote of 7-1, it moved the new disclosure statement to 29(a)(4)(B), immediately after the corporate disclosure statement in 29(a)(4)(A).

Although the Advisory Committee had been closely divided regarding proposed Rule 29(b)(4), it voted unanimously to give its final approval to the proposed amendments to Rule 29, as amended at the spring meeting, along with conforming amendments to Rule 32(g) and the Appendix of Length Limits. Accordingly, the Advisory Committee recommends that the Standing Committee give final approval to the proposed amendments to Rule 29, Rule 32(g), and the Appendix of Length Limits that accompany this report.

B. Form 4 (19-AP-C; 20-AP-D; 21-AP-B)

The proposed amendment to Form 4 would make that form—which applies when seeking in forma pauperis status—simpler and less intrusive.

The Advisory Committee received several written comments, and several witnesses testified at the public hearing. Overall, the comments and testimony were positive, although one witness pushed for more fundamental changes to the IFP process. Others suggested modest changes to improve ease of use, some of which the Advisory Committee adopted. It declined, however, to adopt changes that were suggested to deal with cases with CJA counsel, concluding that it is better to keep the form simpler for those without counsel and that those with appointed counsel can rely on counsel.

The Advisory Committee unanimously recommends that the Standing Committee give final approval to revised Form 4 that accompanies this report.

III. Item for Publication

A. "Incurably Premature"—Rule 15 (24-AP-G)

The Advisory Committee seeks publication of a proposed amendment to remove a potential trap for the unwary in Rule 15. The "incurably premature" doctrine holds that if a motion to reconsider an agency decision makes that decision unreviewable in the court of appeals, then a petition to review that agency decision is not just held in the court of appeals awaiting the agency's decision on the motion to reconsider. Instead, the petition for review is dismissed, and a new petition for review must be filed after the agency decides the motion to reconsider.

Rule 4, dealing with appeals from district court judgments, used to work in a similar way regarding various post-judgment motions. But in 1993, Rule 4 was amended to provide that such a premature notice of appeal becomes effective when the post-judgment motion is decided. The proposal is to do for Rule 15 what was done for Rule 4.

A similar suggestion was considered about twenty-five years ago. But it was dropped due to the strong opposition of the D.C. circuit judges who were active at the time. The Advisory Committee has been informed that there is no large opposition from D.C. Circuit judges at this point and that technological innovations have alleviated the concerns that were raised in the past. Judges may, however, have concerns with particular aspects of the proposal.

The proposed amendment to Rule 15 is like the existing Rule 4, but it reflects the party-specific nature of appellate review of administrative decisions, in contrast to the usually case-specific nature of civil appeals. As with civil appeals, the proposed amendment to Rule 15 would require a party that wants to challenge the result of agency reconsideration to file a new or amended petition.

The proposed amendment does not, however, attempt to align its language with the Multicircuit Petition Statute, 28 U.S.C. § 2112. First, the phrase used in § 2112(a)(1) is "issuance of the order." Courts of appeals have different views as to what counts as "issuance" of an order, so including the term "issuance" invites importing that dispute into the rule. Second, the point of this proposal is to save a premature petition for review that would otherwise be dismissed due to the failure of the petitioner to file a second petition. A petitioner whose premature petition is saved by this proposal is not in much of a position to complain that the petition might be heard in a circuit other than their preferred circuit. Third, a petitioner seeking to participate in the multicircuit lottery will already be paying close attention to such procedural details as when a petition must be time-stamped by the court and delivered to the agency.

One member sought to limit the benefit of the rule to "timely" petitions. But others were troubled by the idea of describing a petition as both premature (too early) and untimely (too late), particularly since the proposed rule operates in a party-specific way. The motion failed for want of a second.

The Advisory Committee unanimously asks the Standing Committee to publish the accompanying proposed amendment to Rule 15 for public comment.

IV. Items Under Consideration

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

The Advisory Committee is continuing its work on the possibility of a new Federal Rule of Appellate Procedure governing intervention on appeal. There is currently no Appellate Rule governing intervention, other than Rule 15 which sets a deadline but no criteria for intervention in agency cases. In the past, the Advisory Committee decided not to pursue creating a new rule governing intervention on appeal, fearing that creating such a new rule would invite more motions to intervene on appeal.

The Advisory Committee is exploring both whether there is a sufficient problem to warrant rulemaking and whether it is possible to create a useful rule. The Federal Judicial Center is conducting extensive research into motions to intervene in the courts of appeals. The Advisory Committee expects to have more to report at the January 2026 meeting of the Standing Committee.

B. Reopening Time to Appeal—Rule 4 (24-AP-M)

The Advisory Committee had geared up to consider a suggestion by Chief Judge Sutton, echoed by Judge Gregory, that the Advisory Committee look into reopening the time to appeal under Rule 4(a)(6). *See Winters v. Taskila*, 88 F.4th 665 (2023); *Parrish v. United States*, 2024 WL 1736340 at *1 (April 23, 2024).

The Supreme Court granted certiorari in *Parrish*. 145 S. Ct. 1122 (2025). It did so after being informed by the Solicitor General that the Advisory Committee was considering the issue. The Advisory Committee is awaiting the decision in *Parrish* before proceeding further.

C. Administrative Stays—Rule 8 (24-AP-L)

The Advisory Committee has begun to consider a suggestion by Will Havemann to amend Rule 8 to provide limits on administrative stays. It considered a draft amendment that expressly authorized administrative orders providing

temporary relief while the court receives briefing and deliberates on a party's motion. The draft also provided that an administrative stay could last no longer than necessary to enable the court to make an informed decision on the motion and expire at a time—not to exceed 14 days—that the court sets.

Some think that 14 days is not realistic in all cases, particularly cases where there is considerable delay in getting the record. On the other hand, not having a time limit defeats the purpose of the amendment. Some cases are urgent, but not all of them are. Criminal cases and immigration cases may present different issues. And attention is owed to the interaction of any proposed rule with Criminal Rule 38, dealing with stays of sentence.

The Advisory Committee will continue to explore these questions.

D. Social Security Numbers in Court Filings—Rule 25 (22-AP-E)

The Advisory Committee defers to the Reporter for the Standing Committee for the update regarding the joint project dealing with full redaction of social security numbers and other privacy matters, but adds the following:

The Advisory Committee considered a possible amendment to Rule 25 that would bar any part of a social security number in an appellate filing by a party not under seal. It considered seeking publication now, on the theory that, whatever the need for social security numbers in other circumstances, there is no need for them in a public appellate filing by the parties, and getting out ahead of other committees could generate useful public response that those committees could use. Although there was some initial support for this approach, the Advisory Committee decided to wait in order to provide the Standing Committee with proposals from all of the advisory committees at the same time.

E. Unrepresented Parties; Filing and Service

The Advisory Committee defers to the Reporter for the Standing Committee for the update regarding the joint project dealing with electronic filing and service by unrepresented parties.

V. Item Removed from the Advisory Committee Agenda

A. Calculation of Time for Motions—Rule 26 (24-AP-N)

The Advisory Committee considered a new suggestion from Jack Metzler to amend Rule 26(a)(1)(B) to not count weekends. He is concerned about gamesmanship:

counsel can deliberately file a motion on Friday so that the ten-day period for responses covers two weekends, reducing the number of workdays available.

A central feature of the massive time computation project was to count days as days and the Advisory Committee does not want to undo that. The time project usually chose multiples of 7, but for motions it went from 8 days to 10 days. The Advisory Committee considered shortening the time to 7 days or lengthening the time to 14 days. But it decided to leave well enough alone.

The Advisory Committee unanimously agreed to remove this item from its agenda.

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

Rule 29. Brief of an Amicus Curiae

(a) During Initial Consideration of a Case on the Merits.

(1) **Applicability**. This Rule 29(a) governs amicus curiae filings during a court's initial consideration of a case on the merits.

(2) **Purpose; When Permitted.** An amicus brief that brings to the court's attention relevant matter not already brought to its attention by the parties may help the court. An amicus brief that does not serve this purpose burdens the court, and its filing is disfavored. The United States ~~or~~, its officer or agency, or a state may file an amicus brief without the

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

consent of the parties or leave of court. Any other amicus curiae may file a brief only with ~~by~~ leave of court or if the brief states that all parties have consented to its filing~~, but a court of appeals~~. The court may prohibit ~~the filing of~~ or ~~may~~ strike an amicus brief that would result in a judge's disqualification.

(3) **Motion for Leave to File.** A ~~The~~ motion for leave to file must be accompanied by the proposed brief and state:

(A) the movant's interest; and

(B) the reason ~~why an amicus~~ the brief ~~is desirable and why~~ serves the purpose set forth in Rule 29(a)(2) ~~the matters asserted are relevant to the disposition of the case~~.

(4) **Contents and Form**. An amicus brief must comply with Rule 32. ~~In addition to the~~

~~requirements of Rule 32,~~ T~~t~~he cover must ~~identify~~ name the party or parties supported and indicate whether the brief supports affirmance or reversal. ~~An amicus~~ The brief need not comply with Rule 28, but it must include the following:

(A) if the amicus ~~curiae~~ is a corporation, a disclosure statement like that required of parties by Rule 26.1;

(B) unless the amicus is the United States, its officer or agency, or a state, the disclosure statement required by Rules 29(b), (c), and (e);

~~(B)~~(C) a table of contents, with page references;

~~(C)~~(D) a table of authorities—cases (alphabetically arranged), statutes, and other authorities, ~~with~~

~~references to~~ together with the pages ~~of the brief~~ where they are cited;

~~(D)~~(E) a concise ~~statement~~ description of the identity, history, experience, and interests of the amicus ~~curiae~~, ~~its interest in the case, and the source of its authority to file~~ together with an explanation of how the brief and the perspective of the amicus will help the court;

(F) if an amicus has existed for less than 12 months, the date the amicus was created;

~~(E) unless the amicus is one listed in the first sentence of Rule 29(a)(2), a statement that indicates whether:~~

~~(i) a party's counsel authored the brief in whole or in part;~~

~~(ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and~~

~~(iii) a person other than the amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person;~~

~~(F)~~(G) an argument, which may be preceded by a summary ~~and which~~ but need not include a statement of the applicable standard of review; and

~~(G)~~(H) a certificate of compliance under Rule 32(g)(1)~~, if length is computed using a word or line limit~~.

(5) **Length**. Except ~~by~~ with the court's permission, an amicus brief must not exceed 6,500 words ~~may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief~~.

(6) **Time for Filing**. An amicus ~~curiae~~ must file its brief~~, accompanied by a motion for filing when necessary,~~ no later than 7 days after the principal brief of the party being supported is filed. An amicus ~~curiae~~ that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. The ~~A~~ court may grant leave for later filing, specifying the time within which an opposing party may answer.

(7) **Reply Brief**. An amicus may file a reply brief only with the court's permission. ~~Except by the court's permission, an amicus curiae may not file a reply brief.~~

(8) **Oral Argument**. An amicus ~~curiae~~ may participate in oral argument only with the court's permission.

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

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

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

(3) a party, its counsel, or any combination of parties, their counsel, or both has a majority

ownership interest in or majority control of a legal entity submitting the brief.

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

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

(e) Disclosing a Relationship Between an Amicus and a Nonparty.

(1) An amicus brief must disclose whether any person contributed or pledged to contribute more than $100 intended to pay for preparing, drafting, or submitting the brief and, if so, must identify each such person. But disclosure is not required if the person is:

- the amicus;
- its counsel; or

- a member of the amicus who first became a member at least 12 months earlier.

(2) If an amicus has existed for less than 12 months, an amicus brief need not disclose contributing members but must disclose the date the amicus was created.

~~(b)~~(f) **During Consideration of Whether to Grant Rehearing.**

(1) **Applicability**. ~~This Rule 29(b)~~ Rules 29(a)-(e) governs amicus ~~filings~~ briefs filed during a court's consideration of whether to grant panel rehearing or rehearing en banc, except as provided in this Rule 29(f), and unless a local rule or order in a case provides otherwise.

(2) **When Permitted.** The United States, ~~or~~ its officer or agency, or a state may file an

amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court. The motion for leave must comply with Rule 29(a)(3).

(3) ~~**Motion for Leave to File.** Rule 29(a)(3) applies to a motion for leave.~~

~~(4)~~ ~~**Contents, Form, and** **Length**. Rule 29(a)(4) applies to the amicus brief.~~ An amicus ~~The~~ brief must not exceed 2,600 words.

~~(5)~~(4) **Time for Filing**. An amicus ~~curiae~~ supporting ~~the~~ a petition for rehearing or supporting neither party must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the petition is filed. An amicus ~~curiae~~ opposing the petition must file its brief, accompanied by a motion for filing when necessary, no

later than the date set by the court for ~~the~~ a response.

Committee Note

The amendments to Rule 29 make changes to the procedure for filing amicus briefs, including to the disclosure requirements.

The amendments seek primarily to provide the courts and the public with more information about an amicus curiae. Throughout its consideration of possible amendments, the Advisory Committee has carefully considered the relevant First Amendment interests.

Some have suggested that information about an amicus is unnecessary because the only thing that matters about an amicus brief is the merits of the legal arguments in that brief. At times, however, courts do consider the identity and perspective of an amicus to be relevant. For that reason, the Committee thinks that some disclosures about an amicus are important to promote the integrity of court processes and rules.

Careful attention to the various interests and the need to avoid unjustified burdens is reflected throughout these amendments. For example, the amendment treats disclosures about the relationship between a party and an amicus differently than disclosures about the relationship between a nonparty and an amicus. While the public interest in knowing about an amicus—in order to evaluate its arguments and a court's consideration of those arguments—is relevant in both situations, there is an additional interest in disclosing the relationship between a party and an amicus: the court's interest in evaluating whether an amicus is

serving as a mouthpiece for a party, thereby evading limits imposed on parties in our adversary system and misleading the court about the independence of an amicus. Moreover, the burden on an amicus of disclosing a relationship with a party is much lower than having to disclose a relationship with nonparties. Disclosing a relationship with a party requires an amicus to check its records (and perhaps make a disclosure) regarding only the limited number of persons who are parties to the case. Disclosing a relationship with a nonparty would, by contrast, require an amicus to check its records (and perhaps make a disclosure) regarding the much larger universe of all persons who are not parties to the case.

To take another example, the amendment treats contributions by a nonparty that are earmarked for a particular brief differently than general contributions by a nonparty to an amicus. People may make contributions to organizations for a host of reasons, including reasons that have nothing to do with filing amicus briefs. Requiring the disclosure of non-earmarked contributions provides less useful information for those who seek to evaluate a brief and imposes far greater burdens on contributors.

Subdivision (a). The amendment to Rule 29(a)(2) adds a statement of the purpose of an amicus brief: to bring to the court's attention relevant matter not already brought to its attention by the parties that may help the court. By contrast, if an amicus curiae brief adds nothing to the parties' briefs, it is a burden rather than a help. Where feasible, avoiding redundancy among amicus briefs can also be helpful.

The amendment to Rule 29(a)(4)(D) expands the required statement regarding the identity of an amicus and its interest in the case and requires "a concise description of the identity, history, experience, and interests of the amicus

curiae, together with an explanation of how the brief and the perspective of the amicus will help the court." The amendment calls for this broader disclosure to help the court and the public evaluate the likely reliability and helpfulness of an amicus, particularly those with anodyne or potentially misleading names. It also requires that the amicus explain how the brief and the perspective of the amicus will further the goal of helping the court. Rule 29(a)(4)(E) is new. It requires an amicus that has existed for less than 12 months to state the date of its creation, helping identify amici that may have been created for the purpose of this litigation. Subsequent provisions are re-lettered.

Existing disclosure requirements about the relationship between the amicus and both parties and nonparties are removed from subdivision (a) and placed in separate subdivisions, one dealing with parties (subdivision (b)) and one dealing with nonparties (subdivision (e)).

Rule 29(a)(5) is amended to directly impose a word limit on amicus briefs, replacing the provision that establishes length limits for amicus briefs as a fraction of the length limits for parties. This results in removing the option to rely on a page count rather than a word count. This change enables Rule 29(a)(4)(H) (formerly 29(a)(4)(G)) to be simplified and require a certification of compliance under Rule 32(g)(1) in all amicus briefs.

Subdivision (b). Subdivision (b) dealing with disclosure of the relationship between the amicus and a party is new, but it draws on existing Rule 29(a)(4)(E). Because of the important interest in knowing whether a party has significant influence or control of an amicus, these disclosures are more far reaching than those involving nonparties, which are addressed in (e).

Rule 29(b)(1) carries forward the existing requirement that authorship of an amicus brief by a party or its counsel must be disclosed.

Rule 29(b)(2) carries forward the existing requirement that money contributed by a party or party's counsel that was intended to fund the preparation or submission of the brief must be disclosed. But in an effort to counteract the possibility of an amicus interpreting the existing rule narrowly, the amendment explicitly refers to "preparing, drafting, or submitting the brief," thereby making clear that it applies to every stage of the process.

Subdivision (b)(3) is new. It requires disclosure of whether a party, its counsel, or any combination of parties or counsel either has a majority ownership interest in or majority control of an amicus. If a party has such control over an amicus, it is in a position to control the content of an amicus brief. If undisclosed, the court and the public may be misled about the independence of an amicus from a party, and a party may be able to effectively exceed the limitations otherwise imposed on parties.

Subdivision (c). Subdivision (c) requires that any disclosure required by paragraph (b) name the party or counsel. This builds upon the requirement in current Rule 29(a)(4)(D)(iii) that certain persons who make earmarked contributions be identified.

Subdivision (d). Subdivision (d) is new. It operates as a backstop to the disclosure requirements of (b) and (c): If the amicus fails to make a required disclosure, and the party or counsel knows it, the party or counsel must make the disclosure.

Subdivision (e). Subdivision (e) focuses on the relationship between the amicus and a nonparty. It makes

several changes to the existing Rule 29(a)(4)(E)(iii), which currently requires the disclosure of any contribution earmarked for a brief, no matter how small, by anyone other than the amicus itself, its members, or its counsel. Earmarked contributions run the risk that the amicus is being used as a paid mouthpiece by the contributor. Knowing about earmarked contributions helps courts and the public evaluate the arguments and information in the amicus brief by providing information about possible reasons for the filing other than those explained by the amicus itself.

The Committee considered requiring the disclosure of nonparties who make any significant contributions to an amicus, whether earmarked or not. But it decided against doing so because of the burdens it could impose on amici and their contributors, even when the reason for the contribution had nothing to do with the brief. Instead, it retained the focus of the existing rule on earmarked contributions.

The Committee considered eliminating the member exception because that exception allows for easy evasion: simply become a member at the time of making an earmarked contribution. But it decided against doing so because members speak through an amicus and an amicus generally speaks for its members. In addition, eliminating the member exception threatened to place an unfair burden on amici who do not budget in advance for amicus briefs (and therefore have to "pass the hat" when the need to file an amicus brief arises) compared to other amici who may file amicus briefs more frequently (and therefore can budget in advance and fund them from general revenue). Without a member exception, the latter (generally larger) amici would not have to disclose, but the former (generally smaller) amici would have to disclose.

Instead, the amendment retains the member exception, but limits it to those who first became members of the amicus at least 12 months earlier. In effect, the amendment is an anti-evasion rule that treats new members of an amicus as non-members. As a result, earmarked contributions made by new members must be disclosed, but earmarked contributions by other members do not have to be disclosed.

This then raises the question of what to do with a newly-formed amicus organization. Rather than eliminate the member exception for such organizations, the amendment protects members from disclosure. But Rule 29(a)(4)(E) requires an amicus that has existed for less than 12 months to disclose the date of its creation. This requirement works in conjunction with the expanded disclosure requirement of Rule 29(a)(4)(D) to reveal an amicus that may have been created for purposes of particular litigation or is less established and broadly-based than its name might suggest. Unless adequately explained, a court and the public might choose to discount the views of such an amicus.

The amendment also provides a $100 threshold for the disclosure requirement. Under the existing rule, a non-member of an amicus who contributes any amount, no matter how small, that is earmarked for a particular brief must be disclosed. This can hamper crowdfunding of amicus briefs while providing little useful information to the courts or the public. Contributions of $100 or less are unlikely to run the risk that an amicus is being used as a mouthpiece for others.

Subdivision (f). Subdivision (f) retains most of the content of existing subdivision (b) and governs amicus briefs at the rehearing stage. It is revised to largely incorporate by reference the provision applicable to amicus briefs at the

initial consideration of the case. Rule 29(f)(1) makes Rule 29(a) through (e) applicable, except as provided in the rest of Rule 29(f) or if a local rule or order in a particular case provides otherwise. As a result, duplicative provisions are eliminated.

Changes Made After Publication and Comment

Subdivision (a). The purpose provision in paragraph (2) is revised to reflect the standard in Supreme Court Rule 37.1. The term "mentioned" is deleted to avoid an implication that an amicus should discuss only matters that have not been mentioned by the parties. The sentence regarding redundancy among amicus briefs is deleted from the rule, with a more muted version placed in the Committee Note. The proposal to require all nongovernmental entities to file a motion is rejected and the existing provision allowing for filing on consent is retained.

The required statement of reasons in paragraph (3) is simplified. Because the consent option is retained, the proposed requirement that the new disclosure requirements be repeated in the motion is deleted.

The new disclosure requirements are referred to in paragraph (4) as a disclosure statement so that they are excluded from the word count under Rule 32(g). They are also moved to item (B), immediately after the corporate disclosure statement, with subsequent items re-lettered.

Subdivision (b). Proposed paragraph (4), requiring the disclosure of substantial financial contributions of a party to an amicus, is deleted.

Subdivision (e). The requirement is rephrased as an obligation to "disclose whether" to make clear that a

statement one way or the other is required, as in Rule 29(b). The member exclusion is revised to apply to someone who first became a member at least 12 months earlier so that a longtime member whose membership has lapsed is within the exception. The provision is reorganized for clarity.

Subdivision (f). In accordance with the retention of the consent option at the initial hearing stage, the content of existing (b)((2) and (b)(3) are maintained but rephrased and consolidated in new (f)(2). Subsequent paragraphs are renumbered.

Corresponding changes are made to the Committee Note. Stylistic changes are made throughout.

Summary of Public Comment

The following comment summaries are arranged into groups – based on the position taken on the two major issues – the proposed motion requirement and the proposed additional disclosures.

I. Opposed to Motion Requirement; No Position For or Against Disclosure

USC-RULES-AP-2024-0001-0003
Andrew Straw
Amicus briefs are an expression of the First Amendment right to petition courts on matters of public interest. It costs virtually nothing to allow amicus briefs to be filed and they should always be allowed regardless of the consent of any party. The Court is under no obligation to do what an amicus wants, but it should always allow such statements in the public record.

USC-RULES-AP-2024-0001-0009
Alan Morrison
Morrison argues that the proposed elimination of the right to file an amicus brief based on the consent of all parties is problematic. He suggests that the Appellate Rules Committee should seek guidance from the Committee on Codes of Judicial Conduct to establish standards for recusal when an amicus brief might trigger disqualification.

USC-RULES-AP-2024-0001-0012
Atlantic Legal Foundation
The Atlantic Legal Foundation opposes the proposed amendments to Rule 29, particularly the elimination of the option to file amicus briefs on consent. It argues that the current system, which allows filing on consent, works well and that the proposed changes would deter the preparation and submission of valuable amicus briefs. It contends that requiring a motion for leave to file would create uncertainty and additional burdens for amici and the courts. It also highlights that the Supreme Court has recently adopted a more permissive approach to amicus briefs, allowing them to be filed without a motion or consent. It suggests that the federal appellate courts should follow the Supreme Court's lead and maintain or even relax the current rules to facilitate the filing of amicus briefs.

USC-RULES-AP-2024-0001-0013
Maria Diamond
Amicus briefs play an important role in educating judges on issues of wide-ranging importance. They provide an opportunity for experts, such as academics, non-profits, and think tanks, to educate the court on those issues. They assist judges by presenting ideas, arguments, theories, insights, factual background, and data not found in the parties' briefs. My primary concern regarding the proposed rule change is elimination of the party consent option, requiring leave of

court for the filing of all amicus briefs. I believe this is a move in the wrong direction. In contrast to the proposal, the United States Supreme Court has changed its rules in the opposite direction, freely allowing the filing of amicus briefs without leave of court or consent of the parties. The proposed change will place additional burdens on the court that outweigh the purported concern over recusal issues.

Furthermore, I am concerned about the proposed content restrictions. While I understand the desire to reduce redundancy, I seriously question how the proposed amendment will prevent redundancy without coordination between amici and the parties. The proposal may also significantly increase the rate of amicus denials, thereby chilling amicus curiae filings. This unintended consequence will deprive the courts of valuable assistance to aid their decision-making on issues of public importance.

USC-RULES-AP-2024-0001-0015
Securities Industry and Financial Markets Association (SIFMA)
SIFMA opposes the proposed amendments to Rule 29, specifically the elimination of the option to file amicus briefs on consent and the new purpose requirement. SIFMA argues that the premise of the proposal, which seeks to filter out unhelpful amicus briefs, is flawed and unsupported by evidence. They believe that the benefit of filtering out unhelpful briefs is outweighed by the burdens imposed by requiring motions for leave. SIFMA also contends that the standard for accepting amicus briefs should not be more stringent in the courts of appeal than in the Supreme Court. They argue that the proposed amendments would create unnecessary barriers and reduce the number of valuable amicus briefs, which provide important perspectives and information to the courts.

USC-RULES-AP-2024-0001-0116
Richard Kramer
We need more, not less, access to the courts! The proposed amendments would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts.

This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.

USC-RULES-AP-2024-0001-0019
National Federation of Independent Business (NFIB)
The NFIB opposes the proposed amendments to Rule 29, arguing that the changes would impose significant burdens on amicus curiae filings and hinder the representation of small businesses in federal courts. They contend that the proposed motion requirement and the subjective standards for assessing the relevance and helpfulness of amicus briefs would create financial and logistical barriers for small organizations. NFIB believes that the current system, which allows filing on consent, works well and that the proposed changes would reduce the number of valuable amicus briefs. They suggest that the federal appellate courts should adopt

the same standards as the Supreme Court, which recently eliminated the motion and consent requirements for amicus briefs.

USC-RULES-AP-2024-0001-0024
DRI Center for Law and Public Policy's Amicus Committee
The DRI Center for Law and Public Policy's Amicus Committee opposes the proposed amendments to Federal Rule of Appellate Procedure 29. They argue against the elimination of the ability for nongovernmental amici curiae to file briefs with the consent of the parties. DRI believes that the current system works well and that the proposed changes would create unnecessary burdens, discourage the preparation of valuable amicus briefs, and waste judicial resources. They also express concerns about the new disclosure requirements, arguing that they are overly complex and impractical. DRI suggests that the disclosure requirements should be straightforward and centrally located within Rule 29 to ensure compliance without dissipating limited resources.

USC-RULES-AP-2024-0001-0027
California Academy of Appellate Lawyers
The California Academy of Appellate Lawyers argues that the revisions would impose unnecessary burdens and costs on amici curiae and their counsel without providing significant benefits. The Academy contends that the current system, which allows filing on consent, works well and that the proposed changes would create additional burdens for both amici and the courts. It also argues that the proposed motion requirement is unnecessary to avoid recusal issues, as courts already have the power to strike amicus briefs that would result in a judge's disqualification. It proposes a way to enable judges to consider whether to recuse or strike an amicus brief. The Academy believes that the proposed changes would not provide a useful filter on the filing of

unhelpful amicus briefs and would instead multiply the burdens on the court.

USC-RULES-AP-2024-0001-0032
Federation of Defense and Corporate Counsel (FDCC)
The FDCC opposes the proposed amendments to Rule 29, particularly the elimination of the option to file amicus briefs with the consent of the parties. The FDCC believes that the proposed changes would discourage the preparation and filing of amicus briefs by organizations that rely on volunteer attorneys to prepare and submit amicus briefs in carefully selected cases. It suggests that the Committee should instead follow the Supreme Court's lead and allow for the timely filing of amicus briefs without the court's permission or the parties' consent, as well as providing that an amicus brief does not require recusal.

USC-RULES-AP-2024-0001-0140
National Association of Home Builders (NAHB)
The NAHB opposes the proposed changes to Rule 29, particularly the elimination of the option to file amicus briefs with the consent of the parties. The NAHB believes that the proposed changes would create additional burdens for amici, the parties, and the judiciary. It also does not support the proposed language regarding redundancy.

USC-RULES-AP-2024-0001-0151
Alan Morrison
Alan Morrison notes that the Supreme Court Justices apparently do not make recusal
judgments based on who owns or controls an amicus and asks, “If the Justices do not care, why should judges of the courts of appeals?”

USC-RULES-AP-2024-0001-0215
Roderick & Solange MacArthur Justice Center
The Roderick & Solange MacArthur Justice Center argue that requiring motions to submit amicus briefs in all cases and curtailing the substance of these briefs would burden courts, parties, and amici curiae. The Center emphasizes that amicus briefs are valuable even if they address issues already mentioned by the parties, as they can offer different analytical approaches, highlight nuances, explain broader contexts, provide practical perspectives, and supply empirical data. They argue that the proposed changes would increase litigation regarding the purpose of amicus briefs and create uncertainty, deterring amici from filing briefs. The Center also points out that the Supreme Court has recently adopted a more permissive approach to amicus briefs and suggests that the federal appellate courts should follow suit.

USC-RULES-AP-2024-0001-0216
Federal Public Defender for the District of Nevada
The proposed amendments would create substantial hardships for their clients and adversely affect the development of constitutional and criminal law. The Committee should consider exceptions for amicus briefs supporting a defendant in a criminal case or a habeas petitioner, or at least amend Rule 29(a)(2) to include Federal Public or Community Defender organizations as entities that may file amicus briefs as a matter of course.

USC-RULES-AP-2024-0001-0217
George Tolley
Elimination of the party consent option likely will add to the burdens on the appellate courts, without providing a substantial benefit. As amended, FRAP 29 would require an appellate court to read and consider the merits of a motion for leave to file

as to every proposed amicus brief. Amici cannot know in advance of filing their amicus brief whether an appellate court might deem the brief redundant of one or more briefs filed by other amici. An appellate court that rejects proposed briefs from amici supporting one side or the other — justly or unjustly, fairly or unfairly — could be ill-equipped to defend itself against charges of impermissible bias for or against one side or the other.

USC-RULES-AP-2024-0001-0219
Lawyers' Committee for Civil Rights Under Law
The Lawyers' Committee for Civil Rights Under Law argues that the amendments would unnecessarily burden the freedom of expression of amici and create an unworkable system. The Committee emphasizes that amicus briefs provide valuable perspectives and information to the courts, even if some portion of the arguments is repetitive or redundant. They point out that the current system, which allows filing on consent, has not overwhelmed the courts with unhelpful briefs, and that the proposed changes would increase the burden on judges by requiring them to rule on motions for leave to file. The Committee also argues that the proposed redundancy filter is unworkable, as it is unclear how amici can ensure they are not replicating the arguments of others without significant coordination.

USC-RULES-AP-2024-0001-0221
Leukemia & Lymphoma Society (LLS)
The Leukemia & Lymphoma Society (LLS) opposes the proposed amendments to Rule 29. The proposed changes would create additional burdens for judges and clerks. The proposed standard for determining whether a brief is helpful is unclear and would deter nonprofit organizations with limited resources from filing briefs. LLS suggests that the Supreme Court's approach, which allows the filing of timely

amicus briefs without the need to obtain consent or leave, would be preferable.

USC-RULES-AP-2024-0001-0222
NAACP Legal Defense and Educational Fund (LDF)
LDF raises concerns about the proposed language regarding the purpose of amicus briefs, arguing that it could discourage helpful amicus participation and lead to arbitrary application. It also raises concerns about the language disfavoring redundant amicus briefs, highlighting the practical challenges of predicting and coordinating with other potential amici.

USC-RULES-AP-2024-0001-0225
Americans United for Separation of Church and State
Americans United for Separation of Church and State argue that the proposed changes would make it difficult for broad coalitions to submit briefs due to the word count limitations and additional disclosure requirements. This could lead to multiple parties filing individual, duplicative briefs, increasing the burden on courts. Additionally, the requirement for non-governmental amici to seek the court's leave to file would elevate the amicus process to something akin to a motion for intervention, increasing the burden on courts and potentially driving concerned parties to pursue the more onerous process of intervention.

USC-RULES-AP-2024-0001-0264
New York Intellectual Property Law Association (NYIPLA)
The New York Intellectual Property Law Association (NYIPLA) argues that the changes would impose unnecessary burdens on amici and the judiciary, particularly by eliminating the option to file amicus briefs with the consent of the parties. It is concerned that the proposed changes would create uncertainty and discourage the preparation of amicus briefs, particularly for organizations

that rely on volunteer efforts. NYIPLA also opposes the proposed standard for determining whether a brief is helpful, arguing that it fails to capture the ways amicus briefs can be beneficial. It recommends aligning the rule with the Supreme Court's approach, which allows the filing of amicus briefs without the need to obtain consent or leave. It is concerned that the limit of 6500 words would not be expanded if the parties are given permission for longer briefs.

USC-RULES-AP-2024-0001-0307
National Association of Criminal Defense Lawyers (NACDL)
The National Association of Criminal Defense Lawyers (NACDL) argues that the changes would impose unwarranted burdens on amici and the judiciary, particularly in federal criminal and related appeals. NACDL emphasizes that their amicus briefs are highly regarded by the judiciary and can provide a more thoroughly researched, broader and deeper, or more nuanced presentation of the issues in the case. Eliminating filing on consent would deter volunteer-reliant organizations from preparing briefs. At least make any mandatory-motion rule inapplicable to criminal, civil rights, and habeas appeals, where there is not even arguably any problem of abuse of amicus participation to be solved. In addition, the proposed substantive standard fails to capture the many ways amicus briefs can be helpful. NACDL has no objection to the expanded disclosure requirements but suggests clarification whether the required disclosures include the value of in-kind contributions.

USC-RULES-AP-2024-0001-0310
American Academy of Appellate Lawyers
The American Academy of Appellate Lawyers argues that the changes would create uncertainty and discourage the preparation of amicus briefs. It suggests that the rule should

be revised to align with Supreme Court Rule 37, which allows the filing of amicus briefs without the need to obtain consent or leave. It is one thing to provide guidance about the proper scope of an amicus brief. But it is quite another thing to convert guidance into a requirement. The redundancy provision is impractical , given the short time after a party's brief for filing an amicus brief.

USC-RULES-AP-2024-0001-0405
Retail Litigation Center (RLC)
The Retail Litigation Center (RLC) argues that the changes would impose unnecessary burdens on amici and the judiciary, particularly by eliminating the option to file amicus briefs with the consent of the parties. The recusal problem is a problem with systems, not the federal rules. Conflicts systems that disqualify potential panelists, despite the express inclusion in the existing Rule 29 of the right to strike an amicus brief that would result in that judge's disqualification, is an issue that needs resolved through updating systems and/or processes. An example of a way to solve this problem is to conduct conflict checks for amici upon selection of a panel, and if a selected panelist would be disqualified due to an amicus brief filed upon consent, the judge can then decide whether to strike the brief, as contemplated in Rule 29's current text. RLC also opposes the proposed standard for determining whether a brief is helpful, arguing that it fails to capture the many ways amicus briefs can be beneficial. Particularly if paired with a motion requirement with no exception for consent of the parties, this standard will certainly be litigated in disputed motion practice.

USC-RULES-AP-2024-0001-0406
Rachel Jennings
Rachel Jennings argues that the changes would disadvantage individual plaintiffs and favor industry players, who are

more likely to have organized amicus groups ready to file briefs on their behalf. Jennings emphasizes that the current system, which allows filing on consent, works well and provides access to the appellate process without imposing impractical hurdles. Jennings also argues that the proposed changes would create more work for courts by increasing contested motions practice. Any revision should align the rule with the Supreme Court's approach, which allows the filing of amicus briefs without the need to obtain consent or leave.

USC-RULES-AP-2024-0001-0407
Law school clinics
Members of law school clinics argue that the proposed amendments would significantly restrict their ability to engage in amicus advocacy and limit valuable experiential learning opportunities for law students. They emphasize the importance of amicus briefs for developing professional legal skills and judgment, as well as for providing unique perspectives and expertise to the courts. They point to the potential negative impact of the proposed requirement for advance approval of amicus filings and the language disfavoring redundant arguments. They argue that these changes would present line-drawing challenges, cause difficulties because of timing constraints, and chill novel contributions.

II. Opposed to Motion Requirement; Opposed to Disclosure

USC-RULES-AP-2024-0001-0004
Washington Legal Foundation
The Washington Legal Foundation (WLF) argue that requiring nongovernmental amici to obtain leave of court to file amicus briefs is unnecessary and inefficient, as judges already have effective methods for filtering unhelpful briefs.

WLF contends that the proposal would increase the burden on the judiciary and create uncertainty for amici, potentially discouraging amicus participation. It also raises First Amendment concerns regarding the proposed disclosure requirements, arguing that they are unnecessary and may violate associational rights.

USC-RULES-AP-2024-0001-0018
Chamber of Commerce of the United States
The Chamber of Commerce of the United States argues that the current Rule 29 already protects the integrity of amicus briefs while respecting First Amendment rights. The proposed disclosure amendments, which require amici to disclose significant contributors and the identities of certain non-party members, are unnecessary and potentially harmful to associational rights. The Chamber contends that these amendments would deter amicus participation, reduce the quality of amicus briefs, and burden the courts with additional motions. They also argue that the proposals to eliminate the consent option and reduce the number of amicus briefs are misguided, as the current framework promotes judicial economy and allows courts to manage unhelpful or duplicative briefs effectively.

USC-RULES-AP-2024-0001-0021
American Property Casualty Insurance Association (APCIA)
APCIA, strongly opposes the proposed amendments to Rule 29. APCIA argues that the elimination of the option to file amicus briefs on consent would limit the valuable role of amici in providing critical context, insight, and analysis to the courts. They contend that the proposed amendments would infringe on First Amendment rights, discount the speech of nonparties, and have a chilling effect on amicus activity. APCIA also criticizes the new disclosure requirements and the subjective standard for assessing the

helpfulness of amicus briefs. They believe that the current rule works well and that the proposed changes would create unnecessary barriers, reduce the number of amicus briefs, and deprive the courts of valuable information.

USC-RULES-AP-2024-0001-0023
American Council of Life Insurers
The American Council of Life Insurers argues that the proposed changes, including the elimination of the option to file amicus briefs by consent and additional disclosure requirements, would hinder amicus participation and add unnecessary costs. It believes the current Rule 29 already provides adequate safeguards and that the proposed changes would not benefit judicial efficiency or the public interest.

USC-RULES-AP-2024-0001-0026
Young America's Foundation
Young America's Foundation argues that the proposed amendments would hinder free speech and impose unfair restrictions on amicus briefs. It believes the proposed requirement for amici to obtain leave of court to file briefs is unfair and that government amici should not have more rights than citizen amici. The Foundation also opposes the proposed disclosure requirements, arguing that they violate Supreme Court precedent and would deter donors from supporting amicus efforts. They contend that the proposed changes would restrict speech and do not further a compelling governmental interest.

USC-RULES-AP-2024-0001-0035
Various National and State Organizations
A coalition of national and state organizations argues that the proposed disclosure requirements infringe on First Amendment rights by mandating broad disclosures that are not sufficiently justified. The organizations also oppose the requirement for amici to file a motion for leave in every case,

arguing that it would burden the courts with unnecessary motions and discourage amicus participation. They believe the current Rule 29 already provides adequate safeguards and that the proposed changes would undermine judicial efficiency and the public interest.

USC-RULES-AP-2024-0001-0110
William Kahl
This proposal will limit the role that amici play in our judicial process, would slow down the process and discourage the submission of briefs, and would threaten First Amendment rights by requiring amici to disclose financial details about their donors.

USC-RULES-AP-2024-0001-0207
Southeastern Legal Foundation
The Southeastern Legal Foundation argues that the changes would hinder the judicial process and restrict the role of amicus briefs. It contends that the proposed changes to Rule 29(a)(2) are vague, overbroad, and unnecessary, potentially leading to discrimination and chilling effects on amici participation. The Foundation also criticizes the additional disclosure requirements under Rule 29(b)(4), asserting that they would drain judicial resources and increase the risk of bias. It believes the current rules already provide adequate safeguards and that the proposed changes would not benefit judicial efficiency or the public interest.

USC-RULES-AP-2024-0001-0213
Alliance Defending Freedom (ADF)
The ADF is critical of the proposed amendments dealing with redundancy, consent, and disclosures. The organization argues that the proposed changes could discourage amicus participation, complicate the filing process, and impose unnecessary burdens on amicus parties. The proposed solution is not only in search of a problem—it is a problem.

The option that best "promotes public confidence in the integrity and impartiality of the judiciary" is not for a conflicted-out judge to decide whether to recuse or exclude an amicus brief that could be of substantial help to the court, especially when amicus briefs are most often filed in high-profile matters of significant legal importance.

USC-RULES-AP-2024-0001-0214
American Civil Liberties Union (ACLU)
The ACLU argues that the proposed disclosure requirements would burden First Amendment associational rights and that limiting amicus briefs to matters "not already mentioned" by the parties would be unduly restrictive. The ACLU also opposes the motion requirement for filing amicus briefs, citing the considerable cost and little benefit. It emphasizes the critical role of amicus briefs in assisting courts and ensuring that decisions do not have unintended consequences.

USC-RULES-AP-2024-0001-0218
Americans for Prosperity Foundation (AFPF)
AFPF argues that the current Rule 29 already provides adequate disclosures and that the proposed changes would unnecessarily burden courts and infringe on First Amendment rights. AFPF believes that amicus briefs serve a valuable purpose and should be freely allowed, and it contends that the proposed motion requirement would needlessly burden courts. It adds that the Advisory Committee correctly decided against requiring disclosure of non-earmarked contributions by nonparties.

USC-RULES-AP-2024-0001-0255
Pacific Legal Foundation
The Pacific Legal Foundation argues that the current rule is effective and that the proposed changes might be perceived as politically motivated. The Foundation believes that the

new disclosure obligations could discourage participation in amicus advocacy and raise concerns related to freedom of association. It also contends that addressing redundant briefs through the proposed approach might reduce the quality of amicus participation.

USC-RULES-AP-2024-0001-0306 (identical at 0410)
National Association of Manufacturers (NAM)
The National Association of Manufacturers argues that the proposed changes could hinder the filing of amicus briefs and infringe on First Amendment rights. It contends that the motion and redundancy requirements could chill useful amicus filings without much added benefit and that the relationship disclosure requirements likely violate First Amendment associational rights.

USC-RULES-AP-2024-0001-0318
Thomas Berry
Thomas Berry agrees with the First Amendment and donor privacy concerns that others have raised. He argues that the proposed changes would discourage organizations from filing briefs in federal appellate courts and could lead to an even greater focus on writing briefs for the Supreme Court instead. Berry urges the Committee to look to the Supreme Court's approach to amicus briefs as a better model.

USC-RULES-AP-2024-0001-0339
Complex Insurance Claims Litigation Association (CICLA)
The Complex Insurance Claims Litigation Association argues that the changes would impose unwarranted barriers to amicus participation and deprive courts of important information critical to judicial decision-making. CICLA is concerned that the proposed standard, combined with the motion requirement, would unduly restrict the scope of amicus participation by "disfavoring" an amicus brief that addresses an issue "mentioned" by one of the parties. It also

thinks that the proposed new disclosure requirements are arbitrary and not narrowly tailored to their stated purpose.

USC-RULES-AP-2024-0001-0353
Free Speech Coalition
The Free Speech Coalition argues that the changes would violate the First Amendment and indicate hostility to amicus briefs, It identifies three illegitimate reasons for the proposed rule: amicus briefs reveal judicial usurpation, make more work for judges, and are often more aggressive than party briefs.

USC-RULES-AP-2024-0001-0366
Various Banking Associations
The Independent Community Bankers of America and various state banking associations argue that the changes would threaten First Amendment rights and create practical challenges for amici participation in appellate litigation.

USC-RULES-AP-2024-0001-0368
Institute for Justice
The Institute for Justice does not support any of the proposed amendments, but focuses on the elimination of the option to file amicus briefs by consent. It argues that this change would create administrability problems and unpredictability in the judicial process. The Institute highlights that motions to file amicus briefs are often decided by judges or clerks who are not familiar with the merits of the case. It points to D.C. Circuit Local Rule 29(a)(2) as an adequate way to deal with recusal issues. [That Rule provides, "Leave to participate as amicus will not be granted and an amicus brief will not be accepted if the participation of amicus would result in the recusal of a member of the panel that has been assigned to the case."]

USC-RULES-AP-2024-0001-0370
Investment Company Institute (ICI)
The Investment Company Institute argues that the changes would create obstacles for filing amicus briefs, potentially limiting informed judicial decision-making. ICI is concerned about the possibility of an overly broad reading of the redundancy and the burdens of a motion requirement. It is at least conceivable that a provision like proposed Rule 29(b)(4) could require financial disclosure in an ICI amicus brief if the percentage threshold were set low enough and a large enough number of members were parties to the same litigation. If this compelled speech requirement were triggered, ICI would be forced to choose between (a) protecting the legitimate privacy and associational interests of ICI and its members and (b) advocating on behalf of investors, the markets, and ICI members. And were ICI to file a brief with the required financial disclosure, some courts may discount unfairly the brief's value, under the erroneous belief that it represents only the narrow interests of the litigants.

III. Opposed to Motion Requirement; Support Disclosure

USC-RULES-AP-2024-0001-0011
Michael Ravnitzky
Michael Ravnitzky supports the proposed disclosure amendments to the Federal Rules of Appellate Procedure, emphasizing the need for enhanced transparency and disclosure in amicus curiae briefs. He argues that transparency is essential for maintaining trust in the judicial process and preventing undue influence. Ravnitzky also calls for the disclosure of connections among amici and major donors, asserting that this will prevent hidden influences from shaping legal outcomes. He also supports retaining the consent requirement for filing amicus briefs.

USC-RULES-AP-2024-0001-0020
Stephen J. Herman
Stephen J. Herman states that the currently proposed amendments do not appear problematic. He highlights the distinction between the resources available to plaintiff and defense interests in preparing amicus briefs and notes that while the current proposal is not specifically addressed to this asymmetry, it effectively accounts for it. He also opposes the motion requirement, suggesting that, if anything, the courts of appeals should follow the Supreme Court and allow amicus briefs without requiring a motion or consent of the parties. He is concerned that if the proposed standard is applied overbroadly, it may discourage the filing of briefs that might be helpful.

USC-RULES-AP-2024-0001-0033
Gerson Smoger
Gerson Smoger argues that eliminating the ability to file an amicus brief by consent would create unnecessary burdens and discourage the filing of valuable amicus briefs. He also expresses concerns about the proposed content restrictions, suggesting that they may not effectively reduce redundancy and could discourage the filing of helpful briefs. Smoger emphasizes the importance of amicus briefs in enhancing transparency and providing the court with insights on the broader implications of decisions. Smoger supports the proposed financial disclosure requirements but suggests that the 25-percent funding threshold is too high, but is an important first step.

USC-RULES-AP-2024-0001-0034
American Association for Justice (AAJ)
The American Association for Justice (AAJ) argues that the proposed amendments could negatively impact the filing and consideration of amicus briefs in federal courts. It contends

that the proposed requirement for amici to seek leave of court to file briefs would be burdensome and inefficient, potentially discouraging the submission of valuable briefs. AAJ also opposes the proposed language disfavoring briefs that are redundant with other amicus briefs. It argues that the proposed amendments will lead to increased motion practice and hinder the courts' ability to consider diverse perspectives. It supports the idea of the proposed disclosure requirements but contends that they are, but should not be, more stringent for nonparties than for parties.

USC-RULES-AP-2024-0001-0220
California Lawyers Association, Litigation Section
The California Lawyers Association's Litigation Section argues that elimination of the consent option for filing amicus briefs could lead to fewer amicus briefs and deny the court valuable input. It is also concerned that if a brief is rejected because of recusal issues, the conflict may remain. The Association supports the new disclosure requirements between a party and amicus curiae, as well as between a nonparty and amicus curiae, as they promote transparency and fairness. It emphasizes the importance of disclosing financial contributions to ensure that the court and the public can determine how much weight to give the amicus brief.

USC-RULES-AP-2024-0001-0311
American Economic Liberties Project (AELP)
The American Economic Liberties Project (AELP) supports the Committee's efforts to enhance transparency and public confidence in amicus curiae practices but recommends several revisions to the proposed amendments to Federal Rule of Appellate Procedure 29. AELP advocates for preserving the party-consent mechanism for filing amicus briefs, developing a simple form for motions for leave, and striking the proposed anti-redundancy provision. AELP also suggests lowering the disclosure threshold for general

contributions to 10% with an alternative minimum of $100,000, requiring disclosure of the date of amici creation since the underlying case was filed, lengthening the contribution disclosure time frame to four years, and requiring amici to disclose whether their law firms frequently represent a party to the litigation. AELP emphasizes the importance of these revisions to balance administrative burdens, potential judicial recusal, and public confidence in the judicial system.

USC-RULES-AP-2024-0001-0340
Committee to Support Antitrust Laws (COSAL)
The Committee to Support Antitrust Laws (COSAL) generally supports the proposed amendments to Federal Rule of Appellate Procedure 29 but raises three main concerns. First, it argues that eliminating the option to file an amicus brief with the consent of all parties will result in unfairness and inefficiency, increasing the burden on courts and creating delays. Second, COSAL believes the standard for permissible amicus briefs—those that address issues not mentioned in the parties' briefs and are not redundant—is too stringent and unworkable, potentially eliminating useful briefs. Third, it contends that the threshold for disclosure of party contributions to amici is too high and suggests it should be lowered to 10%. COSAL emphasizes the importance of transparency and fairness in the judicial process and supports increased disclosure requirements to ensure the integrity of the judicial system.

USC-RULES-AP-2024-0001-0322
Brady Center to Prevent Gun Violence
Eliminating the consent option will burden the courts and may lead to the public perception that courts favor certain viewpoints in allowing amicus briefs. In addition, parties need to know whether a brief has been accepted so they know whether to respond to it in their briefs. The proposed

standard would create problems because of the short time between when a party filed a brief and when amicus briefs are due. Brady generally supports the increased disclosure requirements proposed but suggests clarifying the meaning of member.

USC-RULES-AP-2024-0001-0350
Electronic Frontier Foundation (EFF)
The Electronic Frontier Foundation (EFF) opposes the elimination of the consent provision, stating that it will lead to increased motion practice and hinder the participation of less-resourced amici. It is cautiously comfortable with the 25% threshold but would not want this threshold to be any lower. It supports the disclosure exemption when the donor has been a member for the prior 12 months—EFF suggests exempting the new disclosure requirements from the word count to allow for substantive arguments in amicus briefs.

USC-RULES-AP-2024-0001-0409
Steven Finell
Steven Finell supports expanding the disclosures required of those who proffer amicus briefs to help courts understand who is behind the briefs and ensure that amici are not merely supporting a party. However, he opposes the proposed amendments that would eliminate the submission of amicus briefs upon party consent and require leave of court. Finell proposes that courts of appeals should accept all proffered amicus briefs for whatever they may be worth, rather than requiring motions for leave, which he believes would waste more time and effort than it saves. He also argues that refusing or striking an amicus brief cannot ethically cure a judge's conflict of interest and that the courts of appeals' existing conflict avoidance system is sufficient to address potential conflicts.

IV. No Position For or Against Motion Requirement; Opposed to Disclosure

USC-RULES-AP-2024-0001-0008
Senators Mitch McConnell, John Thune, and John Cornyn
Senators Mitch McConnell, John Thune, and John Cornyn express strong opposition to the proposed amendments regarding amicus brief disclosure. The senators argue that the amendments threaten First Amendment rights and are driven by partisan motives. They believe the amendments would chill free speech and association, undermine the judiciary's integrity, and are unnecessary. If enacted, they encourage affected parties to immediately challenge these provisions in court. They contend that humoring bad-faith political actors is like rewarding a whining child with treats.

USC-RULES-AP-2024-0001-0016
National Taxpayers Union Foundation (NTUF) & People United for Privacy Foundation (PUFPF)
The NTUF and PUFPF express concerns about the proposed amendments to Federal Rule of Appellate Procedure 29, particularly regarding donor privacy and First Amendment rights. The organizations argue that the amendments fail the "exacting scrutiny" standard required by the Supreme Court and do not demonstrate a substantial government interest. They believe the proposed disclosure requirements are not narrowly tailored and could deter participation in the judicial process. They contend that there are no alternative channels for amicus arguments. They emphasize the importance of protecting donor privacy to ensure robust public debate and prevent harassment of individuals supporting nonprofit organizations.

USC-RULES-AP-2024-0001-0028
Philanthropy Roundtable
The Philanthropy Roundtable argues that the expanded amicus disclosure requirements threaten First Amendment rights and could undermine civil society by chilling participation in civic and charitable activities. It emphasizes the importance of protecting the privacy of donors and supporters to ensure diverse perspectives and robust public debate.

USC-RULES-AP-2024-0001-0030
Heritage Foundation
The Heritage Foundation argues that the amendments are politically motivated, constitutionally questionable, and could undermine judicial integrity. The letter emphasizes that judges should decide cases based on the merits, not the identity of the individuals or organizations involved. The Heritage Foundation believes the proposed amendments are unnecessary and would drag the federal judiciary into partisan politics.

USC-RULES-AP-2024-0001-0212
The Buckeye Institute
The Buckeye Institute argues that the proposed changes could stifle participation and infringe on First Amendment rights. It emphasizes the importance of amicus participation in the democratic process and the judicial system. The Buckeye Institute believes the proposed disclosure requirements are not narrowly tailored and could deter individuals and organizations from filing amicus briefs. It also suggests that the Committee should propose rules governing amicus participation at the district court level to facilitate broader participation.

USC-RULES-AP-2024-0001-0408
American Legislative Exchange Council (ALEC)
ALEC argues that the disclosure requirements violate free association and speech rights protected by the First Amendment and could chill public participation in legal matters. It believes the Committee has not demonstrated a compelling interest to justify the proposed amendments. It emphasizes the importance of allowing courts to benefit from additional insights provided by amicus briefs without discouraging public participation.

V. No Position For or Against Motion Requirement; Support Disclosure

USC-RULES-AP-2024-0001-0005
Anonymous
Amicus briefs have become a conduit for hyper-fixated interest groups, lobbying organizations, and partisan political entities to unduly influence the legal and factual proceedings of federal courts. All judges know that receiving amicus briefs is like getting junk mail in that you might be fooled into reading a brief in the same way you might be fooled to reading junk mail that uses a font that resembles someone's natural handwriting. However, at the end of the day, judges know that what's in amicus briefs is much like what's in junk mail: something written by an entity that wants to influence you to do something you'd otherwise not do, most often by emotional trickery and undergraduate-psychology-class marketing tactics.

USC-RULES-AP-2024-0001-0006
Senator Sheldon Whitehouse and Representative Hank Johnson
Senator Sheldon Whitehouse and Representative Hank Johnson argue that the current lack of transparency allows for covert influence by well-funded interests, which can

distort judicial decision-making. If adopted, the new rule would yield a long-overdue, if incomplete, improvement over existing amicus disclosure requirements. They also suggest additional measures, such as requiring amici to disclose links with other amici and ensuring lawyers conduct due diligence in their disclosures.

USC-RULES-AP-2024-0001-0014
Anonymous
In addition to supporting the proposed amendments, this college student would encourage the Committee to go further to strengthen the disclosure requirements. It is in the American public interest for all of us to know who exactly is trying to influence our judicial system through amicus curiae briefs. We – college students, young people, and average American citizens – have every right to have this disclosure, donor or otherwise, from these organizations. I am quite shocked by, yet resigned to, the partisan politicization surrounding these disclosure enhancements.

USC-RULES-AP-2024-0001-0017
Mia Andrade
Mia Andrade thinks that the proposed changes are essential for improving the clarity, efficiency, and fairness of the appellate process. By updating the rules, we can ensure that the legal system remains responsive to contemporary issues, reducing unnecessary delays and ambiguities. This helps maintain the integrity of the judicial process and reinforces public confidence in the legal system, which is crucial for ensuring justice and fairness for all parties involved.

USC-RULES-AP-2024-0001-0025
Anonymous
I strongly urge the passing of this rule to support fairness and justice in the judicial process.

USC-RULES-AP-2024-0001-0031
Court Accountability
Court Accountability emphasizes the need for enhanced transparency and accountability in amicus curiae brief disclosures. It argues that current disclosure requirements are insufficient, allowing parties to use amici to circumvent page limits and mislead courts about their independence. The proposed amendments would require amici to disclose significant financial contributions from parties or their counsel, close loopholes related to member payments and provide detailed information about the amicus's identity and purpose. It also suggests lowering the 25-percent funding threshold for disclosure and supports additional transparency regarding financial links between amici.

USC-RULES-AP-2024-0001-0374
Professor Allison Orr Larsen
Professor Allison Orr Larsen emphasizes the need for improved funding disclosure for amicus briefs to enhance judicial transparency and reliability. She highlights the increasing influence of the "amicus machine," where coordinated amicus briefs shape judicial reasoning and outcomes. Larsen argues that the proposed amendments will help courts assess the credibility of amicus submissions and enable courts to scrutinize amicus facts more carefully. As any new researcher is taught and any cross-examiner knows well, a source's motivation is intrinsically tied to its credibility.

USC-RULES-AP-2024-0001-0401
Senator Sheldon Whitehouse and Representative Hank Johnson
Senator Sheldon Whitehouse and Representative Hank Johnson respond to arguments against greater amicus disclosure. They argue that knowing the true interests behind amicus briefs is crucial for assessing potential conflicts of

interest and the weight of multiple amici in a case. They emphasize that these changes are necessary to prevent well-funded interests from covertly influencing judicial decisions and to maintain public confidence in the integrity of the judicial process. They hope that the Advisory Committee will not be intimidated by overheated rhetoric and name-calling.

USC-RULES-AP-2024-0001-0402
Various organizations and individuals
A group of organizations and individuals argue that enhanced amicus brief disclosure requirements will improve transparency and integrity in judicial proceedings. They highlight the importance of understanding the interests and relationships behind amicus briefs to evaluate their credibility and biases. They believe the proposed amendments will discourage the creation of front organizations and provide courts with valuable context to assess the reliability of amicus submissions.

VI. Other

USC-RULES-AP-2024-0001-0369
International Attestations LLC
International Attestations LLC emphasizes the need for inclusivity and consideration of global events in the context of U.S. rule formation. It argues that the proposed changes to amicus brief standards and in forma pauperis (IFP) considerations should account for upcoming global events, such as the World Cup 2026 and the Los Angeles Olympics 2028. The comment highlights the importance of preparing for these events by ensuring access to the courts for American-born individuals and entities. Kotulski also raises concerns about the proposed amendments' potential impact on the filing of amicus briefs, arguing that the changes could

discourage valuable contributions and hinder access to justice.

USC-RULES-AP-2024-0001-0222
Native American Rights Fund, National Congress of American Indians, and Northern Plains Indian Law Center
The Native American Rights Fund, the National Congress of American Indians, and the Northern Plains Indian Law Center request that federally recognized Indian tribes be added to the list of entities exempt from the leave of court requirement for filing amicus curiae briefs. They argue that Indian tribes, as sovereign entities, should be afforded the same treatment as the United States and individual states, which are already exempt from this requirement. The commenters emphasize that cases defining tribal governmental authority and rights often do not include tribes as parties, making amicus briefs the only avenue for their participation. They highlight the importance of tribal perspectives in cases involving foundational constitutional law principles and advocate for the inclusion of tribes in Rule 29 to ensure their voices are heard. The organizations also point out that the U.S. Supreme Court has already recognized Indian tribes as governmental entities in its rules governing amicus participation, and the Federal Rules of Appellate Procedure should align with this recognition.

There were **58 identical comments** filed by different individuals, but the comment is identical and copied below. The comment numbers end in 0054, 0065, 0069, 0087, 0089, 0092, 0098, 0099, 0109, 0127, 0136, 0139, 0146, 0153, 0156, 0160, 0166, 0170, 0177, 0182, 0183, 0188, 0189, 0190, 0193, 0194, 0195, 0196, 0198, 0206, 0234, 0236, 0237, 0245, 0248, 0253, 0258, 0260, 0266, 0286, 0291, 0293, 0298, 0304, 0317, 0319, 0333, 0348, 0358, 0361, 0364, 0371, 0376, 0379, 0380, 0390, 0391, and 0395.

> I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy.
>
> Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction.
>
> The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts.
>
> This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.

There were **57 identical comments** filed by different individuals, but the comment is identical and copied below. The comment numbers end in 0040, 0046, 0049, 0055, 0057,

0076, 0088, 0095, 0104, 0105, 0106, 0112, 0114, 0115, 0122, 0125, 0126, 0129, 0131, 0157, 0163, 0164, 0173, 0187, 0191, 0204, 0205, 0210, 0238, 0241, 0243, 0244, 0246, 0256, 0262, 0263, 0268, 0270, 0271, 0277, 0282, 0284, 0300, 0309, 0316, 0320, 0324, 0329, 0343, 0345, 0355, 0367, 0377, 0381, 0382, 0389, and 0400.

> I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights.
>
> The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system.
>
> This proposal is a step in the wrong direction, and I urge the Committee to withdraw it.

There were **47 identical comments** filed by different individuals, but the comment is identical and copied below. The comment numbers end in 0037, 0050, 0053, 0056, 0058, 0059, 0064, 0070, 0079, 0085, 0094, 0102, 0107, 0113, 0121, 0123, 0133, 0142, 0144, 0150, 0165, 0168, 0186, 0202, 0223, 0229, 0230, 0231, 0239, 0257, 0273, 0274, 0275, 0278, 0285, 0288, 0289, 0297, 0302, 0312, 0321, 0331, 0337, 0365, 0383, 0388, and 0399.

> I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations.
>
> Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns.
>
> Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy.
>
> This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.

There were **59 identical comments** filed by different individuals, but the comment is identical and copied below. The comment numbers end in 0045, 0060, 0062, 0063, 0066, 0073, 0077, 0080, 0084, 0090, 0091, 0093, 0097, 0103, 0111, 0117, 0119, 0124, 0130, 0135, 0143, 0147, 0152, 0161, 0167, 0171,

0172, 0175, 0176, 0181, 0199, 0209, 0211, 0226, 0232, 0240, 0249, 0261, 0276, 0279, 0280, 0290, 0301, 0313, 0314, 0326, 0330, 0342, 0344, 0351, 0354, 0357, 0360, 0362, 0375, 0386, 0392, 0393, and 0396.

> I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs.
>
> Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating.
>
> Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations.
>
> This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.

There were **56 identical comments** filed by different individuals, but the comment is identical and copied below. The comment numbers end in 0041, 0042, 0043, 0047, 0048, 0052, 0068, 0071, 0078, 0081, 0100, 0108, 0118, 0132, 0138, 0154, 0155, 0158, 0159, 0162, 0169, 0179, 0200, 0208, 0224, 0227, 0228, 0235, 0242, 0252, 0259, 0267, 0272, 0281, 0283, 0292, 0294, 0295, 0296, 0303, 0308, 0315, 0323, 0325, 0327, 0328, 0332, 0335, 0336, 0347, 0349, 0359, 0363, 0378, 0384, and 0394.

I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings.

Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions.

Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process.

This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly.

I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.

There were **54 identical comments** filed by different individuals, but the comment is identical and copied below. The comment numbers end in 0036, 0038, 0039, 0044, 0051, 0061, 0067, 0072, 0075, 0082, 0083, 0086, 0096, 0101, 0120, 0128, 0134, 0137, 0141, 0145, 0148, 0149, 0174, 0178, 0180, 0184, 0185, 0192, 0197, 0201, 0203, 0233, 0247, 0250, 0251, 0254, 0265, 0269, 0287, 0299, 0305, 0334, 0338, 0341, 0346, 0352, 0356, 0372, 0373, 0385, 0387, 0397, 0398, and 0404.

> I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure.
>
> This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step.
>
> I urge the Committee to reconsider this harmful proposal and withdraw it.

Summary of Testimony

Carter Phillips (Chamber of Commerce of the United States)
The Chamber of Commerce opposes the proposed amendments to Rule 29, citing concerns about First Amendment rights. Current Rule 29 already protects the judicial process and the proposed disclosure amendments are unnecessary and overly burdensome. The Chamber also opposes the elimination of the consent option and the proposal to bar redundant amicus briefs, arguing that these changes would reduce the quality of amicus participation and burden the courts with unnecessary motions.

Carter Phillips questions why the courts of appeals want to deviate from the U.S. Supreme Court's approach to amicus practice, including liberal filing of amicus briefs without requiring consent or motions and less disclosure than proposed here. Phillips argues that the proposed disclosure requirements could have significant risks, particularly from the Executive and Legislative branches, and could chill free expression. He provides a hypothetical example involving the Foreign Corrupt Practices Act to illustrate the potential negative consequences of disclosure. Phillips also criticizes the requirement for leave of court for non-governmental amicus briefs, arguing that it would create a cumbersome process and discourage valuable amicus participation. He emphasizes that the current system, which allows filing by consent, works well and that the proposed changes would create unnecessary burdens for the courts and parties involved. In response to a question whether the objection to disclosing financial relationships between a party and an amicus is categorical or whether the concern is with the percentage; that is, why shouldn't a court know if 100% of the resources of an amicus comes from a party? Phillips responded, "But, to get at the problem you've identified . . . it seems to me that you would target that specifically in a particular way about the relationship between the party and the amicus, not by requiring more disclosure of organizations that provide amicus support."

Alex Aronson (Court Accountability)

Alex Aronson, Executive Director of Court Accountability, testifies in support of the proposed disclosure amendments to Rule 29. Court Accountability supports the proposed amendments to Rule 29, arguing that they will enhance transparency and accountability in amicus curiae brief disclosures. The amendments will deter gamesmanship and

provide courts with additional information to evaluate the credibility of amicus submissions.

He argues that the amendments are necessary to improve transparency and accountability within the judicial system. Aronson highlights the negative consequences of amici acting as alter egos of parties or third-party interest campaigns, citing the example of the pending Ninth Circuit appeal in Google vs. Epic Games, where many amici had financial ties to Google that were not disclosed. He emphasizes that the identity of an amicus matters and that transparency is crucial for public confidence in the courts. Aronson also addresses First Amendment objections raised by other commenters, arguing that the proposed amendments are consistent with legal precedent and do not infringe on free speech rights. He suggests that the 25 percent funding threshold for disclosure is too high and recommends additional disclosure of financial links among amici.

Lisa Baird (DRI—Defense Research Institute)
Lisa Baird, Chair of the Amicus Committee for DRI's Center for Law and Public Policy, testifies against the proposed amendments to Rule 29. She argues that the amendments are misguided and based on misunderstandings about the role of amicus briefs. She finds it notable that so many groups with varying interests and political perspectives are united in raising concerns. Baird emphasizes that the current system, which allows filing by consent, works well and should be retained. She highlights the practical problems with the proposed requirement for leave of court for non-governmental amicus briefs, arguing that it would create unnecessary burdens for the courts and discourage valuable amicus participation. While DRI takes no position on the substance of the disclosure requirements, Baird criticizes the proposed disclosure requirements as convoluted and

confusing. She recommends that any disclosure requirements be straightforward and located in one place. Baird urges the Committee to adopt the Supreme Court's approach to amicus filings. In response to a question about motion practice, she predicted that if you give lawyers an avenue and suggest that a motion should be opposed, they will oppose for no other reason than to impose costs and burdens, so this proposal threatens to flip the switch from the current norm of consent.

Thomas Berry

Thomas Berry, speaking in his personal capacity, argues that the requirement for leave of court for non-governmental amicus briefs would add significantly to the federal appellate workload and discourage valuable amicus participation. Berry highlights that drafting an amicus brief is a time-consuming process and that the proposed amendments would make it difficult to justify dedicating resources to producing briefs that might not be accepted. He emphasizes that the current system, which allows filing by consent, works well and that the proposed changes would create unnecessary burdens for the courts and parties involved. Berry also argues that the proposed amendments would incentivize amicus filers to focus more on the Supreme Court, which already receives a high volume of amicus briefs, rather than the federal appellate courts. He urges the Committee to adopt the Supreme Court's approach to amicus filings.

Molly Cain (LDF—NAACP Legal Defense and Educational Fund)

Molly Cain, representing the NAACP Legal Defense and Educational Fund (LDF), argues that the requirement for amicus briefs to be limited to relevant matter not already mentioned by the parties is too restrictive and could discourage helpful amicus participation. Cain emphasizes

that LDF's amicus briefs often expand upon matters mentioned by the parties and that the proposed language could lead courts to refuse consideration of valuable briefs. She also criticizes the language disfavoring redundant amicus briefs, arguing that it would be difficult for litigants to navigate and for courts to enforce. Cain highlights that amicus briefs supporting the same party share the same deadline, making it impossible to predict what other amicus briefs may be filed or what they will argue. This could result in courts lacking a principled basis for deciding which briefs are redundant and which are not.

Lawrence Ebner (Atlantic Legal Foundation)
Lawrence Ebner, Executive Vice President and General Counsel of the Atlantic Legal Foundation, emphasizes the importance of amicus briefs in the courts of appeals, noting that fewer amicus briefs are filed in these courts compared to the Supreme Court, making them more likely to be read and impactful. Ebner outlines the substantial effort, time, and expense involved in researching and drafting an amicus brief, including reviewing relevant materials, formulating arguments, and avoiding duplication. The proposed changes would deter the preparation and submission of worthwhile amicus briefs and unnecessarily burden appellate judges. Requiring a motion would undermine the current culture of consent, where experienced appellate attorneys routinely consent to the filing of amicus briefs. This requirement would create a risk that already-drafted briefs may not be accepted, deterring the preparation and filing of helpful briefs. Ebner urges the Committee to follow the Supreme Court’s lead by not requiring consent or leave.

Doug Kantor (National Association of Convenience Stores)
Doug Kantor, General Counsel of the National Association of Convenience Stores, expresses major concerns about the

proposed changes to Rule 29, particularly regarding First Amendment associational rights. He explains the practical challenges faced by associations in deploying limited resources to advocate on behalf of their members. Kantor highlights the difficulties in coordinating with other associations and the added costs of justifying the uniqueness of each amicus brief through a motion. He also raises concerns about the requirement to disclose non-party funders, noting that associations may need to seek specific funding for unbudgeted cases. Deciding which members to ask often has more to do with who we have tried to ask for funding more recently and who we have not than that member having some special interest in a case. While it is very doubtful that we would ever have someone come anywhere close to the 25 percent number, we have multiple sources of funding (dues, booth space at big trade shows, educational programs) and do not currently conglomerate what individual companies pay in each of these areas. In response to a question about earmarked funding, he explained that some longtime members let their dues lapse.

Seth Lucas

Seth Lucas, a senior research associate at The Heritage Foundation and a law student, argues that the proposed rules are unnecessary, politically motivated, and constitutionally suspect. Lucas criticizes the Committee's justification for the proposed rules, which analogizes them to campaign finance disclosures, arguing that judging is not like voting and that judges should decide cases based on facts and law, not public opinion. He highlights the lack of a clear rationale for the proposed changes and the absence of evidence of a problem that needs to be addressed. Lucas urges the Committee not to adopt the proposed association disclosure rules, arguing that they would drag the judiciary into identity politics and are a partisan solution in search of a problem. In response to the question whether the opposition to disclosing the

financial relationship between a party and an amicus is categorical, he responded, "the problem isn't money. It's whether the parties are getting a second bite at the apple."

Tyler Martinez National Taxpayers Union Foundation and People United for Privacy Foundation)

Tyler Martinez, representing the National Taxpayers Union Foundation and People United for Privacy, emphasizes the importance of amicus briefs in areas of arcane law, such as tax and campaign finance, and argues that donor privacy has been protected by exacting scrutiny. Martinez explains that exacting scrutiny requires a sufficiently important governmental interest and narrow tailoring, and he cautions the Committee against assuming that campaign finance disclosure standards can be applied to amicus briefs. He highlights the challenges of meeting exacting scrutiny for new areas of regulation and argues that the proposed amendments would fail to meet this standard. The proposed disclosure requirements fail to meet this standard and do not provide a substantial government interest. The proposed amendments are not properly tailored and there are no alternative channels for amicus arguments. . In response to the question whether the opposition to disclosing the financial relationship between a party and an amicus is categorical, he responded, "As it's drafted now, yes, it's a categorical problem. . . . if the real worry there is that you're just an arm of a party, and I think the current rules already would allow for enforcement of that. If it's some sort of major amount of funding . . . it has to be much more than 50 percent."

Sharon McGowan (Public Justice)

Sharon McGowan, Chief Executive Officer of Public Justice, opposes the requiring motions for leave to file non-governmental amicus briefs. Public Justice does not take a position on the disclosure proposal. At a time when courts

are trying to promote cooperation among counsel, this amendment tacks in the opposite direction. She argues that the existing Rule 29 already addresses concerns about amicus briefs forcing recusal and that the motion requirement would not provide additional relevant information. McGowan highlights the inefficiency of requiring motions for leave, as they are often decided by the clerk or motions panel before the merits panel is assigned. She provides examples from Public Justice's experience where motions for leave added to the workload of the motions panel or clerk without improving the court's ability to assess the briefs' utility. McGowan also argues that the proposed amendments would increase litigation time and expense and could lead to unwarranted opposition to amicus briefs. In response to a question, she encouraged the Committee to adopt the Supreme Court's approach, which allows all amicus briefs to be filed without consent or motion.

Patrick Moran (NFIB—National Federation of Independent Business)

Patrick Moran, a senior attorney with the National Federation of Independent Business (NFIB) Small Business Legal Center, argues that the proposed helpful and relevant standards would act as unnecessary barriers to the filing of amicus briefs, discouraging helpful briefs and creating a judicial echo chamber. Moran highlights the high costs of filing amicus briefs, especially for small teams of attorneys, and argues that the motion requirement would drive up these costs and stifle the voices of small businesses in federal courts. He also criticizes the proposed amendments for being out of step with the Supreme Court’s amicus rules, which do not require notice and consent. Moran urges the Committee to adopt a rule consistent with the Supreme Court's rules.

Jaime Santos

Jaime Santos, in her personal capacity, argues that the appropriate purpose of an amicus brief is to provide information to a court that can aid in judicial decision-making. Santos criticizes the proposed amendment to Rule 29(a)(2) for suggesting that an amicus brief can only be helpful if it discusses a matter not mentioned by the parties or other amici. She argues that redundancy among briefs can be helpful: A pharmaceutical company saying in its merits brief the rule the other side is asking you to adopt will have disastrous consequences for patients might be compelling or it might not, given the party's financial interest in winning. But three amicus briefs by patient groups, physician groups, and insurers who are willing to go to the trouble to retain counsel to say no, really, this will completely mangle the way we operate, that can be enormously helpful and powerful and relevant despite being duplicative of something a party says. Santos also opposes the proposed motion for leave requirement, arguing that it would lead to more work for under-resourced and overworked courts and increase the amount of uncompensated work required by lawyers. She notes that parties in the court of appeals typically consent, because withholding consent "violates what I think of as FRAP 101, don't be a jerk." But in the district court, where motions are required, the motions are almost invariably opposed, often for pretty ridiculous reasons. Santos also criticizes the proposed new detailed disclosure rules, arguing that they would make it difficult for numerous small organizations to band together because of the space needed to describe each of them and the lack of access to the required financial information. In response to a question whether a small organization wouldn't know any 25% donors, she responded that "may be right," but between micro grants and irregular funding streams, there may not be sufficient infrastructure to keep track and give counsel the confidence to make a representation in a brief.

Stephen Skardon (APCIA—American Property Casualty Insurance Association)
Stephen Skardon, Assistant Vice President, Insurance Counsel at the American Property Casualty Insurance Association (APCIA), emphasizes that APCIA, representing a significant portion of the U.S. property casualty insurance market, frequently files amicus briefs to provide courts with a broad national perspective on insurance-related matters. Skardon argues that the proposed amendments would limit the valuable role of amici by eliminating the option to file briefs on consent, which would deprive courts of critical context and analysis. He also criticized the proposed standard for assessing the helpfulness of amicus briefs, noting that it would result in fewer briefs being filed and would be detrimental to both the courts and the public. APCIA argues that the proposed disclosure requirements would infringe on First Amendment rights. It recommends maintaining the current permissive filing standard or adopting the Supreme Court's approach of eliminating the consent requirement.

Zack Smith
Zack Smith, Senior Legal Fellow and Manager of the Supreme Court and Appellate Advocacy Program at The Heritage Foundation, argues that the proposed changes, particularly those related to donor disclosures, are a solution in search of a problem and are driven by partisan politics. Smith highlights that the proposed amendments likely violate the First Amendment, as they would not pass the exacting scrutiny test required for compelled disclosures. He also criticized the Committee's rationale that the identity of the amicus matters to some judges, arguing that this undermines the principle of judicial impartiality. In response to the question whether he would object to requiring disclosure if a party provided 100% of the funds to an

amicus, Smith responded, "Yes, as drafted, and more to the point . . . I'm not sure throughout the Committee's study of this matter there's been an identified purpose, and . . . given this lack of a clarified governmental interest, it's hard to see how these proposed changes could pass the exacting scrutiny test."

Tad Thomas (AAJ—American Association for Justice)
Tad Thomas, past president of the American Association for Justice (AAJ) and current Chair of AAJ's Legal Affairs Committee, supports increased transparency and strongly believes that the true identity of the amici should be easy to determine by the courts, the parties, and the public. The 25 percent rule is not a problem at all; in many cases, the tax status of the organization requires it to keep detailed documentation of donations. He emphasized the importance of amicus briefs in educating the court on critical legal issues and noted that AAJ frequently files such briefs through party consent. Thomas argued that removing the party consent provision would increase the burden on courts and lead to unnecessary motion practice. He provided an example from the Eleventh Circuit where AAJ faced opposition to their amicus brief, which resulted in additional work for the court. Thomas also recommended removing or simplifying the proposed purpose section, as it could lead to unintended consequences and promote favoritism for certain well-known amici. He urged the Committee to adopt the Supreme Court's approach to amicus briefs or retain the current consent provision.

Larissa Whittingham (RLC—Litigation Counsel for the Retail Litigation Center)
Larissa Whittingham, Litigation Counsel for the Retail Litigation Center (RLC), testified against the proposed amendments to Rule 29(a). She argued that the existing rule already contains safeguards to address concerns about

recusal and that the proposed amendments would create unnecessary burdens and promote adversarialness. The remedy to the recusal problem the report noted is to appropriately configure systems and processes to allow the implementation of existing Rule 29, not by amending the rule. Whittingham emphasized that amicus briefs provide valuable perspectives and data that parties may not be able to offer, and that the proposed standard for assessing the helpfulness of briefs is too limited. She also noted that the proposed amendments would be particularly detrimental to smaller organizations and would be difficult to administer. Whittingham urged the Committee to reject the proposed amendments and maintain the current rule.

Kirsten Wolfford (ACLI—American Council of Life Insurers)

Kirsten Wolfford, representing the American Council of Life Insurers (ACLI), argues that the amendments would create unnecessary burdens and have a chilling effect on the filing of amicus briefs. Eliminating the option to file by consent and adding new disclosure requirements would discourage amicus participation and increase costs without clear benefits. ACLI believes the current Rule 29 adequately prevents "dark" money from influencing amicus briefs. Wolfford emphasizes the unique perspective that amicus briefs provide, which cannot always be replicated by the parties in a matter. She highlights the value of ACLI's amicus briefs in providing background information on the life insurance industry and argues that creating hurdles for these briefs would hinder the court's ability to make informed decisions.

Gerson H. Smoger

Gerson Smoger, an attorney at Smoger & Associates, emphasizes the importance of amicus briefs in providing information to the court that may not be raised by the parties

and highlights the challenges faced by pro bono amicus brief writers. Smoger supports the 6500-word limit for amicus briefs and the requirement for a concise description of the identity and interest of the amicus. However, he opposes the requirement for motions for leave to file amicus briefs, arguing that it would create unnecessary work and limit the ability of the actual panel to hear the briefs. Smoger also supports the 25 percent rule for disclosing financial contributions but argues that it should be lowered to 10 percent. "I've been involved for a long time in . . . multiple boards and multiple organizations, and you always know who gave 25 percent . . . . Everybody's struggling for money. People do always know who's given at least 10 percent because then they're coming back to them, and 25 percent, frankly, is ridiculous because people absolutely know . . . . "

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

Rule 32. Form of Briefs, Appendices, and Other Papers

* * * * *

(g) Certificate of Compliance.

(1) **Briefs and Papers That Require a Certificate.** A brief submitted under Rules 28.1(e)(2), 29(a)(5), 29(f)(3) ~~29(b)(4)~~, or 32(a)(7)(B)—and a paper submitted under Rules 5(c)(1), 21(d)(1), 27(d)(2)(A), 27(d)(2)(C), or 40(d)(3)(A)—must include a certificate by the attorney, or an unrepresented party, that the document complies with the type-volume limitation. The person preparing the certificate may rely

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

on the word or line count of the word-processing system used to prepare the document. The certificate must state the number of words—or the number of lines of monospaced type—in the document.

(2) **Acceptable Form.** Form 6 in the Appendix of Forms meets the requirements for a certificate of compliance.

Committee Note

Rule 32(g) is amended to conform to amendments to Rule 29.

Changes Made After Publication and Comment

The cross reference to Rule 29(f)(2) is changed to 29(f)(3), reflecting changes to Rule 29(f).

Appendix:
Length Limits Stated in the
Federal Rules of Appellate Procedure

* * * * *

Amicus briefs	29(a)(5)	• Amicus brief during initial consideration on merits	~~One-half the length set by the Appellate Rules for a party's principal brief~~ 6,500	~~One-half the length set by the Appellate Rules for a party's principal brief~~ Not applicable	~~One-half the length set by the Appellate Rules for a party's principal brief~~ Not applicable
	29~~(b)(4)~~(f)(3)	• Amicus brief during consideration of whether to grant rehearing	2,600	Not applicable	Not applicable

* * * * *

Changes Made After Publication and Comment

The cross reference to Rule 29(f)(2) was changed to 29(f)(3), reflecting changes to Rule 29(f).

UNITED STATES DISTRICT COURT

for the

<_____> DISTRICT OF <_____>

<Name(s) of plaintiff(s)>,	)	
	)	
Plaintiff(s)	)	
	)	
v.	)	
	)	Case No. <Number>
<Name(s) of defendant(s)>,	)	
	)	
Defendant(s)	)	
	)	

AFFIDAVIT ACCOMPANYING MOTION FOR PERMISSION TO APPEAL IN FORMA PAUPERIS

Affidavit in Support of Motion

I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the filing fees of my appeal or post a bond for them. I believe I am entitled to relief. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C. § 1621.)

Signed: _____ Date _____

The court may grant a motion to proceed in forma pauperis if you show that you cannot pay the filing fees and you have a non-frivolous issue on appeal. Please state your issues on appeal. (Attach additional pages if necessary.)

My issues on appeal are:

1.	What is your monthly take-home pay, if you have any, from your work?	$_____
2.	What is your monthly income from any source other than take-home pay from work (such as unemployment benefits, alimony, child support, public assistance, pension, and social security)?	$_____
3.	How much are your monthly housing costs (such as rent and utilities)?	$_____
4.	How much are your monthly costs for other necessary expenses (such as food, medical care, childcare, and transportation)?	$_____
5.	What is the total value of all your assets (such as bank accounts, investments, market value of car or house)?	$_____
6.	How much debt do you have (such as credit cards, mortgage, and student loans)?	$_____
7.	How many people (including yourself) do you support?	
8.	Do you receive SNAP (Supplemental Nutrition Assistance Program), Medicaid, or SSI (Supplemental Security Income)? These programs may go by different names in some states.	Yes No

Are you a prisoner seeking to appeal a judgment in a civil action or proceeding? If so, then no matter how you answered the questions above, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

For all applicants: if there is anything else that you think explains why you cannot pay the filing fees, please feel free to explain below. (Attach additional pages if necessary.)

Committee Note

Revised Form 4 simplifies the existing Form 4, reducing the existing form to two pages. It is designed not only to reduce the burden on individuals seeking IFP status but also to provide the information that courts of appeals need and use, while omitting unnecessary information.

Changes Made After Publication and Comment

The phrase "if you have any" was added to question 1. The sentence, "These programs may go by different names in some states," was added to question 8. The first paragraph after the table of questions was revised to begin with a question that makes clear immediately that the paragraph is addressed to prisoners. The second paragraph was revised to make clear that it applies to all applicants.

Summary of Public Comment

USC-RULES-AP-2024-0001-0007
Simon Hernandez
The Proposed Form 4 to apply for in forma pauperis in an appellate court will considerably ease those who are in need. As stated in the proposed amendment, the current Form 4 is overly complicated, intrusive, and includes unneeded information. If a court believes that someone is lying about their status, they can inquire. But why put up one more barrier for someone who already is struggling to navigate the complicated appellate process. For example, the current form includes the employment history of a filer for the last two years. This is not likely relevant to the process of establishing if they are qualified for in forma pauperis, the simplified form which includes only income and expenses will do the job. The Proposed Form 4 is an example of how a government form can be better and should.

USC-RULES-AP-2024-0001-0010
Anonymous
The FRAP should be more flexible for incarcerated inmates.

USC-RULES-AP-2024-0001-0011
Michael Ravnitzky
Michael Ravnitzky supports the proposed changes to Appellate Form 4 to simplify the process for waiving fees and costs in appellate cases.

USC-RULES-AP-2024-0001-0017
Mia Andrade
I agree with the proposed amendments to the Federal Rules of Appellate Procedure. These changes are essential for improving the clarity, efficiency, and fairness of the appellate process. By updating the rules, we can ensure that the legal system remains responsive to contemporary issues, reducing unnecessary delays and ambiguities. This helps maintain the integrity of the judicial process and reinforces public confidence in the legal system, which is crucial for ensuring justice and fairness for all parties involved.

USC-RULES-AP-2024-0001-0025
Anonymous
I strongly urge the passing of this rule to support fairness and justice in the judicial process.

USC-RULES-AP-2024-0001-0029
Avital Fried, Myriam Gilles, Andrew Hammond, Alexander A. Reinert, Judith Resnik, Tanina Rostain, Anna Selbrede, Lauren Sudeall, and Julia Udell
They support the proposed revision of Appellate Form 4, which aims to simplify the form, reduce the burden on individuals seeking in forma pauperis (IFP) status, and provide necessary information to the courts while omitting unnecessary details. They recommend revising the language of specific questions in Appellate Form 4 to make them clearer and more inclusive. For Question 1, they suggest adding "if any" to clarify that the question applies even if the applicant has no income. For Question 4, they recommend including "old-age or other dependents' needs" to the list of necessary expenses. For Question 8, they propose adding a note that the names of programs like SNAP, Medicaid, or SSI vary by state. Lastly, they suggest rephrasing a sentence

about explaining inability to pay filing fees to ensure it applies to all applicants, not just prisoners.

USC-RULES-AP-2024-0001-0307
National Association of Criminal Defense Lawyers
NACDL suggests that Form 4 should be amended to include information indicating that a person for whom counsel has been appointed under the Criminal Justice Act (CJA) is automatically entitled by law to appeal in forma pauperis and is not required to complete Form 4.

Summary of Testimony

Sai
Sai expresses gratitude for the opportunity to testify regarding the proposed amendments to Form 4, which Sai has been advocating for since 2015 and 2019. Sai acknowledges that the proposed form is an improvement but identifies several fundamental flaws. Sai emphasizes that 28 U.S.C. § 1915 and the Prison Litigation Reform Act clearly state that the affidavit of finances is required only for prisoners. Sai suggests adding a question at the beginning of the form asking if the applicant is a prisoner, and if not, to skip the rest of the form. Sai also recommends including a statement of qualification standards to help applicants understand if they qualify for IFP status. Sai proposes that the form should automatically qualify non-prisoners who are on means-tested welfare benefits, represented by a public defender or legal aid, or have income and savings below 1.5 times the federal poverty guidelines. Sai further suggests moving the question about welfare benefits to the top of the form and excluding assets like the primary residence and work-related items from the asset calculation. Sai also recommends sealing the form automatically and providing immunity under 18 U.S.C. § 6002. Lastly, Sai advocates for the form to be applied to the Civil Rules (rather than just a form from the Administrative Office) and for the Committee to include representation from pro se litigants.

Professor Judith Resnik, Avital Fried, Anna Selbrede, and Julia Udell

They support the proposed revisions to Appellate Form 4, aimed at simplifying the process for individuals seeking to appeal in forma pauperis (IFP) and improving access to the legal system. They argue that the proposed revisions would reduce the burden on individuals seeking IFP status and provide the necessary information to the courts while omitting unnecessary details. The group also offers several modest revisions to further improve the form, such as clarifying language and adding explanations for certain questions. They emphasize the importance of simplifying forms to increase accessibility and reduce costs for both litigants and the courts.

Professor Judith Resnik describes the challenges faced by people seeking fee waivers at trial and appellate levels. She highlights that a significant portion of filings at both levels are from self-represented litigants and that the current forms are not user-friendly. Avital Fried adds that the current IFP application process can be confusing and that the proposed form addresses privacy concerns and formatting inconsistencies across circuits. Anna Selbrede discusses the benefits of simplified forms, citing research from justice labs and the positive impact on judicial efficiency. Julia Udell offers minor suggestions to further improve the form, such as noting that the names of public benefits programs may vary depending on the state and including elder care expenses. The proposed revisions can serve as a model for district courts.

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

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

* * * * *

(d) Premature Petition or Application. This subdivision (d) applies if a party files a petition for review or an application to enforce after an agency announces or enters its order—but before the agency disposes of any petition for rehearing, reopening, or reconsideration that renders the order nonreviewable as to that party. The premature petition or application becomes effective to seek review or enforcement of the order when the agency disposes of the last such petition for rehearing, reopening, or reconsideration. A party intending to challenge that disposition must file a new or amended petition for review or

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

application to enforce in compliance with this Rule 15.

(e)~~(d)~~ **Intervention.** Unless a statute provides another method, a person who wants to intervene in a proceeding under this rule must file a motion for leave to intervene with the circuit clerk and serve a copy on all parties. The motion—or other notice of intervention authorized by statute—must be filed within 30 days after the petition for review is filed and must contain a concise statement of the interest of the moving party and the grounds for intervention.

(f)~~(e)~~ **Payment of Fees.** When filing any separate or joint petition for review in a court of appeals, the petitioner must pay the circuit clerk all required fees.

Committee Note

Subdivision (d). Subdivision (d) is new. It is designed to eliminate a procedural trap. Some circuits hold that petitions for review of agency orders that have been rendered non-reviewable by the filing of a petition for rehearing (or similar petition) are "incurably premature," meaning that they do not ripen or become valid after the

agency disposes of the rehearing petition. *See, e.g., Nat'l Ass'n of Immigration Judges v. Fed. Labor Relations Auth.*, 77 F.4th 1132, 1139 (D.C. Cir. 2023); *Aeromar, C. Por A. v. Dept. of Transp*., 767 F.2d 1491, 1493 (11th Cir. 1985) (relying on the pre-1993 treatment of notices of appeal and applying the "same principle" to review of agency action). In these circuits, if a party aggrieved by an agency action does not file a second timely petition for review after the petition for rehearing is denied by the agency, that party will find itself out of time: Its first petition for review will be dismissed as premature, and the deadline for filing a second petition for review will have passed. Subdivision (d) removes this trap.

It is modeled after Rule 4(a)(4)(B)(i), as amended in 1993, and is intended to align the treatment of premature petitions for review of agency orders with the treatment of premature notices of appeal. Recognizing that while review of district court orders is generally case based, *see* Fed. R. Civ. P. 54, review of administrative orders is generally party based, subdivision (d) refers to an order that is made "non-reviewable as to that party" by a petition for rehearing, reopening, or reconsideration.

Subdivision (d) does not address whether or when the filing of a petition for rehearing, reopening, or reconsideration renders an agency order non-reviewable as to a party. That is left to the wide variety of statutes, regulations, and judicial decisions that govern agencies and appeals from agency decisions. Rather, subdivision (d) provides that when, under governing law, an agency order is non-reviewable as to a particular party because of the filing of a petition for rehearing, reopening, or reconsideration, a premature petition for review or application to enforce that order will be held in abeyance and become effective when the agency disposes of the last such petition—that is, the last

petition that renders the order non-reviewable as to that party.

As with appeals in civil cases, *see* Rule 4(a)(4)(B)(ii), the premature petition becomes effective to review the original decision, but a party intending to challenge the disposition of a petition for rehearing, reopening, or reconsideration must file a new or amended petition for review or application to enforce.

Subsequent subdivisions are re-lettered.

Minutes of the Spring Meeting of the

Advisory Committee on Appellate Rules

April 2, 2025

Atlanta, GA

Judge Allison Eid, Chair, Advisory Committee on the Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Wednesday, April 2, 2025, at approximately 9:00 a.m. EDT.

In addition to Judge Eid, the following members of the Advisory Committee on Appellate Rules were present in person: Linda Coberley, Professor Bert Huang, Judge Carl J. Nichols, and Lisa Wright. The Solicitor General was represented by Mark Freeman, Director of Appellate Staff, Civil Division, Department of Justice. Judge Richard C. Wesley, Judge Sidney Thomas, Justice Leondra Kruger, and George Hicks attended via Microsoft Teams.

Also present in person were: Judge John D. Bates, Chair, Committee on Rules of Practice and Procedure (Standing Committee); Judge Daniel Bress, Member, Advisory Committee on Bankruptcy Rules and Liaison to the Advisory Committee on Appellate Rules; Andrew Pincus, Member, Standing Committee, and Liaison to the Advisory Committee on Appellate Rules; Christopher Wolpert, Clerk of Court Representative; Carolyn Dubay, Secretary to the Standing Committee, Rules Committee Staff (RCS); Bridget M. Healy, Counsel, RCS; Kyle Brinker, Rules Law Clerk, RCS; Rakita Johnson, Administrative Assistant, RCS; Maria Leary, Federal Judicial Center; Professor Catherine T. Struve, Reporter, Standing Committee; and Professor Edward A. Hartnett, Reporter, Advisory Committee on Appellate Rules.

Professor Daniel R. Coquillette, Consultant, Standing Committee, Tim Reagan, Federal Judicial Center, and Shelly Cox, Management Analyst, RCS, attended via Microsoft Teams.

I. Introduction and Preliminary Matters

Judge Eid opened the meeting and welcomed everyone, including the members attending remotely. She noted that Lisa Wright's term was ending and thanked her for her work on the committee's projects. She also congratulated Scott Myers on his retirement and welcomed Carolyn Dubay. She thanked the Court of Appeals for the Eleventh Circuit for hosting the meeting.

No one had questions about the report from the Federal Judicial Center. (Agenda book page 29).

Mr. Brinker referred to the pending legislation chart and noted that there is no recent Congressional action regarding the Federal Rules of Appellate Procedure. (Agenda book page 26).

Ms. Healy called attention to the rules tracking chart and noted that the amendments to Rules 6 and 39 are in the hands of the Supreme Court. (Agenda book page 19). They are scheduled to take effect December 1 of this year.

Judge Eid noted the draft minutes of the meeting of the Standing Committee and the Report to the Judicial Conference. (Agenda book page 41). We will discuss the matters addressed at the Standing Committee later on the agenda.

II. Approval of the Minutes

The reporter noted a typographical correction to the minutes of the October 9, 2024, Advisory Committee meeting. (Agenda book page 83). There should be a period rather than a comma on the last time of page 90. With this correction, the minutes were approved without dissent.

III. Discussion of Joint Committee Matters

Professor Struve provided an update regarding electronic filing and service for self-represented parties. (Agenda book page 103). The working group has made progress but is not yet seeking publication. The hope is to request publication in the next round. The Bankruptcy Rules Committee has concerns; the Standing Committee is ok with other committees going forward without Bankruptcy. The agenda book sketches a possible amendment to FRAP 25.

The working group is pursuing two major ideas. The first is that since filings made by non-electronic filers are uploaded by the clerk's office, triggering a notice to electronic filers, there does not seem to be a need to require the non-electronic filer to make paper copies and mail them to other parties. The second involves making electronic filing more available to self-represented parties. Future drafts will use the term "unrepresented parties" because of the number of placed in the rules where that phrase is already used.

At the time the sketch was drafted, it was thought that there might not be any situations in the courts of appeals—unlike the district courts—where litigants would have to serve documents on the parties but not file them with the court. But others have since pointed out that there are some, so that aspect of the sketch will have to be changed.

The sketch of FRAP 25 largely follows that sketched for Civil Rule 5, switching the presumption to filing electronically, but allowing local rules that electronic filing so long as they have reasonable exceptions or alternatives. It is also permissible to

impose conditions, particularly limiting an unrepresented party's access to that party's case. Word choices follow the existing Rule. There are ongoing discussions with the style consultants seeking to balance concision with ease of use for unrepresented parties.

Revised FRAP 25 would begin with the idea that notice of electronic filing constitutes service, placing other means of service after that. Service is complete as of the date of the notice. There is no provision, as there is in the current rule, to situations where one learns that a document has not been received; that doesn't seem to be a problem with court-generated notices of electronic filing.

Two issues need to be addressed. The first, already mentioned, is to draft something like the provision for Civil Rule 5(b)(4) for situations where a document is served but not filed. The second is to deal with bankruptcy specific concerns.

It is likely that the Bankruptcy Rules Committee will not be on board. That raises the question of what to do on appeal in a bankruptcy case. The Civil Rules Committee is not inclined to have different service rules for bankruptcy appeals. The sketch for FRAP 25 similarly does not include different service and e-filing rules for bankruptcy appeals.

The Reporter voiced support for the idea described on page 172-73 of the agenda book, surmising that the committees would prefer to keep the practice in the courts of appeals uniform across types of appeal rather than exempting bankruptcy appeals. He invited any member of the Committee to tell us if we are wrong about that surmise. None did.

Mr. Wolpert expressed support for more detail in the rule, urging the inclusion of both sets of bracketed language. Specific provisions make it easier for the Clerk's Office to explain things to self-represented litigants.

Mr. Freeman asked about the structure of the proposed rule and the relationship among the various parts. What is paragraph (3) doing that isn't covered by the others? Professor Struve explained that (3) is addressed to types of cases, while (4) is address to particular litigants. Then what is the difference between (2) and (3)? The point of (2) is to overcome existing rules that bar unrepresented litigants from e-filing, requiring that they be permitted in at least some situations, while (3) is designed to allay concerns that there are cases where electronic filing would be inappropriate, such as prisoner cases. Professor Struve expressed openness to better ways to make these points clear. Mr. Freeman suggested the possibility of combing (2) and (3) in a single paragraph. Professor Struve stated that she would try to clarify, including the interaction with local rules.

Mr. Wolpert cautioned against requiring that conditions be in a local rule rather than an order. Mr. Freeman yielded to the view of the Clerks. Professor Struve see value in (3), allowing the issuance of an order with conditions.

Professor Struve then turned to privacy issues. (Agenda book page 175). FRAP 25 adopts what applied below; currently this allows for the last 4 digits of a social security number to included. Senator Wyden has suggested the redaction of the complete number. Civil, Criminal, and Appellate seem on board, but Bankruptcy needs a truncated number in some situations. Bankruptcy has done a lot to address the concern, including a published rule that would call for social security numbers on fewer occasions. In addition, there are suggestions to better protect the privacy of minors. There is an interesting twist: how to deal with bankruptcy appeals? There is also a question about whether the same protection is needed for taxpayer identification numbers, but there may be less of a security problem in that area. Criminal is taking the lead regarding pseudonyms for minors, which would also be relevant in some civil habeas actions.

The Reporter pointed to his memo. (Agenda book page 184). He had drafted a possible amendment to FRAP 25 in the expectation that other committees would be proposing amendments to be published this summer. Now it seems that isn't going to happen. The Committee might decide that there is no need to do anything to FRAP 25, on the theory that whatever is done with other rule sets will flow through to the Appellate Rules. Alternatively, it might form a subcommittee to look into the possibility of having a rule along the lines sketched in the agenda book: barring any part of a social security number in an appellate filing by a party not under seal. Most aggressively, it could seek publication this summer, on the theory that, whatever the need for social security numbers in other circumstances, there is no need for them in a public appellate filing by the parties, and getting out ahead of other committees could generate useful public response that those committees could use.

A couple of committee members initially expressed support for the more aggressive approach, but after Judge Bates stated that the Standing Committee would prefer to get proposals from all of the advisory committees at the same time, the Committee decided to wait. But no one saw any need for a subcommittee.

IV. Discussion of Matters Published for Public Comment

A. Amicus Briefs—Rule 29 (21-AP-C; 21-AP-G; 21-AP-H; 22-AP-A; 23-AP-B; 23-AP-I; 23-AP-K)

The Reporter presented the report of the amicus subcommittee. (Agenda book page 189). Proposed amendments to Rule 29 were published for public comment. (Agenda book page 237). The Advisory Committee received hundreds of written comments and about two dozen witnesses testified at a hearing.

There are two major areas that led to comments. First, published FRAP 29(b)(4) would require some limited disclosure regarding the financial relationship between a party and an amicus. Second, published FRAP 29(a)(3) would require nongovernmental amici to move for leave to file.

Taking the latter first: Based on the public comment, there is no support in the bar for a motion requirement. The major reason for this proposal was to deal with recusal issues. Accordingly, the subcommittee offers two alternatives. One alternative is to allow amicus briefs to be filed freely, with no requirement either of a motion or party consent but make clear that a court of appeals may assign matters without regard to possible recusal based on amicus briefs and that a judge who might be recused because of an amicus brief could choose to recuse or to strike the brief. The other alternative is to leave this part of the rule as-is, so that party consent is sufficient at the initial consideration stage of a case, but that a motion is required for nongovernmental amici at the rehearing stage.

The Reporter invited Judge Thomas, whose concerns about recusal led to the proposed motion requirement to express his views. Judge Thomas said that he preferred to leave the rule as-is. The major problem is with petitions for rehearing. Back when the national rule was changed, the Ninth Circuit left in place a local rule permitting amicus filings on consent at the rehearing stage. That wasn't a problem back then, but it has become a problem in recent years. Smetimes six judges are recused because of a consent filing. The Ninth Circuit is inclined to follow the national rule and require a motion at the rehearing stage. The Supreme Court model would harm us significantly. Mr. Wolpert added that at least half of the circuit clerks were concerned about the volume of motions to process if motions were required in all cases. The proposal of the California Appellate Lawyers wouldn't work. With the large number of panel permutations, automated recusal is important.

A different judge member agreed with Judge Thomas. If a decision to recuse or strike is made near the end, by that time the party briefs will have already responded to the amicus brief. Striking the brief at that point is too late; the amicus brief had infected the party briefs on the merits.

The Reporter sought to clarify if there was consensus to leave this aspect of the rule as-is. In response to the possibility of adopting the Supreme Court's approach, a liaison member noted that there are speed bumps in the Supreme Court that we don't have. The Reporter added that the Supreme Court has taken the position that an amicus brief does not create recusals there, but that is not the practice in the courts of appeals and there is reason to question whether a FRAP amendment could so provide in the courts of appeals. A different judge member said leave it alone.

In response to a question from Judge Bates, the Reporter stated his view that he did not think that republication would be necessary if the Committee chose to adopt the Supreme Court's approach, noting that the theme of many comments was

along the lines of "don't change this, but if any change is made, it should be to adopt the Supreme Court's approach." On the other hand, there would certainly be no need for republication if the Committee simply decided not to make the proposed change and leave things as-is.

Mr. Freeman suggested the possibility of adopting the Supreme Court's approach at the panel stage. He rarely sees objections there, and he is not sure what it is doing at the panel stage. Judge Thomas responded that it filters out frivolous amicus briefs, briefs that are more like letters to the editor. Pro se amici don't get consent. It serves as a useful filter to keep all sorts of things out of the public record that do not belong there.

An academic member noted that the comments reflected satisfaction with the culture of consent that seemed to be working.

A judge member moved to leave well enough alone in this area. A different judge member clarified that this included no republication. The proposal was adopted unanimously.

The Committee took a break for approximately twenty minutes and resumed at approximately 10:50.

With that decision regarding the motion requirement, the Committee focused its attention on the alternative contained in the agenda book beginning at page 199. The Reporter noted that there were two areas of concern.

First, some commenters were concerned that the proposed rule's description of the purpose of an amicus brief was too restrictive. (Agenda book page 199, line 7.) In particular, most things that an amicus might want to say would have been "mentioned" by a party, and a rule against redundancy among amicus briefs would be difficult to apply: there is little time between the filing of a party's brief and the filing of an amicus brief, and an amicus might not even know who else is filing.

Many of these concerns were tied to the motion requirement. The decision to continue to allow filing on consent at the initial hearing stage takes care of most of these concerns. But the subcommittee took the point that "mentioned" can be too broad and recognized the difficulty in some cases of checking for redundancy among amicus briefs. It therefore moved the statement regarding redundancy among amicus briefs to the Committee Note and rephrased it as something that is helpful when feasible. (Agenda book page 208, line 227). And it revised the statement of purpose to more closely follow Supreme Court Rule 37.1.

Second, many commentators were concerned about the requirement in proposed FRAP 29(b)(4) for an amicus to disclose whether a party is a major contributor—that is, one who contributes 25% or more of the annual revenue of an

amicus. While there was considerable opposition to this proposal, there was also some significant support. Some argued that the 25% threshold was too high, and that a 10% threshold would be more appropriate.

It is important to be clear about what this proposal would and would not require. It would not require the disclosure of all contributors to an amicus. It would not require the disclosure of all major contributors to an amicus. It would not require the disclosure of all contributions by parties to an amicus. It would require the disclosure only of major contributions by parties to an amicus. The Committee previously settled on the 25% level as sufficiently high that the party would be in a position to influence the amicus. And there is reason to think that an amicus with that level of funding from a party would be biased toward that party. As Professor Allision Orr Larsen put it, "As any new researcher is taught and any cross-examiner knows well, a source's motivation is intrinsically tied to its credibility." (Agenda book page 190).

A majority of the subcommittee recommends approval of this aspect of the proposed rule as published. A minority of the subcommittee believes that there is not a sufficient problem to warrant moving forward over such broad opposition and that it would be evaded anyway.

By way of comparison, FRAP 26.1, dealing with corporate disclosures, assumes that if a judge owns stock in a publicly held corporation that in turn owns 10% or more of stock in the party, the judge may have sufficient interest to require recusal. And the Corporate Transparency Act defines a beneficial owner as someone who owns or controls not less than 25% of the ownership interests of the entity."

As for earmarked contributions, current FRAP 29(a)(4)(E)(iii) requires the disclosure of all earmarked contributions by anyone other than the amicus, counsel to the amicus, and a member of the amicus. A prior member of the Committee referred to this as the sock-puppet rule, dealing with situations where someone is speaking through an amicus. The proposed amendment would make two changes: First, it would create a de minimis exception for earmarked contributions of less than $100. Second it would retain the member exception, but not apply that member exception unless the person had been a member for the prior 12 months.

The subcommittee is unanimous in recommending final approval of this amendment, with one slight tweak. In order to deal with the possibility that a long-time member has lets its membership lapse, the member exception is rephrased to apply to those who first became a member more than 12 months ago."

A lawyer member stated that she was the minority on the subcommittee. She noted that there will be proposals that should be adopted despite widespread opposition. For example, if there was a real need for judges to require a motion for amicus briefs, that might be appropriate to require despite opposition from lawyers.

But here, there is a high level of opposition, but no significant problem to be solved. Judges will assume, for example, that a trade association will support a party engaged in that trade. Sometimes an amicus filing by a trade association comes as a surprise, but most of the time it is solicited by a party. It is unwise to try to solve something that we don't know is a problem in the face of this level of opposition.

A liaison member stated that he agrees. Many of the commenters disagree about many things but agreed in their opposition to this proposal. The burden is significant and may deter people from participating. The premises underlying the proposal overstates the dangers. The courts of appeals don't get that many amicus briefs. The First Amendment concerns are sincere and worthy of caution. The proposal reflects a more cynical or jaundiced view of the process than is accurate.

The Reporter noted that a witness testified that anyone running a nonprofit would know off the top of their heads anyone who contributed 25% of the revenue; those are the people they go to when they need money.

Judge Bates asked if the commenters were concerned about the 25% percent threshold. The Reporter stated that he asked witnesses whether their objection was that the percentage was too low or whether their objection to disclosure of the financial relationship between a party and an amicus was categorical. He did not think that any witness had a satisfying answer to that question. It appears that they are concerned that this is the camel's nose under the tent and fear any such disclosures now will lead to more extensive disclosures later.

Mr. Freeman stated that the Department of Justice has lots of concerns. An organization might know that someone is a significant contributor, but is it 23% or 26%? Lawyers need to certify and there can be complexity here. That uncertainty can deter amicus filings. The DOJ does not engage in amicus wrangling, but people do. The Reporter noted that a witness stated that if a lot of organizations join an amicus brief it could be burdensome to get all the necessary information for all of them.

A lawyer member added that amicus wrangling is not necessarily a bad thing. It can prevent duplication. A liaison member asked what's the problem to be addressed. To the extent the concern is that an entity was created for the purpose of an amicus filing, other parts of the proposed rule deal with that. While amici who get lots of funding from a party surely exist, the liaison member doesn't know of any. There is a discrepancy between the 50% threshold in (b)(3) and the 25% threshold in (b)(4). Revenue is harder to determine than legal control; there may be multiple streams of income, and the internal accounting may or may not aggregate those separate streams. Perhaps the threshold in (b)(4) should be raised to 50%.

A judge member stated that no judge in this process has ever said that he or she was hoodwinked by not knowing the information that this provision would require to be disclosed. The Reporter noted that one judge previously on the

Committee had said that if a party made this level of contribution to an amicus, he would want to know about it. The judge agreed but noted that there is a difference between wanting to know and being hoodwinked by not knowing.

A lawyer member noted that she was not terribly impressed by arguments against disclosure by people who would have to make disclosures. It is not surprising that they would oppose disclosure. The point of getting this information is to benefit the public and the judges. It's not about whether the judges have been actually influenced; it is about public trust, that is hurt when such ties are later revealed.

A different lawyer member agreed with prior members that this is a solution in search of a problem. The issue came to the Committee's attention because of elected officials. An academic member noted that amicus practice has evolved enough in the last ten to twenty years and that responding to problems is not the only reason for a rule.

Judge Bates asked if 50% is appropriate for (b)(3), why not for (b)(4)? Mr. Freeman responded that control will always be probative, but contributing a majority of the money in a given year might not be. Attorneys would have to certify; the costs could be high.

The Reporter suggested that the Committee might want to entertain one of three motions; to approve (b)(4) with the 25% threshold, change the threshold to 50%, or eliminate (b)(4). Mr. Freeman moved to strike (b)(4). The motion carried by a vote of five to four, with the chair declining to vote.

The Reporter then directed attention to subdivision (e) on page 205 of the agenda book. The subcommittee recommends a slight revision of the member exception to deal with the situation of a lapsed member. As rephrased, it would continue the member exception but limit that exception to those members who first became a member more than 12 months earlier. The corresponding passage of the Committee Note is on page 211 of the agenda book. It was suggested that the phrase should be "at least" 12 months instead of "more than" 12 months.

A liaison member noted that there was a lot of confusion in the comments about this provision and people misread it. A different liaison member asked what the problem is that needs to be addressed. The Reporter stated that there are two changes in the proposed amendment. One is to limit the member exception; otherwise, the requirement that earmarked contributions be disclosed can be evaded by becoming a member upon making the earmarked contribution. Under the existing rule, if a nonmember wants to fund an amicus brief by an organization and do so anonymously, he can do so as long as he becomes a member. Under the proposed rule, he would be told that if he wants to make a contribution earmarked for the brief that would have to be disclosed, but if he wanted to make a contribution to the general funds, that would not have to be disclosed. The second is to allow for de minimis earmarked

contributions by setting a disclosure threshold of more than a $100. It seems that many of the critics of the proposed rule did not know that the existing rule requires the disclosure of earmarked contributions of any amount (other than by the amicus, its counsel, or its members).

A judge member stated that this is a modest tweak to an existing rule. It reduces the burden on crowd funding an amicus brief, and it does not allow evasion of an existing requirement. It's a good change.

A lawyer member agreed but thought that the phrasing makes the rule harder to understand. The Reporter noted that the current phrasing emerged from style. And academic member suggested that subdivision (e) be drafted in a more reticulated way. Rather than do so from the floor, the Reporter agreed to come up with a suggested revision over lunch.

A liaison member asked whether the word "helpful" was needed in line 25 on page 200. He also raised the issue of what has to be in the brief, suggesting that the Committee Note state how the disclosure requirements can be satisfied if there is nothing to be disclosed. The Reporter stated that a prior committee member had made a point of wanting the rule to require the brief to include a statement tracking the disclosure requirement. A lawyer member observed that, as phrased in the agenda book (page 204-05), subdivision (b) requires a brief to "disclose whether"—thus requiring an affirmative statement—while (c), (d), and (e), are phrase so that nothing need be said unless they apply.

Professor Struve, invoking the ghost of Appellate Rules Committee past, stated that this would be a change from the existing rule and that the Committee had previously made a point of requiring a brief to "state whether." The reason is the lawyer must make an affirmative statement and is not simply overlooking the requirement. An academic member suggested changing subdivision (e) to make this clear.

The Committee took a lunch break from approximately 12:05 until approximately 1:05.

Upon resuming, the Reporter presented what he had drafted over lunch in accordance with the Committee's guidance.

In subdivision (a)(3)(B), the provision was simplified to read, "the reason the brief serves the purpose set forth in Rule 29(a)(2)."

The Committee Note to subdivision (e) on page 211 of the agenda book was revised to refer to "those who first became members of the amicus at least 12 months earlier."

Subdivision (e), dealing with earmarked contributions, was rephrased to read as follows:

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

With subdivision (e), like subdivision (b) phrased as "disclose whether," discussion turned to the length of such disclosures and excluding them from the word count of the brief. One suggestion was that the disclosure itself could be short, the response was that the practice is to use the full language. The key is not to make the disclosure short; it is to not have it count against the word limit. There is some uncertainty whether the existing disclosure counts or not.

Working with the proposed text projected on a screen, the Committee worked to revise the text to make clear that the disclosures would not be counted. It decided to refer to "the disclosure statement" required by the Rule rather than the "disclosures" required by the rule. This was designed to trigger Rule 32(f)'s exclusion of "disclosure statement" from the length limit.

Judge Bates asked a different question, whether "intended to pay" was necessary. Professor Struve noted that the phrase is in the current rule, and some readers might view the change as substantive.

The Committee then discussed the proper order of the required contents of an amicus brief under FRAP 29(a)(4). As published, the amicus disclosure requirements were listed after the description of the amicus. But this location in a brief is after the pages included in the length count begin. To facilitate word counts, proposed FRAP 29(a)(4)(F) was moved earlier in the text to be FRAP 29(a)(4)(B), immediately after any corporate disclosure statement required by FRAP 29(a)(4)(A).

These changes were adopted by consensus, except for the last one, which was adopted by a vote of seven to one.

The Committee then voted unanimously to give its final approval to the proposed amendments to FRAP 29, as amended at this meeting, along with conforming amendments to FRAP 32(g) and the appendix of length limits.

B. Form 4 (19-AP-C; 20-AP-D; 21-AP-B)

Lisa Wright presented the report of the Form 4 subcommittee. (Agenda book page 812). The review Form 4 that the subcommittee recommends for final approval is greatly simplified. It is designed to provide courts with the information they need while omitting what is not needed. The witnesses and written comments were generally supportive. Sai pressed for more fundamental changes, but the subcommittee thought some of them were addressed to the IFP statute itself.

Professor Judith Resnick and students at Yale Law School viewed it as a great leap forward. They suggested some changes, some of which have been adopted. Plus, there have been tweaks by the style consultants. The National Association of Criminal Defense Lawyers suggested some changes to deal with CJA counsel, but the subcommittee concluded that if a party has appointed counsel, that appointed counsel can deal with it; it is better to keep this form simpler for those without counsel.

After correcting one typo on page 816 (an extra "are" in the first paragraph after the table), the Committee unanimously gave its final approval to Form 4.

V. Discussion of Matters Before Subcommittees

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

The Reporter presented the report of the intervention on appeal subcommittee. (Agenda book page 829). The Federal Judicial Center is conducting extensive research into motions to intervene in the courts of appeals. The subcommittee decided to await the results of that research before further proceeding. Best practices call for not providing an interim report at this stage of the research. More information is expected at the fall meeting.

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

The Reporter presented the report of the reopening time to appeal subcommittee. (Agenda book page 831). At the last meeting, a subcommittee was appointed to consider a suggestion from Chief Judge Sutton regarding Rule 4, echoed by Judge Gregory, that the Committee look into reopening the time to appeal under Rule 4(a)(6).

Since then, the Supreme Court granted certification in *Parrish*, the case in which Judge Gregory voiced his suggestion. In opposing certification, the Solicitor General noted the appointment of this subcommittee. Particularly because the Supreme Court granted certification, fully aware that this Committee was looking into the question, the subcommittee decided to await the decision in *Parrish* before proceeding further.

C. Administrative Stays (24-AP-L)

Mr. Freeman presented the report of the administrative stays subcommittee. Under FRAP 8, a court of appeals can stay a district court order pending appeal. First, one asks the district court, then the court of appeals. This process is fairly well understood and determines the status of a district court order while the appeal plays out, which can be a year or more.

An administrative stay addresses what happens denying the briefing on a motion to stay. That takes some time, sometimes two weeks or more just to brief the stay motion. What is the status of the district court's injunction during that period? The issue does not arise often, but it does with some frequency in his cases, especially when there is a change in administration. The subcommittee, following common usage, uses the "stay," but the issue also includes injunctions pending appeal and vacatur of prior orders.

Will Havemann of Hogan Lovells, and previously in Mr. Freeman's office, suggested that rulemaking address administrative stays. In the case that prompted the suggestion, the Court of Appeals for the Fifth Circuit granted an administrative stay and referred the motion for a stay pending appeal to the merits panel. That administrative stay remained in effect without a finding of likelihood of success on the merits, or irreparable harm, etc. The Supreme Court declined to rule because the Court of Appeals had not yet rule on the stay application. Justice Barret and Justice Kavanaugh said that an administrative stay should last no longer than necessary to make an intelligent decision on the motion for a stay pending appeal.

The subcommittee does not suggest codifying the standards for granting an administrative stay, but it does suggest making clear what an administrative stay is for and its duration. The proposed text with Committee Note begins on page 839 of the agenda book. How it would fit with the rest of FRAP 8 is shown on page 839. The proposed rule describes an administrative order as one temporarily providing the relief mentioned in FRAP 8(a)(1), calls for it to last no longer than necessary for the court to make an informed decision, and provides that can last no longer than 14 days. It largely tracks Will Havemann's proposal.

A big question is whether 14 days is right. It is sort of modeled on Civil Rule 65, which allows for a TRO to be in place for 14 days, subject to 14-day extension. The subcommittee considered 7 plus 7, and 14 plus 14; it could use some feedback on this.

At the time of the subcommittee meeting, 14 days seemed perfectly fair; now it seems like a long time. The expectation is that a time limit would be treated the way TROs are now: if a TRO runs over, it is treated as an appealable preliminary injunction; if an administrative stay runs over, it would be treated as a grant of a stay pending appeal, enabling SCOTUS review. The idea is to avoid the situation where one can't get a ruling from the Supreme Court because there is no ruling from the court of appeals.

Judge Bates wondered whether 14 days is a little long, compared with the rigid standards applicable to TROs. He also asked about empowering a single circuit judge to grant relief.

Mr. Freeman responded that the power of a single judge is in the existing rule, just as a single justice of the Supreme Court can grant a stay. In his twenty years, he has never seen it and doesn't feel strongly. But if there is an instantaneous need, it could be useful. Or the matter can just be left to internal procedure of the courts of appeals.

Judge Bates asked about the opinion of Justice Sotomayor and Justice Jackson, which emphasized maintaining the status quo. Mr. Freeman explained that their focus on the status quo in that case might have been an artifact of what the United States was saying in that case. There are all kinds of fights about what counts as the status quo. If the district court grants a preliminary injunction, and the court of appeals grants a stay, what is the status quo? It is sometimes said that an injunction requires a higher standard, but this doesn't hold true across all cases.

Judge Bates asked about requiring reasoning. Mr. Freeman responded that most courts do not issue written opinions, at least beyond 1 sentence. Requiring reasoning pushes an administrative stay to look more like a stay pending appeal.

Judge Bates asked about whether there is a need to do to the district court for an administrative stay, as there is for a stay pending appeal; what about jurisdiction? Mr. Freeman responded that he didn't think there was any effect on jurisdiction; Griggs doesn't apply to stay motions. The proposed amendment would not affect at all the obligation in FRAP 8(a)(1) to seek relief in the district court first.

A judge member said that 14 days is not realistic as an absolute cap in all cases and all circuits. Sometimes a court of appeals has to wait for the record, or the briefing; sometimes it takes 6 months to get the record. Leave it to each court whether to allow one judge to grant a stay or whether to require three. A 14-day limit causes more trouble than it is worth. It would be okay to require that the order itself state a timeline. Sometimes the parties don't care if the stay is in effect 1 month or 4 months.

A liaison member stated that not having a time limit defeats the purpose of the rule. It's okay to allow an administrative stay without reasoning. And if the

parties agree to a longer stay, that's fine. We could simply add "unless parties agree otherwise." Or we set a timeframe of 7 or 14 days and allow for 7 or 14 more for good cause.

The judge responded that there is often no urgency. Less than 1% of cases go to the Supreme Court; we should manage our docket.

Mr. Freeman responded that this is very helpful. If the record is not available, that's on the appellant. If the appellant can't put on its case for a stay, then deny the stay. It doesn't matter in a lot of cases but matters a lot in some cases. Not all courts are as good about this as in the Ninth Circuit.

Judge Bates suggested that without a time limit, we play into the same problem that the Supreme Court was troubled about. The other judge responded that the order can set its own time limit; we try not be cute about it.

In response to a point raised by an academic member, Mr. Freeman suggested that the rule, like Civil Rule 65, shouldn't say that an administrative stay that lasts too long is a grant of a stay pending appeal, but rather leave it to the higher court to find appellate jurisdiction at that point.

A judge asked, if the parties don't object, what's the problem? Mr. Freeman agreed in that situation, but there are others where the parties are in a bind creating a classic rules problem: A party is aggrieved but can't do anything. The TRO parallel enables the party to seek further review.

A liaison member suggested that ordinary cases be decoupled from high profile cases. The Supreme Court has put everyone on notice. Is a rule needed, or just await developments.

Judge Bates asked if it was contemplated that an administrative order would issue only after the filing of a notice of appeal? Generally, yes, although an administrative order pending mandamus is possible. How about without a request from a party? Yes, courts can do it, not trying to stop them. But there has to be some stay motion in order for there to be an administrative stay granted. Mr. Wolpert added that the Court of Appeals for the Tenth Circuit uses administrative stays sparingly and never without a stay motion.

A judge member raised the example of a criminal defendant granted immediate release by the district court. The government seeks a stay pending appeal, but there is no transcript available. It seeks an administrative stay pending the receipt of the transcript. It will probably be more than 14 days to get the transcript. At least there must be a good cause ability to extend past 14 days. Mr. Freeman again noted that this is helpful and thanked the judge. We need to think about immigration cases and

criminal cases. An academic member suggested that the time period begin upon receipt of the record.

Professor Struve suggested that the impact of the proposed rule in criminal cases should be explored, including the interaction with Criminal Rule 38. A judge member raised agency cases. Mr. Freeman responded that there is a separate rule, FRAP 18, for agency cases, and the issue doesn't seem to come there (although maybe in immigration). The judge stated that there are lots of requests for a stay of removal. Judge Bates noted that if the proposed rule is ultimately in place, the implication might be that it couldn't be done in agency cases. Mr. Freeman responded that no such negative inference was intended.

It became clear that the Committee was not prepared to recommend publication at this stage. The subcommittee will continue its work.

D. Rule 15 (24-AP-G)

Professor Huang presented the report of the Rule 15 subcommittee. (Agenda book page 841). The subcommittee is considering a suggestion to fix a potential trap for the unwary in Rule 15. The "incurably premature" doctrine holds that if a motion to reconsider an agency decision makes that decision unreviewable in the court of appeals, then the original petition to review that agency decision effectively disappears and a new one is necessary.

The basic idea of the suggestion is to align Rule 15 with Rule 4. At the last meeting, two tasks were left to be done. First, Judge Eid was going to check in with the D.C. Circuit to see if the judges remained opposed to the idea. Second, the subcommittee would continue drafting.

Judge Eid stated that she had raised this issue at the Standing Committee meeting and that Judge Millett said that she would check with her colleagues. Judge Millett reports that there is no large opposition at this point. Technological innovations have alleviated the concerns that were raised when the issue was raised in the past. Judges may wind up with some concerns about particulars of the proposal.

Professor Huang explained that the subcommittee's proposal builds on the prior proposal from 2000, plus the feedback from the D.C. Circuit judges back then. It is designed to reflect the party-specific nature of administrative review, in contract to the usually case-specific nature of civil appeals. It aligns with FRAP 4, and clarifies that, as with civil appeals, if a party wants to challenge the result of agency reconsideration, a new or amended petition is required. The subcommittee chose not to attempt to align with the multicircuit review statute.

In accordance with a suggestion from Professor Struve, the phrase "to review or seek enforcement" on page 843, line 9, should be changed to "to seek review or enforcement".

Professor Struve added that ellipses are needed at the end to avoid accidental deletion of the rest of the rule. The Reporter agreed and added that existing (d) and (e) would be re-lettered.

The question arose whether the phrase "or application to enforce" was need in the last sentence. The Reporter couldn't think of a situation where it would be needed, but Judge Bates noted that it was safer at this stage to keep it in.

The Reporter asked if it was sufficiently clear that the use of the word "such" in line 10 on page 843 refers to a petition that "renders that order nonreviewable as to that party." Committee members responded yes, with one noting that it needs to be read twice, but then it is clear.

The Committee decided to move the discussion of what the amendment is designed to do from the third paragraph to the first paragraph of the Committee Note. means that the is not just held in the court of appeals awaiting the agency's decision on the motion to reconsider. Instead, the petition for review is dismissed, and a new petition for review must be filed after the agency decides the motion to reconsider.

Mr. Freeman suggested that the word "timely" be added to line 5, so that only a timely petition would be entitled to the benefit of the amended rule. Several members of the Committee were troubled by the idea of describing a petition as both premature (too early) and untimely (too late) particularly since the proposed rule operates in a party-specific way. Mr. Freeman's motion to require that a petition be otherwise timely failed for want of a second.

The Committee unanimously decided to ask the Standing Committee to publish the proposed amendment (as amended at this meeting) for public comment.

VI. Discussion of Recent Suggestion

The Reporter presented a recent suggestion from Jack Metzler regarding the calculation of time. (Agenda book page 849). He suggests that FRAP 26(a)(1)(B) be amended to not count weekends. He is concerned about gamesmanship: counsel can deliberately file a motion on Friday so that the ten-day period for responses covers two weekends, reducing the number of workdays available.

A central feature of the massive time computation project was to count days as days. The Reporter would be loath to undo that. The time project usually chose multiples of 7, but for motions it went from 8 days to 10 days. If the Committee does

anything here, it could consider shortening the time to 7 days or lengthening the time to 14 days. Or it could leave well enough alone.

A motion to remove the item from the agenda was approved unanimously.

VII. Review of Impact and Effectiveness of Recent Rule Changes

The Reporter directed the Committee's attention to a table of recent amendments to the Appellate Rules. (Agenda book page 855). This matter is placed on the agenda to provide an opportunity to discuss whether anybody has noticed things that have gone well or gone poorly with our amendments. No one raised any concerns.

VIII. New Business

No member of the Committee raised new business.

IX. Adjournment

Judge Bates announced that this was his last meeting of the Appellate Rules Committee because his term as chair of the Standing Committee is expiring. Everyone congratulated and thanked Judge Bates for his leadership.

Judge Eid announced that the next meeting will be held on October 15, 2025, in Washington, D.C.

The Committee adjourned at approximately 4:30 p.m.

TAB 2C

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

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Rebecca B. Connelly, Chair
Advisory Committee on Bankruptcy Rules

RE: Report of the Advisory Committee on Bankruptcy Rules

DATE: May 12, 2025

I. Introduction

The Advisory Committee on Bankruptcy Rules met in Atlanta on April 3, 2025. The draft minutes of that meeting are attached.

At the meeting, the Advisory Committee voted to seek final approval following publication of amendments to Bankruptcy Rules 1007 (Lists, Schedules, Statements, and Other Documents; Time to File), 3018 (Chapter 9 or 11—Accepting or Rejecting a Plan), 5009 (Closing a Chapter 7, 12, 13, or 15 Case; Declaring Liens Satisfied), 9006 (Computing and Extending Time; Motions), 9014 (Contested Matters), 9017 (Evidence), new Rule 7043 (Taking Testimony), and amendments to Official Form 410S1 (Notice of Mortgage Payment Change). In addition, the Advisory

Committee voted to seek final approval without publication of corrective amendments to Rules 2007.1 (Appointing a Trustee or Examiner in a Chapter 11 Case) and 3001 (Proof of Claim).

The Advisory Committee also voted to seek publication for comment of proposed amendments to Official Form 106C (Schedule C: The Property You Claim as Exempt).

Part II of this report presents those action items. They are organized as follows:

A. Items for Final Approval

1. Rules and Form published for comment in August 2024:

- Rule 3018;
- Rules 9014, 9017, and new Rule 7043;
- Rules 1007(c), 5009, and 9006;
- Official Form 410S1.

2. Technical amendments to Rules not published:

- Rule 2007.1;
- Rule 3001.

B. Item for Publication

- Official Form 106C.

Part III of this report presents two information items. The first is a report regarding the withdrawal of a proposed amendment to Rule 1007(h). The second discusses two suggestions to allow masters to be used in bankruptcy cases and proceedings.

II. Action Items

A. Items for Final Approval

1. The Advisory Committee recommends that the following rule and form amendments and new rule that were published for public comment in 2024 and are discussed below be given final approval. Bankruptcy Appendix A includes the rules and forms that are in this group, along with summaries of the comments that were submitted.

Action Item 1. Rule 3018 (Chapter 9 or 11—Accepting or Rejecting a Plan). The proposed amendments to subdivision (c) would authorize a court in a chapter 9 or 11 case to treat as an acceptance of a plan a statement on the record by a creditor or its attorney or authorized agent. Conforming amendments would also be made to subdivision (a).

Three sets of comments were submitted regarding the proposed amendments. One was based on an erroneous reading of the proposed amendments. It addressed the change or withdrawal of *ob*jections to plans, not *re*jections (i.e. votes).

The second comment was submitted by the National Conference of Bankruptcy Judges. It proposed a wording change to subdivision (c)(1)(B)(i) that would spell out in greater detail how a stipulation might be made. The Advisory Committee, however, concluded that the more succinct wording is preferable. A written stipulation that is filed becomes part of the record, and the amendment explicitly covers statements that are a "part of the record."

The final comment was submitted by Bankruptcy Judge Robert Kressel (ret.). He pointed out that subdivision (c)(1)(B) as published did not apply to individual creditors. That view was apparently based on the provision's reference only to statements by attorneys and authorized agents of creditors. In contrast to subdivision (c)(1)(A), it thus seemed to exclude statements by individual creditors—real people who can represent themselves. The Advisory Committee believed this exclusion was unintended and voted to reword subdivision (c)(1)(B)(ii) as follows: "made by ~~an attorney for or an authorized agent of~~ the creditor or equity security holder—or its attorney or authorized agent." It also revised the second sentence of the Committee Note accordingly.

After the deadline for the submission of comments, Judge Connelly received a letter from the acting Deputy Attorney General regarding the proposed amendments. It was treated as a suggestion and posted on the AO website. The letter explained that the Department of Justice had no objection to the text of the proposed amendments and it endorsed the statement in the committee note that "[n]othing in the rule is intended to create an obligation to accept or reject a plan." The letter was sent to underscore the limits of the proposed amendment. The suggestion that gave rise to the amendment—from the National Bankruptcy Conference—was motivated by a concern that government entities often do not vote on plans, even if they do not object to them. The Department wanted it understood that the increased flexibility in voting methods provided by the amendment, which the Department supports, cannot add a substantive requirement that creditors must vote on a plan or that courts could compel the United States or federal agencies to do so.

With the wording changes made in response to Judge Kressel's comment, the Advisory Committee give its approval to the proposed amendments to Rule 3018(a) and (c).

Action Item 2. Rules 9014 (Contested Matters), 9017 (Evidence), and new Rule 7043 (Taking Testimony). The proposed amendments and new rule would facilitate video conference hearings for contested matters in bankruptcy cases. Currently Rule 9017 makes applicable to

bankruptcy cases Fed. R. Civ. P. 43 (Taking Testimony). Fed. R. Civ. P. 43(a) allows a court to permit testimony in open court by contemporaneous transmission from a different location "for good cause in compelling circumstances." The proposal would (1) amend Rule 9017 to eliminate the applicability of Fed. R. Civ. P. 43 to bankruptcy cases generally; (2) create a new Rule 7043 (Taking Testimony) that would make Fed. R. Civ. P. 43 applicable in adversary proceedings; and (3) amend Rule 9014 to allow a court to "permit testimony in open court by contemporaneous transmission from a different location" for "cause and with appropriate safeguards."

The Advisory Committee received four comments on the proposals and in response to one of those comments approved minor changes to clarify that any testimony in a contested matter would be governed by the rule, not merely testimony in response to motions. First, the Advisory Committee approved a modification of the title of Rule 9014(d)(2), changing it from "Evidence on a Motion" to "Evidence." Second, the Advisory Committee modified the text of Rule 9014(d)(2) to change the phrase "When a motion in a contested matter" to "When resolution of a contested matter" and changed the phrase "the court may hear the motion" to "the court may hear the matter." (The latter change conforms the language in Rule 9014(d)(2) to the same language in Civil Rule 43(c)). Third, in the first sentence of the third paragraph of the Committee Note, the Advisory Committee deleted the phrase "is a motion procedure that."

In addition, in response to comments submitted outside of the publication process by a former Advisory Committee member, the Advisory Committee approved inserting the word "generally" between the words "do not" and "require" in the third paragraph of the Committee Note to reflect the fact that some contested matters might require the procedural formalities used for adversary proceedings.

The Advisory Committee does not believe these changes require republication as they merely clarify that any testimony in the contested matter – whether on a motion or not – is subject to the rule. This is in fact the way that Civil Rule 43(c) has been interpreted even though it refers to a "motion," and therefore no change in substance is made by the modifications. The Advisory Committee considered whether to retain language that is parallel to Civil Rule 43(c) for the sake of uniformity, but decided that more specificity in the text was advisable.

The Advisory Committee approved the new Rule 7043 and the amended Rule 9017 as published and approved the amended Rule 9014 with the noted changes.

Action Item 3. Rules 1007(c) (Time to File), 5009 (Closing a Chapter 7, 12, 13, or 15 Case; Declaring Liens Satisfied), and 9006 (Computing and Extending Time; Motions). These amendments were proposed with the goal of reducing the number of individual debtors who go through bankruptcy but whose cases are closed without a discharge because they either failed to take the required course on personal financial management or merely failed to file the needed documentation of their completion of the course.

The proposed changes consist of the following:

1. *The deadlines in Rule 1007(c) for filing the certificate of course completion would be eliminated.* The Code only requires that the course be taken before a discharge can be issued, and members of the Advisory Committee were concerned that some debtors might be deprived of a discharge merely because they failed to file their certificates by the times specified in the rules. The proposed amendments would delete subdivision (c)(4), which sets out the deadlines for filing the certificate of course completion in chapter 7, 11, and 13 cases. References to the deadlines in Rule 9006(b) and (c) would also be deleted.

2. *Rule 5009(b) would provide for two reminder notices to be sent, rather than one.* This change would allow one notice to be sent early in the case—when the debtor would be more likely to be reachable and still represented by counsel—and another, if needed, toward the end of the case before eligibility for a discharge would be determined.

Two comments were submitted that specifically addressed these rules. One addressed Rule 9006 generally and did not relate to the proposed amendments, and the other was supportive of proposed amendments. The Advisory Committee approved them as published.

Action Item 4. Official Form 410S1 (Notice of Mortgage Payment Change). The amendments to the form were proposed to reflect the amendments to Rule 3002.1(b) regarding payment changes in home equity lines of credit ("HELOCs") that will take effect on December 1, 2025. Rule 3002.1(b)(2) will allow the holder of a HELOC to provide an annual notice of payment change (with a reconciliation amount), instead of notices throughout the year each time there is a change. The proposed amendments to the form will accommodate this option with a new Part 3.

No comments were submitted, and the Advisory Committee gave its approval to the proposed amendments to Form 410S1 as published.

2. The Advisory Committee recommends that the following corrective rule amendments be given final approval without publication. Bankruptcy Appendix A includes the rules that are in this group.

Action Item 5. Rule 2007.1(b)(3)(B) (Appointing a Trustee or Examiner in a Chapter 11 Case). The restyled version of Rule 2007.1(b)(3)(B) includes a sentence that reads: "The report must be accompanied by a verified statement by each candidate, setting forth the candidate's connections with any entity listed in (A)(i)-(vi)." However, Rule 2007.1(b)(3)(A) lists the entities in six bullet points, not as (i) – (vi). Therefore, a technical correction is needed.

The Advisory Committee approved an amendment that would modify the sentence in Rule 2007.1(b)(3)(B) to read "The report must be accompanied by a verified statement by each candidate, setting forth the candidate's connection with any entity listed in (A)." The only change is the deletion of the erroneous references to (i)-(vi).

Action Item 6. Rule 3001(c) (Required Supporting Information). The Advisory Committee received a suggestion from the National Consumer Law Center noting a potentially inadvertent substantive change in Bankruptcy Rule 3001(c) effected by its restyling.

The prior version of Rule 3001(c)(2)(D) allowed a court to impose sanctions "if the holder of a claim fails to provide any information required by this subdivision (c)." Unrestyled subdivision (c)(3) required that certain information be provided relating to claims based on an open-end or revolving consumer credit agreement. Because the information required by (c)(3) was "information required by this subdivision (c)," the sanctions provision in (c)(2)(D) was applicable to that provision of the rule.

The restyling of Rule 3001, however, redesignated former subdivision (c)(2)(D)—the sanction provision—as (c)(3) and limited the availability of sanctions to the failure "to provide information required by (1) or (2)." Former subdivision (c)(3) was redesignated as (c)(4), as a result of which the sanctions provision no longer applies to it. This was an inadvertent substantive change.

The Consumer Subcommittee recommended that the Advisory Committee approve a technical amendment to Rule 3001(c)(3) to correct this substantive change by replacing the current phrase "information required by (1) or (2)" with the words "information required by (c)."

A suggestion was made at the Advisory Committee meeting to have the sanctions provision follow all of the substantive provisions to which it applies. The Advisory Committee agreed with that suggested modification of the subcommittee's recommendation. It therefore approved amendments reversing the order of the provisions in (c)(3) and (c)(4) and modifying the new (c)(4) to read "information required by (c)." It also approved a conforming change to the cross-reference in subdivision (c)(1).

B. Item for Publication

The Advisory Committee recommends that the following form amendment be published for public comment in August 2025. Bankruptcy Appendix B includes the form in this group.

Action Item 7. Official Form 106C (Schedule C: The Property You Claim as Exempt). The Advisory Committee received a suggestion from a chapter 12 and chapter 13 trustee to amend Official Form 106C to include a total amount of assets being claimed exempt. Section 589b(d)(3) of title 28 requires the uniform final report submitted by trustees to total the "assets exempted." Without the amount totaled on the form, trustees must manually add up the amounts on each form to prepare the required final report.

Official Form 106C was revised in 2015 in response to the Supreme Court's decision in *Schwab v. Reilly*, 560 U.S. 770 (2010), which stated that a debtor could list as the exempt value of an asset on Schedule C "'full fair market value (FMV)' or '100% of FMV,'" rather than a specific

dollar amount. So now there are two options on the form under the column for "Amount of the exemption you claim": a specific dollar amount and "100% of fair market value, up to any applicable statutory limit." Because of that unspecified dollar option, no total amount of claimed exemptions is asked for.

The U.S. Trustee Program has promulgated a regulation pursuant to 28 U.S.C. 589b(d) regarding the completion of forms for the trustee's final report. *See* 28 C.F.R. 58.7. The regulation sets forth a list of items to be included in the trustee's distribution report, including "assets exempted."

The statute does not explain "assets exempted." But the U.S. Trustee Program addressed this issue in response to comments received to the proposed regulation. In the interest of setting a uniform standard that is reasonable and would not require the trustee to expend significant additional resources, the Executive Office for U.S. Trustees ("EOUST") defined "assets exempted" as the total value of assets listed as exempt on the debtor's Schedule C, unless revised pursuant to a court order. The instructions to the final reports reflect this definition and note that 28 U.S.C. § 589b(c) requires the rule to "strike the best achievable practical balance between (1) the reasonable needs of the public for information about the operational results of the Federal bankruptcy system, (2) economy, simplicity, and lack of undue burden on persons with a duty to file these reports, and (3) appropriate privacy concerns and safeguards."

Guided by this information, the Advisory Committee understood that assets claimed as exempt on Form 106C are treated as "assets exempted" for purposes of the trustee's final report, subject to any subsequent amendments or revisions pursuant to a court order. It also reasoned that, in light of the EOUST's "attempt[] to balance the reasonable needs of the public for information with the need not to unduly burden the standing trustees who must file the final reports," adding up and reporting just the specific dollar amounts claimed is acceptable. As a result, the Advisory Committee is proposing for publication an amendment to Form 106C to provide a total of the specific-dollar exemption amounts. It also approved for publication the addition of a space on the form for the total value of the debtor's interest in property for which exemptions are claimed.

III. Information Items

Information Item 1. Withdrawal of a proposed amendment to Rule 1007(h). Last August an amendment to Rule 1007(h) (Interests in Property Acquired or Arising After the Petition is Filed) was published for comment. This amendment would have explicitly allowed a court to require the debtor to file a supplemental schedule to list property or income that becomes property of the estate under § 1115, 1207, or 1306—that is, property that "the debtor acquires after commencement of the case but before the case is closed, dismissed, or converted" and "earnings from services performed by the debtor" during that period.

Seven comments were filed addressing this proposed change. All of them were negative. The commenters were the National Conference of Bankruptcy Judges, the National Association of

Consumer Bankruptcy Attorneys, the National Bankruptcy Conference, and 4 individuals. They expressed a number of reasons for opposing the amendment, including that the proposed amendment was unnecessary, it might be seen as endorsing a requirement not imposed by the Code and that is the subject of conflicting case law, it would give no guidance about what would have to be disclosed, and it would lead to greater disuniformity among districts.

The concerns raised by the commenters were similar to the reasons the Consumer Subcommittee initially opposed an amendment that would have required disclosure in all cases of § 1115, 1207, and 1306 property. The comments led the Advisory Committee to conclude that the middle ground proposal that was published did not escape these problems. Accordingly, the Advisory Committee voted to withdraw the proposed amendment and not pursue it further.

Information Item 2. Suggestions to allow masters to be used in bankruptcy cases and proceedings. Two suggestions to amend Rule 9031 (Using Masters Not Authorized) have been submitted to the Advisory Committee, one by Chief Bankruptcy Judge Michael B. Kaplan of the District of New Jersey and the other by the American Bar Association. These suggestions propose amendments that would allow masters to be used in bankruptcy cases and proceedings, a matter that the Advisory Committee has considered several times in the past and declined to propose. At its spring 2024 meeting, the Advisory Committee discussed the suggestions and agreed that they should be considered further.

The consensus at that meeting was that the Business Subcommittee should gather more information before making a recommendation. Specifically, it was agreed that a survey of bankruptcy judges should be undertaken to learn whether the judges thought the rules should allow masters to be used in bankruptcy cases and in what circumstances, if any, they had ever needed such assistance. Carly Giffin of the Federal Judicial Center offered the FJC's services in creating and conducting such a survey.

Dr. Giffin has now completed the survey, and 221 bankruptcy judges (69%) responded. Dr. Giffin reported on the results at the Advisory Committee's April meeting. Among the responses were the following:

- Respondents were asked if they had ever presided over a case or proceeding in which they would have considered appointing a master if the option had been available. More than half (62%) said no, they had not, and just under a third (32%) said yes.
- All respondents were asked for what purposes a master might be useful for bankruptcy judges (whether or not they would consider appointing one). The most frequently cited uses were overseeing large-volume discovery or discovery disputes (71%), providing expertise in rarely encountered areas of the law (57%), overseeing fee disputes or fee awards (48%), and undertaking claims estimation or valuation (44%).
- Respondents were asked their opinion on whether Rule 9031 should be amended to allow the use of masters in bankruptcy cases or proceedings. Nearly half of respondents (44%) said they were neither in favor nor against amending Rule 9031. Just over a third of

respondents (35%) thought Rule 9031 should be amended, and just over a fifth (21%) said Rule 9031 should not be amended.

Upon reviewing the survey results, the Advisory Committee concluded that there was sufficient interest in allowing masters to be used in bankruptcy cases or proceedings that it should continue to consider the Kaplan and ABA suggestions. It identified as next steps researching whether there is any constitutional or statutory impediment to authorizing bankruptcy judges to appoint masters and considering drafts of possible rule amendments to authorize their use.

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

Rule 1007. Lists, Schedules, Statements, and Other Documents; Time to File

* * * * *

(b) Schedules, Statements, and Other Documents.

* * * * *

(7) ***Personal Financial-Management Course.*** Unless an approved provider has notified the court that the debtor has completed a course in personal financial management after filing the petition or the debtor is not required to complete one as a condition to discharge, an individual debtor in a Chapter 7 or Chapter 13 case—or in a Chapter 11 case in which § 1141(d)(3) applies—must file a certificate of course completion issued by the provider.

[1] Matter to be omitted is lined through.

* * * * *

(c) Time to File.

* * * * *

(4) [abrogated]~~*Financial Management Course*. Unless the court extends the time to file, an individual debtor must file the certificate required by (b)(7) as follows:~~

~~(A) in a Chapter 7 case, within 60 days after the first date set for the meeting of creditors under § 341; and~~

~~(B) in a Chapter 11 or Chapter 13 case, no later than the date the last payment is made under the plan or the date a motion for a discharge is filed under § 1141(d)(5)(B) or § 1328(b).~~

* * * * *

Committee Note

The deadlines in (c)(4) for filing certificates of completion of a course in personal financial management

have been eliminated. When Code § 727(a)(11), 1141(d)(3), or 1328(g)(1) requires course completion for the entry of a discharge, the debtor must demonstrate satisfaction of this requirement by filing a certificate issued by the course provider, unless the provider has already done so. The certificate must be filed before the court rules on discharge, but the rule no longer imposes an earlier deadline for doing so.

Changes Made After Publication and Comment

The amendment to Rule 1007(h) was withdrawn. In order to avoid renumbering (c)(5)-(7), the notation "[abrogated]" was added to line 19, and the number (4) was retained.

Summary of Public Comment

BK-2024-0002-0006 – Mia Andrade. General statement of support.

BK-2024-0002-0005 – Jacqueline Sadlo. Strongly supports the deletion of Rule 1007(c)(4) and the amendments to Rule 5009(b). These changes will benefit pro se debtors and the nonprofit organizations that assist them. They will also benefit the court system by reducing the number of repeat filings and reopenings due to missed deadlines and procedural complexities.

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

Rule 2007.1. Appointing a Trustee or Examiner in a Chapter 11 Case

* * * * *

(b) Requesting the United States Trustee to Convene a Meeting of Creditors to Elect a Trustee.

* * * * *

(3) ***Reporting Election Results; Resolving Disputes.***

(A) *Undisputed Election.* If the election is undisputed, the United States trustee must promptly file a report certifying the election, including the name and address of the person elected and a statement that the election is undisputed. The report must be

[1] Matter to be omitted is lined through.

accompanied by a verified statement of the person elected setting forth that person's connections with:

- the debtor;
- creditors;
- any other party in interest;
- their respective attorneys and accountants;
- the United States trustee; or
- any person employed in the United States trustee's office.

(B) *Disputed Election.* If the election is disputed, the United States trustee must promptly file a report stating that the election is disputed, informing the court of the nature of the dispute and listing the name and address of any candidate elected

under any alternative presented by the dispute. The report must be accompanied by a verified statement by each candidate, setting forth the candidate's connections with any entity listed in (A)~~(i) (vi)~~. No later than the date on which the report is filed, the United States trustee must mail a copy and each verified statement to:

(i) any party in interest that has made a request to convene a meeting under § 1104(b) or to receive a copy of the report; and

(ii) any committee appointed under § 1102.

* * * * *

Committee Note

The second sentence of Rule 2007.1(b)(3)(B) is amended to delete the erroneous reference "any entity listed in (A)(i)-(vi)." There are no clauses (i)-(vi) in (A); the entities are listed in bullet points. Therefore, the sentence is amended to refer to "any entity listed in (A)."

Changes Made After Publication and Comment

Because of the technical nature of the amendment to Rule 2007.1(b), approval is sought without publication.

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

Rule 3001. Proof of Claim

* * * * *

(c) Required Supporting Information.

(1) ***Claim or Interest Based on a Writing.*** If a claim or an interest in the debtor's property securing the claim is based on a writing, the creditor must file a copy with the proof of claim—except for a claim based on a consumer-credit agreement under (4~~-~~3). If the writing has been lost or destroyed, a statement explaining the loss or destruction must be filed with the claim.

(2) ***Additional Information in an Individual Debtor's Case.*** If the debtor is an individual,

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

the creditor must file with the proof of claim:

(A) an itemized statement of the principal amount and any interest, fees, expenses, or other charges incurred before the petition was filed;

(B) for any claimed security interest in the debtor's property, the amount needed to cure any default as of the date the petition was filed; and

(C) for any claimed security interest in the debtor's principal residence:

(i) Form 410A; and

(ii) if there is an escrow account connected with the claim, an escrow-account statement, prepared as of the date the petition was filed, that is

consistent in form with applicable nonbankruptcy law.

(3) ***Claim Based on an Open-End or Revolving Consumer-Credit Agreement.***

(A) *Required Statement.* Except when the claim is secured by an interest in the debtor's real property, a proof of claim for a claim based on an open-end or revolving consumer-credit agreement must be accompanied by a statement that shows the following information about the credit account:

(i) the name of the entity from whom the creditor purchased the account;

(ii) the name of the entity to

whom the debt was owed at the time of an account holder's last transaction on the account;

(iii) the date of that last transaction;

(iv) the date of the last payment on the account; and

(v) the date that the account was charged to profit and loss.

(B) *Copy to a Party in Interest.* On a party in interest's written request, the creditor must send a copy of the writing described in (1) to that party within 30 days after the request is sent.

(4) ***Sanctions in an Individual-Debtor Case.*** If

the debtor is an individual and a claim holder fails to provide any information required by ~~(1) or (2)~~(c), the court may, after notice and a hearing, take one or both of these actions:

(A) preclude the holder from presenting the information in any form as evidence in any contested matter or adversary proceeding in the case—unless the court determines that the failure is substantially justified or is harmless; and

(B) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

~~(4) *Claim Based on an Open-End or Revolving Consumer-Credit Agreement.*~~

~~(A) *Required Statement.* Except when the~~

~~claim is secured by an interest in the debtor's real property, a proof of claim for a claim based on an open-end or revolving consumer-credit agreement must be accompanied by a statement that shows the following information about the credit account:~~

~~(i) the name of the entity from whom the creditor purchased the account;~~

~~(ii) the name of the entity to whom the debt was owed at the time of an account holder's last transaction on the account;~~

~~(iii) the date of that last transaction;~~

~~(iv) the date of the last payment on the account; and~~

~~(v) the date that the account was charged to profit and loss.~~

~~(B) *Copy to a Party in Interest.* On a party in interest's written request, the creditor must send a copy of the writing described in (1) to that party within 30 days after the request is sent.~~

* * * * *

Committee Note

The text of Rule 3001(c)(4) dealing with required information for a claim based on an open-end or revolving consumer-credit agreement has been moved to (c)(3), and the text of Rule 3001(c)(3) dealing with sanctions in an individual-debtor case for failure to provide required information has been moved to (c)(4). This is a technical amendment reflecting the view that the sanctions provisions should logically follow all the substantive provisions they enforce. The first sentence of (c)(4) (former (c)(3)) is amended to replace the reference to "(1) or (2)" with a reference to "(c)." This remedies an inadvertent substantive change made by the restyled version of the rule that became effective on December 1, 2024. The remedies provisions of Rule 3001(c)(4) (formerly (c)(3)) are intended to apply to all failures to provide information required by (c), including that required by (c)(3) (formerly (c)(4)), which is consistent with the substantive provisions of the rule prior to December 1, 2024. A cross-reference to the provisions governing a claim based on a consumer-credit agreement in (c)(1) has

been changed from "(4)" to "(3)" to reflect the new numbering.

Changes Made After Publication and Comment

Because of the technical nature of the amendments to Rule 3001(c), approval is sought without publication.

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

Rule 3018. Chapter 9 or 11—Accepting or Rejecting a Plan

(a) In General.

* * * * *

(3) ***Changing or Withdrawing an Acceptance or Rejection.*** After notice and a hearing and for cause, the court may permit a creditor or equity security holder to change or withdraw an acceptance ~~or rejection~~. The court may permit the change or withdrawal of a rejection as provided in (c)(1)(B).

* * * * *

(c) ~~Form~~ Means for Accepting or Rejecting a Plan; Procedure When More Than One Plan Is Filed.

(1) ***~~Form~~ Alternative Means*.**

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

(A) *By Ballot.* Except as provided in (B), ~~An~~ an acceptance or rejection of a plan[2] must:

(~~A~~i) be in writing;

(~~B~~ii) identify the plan or plans;

(~~C~~iii) be signed by the creditor or equity security holder—or an authorized agent; and

(~~D~~iv) conform to Form 314.

(B) *As a Statement on the Record.* The court may also permit an acceptance—or the change or withdrawal of a rejection—in a statement that is:

[2] The phrase "of a plan" was unintentionally left out of the redline version of the rule when it was published for comment. This was a scrivener's error, and is corrected in this version for final approval.

(i) part of the record, including an oral statement at the confirmation hearing or a stipulation; and

(ii) made by the creditor or equity security holder—or its attorney or authorized agent.

(2) ***When More Than One Plan Is Distributed.*** If more than one plan is sent under Rule 3017, a creditor or equity security holder may accept or reject one or more plans and may indicate preferences among those accepted.

* * * * *

Committee Note

Subdivision (c) is amended to provide more flexibility in how a creditor or equity security holder may indicate acceptance of a plan in a chapter 9 or chapter 11 case. In addition to allowing acceptance or rejection by written ballot, the rule now authorizes a court to permit a creditor or equity security holder—or its attorney or authorized agent—to accept a plan by means of a statement on the record, including by stipulation or by oral

representation at the confirmation hearing. This change reflects the fact that disputes about a plan's provisions are often resolved after the voting deadline and, as a result, an entity that previously rejected the plan or failed to vote accepts it by the conclusion of the confirmation hearing. In such circumstances, the court is permitted to treat that change in position as a plan acceptance when the requirements of subdivision (c)(1)(B) are satisfied.

Subdivision (a) is amended to take note of the means in (c)(1)(B) of changing or withdrawing a rejection.

Nothing in the rule is intended to create an obligation to accept or reject a plan.

Changes Made After Publication and Comment

Subdivision (c)(1)(B)(ii) was reworded to clarify that the provision applies to statements by individual creditors and equity security holders, as well as by attorneys and authorized agents. The second sentence of the Committee Note was similarly revised.

Summary of Public Comment

BK-2024-0002-0003 – Robert Kressel. **S**upports the amendments but questions why subdivision (c)(1)(B) does not apply to an individual creditor.

BK-2024-0002-0006 – Mia Andrade. General statement of support.

BK-2024-0002-0010 – National Conference of Bankruptcy Judges. Generally supports the amendments,

but suggests some wording changes to subdivision (c)(1)(B)(i).

BK-2024-0002-0014 – Anonymous. The proposed amendment improperly conflates a plan vote with the filing or withdrawal of an objection. They are not the same. A creditor may choose not to object to a plan but also not vote on it. In a subchapter V case, this might be done so that confirmation is nonconsensual and thus § 1191(b) applies.

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

Rule 5009. Closing a Chapter 7, 12, 13, or 15 Case; Declaring Liens Satisfied

* * * * *

(b) Chapter 7 or 13—Notice of a Failure to File a Certificate of Completion for a Course on Personal Financial Management.

(1) ***Applicability.*** This subdivision (b) applies if an individual debtor in a Chapter 7 or 13 case is required to file a certificate under Rule 1007(b)(7). ~~and~~

(2) ***Clerk's First Notice to the Debtor.*** If the certificate is not filed ~~fails to do so~~ within 45 days after the ~~first date set for the meeting of creditors under § 341(a)~~ petition is filed. ~~The~~

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

the clerk must promptly notify the debtor that the case ~~will~~ can be closed without entering a discharge if the certificate is not filed ~~within the time prescribed by Rule 1007(c)~~.

(3) ***Clerk's Second Notice to the Debtor.***

(A) *Chapter 7.* In a Chapter 7 case, if the certificate is not filed within 90 days after the petition is filed and the court has not yet sent a second notice, the clerk must promptly notify the debtor that the case can be closed without entering a discharge if the certificate is not filed within 30 days after the notice's date.

(B) *Chapter 13.* In a Chapter 13 case, if the certificate has not been filed when the trustee files a final report and final account, the clerk must promptly

notify the debtor that the case can be closed without entering a discharge if the certificate is not filed within 60 days after the notice's date.

* * * * *

Committee Note

Subdivision (b) is amended in order to reduce the number of cases in which a discharge is not issued solely because a certificate of completion of a personal-financial-management course is not filed as required by Rule 1007(b)(7). When that occurs, a debtor who is otherwise entitled to a discharge must seek to have the case reopened—at added cost—in order to obtain the ultimate benefit of the bankruptcy.

Subdivision (b) now provides for two reminder notices to be sent to debtors who have not satisfied the requirement of Rule 1007(b)(7). The clerk must send the first notice to any chapter 7 or 13 debtor for whom a certificate has not been filed within 45 days after the petition was filed, an earlier date than under the prior rule. Then if a chapter 7 debtor has not complied within 90 days after the petition date and a second notice has not already been sent, the clerk must send a second reminder notice. In a chapter 13 case, as part of the case closing process, the clerk must send a second notice to any debtor who has not complied by the time the trustee files a final report and final account. Both notices must explain that the consequence of not complying with Rule 1007(b)(7) is that the case is subject to being closed without a discharge being entered.

Nothing in the rule precludes a court from taking other steps to obtain compliance with Rule 1007(b)(7) before a case is closed without a discharge.

Changes Made After Publication and Comment

No changes were made after publication and comment.

Summary of Public Comment

BK-2024-0002-0006 – Mia Andrade. General statement of support.

BK-2024-0002-0005 – Jacqueline Sadlo. Strongly supports the deletion of Rule 1007(c)(4) and the amendments to Rule 5009(b). These changes will benefit pro se debtors and the nonprofit organizations that assist them. They will also benefit the court system by reducing the number of repeat filings and reopenings due to missed deadlines and procedural complexities.

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

Rule 7043. Taking Testimony

Fed. R. Civ. P. 43 applies in an adversary proceeding.

Committee Note

Rule 7043 is new and, as was formerly true under Rule 9017, makes Fed. R. Civ. P. 43 applicable to adversary proceedings. Unlike under former Rule 9017, Fed. R. Civ. P. 43 is no longer applicable to contested matters under new Rule 7043.

Changes Made After Publication and Comment

No changes were made after publication and comment.

Summary of Public Comment

BK-2024-0002-0004 – Anonymous. Consider Rule 7043 regarding testimony and the impact it may have on debtors who may be unrepresented or lack appropriate resources. The procedural requirements outlined in this rule may be challenging and result in a disadvantage to someone. However, overall these amendments seem to be a necessary step to improving bankruptcy procedures.

BK-2024-0002-0006 – Mia Andrade. General statement of support.

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[1] New material is underlined in red.

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

Rule 9006. Computing and Extending Time; Motions

* * * * *

(b) Extending Time.

* * * * *

(3) ***Extensions Governed by Other Rules.*** The court may extend the time to:

(A) act under Rules 1006(b)(2), 1017(e), 3002(c), 4003(b), 4004(a), 4007(c), 4008(a), 8002, and 9033—but only as permitted by those rules; and

(B) file the ~~certificate required by Rule 1007(b)(7), and the~~ schedules and statements in a small business

[1] Matter to be omitted is lined through.

case under § 1116(3)—but only as permitted by Rule 1007(c).

(c) Reducing Time.

* * * * *

(2) ***When Not Permitted.*** The court may not reduce the time to act under Rule 2002(a)(7), 2003(a), 3002(c), 3014, 3015, 4001(b)(2) or (c)(2), 4003(a), 4004(a), 4007(c), 4008(a), 8002, or 9033(b). ~~Also, the court may not reduce the time set by Rule 1007(c) to file the certificate required by Rule 1007(b)(7).~~

* * * * *

Committee Note

The references in (b)(3)(B) and (c)(2) to the certificate required by Rule 1007(b)(7) have been deleted because the deadlines for filing those certificates have been eliminated.

Changes Made After Publication and Comment

No changes were made after publication and comment.

Summary of Public Comment

BK-2024-0002-0006 – Mia Andrade. General statement of support.

BK-2024-0002-0004 – Anonymous. Comment concerns Rule 9006 generally (needs more flexibility) and does not relate to the proposed amendment.

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

Rule 9014. Contested Matters

* * * * *

(d) Taking Testimony ~~on a Disputed Factual Issue~~; Interpreter. ~~A witness's testimony on a disputed material factual issue must be taken in the same manner as testimony in an adversary proceeding.~~

(1) ***In Open Court.*** A witness's testimony on a disputed material factual issue 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 cause and with appropriate safeguards, the court may permit

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

testimony in open court by contemporaneous transmission from a different location.

(2) ***Evidence.*** When resolution of a contested matter 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.

(3) ***Interpreter.*** Fed. R. Civ. P. 43(d) applies in a contested matter.

* * * * *

Committee Note

Rule 9014(d) is amended to include language from Fed. R. Civ. P. 43. That rule is no longer generally applicable in a bankruptcy case, and the reference to that rule has been removed from Rule 9017. Instead, Rule 9014(d) incorporates most of the language of Fed. R. Civ. P. 43 for contested matters but eliminates the "compelling circumstances" standard in Fed. R. Civ. P. 43(a) for permitting remote testimony. Terms used in Rule 9014(d) have the same meaning as they do in Fed. R. Civ. P. 43. However, consistent with the other restyled bankruptcy rules, the phrase "good cause" used in Fed. R. Civ. P. 43 has been shortened to "cause" in Rule 9014(d)(1). No substantive change is intended.

Under new Rule 7043, all of Fed. R. Civ. P. 43—including the "compelling circumstances" standard—continues to apply to adversary proceedings. An adversary proceeding in bankruptcy is procedurally like a civil action in district court. Because assessing the credibility of witnesses is often required, there is a strong presumption that testimony will be in person.

A contested matter, however, usually can be resolved expeditiously by means of a hearing. Contested matters do not generally require the procedural formalities used in adversary proceedings, including a complaint, answer, counterclaim, crossclaim, and third-party practice. They occur with frequency over the course of a bankruptcy case and are often resolved on the basis of uncontested testimony. Testimony might concern, for example, the simple proffer by a debtor about the ability to make ongoing installment payments for an automobile that is the subject of a motion to lift the automatic stay. Or, as another example, testimony might be given in a commercial chapter 11 case by a corporate officer about ongoing operational costs in support of a motion to use estate assets to maintain business operations.

The need to quickly resolve most contested matters is recognized in existing Rule 9014, by making presumptively inapplicable the disclosure requirements of Fed. R. Civ. P. 26(a)(2) and 26(a)(3) and the mandatory meeting under Fed. R. Civ. P. 26(f). Under Rule 9014, the court has the discretion to direct that one or more of the other rules in Part VII apply when a contested matter warrants heightened process. The court has similar discretion under Rule 9014(d) to deny a request to testify remotely.

Although the amendment to Rule 9014(d) removes the "compelling circumstances" requirement in Fed. R. Civ.

P. 43(a), the court still must find cause to permit remote testimony and must impose appropriate safeguards. In other words, the presumption of in-person testimony in open court is retained, and remote testimony in contested matters should not be routine. In-person testimony would be particularly appropriate in disputed contested matters where it is necessary for the court to determine the witness's credibility. On the other hand, the greater flexibility to allow remote testimony in contested matters could be useful in consumer cases if the matters are straightforward and witness attendance is cost prohibitive or infeasible due to travel, job, or family obstacles.

Changes Made After Publication and Comment

- The heading of Rule 9014(d)(2) was changed from "Evidence on a Motion" to "Evidence."
- In Rule 9014(d)(2) the phrase "When a motion in a contested matter" was changed to "When resolution of a contested matter," and the phrase "the court may hear the motion" was changed to "the court may hear the matter."
- In the first sentence of the third paragraph of the Committee Note, the phrase "is a motion procedure that" was deleted, and in the second sentence of that paragraph, the word "generally" was inserted between the words "do not" and "require."

Summary of Public Comment

BK-2024-0002-0006 – Mia Andrade. General statement of support.

BK-2024-0002-0009 – National Conference of Bankruptcy Judges. The phrase "motion in a contested

matter" in Rule 9014(d)(2) is potentially redundant and confusing. The phrase "motion or contested matter" should be used instead.

BK-2024-0002-0011 – Adam Hiller. In Rule 9014(d)(2) the word "affidavits" should be changed to "affidavits or declarations" because the practice in many jurisdictions is to use unsworn declarations pursuant to 28 U.S.C. § 1746 instead of affidavits.

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

Rule 9017. Evidence

The Federal Rules of Evidence and Fed. R. Civ. P. ~~43,~~ 44~~,~~ and 44.1 apply in a bankruptcy case.

Committee Note

The Rule is amended to delete the reference to Fed. R. Civ. P. 43. Under new Rule 7043, Fed. R. Civ. P. 43 is applicable to adversary proceedings but not to contested matters. Testimony in contested matters is governed by Rule 9014(d).

Changes Made After Publication and Comment

No changes were made after publication and comment.

Summary of Public Comment

BK-2024-0002-0006 – Mia Andrade. General statement of support.

BK-2024-0002-0009 – National Conference of Bankruptcy Judges. The reference to Civil Rule 44 should not be deleted.

[1] Matter to be omitted is lined through.

Fill in this information to identify the case:

Debtor 1 _____

Debtor 2 (Spouse, if filing) _____

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number _____

Official Form 410S1

Notice of Mortgage Payment Change

12/25

If the debtor's plan provides for payment of postpetition contractual installments on your claim secured by a security interest in the debtor's principal residence, you must use this form to give notice of any changes in the installment payment amount. File this form as a supplement to your proof of claim at least 21 days before the new payment amount is due. See Bankruptcy Rule 3002.1.

Name of creditor: _____ **Court claim no**. (if known): _____

Last 4 digits of any number you use to identify the debtor's account: ____ ____ ____ ____

Date of payment change: Must be at least 21 days after date of this notice ____/____/_____

New total payment: Principal, interest, and escrow, if any $ _____
For HELOC payment amounts, see Part 3

Part 1: Escrow Account Payment Adjustment

1. **Will there be a change in the debtor's escrow account payment?**

❑ No
❑ Yes. Attach a copy of the escrow account statement prepared in a form consistent with applicable nonbankruptcy law. Describe the basis for the change. If a statement is not attached, explain why: _____

Current escrow payment: $ _____ **New escrow payment:** $ _____

Part 2: Mortgage Payment Adjustment

2. **Will the debtor's principal and interest payment change based on an adjustment to the interest rate on the debtor's variable-rate account?**

❑ No
❑ Yes. Attach a copy of the rate change notice prepared in a form consistent with applicable nonbankruptcy law. If a notice is not attached, explain why: _____

Current interest rate: _____% **New interest rate:** _____%

Current principal and interest payment: $ _____ **New principal and interest payment:** $ _____

Part 3: Annual HELOC Notice

3. **Will there be a change in the debtor's home-equity line-of-credit (HELOC) payment for the year going forward?**

❑ No
❑ Yes.

Current HELOC payment: $_____

Reconciliation amount: + $_____ or
- $_____

Debtor 1 _____ Case number (*if known*) _____
First Name Middle Name Last Name

Amount of next payment (including reconciliation amount) **$_____**

Amount of the new payment thereafter (without reconciliation amount) **$_____**

Part 4: Other Payment Change

4. **Will there be a change in the debtor's mortgage payment for a reason not listed above?**

❑ No
❑ Yes. Attach a copy of any documents describing the basis for the change, such as a repayment plan or loan modification agreement. (*Court approval may be required before the payment change can take effect.*)

Reason for change: _____

Current mortgage payment: $ _____ **New mortgage payment:** $ _____

Part 5: Sign Here

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number.

Check the appropriate box.

❑ I am the creditor.
❑ I am the creditor's authorized agent.

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

✘ _____ Date ____/_____/_____
Signature

Print: _____ Title _____
First Name Middle Name Last Name

Company _____

Address _____
Number Street

_____
City State ZIP Code

Contact phone (_____) _____–_____ Email _____

Official Form 410S1 Committee Note

Committee Note

Official Form 410S1, *Notice of Mortgage Payment Change*, is amended to provide space for an annual HELOC notice. As required by Rule 3002.1(b)(2), new Part 3 solicits disclosure of the existing payment amount, a reconciliation amount representing underpayments or overpayments for the past year, the next payment amount (including the reconciliation amount), and the new payment amount thereafter (without the reconciliation amount). The sections of the form previously designated as Parts 3 and 4 are redesignated Parts 4 and 5, respectively.

Changes Made After Publication and Comment

No changes were made after publication and comment.

Summary of Public Comment

BK-2024-0002-0006 – Mia Andrade. General statement of support.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number (If known) _____

☐ Check if this is an amended filing

Official Form 106C

Schedule C: The Property You Claim as Exempt

12/26

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. Using the property you listed on *Schedule A/B: Property* (Official Form 106A/B) as your source, list the property that you claim as exempt. If more space is needed, fill out and attach to this page as many copies of *Part 2: Additional Page* as necessary. On the top of any additional pages, write your name and case number (if known).

For each item of property you claim as exempt, you must specify the amount of the exemption you claim. One way of doing so is to state a specific dollar amount as exempt. Alternatively, you may claim the full fair market value of the property being exempted up to the amount of any applicable statutory limit. Some exemptions—such as those for health aids, rights to receive certain benefits, and tax-exempt retirement funds—may be unlimited in dollar amount. However, if you claim an exemption of 100% of fair market value under a law that limits the exemption to a particular dollar amount and the value of the property is determined to exceed that amount, your exemption would be limited to the applicable statutory amount.

Part 1: Identify the Property You Claim as Exempt

1. **Which set of exemptions are you claiming?** *Check one only, even if your spouse is filing with you.*
   - ☐ You are claiming state and federal nonbankruptcy exemptions. 11 U.S.C. § 522(b)(3)
   - ☐ You are claiming federal exemptions. 11 U.S.C. § 522(b)(2)

2. **For any property you list on *Schedule A/B* that you claim as exempt, fill in the information below.**

A. Brief description of the property and line on *Schedule A/B* that lists this property	**B.** Current value of the portion you own Copy the value from *Schedule A/B*	**C.** Amount of the exemption you claim *Check only one box for each exemption.*	**D.** Specific laws that allow exemption
Brief description: _____ Line from *Schedule A/B:* _____	$_____	☐ $ _____ ☐ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	☐ $ _____ ☐ 100% of fair market value, up to any applicable statutory limit	_____
2.1 **Add the dollar value of all entries from Column B, including any entries for pages you have attached.**	$_____		
2.2 **Add the dollar value of all entries with a specific amount from Column C, including any entries for pages you have attached.**		$_____	

3. **Are you claiming a homestead exemption of more than $214,000?**
   (Subject to adjustment on 4/01/28 and every 3 years after that for cases filed on or after the date of adjustment.)
   - ☐ No
   - ☐ Yes. Did you acquire the property covered by the exemption within 1,215 days before you filed this case?
     - ☐ No

❑ Yes

Part 2: Additional Page

A. Brief description of the property and line on Schedule A/B that lists this property	B. Current value of the portion you own Copy the value from *Schedule A/B*	C. Amount of the exemption you claim *Check only one box for each exemption*	D. Specific laws that allow exemption
Brief description: ________ Line from *Schedule A/B:* ____	$________	❑ $ ______ ❑ 100% of fair market value, up to any applicable statutory limit	________
Brief description: ________ Line from *Schedule A/B:* ____	$________	❑ $ ______ ❑ 100% of fair market value, up to any applicable statutory limit	________
Brief description: ________ Line from *Schedule A/B:* ____	$________	❑ $ ______ ❑ 100% of fair market value, up to any applicable statutory limit	________
Brief description: ________ Line from *Schedule A/B:* ____	$________	❑ $ ______ ❑ 100% of fair market value, up to any applicable statutory limit	________
Brief description: ________ Line from *Schedule A/B:* ____	$________	❑ $ ______ ❑ 100% of fair market value, up to any applicable statutory limit	________
Brief description: ________ Line from *Schedule A/B:* ____	$________	❑ $ ______ ❑ 100% of fair market value, up to any applicable statutory limit	________
Brief description: ________ Line from *Schedule A/B:* ____	$________	❑ $ ______ ❑ 100% of fair market value, up to any applicable statutory limit	________
Brief description: ________ Line from *Schedule A/B:* ____	$________	❑ $ ______ ❑ 100% of fair market value, up to any applicable statutory limit	________
Brief description: ________ Line from *Schedule A/B:* ____	$________	❑ $ ______ ❑ 100% of fair market value, up to any applicable statutory limit	________
Brief description: ________ Line from *Schedule A/B:* ____	$________	❑ $ ______ ❑ 100% of fair market value, up to any applicable statutory limit	________
Brief description: ________ Line from *Schedule A/B:* ____	$________	❑ $ ______ ❑ 100% of fair market value, up to any applicable statutory limit	________

Committee Note

Part 1 of Official Form 106C is amended to add spaces for providing the total amount of column B—current value of the portion of property owned by the debtor—and of column C—amount of the exemption claimed. In adding up the exemption amounts claimed in column C, the debtor should include only those exemptions claimed in specific dollar amounts.

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of April 3, 2025
Atlanta, Georgia, and on Microsoft Teams

The following members attended the meeting in person:

Alane A. Becket, Esq.
Circuit Judge Daniel A. Bress
District Judge James O. Browning
Bankruptcy Judge Rebecca Buehler Connelly
Jenny Doling, Esq.
Bankruptcy Judge Michelle M. Harner
Sean Day, Esq.
District Judge Jeffery P. Hopkins
Bankruptcy Judge Benjamin A. Kahn
District Judge Joan H. Lefkow
Bankruptcy Judge Catherine Peek McEwen
Professor Scott F. Norberg
District Judge J. Paul Oetken
Damian S. Schaible, Esq.
Nancy Whaley, Esq.

The following persons also attended the meeting in person:

Professor S. Elizabeth Gibson, Reporter
Professor Laura B. Bartell, Associate Reporter
District Judge John D. Bates, Chair of the Committee on Rules of Practice and Procedure (the Standing Committee)
Professor Catherine T. Struve, reporter to the Standing Committee
Ramona D. Elliott, Esq., Deputy Director/General Counsel, Executive Office for U.S. Trustees
Kenneth S. Gardner, Clerk, U.S. Bankruptcy Court for the District of Colorado
Bankruptcy Judge Laurel Isicoff, liaison from the Committee on the Administration of the Bankruptcy System
Carolyn Dubay, Administrative Office
Rakita Johnson, Administrative Office
Scott Myers, Administrative Office
Kyle Brinker, Rules Law Clerk
Carly E. Giffin, Federal Judicial Center
Melissa Davey, Chapter 13 Trustee
Rebecca Garcia, Chapter 12 & 13 Trustee
John Rabiej, Esq., Rabiej Litigation Law Center
Rebecca Roberts, Chapter 13 Trustee
K. Edward Safir, Chapter 13 Trustee

The following persons also attended the meeting remotely:

Dean Troy McKenzie, liaison from the Standing Committee
Professor Daniel R. Coquillette, consultant to the Standing Committee
Tim Reagan, Federal Judicial Center
Molly Johnson, Federal Judicial Center
Shelly Cox, Administrative Office
Bridget M. Healy, Administrative Office
Dana Elliott, Administrative Office
John Hawkinson, journalist
Lisa Mullen, Trott Law
Daniel Steen, Lawyers for Civil Justice
Tracy Updike, Chapter 13 Trustee
Crystal Williams

Discussion Agenda

1. **Greetings and Introductions**

Judge Rebecca Connelly welcomed the group and thanked everyone for joining this meeting. She welcomed a new liaison from the Standing Committee, Dean Troy McKenzie, who is attending remotely.

She noted that District Judge J. Paul Oetken will be leaving the Committee after the September meeting. She also introduced the new Chief Counsel for the Rules Committees, Carolyn Dubay; new members Judge Browning and Alane Becket; and the new Department of Justice member, Sean Day. With regret, she noted that Scott Myers, Rules Counsel, will be retiring after the June Standing Committee meeting, so this will be his final meeting of the Bankruptcy Rules Committee. She expressed the Committee's best wishes on his retirement and expressed the significant loss we will feel.

Judge Connelly thanked the members of the public attending in person or remotely for their interest, and she noted that the meeting would be recorded. She summarized the schedule for the meeting and reviewed meeting etiquette for in-person and virtual attendees.

2. **Approval of Minutes of Meeting Held on Sept. 12, 2024**

Nancy Whaley requested a change to the minutes on p. 42 in the agenda book to more accurately reflect her comments. The revised paragraph would read as follows:

> Nancy Whaley said there was concern under the current rule as to where the trustee was located to conduct the meeting of creditors. Since moving to remote hearings, in their district and in most places throughout the country, trustees have to be in their offices, not in their home offices. However, U.S. trustees around the country have different views on where the trustee has to be sitting. Some trustees do not live within their district. Chapter

7 trustees have to be within the district to be appointed, but chapter 12 and 13 trustees do not.

With that amendment, the minutes were approved.

3. **Oral Reports on Meetings of Other Committees**

(A) ***Jan. 7, 2025, Standing Committee Meeting***

Judge Connelly gave the report.

The Standing Committee approved for publication amendments to Rule 2002 (Notices) to eliminate the requirement that every notice given under Rule 2002 comply with Rule 1005, and Official Form 101 (Voluntary Petition for Individuals Filings for Bankruptcy) to modify the prompt requesting the employer identification number of the filer.

(B) ***Meeting of the Advisory Committee on Appellate Rules***

Since the last meeting of the Advisory Committee on Bankruptcy Rules, the Advisory Committee on Appellate Rules met on Oct. 9, 2024, and Apr. 2, 2025. Judge Bress gave the report.

With respect to the social-security-number privacy issue, the Appellate Committee decided to await developments in the other committees, most specifically the Advisory Committee on Bankruptcy Rules.

The Appellate Committee discussed amicus filings under Rule 29. There was a hearing in Feb. 2025 during which substantial interest in the legal community was apparent. There are three main topics.

First, should a proposed amicus be required to file a motion to get court consent to file an amicus brief (as opposed to just getting the consent of the parties). The purpose of this proposal was to help manage recusal issues. The response to this proposal was negative, due to the additional burden and the fear that courts would deny the motions. Therefore the Appellate Committee will not go forward with this proposal.

Second, should an amicus brief be required to disclose whether a party or its counsel had during the last 12 months contributed or pledged to contribute more than 25% of the total revenue of the amicus group for its prior fiscal year? The thought behind this proposal was to create greater transparency over who is filing the brief. Many comments were received in opposition to this proposal. Concerns expressed included that FRAP 29 already had enough disclosure requirements and that additional limitations would threaten First Amendment rights. The Appellate Committee decided not to move forward on this proposal by a vote of 5-4.

Third, the current rule requires disclosure when earmarked funds are provided by a person who is not the amicus, a member of the amicus, or counsel to the amicus. The proposed

amendments would do two main things: (1) it would require non-member disclosure only for earmarked donations of $100 or more toward the preparation of an amicus brief, and (2) it would require disclosure if someone making an earmarked donation joined as a member within the last 12 months. The Appellate Committee decided to move forward on this proposal.

The Appellate Committee also considered a proposed rule on administrative stays (preliminary stays during consideration of a stay pending appeal). A subcommittee had recommended a proposal to have such stays disposed of as soon as possible and to have administrative stays limited to 14 days. The subcommittee will continue to study the issue based on comments from the Appellate Committee.

(C) ***Meeting of the Advisory Committee on Civil Rules***

Since the last meeting of the Advisory Committee on Bankruptcy Rules, the Advisory Committee on Civil Rules met on Oct. 10, 2024, and Apr. 1, 2025. Judge McEwen gave the report.

The Civil Rules Committee recommended amendments to the following rules to the Standing Committee for publication:

1. FRCP 81(c) to clarify whether and how a party in a removed action must make a jury demand. Bankruptcy Rule 9015(a) adopts by reference FRCP 81(c). No conforming change would be necessary if the amendment becomes effective. The Standing Committee approved this recommendation.

2. FRCP 41(a) to clarify that a plaintiff may voluntarily dismiss one or more claims or the entire action by notice before an answer or summary judgment motion is filed. If one of those events has happened, the amendment provides two other methods for obtaining dismissal of all or part of an action. Bankruptcy Rule 7041 adopts by reference FRCP 41, with the proviso that a complaint objecting to the debtor's discharge shall not be dismissed at the plaintiff's instance without notice to specified parties and on court order. No conforming change would be necessary if the amendment becomes effective.

3. FRCP 45(b) to clarify what "delivering" a subpoena means. Bankruptcy Rule 9016 adopts by reference FRCP 45. No conforming change would be necessary if the amendment becomes effective.

4. FRCP 45(c) to clarify that the court's subpoena power for 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 FRCP 45(c). This means a person may be commanded to attend within 100 miles to give remote testimony, subject to obtaining court approval under FRCP 43(a). Bankruptcy Rule 9016 adopts by reference FRCP 45. No conforming change would be necessary if the amendment becomes effective. A companion amendment to FRCP 26(a)(3)(A)(i) requires disclosure of the intent to call a witness to testify remotely. Bankruptcy Rule 7026 adopts by reference FRCP 26 for adversary proceedings. No conforming change would be necessary if the amendment becomes effective.

5. FRCP 7.1 to refine the terminology, identifying a "business organization" instead of a "corporation" for purposes of disclosure of financial interests in a party. The proposed amendment would also require disclosure of a direct or indirect interest in a party, meaning not only a parent business organization but also any publicly held grandparent or great-grandparent that owns at least ten percent in the parent or grandparent. The requirement to disclose "indirect" owners of 10 percent or more of a party is to permit judges to assess disqualification when their financial interests may be affected by a litigation. Bankruptcy Rule 7007.1 is the bankruptcy version of FRCP 7.1. Because 11 U.S.C. §101(9) defines "corporation" broadly, no conforming amendment is necessary for terminology, but a conforming amendment to require disclosure of direct or indirect interests in grandparents and great grandparents might be considered.

The Civil Rules Committee also heard the following information items:

1. The committee continues its review of a more flexible standard under FRCP 43(a), including dropping the required "compelling circumstances" for permitting remote testimony. Proposed Bankruptcy Rule 7043 (slated to become effective Dec. 1, 2026, depending on the outcome of the comment period) adopts FRCP 43 for adversary proceedings.

2. The Discovery Subcommittee continues its review of whether a national rule on sealing should be proposed.

3. The committee continues its review of a proposed amendment to FRCP 55 to change "must" to "may" in the provision that states the Clerk must enter a final default judgment under specified circumstances. Bankruptcy Rule 7055 adopts by reference FRCP 55. No conforming change would be necessary if the amendment is proposed and becomes effective.

4. The Cross-Border Discovery Subcommittee has detected little interest in rulemaking aside from inclusion in the pretrial conference subjects.

5. The committee continues to monitor the extent to which districts are complying with guidelines issued by the Judicial Conference of the United States on random case assignment.

Prof. Struve also provided an update on the social-security-number redaction and pro se service and e-filing projects.

(D) ***December 12-13, 2024, Meeting of the Committee on the Administration of the Bankruptcy System (the "Bankruptcy Committee")***

Judge Isicoff provided the report.

Legislative Proposal Regarding Chapter 7 Debtors' Attorney Fees

As previously reported, the Judicial Conference, on recommendation of the Bankruptcy Committee, has adopted a legislative proposal related to chapter 7 debtors' attorney fees. Not much as progressed since the Administrative Office (AO) transmitted the legislative proposal to Congress, most recently in July 2023, although the Bankruptcy Committee understands that the

proposal continues to be reviewed by Congressional staff. Several bankruptcy judges and the AO continue to make themselves available to members of Congress to answer questions raised in connection with this proposal. If Congress enacts amendments to the Code based on this position, conforming changes to the Bankruptcy Rules would be required. The Bankruptcy Committee will continue to update the Advisory Committee on any progress in this area.

Remote Testimony in Bankruptcy Contested Matters

In 2023 the Bankruptcy Committee preliminarily reviewed suggested amendments to the Bankruptcy Rules concerning remote testimony in bankruptcy contested matters. The Advisory Committee published proposed amendments last August, and today will review comments that were received on the proposed changes during the comment period and consider giving them final approval. Judge Isicoff thanked the Advisory Committee and the Committee on Court Administration and Case Management for collaborating with the Bankruptcy Committee on these proposed amendments, both at the committee and at the staff level.

Masters in Bankruptcy Cases

Judge Isicoff was interested to read the materials in the agenda book about the suggestion to allow appointment of masters in bankruptcy cases. This is an area in which the Bankruptcy Committee was historically very engaged. She will be interested to hear the Federal Judicial Center's report on its survey of bankruptcy judges. The Bankruptcy Committee continues to be available to evaluate this issue at any stage requested by the Advisory Committee or the Standing Committee.

4. **Intercommittee Items**

(A) ***Report on the Work of the Pro-Se Electronic Filing Working Group***

Professor Struve gave the report and thanked those who have participated in the project.

The project on service and electronic filing by self-represented litigants ("SRLs") has two basic goals. As to service, the goal is to eliminate the requirement of separate (paper) service (of documents after the case's initial filing) on a litigant who receives a notice of filing through the court's electronic-filing system or a court-based electronic-noticing program. As to filing, the idea is to make two changes compared with current practice: (1) to presumptively permit SRLs to file electronically (unless a court order or local rule bars them from doing so) and (2) to provide that a local rule or general court order that bars SRLs from using the court's electronic-filing system must include reasonable exceptions or must permit the use of another electronic method for filing documents and receiving electronic notice of activity in the case.

During the fall 2024 advisory committee discussions, the Bankruptcy Rules Committee decided that it was not ready to endorse either aspect of this program for adoption as part of the Bankruptcy Rules. As to the service proposal, in bankruptcy proceedings specifically, there could be multiple self-represented entities, both debtors and creditors. This could create confusion when these entities may not know who must receive paper service. As to the filing proposal there were

several concerns, including that determining the time of filing might be complicated if there were alternatives for electronic filing.

By contrast, the Civil, Appellate, and Criminal Rules Committees – which met subsequently – indicated willingness to proceed with the proposed amendments despite the fact that the Bankruptcy Rules Committee was reluctant. At its January 2025 meeting, the Standing Committee discussed whether it would be justifiable to proceed with proposed amendments to the Civil, Appellate, and Criminal Rules if the Bankruptcy Rules were not correspondingly amended. The Standing Committee did not express opposition to such an approach.

However, it has been suggested that it may be worthwhile for the Bankruptcy Rules Committee to assess whether the decisions of the other three advisory committees might provide a reason to reconsider its skepticism about the proposed amendments. Given that the Bankruptcy Rules Committee did not know of the other committees' views at the time of its fall 2024 discussion, the spring 2025 meeting provides an opportunity revisit and re-weigh the costs and benefits of proceeding with the proposals. In the event that the Committee were to change its view and propose amending the Bankruptcy Rules in tandem with the other sets of rules, it would need to consider amendments to Bankruptcy Rules 5005, 8011, and 9036. In the event that the Committee were to adhere to its fall 2024 view, it would need to consider how best to dovetail the (unchanged) approach of the Bankruptcy Rules with the (changed) approach of the Civil and Appellate Rules. Such dovetailing would entail an amendment to Rule 7005 and perhaps an amendment to Rule 8011.

Professor Struve invited a renewed discussion on whether the decision of the other three advisory committees might provide a reason for the Bankruptcy Advisory Committee to reconsider the proposed amendments.

Judge Connelly emphasized that Civil Rule 5 will change, which will require changes to Bankruptcy Rule 7005.

Judge McEwen asked whether the proposed new civil rule provides an exception that allows courts to order otherwise with respect to the court's electronic filing system, by local rule or otherwise. Prof. Struve said that the proposal would change the existing presumption against allowing SRLs to use electronic filing to a presumption in favor unless the court orders otherwise. If the court has a local rule barring access, it must provide an alternative method of electronic filing for SRLs. The court may also set conditions or restrictions on use of electronic filing, including the type of litigant and the type of filing. A court could not simply bar use of its electronic filing system by SRLs without providing an alternative means of electronic filing.

Judge Kahn asked whether a local rule allowing SRLs to file electronically only with leave of court would be a rule "prohibiting" electronic filing, or would that be a reasonable condition or restriction. Prof. Struve said that was a fair question and should be addressed in the draft.

Judge Isicoff noted that the draft gave, as an example of a reasonable restriction on access, a local provision barring incarcerated SRLs from accessing the court's electronic-filing system.

She asked whether the rationale for such an exception would be the large number of such SRLs, and if so, whether it would similarly count as a reasonable basis for restricting access if a court had a great many SRL filers generally. Prof. Struve said no, and explained that the reason for the example concerning incarcerated SRLs is that many incarcerated individuals have no access to a computer to get the electronic notices, so it will not work to include them in the e-filing system. It is not a question of the number of incarcerated litigants in the federal court system, but a question of availability of the technology.

Judge Harner noted that we will be discussing the SSN issue later today, and there is some benefit to having uniformity among sets of federal rules because bankruptcy litigants may end up in district court and the court of appeals on appeal. She said that 20% of her docket is SRLs, and she thinks many of those appeal. Prof. Struve noted national figures suggesting that, overall, bankruptcy appeals constitute a relatively small part of the docket for district courts and courts of appeals. In a given recent year, out of more than 339,000 civil matters filed in district court, 1,346 were bankruptcy appeals, and out of more than 39,000 appeals filed in the courts of appeals, 657 were bankruptcy appeals. And presumably not all of those appeals involved SRLs. Prof. Struve said that it is certainly important to think about the impact of different rules in bankruptcy and district courts. But a number of district courts and courts of appeals already permit SRLs access to the court's electronic-filing system, and this seems not to have caused serious problems in bankruptcy cases. And even if a district court or court of appeals applied a different service rule than the bankruptcy court below, SRLs might well continue to provide paper service because they learned to do so below.

Ken Gardner said that for the bankruptcy clerk's office this will be a resource issue. Starting with the pandemic, pro se litigants could file anything electronically all the time in his district. Litigants could scan documents and electronically submit them to the clerk, and the clerk had to take steps to get that onto the docket by printing it, scanning it, and posting it. This became so overwhelming that the district shut off the service. An open system puts too much burden on the clerks' offices. The resource issue has been a big challenge. Mr. Gardner noted that a number of bankruptcy courts have implemented an Electronic Self-Representation (eSR) system for preparation of an SRL's bankruptcy petition, and he observed that the eSR system ensures that the date of filing of the petition is time-stamped, which is vital.

Prof. Struve noted that Mr. Gardner's experience is so valuable. Bankruptcy may be different because of the volume of filings. She noted that the proposed draft rule would permit a court to bar SRLs from filing the initial petition electronically, and suggested that that would address the concern about the timing of the bankruptcy filing. As to the use of problematic electronic document formats, she suggested that courts that have allowed SRLs to use CM/ECF may not have that problem because the CM/ECF system will not permit the submission of a document in an unsupported format.

Judge Bates asked how much of the resource problem is related to the initial petition as opposed to the subsequent filings. Mr. Gardner said he was surprised about the volume of subsequent filings that had no apparent purpose. Prof. Struve asked whether those litigants would file the same things if they had to walk a physical document to the clerk's office. Mr. Gardner

said they might, but the electronic filing made it easy and imposed great burdens on the clerk's office. If they arrive at the front counter, there can be a conversation about the submission that may clarify the litigant's purpose in filing it.

Scott Myers observed that an appropriate restriction (permitted under the draft rule) might be a training course to use CM/ECF. And if inappropriate filings are made, access to CM/ECF could be restricted consistent with the draft rule. Ken Gardner said that lawyers are trained and they don't get it right all the time. There is no reason to think SRLs will be more competent.

Ms. Doling asked whether the project is also looking at the potential for AI solutions to the challenges. She said that one of their software providers uses AI to streamline the document collection process -- including by converting the format of documents and flagging documents that are blurry. Mr. Gardner noted that he is involved in the national project looking at the future of CM/ECF filing technology, but he cautioned that regardless of future technological measures, it will still be key to address the practicality of training the users of the system. He suggested that the national rules should allow courts to adopt new technological improvements, but should not force such changes on the courts.

Judge Connelly observed that Mr. Gardner was describing a situation in which the clerk's office must print, scan, and then upload each electronic filing by an SRL; in such a situation, electronic access for SRLs does not benefit the clerk's office and may create additional work for them. But in other bankruptcy courts, the clerk's office may not need to engage in a similar workaround, and may be able to avoid expending those extra resources on accommodating electronic access by SRLs. The future CM/ECF system is intended to help. While Mr. Gardner's experience provides useful information, it is also important to bear in mind that the experience of other courts may differ.

Prof. Struve reviewed the service issue in the proposal, which seeks to avoid requiring paper service on those who get electronic service. Previously members of the Advisory Committee had expressed concerns about multiple SRLs in a single case who would not know to whom they had to provide paper service. Prof. Gibson pointed out that the magnitude of this risk will decrease the more that SRLs are participating in the court's electronic filing system. Mr. Gardner reviewed the BNC system for identifying who gets electronic notice and who has to receive paper notices. There is also a continuing problem of changes in addresses. Prof. Struve said that the BNC acts as the intermediary between a filer and the recipients of notices. Anyone who gets electronic notices will be identified by BNC. But if the sender is not filing electronically, and either the sender or a recipient is not getting electronic notices, that is when there is a problem.

Judge McEwen asked how much trouble it would be to give notice to SRLs of the identities of other SRLs. Mr. Gardner said that this is not done today. Judge McEwen suggested that perhaps everyone who files anything in the bankruptcy court should have to have an email address. Prof. Struve cautioned that many people do not have the ability to reliably monitor things sent to them by email, and a mandatory requirement might be problematic. Judge McEwen asked how we can inform SRLs that they have to serve other SRLs by paper if we don't have an email address. Prof. Struve said that court personnel in district courts that take the approach sketched in the proposed

amendment report that their courts have not experienced a problem with paper filers omitting to serve other paper filers, but that doesn't mean that it wouldn't be a problem in bankruptcy court.

Judge Kahn would not be reluctant to require email if someone is opting into electronic filing. Prof. Struve agreed, but observed that the issue under discussion was what to do about communicating service obligations to paper filers who have not opted into electronic noticing.

Ken Gardner suggested that bankruptcy itself is a voluntary process and, if someone wants to voluntarily file a petition, they could be required to provide an email address. Prof. Bartell noted that creditors do not voluntarily subject themselves to bankruptcy.

Ms. Doling said that the debtors whom her firm represents are required to have an email. If they don't have one before they retain her, they can secure one without cost. And she sees no problem of requiring an email of those who want to file electronically.

Judge Connelly asks for input on the original question – is the Bankruptcy Committee willing to change its position and adopt changes to the Bankruptcy Rules to implement the two positions the other committees are pursuing? Ms. Whaley asked that the changes be identified again, and Prof. Struve and Prof. Gibson reiterated the proposed changes. Judge Connelly noted that changes to the rules would be required regardless of which decision the Committee made.

Judge McEwen moved that the proposals be given to the Technology, Privacy, and Public Access Subcommittee to pursue rules changes to address these issues. The motion carried without objection.

5. **Report by the Consumer Subcommittee**

(A) ***Report on suggestions to amend Rule 2003 with respect to the timing and location of § 341 meetings***

Judge Harner and Professor Gibson provided the report, which was a status update seeking no action by the Advisory Committee.

Rebecca Garcia, a chapter 12 and chapter 13 trustee, submitted a suggestion (Suggestion 24-BK-G) to amend Rule 2003(a) and (c) as pertains to the timing, location, and recording of meetings of creditors in chapter 7, 11, 12, and 13 cases. In response to the Committee's discussion at the fall meeting, Ms. Garcia has submitted a revised suggestion (Suggestion 25-BK-B). Instead of requesting changes to the timing of the chapter 7 and chapter 11 § 341 meetings, the change is limited to chapters 12 and 13, and the request to change the language regarding recording in subdivision (c) is withdrawn.

There are two aspects of the suggestion. The first aspect of her suggestion would authorize remote meetings. Ms. Garcia explained that "Section 341 meetings are now largely [conducted] via remote video (Zoom)." The proposed amendment to Rule 2003(a) would provide explicit authority for this practice, thereby no longer calling for meetings to be held only at "a regular place for holding court . . . or any other place in the district that is convenient for the parties in interest."

At the fall Advisory Committee meeting, members discussed whether Rule 2003 needs to be amended to expressly recognize a practice that is already well established in all districts. There was little enthusiasm for such an amendment. Members said that the rule seems to be working well in this regard and that a rule change might suggest that the current use of remote meetings is unauthorized.

Related to the issue of conducting meetings of creditors by video is the matter of where the meetings may take place. Currently the rule specifies that the meeting must take place in the district—either at "a regular place for holding court" or any other place that is "convenient for the parties in interest." Ms. Garcia suggests eliminating references to where the meeting may be held because the use of videoconferencing makes location irrelevant.

As the rule has been interpreted for remote meetings, the location requirement applies to where the trustee must be present. Discussion at the fall meeting revealed that, in addition to the rule's requirement of location within the district, U.S. trustees generally require that the trustee conduct the meeting of creditors from his or her main office.

Since the fall meeting, Ms. Whaley surveyed chapter 12 and chapter 13 trustees regarding these location requirements. Approximately 30% of the chapter 13 respondents said that they have conducted video meetings from outside the district, and approximately the same number said that they have conducted them from somewhere other than their main office. Many respondents stated that they didn't think that conducting meetings from locations other than their main office would present any problems.

At the fall meeting, Ramona Elliott said that she understood that the National Association of Bankruptcy Trustees (NABT) would be submitting its own suggestion for amending Rule 2003. In light of that information, the Advisory Committee decided to table further consideration of videoconferencing aspects of Ms. Garcia's suggestion. As a result, the Subcommittee took no action on that part of the suggestion at its recent meeting.

Since that time the NABT has submitted a suggestion (Suggestion 25-BK-C) to authorize remote meetings of creditors. The Subcommittee has not had an opportunity to consider this suggestion.

The second aspect of the suggestion by Ms. Garcia relates to the timing of the § 341 meeting. Currently Rule 3002 prescribes different time limits for setting the meeting of creditors depending on the case's chapter. The time periods are as follows:

Chapter 7 or 11 – no fewer than 21 days and no more than 40 days after the order for relief;

Chapter 12 – no fewer than 21 days and no more than 35 days after the order for relief;

Chapter 13 – no fewer than 21 days and no more than 50 days after the order for relief.

In addition, the rule provides that "[i]f the designated meeting place is not regularly staffed by the United States trustee or an assistant who may preside, the meeting may be held no more than 60 days after the order for relief."

Ms. Garcia's revised suggestion proposes that the time limits in chapter 12 and 13 cases be no fewer than 21 days and no more than 60 days after the order for relief. The Advisory Committee indicated at the fall meeting that they would like additional information from chapter 12 and 13 trustees about whether the current deadlines created an issue. Ms. Whaley has now surveyed trustees on that topic.

Of the 83 respondents to the chapter 13 survey, 46% said that the current 50-day time limit caused them problems in managing their § 341 and court calendars; 54% said it did not. Some, however, said it had caused problems when their caseloads were heavier, and 63% said that they would have trouble scheduling their meetings within 50 days if their caseloads increased.

Only 13 chapter 12 trustees responded to the survey, perhaps because some had already responded to the chapter 13 survey. Of the respondents, 69% said that the current 35-day time limit caused them problems in managing their § 341 and court calendars; 31% said it did not.

The Subcommittee discussed the results of Ms. Whaley's survey and considered the next steps it should take. It agreed that any amendments to Rule 2003 proposed in response to Ms. Garcia's revised suggestion should await any suggestion by NABT, assuming that one was forthcoming, in order to avoid piecemeal amendments. The Subcommittee also concluded that because some of the concerns raised by Ms. Garcia's suggestion relate to policies of the Executive Office for U.S. Trustees, discussions between that office and trustee representatives might be helpful in determining whether a consensus might be reached about the need for possible amendments to Rule 2003. Ms. Elliott and Ms. Whaley agreed with that approach.

Now that NABT has filed its suggestion, the Subcommittee may be in a position to present a recommendation regarding Rule 2003 at the fall meeting.

(B) ***Consider comments on proposed amendments to Rule 1007(h) allowing courts to require disclosure of post-petition acquisition of assets by debtors in individual chapter 11, 12 and 13 cases***

Judge Harner and Professor Gibson provided the report.

Last August an amendment to Rule 1007(h) (Interests in Property Acquired or Arising After the Petition is Filed) was published for comment. This amendment would explicitly authorize a court to require the debtor to file a supplemental schedule to list property or income that becomes property of the estate under § 1115, 1207, or 1306—that is, property that "the debtor acquires after commencement of the case but before the case is closed, dismissed, or converted" and "earnings from services performed by the debtor" during that period.

Seven comments were filed addressing this proposed change, all of them negative. The commenters were the National Conference of Bankruptcy Judges, the National Association of

Consumer Bankruptcy Attorneys, the National Bankruptcy Conference, and 4 individuals. They expressed a number of reasons for opposing the amendment: it was unnecessary, it may be seen as endorsing a requirement not imposed by the Code and that's the subject of conflicting case law, it gives no guidance about what would have to be disclosed, and it would lead to greater disuniformity among districts.

These concerns were similar to the reasons the Subcommittee initially gave for opposing an amendment that would have required disclosure of § 1115, 1207, and 1306 property. The comments led the Subcommittee to conclude that the middle ground proposal that was published didn't escape these problems.

The Subcommittee recommended that the Advisory Committee withdraw the proposed amendment to Rule 1007(h) and not pursue it further. The Advisory Committee voted to do so.

(C) ***Consider comments on amendments to Rule 1007(c), 5009(b), and 9006(b) and (c) removing deadlines and adding a required notice of an individual debtor's obligation to take a course on personal financial management and file the certificate of completion***

Judge Harner and Professor Gibson provided the report.

Last August, in response to the recommendation of the Advisory Committee, the Standing Committee published for comment proposed amendments to Rule 1007(c), 5009(b), and 9006(b). They were proposed with the goal of reducing the number of individual debtors who go through bankruptcy but whose cases are closed without a discharge because they either failed to take the required course on personal financial management or merely failed to file the needed documentation of their completion of the course.

The proposed changes would remove the deadlines in Rule 1007(c)(4) for filing the certificate of course completion (and delete references to the deadlines in Rule 9006(b) and (c)) and amend Rule 5009(b) to provide for two reminder notices rather than one.

In addition to a general comment supporting all "the proposed amendments to the Federal Rules of Bankruptcy Procedure," two comments were submitted regarding these rules. One submitted by an unnamed commenter concerns Rule 9006 generally (needs more flexibility) and does not relate to the proposed amendment. The other comment was submitted by a paralegal who assists disadvantaged individuals in chapter 7 cases. She said that she strongly supports the deletion of Rule 1007(c)(4) and the amendments to Rule 5009(b) because these changes will benefit *pro se* debtors and the nonprofit organizations that assist them. She noted that they will also benefit the court system by reducing the number of repeat filings and re-openings due to missed deadlines and procedural complexities.

The Subcommittee recommended that the Advisory Committee give final approval to the proposed amendments to Rules 1007(c), 5009(b), and 9006(b) and (c) as published. The Advisory

Committee voted to do so. Judge Harner noted that the suggestion that gave rise to these amendments resulted from Professor Bartell's scholarship.

(D) ***Recommendation for a technical amendment to Rule 3001(c) to correct an unintended change made when restyling the rule***

Judge Harner and Professor Bartell provided the report.

We received a suggestion from the National Consumer Law Center (24-BK-N) noting a potential inadvertent substantive change in Bankruptcy Rule 3001(c) effected by its restyling.

The unrestyled version of Rule 3001(c)(2)(D) allowed a court to impose sanctions "if the holder of a claim fails to provide any information required by this subdivision (c)." The unrestyled Rule 3001(c)(3) requires that certain information be provided relating to claims based on an open-end or revolving consumer credit agreement. Because Rule 3001(c)(3) clearly required "information required by this subdivision (c)," the sanctions provisions in Rule 3001(c)(2)(D) were applicable to that provision of the rule.

However, the restyled version of Rule 3001 designated former Rule 3001(c)(2)(D) as Rule 3002(c)(3) and limited the availability of sanctions to failure to provide information required by Rule 3002(c)(1) or (2). Former Rule 3001(c)(3) was restyled as Rule 3001(c)(4), so the sanctions provisions no longer applied to it. This was an inadvertent substantive change. Therefore the Subcommittee recommended a technical amendment to Rule 3001(c)(3) to eliminate this substantive change, replacing the current phrase "information required by (1) or (2)" with the words "information required by (c)."

Professor Bartell said that the Subcommittee does not believe that publication of this technical amendment is necessary because it is simply correcting the inadvertent error introduced by the restyling project. Under Section 440.20.40(d) of the Procedures Governing the Rulemaking Process, the "Standing Committee may … eliminate public notice and comment for a technical or conforming amendment if the Committee determines that they are unnecessary." Therefore, the Subcommittee gave its approval to the amendment and recommended that the Advisory Committee give final approval to the amendment and recommend it to the Standing Committee for final approval without publication.

Professor Struve asked whether the sanctions provision and the substantive provision should be reversed in order (and any cross-references revised). The Advisory Committee agreed that such a reorganization would be preferable. Professor Gibson asked whether such a change would still be a technical amendment that does not require republication, and Judge Bates expressed his view that it would be.

The Advisory Committee gave approval to the substance of the amendments with the reorganization and appropriate changes to cross-references and to the committee note. The Committee agreed that the revisions would be drafted and circulated by email after the meeting for approval by the Advisory Committee to recommend the amendments to the Standing

Committee without publication. After the meeting, the Advisory Committee approved the amendments by email vote.

6. **Report by the Forms Subcommittee**

(A) ***Recommendation of No Action on proposed technical amendments to Official Forms 122A-2 and 122C-2 to conform to Connecticut Housing and Utilities Standards***

Judge Kahn and Scott Myers provided the report.

At the fall 2024 meeting, the Advisory Committee considered and approved a proposed amendment to Official Forms 122A-2 and 122C-2 to address a May 2024 change in terminology concerning the Housing and Utilities Standards for Connecticut. Instead of breaking down the state by "Counties" it developed nine "Planning Regions." In completing lines 8 and 9a of the two forms, a debtor must consult the Housing and Utilities Standards for the debtor's "county" to determine the appropriate income deduction amount. To address the change from "Counties" to "Planning Regions" in Connecticut, the Advisory Committee approved adding the words "or planning region" after "county" at lines 8 and 9a of both forms.

While discussing the recommendation during the meeting, however, a member asked whether other states might use designations besides county for these means-test questions. AO staff researched this question after the meeting and learned that several states use designations other than "county" for at least some areas listed in the Housing and Utilities Standards. Louisiana, for example, uses "parish" for all designations, and Alaska uses "borough" or "census area" for its listed locations. In addition, four states—Maryland, Missouri, Nevada, and Virginia—use a city rather than a county designation for some locations. There may be additional variations with respect to US territories. The Advisory Committee reviewed this new information, and by email vote remanded the proposed changes to the Subcommittee for further deliberation.

After considering the additional research, the Subcommittee has concluded that there is not a clear need to amend the forms to address the Connecticut change. Even though Housing and Utilities Standards have been categorized by "parish" in Louisiana and "borough" or "census area" in Alaska since the means-test was incorporated into the Bankruptcy Code in 2005, there has been no indication that debtors from those states have had any problems using the Housing and Utilities table hosted on the Means Testing page of the U.S. Trustee Program website, even though the table header for these designations is uniformly "county."

The Advisory Committee generally does not recommend changes to rules or forms unless there is a suggestion raising a genuine problem that needs to be fixed. Given that Louisiana and Alaska have used designations other than county without generating any confusion for the past 20 years, however, Mr. Myers said that there does not seem to be a real-world problem.

The Subcommittee recommended that no changes be made, and the Advisory Committee concurred.

(B) ***Recommendation concerning proposed amendments to Official Form 410S***

Judge Kahn and Professor Gibson provided the report.

Published for comment last August were amendments to Official Form 410S1. The amendments are intended to reflect the proposed provisions in the amendments to Rule 3002.1(b) regarding payment changes in home equity lines of credit ("HELOCs").

Rule 3002.1(b)(2), as of December 1, 2025, will allow the holder of a HELOC to provide an annual notice of payment change (with reconciliation amount), instead of notices throughout the year each time there's a change. The proposed amendments to the form will accommodate this option with a new Part 3.

No comments were submitted in response to publication. The Subcommittee recommended that the Advisory Committee give its final approval to the proposed amendments to Form 410S1, as published.

The Advisory Committee gave its approval.

(C) ***Consider Instructions for Forms Implementing Rule 3002.1***

Judge Kahn and Professor Gibson provided the report.

Proposed amendments to Rule 3002.1 (Chapter 13—Claim Secured by a Security Interest in the Debtor's Principal Residence) are on schedule to go into effect on December 1, 2025, along with six new forms proposed to implement the rule's new provisions. In response to the publication of the forms for comment, several commenters asked that instructions for completing the forms be provided.

The Subcommittee approved the instructions included in the agenda book and recommended that the Advisory Committee ask the AO to adopt them as instructions for Official Forms 410C13-M1, 410C13-M1R, 410C13-M2, 410C13-M2R, 410C13-N, and 410C13-NR. They do not need to go through the rulemaking process.

Judge Connelly noted that the instructions are very useful to the implementation of the forms.

The Advisory Committee approved the instructions and asked the AO to adopt them.

(D) ***Consider recommendation to publish proposed amendments to Form 106C to include totals***

Judge Kahn and Professor Gibson provided the report.

Rebecca Garcia, a chapter 12 and chapter 13 trustee, submitted a suggestion (Suggestion 24-BK-H) to amend Official Form 106C (Schedule C: The Property You Claim as Exempt). The suggestion, which has been endorsed by the Association of Chapter 12 Trustees and the National Association of Chapter 13 Trustees, proposes amending the form to include a total amount of assets being claimed exempt. Ms. Garcia explains that "28 U.S.C. Sec. 589b(d)(3) requires the uniform final report submitted by trustees to total the 'assets exempted.' Without the amount totaled on the form, the Trustee is required to manually add up the amounts on each form in preparation of the required final report."

As was discussed at the fall meeting, the form was revised in response to the Supreme Court's decision in *Schwab v. Reilly*, 560 U.S. 770 (2010), which stated that a debtor could list as the exempt value of an asset on Schedule C "'full fair market value (FMV)' or '100% of FMV.'" So now there are two options under the column for "Amount of the exemption you claim": a specific dollar amount and 100% of fair market value, up to any applicable statutory limit. Because of that unspecified dollar option, no total amount of claimed exemptions is asked for.

Members of the Subcommittee understood the desire of trustees to have a total dollar amount of claimed exemptions listed on Form 106C in order to simplify their task of reporting "assets exempted" to the U.S. trustee under 28 U.S.C. § 589b. But because the form—in response to *Schwab*—allows an unspecified dollar amount to be claimed, simple addition to arrive at a total amount is not always possible. The value of an asset claimed as 100% exempt might be unliquidated or in dispute. Requiring a debtor to assign a definite value to such property in order to arrive at a total amount would be contrary to the option recognized in *Schwab*.

The Subcommittee's discussions about whether the form should include a total amount led it to ask questions about the current practices of reporting on assets exempted:

- Does reporting only exemptions claimed in a specific dollar amount satisfy the statutory requirement?
- Are unspecified amounts currently being reported and, if so, how?
- Are assets claimed as exempt on Form 106C the same as "assets exempted"?

Ms. Elliott offered to investigate these issues and report back to the Subcommittee.

During the Subcommittee's February meeting, Ramona Elliott explained that the U.S. Trustee Program had promulgated a regulation pursuant to 28 U.S.C. § 589b(d) regarding the completion of forms for the trustee's final report. *See* 28 C.F.R. 58.7. The regulation sets forth a list of items to be included in the trustee's distribution report, including "assets exempted."

The statute does not explain "assets exempted." But the U.S. Trustee Program did address this issue in response to comments received to the proposed regulation. In the interest of setting a uniform standard that is reasonable and would not require the trustee to expend significant additional resources, the Executive Office for U.S. Trustees ("EOUST") defined "assets

exempted" as the total value of assets listed as exempt on the debtor's Schedule C, unless revised pursuant to a court order. The instructions to the final reports reflect this definition and note that 28 U.S.C. § 589b(c) requires the rule to "strike the best achievable practical balance between (1) the reasonable needs of the public for information about the operational results of the Federal bankruptcy system; (2) economy, simplicity, and lack of undue burden on persons with a duty to file these reports; and (3) appropriate privacy concerns and safeguards."

Guided by this information, the Subcommittee understood that assets claimed as exempt on Form 106C are treated as "assets exempted" for purposes of the trustee's final report, subject to any subsequent amendments or revisions pursuant to a court order. It also reasoned that, in light of the EOUST's "attempt[] to balance the reasonable needs of the public for information with the need not to unduly burden the standing trustees who must file the final reports," adding up and reporting just the specific dollar amounts is acceptable. As a result, the Subcommittee decided that Form 106C should be amended to provide a total of the specified exemption amounts and recommended the amended Form 106C be approved for publication. Spaces are added to provide a total amount of exemptions claimed in a specific amount, as well as a total value of the debtor's interest in property for which exemptions are claimed.

Judge Kahn said that the statutes require the U.S. Trustee to compile information to the extent it is reasonable to do so. This does not require complete precision. That is why he supported the amendments.

The Advisory Committee approved for publication the proposed amendments to Form 106C and will recommend them to the Standing Committee for publication.

7. **Report of the Technology, Privacy, and Public Access Subcommittee**

(A) ***Consider comments on new Rule 7043 and amended Rules 9014 and 9017 regarding remote testimony***

Judge Oetken and Professor Bartell provided the report.

The National Bankruptcy Conference (NBC) submitted proposals to amend Bankruptcy Rules 9014 and 9017 and introduce a new Rule 7043 to facilitate video conference hearings for contested matters in bankruptcy cases. The proposed new rule and amendments were published for public comment in August, 2024.

The Committee received four comments on the proposals. Professor Bartell reviewed them and offered responses.

Comment BK-2024-0002-0004: An anonymous comment posted on Oct. 15, 2024, urged the Advisory Committee to "consider Rule 7043 regarding testimony and the impact it may have on debtors who may be unrepresented or lack appropriate resources. The procedural requirements outlined in this rule may be challenging and result in a disadvantage to someone." However, the

author stated that "[o]verall, these amendments seem to be a necessary step to improving bankruptcy procedures."

Response: New Rule 7043 simply makes Civil Rule 43 applicable in adversary proceedings. Under existing Rule 9017, Civil Rule 43 is applicable in bankruptcy cases generally, including as to contested matters. If the requirements of Civil Rule 43 are "challenging" to unrepresented debtors, the amendments should ameliorate those problems by limiting their applicability. The Subcommittee recommended no change in response to this comment.

Comment BK-2024-0002-0006: Mia Andrade, without specifying which amendments she addressed, stated that she agreed with the proposed amendments "as it is crucial as it ensures that the legal framework remains responsive and effective in addressing contemporary financial challenges. These amendments can enhance the clarity, efficiency, and fairness of bankruptcy proceedings, providing better protection for both debtors and creditors. By updating these rules, the legal system can adapt to evolving economic conditions and technological advances, ultimately fostering a more stable and predictable enforcement for financial recovery and dispute resolution. This proactive approach not only strengthens the integrity of the bankruptcy process but also promotes confidence in the judicial system, which is essential for maintaining public trust and economic stability."

Response: None required.

Comment BK-2024-0002-0009: The National Conference of Bankruptcy Judges had two comments on the proposed rule changes. First, they interpreted the redlined copy of the changes to Rule 9017 to show deletion of Civil Rule 44 and believe such a deletion is inappropriate. Second, they believe that the phrase "motion in a contested matter" in Rule 9014(d)(2) is "potentially redundant and confusing" and suggest using the phrase "motion or contested matter."

Response: As to the first comment, their interpretation of the redlined version of Rule 9017 is erroneous. This was a problem with the typeface, in that Rule 43 and the comma following Rule 44 were marked as deleted, and the deletion marks were closely adjacent to the cross bars on "44" so it looked like Rule 44 was also deleted. That is not the case, and if one increases the font size of the proposed amendment, one can see that the deletion marks did not relate to "44." The Subcommittee recommended no change in response to this comment.

As to the second comment, the suggested language would dramatically change the substance of the proposed amendment. The proposed amendment is intended to apply only in contested matters. Rule 9014 is entitled "Contested Matters." If a motion were made in an adversary proceeding, it would not be governed by the amended rule.

The comment did point out some confusion about whether other aspects of a contested matter – such as an application or a response to a motion – would be governed by the rule. The Subcommittee decided to make three changes in response to the comment to clarify that any testimony in a contested matter would be governed by the rule. First, the Subcommittee decided to change the title of Rule 9014(d)(2) from "Evidence on a Motion" to "Evidence." Second, the

Subcommittee suggested modifying the text of Rule 9014(d)(2) to change the phrase "When a motion in a contested matter" to "When resolution of a contested matter" and changing the phrase "the court may hear the motion" to "the court may hear the matter." (This latter change conforms the language in Rule 9014(d)(2) to the same language in Civil Rule 43(c)). Third, in the first sentence of the third paragraph of the Committee Note, the Subcommittee recommended changing the language from "a motion procedure" to "proceeding."

The Subcommittee did not believe these changes require republication as they merely clarify that any testimony in the contested matter – whether on a motion or not – is subject to the rule. This is in fact the way that Civil Rule 43(c) has been interpreted even though it refers to a "motion," and therefore no change in substance is made by the modifications. The Subcommittee considered whether to retain language that is parallel to Civil Rule 43(c) for the sake of uniformity, but decided that more specificity in the text was advisable.

Comment BK-2024-0002-0011: Adam Hiller commented that the newly-added Rule 9014(d)(2) should replace the word "affidavits" with "affidavits or declarations" because the practice in many jurisdictions is to use unsworn declarations pursuant to 28 U.S. Code § 1746 instead of affidavits."

Response: Although Mr. Hiller may well be accurate with respect to current practice, the language of Rule 9014(d)(2) to which his comment is addressed is identical to that of Civil Rule 43(c) and until and unless Civil Rule 43(c) is modified to amend its reference to "affidavits" to include declarations, Bankruptcy Rule 9014(d)(2) should not do so.

David Hubbert comments: Former Committee member David Hubbert made two comments on the Committee Note to Rule 9014(d) outside of the publication process. In the third paragraph, the second sentence reads "contested matters do not require the procedural formalities used in adversary proceedings, including a complaint, answer, counterclaim, crossclaim, and third-party practice." He noted that there may be some contested matters "where many of the procedural formalities are appropriate and adopted for that matter under Rule 9014(c)." He suggested adding the word "generally" between the words "do not" and "require."

Second, in the final paragraph of the note, the penultimate sentence currently reads "In-person testimony would be particularly appropriate in disputed contested matters where it is necessary for the court to determine the witness's credibility." He suggested that "a witness's credibility is weighed no matter how the testimony is heard in court." He further pointed out that the committee note (1996) to Civil Rule 43 states that the court can reject a stipulation between the parties providing that testimony should be presented by transmission by reason of "the apparent importance of the testimony in the full context of the trial." He therefore suggested replacing the sentence with one reading as follows: "In-person testimony would be appropriate in disputed contested matters where the witness is important or there is conflicting evidence for the court to consider."

Response: The Subcommittee agreed to insert the word "generally" in the second sentence of the third paragraph of the Committee Note. As to Mr. Hubbert's second suggestion, although

it is true that a witness's credibility is weighed even if the witness testifies remotely, judges will certainly agree that they can assess credibility more easily if the witness is physically present when testifying rather than on a screen. The Committee Note is distinguishing between matters in which determination of the witness's credibility is necessary to resolve the dispute, and those in which it is not. The Subcommittee recommended no change in response to this comment.

The Subcommittee recommended that the Advisory Committee give final approval to new Rule 7043 and the proposed amendments to Rules 9014 and 9017 as published with the additional amendments just discussed to Rule 9014 and its Committee Note.

In line 47 of the committee note, Judge McEwen suggested replacing "a proceeding" with "litigation." She expressed concern about using a term that is also used for "adversary proceedings" and said it might cause confusion. Judge Kahn noted that the jurisdictional statute refers to "proceedings" which include contested matters. He thinks "litigation" may be more limited and opposed that change. Judge Harner suggested removing the words "is a proceeding that can" and inserting "can" after "usually" to avoid the issue entirely. The Advisory Committee agreed to that change.

With those changes the Advisory Committee gave final approval to Rule 7043 and the amendments to Rules 9014 and 9017 and recommended them to the Standing Committee for final approval.

8. **Report of the Business Subcommittee**

(A) ***Consider comments on proposed amendments to Rule 3018 (Suggestion 23-BK-F from the NBC and 25-BK-D from the DOJ) authorizing a court to treat as acceptance of a plan a statement on the record by the creditor's attorney or authorized agent***

Judge McEwen and Professor Gibson provided the report.

Last August amendments to Rule 3018(a) and (c) were published for comment. The Advisory Committee proposed them in response to a suggestion from the National Bankruptcy Conference. The proposed amendments to subdivision (c) would authorize a court in a chapter 9 or 11 case to treat as an acceptance of a plan a statement on the record by a creditor's attorney or authorized agent. Conforming amendments were also proposed for Rule 3018(a).

Three sets of comments were submitted regarding the proposed amendments.

BK-2024-0002-0014 – Anonymous. The proposed amendment improperly conflates a plan vote with the filing or withdrawal of an objection. They are not the same.

Professor Gibson said that this comment could be disregarded as it appears to be based on an erroneous reading of the proposed amendments. They address the change or withdrawal of

*re*jections (i.e. votes), not *ob*jections to plans. The Advisory Committee was well aware of the difference.

BK-2024-0002-0003 – Robert Kressel. He supports the amendments but questions why subdivision (c)(1)(B) does not apply to an individual creditor.

Professor Gibson explained that Judge Kressel's comment that subdivision (c)(1)(B) does not apply to individual creditors is apparently based on the provision's reference only to statements by attorneys and authorized agents of creditors. In contrast to (c)(1)(A), it thus seems to exclude statements by individual creditors—real people who can represent themselves. The Subcommittee believes this exclusion was unintended and recommended that subdivision (c)(1)(B)(ii) be reworded as follows to make clear that the creditor or equity security holder could make the statement accepting the plan: "made by the creditor or equity security holder—or its attorney or authorized agent." A conforming change to the second sentence of the committee note was also recommended. It would read, "In addition to allowing acceptance or rejection by written ballot, the rule now authorizes a court to permit a creditor or equity security holder—or its attorney or authorized agent—to accept a plan by means of a statement on the record, including by stipulation or by oral representation at the confirmation hearing."

BK-2024-0002-0010 – National Conference of Bankruptcy Judges. It generally supports the amendments, but suggests some wording changes to make clear that a qualifying statement could be made orally by a creditor or equity security holder (or their attorney) or by a stipulation read into the record or filed. The Subcommittee declined to make any change in response to this comment because it was unnecessary. The suggested wording would spell out in greater detail how such a stipulation might be made, but the Subcommittee concluded that the more succinct wording is preferable. A written stipulation that is filed becomes part of the record; the amendment explicitly covers statements that are a "part of the record."

Suggestion 25-BK-D – U.S. Department of Justice. It has no objection to the text of the proposed amendments, and it endorses the statement in the committee note that "[n]othing in the rule is intended to create an obligation to accept or reject a plan." It writes to underscore the limits of the proposed amendment. The suggestion that gave rise to the amendment—from the National Bankruptcy Conference—was motivated by a concern that government entities often do not vote on plans, even if they do not object to them. It should be understood that the increased flexibility in voting methods provided by the amendment, which the Department supports, cannot add a substantive requirement that creditors must vote on a plan or that courts could compel the United States or federal agencies to do so.

The statement is consistent with the Committee's intent and requires no further action.

The Subcommittee recommended that the Advisory Committee give final approval to the proposed amendments to Rule 3018(a) and (c) with the changes from the published rule and committee note that respond to the suggestion of Judge Kessel. The Advisory Committee provided that approval.

(B) ***Report concerning Suggestions 24-BK-A and 24-BK-C to Allow Masters in Bankruptcy Cases and Proceedings***

Judge McEwen and Professor Gibson provided the report.

Professor Gibson noted that this is a status report on a matter that has come to the Advisory Committee before. Two suggestions to amend Rule 9031 have been submitted to the Advisory Committee, one by Chief Bankruptcy Judge Michael B. Kaplan of the District of New Jersey (24-BK-A) and the other by the American Bar Association (24-BK-C). These suggestions propose amendments that would allow masters to be used in bankruptcy cases and proceedings, a matter that the Advisory Committee has considered several times in the past and declined to propose.

At its spring 2024 meeting, the Advisory Committee discussed the suggestions and agreed with the Subcommittee that they should be considered further. The consensus at that meeting was that the Subcommittee should gather more information before making a recommendation. Specifically, it was agreed that a survey of bankruptcy judges should be undertaken to learn whether the judges thought the rules should allow masters to be used in bankruptcy cases and in what circumstances, if any, they had ever needed such assistance.

Dr. Carly Giffin of the Federal Judicial Center offered the FJC's services in creating and conducting such a survey, and Professor Gibson invited Dr. Giffin to discuss the results of the survey. Dr. Giffin noted that, among other questions, the judges were asked about whether they ever presided over a case or proceeding in which they would have appointed a master if they had been permitted to do so (32% yes, 62% no). They were also asked for what purposes they could see a master being useful to a bankruptcy judge (overseeing discovery 71%, special areas of expertise 57%, fee disputes 47%, claims estimation or valuation 44%), concerns about amending Rule 9031 to allow masters (cost to estate 69%), and overall reaction to the idea of amending Rule 9031 (35% in favor, 21% opposed, 44% neither in favor nor opposed) The respondents provided many thoughtful comments in response to the survey which can be reviewed in the agenda book.

Upon reviewing the survey results, the Subcommittee concluded that there was sufficient interest in allowing masters to be used in bankruptcy cases or proceedings that it should continue to consider the Kaplan and ABA suggestions. It identified as next steps researching whether there is any constitutional or statutory impediment to authorizing bankruptcy judges to appoint masters and considering drafts of possible rule amendments to authorize their use.

Judge Connelly asked how the survey was distributed, and Dr. Giffin said it was distributed online and anonymously and two reminder notices were given. Judge McEwen asked what the next steps would be. Prof. Gibson said that we would want to look at the constitutional issue, which the Rules Clerk is researching. Then if that question is resolved satisfactorily, we would prepare an amended rule for consideration. Judge Connelly said that the responses to the survey were very helpful.

(C) ***Recommendation for technical amendment to Rule 2007.1(b)(3)(B) to address a restyling error***

Judge McEwen and Professor Bartell provided the report.

The restyled version of Rule 2007.1(b)(3)(B) includes a sentence that reads: "The report must be accompanied by a verified statement by each candidate, setting forth the candidate's connections with any entity listed in (A)(i)-(vi)." However, Rule 2007.1(b)(3)(A) lists the entities in six bullet points, not as (i) – (vi). Therefore, a technical correction is needed.

The Subcommittee recommended that the sentence in Rule 2007.1(b)(3)(B) be amended to read "The report must be accompanied by a verified statement by each candidate, setting forth the candidate's connection with any entity listed in (A)." The only change is the deletion of the erroneous references to (i)-(vi).

This amendment does not require publication. The Subcommittee recommended the technical amendment to the Advisory Committee for approval and submission to the Standing Committee for final approval. The Advisory Committee approved the amendment.

9. **Report of the Appellate Rules and Cross Border Subcommittee**

(A) ***Consider Suggestion 24-BK-O from Judge McEwen to incorporate into Rule 7012 pending changes to Civil Rule 12(a)***

Judge Bress and Professor Bartell provided the report.

Judge Catherine Peek McEwen suggested (24-BK-O) that the Advisory Committee consider whether amendments to Bankruptcy Rule 7012 are appropriate in light of the pending amendments to Civil Rule 12(a), which clarify that a federal statute specifying a time for serving a responsive pleading supersedes the response times otherwise set by Civil Rule 12(a)(2) – (4) rather than just Civil Rule 12(a)(1). Civil Rule 12(a) is not applicable in a bankruptcy case.

The concern addressed by the Civil Rule amendment was that there are federal laws – in particular the Freedom of Information Act and the Government in the Sunshine Act – that establish 30-day time limits for responsive pleadings for actions against the United States or its agencies or officers or employees sued in an official capacity, while Civil Rule 12(a)(2) specifies 60 days. The language in Civil Rule 12(a)(1) reading "Unless another time is specified by this rule or a federal statute" previously qualified only the time periods specified in Civil Rule 12(a)(1) and was not applicable to the other subsections of Civil Rule 12(a). Because 28 U.S.C. § 2072(b) states that "[a]ll laws in conflict with such rules [including the Civil Rules] shall be of no further force or effect after such rules have taken effect," the existing structure of Civil Rule 12(a) created the risk of conflicting with the existing federal laws, which was not the intent. There are several civil rules in addition to Civil Rule 12(a) that are qualified by deference to potential conflicting federal statutes.

Unlike the Civil Rules, which are governed by the supersession clause of 28 U.S.C. § 2072(b), the Bankruptcy Rules are authorized by 28 U.S.C. § 2075, which contains no such clause. Therefore, as a matter of federal law, if the Bankruptcy Rules are inconsistent with federal law, federal law prevails. There are no bankruptcy rules that include language qualifying their provisions by reference to conflicting federal statutes or federal law.

Therefore, the insertion of qualifying language such as "unless another time is specified by a federal statute" (or something similar) in Bankruptcy Rule 7012(a) is unnecessary and would be inconsistent with the structure of the bankruptcy rules under 28 U.S.C. § 2075. The Subcommittee recommended no action on the suggestion. The Advisory Committee agreed.

10. **Reporters' memos**

(A) ***Memo concerning Suggestions 24-BK-J, 24-BK-K, 24-BK-L, and 24-BK-M from Sai***

Professor Bartell provided the report.

Sai submitted four suggestions. In the first he suggests that the rules should preclude use of all-caps for party and case names and require that proper diacritics be used. In the second he suggests that the substance of local rules that are universal or near universal should be incorporated into the federal rules. Third, he suggests that to the extent that the various sets of federal rules of procedure have similar provisions, the provisions should be moved to a set of Federal Common Rules that apply across the various sets of federal rules except when individual differences are provided in the separate rules. Fourth, he calls for standardized pages equivalents for words and lines and elimination of monospaced fonts.

These suggestions were addressed to each of the Appellate, Bankruptcy, Criminal and Civil Rules Committees. The Appellate Rules Committee considered the suggestions at its fall meeting and removed them from its agenda. For the reasons provided in the memorandum included in the agenda book, the reporters recommend that the Advisory Committee take no action on these suggestions at this time. If one of the other rules committees decides to pursue them, the Advisory Committee can revisit its decision.

Judge Bates, in response to a question, said that Sai is an individual with many ideas about the rules, some of which have been pursued.

Judge McEwen stated that the Civil Rules Committee has also decided not to take up these suggestions. Judge McEwen said she understands the position on use of all-caps, but agrees with the recommendation not to pursue the suggestions.

The Advisory Committee agreed to take no action on the suggestions.

(B) ***Memo concerning proposed changes to Rule 9037 requiring use of pseudonyms rather than initials for minors in filings and restriction or elimination of the use of redacted SSNs in bankruptcy appeals***

Professor Gibson provided the report.

At the Advisory Committee meeting on September 12, 2024, Tom Byron reported on suggestions that address particular issues relating to the privacy rules, including suggestions regarding redaction of social-security numbers (SSNs) in federal-court filings and a suggestion relating to initials of known minors in court filings (22-BK-D and 24-BK-E). At the same meeting, the Advisory Committee decided to take no action on the suggestion from Senator Wyden (22-BK-I) concerning complete redaction of SSNs in bankruptcy court filings.

Since that time the other rules committees have been considering the same issues. The Criminal Rules Committee is likely to propose amendments to Criminal Rule 49.1 to require full redaction of an individual's SSN, as well as the use of pseudonyms rather than initials for minors' names. The Civil Rules Committee is considering whether to propose similar amendments to Civil Rule 5.2, and the Appellate Rules Committee will likely be receptive to those changes if proposed.

Professor Gibson said that when the agenda materials were prepared, it was thought that there might be an attempt to publish amendments to the privacy rules this summer, which is why this was coming from the reporters. But now that doesn't seem likely, these issues can be referred to the Technology, Privacy, and Public Access Subcommittee if the Advisory Committee agrees.

There were two issues for the Advisory Committee's consideration. First, the Advisory Committee has not yet considered amendments to Bankruptcy Rule 9037(a)(3), which currently requires redaction by using a minor's initials. Second, the decision of the Advisory Committee not to amend Rule 9037(a)(1), which permits bankruptcy filings to include the last four digits of the SSN, creates the issue of whether the last four digits of the SSN can be included in filings in bankruptcy appeals, even if doing so will be prohibited for appeals of civil and criminal cases.

Last year the Department of Justice submitted a suggestion to the Criminal Rules Advisory Committee that Criminal Rule 49.1 be amended to require pseudonyms for minors rather than using initials. The suggestion explained that referring to child victims and child witnesses by their initials—especially in crimes involving the sexual exploitation of a child—may be insufficient to ensure the child's privacy and safety. Because of the current uniformity of the privacy rules, the DOJ suggestion was also referred to the bankruptcy, civil, and appellate rules committees.

The potential harm of disclosing a minor's identity may not be as great in bankruptcy cases as in the criminal context; nevertheless, protection against disclosure is desirable, as current Rule 9037(a)(3) recognizes by requiring initials. While the Advisory Committee identified a need to retain the last four digits of SSNs in certain bankruptcy filings—even if the civil and criminal rules require complete redaction—the reporters could think of no bankruptcy reason to continue to require initials for minors if the other rules committees modify their comparable provisions to require pseudonyms instead.

Second, the decision of the Advisory Committee not to amend Rule 9037(a)(1), which permits bankruptcy filings to include the last four digits of the SSN, creates the issue of whether the last four digits of the SSN can be included in filings in bankruptcy appeals, even if doing so will otherwise be prohibited in district courts and courts of appeal.

Appellate Rule 25(a)(5) incorporates for appeals the privacy rules applicable to the case in the trial court. The Appellate Rules govern bankruptcy appeals in the courts of appeals. Part VIII of the Bankruptcy Rules governs appeals to district courts and BAPs. Although Part VIII does not cross-reference Bankruptcy Rule 9037, as a general provision in Part IX of the rules, Rule 9037 applies to bankruptcy appeals covered by Part VIII.

If the Civil and Criminal Rules are amended to preclude the use of the last four digits of the SSN, there will be a lack of uniformity with Bankruptcy Rule 9037(a)(1), which may cause some confusion regarding bankruptcy appeals. A policy issue is thus presented. In an appeal to the district court from a bankruptcy court, should the same privacy rule that otherwise applies in the district court (for civil and criminal cases) apply—thus requiring further redaction—or should the bankruptcy rule continue to apply? And likewise for appeals to the court of appeals: should the same rule that applies to civil and criminal appeals (complete redaction) apply, or should the bankruptcy rule be applicable? Which would cause less confusion—a unique rule for bankruptcy appeals in the district court and court of appeals, or changing rules for a bankruptcy case as it proceeds through the appellate process?

The Appellate Rules Committee might consider an amendment to Appellate Rule 25(a)(5) that would resolve that issue for the courts of appeal. The proposed revision would require full redaction of SSNs, but would not apply to clerks forwarding the record.

If Appellate Rule 25(a)(5) were to be so amended, the issue becomes whether Part VIII of the Bankruptcy Rules should take the same approach for appeals to district courts and perhaps BAPs. The reporters believe the answer is yes. Any pleading created for filing in the district court could easily comply with the complete redaction requirement. The primary reason underlying the decision of the Advisory Committee to retain the last four digits of the SSN in bankruptcy filings does not have any persuasive power when a matter is on appeal. No one will have any difficulty ascertaining the identity of a party to an appeal, and appellate briefs, appendices, and motions are unlikely to require the inclusion of SSNs. Even if there were truncated SSNs in documents included in the record that must be transmitted to the district court under Bankruptcy Rule 8010, the approach being considered by the Appellate Rules Committee would allow them to remain without the clerk needing to fully redact them before forwarding the record.

If the Advisory Committee agrees to this approach, a new provision could be proposed for Rule 8011 (Filing and Service; Signature) that incorporates Rule 9037 and adds language similar to that being considered for Appellate Rule 25(a)(5).

Judge Connelly asked the status of Appellate Rule 25. Judge Bress said that the Appellate Committee is waiting to see what the Civil and Bankruptcy Committees are going to do.

Professor Struve said that the Appellate Committee decided to delay their recommendation because the Standing Committee might prefer to have all committees go forward at the same time. At the Civil Rules Committee, they are also examining whether individual taxpayer identification numbers should be treated the same as SSNs.

Judge Connelly asked whether the goal was to have amendments ready to go to Standing Committee in January. Professor Struve said that the hope was to proceed in January or June.

Ms. Doling said that she doesn't object to continuing to consider this issue, but is concerned that there are no penalties for violating existing Rule 9037. She said that she might be filing a suggestion to add sanctions. Professor Gibson expressed concern about dealing with Rule 9037 individually rather than all the privacy rules together.

Judge Isicoff again emphasized that in some jurisdictions the court really needs the SSNs to distinguish between debtors with the same name but that once a case is on appeal that concern should not be relevant. Prof. Gibson assured Judge Isicoff that there was no suggestion of revisiting the prior decision of the Advisory Committee to retain the use of SSNs in bankruptcy filings.

The Advisory Committee referred the matter to the Technology, Privacy, and Public Access Subcommittee for further consideration.

11. **New Business**

There was no new business.

12. **Future Meetings**

The fall 2025 meeting will be held on September 25, 2025, in Washington, D.C.

13. **Adjournment**

The meeting was adjourned at 1:46 p.m.

TAB 2D

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

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Robin L. Rosenberg, Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rules

DATE: May 15, 2025

Introduction

The Civil Rules Advisory Committee met in Atlanta on April 1, 2025. 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.

Part I of this report will present four action items (one of which has two parts). During its April 1 meeting, the Advisory Committee voted to recommend publication in August 2025 of amendments to the following rules:

(a) Rule 41(a): The Advisory Committee proposes publication of amendments to Rule 41 to better facilitate voluntary dismissal of one or more claims in a litigation, as opposed to the entire action. This matter was first presented to the Standing Committee at its January 2025 meeting, but

several questions were raised that prompted re-examination of the proposal. As presented below, the Advisory Committee's Rule 41 Subcommittee (chaired by Judge Cathy Bissoon, W.D. Pa.) carefully considered these questions. The Committee retracted its proposal to extend Rule 41(d) to allow an award of costs after dismissal of even a single claim in a prior action.

(b) Rule 45(c) subpoena for remote testimony and clarification amendment to Rule 26(a)(3)(A)(i): The Rule 43/45 Subcommittee, chaired by Judge M. Hannah Lauck (E.D. Va.), met four times between the Advisory Committee's October 2024 meeting and its April 1 meeting. It now proposes publication of an amendment to Rule 45(c), prompted by *In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023). In that case, the Ninth Circuit held that even though the district court had found remote testimony justified under Rule 43 it could not, by subpoena, compel a witness to provide that testimony. The proposed place for the testimony was within 100 miles of the witness's residence but more than 100 miles from the courthouse, which the court said was beyond the "subpoena power" of the district court. The Ninth Circuit recognized that a rule change could alter this outcome, and the proposed amendment is designed to do that.

In addition, the Advisory Committee recommends publishing a proposed amendment to Rule 26(a)(3)(A)(i) clarifying that each party's pretrial disclosures must specify whether any of the witnesses the party expects to present will provide remote testimony. [Further Subcommittee work on remote testimony in general is described in the Information Items section below.]

(c) Rule 45(b)(1) service of subpoena: The Advisory Committee proposes publication of an amendment to specify methods of service of a subpoena that suffice under the rule, and also to authorize the court in a given case to approve alternative methods. The authorized methods draw in part from Rule 4(e)(2)(A) and (B) for service of original process -- personal delivery to the individual or leaving the subpoena at the person's dwelling place -- with the addition of service by U.S. mail or commercial carrier if a confirmation of delivery is provided. The amendment also authorizes the court to approve another means of service for good cause. The proposed amendment includes two other changes: (1) relaxing the current requirement that witness fees be tendered at the time of service, and (2) providing a 14-day notice period (subject to shortening by the court for good cause) when the subpoena requires attendance at a trial, hearing, or deposition.

(d) Rule 7.1: Responding to concerns that the current disclosure requirements do not adequately alert judges to possible grounds for recusal, the Advisory Committee recommends publication of an amendment intended to provide judges with additional needed information. Two main changes are proposed. One substitutes the term "business organization" for the word "corporation" in the current rule. This change reflects the reality that business entities often have non-corporate forms. The other is to require disclosure of any business organization that directly or indirectly owns 10% or more of the party. These changes are intended to reflect Advisory Opinion No. 57 from the Judicial Conference Committee on the Codes of Conduct.

Part II of this report provides brief descriptions of various ongoing projects of the Advisory Committee. Additional details on these topics can be found in the agenda book for the Advisory Committee's April meeting, which can be accessed via the link below:

https://www.uscourts.gov/forms-rules/records-rules-committees/agenda-books/advisory-committee-civil-rules-april-2025

(a) Filing under seal: The Discovery Subcommittee continues to study possible changes to clarify the circumstances that justify filing under seal, and possible national procedures for handling motions to file under seal.

(b) Remote testimony: The Rule 43/45 Subcommittee continues to consider whether to relax the current requirements to support remote testimony in Rule 43(a), focusing in particular on the "compelling circumstances" requirement in the current rule. It hopes to benefit from a full-day conference on the subject later this year.

(c) Third-party litigation funding: For 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 several bills have been introduced in Congress as well. At its October 2024 meeting the Advisory Committee appointed a TPLF Subcommittee chaired by Judge R. David Proctor (N.D. Ala.). That subcommittee has been gathering material and has also sent representatives to bar gatherings addressing the subject.

(d) Cross-border Discovery: The Cross-border Discovery Subcommittee, chaired by Judge Manish Shah (N.D. Ill.), continues its outreach to gain information about problems generated by such discovery and whether a rule change would be a desirable response. It is unclear whether rule changes will be proposed.

(e) Rule 55 default and default judgment rule: Rule 55(a) and Rule 55(b)(1) say that the clerk "must" enter a party's default for failure to plead, and that the clerk also "must" enter a default judgment when the action is for a "sum certain or a sum that can be made certain by computation," including costs of suit. An extensive FJC study showed that entry of default judgments by clerks is not done in most districts, and that in some districts clerks refer applications for entry of default to the court. Consideration has focused on providing by rule that the clerk may refer the matter to the court instead of entering a default or default judgment, and it may be that there will be a recommendation to abrogate Rule 55(b)(1) to provide that entry of default judgment must be done by the court.

(f) Random case assignment: This matter remains under active review, including monitoring adoption of the guidance issued by the Judicial Conference in March 2024 regarding district-wide random assignment of some actions.

I. ACTION ITEMS

(a) Rule 41(a)

The Advisory Committee proposes two amendments to Rule 41(a). The first adds additional flexibility for litigants by explicitly permitting the dismissal of one or more claims in an action, rather than only the entire action, as the text of the current rule suggests. Many courts already allow such flexibility without presenting problems, and permitting dismissal of claims is consistent with the policy reflected throughout the rules of narrowing the issues in a case pretrial. The second is requiring only the signatures of parties that are actively litigating in a case on a stipulation of dismissal. The Advisory Committee concluded that requiring signatures of parties who have departed from the litigation creates opportunities for such parties to stymie settlements if they cannot be found or oppose the stipulation.

Proposed amendments to Rule 41 were presented to the Standing Committee at its January 2025 meeting. Although the Standing Committee was aligned with the Advisory Committee with respect to the goals of the amendments, there were several areas of concern that the Standing Committee thought would benefit from a second look. After extensive deliberation the Rule 41 Subcommittee proposed several changes in response to this helpful feedback that the Advisory Committee adopted.

First, the Advisory Committee abandoned its earlier proposal to amend Rule 41(d), which provides that the judge may award costs to the defendant "[i]f a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant." Previously, the Advisory Committee approved an amendment to this provision that would have permitted the judge to award costs when the plaintiff had previously dismissed and refiled "one or more claims," as opposed to the entire action. Concerns were raised, however, that such an amendment would leave open the possibility that a judge would disproportionately award costs of an entire previous action, when the plaintiff had dismissed only a part of it. Upon reflection, the Subcommittee and Advisory Committee agreed that the amendment was unnecessary. The existing rule is typically deployed when a plaintiff has in fact dismissed an entire previous action, usually when the plaintiff is in search of a more favorable forum or judge. It is in those circumstances that an award of costs is most appropriate. As a result, the Advisory Committee concluded that Rule 41(d) should remain unchanged.

Second, the Advisory Committee made several minor changes to Rule 41(a) and the Committee Note to clarify that the deadline for unilateral dismissal of a claim is filing of an answer or motion for summary judgment by the party opposing the claim.

Third, the Advisory Committee reexamined the text of the proposed amendment to Rule 41(a)(1)(A)(ii) that would require that a stipulation of dismissal be signed by "all parties who have appeared and remain in the action." The subcommittee's goal in proposing this amendment is to ensure that a party who has departed the litigation (either by voluntarily dismissing all of its claims

or having all claims against it voluntarily dismissed) cannot obstruct a stipulation of dismissal if it cannot be easily found or if it refuses to sign the stipulation. A concern was raised at the Standing Committee meeting about the interaction between this proposed amendment and Rule 54(b), which provides that (absent a partial final judgment) all parties "remain" in the action until final judgment. So, if parties no longer actively litigating in the case are not required to sign a stipulation of dismissal those parties may not receive notice that their window to appeal has opened.

Ultimately, after much discussion, the subcommittee decided to retain the proposed language "remain in the action," and the Advisory Committee agreed that the proposed language was sufficiently clear (particularly when compared to alternatives that sought greater precision but were quite clunky). Additions to the committee note have been made to clarify the amendment's purpose. Moreover, there are numerous instances in the rules that apply to parties actively litigating and not to those who are no longer in the case. One example is Rule 33, which permits service of interrogatories on "a party." It seems unlikely that anyone would interpret that rule to permit service of interrogatories on a party that is no longer prosecuting or defending against a live claim, Rule 54(b) notwithstanding. With respect to concerns that a party might not receive adequate notice, the Advisory Committee was satisfied that current safeguards make that unlikely, including the practice that such a party will continue to receive notice of docket entries through CM/ECF, although typically denominated as "terminated" from the action. In sum, the Advisory Committee concluded that the benefits of the amendment outweigh any risks, though it is of course open to reconsideration if the public comment period suggests otherwise.

Rule 41(a) Amendment Proposal

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 action **or one or more 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 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.

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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 claims" in a multi-claim case. A plaintiff may accomplish dismissal of either an action or one or more 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.

(b) Rules 45(c) and 26(a)(3)(A)(i)

The Rule 43/45 Subcommittee has been very busy. It held four meetings after the Advisory Committee's October meeting to finalize its proposal to amend Rule 45(c) to remove the difficulty presented by the decision in *In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023). That case held that, despite the 2013 revision of Rule 45 authorizing the court presiding over an action to issue a subpoena for testimony that can be served anywhere in the United States, for trial testimony that

authority extends only within the "subpoena power" of the court and does not permit the court to command a distant witness to provide remote trial testimony.

There have been disagreements among district courts about whether they have such power as to distant trial witnesses. The *Kirkland* decision seems to be the first court of appeals decision finding that the district court lacked such authority. The court reached this result even though the Committee Note accompanying the 2013 amendment to Rule 45 clearly said that such authority existed. The Ninth Circuit recognized, however, that a rule amendment could solve the problem.

The *Kirkland* decision is on the books and seems to be having some unfortunate ripple effects, even in cases involving only discovery rather than trial testimony. So the Subcommittee is bringing this amendment proposal forward now even though it has another (and possibly more important) topic on its agenda -- whether to relax the criteria for remote trial testimony under Rule 43(a).

In addition, the Advisory Committee is proposing a slight clarification for Rule 26(a)(3)(A)(i).

Rule 45(c) amendment proposal

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:

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

(ii) is commanded to attend a trial or hearing 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.

(3~~2~~) ***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.

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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 testimony. Instead, it applies to any subpoena for witness testimony. Ordinarily, court approval is required for remote testimony in court. Rule 43, for example, authorizes remote 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).

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.[1]

Rule 26(a) amendment proposal

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 Rules 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 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 the rule presently requires disclosure of witnesses a party "expects to present," it should be understood to include witnesses who will testify remotely. This amendment clarifies that the disclosure requirement

[1] During the Standing Committee's January 2025 meeting, a question was raised about possible implications of changes to Rule 45(c) for the "unavailability" criterion for admissibility of deposition transcripts at trial under Rule 32(a)(4) or of prior testimony under Fed. R. Evid. 804(a). These questions received substantial attention before the Advisory Committee subcommittee. After lengthy discussion it was concluded that clarifying the subpoena power would not produce a change in the application of those other rules, which deal with hearsay objections. Some efforts were made to draft Committee Note language to affirm that there was no intention to alter the application of those rules. After lengthy discussion, however, it was concluded that including that language might cause complications rather than avoid them.

applies whether or not the witness is testifying in person or remotely and alerts the parties and the court that a party expects to present one or more witnesses remotely.

(c) Rule 45(b)(1)

This proposed amendment responds to a problem that has been brought up repeatedly in submissions to the Committee over the last two decades or so -- the ambiguity of the requirement in Rule 45(b)(1) of "serving" the witness with the subpoena and also (at the time of service) tendering the witness fee to the witness. For the majority of subpoenas, service is not problematical. But problems have emerged with sufficient frequency to justify a rule change.

The Advisory Committee proposed the amendment presented below to achieve three basic objectives:

(1) Borrowing from Rule 4(e)(2)(A) and (B) some well-recognized methods of service -- personal delivery or leaving at the abode of the person with a person "of suitable age and discretion who resides there," and adding service by mail or commercial carrier if that includes confirmation of receipt, as has been found sufficient in some courts. The proposed amendment also empowers the district to authorize additional methods for good cause;

(2) Adding a notice period -- 14 days in the draft -- unless the court authorizes a shorter period; and

(3) Providing that the tender of witness fees is not required to effect service of the subpoena, so long as the statutory fees are tendered upon service or at the time the witness appears as commanded by the subpoena.

This amendment proposal is designed to address practical problems that have sometimes resulted from the ambiguity of Rule 45(b)(1)'s current use of the term "delivering a copy to the named person" without being more specific about how that is to be done.

There has been at least one recent reported decision in which multiple attempts at service were deemed ineffective because the witness fee had not also been tendered. And in another recent case, the server did not initially deliver the witness fee check because it had the server's information on it and the server worried for his personal safety if that were revealed to the witness.

Rule 45. Subpoena

* * * * *

(b) Service.

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

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

(i) delivering it to the individual personally;

(ii) leaving a copy at the person's dwelling or usual place of abode with someone of 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 authorized by the court for good cause that 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 requiring the person to attend 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 what is meant by "delivering" the 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 "delivery" 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. 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.

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.

(d) Rule 7.1

The Advisory Committee recommends publishing for public comment amendments to Rule 7.1(a) requiring disclosure by a corporate party of parents and business organizations that directly or indirectly own 10% or more of it. The goal of the amendment is to mandate disclosure of corporate "grandparents" or "great grandparents" in which a judge may hold a financial interest that requires recusal. This report elaborates on the reasons for these changes below after presenting the proposed rule amendment and Committee Note.

Rule 7.1(a) Amendment Proposal

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

(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.

* * * * *

ADVISORY COMMITTEE REASONS FOR PROPOSED RULE CHANGES

Currently, Rule 7.1(a) requires that a nongovernmental corporate party disclose "any parent corporation and any publicly held corporation owning 10% or more of its stock." The Rule 7.1 Subcommittee, created in spring 2023 and chaired by Justice Jane Bland (Supreme Court of Texas), was formed to consider rule changes to better inform judges of any financial interest "in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding." 28 U.S.C. § 455(b)(4).

More specifically, this project was sparked by concerns that judges are not sufficiently informed in situations in which they might hold an interest in a business organization that is a "grandparent" or "great-grandparent" of a party. For instance, a judge might hold an interest in a "grandparent" corporation that wholly owns a subsidiary that, in turn, owns a party. Under such circumstances, that judge likely has a financial interest requiring her to recuse. But because the rule requires disclosure of only a "parent corporation and any publicly held corporation owning 10% of more of [a corporate party's] stock," the judge will remain in the dark.

Although there do not appear to be serious concerns that judges have acted in a biased manner due to this lack of information, it is also the case that whenever a judge presides over a case in which she has an arguable financial interest in the outcome there is a threat to perceptions of the court's legitimacy and impartiality. As a result, over the last two years, the Subcommittee has considered several possible revisions to the rule that would make it more likely that "grandparents" and other entities up the corporate chain of ownership of a party, in which a judge is reasonably likely to hold an interest, will be disclosed without imposing unnecessarily onerous requirements on litigants.

Notably, the committee note to Fed. R. App. P. 26.1, whose relevant language is identical to Rule 7.1, has since 1998 provided that:

> Disclosure of a party's parent corporation is necessary because a judgment against a subsidiary can negatively impact the parent. A judge who owns stock in the parent corporation, therefore, has an interest in litigation involving the subsidiary. **The**

> **rule requires disclosure of all of a party's parent corporations meaning grandparent and great grandparent corporations as well.** For example, if a party is a closely held corporation, the majority shareholder of which is a corporation formed by a publicly traded corporation for the purpose of acquiring and holding the shares of the party, the publicly traded grandparent corporation should be disclosed. (Emphasis added.)[2]

This requirement does not appear to have spawned litigation, confusion, or controversy. Despite using the same language, though, Rule 7.1 has by and large been interpreted to require disclosure of only "parents," and not grandparents or other corporate relatives.

In the early days of this project, the Rules Law Clerk and Reporters canvassed a wide swath of disclosure requirements, including districts' local rules and various state rules, to develop an array of options. Among state and local rules, the two dominant approaches were to either use a broad catch-all term (such as to require disclosure of all "affiliates" of a party) or a lengthy "laundry list" of various specific business relationships. Subcommittee deliberation and outreach revealed that both approaches had problems. Broad catch-all provisions requiring disclosure of "affiliates" (or some such term) sweep in a wave of entities that the judge is unlikely to hold and often lead to vast disclosures in which any pertinent information might be buried. On the other hand, the "laundry list" approach seemed to encounter the ever-present danger of lists, that they are overinclusive and underinclusive and require constant maintenance to account for the constantly evolving variety of business relationships. Recognizing that no rule can uncover all instances when recusal might be required by the statute's demand that a judge disqualify on the basis of any interest "however small," 28 U.S.C. § 455(d)(4), our effort has been focused on threading the needle between a rule that is too capacious and one that is too specific. So, after much study, the Subcommittee returned to where it began: an effort to ensure disclosure of corporate "grandparents" and such, as Fed. R. App. P. 26.1 does now, albeit in the note.

In the midst of the Subcommittee's work, in February 2024, the Codes of Conduct Committee issued new guidance to judges: Committee on Codes of Conduct Advisory Opinion No. 57: Disqualification Based on a Parent-Subsidiary Relationship. This guidance directs a judge to focus on whether a parent corporation that does not wholly own a party "has control of a party." The guidance does not define "control" but instead "advises that the 10% disclosure requirement in the Federal Rules (e.g., Fed. R. App. P. 26.1, Fed. R. Civ. P. 7.1, Fed. R. Bankr. P. 7007.1, and Fed. R. Bankr. P. 8012) creates a threshold rebuttable presumption of control for recusal purposes." Should a party disclose an owner of 10% of more of a party, the guidance advises that "a judge

[2] This language was added to the note in response to a public comment that disclosure of only a "parent" was too narrow. Review of the minutes and agenda books of the Appellate Rules Committee and the Standing Committee reveal no opposition, or even discussion, of this addition to the note. The amended rule was subsequently approved by the various bodies up the chain of command and went into effect in December 1998.

may exercise his or her discretion to seek information from the parties or their attorneys; a judge may also review publicly available sources, such as Securities and Exchange Commission filings."

In light of this guidance, the Subcommittee also considered amending Rule 7.1 to require corporate parties to disclose any entity that has control over it. This move would, however, beg the question (as does the Codes of Conduct Committee guidance) as to what constitutes "control." The guidance does not attempt such a definition; instead, it refers to 10% ownership figure in the various Federal Rules as a proxy for control.

Based on the Codes of Conduct Committee guidance, the Subcommittee concluded that a rule that continues to mandate disclosure of *ownership* of a party is the most promising avenue toward disclosure of grandparents, et al. The goal is to better equip judges to comply with the Codes of Conduct guidance, and therefore their statutory and ethical obligations. This is, and always has been, a tricky exercise. Although the appellate rule has not caused controversy, a rule cannot be amended by amending only the committee note, so the challenge has been to draft rule language that will best meet our goals without being over or underinclusive.

As a result, the Advisory Committee has settled on two proposed changes to the rule, as reflected in the above proposal:

(1) Replace references to "a corporate party" with the broader term "business organizations."

(2) Require disclosure of "a parent business organization" and "any publicly held business organization that directly or indirectly owns 10% or more of" a party.

The Subcommittee's rationale for each of these changes follows.

Business Organizations

The Advisory Committee was concerned that references to "corporations" in the rule is too narrow since there are many business organizations other than corporations whose disclosure would assist judges in complying with their recusal obligations. For instance, "LLCs" or "Master Partnerships" are not necessarily defined as corporations under some state laws. Having concluded that the term corporation now feels too narrow, the next question becomes what to replace it with. The Subcommittee considered several possibilities, but "business organizations" quickly emerged as the most common and generally understood term. For instance, the National Conference of Commissioners on Uniform State Laws and the American Bar Association have long authored the "Uniform Business Organizations Code." Texas also has a "Business Organizations Code." Additionally, while some schools have stuck with the traditional name "Corporations," most leading law schools' introductory corporate law courses are now called "Business Organizations" or "Business Associations."

Direct or Indirect Ownership

As explained above, and as the draft Committee Note reflects, the primary goal was to better inform judges of the possibility that the value of interests they hold in "grandparents" and others up the chain of ownership from parties might be affected by the outcome of cases before them. Although this requirement does not seem controversial, as evidenced by the lack of controversy that has emerged from 27 years of experience with the appellate rule's committee note, drafting rule language to capture this goal has proven challenging. But once the Subcommittee settled on a lodestar of consistency with the Codes of Conduct Committee's guidance, its focus turned to ensuring disclosure of owners of 10% or more of a party.[3] Candidly, absolute precision has proven elusive, so the Subcommittee eventually converged on rule language that reflects the intent of the amendment and will hopefully prompt parties to reveal owners and part owners in which judges are likely to hold investments and whose value may be affected by the outcome of the litigation.

First, the Advisory Committee decided to retain the requirement that a "parent business organization" be disclosed. "Parent" is to some degree an elusive term that might be defined in numerous ways. Nevertheless, it has been part of the various federal disclosure rules since their inception, and it does not seem to have caused significant problems. The Advisory Committee considered eliminating the requirement of disclosing a parent altogether (that is, requiring only disclosure of publicly held direct or indirect owners of 10% or more) but concluded that there was no good reason to eliminate it, and that there may very well be occasions when a judge holds an interest in a privately held entity that is a parent of a party, but the judge is unaware.

Second, the Advisory Committee opted for language requiring disclosure of direct or indirect owners of 10% or more of a party. As the Committee Note explains, this is a pragmatic concept intended to prompt disclosure of grandparents or others who may own a significant share of a party via ownership of another intermediate entity. Such disclosure would trigger the suggestion in the Codes of Conduct Committee advisory opinion that a judge investigate further whether recusal is necessary. As was the case when the words "parent corporation" were discussed in the 1990s, there is a certain inherent imprecision to the language, but parties have long been trusted to meet their disclosure obligations faithfully and practically based on the purpose of those obligations. The Subcommittee labored over whether to prescribe a mathematical formula for indirect ownership or to lay out a series of examples of indirect ownership (or lack thereof) in the note, but ultimately opted against either option, in favor of a more general standard informed by a purpose defined in the committee note.

Of course, rulemakers should always be wary of imposing vague requirements on litigants. At the same time, however, this is not a rule that governs how parties conduct litigation or interact with one another. Nor is it a rule that is related to the law, facts, and merits of a case. Rather, it is

[3] As reflected in the draft amendment, the proposed rule abandons the term "stock" to define ownership, since ownership interests may have many different labels.

a rule that attempts to help judges comply with a mandate that itself is rather vague. To borrow from mathematics, the Rule's relationship to the recusal standard is something like an asymptote -- a line that a curve approaches but never touches. After several years of deliberation and study, the Advisory Committee is eager to hear the reactions of those potentially affected by the rule in the public-comment period. If in fact, what is proposed is too vague or onerous compared to the potential benefits, we will surely learn that then.

II. Information items

The Advisory Committee also has many ongoing projects, often under the guidance of one of its subcommittees. This summary description can be augmented by reference to the agenda book for the Advisory Committee's April meeting via the link provided earlier in this report.

(a) Filing under seal

In addition to the Rule 45(b)(1) amendment dealing with service of subpoenas, the Discovery Subcommittee has also been evaluating proposals to amend the rules to implement procedural guardrails around sealing decisions. Some of these proposals are rather elaborate. Other submissions demonstrate that different districts have an array of local practices affecting decisions whether to permit filing under seal.

Specifying the standard for filing under seal in the rules

One thing has remained a relative constant during these deliberations, that the standard for granting a protective order under Rule 26(c) is not as demanding as the standard for sealing materials filed in the court's record. *See, e.g.*, *June Medical Services, L.L.C. v. Phillips*, 22 F.4th 512, 521 (5th Cir. 2022) ("Different legal standards govern protective orders and sealing orders.").

Nevertheless, that difference is not specified in the current rules. Some time ago, the Discovery Subcommittee drafted a rule amendment designed to bring home that point:

Rule 26. Duty to Disclose; General Provisions Governing Discovery

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(c) Protective Orders.

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(4) ***Filing Under Seal.*** Filings may be made under seal only under Rule 5(d)(5).

The Committee Note could recognize that protective orders -- whether entered on stipulation or after full litigation on a motion for a protective order -- ought not also authorize

filing of "confidential" materials under seal. Instead, the decision whether to authorize such filing under seal should be handled by a motion under new Rule 5(d)(5).

Rule 5. Serving and Filing Pleadings and Other Papers

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(d) Filing.

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(5) ***Filing Under Seal.*** Unless filing under seal is directed [or permitted] {authorized} by a federal statute or by these rules, no paper [or other material] may be filed under seal unless [the court determines that] filing under seal is justified and consistent with the common law and First Amendment rights of public access to court filings.[4]

This provision could be accompanied by a Committee Note explaining that the rule does not take a position on what exact locution must be used to justify filing under seal, or whether it applies to all pretrial motions. For example, some courts regard "non-merits" or "discovery" motions as not implicating rights of public access comparable to those involved with "merits" motions. Trying to draw such a line in a rule would likely prove difficult, and might alter the rules in some circuits.

One starting point is that since 2000 Rule 5(d)(1)(A) has directed that discovery materials not be filed until "used in the proceeding or the court orders filing." Exchanges through discovery subject to a protective order therefore do not directly implicate filing under seal.

Another starting point here is that there are federal statutes and rules that call for sealing. The False Claims Act is a prominent example of such a statute. Within the rules, there are also provisions that call for submission of materials to the court without guaranteeing public access. Rule 26(b)(5)(B) obligates a party that has received materials through discovery and then been notified that the producing party inadvertently produced privileged materials to return or sequester the materials, but also says the receiving party may "promptly present the information to court under seal for a determination of the [privilege] claim." Rule 5.2(d) also authorizes court orders for filing under seal to protect privacy. Rule 5.2(h) provides that if a person entitled to protection regarding personal information under Rule 5.2(a) does not file under seal, the protection is waived. Other rule provisions mentioning filing under seal include:

[4] The bracketed addition "or permitted" was suggested during the Advisory Committee's October 2023 meeting, to reflect the possibility that federal law might permit such filing without directing that it occur. It might be better to say "authorized," so that possibility is also included in the above sketch.

Rule 5.2(f) -- Option to file unredacted filing under seal, which the court must retain as part of the record.

Rule 26(c)(1)(F) -- protective order "requiring that a deposition be sealed and opened only on court order" [possibly redundant now that discovery materials are filed only when "used in the proceeding"]

Rule 45(e)(2)(B) -- subpoena provision parallel to Rule 26(b)(5)(B)

Rule G(3)(c)(ii)(B) -- complaint in forfeiture action filed under seal

Rule G(5)(a)(ii)(C)(1) -- 60-day deadline for filing claim in forfeiture proceeding "not counting any time when the complaint was under seal"

There is a lingering issue about what constitutes "filing." Rule 5(d)(1)(A) says that "[a]ny paper after the complaint that is required to be served must be filed no later than a reasonable time after service." One would think that an application to the court for a ruling on privilege under Rule 26(b)(5)(B) should be served on the party (or nonparty) that asserted the privilege claim. Having given the notice required by the rule, the party claiming privilege protection should often be aware of the contents of the allegedly privileged materials, so service of the motion (including the sealed information) would not be inconsistent with the privilege. And it is conceivable that should the court conclude the materials are indeed privileged its decision could be reviewed on appeal, presumably meaning that the sealed materials themselves should somehow be included in the record. Perhaps they would be regarded as "lodged" rather than filed.

As noted already, Rule 5.2(d) also has provisions on filing under seal to implement privacy protections per court order. In somewhat the same vein, Rule 5.2(c) limits access to electronic files in Social Security appeals and immigration cases.

Rule 79 also may bear on these issues. Rule 79(d) directs the clerk to keep "records required by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference."

Finally, it is worth noting that it appears there are different degrees of sealing. Beyond ordinary sealing, there may be more aggressive sealing for information that is "highly confidential," or some similar designation. And national security concerns may in exceptional circumstances call for even stricter confidentiality protections. It is not clear that a Civil Rule adopting these distinctions is necessary or appropriate.

Specifying procedures for deciding whether to permit filing under seal

Various submissions emphasize that there is a considerable variety of approaches to the handling of this question among different districts. Almost any set of national procedures would likely add required steps to the methods employed by some districts. At the same time, there might be arguments that some procedures in a national rule could displace procedures already in place in certain districts.

From the perspective of the practicing bar, this variety can produce headaches. In addition, as filing deadlines approach on motions and other matters, the question whether the materials a party wants to file can be filed under seal may loom large. Yet at least one proposal was that there be a mandatory seven-day waiting period after a motion to seal is filed before the court can rule on it.

As noted below, an ongoing concern is whether trying to develop and implement nationally-binding procedures for sealing decisions is worth the effort. Moreover, it may be that the dockets of some districts may be quite different from the dockets of other districts in terms of the confidentiality of materials that might be filed.

Against this background, at its April meeting the Advisory Committee discussed a variety of specifics that might be included among such national procedures. More detail on these items is provided at pp. 242-46 of the agenda book for the Advisory Committee's April meeting. Here is a summary:

(1) Can the motion to seal itself be filed under seal?

(2) If filing under seal is authorized by the court, must the filing party also file a redacted version of the material in the court's open docket?

(3) Must the party seeking leave to file under seal notify any person who claims a confidentiality interest in the materials (perhaps a nonparty whose materials were obtained by subpoena) of the application?

(4) If the motion to seal is denied, what happens then? There are at least two alternatives -- the moving party may seek to remove the materials (though it's not clear this is possible in the era of CM/ECF), or the seal is removed from the filed materials.

(5) Must the motion to seal specify a date when the seal will be lifted?

(6) Should the sealing rule guarantee any "interested person" or "member of the public" the right to move to unseal? These issues are ordinarily handled under Rule 24 on intervention, so it is not clear that a special rule is needed for the sealing situation.

(7) If the motion to seal does not specify a date on which the seal will be lifted, should the rule provide that the seal be removed upon "final termination" of the action? At least in cases in which there is an appeal, it may be a challenge for the clerk's office to determine when final termination occurs.

* * * * *

There has been at least one submission opposing adoption of any rule amendments. See 21-CV-G, from the Lawyers for Civil Justice, arguing that the various amendment proposals would unduly limit judges' discretion regarding confidential information, conflict with statutory privacy standards, and stoke unprecedented satellite litigation.

At the Advisory Committee meeting, the Discovery Subcommittee presented three questions:

(1) Should the Subcommittee try to develop nationally uniform procedures for handling motions to seal?

(2) If so, how should it go about gathering information to inform a decision about which procedures to adopt? As introduced below, the various proposals we have received cannot all be adopted as some conflict with others.

(3) If the national rules do not prescribe procedures for motions to seal, is there a value nonetheless to amending the rules to specify that the standard for sealing court files differs from the standard for protective orders?

The Subcommittee will return to these questions. Views of Standing Committee members would be very helpful to the Subcommittee.

(b) Remote testimony

Until 1996, Rule 43(a) required that all witness testimony at trials occur in open court -- only in-person testimony was accepted. In that year, the rule was amended by the addition of the following sentence:

For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

The Committee Note accompanying this addition to Rule 43(a) emphasized the continuing commitment to the value of live, in-person witness testimony at trials and suggested that the most likely justification for court permission for remote trial testimony would be an unforeseen inability

of a witness previously expected to appear at trial to attend the trial. As of 1996, that meant that, as to any witness outside the court's subpoena power, there would not be such a justification.

But developments since 1996 have produced significant changes. For one thing, the 2013 amendments to Rule 45 meant that the court's subpoena power is no longer limited to one part of the country; though the court cannot require a distant witness to show up in the courtroom, it can issue a subpoena requiring the witness to appear somewhere else. The action item regarding Rule 45(c) presented earlier in this agenda report confirms -- as the Committee Note to the Rule 45 amendment said in 2013 -- that a subpoena could be used to compel remote trial testimony just as it could be used to compel remote deposition testimony.

Technological change since 1996 has changed the landscape on remote testimony, a point made during the Standing Committee's January 2025 meeting. In 1996, the remote testimony possibility was largely focused on use of the telephone. Today Zoom, Teams, and other services enable something much more like live in-person testimony.

The pandemic experience brought home how effectively these technological breakthroughs can enable participation in court proceedings from remote participants. A number of state court systems -- notably those of Michigan and Texas -- have made great use of these technologies for efficient court proceedings.

These developments have also called attention to the somewhat odd disjunction between Rule 43(a) and Rule 43(c), which provides:

> 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.

Though there is no explicit authorization for remote testimony, this provision does not seemingly require that the witness be present in court to provide the "oral testimony." Certainly the witnesses who testified in depositions need not be in court. But it does not appear that Rule 43(c) was considered when Rule 43(a) was amended in 1996.

Though one might say that there is a major difference between a "trial" and a hearing on a motion, in at least some instances that difference might seem less compelling. One example is a motion for a preliminary injunction under Rule 65(a). If credibility determinations are a reason for insisting on live in-person testimony, it would seem that they may often matter in preliminary-injunction hearings. Moreover, under Rule 65(a)(2) even after the hearing has begun the court "may advance the trial on the merits and consolidate it with the hearing" on the motion, seemingly dissolving the dividing line between a "trial" and a "motion" altogether.

Last August, the Bankruptcy Rules Committee published a proposed rule amendment that would remove the "compelling circumstances" requirement for remote testimony in relation to "contested matters," but not for adversary proceedings. In terms of complexity and duration, it

may be that the dividing line between "contested matters" and trials of adversary proceedings is -- like the difference between a trial under Rule 43(a) and a motion under Rule 43(c) -- not so clear as might be expected.

At the same time, the Advisory Committee remains convinced that live in-person testimony remains the "gold standard" for trials. That said, the Rule 43/45 Subcommittee has begun to consider removing the "compelling circumstances" requirement from Rule 43(a) along the following lines:

Rule 43. Taking Testimony

(a) In Open Court. 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~~.

This possible revision substitutes "contemporaneous remote testimony" for "testimony ... by contemporaneous transmission from a different location." The premise is that the shorter phrase has become commonplace since the rule was amended in 1996. It also is used in the proposed Rule 45(c) amendment in the Action Items section of this report.

This would be a small change in the rule -- only deleting three words -- but might well signal a significant shift in the attitude toward such remote trial testimony. A Committee Note could stress a number of themes in explaining how this small change should be applied under the amended rule. Whether such a small change in the rule would support an extensive Committee Note might be an issue.

The following is not by any means a draft Committee Note, but it does discuss things that a Note could address. At least some of them may be controversial, and this presentation does not presume to determine how those controversies would be resolved. The Advisory Committee invites Standing Committee reaction to the utility of these considerations that might be included in a Committee Note.

The Note could begin by stressing that the amendment does not retreat from the view that in-person testimony is critical, and may be supplanted by remote testimony only when a careful examination of pertinent factors shows that in the given circumstance that strong preference for in-person testimony at trial should be relaxed. Nothing in the rule requires a judge to permit remote trial testimony, and the assumption of the amendment is that courts will approach requests for remote trial testimony with caution and skepticism.

Against that background, a Note could identify a non-exclusive series of factors that a court could weigh in deciding whether to authorize remote trial testimony. The Note's theme might be

that the good cause standard has real teeth in this context, given the universally-recognized importance of face-to-face evaluation of credibility, and that judges should therefore carefully consider all the pertinent factors before authorizing remote testimony.

Party agreement: The 1996 Note provides a pretty good description of the role of party agreement:

> Good cause and compelling circumstances may be established with relative ease if all parties agree that testimony should be presented by transmission. The court is not bound by a stipulation, however, and can insist on live testimony. Rejection of the parties' agreement will be influenced, among other factors, by the apparent importance of the testimony in the full context of the trial.

That approach seems equally relevant under a stand-alone good cause standard. And granting permission for remote testimony may be particularly important when both sides want to present some witnesses by remote testimony. But the decision is ultimately for the court, not the parties.

Importance of having this witness testify: The fact a witness can offer admissible testimony hardly proves that it is important to have that particular witness at trial. Indeed, under Fed. R. Evid. 403, the court may exclude "cumulative" witnesses who have relevant evidence.

At the same time, there may be situations in which only one witness has personal knowledge of critical matters, such as what was said during a given conversation, or what happened at a specific location that is important to the dispute.

In between, there are myriad gradations. At the other end of the spectrum from the "essential" witness with "unique" knowledge, for example, a witness may be needed to lay a foundation for admission of a given exhibit, or to show that a person was at a given location at a particular time. Depending on the exhibit or the circumstances at the given time, there may be numerous others who can provide the same information. This is the opposite of "unique" evidence.

This factor may sometimes resemble the "apex witness" concern that some report arises with frequency. Many cases hold that high government officials and high corporate officers ought not even be required to appear for a deposition unless they have unique and extremely important knowledge. Indeed, depending on the circumstances of a given case, there may be a significant question about whether the high official has any direct knowledge of the matters to be presented at trial. At least in some circumstances, insisting on testimony by a given witness when others could equally provide comparable evidence could be employed to impose costs on another party. Though providing remote testimony may often be less intrusive for the witness than appearing in court for in-person testimony, the need to prepare adequately and be present electronically at the right moment may be more burdensome than submitting to a deposition.

Importance of in-person testimony to make credibility determinations: Particularly as to witnesses who only provide a foundation for exhibits or present other noncontroversial matters, there may be little concern with the value of in-person attendance to enable the trier of fact to determine credibility. As to other witnesses, however, conflicts between the testimony of different witnesses about important events in the case may make credibility determinations central to the case. Courts may have different views on the value of face-to-face judgments of credibility, but this factor should inform the court's decision whether in-person testimony would contribute value to the trial.

Technology issues: There has been a sea change in technology since the 1996 amendment was adopted, and further changes are likely. Nonetheless, the court should ordinarily give considerable attention to at least two sorts of technology issues:

First, the court may evaluate the technology available in its courtroom. Not all courtrooms are identical in that regard. For various reasons, including security concerns, it may be very difficult to navigate the technology in some courts.

Second, the court should also make a careful inquiry into the method the proponent of remote testimony proposes to use to provide that testimony. The proponent ought to be able to assure the court that such testimony will be smoothly presented.

Deposition testimony as a substitute: Another consideration is whether deposition testimony from this witness -- particularly a video deposition -- would be equal to or better than "live" remote testimony. If the deposition of the witness was taken a long time before trial, the deposition may not fairly represent what the witness can provide on the issues that have emerged in trial preparation. If so, however, it may be that a re-deposition of this witness would be a viable solution and therefore a reason to relax the rule that ordinarily a witness need submit to a deposition only once.

The 1996 Note took a position: "Ordinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena." Of course, the "reach of a trial subpoena" is nationwide now (subject to our proposed amendment to Rule 45(c)), but the more basic point is that there may be a policy disagreement about whether a deposition is to be preferred. The proponents of change urge that the rule should presume that remote testimony is preferred. Granting the court expanded latitude to authorize remote testimony does not necessarily mean that the rule should embrace this hierarchy of methods of testimony when deciding whether to authorize remote testimony in a particular case, but given technological change since 1996, the 1996 preference for a video deposition no longer seems obvious.

Evaluating safeguards: As in 1996, the amended rule would still require "adequate safeguards." As with technology, it would seem that the proponent of the witness should bear the burden of persuading the court that such safeguards will be in place. Some assert that parties

routinely agree on safeguards. Further information may suggest some safeguards that could be mentioned in a Note, though not as an exclusive list. On this score, the 1996 Committee Note did include the following: "Deposition procedures ensure the opportunity of all parties to be represented while the witness is testifying." Whether that can be said with remote testimony, or how it may be ensured, may be important factors. Short of having lawyers for all the parties in the room where the witness testifies, experience will probably show that safeguards have been developed to achieve something like parity with the traditional deposition setting.

Timing: The 1996 Note strongly implied that remote testimony should be limited to situations in which the need for it resulted from a sudden, last-minute development:

> 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.

At that time, a subpoena could not be used to compel a witness to provide trial testimony unless the witness was within the "subpoena power" of the trial court. Though the *Kirkland* case has cast doubt on this conclusion, the 2013 amendment to Rule 45 changed that predicate assumption; now a subpoena may compel the witness to attend at a place within the geographical limits of Rule 45(c). The Rule 45(c) amendment proposed for publication for public comment in the Action Items section above is designed to ensure that the court that balances the 43(a) factors and finds good cause for this witness to testify remotely will not encounter an authority barrier to obtaining that remote testimony.

The 1996 timing discussion presumably provided comfort for parties beyond the "subpoena power" of the court because the fact they were located far away would likely be known early on. (Corporate officers might be a prominent example.) Removing that limiting factor may invite something like "apex trial testimony." Whether that could be justified under the other factors mentioned above is debatable, however. If the only reason for opposing remote testimony by the CEO who genuinely has unique and important evidence is that the parties knew all along that she lived and worked on the other side of the country, it might not seem that factor should be decisive should the court conclude that remote testimony is preferable to a deposition.

Another timing element has to do with ensuring that the need for remote testimony is known to the other parties and (given the need for court approval under Rule 43(a)) to the court. The proposed amendment to Rule 26(a)(3)(A)(i) included with the Rule 45(c) amendment in the Action Items section of this report should facilitate in that effort.

Amending Rule 43(c) also?

The Rule 43/45 Subcommittee has also considered whether there is reason to amend Rule 43(c) to bring it into parallel with Rule 43(a). As noted above, it can be said that the dividing line between trial testimony and testimony on a motion is not always crystal clear. It seems that oral

testimony offered during motion hearings is ordinarily in-person, so the remote testimony issue with which we are grappling may not be presented. *See* 9A Fed. Prac. & Pro. § 2416 at nn. 10-11. But one might add specific reference to remote testimony to the delphic "oral testimony" in the current rule. [Arguably "oral testimony" meant in-person testimony when the rule was written.] For a starting point, the following might be added to parallel Rule 43(a):

> **(c) Evidence on a motion.** When a motion relies on facts outside the record, the court may hear the mater on affidavits or may hear it wholly or partly on oral testimony or on depositions. For good cause and with appropriate safeguards, the court may permit contemporaneous remote oral testimony.

* * * * *

This work is ongoing. Reactions/insights from Standing Committee members are welcome.

(c) Third-party Litigation Funding

This TPLF Subcommittee (chaired by Judge R. David Proctor, N.D. Ala.) was created at the Committee's October 2024 meeting, and has embarked on a program designed to educate subcommittee members about the issues involved. This effort involves ongoing outreach; Subcommittee representatives have met with bar groups about the issues raised and further such sessions are planned.

Meanwhile, there have been developments in other arenas. In Congress, a number of bills calling for disclosure of TPLF were introduced. Most recently, in February 2025, Rep. Issa introduced H.R. 1109 (119th Cong. 1st Sess.), the Litigation Transparency Act of 2025. A link to this bill is included in this agenda book. Bills have been introduced in a number of states directing disclosure as well. Several years ago the State of Wisconsin adopted "tort reform" legislation that included disclosure requirements for TPLF arrangements. Other states that have entertained such legislative proposals include West Virginia and Louisiana.

Some district courts have adopted local rules or practices with regard to disclosure of funding. The District of New Jersey adopted a local rule requiring disclosure whether there was funding and, if so, of the identity of the funder. In the Northern District of California, there is a local rule or standing order calling for disclosure in class actions.

There is, in short, little question that TPLF has gained prominence. And the amount of such funding seems to be growing rather rapidly.

There seems to be sharp disagreement, however, on whether to greet these developments or deplore them. On one side, litigation funding is greeted in some circles as "unlocking the courthouse door" by facilitating the assertion of valid claims. On the other hand, litigation funding is sometimes deplored in mass tort litigation as enabling the assertion of hundreds or even

thousands of groundless claims "found" by claims aggregators and "sold" to lawyers who don't do their Rule 11 due diligence before filing in court.

From a rulemaking standpoint, beyond deciding whether to regard litigation funding as basically good or bad, there are a number of questions needing answers. Here are some of them:

(1) How does one describe in a rule the arrangements that trigger a disclosure obligation? In an era when lawyers and law firms often rely on bank lines of credit to pay the rent, pay salaries, hire expert witnesses, etc., all seem to agree that TPLF disclosure requirements should not apply to such commonplace arrangements.

(2) Is this problem limited to certain kinds of litigation? For example, some see MDL proceedings or "mass tort" litigation as a particular locus. Others regard patent litigation as a source of concern; in the District of Delaware there have been disputes about disclosure of funding in patent infringement litigation. Yet others (including a number of state attorneys general) fear that litigation funding may be a vehicle for malign foreign interests to harm this country, or at least hobble American companies when they compete for business abroad.

(3) Should the focus be on "big dollar" funding? One sort of funding is what is called "consumer" funding, often dealing with car crashes and involving relatively modest amounts of money. "Commercial" funding, on the other hand, is said in some instances to run to millions of dollars.

(4) Does funding prompt the filing of unsupported claims? Funders insist that they carefully scrutinize the grounds for the claims before deciding whether to grant funding, and that they reject most requests for funding. They also say that they offer expert assistance to lawyers that get the funding to help them win their cases. Since the usual non-recourse nature of funding means that the funder gets nothing unless there is a favorable outcome, it seems that funding groundless claims would not make sense.

(5) The above is largely keyed to funding of individual lawsuits. A new version, it seems, is "inventory funding," which permits the funder to acquire an interest in multiple lawsuits. One might say this verges on a line of credit; in a real sense if a firm's inventory of cases don't pay off the firm can't pay the bank. How such inventory funding actually works remains somewhat uncertain.

(6) If some disclosure is required, what should be disclosed, and to whom should it be disclosed? The original proposal called for disclosure of the underlying agreement and all underlying documentation. But if funders insist on candid and complete disclosure regarding the strengths and weaknesses of the cases on which lawyers seek funding, core work product protections would often seem to be involved.

(7) Will requiring some disclosure lead to time-consuming discovery forays that distract from the merits of the underlying cases?

(8) What is the court to do with the information disclosed if disclosure is required? One concern is that lawyers seeking funding are handing over control of their cases in contravention of their professional responsibilities. Though judges surely have a proper role in ensuring that the lawyers appearing before them behave in an ethical manner, they would not usually undertake a deep dive into the lawyer-client relationship to make certain the lawyers are behaving in a proper manner.

(9) If judges don't normally have a responsibility to monitor the lawyers' compliance with their professional obligations, does that change when settlement is possible? Should judges then be concerned that settlement decisions are controlled by funders whose involvement is not known to the court?

* * * * *

There surely are other questions to be explored. Presently it seems likely that the George Washington National Law Center will hold an all-day conference about the topic for the subcommittee, tentatively scheduled the day before the Committee's Fall meeting.

Guidance from Standing Committee members about the issues presently under study, or others that should be added, would be welcome. A link to the bill pending in Congress is provided below.

https://www.congress.gov/bill/119th-congress/house-bill/1109/text?s=2&r=1&q=%7B%22search%22%3A%22hr1109%22%7D

(d) Cross-border Discovery

The Cross-border Discovery Subcommittee (chaired by Judge Manish Shah, N.D. Ill.) also remains in the learning outreach mode. Representatives of the Subcommittee have attended meetings of the Lawyers for Civil Justice, the American Association for Justice, and the Sedona Group. In addition, Prof. Zachary Clopton (Northwestern), a member of the Subcommittee, has met with a panel of transnational discovery experts affiliated with the ABA. The information-gathering effort continues.

It is presently unclear whether there is widespread enthusiasm for rule amendments keyed to cross-border discovery issues. To a significant extent, it seems that lawyers say "we can work that out." The basic tools for working it out seem to be in place in the rules already. There seems no doubt that any party could raise cross-border discovery issues in a Rule 26(f) discovery-planning meeting and present any disagreements to the court under Rule 16.

For at least some lawyers, the current rules appear to be sufficient. To consider one possible rule amendment -- to add explicit reference to cross-border discovery to Rule 26(f) -- there appear to be sectors of the bar that find that possibility extremely unnerving. For some of them, a rule change along these lines might signal to the judge that it is important to put the brakes on discovery and proceed in a gingerly manner. Some might consider that a recipe for delay tactics.

A somewhat different point is that divergent attitudes toward privacy and intrusive discovery could create a zero/sum situation. From one perspective, multinational actors may be faced with a Hobson's choice between violating non-U.S. privacy rules (e.g., the GDPR in the EU), and disobeying American judicial orders to provide the sort of broad discovery common in U.S. litigation, risking possible default.

In the background lies the Hague Convention. Early on, some responding parties insisted that American courts should routinely insist that parties seeking discovery abroad be required to resort first to the Convention's techniques.

Many claim that the Convention is too slow and too narrow to satisfy the information needs of U.S. litigation. The Convention itself may offer a middle ground solution if the parties agree to appointment of a local official in the country where the information is held to streamline the Convention process. But that is possible only if all the parties agree.

To complicate things further, many countries are not signatories to the Convention, and some that are parties to the Convention have "reservations" that forbid complying with American discovery.

Mediating between these divergent attitudes toward privacy and the legitimacy of giving parties the power to compel disclosure without having first to get a court order to that effect is a challenging task. At the margins, one side says that the other side is "hiding" its critical information overseas, and the other side says the American plaintiffs are exploiting American discovery to make their clients face the risk of sanctions in the U.S. unless they violate the privacy laws of an EU (or other) country. Thus the Hobson's choice.

* * * * *

At present, it remains uncertain whether a rule change is warranted or, if so, what it should be. Views of Standing Committee members on this topic would be helpful.

(e) Rule 55 default procedure

At the request of the Advisory Committee, the Federal Judicial Center did a very thorough study of default practice under Rule 55. The study was prompted by the fact the current rule (seemingly unchanged in this regard since 1938) says that the clerk "must" enter a default when a party does not defend, and also "must" enter a default judgment when the suit is "for a sum certain

or a sum that can be made certain by computation," including costs of suit. A link to that report appears below:

https://www.fjc.gov/content/389994/default-and-default-judgment-practices-district-courts

The concern is that what the rule commands seems not to be the actual practice in many places, particularly as to entry of default judgment. When the FJC study was first presented to the Advisory Committee at its October 2024 meeting there was discussion of changing "must" to "may," but there was concern that giving the clerk unbridled discretion whether to enter a default or default judgment seemed inappropriate, so the topic got further study.

That study showed that -- at least as to entry of default judgment -- the court's discretion plays an important role, as described in the Federal Practice & Procedure treatise:

> When an application is made to the court under Rule 55(b)(2) for the entry of a judgment by default, the district judge is required to exercise sound judicial discretion in determining whether the judgment should be entered. The ability of the court to exercise its discretion and refuse to enter a default judgment is made effective by the two requirements of Rule 55(b)(2) that an application must be presented to the court for the entry of judgment and that notice of the application must be sent to any defaulting party who has appeared. The latter requirement enables the defaulting party to show cause to the court why a default judgment should not be entered or why the requested relief should not be granted. This element of discretion makes it clear that the party making the request is not entitled to a default judgment as of right, even when the defendant is technically in default and that fact has been noted under Rule 55(a). * * *
>
> In determining whether to enter a default judgment, the court is free to consider a number of factors that may appear from the record before it. * * * Among the factors considered are the amount of money potentially involved; whether material issues of fact or issues of substantial public importance are at issue; whether the default is largely technical; whether plaintiff has been substantially prejudiced by the delay involved; and whether the grounds for default are clearly established or are in doubt. Furthermore, the court may consider how harsh an effect a default judgment might have; or whether the default was caused by a good-faith mistake or excusable or inexcusable neglect on the part of the defendant. Plaintiff's actions also might be relevant; if plaintiff has engaged in a course of delay or has sought numerous continuances, the court may determine that a default judgment would not be appropriate.

10A Fed. Prac. & Pro. § 2685 at 28-49. The quoted material spans many pages of the treatise because the notes to this text provide citations to a multitude of illustrative cases. It does seem odd to give the clerk that degree of discretion.

At the same time, it does not seem that default practice in the federal courts is nearly as important as a matter of administration of justice as default practice in the state courts. As the FJC study showed in two charts (pp. 24-25 of the study), default judgments have since 1988 fallen from about 9% of all civil terminations to under 2% of all civil terminations.

This federal court situation can be contrasted with the situation in at least some state courts. There has been much concern recently about the increasing frequency of default judgments in state courts, often in debt collection matters in which the alleged debtor does not have assistance of counsel and fails to appear. *See* Pew Charitable Trusts, *How Debt Collectors Are Transforming the Business of State Courts* (2020). Some of this activity may result from the practice of "debt buying." *See* Federal Trade Commission, *Structure & Practices of the Debt Buying Industry* (2013). *See also* Paula Hannaford-Agor & Brittany Kauffman, *Prevent Whack-A-Mole Management of Consumer Debt Cases: A Proposal for a Coherent and Comprehensive Approach for State Courts* (2020). The ALI has launched a Project on High Volume Litigation to consider these issues. There has been substantial academic attention to what's happening in state courts as well. *See, e.g.*, Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 Harv. L. Rev. 1704 (2022).

Changing the procedures for default cases may be in order to respond to what Prof. Bookman calls "a broken adversarial system" in the state courts. Pamela Bookman, *Default Procedures*, 173 U. Pa. L. Rev. ___ (forthcoming 2025) (at 3). But these important developments do not seem pertinent to concerns about Rule 55. The claims asserted in these state-court actions would almost always be based on state law, and in the event of diversity of citizenship the amount-in-controversy requirement would ordinarily prevent filing in federal court. Thus, Prof. Bookman reports that state-court default rates are "often over 70% in debt-collection cases * * * down from rates as high as 95% a decade ago." *Id.* at 1-2.

Making major changes to Rule 55 might entail providing specifics that (as the FJC report shows) are handled quite differently in districts with local rules about default procedure. *See* Appendix C to the FJC report. Among the possible questions are (1) what is required to initiate default procedure (an "application," a "request," or a "motion"); (2) whether notice to the defendant of the application for entry of default, in addition to service of process, should be a requisite to entry of default or default judgment; (3) what exactly must be shown to support entry of default or default judgment; (4) whether entry of default judgment must be preceded by formal entry of default; (5) whether there should be a meet-and-confer prerequisite to entry of default; (6) how the clerk should compute interest and attorney fees (if included as part of costs of suit); and (7) whether there should be a time limit after entry of default for seeking entry of default judgment.

At the Advisory Committee's April 2025 meeting, there was support for removing the "must" command from the rule, and also for abrogating Rule 55(b)(1). As presented in the Advisory Committee agenda book, these possibilities might be presented as follows:

Rule 55. Default; Default Judgment

(a) Entering a Default. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk may ~~must~~ enter the party's default or [refer] {forward} the matter to the court for directions.

(b) Entering a Default Judgment.

Alternative 1

(1) By the Clerk. If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk—on the plaintiff's request, with an affidavit showing the amount due—may ~~must~~ enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person nor in military service affected by 50 U.S.C. § 3931, or [refer] {forward} the matter to the court for directions.[5]

[5] Reference to 50 U.S.C. § 3931 seems warranted, though it is not presently mentioned in Rule 55. Some local rules do mention this provision. It is entitled "Protection of servicemembers against default judgments," and provides:

(a) Applicability of section

This section applies to any civil action or proceeding, including any child custody proceeding, in which the defendant does not make an appearance.

(b) Affidavit requirement

(1) Plaintiff to file affidavit

In any action or proceeding covered by this section, the court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit --

(A) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or

(B) if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service.

Alternative 2

(1) ~~**By the Clerk.** If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk -- on the plaintiff's request, with an affidavit showing the amount due -- must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.~~ [Abrogated]

(2) ~~**By the Court.** In all other cases, t~~The party must apply to the court for a default judgment. * * * *

In addition, a reference to 50 U.S.C. § 3931 should probably be added to Rule 55(b)(2) at the same time, perhaps whether or not Rule 55(b)(1) is abrogated.

(f) Random assignment of cases

As reported previously, the Advisory Committee continues to monitor district-court responses to the Judicial Conference's March 2024 guidance regarding random assignment of civil cases. This monitoring indicates that there are many districts that have modified their case-assignment practices in response to the Conference guidance. The issue will remain on the Advisory Committee's agenda and the committee will continue to monitor the situation as it develops.

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(2) Appointment of attorney to represent defendant in military service

> If in an action covered by this section it appears that the defendant is in military service, the court may not enter a judgment until after the court appoints an attorney to represent the defendant. If an attorney appointed under this section to represent a servicemember cannot locate the servicemember, actions by the attorney in the case shall not waive any defense of the servicemember or otherwise bind the servicemember.

A later provision calls for plaintiff to post a bond if the court is unable to determine whether the defendant is in military service.

Given the possibility that amendment of the rule could be said to supersede this statutory requirement, it may be prudent to include mention of the statute in Rule 55(b)(1) and, perhaps, add a reference to it in Rule 55(b)(2).

PROPOSED AMENDMENT 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.

PROPOSED AMENDMENT 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 Rules 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

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

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

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

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

* * * * *

Committee Note

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

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

PROPOSED AMENDMENT 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 action or one or more 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

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

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 claims" in a multi-claim case. A plaintiff may accomplish dismissal of either an action or one or more 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.

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

Rule 45. Subpoena

* * * * *

(b) Service.

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

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

(i) delivering it to the individual personally;

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

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abode with someone of 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 authorized by the court for good cause that 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 requiring the person to attend 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 what is meant by "delivering" the 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 "delivery" 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. 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.

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.

PROPOSED AMENDMENT 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 or hearing 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 testimony. Instead, it applies to any subpoena for witness testimony. Ordinarily, court approval is required for remote testimony in court. Rule 43, for example, authorizes remote 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).

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.

DRAFT MINUTES
CIVIL RULES ADVISORY COMMITTEE
Atlanta, GA
April 1, 2025

The Civil Rules Advisory Committee met at the Elbert P. Tuttle U.S. Courthouse, in Atlanta, GA, on April 1, 2025. The meeting was open to the public. Participants included Judge Robin L. Rosenberg, Advisory Committee Chair, and Advisory Committee members Judge Cathy Bissoon, Justice Jane Bland (remotely), David Burman, Judge Annie Christoff, Professor Zachary Clopton, Chief Judge David Godbey, Jocelyn Larkin, Judge M. Hannah Lauck, Judge R. David Proctor, Judge Marvin Quattlebaum, Joseph Sellers, Judge Manish Shah, and David Wright. Professor Richard L. Marcus participated as Reporter, Professor Andrew D. Bradt as Associate Reporter, and Professor Edward H. Cooper (remotely) as Consultant. Judge John D. Bates, Chair, Professor Catherine T. Struve, Reporter, and Professor Daniel R. Coquillette, Consultant (remotely) represented the Standing Committee. Judge Catherine P. McEwen participated as liaison from the Bankruptcy Rules Committee. Clerk Liaison Thomas Bruton also participated. The Administrative Office was represented by Carolyn Dubay, Scott Myers, Rakita Johnson, Shelly Cox (remotely), and law clerk Kyle Brinker. The Federal Judicial Center was represented by Dr. Emery Lee and Dr. Tim Reagan (remotely). Members of the public who joined the meeting remotely or in person are identified in the attached attendance list.

Judge Rosenberg opened the meeting by welcoming all observers with appreciation for their participation and interest in the rulemaking process. She thanked the staff of both the Rules Committees and the U.S. Court of Appeals for the Eleventh Circuit for hosting the meeting. Before beginning the day's agenda, Judge Rosenberg detailed the contributions by Joseph Sellers, who has been an attorney member of Advisory Committee since 2018, and for whom this was his last meeting as a member. She noted that Mr. Sellers had served on many subcommittees, including Discovery, MDL, Rule 43/45, Third-Party Litigation Funding, Rule 30(b)(6), and the CARES Act. Judge Rosenberg said that she could not think of a more active member, or one who has contributed so much to the rulemaking process. She also applauded how Mr. Sellers has interacted with committee members, staff, and the public, with an open mind, respect, and the ability to consider opposing views. She thanked him for his years of service to the Advisory Committee.

Judge Rosenberg also introduced the new Chief Counsel to the Rules Committees, Carolyn Dubay. Judge Rosenberg noted Ms. Dubay's extensive experience in the judiciary and the Administrative Office, including her prior positions as an AO deputy judicial integrity officer, an attorney advisor and researcher at the Federal Judicial Center, a Supreme Court fellow, and a law clerk for Judge Seybert (E.D.N.Y.). Judge Rosenberg welcomed Dubay and noted that she looks forward to working together. Judge Rosenberg also thanked Scott Myers, who has supported the Bankruptcy Rules and Standing Committees during his nearly two decades as an attorney for the Administrative Office. Myers is retiring this June.

Turning to the day's agenda, Judge Rosenberg noted that there were five action items to address, including four proposed amendments for publication. She thanked the various subcommittee chairs for their hard work and the public observers for their ongoing interest in the work of the Advisory Committee.

Opening Business

Before turning to action items, there were several items of opening business. First, Judge Rosenberg reported that in January the Standing Committee had approved for publication the proposed amendment to Rule 81(c)(3) regarding demands for jury trial after removal. A report of the most recent Session of the Judicial Conference of the United States is in the agenda book.

Scott Myers then delivered a report on the status of proposed amendments to the civil rules. He shared that the Judicial Conference and the Supreme Court had approved amended Rules 16, 26, and 26.1 and new Rule 16.1. Myers reported that he expected the proposed amendments to be delivered to Congress in the upcoming weeks. If Congress does not object, the new and amended rules will go into effect December 1, 2025.

Rules Law Clerk Kyle Brinker then delivered a brief report on legislation that may impact the civil rules, further detailed in the agenda book. Brinker noted that all bills introduced in the prior Congress expired at the end of its last session and must be reintroduced. One such bill, H.R. 1109, requiring disclosure of anyone who has a right to payment based on the outcome of a case, is currently being considered by the House Judiciary Committee. Professor Marcus noted that the text of the bill is in the agenda book in the materials on third-party litigation funding. Professor Marcus reported that the subcommittee studying that issue is aware of the bill and is monitoring its progress.

Action Items

Review of Minutes

Judge Rosenberg then turned to the first action item: approval of the minutes of the October 10, 2024 Advisory Committee meeting, held at the Administrative Office in Washington, DC. The draft minutes included in the agenda book were unanimously approved, subject to corrections by the Reporter as needed.

Rule 41(a)

The next action item was the proposed amendments to Rule 41(a), which the Advisory Committee had previously approved for publication at its October 2024 meeting. At its January 2025 meeting, the Standing Committee asked the Advisory Committee to take a second look at some of the language of the proposed amendments and the Committee Note. No member of the Standing Committee expressed opposition to the main goal of the amendments: to facilitate voluntary dismissal of individual claims. But there were questions raised about some other aspects of the amendments, detailed below. Because any proposed amendments would not be published for public comment until after the Standing Committee's June 2025 meeting, such reconsideration would not cause any delay to the progress of the amendments. The Rule 41(a) Subcommittee, chaired by Judge Cathy Bissoon (W.D. Pa.) then met, considered the Standing Committee's comments closely, and responded to them.

Judge Rosenberg presented the revised proposal for amendments to the Advisory Committee. She noted that the amendments have two goals: (1) to clarify that the rule may be used to dismiss individual claims, and not only an entire action; and (2) to require that only parties currently engaged in the case must sign a stipulation of dismissal of one or more claims. Judge Bissoon then explained that the subcommittee has considered extensively all of the helpful suggestions raised by the Standing Committee and adopted some but not all of them. The Style Consultants also reviewed the new draft rule, and the subcommittee also responded to their suggestions. She then asked Professor Bradt to explain the changes made in response to the Standing Committee's feedback.

Professor Bradt first noted that the most significant change to the original proposal was to abandon any amendment to Rule 41(d), regarding the judge's power to award costs to a defendant against whom a plaintiff has refiled a previously voluntarily dismissed action. The subcommittee had proposed an amendment that would allow a judge to award costs related to a previously dismissed claim or claims. Its aim, however, was only to make Rule 41(d) parallel the amended language in Rule 41(a) that clarifies that a plaintiff may voluntarily dismiss a claim or claims. The Standing Committee expressed concerns, however, that the new provision was confusing and potentially left open the possibility of a judge disproportionately awarding costs of an entire prior action when only part of it had been voluntarily dismissed from that action and refiled. Upon reconsideration, the subcommittee acknowledged the potential confusion and concluded that no amendment to Rule 41(d) was necessary. Although many federal courts already interpret Rule 41(a) to allow dismissal of less than an entire action, research could not unearth any cases that had awarded costs when only those claims were refiled. Rather, Rule 41(d) is typically deployed when the plaintiff does in fact dismiss an entire action and then refiles it, likely (and perhaps blatantly) in pursuit of a more favorable judge or forum. Since Rule 41(d) is most apt in such circumstances, and not when only some but not all claims are dismissed, the subcommittee decided that Rule 41(d) was best left alone. Professor Marcus added his agreement with this conclusion.

Professor Bradt then noted that, in response to another question from the Standing Committee, the subcommittee had also clarified the Committee Note to state explicitly that the deadline for voluntary dismissal without a court order or stipulation is the filing of an answer or motion for summary judgment by the party opposing the claim.

Another area of concern raised by the Standing Committee involved the proposed amendment to Rule 41(a)(1)(A)(ii) to require signatures on a stipulation of dismissal only by parties who have appeared and "remain in the action" (as opposed to "all parties who have appeared," as the rule currently requires). The subcommittee's goal in proposing this amendment is to ensure that a party who has departed the litigation (either by voluntarily dismissing all of its claims, or having all claims against it voluntarily dismissed) cannot disrupt a settlement if it cannot be easily found or if it refuses to sign the stipulation. At the Standing Committee meeting, a Reporter to another committee asked about the interaction between this amendment and Rule 54(b), which provides that (absent a partial final judgment) all parties "remain" in the action until final judgment. This Reporter expressed concern that if parties who are no longer actively litigating in the case are not required to sign the stipulation those parties may not receive notice that that their window to appeal has opened.

Professor Bradt reported that, for several reasons, detailed in the agenda book, the subcommittee decided to stay with the proposed language "remain in the action." In sum, the subcommittee concluded that the benefits of the revised rule outweigh the risks. Moreover, as Professor Marcus explained, there are numerous instances when the rules contemplate a distinction between a party to a case who is actively litigating and one who is not. Additionally, as a practical matter, parties who have been dismissed from the action continue to receive CM/ECF notices about the case, and it is reasonable to expect them to pay attention to the docket if they believe they have preserved some right to appeal despite dismissing all of their claims, or having all claims against them dismissed.

Judge Rosenberg then opened the floor to comments from Advisory Committee members. One judge member expressed approval of the "remain in the action" language as sufficiently clear and confirmed that CM/ECF alerts should guard against parties missing the appeal window.

Judge Bates expressed a concern about the amended title of the Rule, which now refers to "Dismissal of Actions or Claims." The new title perhaps creates ambiguity because some parts of the rule speak to dismissal of claims and others only to dismissal of the action. For instance, amended Rule 41(a) speaks to dismissal of one or more claims, but it may be unclear whether the rule also allows dismissal of an entire action. Several other judge members also expressed their concerns about the ambiguity, particularly for especially textualist-inclined courts, so during the lunch hour, the subcommittee agreed to make clear in both the text of the rule and the Committee Note that Rule 41(a) allows dismissal of both one or more claims or entire actions.

After making this revision during the lunch hour, the Advisory Committee reconvened and voted unanimously to recommend the amended rule for publication for public comment.

Rule 45(c) and Rule 26(a)(3)(A)(i)

Judge Rosenberg then introduced the next action item, a proposed amendment to Rule 45(c), part of the work of the Rule 43/45 Subcommittee, chaired by Judge Hannah Lauck (E.D. Va.). The proposed amendments are spelled out at p. 95-98 of the agenda book, with minor changes based on suggestions from the Style Consultants, detailed in an Appendix distributed to committee members at the meeting. The intent of this amendment is to clarify that the rule permits a subpoena to a witness to provide remote testimony within 100 miles of where they live and work. Some courts, such as the Ninth Circuit in *In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023), have held that, despite contrary language in the committee note, the rule provides courts with only the power to command that a witness appear for trial if the witness lives or works within 100 miles of the courthouse where the trial is being held.

Judge Lauck explained that with respect to remote testimony the subcommittee was "tackling the forest and the trees," but this is "the first tree." She explained that remote testimony is a much larger part of litigation life since the pandemic, so reexamination of the provisions addressing that topic in the rules is ripe. This first step responds specifically to the Ninth Circuit's decision in *Kirkland.* The proposed amendment would clarify that the subpoena power extends nationwide, so long as the witness is commanded to testify within 100 miles of the locations enumerated in Rule 45(c)(1)(A). This would be accomplished through a new Rule 45(c)(2)

providing that "Under Rule 45(c), the place of attendance for remote testimony is the location the person is commanded to appear in person." The Committee Note also clarifies that for purposes of Rule 45(c), the witness "attends" at the place where the person must appear to give testimony, while for purposes of Rules 43 and 77(b), such remote testimony occurs in the court where the trial or hearing is conducted.

Judge Lauck reported that the subcommittee had engaged in extensive outreach with respect to this particular issue and the broader issue of remote testimony more generally. Further analysis of the broader issue is necessary to consider potential amendments to Rule 43 affecting when remote testimony may be used. But the subcommittee decided that the broader project should not delay a response to the particular issue presented in *Kirkland*. Judge Lauck also noted that the subcommittee has proposed an accompanying amendment to Rule 26(a)(3)(A)(i) to require initial disclosure of witnesses a party intends to call to testify remotely.

Professor Marcus added that the proposals here are intended to resolve the issue presented in *Kirkland*, while leaving for later analysis any proposal to alter the standards for when remote testimony is available under Rule 43. Judge Rosenberg then added that the amendments were the focus of intense discussions among the reporters, including Professor Struve. The subcommittee also made several small changes to the rule's syntax, as proposed by the Style Consultants. Compared to the agenda book materials at pp. 97, the changes to Rule 45(c) are: (1) add the word "remote" before testimony at line 337, and (2) remove the sentence from the note beginning at line 345, which stated that the rule has no effect on the criterion for unavailability for deposition testimony under Rule 32(a)(4)(D), or Federal Rule of Evidence 804(a). With respect to Rule 26, the subcommittee adopted a suggestion from the Style Consultants to remove an comma and add parentheses.

An attorney member of the subcommittee sought elaboration on the removal of the sentence in the Committee Note regarding the amendment's lack of effect on unavailability for deposition testimony. Professor Struve explained that there were concerns that specifically allowing remote testimony within 100 miles might render an otherwise unavailable witness (in a court following *Kirkland*) available for a deposition. But this is a residual question and may be resolved during the broader discussion of Rule 43, so saying anything about it now may be premature and the issue can be monitored. Professor Bradt added that the goal is to correct the narrow issue in *Kirkland* without tying the committee's hands when it comes to other issues related to remote testimony.

A discussion then followed about the language of the proposed amendment to Rule 26(a)(3)(A)(i) requiring initial disclosure of witnesses "and whether the testimony will be in person or remote." One academic committee member suggested that the rule be modified to require disclosure of witnesses the party "expects" will be remote, since it may be unclear at such an early stage of the case whether or not the witness will appear in person. A judge member agreed and noted that under Rule 43 it is ultimately the judge's decision whether a witness will be allowed to testify remotely; such a result cannot be accomplished unilaterally by a party in a disclosure. Professor Marcus noted that the amendment is not intended to give the parties control over whether a witness will ultimately testify remotely, but rather to alert the other parties and the judge to the possibility. The court will eventually make the decision on whether witnesses will be allowed to

appear remotely at the final pretrial conference. A judge member agreed that the language was sufficiently clear as proposed and that the court will necessarily consider any remote-testimony questions as the trial date nears.

Two other judge members expressed concerns about the specific reference in the proposed amendment to Rule 45(c) and what work the reference is doing in the rule. These judges suggested further clarifying the text to refer even more specifically to Rule 45(c)(1). Another judge member suggested reorganizing to make the new provision part of Rule 45(c)(1) in order to more precisely clarify its effect. Professor Marcus explained that the intent is to limit the effect of the rule to the scope of the subpoena power. Rule 45(c) provides protection to the witness against having to travel more that 100 miles, while Rule 43 and 77(b) are focused on protecting the trial process. Moreover, Professor Marcus warned against unintended consequences of rejiggering the rule's structure and noted that the purpose of this small change was narrowly tailored to clarify the ambiguity noted in *Kirkland*.

Judge Rosenberg then called the morning break, during which the reporters and subcommittee chair conferred on the changes suggested from the floor. After discussion the following change was proposed: adding "(1)" after the reference to "Rule 45(c)" in Rule 45(c)(2), and in the Committee Note. No one objected to this change. Subsequently, the Advisory Committee voted unanimously to recommend that the amendment package be published for public comment.

Rule 45(b)

Judge Rosenberg then introduced a proposed amendment to Rule 45(b) regarding service of subpoenas. The proposed amendment appears beginning at p. 131 of the agenda book, with modifications reflected in the Appendix distributed to committee members in response to suggestions from the Style Consultants. Judge Rosenberg explained that the amendment is designed to address ambiguities around delivery of a summons and tendering of fees that have been raised periodically for nearly two decades.

Judge David Godbey (N.D. Tex.), Chair of the Discovery Subcommittee, noted that some courts had read the current rule to require in-hand service of a subpoena, while other courts had read the language more flexibly to allow other methods of service. The subcommittee's efforts were focused on providing clarity with respect to other acceptable methods of service. Moreover, based on feedback from practitioners, the proposed amendment adds a presumptive 14-day window between service of the subpoena and the time the witness must appear to testify. Professor Marcus added that another change to the rule was to permit the tendering of fees to the witness at the time of service or the time and place where the witness is commanded to appear. The current requirement that fees must be tendered at the time of service makes service more complicated and may hinder even "heroic" efforts to serve a recalcitrant witness. Because the serving party wants the witness to appear, there is a strong incentive to provide fees for a witness who needs them. For other witnesses, tendering at the place of appearance serves the purposes of the rule.

Professor Struve suggested that it might be helpful to engage with Administrative Office staff who maintain Form 88 for subpoenas. That form makes no mention of fees, which makes sense under the current rule. But if the rule changes, revision of the form will be necessary and the

new version should include language informing the witness that fees will be tendered at the place of appearance, if not before.

An attorney member of the subcommittee highlighted other features of the amended rule, including providing for the use of a commercial carrier so long as a receipt is provided, other means of service that a court may authorize for good cause if standard methods aren't working, and the value of the 14-day window, which is standard practice that will be made uniform and mandatory by rule.

Another attorney member noted that the committee should be on the lookout for public comments that the rule is too vague when it comes to some terminology, such as the witness's last known address, or a person of suitable age and discretion. But this member believed that the rule should go forward for publication as written, and the committee can see what emerges from the comment period. Professor Marcus added that refinements can be made, if necessary, after the comment period.

A judge member expressed concern about the suggested provision, at Rule 45(1)(A)(ii), that authorizes leaving the summons at the witness's dwelling with someone of suitable age and discretion who resides there. This judge expressed the concern that a summons might be left with anyone who lives in the same large apartment building as the witness but would then never be delivered. Professor Marcus responded that this language is drawn directly from Rule 4 for service of the summons and complaint. He was unaware of whether a problem like the one described arises with respect to original service, but it would be anomalous to require more to serve a subpoena than the summons and complaint.

A judge liaison expressed concern that the wording of the proposed Rule 45(b)(1)(A)(iii) was unclear with respect to whether a confirmation of receipt is required when the serving party uses U.S. mail or only when the serving party uses a commercial carrier. Judge Godbey responded that the subcommittee intended that the receipt be required for both U.S. mail and commercial-carrier delivery.

Another judge member then asked whether the rule required only a method of service that provides confirmation of receipt or whether the rule demands that actual confirmation of receipt be provided. Judge Godbey and Professor Cooper agreed that the intent of the rule was to require that the serving party actually receive the confirmation of delivery, so the language should make that clear. An attorney member agreed, noting that if delivery is unsuccessful, then the judge could consider alternative means of service, consistent with the language from the *Mullane* case in the rule. But another attorney member agreed that the language of the rule may suggest that service is accomplished upon mailing even if no receipt is provided, so the rule should prescribe "actual" confirmation of receipt. After further discussion, the reporters agreed to review the language over lunch and perhaps provide a revision.

Following lunch, the reporters suggested inserting the word "actual" before receipt in Rule 45(b)(1)(A)(iii) to clarify that actual confirmation of receipt is necessary for service to be effective. Judge Bates asked whether the Style Consultants might consider the word "actual" to be redundant. Professor Marcus responded that because the addition of "actual" was at the request of the several

committee members who thought it provided needed clarity, its inclusion should be considered substantive. Professor Cooper added that the word "actual" here performs a useful function to distinguish the rule from Rule 87, from which the word "actual" was left out intentionally.

A judge member then suggested that the use of the word "form" might be ambiguous, since "form" might refer to the characteristics of the subpoena itself and not the method of serving it. Another judge member agreed that the use of the term "method" instead of "form" would be clearer. Professor Cooper noted that the word "form" is drawn from Rule 4(f)(2)(C)(ii), addressed to serving an individual in a foreign country by "using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt." But, Professor Cooper added, parallel language is not required here in light of the specificity of the rule. The Advisory Committee reached consensus that "method" would be preferable to "form," and the reporters made the change. Subsequently, the Advisory Committee approved the amended rule for submission to the Standing Committee for publication.

Rule 7.1(a)

Before the lunch break, Judge Rosenberg turned to the Chair of the Rule 7.1 Subcommittee, Justice Jane Bland (Supreme Court of Texas), who was attending remotely, to introduce the final action item: amendments to Rule 7.1 on corporate-party disclosures to be published for public comment. Currently, the rule requires that a corporate party disclose "any parent corporation and any publicly held corporation owning 10% or more of its stock." The subcommittee has been focusing primarily on the concern that current Rule 7.1 does not require corporate parties to disclose corporate "grandparents," in which a judge might hold a financial interest that requires recusal. Justice Bland noted that the Codes of Conduct Committee's recently revised guidance to judges cited to the various federal disclosure rules in identifying 10% ownership of a party as creating a rebuttable presumption that a judge with a financial interest in such an owner of the party should recuse, unless the judge learns information that demonstrates that she nevertheless has no financial interest in the outcome of the litigation. The subcommittee's efforts have been directed toward providing judges with enough information about a corporate party's ownership to decide whether recusal is necessary.

Toward that end, after research and deliberation the subcommittee has proposed two changes to the Rule.

First, to change references to "corporations" to "business organizations." The reason for the change is to capture various business entities, such as LLCs or master partnerships, that may not be formally labeled corporations under the relevant state law that created them. "Business organizations" is a broader term that better reflects the range of entities that should be disclosed, since a financial interest in such an entity might require recusal. The subcommittee landed on "business organizations" as the appropriate term because of its common usage, including in the Uniform Business Organizations Code, various state laws, and the introductory course in many law schools.

Second, to direct that a party disclose "any publicly held business organization that directly or indirectly owns 10% or more of it." The goal is to require disclosure of publicly traded

grandparents or great grandparents that have sufficient ownership of a party to trigger investigation of recusal consistent with the Codes of Conduct Committee guidance. The subcommittee believes that this expanded disclosure requirement will ensure that judges have sufficient information about any entity up the corporate chain of ownership in which she may hold a financial interest. Other subcommittee members agreed that this language should promote the necessary disclosures. The use of the term "it," which had been vetted by the Style Consultants before the meeting, is intended to require disclosure of all ownership interests, regardless of their formal label as "stock" or "shares," or some other term.

Professor Bradt added that the subcommittee had deliberated extensively over the appropriate language after study of other disclosure requirements in local rules and state courts. Based on outreach to judges and attorneys regarding their experience with these rules, the subcommittee opted against requiring disclosure of a catch-all set of corporate connections, such as "affiliates," as overly broad and onerous to comply with and digest. The subcommittee also opted against a lengthy list of specific connections to disclose as being potentially over or underinclusive and potentially requiring amendment as new corporate forms emerge that may not be on the list. Given the subcommittee's goal of ensuring that "grandparents" are disclosed – likely an uncontroversial proposition since the Committee Note to Fed. R. App. P. 26.1 since 1998 has guided attorneys to disclose "grandparent and great grandparent corporations" without controversy. As the Committee Note explains, the proposed language represents a pragmatic concept intended to accomplish what the Appellate Rule already demands. Since the rule covers a matter ancillary to the merits and does not define parties' obligations to one another, the subcommittee came to the views that its approach, albeit imprecise, was the best avenue toward achieving its goal. An attorney member added that the public-comment period would be especially useful in learning whether this change is in fact insufficiently clear.

The Advisory Committee then adjourned for its scheduled lunch break. After lunch, discussion resumed. The clerk liaison expressed support for the rule so long as the information provided would be compatible with clerks' conflicts-check software. An attorney member responded that the requirement was not onerous and could be easily filed with other mandatory disclosures in such a way that the clerk need not enter it into the conflicts check manually. Another attorney member suggested replacing the words "more capacious" in the Committee Note with "broader." The change was adopted without objection. Subsequently, the Advisory Committee voted unanimously to recommend that the amendments be published for public comment.

Subcommittee Reports

Discovery Subcommittee

Judge Godbey, Chair of the Discovery Subcommittee, reported that it had been mostly focused on the proposed amendments to Rule 45(b), which was approved for publication earlier in the meeting. The other major issue on this subcommittee's plate is the proposal for national uniform rules on motions to seal. Judge Godbey thanked the subcommittee's members, especially the lawyer members, for their hard work on this complicated issue.

District practices vary a great deal on motions to seal, creating complications for lawyers. Although a majority of subcommittee members expressed support for at least considering uniform rules, such a project would require enormous time and effort. Moreover, districts have well-established procedures and local rules, so a new national standard could cause challenges for those districts forced to adopt a different process. As a practical matter, the vast majority of requests to seal are stipulated to by the parties, so proposals demanding more extensive procedures may make a process that should be easy unnecessarily complicated. Professor Marcus added that a new national rule would surely require many districts to change their practices, which may also complicate matters for lawyers used to well-established processes. He suggested that another possibility might be a rule that clarified that the standard for a motion to seal is different from the standard that applies to protective orders under Rule 26(c). Such a rule would remind lawyers that they need to refer to the applicable circuit law for the relevant standards.

A lawyer member contended that many of the proposals for new rules were overly onerous for both the judge and the litigants. This member noted that he had heard about an effort to notify people that documents had been sealed so they could potentially intervene to file a challenge. Professor Marcus noted that one submission suggested that the AO maintain a centralized website that included every request to file under seal so that anyone who might want to challenge such a request could find it there. Thus far, the subcommittee has not pursued this idea, as there already is much litigation on requests to seal.

A judge member expressed concerns about a national rule that simply incorporates the First Amendment and common-law standards for motions to seal, on the ground that such a rule would beg many questions in different kinds of cases. Professor Marcus noted that the goal of such a rule would not be to change the standard but to alert lawyers to determine what the relevant standards are in the circuit in which they are litigating. One judge member saw value in this approach by alerting parties that they need judicial approval to seal documents.

Another judge member expressed skepticism of national standards because the methods courts have already developed are working well for them. Any rule would need to either be so detailed as to essentially become a best-practices guide, or it would be so vague as to leave many questions unanswered. This judge also questioned whether there was anything to be gained by a rule that only alerted lawyers that the standard for sealing varied from the standard for a protective order. Another judge member added that no national standard is likely to be feasible until there is a national CM/ECF system that is uniform across the districts. This judge agreed that there may be value in a rule reminding lawyers that the sealing standard is different, but expressed doubts that a rule could develop a uniform, substantive test that would apply across the whole range of potential circumstances.

Judge Rosenberg sought guidance from attorney members as to whether the differing practices across the district courts created challenges for lawyers. One attorney member said that these different rules do often present problems that add expense and uncertainty, problems exacerbated by the likelihood that such issues often must be addressed at the last minute before a filing deadline. Many lawyers just agree to a request to seal because the fight is not worth the effort, perhaps leading to oversealing. This lawyer, however, agreed that developing a national standard would be difficult. Another attorney member agreed that uncertainty over whether a

motion to seal a document filed along with the document would be granted often created agita. A different lawyer member agreed that lawyers hate the cacophony of approaches among the districts, but that it would be very hard to develop a single standard. Another lawyer member echoed this view: the current system is a "gigantic pain" but he feared that a national rule would be driven toward the most rigorous standard. He noted his experience with some very restrictive districts and warned that if such an approach were nationalized it would make life much more difficult for lawyers. Another attorney member worried that even if the rule presented a national standard, districts would still interpret that standard in different ways, making the effort at uniformity fruitless. In sum, the attorney members of the Advisory Committee noted dissatisfaction with the current state of affairs but also concerns that a national rule, assuming one could be developed, could make things worse.

Judge Bates expressed pessimism about the rules process coming up with a national rule. CACM undertook a similar effort 23 years ago and managed to do very little. Even very little may be worthwhile, but a national standard would be a "very heavy lift" and may not be worth the effort. Another judge member suggested exploring an amendment to Rule 16 that would direct the judge's attention to potential sealing issues early in the litigation. This judge noted that the bankruptcy courts have a "free peek" process under which a judge will look at a document and allow the party to withdraw it if the motion to seal is denied.

Summing up, Professor Marcus said that the emerging consensus seemed to be that there was not a groundswell in favor a national substantive standard, but that an amendment calling attention to the differing standards for a motion to seal and a protective order may have promise. The issue will therefore remain on the subcommittee's agenda for further study.

Rule 43/45 Subcommittee

Judge Rosenberg explained that in addition to its work on the proposed amendment to Rule 45(c), now recommended for publication, this subcommittee is reviewing proposals to relax the current constraints on remote trial testimony under Rule 43(a). She explained that, prior to 1996, there was no provision in the rules permitting remote trial testimony. The current rule allows such testimony in rare circumstances, but technology developed since 1996 may render that rule's limitations on remote testimony anachronistic. Judge Rosenberg reported that the subcommittee was working on putting together a mini-conference this summer, sponsored jointly by Duke Law School's Bolch Judicial Institute and UC-Berkeley's Berkeley Judicial Institute, to hear from judges and practitioners about their experiences with expanded remote testimony.

Judge Lauck, the chair of the subcommittee, noted that the 1996 rule was likely directed toward testimony submitted by telephone, but "contemporaneous transmission" may now be accomplished by various video-conferencing software applications. The subcommittee is considering loosening the restrictions on such testimony at trial, and at hearings on motions. She noted that this issue has generated a great deal of interest. Although no one challenges that the "gold standard" remains live, in-person testimony in open court, and that this should remain the presumption, positive experience with remote testimony during the pandemic suggests that it should be allowed more regularly. Currently, the rule essentially states a preference for prior deposition testimony over live remote testimony, but times may have sufficiently changed to

undermine that preference. For instance, Justice Bland has shared information about the widespread and successful use of remote testimony in Texas state courts. In large states, and perhaps districts, the opportunity for remote testimony may materially enhance access to court. Indeed, jurors seem to find live remote testimony easier to follow than reading or playing a video of a prerecorded deposition. Judge Lauck also noted that the subcommittee has already received feedback from various bar groups, and that the upcoming mini-conference will also be helpful in giving the subcommittee the information it needs.

Judge Lauck also noted that the Bankruptcy Rules Committee is considering a minor change to its rules that would drop in many cases the "compelling circumstances" requirement similar to the requirement in our Rule 43(a). A judge liaison noted that such a change would not be minor, as contested matters in bankruptcy can be as complex as a civil trial.

Judge Bates added his thanks to the subcommittee for taking on this vital subject. Experiences during the pandemic have opened our eyes to possibilities that we need to explore, but great care needs to be taken. He noted that it would be important for the Advisory Committee to collaborate with the other rules committees, because changing Rule 43(a) to make remote testimony more common will send a strong signal that such testimony is acceptable more often. He also cautioned against a change in the rule accompanied by an overly lengthy Committee Note.

Third-Party Litigation Funding Subcommittee

This subcommittee, created at the October 2024 meeting and chaired by Judge David Proctor (N.D. Ala.), is in its early days. Judge Proctor reported that the subcommittee is getting its arms around the topic, and has met, or will meet, with various lawyer groups. The subcommittee is also planning to send members to numerous upcoming academic conferences on this issue. As Professor Marcus noted, this is a dynamic issue and the reporters and members of the subcommittee are learning a great deal. The subcommittee will report on its progress at the fall meeting.

Cross-Border Discovery Subcommittee

Subcommittee Chair Judge Manish Shah (N.D. Ill.) reported that the cross-border discovery subcommittee has engaged in extensive outreach, including to the Department of Justice, Lawyers for Civil Justice, the American Association for Justice, the Sedona Conference, and the ABA. The prevalence of cross-border discovery and conflicting national laws related to privacy and disclosure often create significant challenges. Whether a federal rule could mitigate those challenges remains an open question. One possibility is to include cross-border discovery among the issues parties must meet and confer about and include in their discovery plan under Rule 26(f). Some have suggested that early attention from the judge could be salutary. But some, including DOJ, have expressed that such a requirement is unnecessary because anticipated problems often do not arise, and, if they do, they can be solved by the parties without involvement of the court. All told, Judge Shah reported, there does not appear to be a groundswell of support from practitioners in favor of a rule change. But the underlying issues will likely only become more complicated, so the subcommittee will remain in listening mode. Judge Rosenberg agreed, noting that none of the organizations the subcommittee has reached out to have strongly supported a rule

change, though the Sedona Conference has laid out a potential methodology for approaching these issues.

Other Information Items

Rule 55 Default Judgments

Judge Rosenberg reminded the committee that in October members discussed the FJC study on practices in the district courts regarding default judgments. At that meeting, several members expressed concerns about the requirement in Rule 55(b)(1) that a clerk "must" enter a default judgment for a sum certain against a defendant who has not appeared and defaulted. The FJC study revealed that practices among the districts vary considerably, and judges are often involved in this process despite the text of the rule. Judge Rosenberg noted that the rule has existed for a very long time, so there is a question as to the extent of any real-world problem it creates. That said, there may be a benefit to clarifying the rule to make it consistent with actual practice.

Professor Marcus reported that he has been looking closely at this issue since the October meeting. One question is whether default practice creates a significant problem for the federal courts. Recent research by Professor Bookman (Fordham Law) has demonstrated that defaults do present a major problem in the state courts, where around 90% of cases end that way, but there are far fewer defaults in federal courts, where the stakes are often higher and more attention is paid to each case. Professor Marcus added that there are many local rules on defaults that the committee might prefer not to tamper with. But the committee could avoid that with a narrow proposal directed at the requirement in the rule that a clerk must enter a default judgment for a sum certain, as outlined in the agenda book. One possibility might be to eliminate Rule 55(b)(1), which would have the effect of requiring all default judgments be entered by the court. Another possibility would be to change the "must" in the rule to a "may" after consultation with the presiding judge.

An attorney member supported making a change along the lines of what Professor Marcus described, since, in his experience, it would be more descriptive of what actually happens. Although the current rule has long existed without causing major problems, much has changed since the rule's promulgation, including more complex claims that may include attorney fee awards or complicated computation of the "sum certain." The duty to enter such a default judgment should not fall on the clerk. Judge Rosenberg added that there is value in litigants' knowing who the true decision maker will be, and the current rule obscures that if the judge is involved. The clerk liaison agreed that a change in the rule would better describe typical practice because clerks often direct parties seeking such a judgment to make a motion.

Two judge members expressed support for eliminating Rule 55(b)(1) and requiring all requests for default judgment be made by motion. In their view, judicial attention is merited and requiring it in these cases wouldn't add a significant burden. Judge Bates agreed, noting that he sees perhaps a dozen such cases a year (often when a company has defaulted in a case seeking payment on an ERISA claim), and he is involved in all of them. Another judge member wondered whether there should be better guidance for clerks if they are to retain the duty to enter default judgments, perhaps via an AO form.

The reporters agreed to continue studying the issue for further discussion at the October meeting.

Random Case Assignment

Professor Bradt reported that proposals for rulemaking on district court case assignment remain on the agenda while the reporters continue to monitor the district courts' uptake of the 2024 Judicial Conference to randomly assign cases seeking injunctions against government action among all judges in a district, rather than assigning the case to the lone judge in a division in which a case is filed. Many districts have chosen to follow the guidance, while in others the question remains under consideration. Professor Bradt explained that close monitoring would continue in the upcoming months and that he would report again at the fall Advisory Committee meeting.

Attorney Admissions

Professors Struve and Bradt, the co-reporters of the intercommittee group considering proposals to more easily facilitate attorney admissions to the district courts, rested on the materials in the agenda book in light of the late hour. Professor Struve noted that the committee was still engaged in research and outreach and would report on its progress in the fall.

Items to be Dropped from the Agenda

Professor Marcus outlined several proposed amendments that are recommended to be dropped from the agenda. He thanked those who submitted these thoughtful proposals, even though after careful consideration the reporters recommend that the Advisory Committee not pursue them.

First, several creative and thoughtful proposals from Sai (24-CV-O; P; Q; R). These proposals center on making various practices currently covered by local rules uniform throughout the country. One proposal would mandate uniform word and line limitations throughout the district courts for various filings. Another would be to create a new set of federal "common rules" based on practices apparently adopted by most or all districts. As Professor Marcus explained, while more uniformity on these matters might make life easier for attorneys practicing in multiple districts, the local rules represent important variation and experimentation among the districts, for whom "one size may not fit all." As a result, a national set of rules covering issues related to filings does not seem promising.

Second, Joshua Goodrich proposed amending Rule 12(f) to allow motions to strike material in legal briefs and memoranda (24-CV-T). The current rule applies only to pleadings, and Mr. Goodrich believes there should be an opportunity to file such a motion to expunge redundant or scandalous material from other filings. As noted in the agenda book, the extent of the need for such a rule is unclear, and adding such a motion to Rule 12 could create confusion over the effect of that motion on the timing of the defendant's answer. Moreover, adding opportunities to make motions to strike materials in an adversary's papers may increase friction instead of inducing civility.

Third, Serena Morones suggests limiting the duration of expert depositions to four hours under Rule 30(d)(1) (25-CV-A). Essentially, she contends that the current limit of seven hours is inhumane and overlong given the prior production of an expert report. This leads to unnecessarily long depositions during which opposing counsel seeks to bully or trap the expert witness into a sound bite that may later be grist for a *Daubert* motion. Professor Marcus noted that the seven-hour limit may be worthy of further discussion, but that expert depositions are an unlikely target for special treatment, especially when experts are likely compensated for appearing at a deposition, unlike lay witnesses.

No Advisory Committee member expressed opposition to removing these items from the agenda.

Federal Judicial Center Update

Judge Rosenberg then turned to representatives from the Federal Judicial Center, Drs. Emery Lee and Tim Reagan (remotely), to elaborate on their memo updating the Advisory Committee on the Center's recent activities. Reagan noted that one project the Center is working on is collecting best practices from districts that allow unrepresented litigants to use electronic filing. The Center has compiled the districts' policies and looks forward to releasing a report soon. Professor Marcus noted that this information will be very useful as the advisory committees continue to investigate this issue.

Adjournment

With the agenda accomplished, Judge Rosenberg turned the floor over to Judge Bates, who took the occasion to "say goodbye" to the Advisory Committee after having attended every meeting for the last nine years. Since his term as Standing Committee Chair is expiring at the end of the summer, this will be his last meeting as a committee member or chair. He thanked the committee members for their dedication and care. Judge Bates wished the Advisory Committee best of luck in its efforts.

Judge Rosenberg, in turn, thanked Judge Bates on behalf of the Advisory Committee for his years of service, as chair of both this committee and the Standing Committee. She thanked him for his calm and dedicated leadership and for setting the very high standard that we all aim to reach.

With that, Judge Rosenberg adjourned the meeting.

TAB 2E

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

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. James C. Dever III, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: May 15, 2025

I. INTRODUCTION

The Advisory Committee on Criminal Rules met in Washington, D.C., on April 24, 2025. Draft minutes of the meeting are attached.

The Advisory Committee has one action item: it unanimously recommends publication of amendments to Rule 17 and the accompanying Committee Note.

In addition, this report includes several information items, including updates on the reports from some subcommittees, the placement of proposals on its study agenda, and the removal of several other items from its agenda. Finally, the Committee heard reports on the continuing cross-committee work on attorney admissions and electronic filing by self-represented individuals.

II. ACTION ITEM: RULE 17 SUBPOENA AUTHORITY (22-CR-A; 24-CR-J; 25-CR-G)

The Advisory Committee voted unanimously at its April 2025 meeting to recommend that the Standing Committee approve for publication the proposed amendments to Rule 17 and the accompanying Committee Note. A copy of the proposed amendments is attached to this report. An overview of the proposed amendments follows a recap of their development.

A. Developing the Proposed Amendments to Rule 17 and the Committee Note

In the spring of 2022, the Advisory Committee received a proposal to amend Rule 17 from the White Collar Crime Committee of the New York City Bar (22-CR-A). The proposal urged revision of the rule to allow subpoenas to third parties for information "relevant and material to the preparation of the prosecution or defense." This "materiality" standard, the proposal argued, would be more appropriate than the test announced by the Supreme Court in *United States v. Nixon*, 418 U.S. 683, 700 (1974), which almost all federal courts now apply to restrict defense subpoenas to third parties under Rule 17(c).

Nixon involved a subpoena issued by the Special Prosecutor ordering then President Nixon to produce White House tapes for use in the criminal prosecution of White House staff. The prosecutor had filed a motion seeking trial court authorization of the subpoena, and the Court, quoting language that remains today in the rule, stated:

> [I]n order to require production prior to trial, the moving party must show: (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition."

Nixon, 418 U.S. at 699-700. The Court continued, "the Special Prosecutor, in order to carry his burden, must clear three hurdles: (1) relevancy; (2) admissibility; (3) specificity." *Id.* at 700.

The New York City Bar's proposal noted that the Court in *Nixon* declined to decide if the standard it announced was appropriate for third-party subpoenas by the defense; that the restrictive requirements applied in *Nixon* were developed in *Bowman Dairy v. United States*, 341 U.S. 214 (1951), where the Court suggested concern that the subpoena there *between* parties could provide an end run around restrictions in Rule 16; that unlike prosecutors, defendants have no access to grand jury subpoenas or search warrants to obtain evidence from third parties; that defendants should have at least as much access to information from third parties when facing incarceration and criminal punishment as they do when defending against civil claims; and that a few district courts have already recognized that the strict *Nixon* test should not apply to defense subpoenas to

third-parties.[1] In addition to replacing the *Nixon* standard with "materiality," the proposal included other revisions. This included adding "electronically stored information" to the list of items a subpoena recipient may be ordered to produce, restoring language removed during restyling that had restricted Rule 17(h) to subpoenas to the government or to the defendant, and eliminating language in Rule 17(c)(1) to make it clear that no court order or prior approval is required to issue a subpoena, regardless of whether it seeks production in advance of trial, unless it seeks personal and confidential information.

To evaluate the proposal to amend Rule 17, then Chair of the Advisory Committee Judge Raymond Kethledge appointed a Subcommittee chaired by Judge Jacqueline Nguyen to develop a recommendation for the Advisory Committee.

While the Subcommittee undertook its work, the Advisory Committee also received two additional letters related to Rule 17 from the National Association of Criminal Defense Lawyers (NACDL) (24-CR-J and 25-CR-G). NACDL raised similar concerns to those in the New York City Bar's proposal, and it added other considerations (for example, authorization of ex parte subpoenas and expanding availability of subpoenas to criminal proceedings other than trials).

Over a period of more than two years, the Subcommittee's examination of the problem included the following:

- organizing a day-long information session at the Advisory Committee's October 2022 meeting, with eleven defense and prosecution practitioners invited from around the country to share their experience and concerns about Rule 17 and answer questions from Advisory Committee members;

- meeting with experts representing tech companies, banks, and financial service companies, whose practices included responding to subpoenas;

- hearing summaries of the Reporters' discussions with individuals representing medical providers, hospitals, and schools, as well as attorneys from the Department of Justice who work on victim and witness issues in the Executive Office of U.S. Attorneys; and

- reviewing multiple research memoranda by the Reporters and Rules Law Clerks about the rule's history, as well as subpoena law and practice in both federal and state courts.

[1] These arguments are forcefully made as well in a petition for certiorari seeking review of the question "Whether a criminal defendant seeking pretrial production of documents from a third party by subpoena under Federal Rule of Criminal Procedure 17(c) must satisfy the heightened standard applied in *United States v. Nixon,* 418 U.S. 683 (1974) – a question that *Nixon* expressly left open." See *Rand v. United States of America*, Petition for a writ of certiorari, No. 16-526, 2016 WL 6123829, at *i (Oct. 18, 2016). See *United States v. Rand*, 853 F.3d 451 (4th Cir. 2016), *cert. denied,* 580 U.S. 1001 (2016).

The Subcommittee's investigation identified several concerns about the language of the rule, which has remained essentially unchanged since its adoption in 1944, except for the addition of (c)(3) in 2008 to implement the Crime Victims' Rights Act. In brief, the rule's existing guidance about obtaining, reviewing, and responding to subpoenas to produce items is ambiguous and incomplete, and it has produced conflicting interpretations that afflict multiple aspects of subpoena practice. Even the *Nixon* standard itself is applied in different ways from district to district. That inconsistency, the Advisory Committee learned, has meant that access to evidence from third parties is nearly impossible in some places, and much easier in others. In addition, the conflicting interpretations have created uncertainty and increased costs for parties and courts.

More important, some of the most restrictive interpretations of the rule can deprive the defense of a realistic opportunity to secure evidence needed for accurate adjudication. Many practitioners related their experience with courts reading the rule to bar all ex parte motions and subpoenas, or to mandate that everything produced must be provided to both sides. Attorneys noted that without ex parte motions, "the government will be able to see what the defense is seeking and then get a copy of the documents when they come in—even if he would not have been required to disclose them to the government under Rule 16." Minutes of the Oct. 27, 2022 Meeting of the Advisory Committee on Criminal Rules, at p. 18. One said, "it was "somewhat terrifying … that a rule exists that can result in us actually not following or adhering to our ethical duties as defense attorneys. It should not depend on how liberal the judge is in terms of his or her reading of the statute." *Id.* at p. 42. This attorney added, "Many things are left in the dark because, as a defense attorney, you don't want to run the risk of disclosing information that can end up harming your client." *Id.* at p. 58. Another attorney related this example:

> [I]n a sexual assault the defense investigation uncovered from its own witness interviews that the alleged victim, instead of immediately reporting the assault or immediately going to a hospital and Medical Center, instead went to a casino and spent considerable time there. … The videos would show that what happened was inconsistent with the victim's statement. The government had not turned over this information, which wasn't in its control. This evidence, which was critical to their theory of defense, was in the hands of a third party. Disclosing the request for this information would have tipped the hand of what their defense theory was and identified the witnesses they were talking to. So her office very much wanted to file this request for information from the casino ex parte and under seal. The trial ended in an acquittal, and the information obtained by subpoena was very important."

Id. at p. 29.

As for the *Nixon* test, defense practitioners related that judges had interpreted that test to categorically prohibit subpoenas for impeachment evidence, or to prohibit a subpoena unless a party first presents a nearly verbatim recital of the contents of each item sought as proof of its certain admissibility. One participant related a case in which a subpoena for phone records provided evidence that defendant was in fact innocent, and the charges were dropped on the first day of trial. "But if there had been a motion to quash under *Nixon*," he said, he "would have been

unable to satisfy the *Nixon* test." *Id.* at p. 17. Another stated many courts "read the *Nixon* standard to require you to describe the documents with super precision," which he could rarely do. Another agreed he cannot pass the *Nixon* standard unless he knows "exactly what this camera is going to show or exactly what the phone records will say." *Id.* at p. 42.

These strict readings are not just problematic, they are unnecessary. Despite repeated inquiries to practitioners and other experts, no one reported that "fishing expeditions," harassment, unwarranted disclosure, or other abuses of Rule 17 existed or were more of a problem in the jurisdictions that follow more flexible interpretations of the rule. Instead, both government and defense practitioners reported that judges tend to manage subpoenas for sensitive information, problematic parties or counsel, and other issues on a case-by-case basis, using tools such as requiring motions before issuance, ordering returns to the court, in camera review, and strict protective orders regulating who can access or review specific material obtained, for what purpose, and how the material must be redacted, anonymized, stored, and destroyed.

The Subcommittee also hoped to clarify several procedural issues in the rule text and expand, to some extent, access to third party information under the rule, while preserving sufficient judicial control over the subpoena process. Its first discussion draft of an amendment:

- required a motion and court order to ensure judicial oversight for every non-grand jury subpoena to produce documents or information, not just for those seeking "personal and confidential information" about a victim;

- contained two separate sets of procedures—one for subpoenas seeking either "personal or confidential information about a victim" or information likely to be "protected by [a privilege, confidentiality protection, or privacy protection under federal or state law]" and less rigorous set of procedures for subpoenas seeking other, unprotected information;

- included issuance standards for both sets of subpoenas with two requirements derived from the *Nixon* test—the requesting party had to describe each designated item with reasonable particularity and state facts showing that the item is not reasonably available to the party from another source—but others that departed from the *Nixon* admissibility standard. A subpoena for unprotected information required a "materiality" showing—that the information is "material to preparing the prosecution or defense"—while a subpoena for protected information required a showing that it is likely to be admissible or exculpatory;

- permitted production of the designated items to the requesting party's counsel only when the subpoena sought unprotected information; required for all other subpoenas that the subpoena recipient turn over all items to the court: and then required the court to review those items in camera and ensure that any disclosure complied with federal law;

- added a provision expressly authorizing ex parte subpoenas upon a showing of good cause, and limiting disclosure of items produced to non-requesting parties; and

- clarified which provisions of the rule applied to non-grand jury subpoenas only, distinguishing provisions that governed grand jury subpoenas as well.

For a full day at its November 2024 meeting, Advisory Committee members and a dozen invited defense, prosecution, privacy, and victim experts shared their views about the issues highlighted in the discussion draft:

- *Need for judicial oversight*. Participants voiced strong support for more flexibility than the draft allowed. They argued that many subpoenas are now available to the parties without a motion and court order even when seeking production before trial, and that they should remain so. They also recommended that the rule permit some subpoenas to be returnable directly to the requesting party and not be returned to the court. There was general agreement that in camera review by judges is burdensome, particularly when a large amount of material is involved, and not needed in all cases. The practitioners also emphasized that negotiation rather than litigation between the requesting party and subpoena recipient is the norm for many cases and should be encouraged. Protective orders are common, developed by the parties for court approval, or by the court if there is an ex parte subpoena or the parties cannot agree.

- *Bifurcated approach to protected and unprotected information*. This aspect of the discussion draft received little support, with many participants questioning the need for different standards for protected and unprotected information, and warning that defining that distinction could create burdensome litigation.

- *Modifying the* Nixon *standard*. Despite continued support by some for a more generous standard allowing access to the information that would "lead to" admissible evidence, others expressed concern that any change to the *Nixon* test could increase abuse by defendants as well as decrease cooperation by victims and witnesses. Participants did agree that it might be possible to reach consensus on a standard that would relax, somewhat, *Nixon*'s "admissibility" requirement.

- *Allowing subpoenas for other types of proceedings.* Participants favored adding text that would clarify that subpoenas should be available to both parties for sentencing and at least some evidentiary hearings in addition to trial, including hearings on suppression motions.

- *Access to ex parte subpoenas*. Participants generally agreed with the draft's approach, emphasizing that parties do sometimes need to proceed ex parte, and when material is produced for an ex parte subpoena, disclosure to the opposing party should not be required. Participants echoed the experience of those at earlier sessions who related that when judges did not allow ex parte motions, defense counsel was left with two

> untenable options: either risk harming the client by revealing defense strategy or even uncovering inculpatory information the government would otherwise not have known, or forego a subpoena, abandoning pursuit of information that they believe is essential to defend the client.

Using this helpful guidance, the Subcommittee developed the present draft, which adopts a more incremental, flexible approach, and attempts to replicate and preserve the policies followed where subpoena practice is reportedly working well. At its April 2025 meeting, the Committee rejected (by a vote of 8 to 4) a more significant departure from *Nixon* that would have required that the items be likely to "lead to" admissible evidence, and also rejected (by a vote of 11 to 1) a proposed addition to Rule 17(c)(3) that would have expanded the motion and notice requirements in that subsection to include subpoenas seeking personal and confidential information about witnesses as well as victims.

After making several minor modifications, the Advisory Committee unanimously approved the draft amendments to the Rule and Committee Note as ready for referral to the Standing Committee for publication. The attached versions include several style changes incorporated after that approval.

B. Overview of the Substantive Amendments to Rule 17

The Advisory Committee's proposed amendments to Rule 17 are concentrated in section (c) of the rule, which governs subpoenas to produce documents and other items. A list of the seven primary issues addressed in the amendments appears below. The draft Committee Note contains additional explanations of the proposed amendments.

(1) *Application to Proceedings Other Than Trial*

Some courts had interpreted the existing language in Rule 17(c)(1), which refers only to "trial," as barring subpoenas for all proceedings other than trial. This interpretation leaves the defense with no mechanism to obtain evidence from third parties for proceedings other than trial, and drastically limits the government's options.[2] To fix this, new Rule 17(c)(2)(A) expressly authorizes the use of subpoenas at sentencing and suppression hearings (where these subpoenas are already used regularly in many districts), as well as detention and revocation hearings, where there is statutory or rule authority for parties to present evidence and the need for third party evidence arises on occasion.

The Advisory Committee had an extended discussion of which proceedings should be listed in the rule. The Advisory Committee decided to include revocations on the list after multiple members – defense, prosecution, and judges – spoke about the occasional need for subpoenas for revocation proceedings to obtain, for example, police reports, body camera footage, and treatment records. As for detention hearings, everyone agreed it would be rare to use a 17(c) subpoena at an

[2]The government may obtain evidence from third parties for non-trial proceedings with a search warrant, or, under limited circumstances, with a grand jury subpoena.

initial detention, but a clear majority expressed support for including them in the amended rule. The members' reasons included the possibility of a reconsideration of detention where items such as employment records would be useful, the importance of this stage, and the Bail Reform Act's allowance of the presentation of witnesses and information. There was no support for attempting to specify which detention hearings should allow subpoenas and which should not.

Responding to the concern that there would be few limits on subpoenas when the rules of evidence do not apply, members noted the party seeking the subpoena would also have to describe it with particularity, establish the recipient has the information, and that it cannot be obtained any other way, and that even where judges have accepted subpoenas for detention hearings, they have seldom been used.

The amendment also provides flexibility to the court to allow the use of subpoenas for other evidentiary hearings in an individual case. As explained in the proposed Committee Note, proceedings such as preliminary hearings occur very early in the process, and there is seldom time to seek a subpoena. But there are rare cases in which there may be an opportunity to seek a subpoena and a need to do so, and the rule provides flexibility for the courts to authorize subpoenas in such cases.

(2) *Codifying a Somewhat Loosened Nixon Standard*

Rather than substituting an entirely different standard for non-grand-jury subpoenas seeking the production of documents or other items, the amendment makes a more incremental change, codifying in Rule 17(c)(2)(B) an interpretation of the *Nixon* standard that is slightly looser than what some courts have demanded. Some courts have required the requesting party to prove with certainty that the information would be admitted, thus barring, for example, subpoenas for impeachment evidence until after the other party had presented its witnesses. The Advisory Committee was persuaded these decisions had applied the admissibility requirement in *Nixon*'s interpretation of prior text too rigidly. In other districts, judges have found the "admissibility" requirement of *Nixon* can be satisfied by a showing of likely admissibility, and defense and government practitioners in such districts reported no problems. Retaining some relationship to admissibility narrowed the scope of what can be sought by tying that information to the designated proceeding and further preventing "fishing expeditions." As the Criminal Division Chief for the U.S. Attorney's Office for the Western District of North Carolina stated at the Committee's November meeting, "Admissibility is what tethers it to the trial or hearing; if you sever that, it becomes a completely different beast." Minutes of the November 6-7, 2024, Meeting of the Advisory Committee for the Criminal Rules, p. 39.

The Advisory Committee, by a vote of 8 to 4, adopted the "likely admissible" language to indicate that somewhat more flexibility is intended. In doing so, it rejected an alternative formulation— "likely to lead to" admissible evidence—that would have nudged the amendments even closer to the standards supported by the New York City Bar Committee, NACDL, and many of the defense practitioners who spoke with the Advisory Committee.

Other aspects of the standard codified in the rule are also derived from the *Nixon* decision. Requiring that items be described with reasonable particularity is intended to replace whatever "specificity" metric courts had been applying under *Nixon*. That the items are not reasonably available from another source replaces the *Nixon* mandate that a party show that the items "are not otherwise procurable reasonably in advance of trial by exercise of due diligence." That the items are "likely to be possessed by the recipient," is not separately addressed in *Nixon.* But, like the other requirements, is an important aspect of protecting against "fishing expeditions," which *Nixon* does mention. In addition to the statement in (2)(B), both (c)(2)(D) and (c)(7) reference these modified *Nixon* requirements as necessary showings when seeking a subpoena by motion or defending a subpoena against a motion to quash.

The proposed amendments continue to restrict Rule 17 subpoenas so that they are not tools for discovery (e.g., by limiting them to items described with reasonable particularity that are "likely admissible" as evidence in a designated proceeding). But the amendments do not perpetuate the outdated policy of requiring a motion and heightened justification whenever a subpoena seeks production in advance of trial. *Nixon's* standard included the statement that a subpoena to produce items before trial is not available unless the party "cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial." Many courts applying the *Nixon* test today often do not discuss this requirement, instead sticking to "relevance, specificity, and admissibility." And for good reason. When Rule 17 was adopted and its requirements first developed, pretrial access to evidence was much more restricted than it is now. The rule's authorization of production in advance of trial to avoid delay and expedite trial was novel, and the Court termed it the rule's "chief innovation." *Nixon*, 418 U.S. at 698. These days, mid-trial production and other late revelations tend to be unwelcome surprises or lapses, not standard procedure.

(3) *When Motion and Order Required*

New Rule 17(c)(2)(C) provides a clear rule explaining when a party must obtain the court's permission by motion before serving a subpoena and when the party may serve a subpoena without motion. Courts continue to differ on when a motion is required based in part on the ambiguity of the language in Rule 17(c)(1), and the *Nixon* Court's interpretation of this provision as requiring court authorization for a subpoena seeking production in advance of trial. In many districts, motions before issuance are not routinely required. Practitioners and judges expressed significant concerns about the burdens that a motion requirement for all or most Rule 17(c) subpoenas would create in their districts, for both counsel and courts.[3]

[3] Consider this description from a CJA attorney:

> In her experience, an attorney's first Rule 17(c) motion takes 20 hours, which is close to $3,000 of taxpayer money. Subsequent ones now take her three hours, which is $500.00 of taxpayer money. Additionally, there will be a hearing, which adds to the cost. All of this cost is imposed on many people who are not bad actors. She explained that even putting in three hours plus court time and then potentially fighting with the recipient means she will hit her funding cap really early as a CJA lawyer, requiring her to apply to exceed the cap. It requires her to explain things more and raises a

The added text creates a default, allowing a party to serve the subpoena without a motion unless a motion is required by local rule, court order, or by Rule 17(c)(3)—the existing provision regulating subpoenas seeking certain victim information—or new Rule 17(c)(4) requiring a motion before a self-represented party may serve a subpoena to produce items. The new provision ensures court supervision when needed most, and it provides flexibility to courts to add oversight to accommodate particular types of subpoenas or individual cases.

The Committee Note also suggests that even without a motion, other procedures in the rule or otherwise available to the court, such as protective orders, are available to control potential abuse of the subpoena process by the parties.

(4) *Proceeding Ex Parte*

New Rule 17(c)(2)(E) and (F) respond to concerns about interpretations of the existing text of the rule that mandate disclosure of every motion and subpoena to all parties. The Advisory Committee concluded that both the defense and the government had advanced persuasive reasons for proceeding ex parte under Rule 17(c), and that permitting ex parte motions and production had been working well in many districts.

New subsection (E) to Rule 17(c)(2) provides that upon a showing of good cause a court must permit a party to file ex parte a required motion for a subpoena under Rule 17(c). The proposed amendment uses mandatory language to avoid any possibility that an individual judge, or a court in a local rule, could prohibit ex parte motions. New (c)(2)(F) also states that a party has no duty to inform the other parties about a subpoena when no motion is required, absent an order to do so.

(5) *Place of Production*

New Rule 17(c)(5) clarifies the circumstances that require a subpoena recipient to produce the designated items to the court rather than to the requesting party. This is yet another issue that has divided courts interpreting the rule's existing text in Rule 17(c)(1). Some courts read the rule as requiring recipients of all subpoenas to produce the designated items to the court. Others regularly permit returns directly to the party seeking the items. The revised text again adopts a default rule, mandating returns to the court if the requesting party is self-represented, unless the court orders otherwise. It also makes returns to a party's counsel discretionary, allowing courts to determine when they wish to receive and review subpoenaed materials before receipt by counsel.

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worry about voucher cutting. If she did a lot of investigative work, but the subpoenas don't pan out, she worries that the judge may not want to approve funds to compensate for her work.

Minutes of the Oct. 27, 2022 Meeting of the Advisory Committee on Criminal Rules, p. 43.

(6) *Preserving Disclosure Policies in Rule 16*

New Rule 17(c)(6) resolves another dispute about the meaning of the rule's existing text, which some courts have read to allow them to order a subpoena recipient to provide all items received to the opposing party, regardless of whether they would be subject to discovery under Rule 16.

The Advisory Committee recognized that the policies regulating disclosure between parties have been carefully codified in Rule 16 and other discovery rules. Rule 17(c) should not modify them. Accordingly, the new text states that disclosure of information and other items between parties, including information and items a party may obtain by subpoena, is regulated by Rule 16 and other discovery rules.

(7) *Clarifying Which Provisions Apply to Different Proceedings*

To improve clarity and avoid confusion, the amendments clearly indicate what types of proceedings are governed by each subdivision in Rule 17:

Subdivision (a) applies to all subpoenas: those to testify and those to produce material, and to grand jury and non-grand-jury subpoenas.

Subdivision (b) applies only to subpoenas to testify.

Subdivision (c) applies only to subpoenas to produce designated items. Within subdivision (c), paragraphs (2) through (6) apply only to non-grand-jury subpoenas.

Subdivisions (d) and (e) regarding service apply to both subpoenas for testimony and subpoenas to produce designated items.

III. SUBCOMMITTEE REPORTS

A. Rule 49.1, Reference to Minors by Pseudonyms (24-CR-A and 24-CR-C); Full Redaction of Social-Security Numbers (22-CR-B)

1. Reference to Minors by Pseudonyms

Judge Michael Harvey reported that the Subcommittee unanimously supported the Department of Justice's suggestion that Rule 49.1 be revised to provide greater protection to minor victims by requiring that public pleadings employ pseudonyms, rather than a minor's initials. However, despite the reporters' work with the style consultants and with the reporters for sister advisory committees (which may recommend parallel amendments to their own privacy rules), the Subcommittee was not able to reach agreement on the language of an amendment in time for submission at the April 2025 meeting.

Members expressed concern that language suggested by the style consultants to streamline Rule 49.1(a) was more of a change than necessary to incorporate the substance of the proposed change. This could have negative consequences. Some practitioners who were asked for comments interpreted the proposed language as requiring them to include—and then redact—certain information. The Subcommittee thought that interpretation was not sound, but it was reluctant to generate concerns of this nature. Moreover, a greater than necessary change in the language could have unintended consequences.

Members suggested language that would implement the proposal to require pseudonyms with minimal changes to the current structure and language, and the Subcommittee requested the reporters to return to the style consultants to see if that language (or something similar) would be acceptable**.**

2. Complete Redaction of Social-Security Numbers

Although there has been agreement that neither the prosecution nor the defense need the last four digits of social-security numbers in public filings, the Subcommittee wanted to understand whether there was any harm in including this information. Rules Law Clerk Kyle Brinker provided an excellent research memorandum explaining how this information could be misused by identity thieves and fraudsters.[4] Moreover, full redaction is now considered a best practice by a variety of government agencies. The Subcommittee found this analysis very convincing, and it concluded the case had been made for complete redaction of social-security numbers in Rule 49.1.

However, reviewing the introductory language of Rule 49.1(a) as well as (a)(1) caused the Subcommittee to focus, for the first time, on the question whether the last four digits of taxpayer-identification numbers should also be redacted. Mr. Brinker's research memoranda had not focused on individual taxpayer-information numbers (ITINs). The Internal Revenue Service requires any individual who is not eligible to get a social security number to apply for an ITIN if they must furnish a taxpayer identification number for U.S. tax purposes or file a U.S. federal tax return. Millions of individuals now possess ITINs, and individual ITINs could be useful to identity thieves and fraudsters. As of December 2023, the IRS had issued 26 million ITINs, and there were more than 5.8 million active ITINs. ITINs are now commonly used for a variety of non-tax purposes, including obtaining drivers' licenses and credit cards, and opening bank accounts, and establishing a credit history. Thus, having an individual's full ITIN would be of great value to identity thieves and fraudsters.

But the risk of disclosing only the last four ITIN digits is less clear than the risk associated with SSNs, and the Subcommittee had no information about whether various entities—such as banks, credit card companies, or drivers' license bureaus—accept the last four ITIN digits for authentication. We requested that additional research be done on the potential for harm from public filings including the final four digits of taxpayer-identification numbers, as well as additional information about the different types of taxpayer-identification numbers. Mr. Brinker has provided

[4] To avoid providing any sort of roadmap for misuse of this information, Mr. Brinker's memorandum was not included in the Committee's agenda book.

another excellent research memorandum that will inform the Subcommittee's further consideration of this issue.

3. Next Steps

The Subcommittee will meet over the summer to discuss revisions that might be acceptable to style, Mr. Brinker's research, and any additional issues raised by our sister committees, with the hope that parallel amendments to the privacy rules can be proposed at the fall meetings.

B. Rule 40, clarifying procedures for previously released defendant arrested in one district under a warrant issued in another district (24-CR-D & 23-CR-H)

The Magistrate Judge's Advisory Group (MJAG) and Judge Zachary Bolitho have recommended clarification of Rule 40, which governs arrest for failing to appear in another district or for violating conditions of release set in another district. Judge Harvey provided a report on the work of the Rule 40 Subcommittee.

Judge Bolitho suggested that Rule 40 be amended to address two issues: (1) Whether a defendant who has been arrested on a petition to revoke pre-trial or presentencing release from another district has the right to a detention hearing in the district of arrest; and (2) If so, what is the standard that applies in the detention hearing?

MJAG's more comprehensive proposal identified seven points of confusion that arise when defendants are arrested for failing to appear in, or for violating conditions of pretrial or presentence release set in, another district. It recommends that the Advisory Committee draft a new Rule 5.2 "Revoking or Modifying Pretrial Release" that would address each of the seven issues for pretrial release.

- Which parts of Rule 5(c)(3) apply?
- Why does the rule exclude "adjacent district" as an option?
- Why does the rule not address informing the defendant of the alleged violation?
- Why does the rule not address informing the defendant about the right to consult counsel, and how does the previous appointment of counsel in the issuing district affect the right?
- What detention standard applies?
- Under what circumstances would a judge in the arresting district modify a detention order?
- Does a magistrate judge in the issuing district have the authority to modify a detention order by a magistrate judge in the arresting district?

The proposals raise numerous issues. The Subcommittee is just beginning its work. It held its first meeting to identify the issues it felt were of greatest importance, and to identify additional information and research that would be required. It will continue to meet over the summer.

IV. ITEMS REMOVED FROM THE COMMITTEE'S AGENDA

A. Rule 43, Expanded Use of Video Conferencing (24-CR-B)

The Advisory Committee voted to accept the Rule 43 Subcommittee's unanimous recommendation that it remove from its agenda Judge Brett Ludwig's proposal to amend Rule 43 to extend the district courts' authority to use videoconferencing, beyond initial appearances and arraignments, with the defendant's consent.

Judge Ludwig contended that experience under the CARES Act demonstrated that there is no good reason to limit the use of technology to only initial appearances and arraignments. He urged that under the CARES Act "courts around the country embraced the use of technology without any noticeable deficit in the administration of justice," and his own court and others were "able to fairly and efficiently conduct all manner [of] pretrial hearings by videoconference, including Change of Plea Hearings under Rule 11 and Sentencing Hearings under Rule 32."

Judge Ludwig noted several advantages of expanding the authority to use video conferencing with the defendant's consent. It would give judges flexibility to make use of the expenditures already made for these resources, showing Congress and the public that the courts are taking steps to offer substantial affirmative cost savings in many districts, including his own, where there are no long-term pretrial detention facilities within close proximity to the courthouse. Bringing defendants to the courthouse imposes significant costs for personnel, transportation, and security at both the jail and courthouse, and imposes physical and mental costs on defendants. He also stated that "[w]hen the CARES Act authority ended, several frustrated defendants and defense counsel complained, insisting they would have preferred to appear by videoconference. Under the current rules, I could not accommodate them."

Although the Advisory Committee had previously considered proposals to expand the use of video conferencing—in each case ultimately declining to amend Rule 43—there were two new factors: the experience with the CARES Act and greater acceptance of remote proceedings by a significant number of judges. Judge Dever appointed a subcommittee to consider whether to recommend any amendments expanding the availability of remote appearance of defendants for proceedings other than trials, pleas, or initial sentencings.

Judge André Birotte, who chaired the Subcommittee, reported on its decision to recommend that no further action be taken to expand the use of video conferencing. The Subcommittee had discussed the possibility of expanding the use of video conferencing with the defendant's consent for a long list of hearings[5] which contemplate the defendant's presence, and for which neither Rule 43 nor another rule expressly permits appearance by video.

[5] The list included:

- 5.1 – preliminary hearing ("may cross-examine … witnesses and introduce evidence")
- 7(b) – waiver of indictment ("in open court and after being advised …")

The Subcommittee recognized the challenges that arise in districts that are very large geographically, such as Alaska, but it ultimately concluded that Rule 43 should not be amended to expand the use of video conferencing. Members emphasized several points. The rule already allows remote hearings on legal matters like status conferences. But challenges would arise with testimonial hearings, like detention hearings, where remote proceedings could lead to issues, such as claims of ineffective assistance of counsel, due to the lack of in-person interaction.

Some of the discussion focused on the possibility of allowing change-of-plea hearings to be conducted with the defendant appearing remotely, even though the Subcommittee's charge excluded this possibility. Members stressed the importance of the judge being able to see the defendant in person, and they noted that in-person interactions between the defendant and counsel are often crucial to ensuring the process goes smoothly. A member also noted the general consensus among the defense bar that in-person proceedings are preferred because they ensure clear communication and reinforce the seriousness of proceedings for clients, especially when their liberty is at stake. The Department of Justice also had concerns about expanding video conferencing to change of plea proceedings. In districts where Magistrate Judges conduct plea colloquies and there are long delays before the District Court adopts the Magistrate Judge's Report and Recommendation, permitting the Magistrate Judge to conduct the colloquy remotely could increase the likelihood that a defendant would move to withdraw the plea before it was accepted by the District Court.

Subcommittee members discussed, but ultimately decided not to pursue, either a hardship exception or a distance-based exception, perhaps applied on a district-by-district basis. The shared concern was that this could be a slippery slope. A distance-based exception could eventually lead to cost-cutting measures, for example, potentially affecting how in-person meetings with clients would be approved or how Criminal Justice Act vouchers would be reviewed for in-person meetings if a virtual option were available.

- 12(f),(h) – suppression hearing (referencing Rule 26.2 and government witness)
- 12.2 – insanity/competency hearings in non-capital cases (18 U.S.C. 4247(d)4)
- 15(c) – deposition (absent waiver or disruptive conduct defendant must be in witness' presence)
- 17.1 – pretrial conference (refers to statements by defendant during the conference)
- 32.1(a) - initial appearance for revocation (must be "taken . . . before . . . magistrate judge")
- 32.1(b)(1) – preliminary hearing – revocation (opportunity to appear, present evidence …)
- 32.2(b)(1)(B) – forfeiture hearing (court may consider "additional evidence … presented by the parties")
- 32.2(c) – ancillary proceeding in forfeiture (not explicitly referencing a hearing, but allowing third party to file a petition asserting an interest in property and providing for discovery)
- 33(a) – hearing on a motion for a new trial (but says nothing about presence of defendant)
- 44(c)(2) – conflict inquiries (court "must personally advise each defendant ….")
- 46(j)/ 18 U.S.C. § 3142(f) – detention hearing (opportunity to testify, present witnesses …)

The Advisory Committee voted unanimously to accept the Subcommittee's recommendation and remove the suggestion from its agenda.

B. Formatting of Pleadings, Incorporation of Local Rules, and Creation of New Set of Common Rules (24-CR-E, 24-CR-F, 24-CR-G, and 24-CR-H)

Agreeing with the recent actions of the Appellate, Bankruptcy, and Civil Rules Advisory Committees, the Advisory Committee removed from its agenda proposals by Sai to regulate the format of pleadings, identify common provisions in local rules and incorporate them into the relevant national rule, and create a new set of common federal rules.

V. ADDITION OF ITEM TO STUDY AGENDA

After a brief discussion, Judge Dever announced that two proposals to amend Rule 15 to allow for pretrial depositions would be placed on the Advisory Committee's study agenda. This would allow the Committee to begin gathering information, particularly about the experience in states allowing pretrial depositions, before a decision was made to create a subcommittee.

VI. CROSS-COMMITTEE PROJECTS

A. Self-Represented Litigant Access to Electronic Filing

Professor Struve reported on developments in the working group as well as discussions of potential rules in the other advisory committee meetings.

B. Unified Bar Admissions

Professor Struve also provided an oral report on the work of the Joint Subcommittee.

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

Rule 17. Subpoena

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

(b) Subpoena to Testify—Defendant Unable to Pay Costs and Witness Fees. Upon a defendant's ex parte application, the court must order that a subpoena be issued for a named witness if the

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

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

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

(1) ***In General—Items Obtainable.*** A subpoena may ~~order~~ require the ~~witness~~ recipient to produce any ~~books, papers, documents,~~ item, including any data or information or any book, paper, document, or other ~~objects the subpoena designates~~ object. ~~The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items~~

~~arrive, the court may permit the parties and their attorneys to inspect all or part of them.~~

(2) ~~***Quashing or Modifying the Subpoena.*** On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.~~ ***Non-Grand-Jury Subpoena—When Available; Required Content and Limitations; Issuance; Disclosure.***

(A) *When Available.* A non-grand-jury subpoena is available for a trial; for a hearing on detention, suppression, sentencing, or revocation; or for any additional hearing that the court permits in an individual case.

(B) *Required Content and Limitations.* The subpoena must describe each

designated item with reasonable particularity and seek only items that:

(i) are likely to be possessed by the subpoena's recipient;

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

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

(C) *When a Motion and Order Are Required.* A motion and order are not required before service of a non-grand-jury subpoena unless (3) or (4), a local rule, or a court order requires them.

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

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

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

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

(F) *Disclosure When No Motion Is Required.* When no motion is required, a party need not disclose to any other party that it is seeking or has served the subpoena, unless a local rule or court order provides otherwise.

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

(A) *Motion and Order Required.* After a complaint, indictment, or information is filed, a non-grand-jury subpoena requiring the production of personal or confidential information about a victim may be served on a third party only on motion and by court order. ~~Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object.~~

(B) *Notice to a Victim*. Unless there are exceptional circumstances, the court must, before entering the order,

require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object.

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

(A) files a motion;

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

(C) obtains an order.

(5) ***Place to Produce the Designated Items.*** Unless the court orders otherwise, a subpoena requested by a self-represented party must require the recipient to produce to the court the designated items. A non-grand-jury subpoena requested by a represented party

may require the recipient to produce the designated items to that party's counsel.

(6) ***Disclosing to Other Parties the Items Received.*** A party must disclose to an opposing party an item the party receives from a subpoena's recipient only if the item is discoverable under these rules.

(7) ***Quashing or Modifying the Subpoena.*** On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive. A party responding to a motion to quash a non-grand-jury subpoena must make the showing described in (2)(D).

(d) Service. A marshal, a deputy marshal, or any nonparty who is at least 18 years old may serve a subpoena. The server must deliver a copy ~~of the subpoena~~ to the witness or to the subpoena's

recipient and must tender to the witness one day's witness-attendance fee and the legal mileage allowance. But the ~~The~~ server need not tender the attendance fee or mileage allowance if ~~when~~ the United States, a federal officer, or a federal agency has requested the subpoena.

(e) Place of Service.

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

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

(f) ~~Issuing~~Subpoena for a Deposition ~~Subpoena~~.

(1) ***Issuance.*** A court order to take a deposition authorizes the clerk in the district where the

deposition is to be taken to issue a subpoena for any witness named or described in the order.

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

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

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

Committee Note

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

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

Rule 17(b) formerly headed "Defendant Unable to Pay," has been retitled to clarify that it applies only to subpoenas for testimony. Changes to the text are stylistic only.

Rule 17(c), covering subpoenas to produce data, objects, or other items, has been revised to address multiple issues with the prior language that had contributed to conflicting interpretations in the courts. Formerly it had three subsections, now it has seven. The changes are intended to promote clarity about what the Rule requires, while safeguarding the discretion of courts to tailor subpoena

practice to the circumstances of a district or case. The section's heading —"Subpoena to Produce Information, Objects, or Other Items"—has been revised to more accurately describe the amended language in (c)(1).

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

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

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

subpoena to obtain evidence for introduction at the listed hearings.

The ending clause explicitly recognizes the discretion of the court in an individual case to permit a Rule 17 subpoena to produce items in other evidentiary hearings not listed in the Rule in which a party may be allowed to present witnesses or evidence. Examples include preliminary hearings and new trial hearings. The present use of Rule 17 subpoenas for items in such proceedings is not as common, in part because of the difficulties, costs, and delays that may arise when subpoena practice is imported into these less formal or more expedited proceedings.

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

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

The Committee agreed that the basic character of Rule 17 subpoenas as seeking evidence for a particular

proceeding should remain unchanged, and that the rule should continue to prohibit the use of subpoenas for general discovery from third parties. But it also determined that the admissibility requirement, as well as other aspects of the prevailing interpretation of the prior language, was being applied inconsistently, resulting in harmful uncertainty and unnecessarily restricted access to evidence needed from third parties for trial and other proceedings.

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

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

The text of **(c)(2)(B)(iii)** requires that each item either be, or contain information that is, "likely to be

admissible as evidence in the designated proceeding." In using "*likely* to be admissible," the Committee deliberately rejected stricter formulations applied by some courts. In some circumstances, it will be impossible to be certain *before* a proceeding begins that a precisely identified item will be admissible. Such circumstances include when an item's admissibility depends on whether the opposing party first presents other evidence. For example, impeachment evidence should be available to a party by subpoena for use at trial when a party knows that a witness will or is likely to testify. That evidence should not be unavailable simply because admissibility cannot be determined definitively until after the witness has actually testified. The "likely to be admissible" standard is already used by some courts applying Rule 17 and more accurately describes the appropriate inquiry. There is no separate reference to "relevance" in **(c)(2)(B)** because it is not likely that information would be admissible unless it was relevant.

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

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

Rule 17(c)(2)(C) defines when a motion and court order are required before a party may serve a non-grand-jury

subpoena to produce items. Courts have disagreed about if or when the former language in (c)(1)—which stated "the court may direct the witness to produce the designated items in court before trial or before they are offered in evidence"—required a court to first approve a subpoena under 17(c). The resulting practice has differed greatly from court to court (and in some cases judge to judge), with some courts requiring motions for every subpoena to produce items, others permitting parties to obtain and serve such subpoenas without judicial involvement (unless the subpoena sought victim information under (c)(3)), and still others insisting on prior approval in certain circumstances but not others.

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

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

Rule 17(c)(2)(D). When a motion is required for a non-grand-jury subpoena, new (c)(2)(D) states exactly what a party must do in the motion to prove that the proposed subpoena does indeed comply with (c)(2)(B)'s requirements. Rule 17(c)**(**2)(D)(i) requires the party to demonstrate to the court that the subpoena describes each designated item with reasonable particularity. And **(**2)(D)(ii) requires the party to "state facts," showing each item is "likely to be possessed by the subpoena's recipient," "not reasonably available to the party from another source," and "likely to be admissible as evidence in the designated proceeding." Requiring a factual basis is intended to prevent the use of Rule 17 subpoenas based upon unsubstantiated guesses or mere speculation.

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

Rule17(c)(2)(F) clarifies that unless required by a local rule or court order, a party has no duty to inform the other parties about a subpoena when no motion is required.

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

Rule 17(c)(4). This new provision extends the motion requirement to a subpoena requested by a self-represented party. Two reasons underlie this decision. First, self-represented parties are not bound by ethical rules that deter an attorney's misuse of the court's compulsory authority, raising the risk that the subpoena would not comply with (c)(2)(B). Second, requiring judicial oversight of this very small subset of subpoenas would not significantly add to the courts' burden, even in districts where there is relatively little motion practice under Rule 17.

Rule 17(c)(5) is also new. It clarifies when a subpoena must order the recipient to produce designated items to the court, and when it need not do so. Again, the text in former (c)(1) stating that the "court may direct the witness to produce the designated items in court before trial or before they are to be offered into evidence" produced conflicting decisions on this point. Some courts read the rule as always requiring returns to the court, others that it required returns to the court whenever a subpoena ordered production before trial, and still others that it permitted returns directly to the requesting party unless the court ordered items produced to

it. The Committee concluded that judges should have discretion to determine where (and how) production should take place. To the extent the prior text of the rule was leading to unnecessary limits on the discretion of the court to allow returns to the requesting party, it created needless burdens for courts and required revision.

Accordingly, subsection (c)(5) sets two defaults, both subject to departure by court order. First, it provides that a subpoena requested by a self-represented party must require the recipient to produce the designated items to the court. Judicial oversight at both the issuance stage and production stages is added assurance that parties without legal training or ethical responsibilities will not deliberately or unintentionally access inappropriate or non-compliant information that a judge would be able to intercept if the recipient were required to provide the items to the court. The second default in (5) is for all other non-grand-jury subpoenas, namely those sought by represented parties. It provides the subpoena may require the recipient to produce the designated items to that party's counsel, reflecting present practice in many districts. The rule places no restrictions on the court's discretion to vary from these default rules. For example, when a subpoena is likely to produce private or privileged information, it is common practice for courts to order in camera review before disclosure to anyone.

New **Rule 17(c)(6)** states, "A party must disclose to an opposing party an item the party receives from a subpoena's recipient only if the item is discoverable under these rules." This provision resolves another dispute about the meaning of the Rule's prior text, which some courts read as requiring that each party have access to any item that a subpoena recipient produces to another party. That position undermines the careful calibration of discovery and

disclosure in Rule 16 and other discovery rules. For example, even if every item produced by a subpoena is admissible, it does not follow that the requesting party will decide to use all of those items in its "case-in-chief at trial." And a defense subpoena may produce inculpatory evidence the government did not know about, as well as evidence the defense hopes to use at the designated proceeding. The new text recognizes that disclosure of information and other items between parties, including information and items the party may obtain by subpoena, is regulated by the Constitution, Rule 16, and other discovery rules. Rule 17 does not modify that carefully developed law.

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

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

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

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

Rule 17(g) includes three changes: (1) the heading has been revised to better describe its content; (2) "or subpoena recipient" has been added to clarify its application to both subpoenas for testimony and subpoenas to produce

items; and (3) the reference to 28 U.S.C. §636 has been restyled.

ADVISORY COMMITTEE ON CRIMINAL RULES
MINUTES
April 24, 2025
Washington, D.C.

Attendance and Preliminary Matters

The Advisory Committee on Criminal Rules ("the Committee") met on April 24, 2025, in Washington, D.C. The following members, liaisons, reporters, and consultants were in attendance:

Judge James C. Dever III, Chair
Judge André Birotte Jr. (via Teams)
Judge Jane J. Boyle (via Teams)
Judge Timothy Burgess
Dean Roger A. Fairfax, Jr.
Judge Michael Harvey
Marianne Mariano, Esq.
Judge Michael Mosman
Shazzie Naseem, Esq.
Judge Jacqueline H. Nguyen
Brandy Lonchena, Esq., Clerk of Court Representative (via Teams)
Catherine M. Recker, Esq.
Justice Carlos Samour
Sonja Ralston, Esq.[1]
Judge John D. Bates, Chair, Standing Committee
Judge Paul Barbadoro, Standing Committee Liaison
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Professor Catherine T. Struve, Reporter, Standing Committee
Professor Daniel R. Coquillette, Standing Committee Consultant (via Microsoft Teams)

The following persons participated to support the Committee:

Carolyn A. Dubay, Esq., Secretary to the Standing Committee
Kyle Brinker, Esq., Law Clerk, Standing Committee
Shelly Cox, Management Analyst, Rules Committee Staff
Bridget M. Healy, Esq., Counsel, Rules Committee Staff
Rakita Johnson, Administrative Analyst, Rules Committee Staff
Dr. Elizabeth Wiggins, Director, Research Division, Federal Judicial Center

[1] Ms. Ralston represented the Department of Justice.

Opening Business

Judge Dever opened the meeting and welcomed the in-person attendees as well as those participating remotely: Judge Birotte, Judge Boyle, Ms. Lonchena, and Professor Coquillette.

Judge Dever said that several members were completing their second terms, and he briefly highlighted some of the contributions each had made. Judge Nguyen did an extraordinary job as chair of the Rule 17 Subcommittee and a member of the Rule 6 Subcommittee. Dean Fairfax made major contributions to the consideration of amendments to Rules 6 and 16. And Ms. Recker (whose second term had been extended) did extraordinary work on the Criminal Rules Emergency provision, Rule 17, and Rule 6. He said that Judge Nguyen, Dean Fairfax, and Ms. Recker would be invited to make any final comments at the end of the meeting.

Next, Judge Dever recognized Judge John Bates, who was attending his last Criminal Rules meeting as chair of the Standing Committee. He described Judge Bates as an absolute All Star in the federal judiciary and as a public servant. He noted that Judge Bates has performed many important duties for the judicial branch beyond his service as a United States District judge: Director of the Administrative Office of U.S. Courts, Chair of the Advisory Committee on Civil Rules, and Chair of the Standing Committee. He embodies everything that's right about public service in the United States and being a citizen leader. Judge Dever expressed his gratitude for Judge Bates' service.

Others participating in the meeting were recognized next. Judge Dever welcomed Ms. Dubay, the new Chief Counsel and Secretary to the Standing Committee, noting that she brought an extraordinary amount of experience. Ms. Dubay clerked on the Eastern District of New York, practiced at Hutton and Williams, and held a variety of positions with increasing responsibility in the Administrative Office of U.S. Courts, the Federal Judicial Center, and the North Carolina Judicial Standards Commission. Judge Dever also recognized Scott Myers, who would be retiring after twenty years of service at the Administrative Office of U.S. Courts. Judge Dever thanked Kyle Brinker, the Rules Law Clerk, for his extraordinary work, noting that Mr. Brinker would be joining Kirkland and Ellis at the end of his term with the Rules Committees. Finally, Judge Dever acknowledged the members of the public observing the meeting and thanked them for their interest.

A senior inspector with the U.S. Marshals Service provided his contact information and noted the security procedures in the building.

Judge Dever noted that the Committee's next meeting would be November 6, 2025. The location (which would not be Washington) had not yet been determined.

Professor Beale took the floor to note this was Judge Dever's last meeting as chair of the Advisory Committee and to comment on his many contributions. Recalling that Judge Bates had been described as "an All Star," she called Judge Dever "an All Star recidivist." He served six years as a member of the Committee, plus a what he called his "bonus year." During his term as a member, the big lift (in which Ms. Recker also participated actively) was the emergency rule, now Rule 62. It was unlike anything that Professor Beale had participated in before with many,

many, many nighttime calls. Congress was involved, and it was a cross-committee project, but criminal cases are very different than civil cases and the Criminal Rules Advisory Committee had the most difficult assignment. Moreover, Congress gave only two years to get the whole thing done, which required action at warp speed under the Rules Enabling Act process. For Judge Dever's remarkable effort as the chair of that Emergency Rules Subcommittee, he was "rewarded" by shortly thereafter being appointed to serve as chair of the Committee. Another major accomplishment was the completion of a successful amendment to Rule 16 (expert discovery), which was the first substantive expansion of the rule's disclosure obligations in decades.

What characteristics allowed Judge Dever to make these many contributions? Professor Beale quoted Martin Luther King, Jr.'s statement that the ultimate measure of a person is not where he stands in moments of comfort, but where he stands in times of challenge and controversy. She said that was the situation in which Judge Dever really stepped up—not the easy things that all agreed upon, but the harder things, where you need to find true north, try to get agreement on it, and move the group ahead.

Another online source identified three C's of leadership, which Judge Dever has exemplified. The first "C" is competence. Judge Dever has a deep understanding and knowledge of the rules and how they apply in a wide variety of cases and proceedings. The second is commitment. Professor Beale explained that the reporters often emailed and texted with Judge Dever on nights and weekends to get a reaction or approval of a draft or directions on how to move forward. So although all of the members work hard—and the reporters appreciate that hard work—Judge Dever's commitment as chair far surpassed that of any member. The final "C" is character, which is knowing what is right and having the courage to act on it. Judge Dever's character has been inspiring, and Professor Beale expressed her great gratitude for his contributions to the rule of law, fairness, and the improvement of the criminal justice system, and especially his support of and assistance to the reporters.

Professor King began by commenting that the thing about Jim that she had come to appreciate so much was that he had a strong common sense compass that always steered us in the right direction. If we veered around from time to time, he brought us back and that was really special. She also praised his generosity and his forgiving nature. She said he laughed off the reporters' stupid mistakes like addressing him as "Dave" in emails, which she did once. Judge Dever was very patient, and he listened to everyone. Moreover, despite his calm, easygoing manner, he always seemed to keep us on track. In hundreds of meetings and committee calls, Judge Dever always ended on time despite making everybody feel they had been heard. That was magic. She thanked Judge Dever for being such a wonderful leader and during the years he had been on the Committee and then as chair.

Judge Dever responded by expressing gratitude to the reporters, saying that only the chair can appreciate how much they do, and the wisdom, dedication, and intellectual force they bring to the process. He then turned to the main agenda for the meeting, paraphrasing Teddy Roosevelt, who once observed that the greatest professional gift that each of us can receive is the opportunity to work hard at work worth doing. That, Judge Dever said, is what we get to do on the Criminal Rules Advisory Committee. He said it had been his great privilege to serve as a

member of the Advisory Committee, to serve with the reporters, and to serve with all of the members.

Judge Bates asked to speak. First, he thanked Judge Dever for his kind remarks, saying it had been a pleasure to serve in the rules community for many years and to be a part of the Criminal Rules Advisory Committee. He praised the wonderful work that had taken up the Committee's time and efforts over Judge Dever's years as chair. He said it had been especially engaging and enlightening to participate in developing some of the amendments to the criminal rules, particularly Rule 62 and all the other rules that Judge Dever mentioned.

Judge Bates commented that one of the most memorable things that he had been involved with as part of the rules process was actually not a rule amendment but legislation. When COVID hit, in early March 2020, Judge Campbell, Judge Kethledge (then the chair of the Criminal Rules Advisory Committee), Judge Furman (liaison from the Standing Committee to Criminal Rules), and Judge Kaplan, with some help from the reporters, put together legislation that was included in the first CARES Act that went into effect within about three weeks. The legislation enabled the federal criminal justice system to keep running during COVID. Because more than ninety percent of cases are resolved by pleas, then followed by sentencing, the CARES ACT provisions were needed to allow those pleas and sentencings to take place remotely. Judge Bates characterized that as an example of the flexibility that the rules process has and can contribute to the efforts of the federal judiciary.

Judge Bates echoed the comments that have been made about Judge Dever's even disposition, his ability to run a good and timely meeting, and his extraordinary willingness and aptitude to hear from everyone. Chairs also have their own views, and sometimes they have to hear from others before weighing in. He noted that Judge Dever had done that remarkably well and been a contributor to the rules process.

Then Judge Bates announced that Judge Dever would be the new chair of the Standing Committee. So Judge Dever would continue to attend the Criminal Rules Committee, rather than leaving it behind altogether. Judge Bates also announced that Judge Mosman would be the new Criminal Rules chair. He said the Committee would be in good hands, and the work would continue.

After thanking Judge Bates, Judge Dever called for a motion to approve the minutes, with the proviso that would allow the correction of any typographical errors. The motion passed unanimously.

Noting that the agenda book included draft minutes from the Standing Committee meeting at page 60 and the report to the Judicial Conference at page 93, Judge Dever recognized Ms. Dubay for any comments about these materials or the detailed chart tracking the proposed amendments at page 102. Ms. Dubay said just the day before she had the pleasure of delivering her first Congressional package (which did not include any amendments to the criminal rules). She described the process: she hand delivered the package to the Supreme Court and then walked over to Congress and hand delivered it to representatives for the Vice President (as president of the Senate) and to the Speaker of the House.

Judge Dever asked Mr. Brinker if there was anything in particular in the chart on page 109 of pending legislation that would directly or effectively amend the federal rules. Mr. Brinker mentioned two things that were not in the agenda book because the text only very recently became available. They were both bills that were reintroduced from last Congress, and appeared in the November agenda book. First, the Sunshine in the Courtroom act of 2025 would permit court proceedings to be photographed, recorded, broadcast or televised at the discretion of the presiding judge. Second, the Trafficking Survivors Act Survivors Relief Act of 2025 (which he had informed the Committee about in November) would permit a person who had been convicted of a nonviolent federal offense as a result of having been a victim of trafficking to move the convicting court to vacate the judgment and enter judgment of acquittal. Mr. Brinker said no action had been taken on either bill since its introduction, and that the Rules staff would continue to monitor any developments.

Rule 17

Judge Dever then turned to Rule 17, thanked Judge Nguyen for her leadership of the Subcommittee, and asked her to present the Subcommittee's recommendation.

Judge Nguyen expressed appreciation for the full day at the November meeting for discussion of the prior subcommittee draft, saying that the feedback from three panels of speakers and the full Committee had been incredibly useful to the Subcommittee. The Subcommittee attempted to produce a revised draft that would implement the key takeaways, focusing on areas where there appeared to be broad consensus or support expressed by the speakers, as well as by the members of this Committee.

Judge Nguyen framed the discussion by noting several key takeaway points. First, the Subcommittee heard a directive from the committee members to take an incremental approach, a narrower amendment, that would somewhat loosen the *Nixon* standard. So instead of requiring admissibility, the new draft proposes something slightly less restrictive. The Subcommittee recognized that there are multiple districts in which there's no Rule 17(c) problem, and it wanted to leave the practice in those districts alone, not upend them. But in the districts in which there was very limited—or virtually nonexistent—Rule 17(c) practice, loosening the *Nixon* standard will help. She reminded the Committee of prior discussion since the beginning of the Rule 17 project about different districts having very significantly different interpretations of Rule 17(c). The Subcommittee's goal was to bring some limited uniformity to Rule 17(c) practice. So the first point was a slight loosening of the *Nixon* standard (with details to be provided later in the meeting).

The second point was the need to provide for ex parte subpoenas, which judges in some districts had held were not permitted under Rule 17(c).

The third takeaway was the importance of maintaining protections (including motions to quash and strong protective orders) so that the revised rule would not open up the floodgates and increase the burden on already very busy district judges.

Judge Nguyen then directed the Committee's attention to page 2 of the Subcommittee's discussion to sum up the substantive revisions. She noted the agenda book included both the redline and clean drafts.[2] Focusing on the text of the proposed amendment, Judge Nguyen noted several new provisions. First, (c)(1)(B) essentially clarified and provided that the rule allows subpoenas for proceedings more than just simply trials. Second, (c)(1)(B) and (c)(2)(B) codified the loosened *Nixon* standard. And third, (c)(2)(A) and (c)(3) and (4) address when a motion is required. Under (c)(2) no motion was required unless the subpoena seeks personal and confidential information about a victim, or unless the subpoena is sought by an unrepresented party.

Next, ex parte motions are permitted, and if there is no motion required, there is no requirement of disclosure to the other party unless required by a local rule or court order. Judge Nguyen noted that throughout the changes the Subcommittee tried to leave a lot of discretion for the district judges to order something different than the default provided by Rule 17. So, for example, as provided on line 32 of the clean version, the court may for good cause permit the party to file the motion ex parte. She noted again that (c)(2) clarifies that there is no need to turn over the information to the opposing party absent a court order. Again, this built in discretion for differing practices in the districts that want to have a different rule.

The draft's (c)(5) clarifies when a subpoena recipient must produce the items to the court rather than to a requesting party. And finally, (c)(6) provides that disclosure of information and other items between the parties, including information and items the parties obtained by subpoena, is regulated by Rule 16 and other discovery rules. And that implemented the idea of moving incrementally and not doing a wholesale revision of the rules.

Judge Nguyen then called on the reporters to provide any additional details and comments on the Subcommittee's work.

Professor King thanked Judge Nguyen for her terrific summary and then directed the Committee's attention to language that had been at the root of some of the ambiguity and disputes about how the rule applies, which the proposed amendment would remove. The deleted language, on lines 20-23 of the redline, has been the source of dispute about whether Rule 17(c) applies to more than trial. Other language in the rule has been the source of disputes about where the subpoenaed material has to be produced and to whom. Does the material subpoenaed have to be turned over to the opposing party if you can proceed ex parte?

Ambiguous language in the current rule has been the source of that conflict. So one of the Subcommittee's main missions has been to clarify the provisions that gave rise to those disputes, and provide at least a presumption of what can and cannot be done. The rule often includes an "unless" clause that allows district judges to respond to the particular circumstances of a case or for an individual district to create a rule that's still consistent with the rule but accommodates those particular circumstances.

[2] All references to line numbers and portions of the draft amendment in these minutes refer to the version in the Committee's April 2025 agenda book.

Professor Beale noted that the draft also attempted to clarify other issues. As previously noted by a number of members and other commenters, the current rule does not always indicate which provisions are applicable to subpoenas for testimony versus subpoenas for the production of material. The Subcommittee's draft tries to clarify that. And the current rule doesn't indicate which provisions are relevant to grand jury subpoenas and which are not. The proposed rule tries to clarify that as well. That clarity would be very helpful to courts and parties moving forward. She also noted that although the Subcommittee was trying to resolve conflicts among the courts, the proposed amendment would also allow for considerable variation in practice, from district to district and judge to judge. But the proposed amendment does set a default that attempts to change the practice in the districts that have provided the least opportunity for the defense to get really important and needed information. She expressed hope that bringing that baseline up would be both acceptable and helpful moving forward.

Before moving to specific discussion, Judge Nguyen sought to get a sense from the Committee members about the general framework, which is different than the draft that was the basis for the discussion at the November meeting. She asked first for comments from members of the Subcommittee.

A defense member said that generally speaking this draft was a vast improvement over every other draft considered over the last three years. She said she was very proud of the work of the Committee, and she liked this framework immensely. She would also have specific comments later. Noting that she was a relatively new member, she said she had joined after a great deal of work had gone into a very expansive change of the rule and a lot of variations on how a subpoena might be obtained in different categories. She thought the Subcommittee had been responsive to the feedback in November, and had a much more reserved and incremental approach. The Subcommittee pivoted and sought to insure that the revisions would not lead to increased litigation and increased work for the courts. She noted there were options within this draft that would do that. And she thought it addressed very cleanly the identified issues. She also noted wryly that joining the Committee halfway through this process had been a little like the nightmare in which you have to take an exam, but you didn't actually go to the class. In her case, she said, she'd been to about half of the classes. She thought it had been a great effort by the Subcommittee both before and after she joined to identify precisely what problem we were trying to address. And, she thought, this draft went a long way toward that.

Judge Dever spoke next, noting that he had not earlier welcomed Sonya Ralston from the Department of Justice. Ms. Tessier, who previously did a wonderful job as the Department's representative, had joined the Colorado Attorney General's office.

Since Ms. Ralston was now a member of the Subcommittee, Judge Dever invited her to make comments. He also noted that the Department's perspective had been tremendously helpful throughout the process, first with Mr. Wroblewski, then Ms. Tessier, and now Ms. Ralston.

Ms. Ralston said it was a real pleasure to participate, noting she shared the previous speaker's feeling about the exam nightmare a little. But fortunately, she had been able to borrow the notes from some excellent "classmates," so she felt pretty well caught up. She agreed that the Department of Justice is happy with the structure that the Subcommittee has worked out. It is

clearer, more specific and provides the type of guidance needed. The Department appreciated the clarity and the specificity of the way the proposed amendment was broken down into the different subsections and the way it was organized, which helps crystallize the issues and make it clear.

A judge member of the Subcommittee agreed that the rule is much better than it was. She was, however, unsure about what proceedings other than trial that the amendment would apply to. Judge Nguyen deferred discussion of that question until later in the meeting.

Noting that she was first seeking general comments before walking through specifics, Judge Nguyen solicited general feedback from other committee members. A judge member commented that this was a slight move towards getting something that is outside of the *Nixon* framework, though we could not know exactly how much looser. But it would definitely be better.

Judge Bates asked for more of an explanation of the Subcommittee's approach, which is a national rule, but one that leaves a lot of flexibility on almost all issues to local courts, and indeed even to individual judges. But the wide variation is, to some extent, the issue that we are trying to address, and this rule would continue to allow that.

Judge Nguyen agreed. The proposed amendment was an attempt to move incrementally to loosen the *Nixon* standard and to clarify that ex parte motions are available for districts that prohibited ex parte practice altogether—which means that the defense attorneys did not obtain the information—and for districts that require in all circumstances that the recipient must turn any information obtained over to the other side, which prohibits both sides from obtaining information, because they did not know what they would get. But there is already a lot of flexibility in other districts. We wanted to maintain that because we recognized that the nature of the criminal cases and the extent of criminal litigation really does vary from district to district. The amendment is not meant to restrict the district judges in the districts where they already have developed a way to work out Rule 17(c) subpoena practice.

Professor Beale commented that the redline version, lines 35-38, provided a good example of this approach. A motion and order are not required before the service of a non-grand-jury subpoena, unless (3) required by the existing victim provisions, or (4) the subpoena is sought by a self-represented defendant or a local rule or a court order requires a motion. So there is a strong nudge towards not requiring a motion except for cases involving victims or self-represented defendants. What we heard at the meeting in November is that it would be far too much trouble to require motions in most cases. The parties don't want them. Judges don't want them. But in some districts, judges may at least consider a local rule requiring motions and court orders. And in some subset of cases (or in many cases), some individual judges may feel strongly about requiring a motion. So the compromise on various points is to set a new baseline but allow for individual judges to vary. That could also be useful in individual cases, or with a certain litigant who's been a real problem and has been abusing subpoenas; a judge might require a motion and order in such cases. The proposed amendment strikes a balance. It will not produce complete uniformity (though it could if no districts adopt any different local rules). Judges would know more than they would ordinarily in their general supervision of a case, and if something

was going really, really wrong, they might require the parties to do something more. That, she said, is one way of thinking about how the Subcommittee responded to that information that we got in November. It would be too much for the courts and for litigants to require a motion and order in broad swaths of kinds of cases. So then the Subcommittee had to decide how to pare back the motion requirement.

Professor King also responded to Judge Bates's question. There are places in the proposed amendment where judges have authority to depart from the default, but there are also places in the rule that correct misunderstandings of the existing language. For example, some judges now say Rule 17 does not allow ex parte subpoenas, or a subpoena for a sentencing. Some interpreted the rule as requiring a return to the court for a subpoena before trial. Some said Rule 17 did not allow a subpoena for impeachment material. She had read one decision in which a magistrate judge thought it would be an ethical violation to order an ex parte subpoena. Although the proposed amendment would not bring consistency to every point where there is now inconsistency, on various points where there had been very restrictive interpretations, it would tell litigants and judges that's not what this rule means. For those points it's much clearer. And then for the places in which the courts want to have more motions, the proposed amendment permits but does not require them. And if you want to be strict about how you interpret good cause for ex parte fine, but the rule doesn't prevent ex parte motions. That's the balance the Subcommittee was trying to strike.

Judge Nguyen noted it would also be useful to focus on another issue: how to handle personal and confidential information. The Subcommittee discussed that issue extensively, and in the prior draft discussed in November there were two categories of information: (1) protected information including personal and confidential, subject to many restrictions and the protections, and (2) everything else. That led us down the path of how much judicial supervision should be involved. At the November meeting there was uniformly an unfavorable response to judicial supervision in all instances for protected information. The camera reviews would dramatically increase litigation and court time. With this particular draft, the Subcommittee also tried to address that issue with very helpful feedback from the Department of Justice. For personal and confidential information about a victim, for example, a motion will continue to be required.

She noted some concern had also been expressed about whether the proposed amendment was an attempt to move the Criminal Rules to something closer to civil discovery. No we are not. She pointed out that certain showings required for the motions, such as identifying the items sought with particularity. So that was the attempt to work out that rule, and we would get into specifics later in the meeting.

Ms. Ralston commented that from the Department of Justice perspective, the proposed amendment addressed two different types of procedure, which she characterized as "when procedure" and the "how procedure." She thought most, perhaps all, of the places where the current draft would leave discretion to the local rules or to the individual judge are on "how" questions, not "when" a subpoena is available. She thought that was an appropriate distinction for those questions of local practice, where it might be more appropriate for a court to say this is "how" we do it here (e.g. about how many motions are required) versus the standard for "when" subpoenas are allowed.

A defense member said he had attended his first meeting in November, and he had been very impressed with the way that the Subcommittee organized the meetings. After hearing the panel in New York and the different perspectives that were presented to us from around the country by witnesses from DOJ, defense attorneys, and professors, the member had wondered how the Committee would be able to take that range of diverse opinions and put something together. It just seemed like an almost impossible task. But after having reviewed this version of the proposed amendment and the comments, he was very impressed. He agreed with a previous speaker that it gathered all of those perspectives and crafted an incremental step forward, but an important one. His overall sense of the clean version was that it was more permissive. He hoped the district courts would see it as giving more permission to be more open with the way that discovery can occur and not necessarily as restricted. And even though the courts could fashion rules for themselves as to how they want to interpret some of these changes, the sense from the Committee (hopefully to be conveyed, not only through the rule but in in the comments) is that we want this process to be more open for defense counsel. It is incremental. The defense bar would like to go to the outside extreme on discovery, to get everything that it needs. But he recognized the need for compromise in terms of how to move forward. He said the proposed amendment encapsulated a compromise between what both sides wanted, and what the judges would recognize as important in the process. As to the Department of Justice, something that he was a little surprised to learn was how much it uses the Rule 17 subpoena process.

Judge Nguyen moved on to the specifics of the rule, using the red line and the memo discussion that tracked it. The first issue on which the Subcommittee sought feedback was on lines 24-27.

Professor King noted that some style changes had altered the lines referred to in the reporters' memo. The reporters noted their gratitude to the style consultants for their reviews of multiple drafts, often overnight and on weekends. Professor Beale added that there were a few additional style changes, not shown in the agenda book, that the reporters had agreed to make. She said that if the Committee did reach agreement on the proposed amendment, it would not need or want to discuss the remaining minor style issues.

For the Committee, and especially new members, Professor Beale quickly sketched out the process. If approved at this meeting, the proposed amendment would be a long way from submission to the Supreme Court. If the Committee approved a draft of the proposed amendment text and committee note, they would go next to the Standing Committee. Standing would have an opportunity to review, comment, and decide whether it is ready to go out for publication. Publication would get more feedback from a broader audience.

Judge Dever emphasized that the beauty of the rules process is getting the perspectives of so many stakeholders: practitioners, judges at every level, academics, and the public, and multiple opportunity to reflect and revise.

Professor Beale turned to Line 26 in the redline, listing the types of proceedings where a non-grand-jury subpoena was available, not only at trial. This was intended to respond to some decisions holding Rule 17(c) subpoenas were available only for trial. We did not think that was

what the rule ever was intended to do, but certainly that was not what it should be doing moving forward.

She continued that the most recent submission we received from NACDL says the draft rule is far too limited in specifying only trials and three or four types of hearings where materials could be subpoenaed. NACDL, she said, had not noted the language "unless the court permits otherwise." That was, she noted, the kind of language to which Judge Bates referred earlier, leaving discretion to individual courts. The point of the list was to identify things where in 100% of the cases a judge would say absolutely you can get a subpoena for this proceeding. But it also left open the flexibility for subpoenas in other kinds of evidentiary hearings. The Subcommittee discussed the list at length, and members could provide more details about the relatively infrequent but occasionally important need for subpoenas in some of the other very early pretrial proceedings. The idea was to list the proceedings for which the Subcommittee thought subpoenas should be available, and the question was whether revocation should be on that list.

Judge Bates asked the purpose of the "unless the court permits otherwise" language. He asked what the Subcommittee intended. It did not provide for a variation by local rule. Did the omission of local rules mean the Subcommittee was not anticipating that a court could change that by local rule?

Judge Bates said his question was sort of the flip side of expanding, allowing for a subpoena in another type of proceeding, but instead whether a court individually, a judge individually, or by local rule could contract the list. If the amendment includes revocation proceedings, could courts adopt local rules saying no subpoenas are available in revocation proceedings? Could a local rule contract the list?

Judge Nguyen responded the Subcommittee had not construed it that way or discussed that possibility. She said the idea, as the reporters had explained, was to list the common proceedings in addition to trials at which subpoenas had been allowed, including detention, suppression, sentencing—not 2255s. But then what about revocation? It was not meant to be construed in the fashion Judge Bates had suggested. Professor Beale said there is a little implication to the contrary, but it could be stronger. A judge member interjected that she did not favor revising the proposed amendment to allow for a local rule on this point.

Professor Beale commented that there was an implication in the current language: unless the court "permits" is positive. Unless the court "permits" more, subpoenas are available only for these proceedings. That was what the Subcommittee meant. If that implication is not sufficient, it could be made stronger, e.g., "[u]nless the court permits for additional proceedings, non-grand-jury subpoenas available for …."

Judge Bates commented that it seemed clear to him that "[u]nless the court permits" in the first sentence did not apply to the rest of the subsection, which sets forth the new non-*Nixon* standard and there's no ability for a court to change that by local rule or for an individual judge to apply a different standard. The reporters agreed. "[u]nless the court permits" was only in that one sentence. The reporters both said it could be clearer, and agreed with Judge Bates that the "unless" clause does not apply to the loosened Nixon standard stated there.

Professor King responded that in the revocation context the need for greater protection or less protection, different procedures, confrontation, etc., is decided on an individual basis as a due process matter. The Subcommittee did not really talk about local rules in the context of revocations. The Subcommittee had anecdotal information about particular cases in which judges granted subpoenas for evidentiary hearings like a motion for new trial on jury misconduct or whatever. So it did not add local rule here, though it could be added.

Professor King also directed people's attention to the note here, which makes a comment about habeas cases not being included.

Professor Beale noted that on page 133 of the agenda book, starting with line 37 of the committee note, the unless clause explicitly recognized the discretion of the court to permit a Rule 17 subpoena to produce items in other evidentiary hearings not listed in the rule in which a party may be allowed to present witnesses or evidence. Examples include preliminary hearings, new trial hearings, or revocation hearings. If revocation hearing came out of the brackets in the text, that portion of the note would also be revised. The present use of Rule 17 subpoenas in such proceedings is not as common, in part because of difficulties, cost limitations and delay that may arise when subpoena practice is imported into these less formal or more expedited proceedings. And yet in the Subcommittee's discussion, members were able to identify very unusual situations that had arisen where they had been able to get subpoenas and would use them. It was thinking on a case-by-case basis, but that could be changed. Then, as Professor King said, the provisions are not applicable to hearings in 2254 and 2255 proceedings, where a court may apply subpoena provisions of the Federal Rules of Civil Procedure.

A judge member indicated the view that local rules on which proceedings would introduce too much variation.

A member asked if it was the intent of the Subcommittee that the hearings that are specified—trial, suppression, detention—are mandatory, where they have to be available, the court has no discretion?

Professor King replied it was not mandatory in the sense that the court had to grant a subpoena whenever requested. It was meant to convey that the types of hearings listed were not ruled out by the text. But the movant must satisfy the other requirements of the rule. She noted that the word "available" is used several times in the rule—e.g., it's available without a motion or only with the motion—it did not mean that it would be granted, but only that it is possible to get a subpoena.

Judge Dever said that was a great question. And part of it was designed to respond to a line of cases in some districts holding that you can use a Rule 17(c) subpoena only for a trial and nothing else. The amendment tries to address that issue, raising the floor.

A defense member spoke to encourage the inclusion of revocation on the list. She commented that revocations had been more and more important recently. The use of subpoenas had been primarily for witnesses; that would not be affected at all by the current proposal. But both parties might need to subpoena different information, whether from a treatment agency or

an employer. She noted that even probation doesn't necessarily have access to everything because of strict confidentiality laws and the fact that a lot of therapy is group therapy. There had been a number of recent issues in her district, so she suggested including revocation, thinking it was the one area where both the defense and government would need that ability. She thought listing it in the text as opposed to under the unless clause made sense. A judge interjected that she agreed.

The member also addressed one point in the reporter's memo about the ability to subpoena probation. The member thought that would be a waste of time, because probation works for the judge. Her office would never serve probation with a subpoena, but it would use a motion if they thought probation's file would hold information that either the government or defense wants. But it would never occur to them to subpoena probation, because that would in essence be subpoenaing the judge. They could subpoena a probation officer for testimony, but again they are the court's officer. They would just simply be made available or she would be told they're not available.

Ms. Ralston said that the Department did not have strong feelings about this one way or the other. She thought the issue about probation officers was probably the most significant one, and the Department did not have a direct interest in it. That would be up to the judges. Leaving it in the judge's individual discretion would allow for the cases where it is the most significant, like a revocation based on a new law violation where there is additional evidence that would be akin to a criminal charge. But lots of revocations are not that. Because there is so much variation, and the rules of evidence don't apply it is different. But she noted there is evolving case law in different courts about how much evidence is required to sustain a revocation. That may change even outside of the rules.

A judge member said she had recently had many people on probation or supervisory release who beat up their wives. She was aware that was something not all judges dealt with, but she felt it was important to do so and she liked to have the police officers to be subpoenaed. The probation officer would be involved too. She commented forcefully that beating your wife is serious.

A magistrate judge member said they are sometimes referred these matters for reports and recommendations. He had cases where the Justice Department sought to establish new law violations, it became a mini trial, and both sides needed discovery. He had one a few years ago for Judge Bates that involved domestic violence in another jurisdiction. That jurisdiction was not prosecuting the case, but the Justice Department wanted to deal with it as a potential supervised release violation. It was like a trial, and he thought both sides would have liked more discovery than they had. So he supported including revocation.

Ms. Ralston pointed out that the issue was subpoenas for records or documents, not subpoenas for testimony, which would be available. Those are covered in a different part of Rule 17.

Professor Beale said there are no restrictions on subpoenas for testimony and is not being changed. But there might be treatment records or something else that would require a subpoena for production.

A member suggested that a police report could be important. And there are many other documents relevant to domestic violence.

Professor Beale agreed that type of proceeding does occur, is important, and is contested. In this proposal, if the Committee deleted the brackets, then revocation would be included as one of the designated proceedings. Then it would be clear to the parties and the court that subpoenas for production of the reports and so forth would be available.

A judge member not on the Subcommittee said he favored removing the brackets and including revocation proceedings in the rule. If probation officers had documents perhaps a subpoena was not the answer, but he had never experienced that issue. But he had not thought about the concern about underlying information such as local police reports that form the basis of the revocation allegation.

Another member noted that a common piece of evidence that the government often wants is body camera footage from that incident. That would be also a subpoena item.

Judge Bates agreed with the comments that had been made with respect to revocation. Noting he was not expressing his own views, he was confident that there was a body of district and magistrate judges who, more for efficiency's sake than anything else, would ask whether we would be turning revocation proceedings into more than they need to be. He thought that many judges would instinctively feel that way, that we don't need to complicate revocation proceedings and don't need to have subpoenas for records flying around.

A judge member said that the vast majority of the revocations that he had were resolved with a defendant agreeing to plead to one or two. So it is a pretty narrow slice of that practice, because by the time they get to the court are going to plead.

A member noted that the draft committee note groups together revocation and proceedings under Rules 5.1 and 33 on that list of not as common but potential areas where the subpoenas should be permitted. Noting there seemed to be consensus about removing the brackets from revocation, he asked whether there had been further discussion on Rule 5.1 preliminary hearings and new trial motions, and whether there were any other proceedings that were discussed but failed to make that list other than those three.

Judge Nguyen responded that the Subcommittee had considered—with the perspective of the defense attorneys as well as the DOJ—the various types of proceedings that are the one-offs. The listing could get very long if it included all of the one-offs. The Subcommittee thought the "unless the court permits otherwise" language would cover those very rare occasions where a judge might exercise her discretion to allow subpoenas in one particular proceeding. With the brackets removed from revocation, it would be necessary to see if revisions to the committee note would be needed to match any changes the Committee has made in the text.

The member asked, more substantively, because the Subcommittee did select those three proceedings to mention, whether Rule 5.1 and 33 hearings were in a separate category. Here's a long list, but you know those three were highlighted in the committee note. Was there any discussion about those two in particular?

Professor King said preliminary hearings had come up, and the concern was that there was generally not sufficient time for subpoenas. They are rare because the proceedings are so quick. She said there had been little discussion of Rule 33 motions for a new trial.

Judge Dever said there was a discussion about hearings under Rule 5.1. Where there is a preliminary hearing with a detention hearing then they will be able to get a subpoena for the detention hearing. It was just narrowing it down. He recalled some discussion on a preliminary hearing, given the standard that the judge will be applying, as long as their client has not been detained, the defense will use the subpoena later in the process. But again, the proposed amendment leaves the discretion. There was discussion that when the detention hearing and preliminary hearing are combined, the judge obviously has to address the probable cause before she addresses detention. If she doesn't find probable cause, she's not going to reach detention. So to the extent there's a subpoena for that type of hearing the defendant will be able to get it.

Professor Beale commented that if the text passed, then the Committee would also have to vote on the note. There could be changes in the note, and changes in the note would be required if the Committee made changes in the text. If the Committee removed the brackets for revocation hearings, revocation would be removed from the sentence of the note that lists examples of proceedings that are not designated. So if the member thought another proceeding should be listed as an example of the kind of thing that a court might allow a subpoena for on a case-by-case basis, it would be appropriate to include it in the note. But it would not have to be listed, because the examples are not an exhaustive listing.

Judge Nguyen said she thought she was hearing consensus on removing the brackets and including revocations as proceedings for which subpoenas would be available.

Another member asked why detention hearings are on the list in the rule, rather than in the advisory committee notes, meaning they are the type of hearings where presumptively you could receive a subpoena. And there are other proceedings, where a subpoena may be authorized with the court's permission. The member wondered why detention hearings were treated differently than preliminary hearings. Detention hearings are also very early, and they are preliminary. Often they are done by proffer.

Professor King responded that both sides wanted them. Defense attorneys had many anecdotal illustrations of when a subpoena for documents or something else was essential for a detention hearing. And there is something about detention that's more impactful than some of the other proceedings.

Professor Beale recalled that a defense member on the Subcommittee had provided the example of a case in which she had represented a noncitizen in a detention hearing, and invited the member to describe that case.

The member explained that detention hearings do not necessarily happen quickly. She represented a Canadian citizen, and the defense probably filed ten different requests to alter his detention status. She had Canadian experts come and testify. It was very involved. Professor King noted it is not just the initial detention hearing, it's the reconsideration.

Judge Nguyen explained that the inclusion of hearings on line 26 was either produced by consensus, with both sides wanting them, or commonly identified hearings where it comes up often. The committee notes then explained that for the more rare one-off cases, we don't need to list them all. That was the general intent of why certain proceedings were called out in the rule.

Noting that an earlier speaker said it is pretty rare to ask for a subpoena for a revocation hearing, a defense member commented it would be equally rare to ask for a subpoena for a detention hearing. But she thought the Subcommittee included detention hearings because the Bail Reform Act anticipates the ability to present witnesses and evidence at that hearing. That was a congressional decision, so detention hearings made the list because of that statutory authority. But she also noted that subpoenas, even in trial, are kind of rare. Trials are extremely rare. She commented that the Committee was considering an important process, particularly to the defense that has a very limited ability to get certain information in advance of some of these proceedings. But what was put on the list were places where either there was statutory authority to be able to have that access, or where the Subcommittee felt it was common. Including sentencing might not have been intuitive before the passage of the Sentencing Reform Act. But now sentencing is one of (if not the most) important, contentious, and lengthy parts of the process. Having the ability to subpoena information is important often on both sides (since the government can no longer rely on a grand jury). She acknowledged that none of this is extremely common, but what ended up on the list were the proceedings in which subpoenas have been used most often in a rare arena. Professor Beale added it was also a policy judgment that in those designated hearings, it ought to be clear that you can seek a subpoena for documentary evidence.

Judge Bates said he was hearing that subpoenas in detention hearings would be rare. He agreed, saying he had never seen a detention hearing where there was any interest in subpoenaing documents. But he was in a district that does not have a lot of discovery to begin with. And later consideration of changing a detention decision might be a context where a subpoena would be more warranted or more likely to be sought. He wondered whether putting detention in the text of the rule would send a signal to the bar of an expectation subpoenas will be utilized, when that would almost never be true in the initial detention hearings, which have a real time constraint. The timeliness factor for detention hearings does not exist as much with preliminary hearings or suppression hearings, etc. Would we be encouraging something that we don't need to be encouraging for the initial detention hearing?

A defense member responded that the changes to the language that make it seem now that the possibility of a subpoena is more permissive are important. That encourages a permissive attitude toward subpoenas, even for detention hearings and even though that is unlikely because of the time frame. The member agreed that in that initial detention hearing there would be almost no chance that you would use a subpoena. But as an earlier speaker had noted, when there is a motion for reconsideration of the detention hearing, counsel wants to know that subpoenas are available. And perhaps the judge being informed that there is more permission available for the

subpoena process would be influenced later, when the trial process comes up, and is going to have a mindset of permissiveness carried over from that initial part of the process. And so, although practically speaking there will be few subpoenas at these early stages, the overall goal was instilling a mindset of greater permissiveness in the bar and the court. The goal was not that counsel would believe they had to seek subpoenas, but that they would know they could. And the court knows they could, and that informs the rest of the process as well.

To address Judge Bates's concern about sending a signal, a member asked whether it would be helpful to revise the draft committee note, perhaps with a word or phrase like "unusually" or something that's a little stronger than "less often." The note might say "in unusual, very unusual circumstances, subpoenas would be available in detention hearings." The issue could be addressed either by removing detention from the list in the text, but having it listed in the committee note with proceedings under Rules 5.1 and 33, or retaining it in the text, but then modifying with language in the committee note.

Ms. Ralston offered two comments. First, the issue of delay would be a significant deterrent to the party seeking the subpoena because the person whose ox is gored is the person who wants to change the status quo. So whoever is trying to appeal the initial detention would be the person who has the burden to produce the evidence, and the person who is burdened by the delay that would be caused. Those incentives kind of go hand in hand, making it true that this will not happen often. And second, an alternative, if you wanted to be a little more restrictive about it, would be to say "hearings on detention after initial appearance." That would make it clear that it would not apply to all proceedings that would fall within the language of the Bail Reform Act: "upon the appearance before a judicial officer." That language includes the defendant's appearance at arraignment and then there's detention, kind of instantaneously as part of that. The inclusion on the list for availability of subpoenas would be only for a small subset of cases that there is some kind of subsequent detention hearing, like where it's put over for a couple of days or appealed to the district court or something like that.

Responding to Ms. Ralton's point about incentives, a defense member agreed that there would not generally be a need or even an incentive to issue subpoenas when the detention happens at the initial appearance. But just because that initial appearance detention setting only rarely requires subpoena she did not favor limiting the rule to subpoenas for only subsequent detention proceedings. She thought that would be slicing it too fine to accommodate a rare situation. In her experience, if the defense had to parse through a rule that said, well, not for the first time, but subsequent nine hearings, that would overly complicate something that will not generally be much of an issue. She favored leaving detention hearings in the rule and not worrying about the fact that they would very rarely be an issue at the initial stage.

Another member said there was a very varied practice among districts. It was not uncommon when the government moved for detention in her district the defense would take time to prepare their best first pitch to the court. That could happen weeks into the case. There might be an initial detention order pending the hearing, but the hearing had not yet occurred and so there was time to get a subpoena if one was needed. And she certainly could get a subpoena under her district's current practice. She had not personally done so in thirty years, but the availability had not resulted in either party rushing to the court to try to subpoena information

because they want it at this early stage for some reason other than the bail hearing. She said the information sought was often very, very limited. There may be an employer issue, or maybe the file in a case that doesn't involve an immigration criminal violation, but a person whose status is part of that proceeding. Sometimes that is an item the government gets for the defense. She could envision other times trying to subpoena a piece of that. So it is very rare, and she stressed that there are varying practices around the country, and it was not uncommon in her district that the defense has as much time as it needs to make our best first pitch at the first detention hearing.

Another member said it is routine for the government or the defense to seek some time to prepare for the detention hearing. It never happens on the first day, and he thought it would not be helpful to try to draw the between first and subsequent detention hearings. But because subpoenas for detention hearings are rare, he favored not to listing them in the rule, and instead adding them in the committee note to the list of what the court can consider in an appropriate case, rather than have it presumptively be permitted.

Judge Nguyen agreed with Judge Bates that it might send a signal that at the detention hearing maybe you ought to think about getting a subpoena if you have information that relates to the District Court's determination of whether somebody should be detained or not. But she was not troubled by that, because for her it was cabined by the romanette requirements that you must have information that is possessed by the recipient of the subpoena, that is not reasonably available from any other source, and most importantly that you are seeking information that is likely be admissible or to lead to evidence that's admissible in the designated proceedings. And so for her, even though rare, detention is such a big deal in the criminal context that she was not that troubled by having it included in the list.

She then raised the question whether to take a straw poll of the Committee whether to retain detention hearings in the list of proceedings in the text.

A member asked whether courts give less weight to something that is in the committee note but not the text. Professor Beale responded that before we get to the courts, the first question might be whether counsel would read the committee note. Would they read the rule and know they could ask for subpoenas? Or if the rule did not list a proceeding, would counsel say it's not listed, so I guess we can't get subpoenas? Either advocates or judges may or may not look at the committee note. We have often heard that people don't know what's in the committee notes, and of course, the rules pamphlet the government produces does not include the committee notes.

Judge Bates said there is a difference between having something in the text and in the committee note, and there are many who feel that counsel won't necessarily look at committee notes. But in this situation, he thought having it in the committee note, not in the text, seemed somewhat consistent with the rarity of the situation. Everyone agreed it was very rare, and he identified four different stages at which it might arise. It may rarely occur in the initial two or three day period, or a longer period than the previous speaker had identified, even for an initial hearing. Or on appeal to a district judge, the defense counsel may want to explore those facts further. And another context was reconsideration of detention. So there are many different contexts, but all of them very rare. And he thought if something was really rare, maybe the better

places was the committee note rather than the text. But he acknowledged there are some who don't look at the committee notes.

Professor Coquillette said he agreed with Judge Bates. It does make a difference whether something is in the committee note or in the text, and traditionally if something is important it should go in the text because many people don't read the committee note. On the other hand, this is obviously a very marginal thing, and so he thought it was a legitimate decision for the Committee.

Professor King reminded the Committee that one of the reasons detention hearings were in the text was because of the statutory authorization for evidentiary hearings. The Committee should take that into account when deciding where to place these hearings in the rule.

Judge Dever followed up on that point. The statute gives the defendant the right to have witnesses and other things. The Subcommittee thought the rule should comport with the statute. And it should be in the text because, as others have said, we hoped everyone who participates, either as an advocate or as a judge, at least reads the text. If they read the committee note, that was a bonus. But the statute authorizes the defense to call witnesses and present evidence. The Subcommittee thought it was worthy of being in the text for that reason though, as everyone said, it is rare.

Ms. Ralston asked a practical question: the Bail Reform Act said that the defendant shall be offered the opportunity to present witnesses, cross examine, and present information by proffer or otherwise. Was the rule's "reasonably likely to be admissible" the same standard as a proffer? Then you don't have to go through the whole subpoena process to get the information, because the thing you would say to get the subpoena is the same thing you would say under the statute to make the showing.

A defense member responded that there may be competing proffers, for example the government saying the defendant is chronically unemployed, and the defense saying the defendant has always had employment. It would be rare, but there are times when proffers alone might not be all you want to present to the judge. And under the Bail Reform Act, one of the defendant's rights is to try to marshal that information. This is the very rare way that a defendant would be able to do that. She said because just because something was rare, that did not make it unimportant. The Bail Reform Act was a drastic shift in how release and detention issues were handled in the country. It is no small proceeding. So that something as rare did not make it less important.

Judge Bates asked what the evidentiary standards are at detention hearings. Because the standard in the proposed amendment is items that would likely be is admissible in the designated proceeding. Did the modified *Nixon* standard make sense in a detention hearing? What are the constraints in terms of admissible evidence in detention proceedings?

A member responded that in practice there are very few constraints. You can proceed by proffer. That is an acknowledgment that this is so early and the parties are scrambling. The parties are given a lot of leeway, especially the defense. Counsel make assertions based on what

their clients have told them. And that's entirely legitimate. The rules of hearsay, rules of evidence don't really come into play as a practical matter in detention hearing. So he agreed that Judge Bates had raised an additional issue of what the substantive standards mean when a court or even a litigant was trying to figure it out. The *Nixon* standard was changed by this rule. With respect to a subpoena in a detention hearing, was there any limitation there at all? Ms. Ralston observed that the statute says that the rules of evidence do not apply.

A member responded that under this standard, if you were to get a subpoena, although admissibility is different than it would be at trial because the rules of evidence don't apply—just as they don't apply in suppression hearings and sentencing—but the other prongs incorporating the modified *Nixon* standard do apply. The reason this would be rare is that defense (or government) would have to be able to articulate with particularity what they are seeking under the subpoena. That's part of the *Nixon* standard that was not being changed, and would still apply to this proceeding. The party seeking the subpoena would also have to establish that the person being served has the information being sought. It would be very early in the game to be able to establish that, but it might be possible. And then finally, the party seeking the subpoena must establish that it cannot get it any other way. The defense might be able to get employment records with a release from the defendant. So there are multiple layers and a reason why it is rare. But the admissibility part of the standard is only one part, and the other parts still do apply even in proceedings where the rules of evidence do not apply.

Judge Dever noted there was consensus to leave revocation in, and the question now was having detention in the text or the suggestion of perhaps strengthening the language, recognizing sort of the unusual nature of it in the committee note. He asked for a show of hands of members who favored retaining detention hearings in the text, as reflected on line 26 of the redline version, page 128, and then a show of hands of those who would remove detention from the text. A clear majority of the Committee favored retaining detention hearings in the text.

Judge Dever gave members a ten minute break.

After the break, Judge Nguyen turned to the issue on line 30 of the redline. She noted this was a big issue, and there was no unanimity among Subcommittee members on what *Nixon*'s admissibility standard should be. This was the critical issue that started this whole endeavor of attempting to improve Rule 17(c). The alternatives in brackets were that the item contain information that is "likely to be admissible evidence" or that it is "likely to lead to" admissible evidence? She asked to hear from both DOJ and the defense attorney members of the Subcommittee first to articulate why they thought one standard was better than the other. Also, she asked them to discuss whether, in practice, it would make a difference.

A defense member spoke first, observing that this issue was important and could make a difference. Before the last meeting, the identified problem was that there are districts interpreting *Nixon* so restrictively that there was virtually no opportunity for the defense to subpoena items under Rule 17(c). Last fall, after reviewing a very expansive draft proposal from the Subcommittee, this Committee decided that a more incremental approach would be preferable. It should preserve practice in districts where the defense had access to subpoenas, but it should also provide a loosening of *Nixon* to signal change in the other districts. She pointed out that the

Nixon standard is not just about admissibility. It has a particularity prong, and at the meetings in Arizona and then last fall in New York the witnesses identified problems with both having to state with particularity what they want in a subpoena as well as admissibility. The proposed amendment loosens only admissibility, so it is already a very incremental and narrow approach to the problem the Subcommittee had identified. And consistent with this, as between "likely admissible" and "likely to lead to admissible evidence," she favored "likely to lead to admissible evidence." She thought this would move the ball forward in the most meaningful way. And it more accurately reflected the practice in good districts and would not increase subpoena practice in those districts that are already allowing the defense access to 17(c) subpoenas. She asked the Committee to recall that the initial proposal from the New York bar included a fairly expansive standard of allowing the defense in certain circumstances, to subpoena information "material to the preparation of the prosecution or defense." But that expansive language was rejected. At the November meeting, Lisa Miller, then the Deputy Assistant Attorney General, suggested to the Committee that the Department might be able to support "likely admissible." The member recognized that there was nothing binding about that conversation. But in addition to suggesting that the Department might be able to support "likely admissible," Ms. Miller had also suggested the addition of a catch-all "interest of justice" provision. That would have given the courts more flexibility beyond the "likely admissible" standard. The Committee ultimately concluded, though, that "interest of justice" was too undefined, would likely not promote uniformity, and would certainly lead to increase in litigation. But nonetheless, it had been suggested by the Department's representatives.

In the member's view, the two standards being considered—"likely admissible" versus "likely to lead to admissible evidence"—were both narrower than what Ms. Miller had suggested. "Likely admissible" might not change the practice in restrictive districts, and it could undercut practice in places where Rule 17 is working well. She thought that "likely to lead to admissible evidence" was a standard that most moderate courts are applying now, so it would not increase subpoena practice in those districts. But it most clearly sent the signal that the amendment is meant to be a change and allow for broader practice in the most restrictive districts. She noted in addition there is a safety net that will allow every district or each individual judge to set their own procedure with respect to subpoenas. She thought it was an overstatement to say that "likely to lead to admissible evidence" was going to blow off the barn doors. To the extent there was a sharp increase in subpoena requests in any given district or before any given judge, she thought that the court would look very closely at why that was occurring and cabin the practice if that was appropriate within their own district. But "likely admissible" would not change much of the current *Nixon* standard in the most restrictive districts.

Another defense member spoke next. She said the New York City Bar Association's proposal was motivated by the problem that in some districts the "likely to lead to admissible" or even "likely admissible" simply is not practiced. It was important not to do damage to the districts in which the status quo is a standard of "likely to lead to" admissible evidence. But it was equally important to loosen the standard sufficiently for districts—like the member's—where the biggest obstacle is being able to point to that evidence is admissible. The member said that at the meeting in Phoenix we heard from many of the defense practitioners that the admissibility requirement caused the most difficulty. So if the goal for this rule was to loosen the

standard, then "likely to lead to admissible evidence" would be the most effective way to encourage districts like hers to be more permissive. The member also noted that Ms. Miller said in her testimony in New York that the status quo permits some investigation. But that is the status quo in some districts, not in all. The member said uniformity was a worthy aspirational goal, and a goal that she would like to achieve.

Ms. Ralston responded. First, she challenged the idea that reasonable particularity is a significant limitation. A search warrant requires reasonable particularity, and "all documents containing the defendant's name" qualifies as reasonably particular. But it was not a significant limitation on the amount of information that was being sought. She thought that was also true in civil discovery, although she had never been a civil practitioner. People fight over the terms that will be searched in an electronic discovery because the search has to be in some sense "particular," but that didn't preclude a very lengthy, expensive, and large production of discovery. In criminal cases the government already provides tremendous discovery, and anything that significantly adds to the time and expense and volume of that practice has a cost for speedy justice, which is important not just for defendants, but also for the public and for the goals of criminal justice.

Second, what Ms. Ralston had heard from her colleagues throughout the country, in the U.S. Attorney's offices, was strong opposition to "likely to lead to." She thought that opposition indicated that standard was already the practice in very few districts, if anywhere. No one had said that they wanted to really restrict what was happening now, but everyone opposed a vast expansion. So she questioned the factual premise.

Finally, Ms. Ralston expressed concern that "likely to lead to" did not necessarily have a limiting principle. She asked "to lead to" after how many steps? She said it is very easy to tell a story about how the butterfly flapping its wings in Tokyo caused the tornado in Alabama, and that type of "but for" causation is expansive. It would be a large change from the *Nixon* standard stated by the Supreme Court, and from the way it is practiced in most, if not the overwhelming majority of, districts today. The "likely to be admissible" standard leaves room for situations where if the defense were to put on a case, if there were a need for impeachment of some witness, if there is a need for rebuttal, where you won't know until trial that something is admissible until we have been through more of the proceeding. But it doesn't relieve you of the necessity of explaining relevance and authenticity, or reasons to believe at least that the thing you're looking for would meet those standards. She thought that it would be an expansion of the rule as it currently stood, and the Committee in November expressed rather clearly that it was looking for an incremental change. Ms. Ralston contended that "likely to be admissible" was the incremental change that required painting a more specific picture of what you are looking for. To say that is my case, this is the picture puzzle, and this is the missing piece. If I find this information, it will complete the story. And it would not be the fishing expedition that was a large part of the rationale behind the *Nixon* rule.

A member asked Ms. Ralston whether the Department's concern was that "likely to lead to" would create an exponential increase in documents provided in discovery. He commented that everyone who handled criminal cases had seen an exponential rise in the amount of discovery. But he wondered how to quantify that in regard to this proposed change.

Ms. Ralston responded that the breadth of what the Department was already turning over—the breadth of what the rules required, what the Constitution required, and as a matter of policy, how much beyond that the Department went—indicated that there is not much need for broad, expansive additional discovery authority because so much was already being provided. Beyond that, there were concerns, to be discussed more later, about privacy and about potential intimidation (even if not intentional) discouraging participation in the criminal justice process by witnesses and other members of the public. Ms. Ralston thought it was not necessary for the rule to be that broad, especially at first. But if the Committee adopted the "likely to be admissible" standard and found it had proved insufficient after a number of years, additional change would be possible. Rolling back a broader change would be much more difficult. She said the Department remained unconvinced that there was a problem that needs to be solved, but to the extent the standard was to be loosened, it thought that the more incremental change was most appropriate.

In response to Ms. Ralston, Professor Beale reminded the Committee that discovery from the government was not the issue. The government "discovery" that is now producing these massive amounts of material includes material the government has been able to obtain by search warrants and by grand jury subpoenas and so forth. And everyone appreciated that the volume of material had been increasing. But the proposal concerned material held by third parties. Rule 16 does not cover it, and the argument was that the defense requires things that the government never thought to look for, and so the defense cannot get them from the government. It is not part of existing discovery. And the argument was there are things—data, documents, etcetera—held by third parties, and that a vehicle was needed to obtain them. The speakers in Phoenix expressed concern about the tight interpretation of *Nixon* in some districts that would not allow defense counsel to obtain material to carry out their obligation to prepare the defense. They described the problem of counsel saying "I need to see these records. I don't know for sure what's in there. I don't know if they will help my client or hurt my client. But I know that they are critical to making our case." Some of those witnesses would say the problem is that they had never seen the material in question, because they had no way to get it from these third parties other than a subpoena. So, Professor Beale said, the question was whether the Committee thought the witnesses had described enough of a problem. And if there was a problem, was this enough of a solution to say the material being sought is "likely to be admissible" when you don't know what's in there, because you haven't been able to get it.

Ms. Ralston responded that "likely" does a lot of work. She likened the idea that it's unknown to Schrödinger's box—I don't know what is in there until I open it. But that does not prevent counsel from saying "I think what's in the box is X." For example, I want the video from the convenience store across the street from where the robbery allegedly happened. I think the video will show the robbery, and show it was not my client. That is likely to be admissible because the video likely captured the scene, and whatever it shows, it would probably be admissible. You know it's going to be relevant. You know it's going to be specific, and it's going to be authentic. She thought that type of situation, which had been used as an example of the problem, would be covered by likely to be admissible. Likely to be admissible leaves room for situations in which the defense says I don't know exactly what's there, because it would cover cases in which counsel says "if it is as I believe it to be" then it be would admissible.

Judge Bates said he was thinking of the Standing Committee, which does not have the in depth experience of the Subcommittee. He asked for one or two examples of information that the defense would want that might be reached by a "likely to lead to evidence" standard, but not under a "likely to be admissible" standard. He asked for a concrete example of it that you couldn't get under the more restrictive standard.

A defense member offered two examples, one of material sought by the defense, and the other sought by the prosecution. The defense example arose in a qui tam investigation that led to a prosecution. During the investigation, emails were seized from a business that employed the client as either president or an employee. In criminal discovery, the government provided the emails that had been seized. The defense sought a subpoena for other emails that would have put context to the emails that had been seized by the government. They sought to subpoena the other emails that were critical to the theory of the defense to put context to the emails that had already been provided. The emails were interwoven, in fact, in terms of dates and exchanges. The member said the court denied that request because the defense could not establish how the emails would be admissible, and particularity also came into play a bit because the court expected to be told the verbatim content of the emails. The member thought "likely to lead to admissible evidence" would have produced a different result. And, she said, the defense attorney in that case very much believed it would have produced a different result.

Another member followed up on that example, to further define the "likely admissible" versus "likely to lead to." In an instance where your defendant might say, I know that other people were involved in e-mail exchanges related to this issue, but I don't know who they are, the "likely to lead to" admissible allows a defense attorney to first subpoena the business, perhaps to find out who else might have been on e-mail communications, and then potentially issue another subpoena to someone that is now disclosed as part of that group of people that might have been on communications with the defendant. The defendant may not have been involved in the transaction or discussion. It might be a third party now that was involved in that discussion. Perhaps you thought it was only internal company people that were dealing with it, but now you find out a subcontractor may have been involved. So you get a chance to potentially come back to the court and say this developed now and I need to issue another subpoena. The court under a "likely to lead to" standard would be potentially more open to approving such a request, seeing that you had recovered information. It might then allow you to issue another subpoena, because that seems likely now to lead to that information. The member thought that the "likely to lead to" provides more opportunity, more openness to collecting this information on behalf of your client. He did agree that both standards were more expansive than current standards. But given the difficulty of amending the rule, he advocated making the change as broad as possible the first time around, with the likely to lead to versus likely admissible.

The speaker who had offered the first example added that there is some form of open file discovery in many districts. The government has trained on what the member thought was called smart evidence gathering and discovery procedures because in this age of data it is very easy for cases on the government side to be overwhelmed with ESI and other information. In the past, the government seized every computer and every phone in a home, even if it was the teenager's phone, and whatever you thought was covered by the warrant. But, she said, it is now common practice to be more discerning at the moment of seizure. The two examples just discussed show

that the government's more restrictive seizures limited the defense, when it sought access to what the government had not seized and thus did not turn over in discovery. Because electronically stored evidence is overwhelming everyone, the last thing the member would do is subpoena terabytes of random information, in the hope that it might lead to something. The rest of the requirements—that she was particularly looking for something that was going to be relevant and be admissible or likely lead to admissible evidence—cabined where subpoena practice would go.

Her other example concerned the government seeking information by subpoena. In the member's district, one of their jails did not provide call logs automatically. The government served a subpoena to get them in one of her trials. It was a cold case trial. The member thought the government was hoping there was something on those calls. But the government served the subpoena without making a motion, and the judge who later learned of it expressed surprise. The member presumed, though there was no motion, that the government thought it could satisfy the *Nixon* standard. In that case they asked for recordings of every call that the defendant had made from the jail. She observed that the only standard the government could have met in that situation was "likely to lead to admissible evidence," because the calls could have included clients reading a bedtime story to their kids or calling their mother. So it could only be the hope that the client said something, coded or otherwise, that they could point to as an admission. None of those records were introduced in that particular case, because nothing was there. The member thought the example highlighted the standard that prosecutor must have been operating under. But since the government did not make a motion, it did not put its argument on the record.

A judge member responded to Judge Bates' question, noting that he handled many cases from what is called Indian Country that involve offenses that are rare in other districts, such as sex crimes. In a child sex abuse case it was pretty common to have a defense theory that involved school records as a potential source for further defenses, for other possible perpetrators. For example, there may have been reason to believe that there are complaints about other perpetrators or other caregivers. School records could be very important that way. But if the defense had only the client's statement that another child told him what happened at school, that would not meet the higher standard. It was common in those cases for the defense to seek the school records and follow up on a lead that there was a possible other perpetrator.

A practitioner member provided another possible example. In a complicated Medicare fraud context, the grand jury may subpoena certain categories of data about a patient or about a nursing home resident, but not other categories about that same patient or resident. Those other categories could be very important for the defense to have a broader understanding of that patient or that resident's medical situation that might undermine the government's theory that based on the categories of information they have. But without those records, it would not be possible to present that defense. Of course not all of the records would necessarily support the defense theory, but the defense could not determine that until it saw them. Defense counsel might get a very good idea from the client who had been rendering those services, but without the records, it would not be able to present the defense.

Ms. Ralston asked how those examples fell in the margin between "likely *to be* admissible" and "likely *to lead to* admissible evidence." In each example, it sounded that the

records themselves would (if they showed what the defense thought they would) would likely be admissible. These would be original records, about business documents, business records, public records, things that for that reason would not be hearsay. If they showed what the defense thought they would, they would also be relevant, i.e., "it wasn't my client," or "the billing and treatment context shows no mens rea for fraud." She understood why the defense would want these documents, but not how they were on the margin.

Ms. Ralston noted that the language "would lead to" allowed for more chains of events. Counsel wants the emails in order to get the names, so that counsel can talk to that person, so that counsel can learn more about them, so that counsel can get their personal records. This could go on and on and on. And that the thing you thought would be admissible could be ten steps down the road. Ms. Ralston did not think it was necessary to go that far to solve any of the problems that had been articulated by her colleagues and all the way back to the Phoenix meeting. These are things that could be solved by "likely to be admissible" based upon the understanding that "likely" means if the record says what counsel thinks it will say.

Judge Nguyen asked again whether the choice of "likely to be admissible" or "likely to lead to admissible evidence" really made any practical difference in the end. She noted she was especially interested in hearing from her district court colleagues who had the experience. Because in her view, the particularity requirement was really important. You had to articulate why it is that you needed this information. In the sex crime example, if you had a lead that caused you to believe that these records might be relevant, and if the records showed what you thought, it would bear out the lead. She thought a subpoena was just as likely to be approved under the "likely to be admissible" versus "likely to lead to admissible," as a practical matter, once the court understood the narrative. The judge could see why you needed it. You'd described it with sufficient particularity. You've told the court that you could not get it from any other source. The government didn't have it to turn it over under Rule 16. And if the lead bore out, it would be "likely to be admissible." She echoed Ms. Ralston's point that "likely" does a lot of work. She asked committee members to think whether there would be other judges (at Standing and then multiple stages after that) who would not be as familiar and had not struggled with the very subtle differences between the two options. They might be concerned that "likely to lead to" would put us a little bit too close to civil discovery and an expansive discovery tool. She suggested that the chances of succeeding in this incremental reform might be improved with a loosened *Nixon* standard less permissive than "likely to lead to."

A judge member expressed the view that "likely to be admissible" was much better than "likely to lead to admissible evidence," which she said does not make sense and was confusing.

Ms. Ralston asked a follow-up question about particularity. The Department had read "reasonable particularity" to be descriptive of the item, not descriptive of the reason you should get it. The only part of the rule that talks about the reason that you should get it is the admissibility question. The particularity is "I want emails from my client held by the employer." That is describing the item that you want and not the reason why you think you should get it.

Judge Nguyen agreed and said she had been making the more general point that in an effort to get the subpoena there has to be a reason why you think this relates to whatever defense

you think you're going to craft and if you can meet that standard. She asked if her district court colleagues disagreed and saw a significant difference between the two standards.

One member responded that he was still not sure how he came out on that question. In giving the example concerning school records he had been trying to answer Judge Bates's question. Returning to that example, he imagined a defense attorney came to him with a request seeking school records that named someone else the child complained about at school. The member might ask counsel "do you believe the records will give you the actual name?" Counsel might reply he did not know. And if the judge asked whether counsel believed the records would tell what happened, counsel might again answer he did not know. At that point, the member thought the defense had not identified something that was going to be admissible. But if you said you thought when you got those records, then you would be able to follow up this lead for the defense. Then the answer would be likely be yes. So in that scenario the standard could make a difference. For most production, if you get what you want and then that would take you to what you think will support your theory. There was usually one more step.

Ms. Ralston commented that the rule used the word "item," which it defined to include information. Asking the agent "did you investigate other disclosures the child made about potential perpetrators?" would be a perfectly admissible question. It would be based on the information from the record, even if the record itself was not admissible. She thought that the information contained in the school record, even if not the record itself, would be admissible as a form of cross examination to cast doubt on the government's investigation, to say there is reasonable doubt.

The member who had suggested the example agreed the defense could ask an agent that question. But that would be a lesser defense than following up on a lead that would give you another perpetrator.

Ms. Ralston said she did not read the rule to be saying that if you made the showing to get the school record based on "likely to be admissible" that would preclude using the information in the record you got to follow up in some other way. She was saying that you have to have enough reason to think that the first thing will get will be useful in the proceeding.

The member who provided the example said he was just answering the question whether the typical person seeking records like this could make the showing that what they want was likely to be admissible. In his opinion, typically in the scenario he had described, the answer was no. You could not describe it.

Judge Bates commented that in this scenario he was not sure that the defense counsel must respond "I don't know" to those questions. There had to be a basis, something that lead them to suspect that in those records there would be something. So they had to be able to say "I have received information that someone else has made complaints," something beyond the "I don't know." Why, he asked, wouldn't that be encompassed by "likely to be admissible," rather than "lead to" admissible evidence? The member who provided the example responded that the cue you got to seek more information would be vague. Your client tells you that his daughter told him she'd complained about somebody else at school also or something about that.

Judge Bates said that was what you would be telling the judge. That would be the basis on which you thought there would be information in the records you were seeking. So it not be "I don't know," it would be "I suspect based on this information." Judge Bates thought that "lead to" raises the concern about enabling fishing expeditions. That, he said, was what the Committee needed to consider. Is there a concern about fishing expeditions? He thought there needed to be some specific language that cut off what is commonly called a fishing expedition, where there's no basis for really seeking the record, so just a hope.

In response to a question whether this could be addressed in the advisory notes, rather than the text, Judge Dever stated the standard must be the same in the text and the note.

A member said he shared the concern about fishing expeditions. Also, more broadly, since we were trying to change the rule to make it broader in different respects, it might be wise not to get overly ambitious. That might be counterproductive in the long run. He noted that there was a section saying for a lot of these subpoenas, you don't need a motion or an order. So we are already making those kind of changes that loosen the rule, to permit more flexibility. Given that, he thought it might make sense to go with the "be" admissible standard and not with the "lead to" admissible evidence standard.

Another member agreed with the comment that if "likely to lead to" would result in the failure of the amendment, he would certainly support the more conservative approach and say "likely admissible." His more fundamental question was whether "likely admissible" would be enough to change the mindsets of the courts around the country on this particular issue. Because, he noted, that was ultimately what the Committee was trying to do. The Committee was trying to loosen the *Nixon* standard. He wondered if the district judge members thought "likely admissible" would loosen the *Nixon* standard enough to convince them if defense counsel were standing in front of them that they would be more likely to approve a subpoena. If so, he would support that "likely admissible." Or was that not enough to move the needle in the restrictive districts? But if "likely to lead to" would push the courts and the Standing Committee too far, and they would not accept it, then he would accept the more incremental approach. So, he asked, would the language do enough to convince the courts where this restrictive practice is in place to loosen the standard?

Judge Nguyen responded that there was no question the proposed amendment would loosen it a little bit, but it was a question of taking an incremental approach or loosening it a lot. She said "likely to lead to" is definitely broader and harder for the judges to apply. There would be questions of how far we go. That was Ms. Ralston's point: how many steps do we permit in order for the evidence to finally be shown to be likely to be admissible? They both loosen the *Nixon* standard. There was no question about that.

Another member said it was not only the standard, but also what was in the committee notes. The member understood that not everyone reads the notes, and they cannot suggest something in the notes that's not in the text. But he thought lines 60-74 and 75-87 really explained what the Committee was trying to do with this change, and that *Nixon* has been much too strictly interpreted in some jurisdictions. There is an attempt to loosen that standard and to give some examples of where it has been misapplied in the past. The member said he preferred a

more incremental approach. He thought the "likely to be admissible" combined with what the committee note said the Committee was attempting to do would go a long way to pushing jurisdictions like his own, which traditionally had provided very little discovery, post *Nixon*.

Other district judge members who had not spoken to the issue were invited to respond to Judge Nguyen's question on the difference "likely to be" versus "likely to lead to."

One member commented that this had not been one of the issues of greatest concern to him. He had interpreted the term "likely" to be a limiting term that had sufficient meaning to provide a standard that could be administered by district judges. Fishing expeditions were a big concern to him, and he thought he might be attaching more significance to the limiting use of "likely" than others would. If he was misreading the significance of "likely," then the fishing expedition concern would really bother him.

A judge member expressed the view that "likely" means we are not sure that it would be admissible evidence or would lead to admissible evidence.

Another judge member said he shared the concerns about "likely" and about the possibility of fishing expeditions. If committee members favored a more incremental approach, he thought it might be better not to include "likely," see how it played out, and revisit it if necessary.

Professor Beale commented that the Committee had been discussing whether the standard should be "likely to be admissible," or "likely to lead to" admissible evidence. "Likely" was in both tests.

Noting that she was making an argument by analogy from a past Civil Rule, Professor Struve said Civil Rule 26(b) previously included a definition of the scope of discovery, which was bifurcated. It provided for discovery about material that was relevant to any party's claim or defense. And it also said that for good cause the court may order discovery of any matter relevant to the subject matter of the action. She suggested that if there were hesitation about allowing broad access under the "likely to lead to" standard, the rule could bifurcate it and say "likely to be admissible," or for a good cause on motion the court could allow a subpoena for material "likely to lead to" admissible evidence. That would be an intermediate option between the binary that the Committee was considering.

A defense member of the Subcommittee commented on fishing expedition concerns. She acknowledged the concern was in the case law. But she said with the advent of ESI, defense attorneys are generally not interested in subpoenaing vast amounts of data in the hope it might lead to something that's admissible. She wanted to give an example of a one-step request to illustrate the point regarding emails about a particular meeting. The emails themselves might not be admissible, but they might reveal the name of someone who attended a meeting, and that person's testimony could be subpoenaed. She thought the concept of fishing expeditions clouded the argument with something horrible everyone was afraid of. But defense attorneys did not want to do that. It doesn't help. A judge responded that the member was a good defense attorney, and she would not do so. But sometimes defense attorneys did so.

Ms. Ralston commented that not everyone had the same incentives to resolve something quickly. But she thought everyone was assuming something that hadn't been specifically stated: the subpoena requester must have a good faith basis to believe that the thing requested will be as they are expecting it to be. That assumption of good faith was doing a lot of the work. It was being read into the "likely to be admissible." She suggested the requirement of a good faith belief might be spelled out more in the note, explaining that the party requesting a subpoena need not know for sure what was in a document before being able to subpoena it, but must have a good faith basis, like the good faith belief to ask a question in court. Good faith, she said, is the general rule for everything. And because it was the general rule, it was being assumed and not made explicit. But when you start to think about "the lead to" it got harder and harder to articulate that reason to believe that the item sought was there. The lack of a requirement in the text that the person seeking the subpoena articulate the basis for belief was one of the reasons the Department viewed "lead to" as particularly dangerous.

On the good faith point, Professor Beale noted that as a matter of style and general rules etiquette good faith requirements are not included in individual rules. Including it in one rule might suggest it was not required in any other rules. In the Subcommittee there was a suggestion to put good faith in the text, but the Subcommittee declined to do so because that would be inconsistent with the general approach in the rules. She knew of nothing prohibiting mentioning good faith in the note. She observed, however, that it could be problematic to mention it for only one particular issue.

Ms. Ralston said the Committee could do it in terms of defining what it means for something to be "likely to be admissible." If you can articulate why you think whatever is there is there.

Noting there had been some discussion of about what the facts have to be and when facts have to support certain things, Professor King pointed out that if there is a motion to quash, the proposed amendment required a showing that each designated item be described with reasonable particularity, and facts must be stated showing that each item satisfies (c)(1)(B)(i)-(iii), which includes the "likely to be possessed." You must show facts supporting whatever standard the Committee came up with, whether it was "likely to be admissible" or "likely to lead to" admissibility. That was lines 39-41 on page 128 of the agenda book.

Judge Bates noted that Professor King was assuming the proposal would retain "state facts" after discussion. Another judge who said she believed in clarity asked if this could be stated clearly, perhaps at the beginning of the rule.

Judge Dever asked for another straw vote of committee members, reminding them that they were not at the end of the process. He suggested that members not let the perfect in their own minds to be the enemy of better. He asked for a show of hands of members who supported the language of "likely to be admissible"? Then he asked for a show of hands on "likely to lead to" admissible evidence.

By a vote of 8 to 4, members supported "likely to be admissible." A member who had voted for "likely to lead to" noted he viewed "likely to be admissible" as the compromise

position, and he would support it if that were necessary to secure approval in the Standing Committee.

Judges Dever and Nguyen noted that they would be calling for a vote on the proposed amendment as a whole at the end of the discussion of particular issues, and Judge Nguyen asked the Committee to consider two interrelated issues together. On lines 48, 51, 53, 57, and 58 the question for the Committee to discuss was whether the motion and order requirement for subpoenas for personal and confidential information should also apply to prospective witnesses, and the notice provision as well. The Subcommittee had bracketed it. Currently the motion, order, and notice requirements applied only to victims. The Department had urged that witnesses have the same privacy interests as victims, and that the rule should provide the same level of protection: a motion and order required before you can seek personal and confidential information pertaining to prospective witnesses, who should also be given notice.

Ms. Ralston thanked the Committee for considering the Department's suggestion, which had been added since the November meeting. She said that the Department thought this addition to the rule was important to protect the integrity of the process and privacy interests in light of the two expansions of subpoena authority being made in the proposed amendment. The first change was the expansion of the *Nixon* standard. In the Department's view, if there were a substantive expansion of the universe of available information, it would be important to restrict the rule with the requirement of a motion. She noted that many districts now require a motion for any subpoena under Rule 17. The proposed amendment would narrow that to a smaller scope of situations in which you need a motion. The Department was proposing that the narrowing of the motion requirement be restricted somewhat. The amended rule would still narrow the times when you needed a motion, but not narrow the motion requirement quite as much as the Subcommittee had previously considered. The Department sought to protect this information for prospective witnesses, she said, for largely the same reasons as the protection of victims. People's knowledge that really sensitive information about them could be disclosed without any intervention from a court and without any notice to the person could really dissuade them from participating in the process. Witness participation is a critical element to meeting the government's burden beyond a reasonable doubt in criminal cases. Anything that would dissuade people from participating would make it that much harder to do justice for victims, for the public, and to serve the ends of the criminal justice system. The Department thought it was important to create a balance. The Department accepted that in appropriate circumstances this information could be obtained by subpoena, but oversight by the court was an appropriate middle ground. As the draft currently stood, it did not require notice, though it permitted the court to order notice in appropriate circumstances. The Department thought that was a very balanced approach, balancing the interests of the witnesses and the needs of defendants to secure this information.

Responding to some of the points in the reporters' memo, Ms. Ralston characterized the issue about legislatures as somewhat of a red herring. The statutes addressing limitations on subpoenas had been focused on the government's use of grand jury subpoenas because the availability of Rule 17 subpoenas had been so limited. The lack of additional protections like those in the CVRA should not be taken as an affirmative statement by Congress that such protection is unwarranted. Rather, it was not necessary at the time to consider it. And the idea that witness credibility is always central proved too much. By that logic, there would always be

an incentive to seek as much personal information about the witness as possible. Their medical records might show that they have some perception impairment or other things. People are rightly sensitive about that information being obtainable without their consent, without their knowledge, and without any intervention by the court. She thought these types of subpoenas would be sought by ex parte motions. The Department was not saying that notice to the government should be required, but it thought that the court should be involved in the process. She thought the concerns about knowing who will be a witness were overblown. The reason a party would want someone's information is because they thought that person would be a witness. Personal information is most likely to be relevant as impeachment information, and there is no need to impeach somebody if they're not going to be a witness. As to defining what personal and confidential means, she noted that was not a unique issue. The Department was seeking to include witnesses in the existing provision governing subpoenas to victims. To the extent there is ambiguity about the term personal and confidential, it was already in the rule and had to be dealt with.

Professor Beale commented that the statutory provisions to which the reporters' memo referred included, among other things, the Stored Communications Act and some of the banking provisions do deal specifically with notice: these people get notice, and these people do not. So there are statutory provisions that do contemplate that type of limitation on notice. These provisions were not included in the current reporters' memo, but had been in earlier memos. Ms. Ralston acknowledged that the proposed amendment does include the language "unless the statute provides otherwise, the court may …." Finally, Professor Beale commented that the defense bar felt very strongly about this issue.

A practitioner member responded, noting that over the three years that the Subcommittee had been considering Rule 17, it had met many times, and the reporters and the law clerks had provided numerous, excellent, and sometimes very dense memos. The Subcommittee had spoken by Zoom with experts, including in house and outside counsel to the tech industry, the banking industry, education, healthcare, and billing regarding privacy protections and notice to individuals whose records are being sought. The Subcommittee learned, as Professor Beale suggested, that not all statutory and regulatory regimes treat privacy protections similarly. Some expressly provide for privacy protections and notice, the most prominent being HIPAA and FERPA. Others reflect deliberate policy choices not to require notice. The Stored Communications Act, for example, does not require notice for non-content data, because Congress decided the holders of that data ought to be able to sell it. Still others expressly prohibit notice, such as the Bank Secrecy Act. Specifically with respect to suspicious activity reports, there is an absolute statutory prohibition on notice.

The member said that in all this time, through all these conversations, no one complained about witnesses' personal and confidential information being subpoenaed. In her view, adding prospective witnesses to victim provisions of 17(c)(3) would be a fix for something no one said was broken.

During the three years, the Subcommittee spent considerable time and research looking into what is meant by personal and confidential when we evaluated the protected and unprotected categories of information. Beyond the statutes and regulations that explicitly address protected

information, there was a broad range of personal and confidential information that people hope or expect to keep private that is not protected by law. In one of the memos we had many different examples of that information, and she named some: motor vehicle records, IP addresses, passwords, diaries, calendars, hotel registries, contact lists, death certificates, data records, in cars, and emails between employees and employers.

The member argued that the breadth and indeterminacy of personal and confidential makes adding prospective witnesses to 17(c)(3) burdensome and problematic. In her view, Rule 17 is not the appropriate vehicle to deal with the evolution of privacy interests. Some of the burdens that we identified in Subcommittee meetings include the inability to identify the person or entity whose information is sought, no known contact information for the person whose information is sought, too many people and entities involved, and the possibility that advance notice might lead to the destruction of evidence. Returning to her point that notice to prospective witnesses was a fix for something that was not broken, she commented that the most important thing the Committee learned at the November meeting came from Ms. Miller, the Deputy Assistant Attorney General for the Criminal Division. When asked whether she thought there was a greater risk to victims and witnesses in districts that had interpreted *Nixon* more permissively, Ms. Miller said she had not noticed a trend. Similarly, Mr. Randall, from the U.S. Attorney's Office in the Western District of North Carolina, said he had no sense of current abuses. The member emphasized the Department's proposal would be a very significant addition. The Subcommittee had expended an extraordinary amount of effort trying to understand what personal and confidential meant, and indeed in one of our memos it was referred to as a mystery.

Another defense practitioner began with the observation that in the rule making process the first step was to identify a problem. Personal and confidential information about witnesses had not been identified as a problem. And the next step was determining whether a remedy could be provided by the rule by a rule change consistent with the Rules Enabling Act. She thought the Department's proposal failed on both of those counts. We held two hearings where practitioners were invited to address the Committee. As the prior speaker had highlighted, at the November meeting, it heard from Ms. Miller, who was the Deputy Assistant Attorney General at the time but had practiced in the Southern District of Florida, where there is no motion required to get a subpoena, and from Mr. Randle, who was chief of the Criminal Division in the Western District of North Carolina, which similarly did not currently require a motion to serve a subpoena. In response to Judge Nguyen, both said very clearly that they were not aware of any problem or any trend in this area. And, the member said, there was good reason for the lack of any problems or negative trends. State and federal legislatures have deliberated privacy issues and enacted privacy laws that were already doing the work necessary in this area. They had identified the means by which information can be disclosed. Often it includes the requirement of a court order. That meant the defense would be required, under those privacy laws—regardless of Rule 17—to go to the court, and those laws also stated who had to provide the notice and how. Those were carefully crafted laws across all States and within the federal code. Given the multitude of laws already in place, and in the absence of any articulable problem, the member suggested that adding prospective witnesses here arguably violates the Rules Enabling Act. It would certainly cause confusion and a lack of clarity, leading to disparity among districts, and undoing the primary goal of this work. Instead of fixing the narrow interpretation of *Nixon* in a few districts, it would drastically change the practice in many districts, resulting in extensive—and in the

member's view—unnecessary litigation on the meaning of many things, including what or who a prospective witness is, and when they become that. And every word used to describe privacy would be litigated.

The Committee had suggested that in addition to this incremental approach, another goal would be to limit the work of the courts on the front end. Adding a motion requirement for prospective witnesses, the member said, would not do that. Instead, it would increase the work of the district courts around the country, including districts where the Department had already acknowledged motions were not required now and there was no problem.

Finally, the member responded to the earlier observation that not all defense a attorneys—and generally not all attorneys—always act ethically. The member noted that the Federal Defenders represented roughly seventy percent of criminal defendants in federal court, and the CJA panel represented at least an additional twenty percent. These lawyers had their livelihood before the court. They took their ethical obligations as seriously as their counterparts in the U.S. Attorneys' Offices. So, though she understood the concern and respected that there are instances where folks cross a line on both sides of the aisle, the member urged that rule drafting should not address those few instances of that type of conduct, but instead should promote uniformity as much as possible among our very different districts. In her view, the Department's proposed change would undermine all of the work that has been done on Rule 17(c). Under the Rules Enabling Act, the Criminal Rules should neither abridge nor enlarge substantive rights. Privacy laws are vast and varied, and they are honored. To add some additional layer within this rule, in her view seemed to contravene that requirement.

A judicial participant started by saying how helpful the New York meeting had been for him. It expanded his understanding of the problem, and he had come into that meeting with some doubts about whether we could come up with a proposal that he could envision becoming a rule. He characterized the current draft as a tremendous improvement. He agreed with the hope that the Committee would not lose sight of the fact that reform of this rule is badly needed, and this is a really good rule. He said he would express a concern but also his willingness to support the rule whether the Committee made the change he would suggest. He noted that the last thing he would want to do is promote unnecessary motion practice by lawyers. He did not want counsel to have to file motions unnecessarily, and he certainly did not want his judicial colleagues to have to spend time reviewing meaningless motions.

The Department's proposal dealt with the privacy interests of ordinary citizens that have been drawn into a criminal case because they happen to be witnesses. Those privacy interests, the member said, were important. He acknowledged that state and federal laws already provide privacy protections, but they vary a lot from state to state, and there were many legitimate privacy interests not captured by a state or federal privacy law. He was willing to devote his time to reviewing and deciding whether this is the kind of subpoena that should be served or not in this limited class of cases. He recognized there were some dangers, including the danger that the exception of requiring a motion would swallow the general rule. But this rule would give districts that wanted to take a different approach to do so, and even individual judges. He suspected that his district would adopt a local rule requiring a motion for these subpoenas. But he understood why many other districts might not want to do that. And to the Rules Enabling Act

point, the member was generally in favor of trying to find a national consensus approach where that was possible. But this was an area where he expected wide disagreement. Districts that had no experience with granting 17(c) subpoenas, where nobody even tried to get a subpoena, would view this rule as a very substantial change. On the other hand, there were many districts that were used to uninhibited practices and might see this as a constraint. This might be a situation, he thought, where for the time being absolute uniformity was not needed. The argument about the exception swallowing the rule did concern him. And the option allowing districts and judges to do things differently persuaded him that despite his concerns he would rather have this rule in whatever form it is than to have no successful reform. He wanted to express his concern but also acknowledge the other side. And he thought the rule was just an amazing improvement, and a much needed reform. Like a prior speaker, he wanted to see it enacted.

Another judicial member agreed that the proposal would make the rule so much better. She praised the structure, and said it made sense.

Judge Bates asked if this provision left room for variation among districts. It seemed to set a rule that could not be changed by court order or local rule.

Judge Dever responded, pointing to lines 37-38 on page 128 of the materials. The proposal set a general rule when a motion is not required, and then when it can be. He noted that the Subcommittee had discussed the ubiquity in many districts (including his own) of protective orders that get entered at the beginning of the case, the requirement that the lawyers meet and confer about topics if there's a disagreement about some issues—sort of case management of issues as you get closer to trial. He thought the rule was taking all of that into account, giving that discretion to the trial judge to manage that. A one count 18 U.S.C. § 922(g) case is different than a multidefendant human trafficking case. A court will be concerned with different interests in connection with the protective order.

Professor King drew the Committee's attention to the text on page 128, lines 36-38, which states: "A motion and order are not required unless subsection (c)(1)(3) or (4), a local rule or a court requires them."

Judge Bates said it does not say a local rule or court order could not require them. It seemed to him that (c)(3) said a motion is required. Professor King agreed: for a victim, a motion is required. And the Department's proposal would require a motion for a prospective witness as well. She agreed with Judge Bates that if the Committee added witnesses to (c)(3), courts would have no latitude to allow the parties to proceed without a motion. An earlier speaker clarified that he had been talking about latitude for local rules to *add* a requirement of motions for witnesses if it were not included in the rule. He had been explaining why, if he did not prevail in his view that witnesses should be added to (c)(3) he would be able to deal with that by a local rule adding such a requirement.

Judge Nguyen clarified that speaker's district might require a motion when it comes to personal and confidential information for prospective witnesses, but the presumptive rule would require that only for personal and confidential information as to victims. The speaker agreed: assuming that the Committee did not share his concern to the same degree, he understood that a

district could, by local rule, decide to require a motion for personal or confidential information about a witness. That had given him the comfort that if he could get his district to agree, they could do that by local rule. He could live with that while we gained experience with the implementation of the rule. Judge Nguyen confirmed that if the Committee decided not to include a requirement of a motion and notice for prospective witnesses, line 38 would permit the speaker's district to enact a local rule.

Professor King pointed out that the committee note addressed this situation. On lines 106-14, the note to this provision encouraged courts to use protective orders: "Other requirements stated in the rule or otherwise available to the court are adequate to control potential abuse of the subpoena by parties, and districts that have required under the prior language, the rule may continue to do that by local rule or court order." But the key was that judicial oversight before service was no longer required by the revised text of the rule, as it had been under the rule. Some judges read the current rule to require a motion for every subpoena. The Subcommittee draft said that was no longer required by the rule, but you can add a motion requirement in your court—or for this case—if you wanted to do so.

Judge Nguyen commented that expanding the motion and notice requirement to cover perspective witnesses as a presumptive rule would be contrary to the incremental approach, which the Subcommittee had been encouraged to implement.

A member made a similar point: not including that requirement allowed districts to preserve their practice. She said she would not be surprised if her district adopted such a local rule requiring a motion. But it allowed districts that did not now require motions to continue that practice in the absence of showing of any problem. She had previously noted that the Western District of North Carolina and the Southern District of Florida did not require motions according to speakers at the November meeting. At the same meeting Mr. Beirne said that in the District of Massachusetts you did not need a motion once a trial date was set. He said in the Varsity Blues case it was clear there was going to be a lot of discovery raising privacy issues, and there was an extremely well-crafted, restrictive protective order from the beginning of the case. When subpoena practice began closer to trial, they did not need a motion and were still covered by the protective order. So, she said, there were a multitude of different ways that districts were already addressing this issue. It was being dealt with.

Ms. Ralston responded to some of these points. First, on the scope of the Rules Enabling Act, the Department was proposing a motion requirement, which was clearly procedural. Second, there had been a suggestion that the Department was seeking to fix something that was not broken. In the Department's view, however, the *Nixon* standard was currently providing a safeguard, so perhaps nothing was "broken" yet. But once you relaxed the *Nixon* standard, then it might be "broken." She asked the Committee to consider the potential unintended consequences of broadening the substantive standard of what you can subpoena and the showing you have to make to do so. That expansion would allow the parties to seek a broader scope of information, which would raise significant and real concerns for people who are involuntarily in this process about very sensitive aspects of their life or information that could put them in danger. Whether the change the Department proposed was incremental would depend on the baseline. A number of courts have said you have to have a motion. Moving from always requiring a motion to rarely

requiring a motion would be a big change. And going from always requiring a motion to requiring a motion slightly more than rarely would be a more incremental change. So how incremental the change would be depended on your baseline. She did not think there had been a comprehensive survey of current practice. But she acknowledged that the proposed amendment did allow for local rules to be more protective, and she suspected that the Department might encourage courts to adopt those more protective local rules.

Professor Beale said that one of the things that gave the Subcommittee confidence and comfort that it would not be suddenly opening the door to new problems by relaxing the *Nixon* standard, was that those new problems did not seem to exist in the districts where subpoena practice had not been restricted. No one at the hearings had identified significant problems where courts had taken a narrow view of *Nixon*. So if you expanded something significantly, which would be happening in some districts, you might expect that they would have the same sort of experience in the districts that presently have more expansive subpoena practice. But the proposed amendment had the safeguard that individual districts that had a greater concern, or who felt that the nature of their caseload or something else demanded more protection, could adopt a local rule. That, she said, is where the Subcommittee came down: both having this ability of individual districts to adopt local rules and the experience in so many districts where this was working well. She observed that Ms. Miller had identified two problem cases. But in response to a follow-up question, Ms. Miller said they arose from Rule 16 discovery. They had nothing to do with subpoenas. As an earlier speaker said, sometimes lawyers don't do what they should, and these problem cases Ms. Miller identified were both clear violations of Rule 16 and protective orders. But there had been no showing that in districts with more permissive subpoena practice there has been a big problem without notice to the witnesses and so forth.

A member followed up, commenting on the people who testified at the November hearing. The Federal Defender in the Southern District of Florida said that he had access to the subpoena on his desktop. It was pretty permissive. But secondly and really importantly, he told us that in his district they had the second highest in volume for trials and indictments. That is the district in which Ms. Miller practiced, and they did not see problems. If there were no problems in the second highest volume district, where the defense attorneys could keep the subpoena form on their desktop, the member thought that was powerful evidence that this was not a problem. The purpose of the mini conference was to assemble people with a wide variety of experience.

A member asked Ms. Ralston what part of the proposed amendment causes the Department concern. She had acknowledged it was not a problem at present, but broadening or loosening the *Nixon* standard was going to lead to a problem. What aspect, specifically, did she think would lead to that problem?

Ms. Ralston responded that moving from evidence that is "admissible" to evidence that is "likely to be admissible" opened a broader category of things to be sought. That widened the potential for subpoenas seeking sensitive information about witnesses. She acknowledged that not every district currently restricted subpoenas narrowly to evidence that would be admissible and that there have not been broadly identified problems in those districts. But even where the local practice was broader than *Nixon*, *Nixon* was the law. There was always the backstop, the opportunity for the person or the government to move to quash a subpoena that was far too

broad. So even in places where it was the practice that you could go broader, everyone was operating against this backstop, and knew it was still there. Once you took away that backstop and changed the standard, what happens might not be the same as the experience in districts that currently have a broader subpoena practice. But she could not predict the future and say there would absolutely be a problem. Ms. Ralston agreed that protective orders go a long way, and that in many situations a motion is required by statute. So she could not say this was a huge category. Ms. Ralston added that as between the requirements of a motion and notice, the motion part was much more important to the Department than notice.

Judge Dever asked for a straw poll for the issue on pages 116-18, lines 48, 51, and 52: whether to add a motion and order requirement for personal confidential information about prospective witnesses as well as a discretionary notice requirement. He noted there was no change in the victim requirements. The proposed additions concerning prospective witnesses failed by a vote of 11 to 1.

Judge Dever said that it was helpful to have the straw polls before taking a vote on the complete draft, and he reminded everyone that if the amendment moved forward, it would be published and the Committee would get a great deal of additional input. He adjourned for a 30 minute lunch break.

Rule 43

After the lunch break, the Committee paused its discussion of Rule 17 to hear the Rule 43 Subcommittee report from Judge Birotte, who was speaking from England and dealing with a significant time difference. The Committee had received a communication from Judge Brett Ludwig asking it to consider amending Rule 43 to extend the courts' authority to use video conferencing beyond initial appearances, arraignments, etc. Judge Ludwig's view was that the courts had learned some important lessons from COVID, and the CARES Act gave the courts a lot of flexibility and some access that had not previously been available. There were several districts throughout the country that either did not have detention centers or were so large that people had to travel many hours to get to court. Video conferencing under the CARES Act was a good remedy for that.

This Committee had dealt with proposals to expand the use of videoconferencing in the past, and it declined to make any changes. But when we received this communication, we thought we should look at it again given the experience under the CARES Act. The reporters had prepared a memo for the Subcommittee identifying potential areas (listed on page 149 of the agenda book) where we might want to consider whether the rule needed to be amended: preliminary hearings, waiver of indictments, suppression hearings, ancillary things and forfeiture, etc.

This had been a difficult issue for him personally, Judge Birotte said, because in his district video conferencing helped, though it was not entirely necessary. His district did not have some of the challenges like those in Alaska, where people travel some 600 miles. He had also heard there were huge distances in other districts, and it took a great deal of effort to get people into court.

But at the end of the day, particularly in consultation with defense members, the Subcommittee concluded that no changes were warranted. Presently Rule 43 allows some flexibility with respect to video conferencing, and he suggested that some judges might need to be more educated about the flexibility that Rule 43 already allows. But the overall sentiment was that given the serious nature and the weight of the proceedings, no expansion of video conferencing was appropriate. Defendants need to understand and appreciate the seriousness of the hearing, and being in person was the preferred method. He invited comments from other members of the Subcommittee in case he had missed anything, but said that the Subcommittee's view was that Rule 43 did not need to be amended at this time.

A subcommittee member said they had gone through the very comprehensive list that the reporters had provided on various types of hearings, and he had thought of another that might qualify. But after very careful consideration, the Subcommittee did not see any room for expanding video participation.

After hearing no other member wished to comment, Judge Dever thanked Judge Birotte for chairing the Subcommittee and also thanked the reporters for their excellent work. He noted a reference in the materials to all the times that the Committee had considered the issue, in 2024, 2020, 2017, and the other dates referenced.

The Subcommittee's recommendation was not to amend Rule 43 or other related rules in the manner suggested by Judge Ludwig. Procedurally, that would mean removing it from the Committee's agenda. Judge Dever asked for a show of hands of those in favor of accepting the Subcommittee's unanimous recommendation to remove the suggestion from the agenda. There was unanimous approval, and Judge Dever said they would inform Judge Ludwig. He thanked Judge Birotte for staying with the Committee, despite Internet issues, and for his excellent work as chair of this Subcommittee. Judge Dever also said as a personal matter it had been a real pleasure working with Judge Birotte.

Judge Birotte responded saying Judge Dever's reputation loomed large and that as chair of Standing he expected Judge Dever would be sure the Criminal Rules Committee minded its Ps and Qs. Judge Birotte asked to be excused at that point.

Rule 17

The Committee then returned to its discussion of Rule 17. Judge Nguyen thanked all present for their patience, saying there were just a few additional issues to discuss which she thought would go more quickly.

On line 64 of the redline, as currently written, a self-represented party could get a subpoena only by way of motion, with the showings discussed earlier and a court order. And then the subpoena return had to be to the court. The question for discussion was whether to include the bracketed language: "unless the court orders otherwise," to give the court some flexibility in determining where the subpoena is going to be returned. For example, sometimes a self-represented party is a lawyer. So did the Committee want the District Court to have discretion to say since you are a lawyer, you can have the return to you directly instead of

returning it to the court, which might feel it was not necessary to review? She asked if there were any strong feelings on this issue about it one way or the other. Before any member commented, Professor Beale noted an error in the agenda book discussion of this issue on page 119. The second bullet against including this provision was included by mistake.

Judge Nguyen noted the other arguments on page 119 for including an unless clause in the text saying that the bracket language will preserve the judge's discretion to determine whether a motion was needed. She asked if the district judges want greater discretion in dealing with subpoenas for self-represented parties, to have greater control. The sense of the room was that the judicial members did favor more discretion.

A member commented that she understood there might be a change from referring to "unrepresented" rather than self-represented people, and she thought self-represented was the right phrase in the criminal context.

Professor Beale noted that Professor Struve had raised this issue because of the interest in uniformity across different sets of rules.

Professor Struve responded that on substantive grounds she supported the use of "self-represented," and she thought it would work perfectly well for the Criminal Rules to use that term. But it would not work as well to try to insert it into the other sets of rules—which is what she had been thinking of proposing—because they had about twenty other places where they already used the term "unrepresented," one of which would be hard to change. If the Criminal Rules would like to use "self-represented" and be a model for best practices, she would support that.

Professor Beale commented that only one Criminal Rule at present used "unrepresented"—Rule 49. This would be largely a consistency and style issue because "unrepresented" includes people who are representing themselves. Professor Struve said that she expected the community that discusses matters affecting self-represented litigants would comment adversely if the other sets of rules were published using the term "unrepresented," which is not the current parlance.

Judge Dever noted that often self-represented defendants have standby counsel. He had cases in which returns went to standby counsel and not to the court. The proposed amendment would give the judge the discretion to do that for self-represented defendants who had standby counsel.

Judge Nguyen clarified that the Committee preferred to retain the term "self-represented" (as opposed to unrepresented), and to delete the brackets because we want to allow discretion in cases involving self-represented defendants.

Ms. Ralston asked whether the amendment should (as it did in other places) add "unless a court order or local rule provides otherwise" to account for the self-represented defendant with standby counsel. Professor King asked if she were envisioning a local rule stating that "if a self-represented party is appointed standby counsel, then in this district…."? That had not been

considered in the Subcommittee. Professor Beale suggested that the Committee could defer consideration. It was a fairly minor issue that had not been discussed, and they had no information about how often rules would deal with the possibility of standby counsel and where returns should be sent. The Committee could come back to that issue after publication when considering possible changes. Alternatively, Professor King suggested, it could put "or local rule" in brackets between the court and orders. The brackets would trigger conversation on this point at Standing and upon publication. Ms. Ralston replied she did not have strong feelings about the issue, but she had wondered if the judges might think that would be more efficient.

A member said she was not sure it would matter in practice. As written, the amendment gave the court a lot more control over that self-represented individual—who might say "this rule says you could give me permission to have it." She thought it was better to leave it addressing only what the self-represented person's rights are. An attorney acting as standby counsel is an attorney before the court, and the judge could choose to do anything under Rule 17 that would apply to an attorney. That could become a bartering point: I'll let your standby counsel have it. So the member suggested that the rule address only what the self-represented person's rights were, or limitations on them.

Judge Nguyen stated that she understood that the Committee favored removing the bracket from the redline but leaving out local rules for now. Seeing no additional hands, she moved on to the last issue on which the Subcommittee was recommending discussion. She noted it would skip item F, and move to the issue on page 120: should the rule encourage courts to consider protective orders or in camera review for potentially sensitive material? This had been in the background, but the Subcommittee didn't have a chance to focus on whether it should be addressed explicitly in the rule. As Judge Dever had noted earlier, protective orders are fairly routine. So, she asked, was there a problem that we needed to address by putting that into the rule? Professor King commented that this was indirectly referred to on line 110 of the committee note, which says other requirements in the rule or otherwise available to the court are adequate to control potential abuse of the subpoena process by the parties. Protective orders could be mentioned there. Or there could be a separate provision in the text, but the Subcommittee did not get to that. Professor Beale added that one reason it was not a higher priority on the Subcommittee was that courts generally have authority to use protective orders and use them in lots of different contexts. The question was whether there was a special reason to emphasize that here.

Judge Dever said part of what prompted the Subcommittee's discussion was hearing a lot at the November meeting in New York about how often the protective orders are in place and these things get negotiated between lawyers. The first question in all rulemaking is whether there is a problem. And the Subcommittee really did not hear that was a problem. But the Subcommittee wanted to know whether the Committee thought that the rule should expressly deal with the topic.

A member said his own view from his practice and familiarity with other judges in the Ninth Circuit was that this was not a problem. He thought there was wide use of protective orders that were easily negotiated. He did not think the Committee needed to address it.

Ms. Ralston asked whether there needed to be some clarification that a protective order governing discovery would also apply to subpoena returns. She understood that at the November meeting there had been many comments that subpoenas are not discovery. She asked whether there was any lack of clarity about that, because she thought it would be obvious. But she was concerned about any ambiguity, because the Department viewed protective orders as very important. One district judge member commented that she did not think there was any ambiguity.

Noting that she was not hearing any problems, Judge Nguyen suggested that the text not be amended to include a measure that nobody was very concerned about. But an addition on line 110-11 of the committee note to identify protective orders as one of the common control tools district courts use would be an option.

Professor King said the note might read: "otherwise available to the court comma, including protective orders, comma are adequate to control." The whole sentence, beginning on line 109 would read:

> Other requirements stated in the rule or otherwise available to the court, including protective orders, are adequate to control potential abuse.

Judge Nguyen noted many heads nodding, and she concluded the Committee favored including that reference to protective orders.

Judge Nguyen asked for any additional comments or concerns.

Judge Bates said he had additional questions, some of which related to the structural points discussed earlier. In (c)(2)(B) the rule stated that a movant must show certain things. It must describe each designated items with reasonable particularity, and "state facts showing…." He asked would it always be "facts"? The Committee note said that was intended to eliminate the possibility of speculation. But as noted in the earlier discussion, sometimes the movant has a reasonable, good faith belief but may not be able to state clear unambiguous facts. He suggested that "state facts" was a little narrower than what the Committee might mean. Did it mean explain why each item satisfies (1)(B)(1) through (3), which would be a little broader than stating facts?

Judge Nguyen stated her view that the Subcommittee intended to say something along the lines of make a showing that satisfies (1)(B)(1) through (3), and that was another way to say it.

Judge Dever commented that in terms of practice with subpoenas in his district and what the member had described, the Subcommittee drafted the rule to say what the court receives. They do say "This is why I need the video: my client was gambling at the casino an hour before any five thousand dollars was seized from him, and the video will show he won the money and it was not drug proceeds. I need the casino video to show that that's not drug proceeds." Judge Dever said those are "facts," instead of just saying the casino might have some information. A judge agreed the court needed facts.

Ms. Ralston said "facts" paralleled the rule under the Fourth Amendment for getting a warrant. Suspicion or speculation is not sufficient. You have to provide reasonably articulable facts. She urged that we not use less specific words in this context.

A member responded that was covered. The amendment required the movant to state a lot of things, one of which was a description of each item with reasonable particularity. The member thought that covered similar language you might find in warrants. The member did not see a big difference or have strong feelings about "state facts." She thought "make a showing" here would be stating facts. But she thought "state fact showing" was a bit of an awkward way to read that clause of the rule, whereas "make a showing" was a more legalistic way of explaining what the party needs to do.

Judge Nguyen said she did not feel strongly about it because, like the prior speaker, she read "state facts" as make a showing. She did not think it was so restrictive that you could not make a good faith proffer based on belief that you get from your client, as in an earlier example.

A member asked what exactly is "make a showing"? The member thought stating facts was very specific. Judge Nguyen responded that she thought the Committee was inclined to leave the language ("state facts") as is.

Judge Bates said he had two other points that had to do with local rules. The ex parte provision, line 42, said the court may for good cause permit the party to file the motion ex parte. He asked whether that was intended to mean a court cannot have a local rule inconsistent with that allowing such motions for good cause.

Professor King said she thought Judge Bates was asking whether the amendment prevented a district or an individual judge from having a local rule or standing order that said no ex parte motions in my court. She said that it did. The Subcommittee intended to stop the blanket practice of never allowing ex parte motions. She asked if Judge Bates thought it was ambiguous.

Judge Bates said he was raising the question to understand what that language was doing and he had the same type of question for (c)(6) on the redline version. It said a party must disclose to an opposing party an item the party receives from a subpoenaed recipient only if the item is discoverable under the rules. Did that preclude a conflicting court order or local rule?

Professor Beale replied that the proposed amendment was intended to prohibit what the Subcommittee thought were very unwise court orders and practices that were inconsistent with the fact that Rule 16 and the other discovery rules are the standard for when you have to turn things over. Part of that stemmed from the concerns expressed at our various mini conferences from attorneys in districts that had no subpoena practice. They said requiring disclosure to the other party in those courts essentially meant there was no subpoena practice because the lawyers did not know whether they would end up getting inculpatory—rather than exculpatory—information. They could not take that risk. One defense lawyer said she might have to withdraw if she made a motion and then the court required her to turn the subpoenaed material over because she would have done something so inconsistent with her client's interests.

A member followed up on Judge Bates' question about line 42 in subpart (c). The member said that if he were a judge or was in a district that hadn't allowed ex parte subpoenas, he did not think the rule could be read to prohibit him or his district from maintaining a status quo of not allowing ex parte motions. If there were a recalcitrant district or judge that had not

permitted ex parte subpoenas, they would read the language and say that's not what we're going to do. The member did not think the rule would keep them from maintaining the status quo.

Another member asked if the problem would be solved if "may" were changed to "should" or "shall." A third member noted he now understood the problem, and asked if changing from "may" to "must for good cause shown" would that address that concern.

The judge who had stated the view that the current language would not preclude a "recalcitrant" judge from continuing to prohibit ex parte filings thought that it would do so. Judge Bates noted he had been trying to raise the issue without stating a view about what it should be.

Judge Nguyen asked if anyone objected to changing "may" to "must."

Ms. Ralston asked if there was a difference between a party's ex parte filing of a motion and the court's acceptance of it? Could the rule say a party may file the motion with the court, and the court must accept it? Was there a way to express the point that a party has the right to file the thing and the court could not as a blanket policy not consider it? She expressed some concern that changing "may" to "must" somewhat undermines the good cause requirement. It felt like it was giving more control to the party.

Judge Dever commented that the committee note beginning on lines 128, page 136 of the agenda book dealt with this topic. As the Committee did with the *Nixon* standard, he thought it would be easy enough to add a sentence stating that part of what animated the discussion over the last two and a half years was that some courts absolutely prohibited the filing of ex parte motions. If a party tried to file ex parte, the court would say that unless it was served on the other side the court would not consider it. The Subcommittee thought it was important for the parties to have the opportunity to file ex parte motions in some circumstances. Judge Nguyen had touched on one, where the defense lawyer thinks the subpoena will produce exculpatory material, but might also produce something that would be inculpatory. The lawyer would want to file ex parte. He suggested addressing Ms. Ralston's concern with a sentence to make it clear that the purpose of "must" was to make it clear if a party otherwise met the standard, the court must permit the party to file the motion ex parte. The court does not have to grant the motion, but the court cannot return the motion because no ex parte motions are permitted in this court in criminal cases.

Judge Nguyen thought it was a great suggestion to clarify that upon a showing of good cause, the court must allow ex parte application. That was the intent of the Subcommittee. She had not thought about the point Judge Bates had raised, and she noted one could make certain assumptions without realizing that language could be read differently. She asked if there were any objection to changing "may" to "must" and then clarifying that in the committee notes. Hearing no objection, she took that as an informal vote.

Professor Beale said the draft did not include a reference to filing under seal because the practitioners they had asked said they would always file ex parte motions under seal, and no

mention in the text was necessary. Judge Bates asked if it was not needed in the text, why include in the note? The reporters agreed to delete that from the note.

A member said he had previously raised concerns about other laws that would prohibit disclosure of certain information just by through a subpoena. The response at a prior meeting had been that the proposal was not intended to expand what a subpoena could otherwise do. But this was not stated in the text or the note. He recognized that a rule cannot go beyond what the law would otherwise permit. But he noted that examples offered earlier in the day referred to trying to get emails, and it was not clear to him that you could get an e-mail with a subpoena, given the Stored Communications Act. So he asked if the note should say that the rule was not trying to create a super subpoena. Perhaps there was no need to do so, because the law is the law.

Professor Beale responded that at the broadest level every rule could say unless otherwise permitted or otherwise prohibited. But the Committees tend not to do that because then there would be a negative implication if such a statement were omitted from other rules. That was a partial explanation. But she also noted that this had been the Subcommittee's focus much earlier, a long time ago, and had been so much a part of its thinking that it was not recognizing that an entirely new audience was coming into it.

Professor King noted this had not been a problem under the existing rule, and she asked whether there was something about the amendments that would suggest that it could become a problem? In other words, was there something in the amendments that suggest that this could be a greater issue?

Ms. Ralston said that the note on line 20 or 21, page 133, clarifying what can be sought, stated data included other information and recognized the parties subpoena electronically stored information, and other intangible items. That opened the question what kinds of electronically stored information. Emails are one of the most common kinds of electronically stored information. And there is another law that governs emails. She did not want to change anything in the rule, but she suggested that a sentence could be added at the end of that paragraph in the note stating some information may not be available by subpoena if otherwise governed by statute or something. It could be added to line 22.

The member who raised the issue responded to Professor King saying he thought prosecutors already knew or should know what you can get with a subpoena under the Stored Communications Act, and when you need a search warrant. That is part of all their investigatory practices. Magistrate judges were dealing with these issues all of the time, and defense attorneys would learn what you can and cannot get with a Supreme Court, if they did not know it already. So he wanted to have the Committee consider whether it was worth putting that marker right in the note.

Professor Beale commented that "data" and "information" were both already in Rule 17, so the proposed amendment would not authorize subpoenas for kinds of things that you could not already get. That led back to the question whether there was a reason for concern. And she thought the member might be suggesting it would be the change in some districts where defense

lawyers haven't really had a realistic opportunity to obtain subpoenas. They might be coming to this new.

A defense member commented that serving a subpoena for ESI is permissible, and it depends on who you are serving the subpoena on. If you're serving the ISP, the person who holds the data, that was governed by the Stored Communications Act. But everybody else has ESI that gets subpoenaed. She thought defense lawyers generally are not going to serve a subpoena on Google, because they could not get anything. And it was virtually impossible to get the tech industry to respond. In her view, it was such a narrow point that it did not merit inclusion in the note.

The member who raised the issue agreed that Google would not respond to a subpoena, and you could probably subpoena records including emails from someone's phone. But it was not as clear to him that you could subpoena emails from an employer if they fell into an RCS or ECS as defined or obscured communications. Were they providing public services in some way? He thought some employers did, and some did not. He said there was a gray zone, and magistrate judges were often trying to figure out whether a new source of electronic data fell within the Stored Communications Act or not.

Judge Nguyen said the Subcommittee did consider that issue and recognized that the rules can't disrupt statutory or other protections. But it did not drill down too much on the question whether we needed to clarify that issue in the committee note. It did hear from a lawyer representing big banks, big data holders. He said they are well aware of the protections, didn't want to run afoul of them, and would move to quash. And the Subcommittee heard from a professor who talked about the Stored Communications Act. So it was aware of that, had discussed it, but really did not think it was necessary to clarify that in the note. She also raised the question whether other notes clarified similar points. Or did everyone operate under the assumption that if there was a statute it could not be trumped by the rules.

Judge Dever said this was certainly not a super subpoena. As Professor Beale said, the general practice was not to add something like "you have to otherwise comply with the law" to the note. It is implicit that there must be compliance with other laws. But if during the public comment we learned that it was generating concerns of this nature, a clarification to the note could be added.

Professor Beale commented that something like that happened when the Committee amended Rule 41 to deal with electronic searches. A significant number of people thought that the amendment—which dealt with venue—was restricting the protections of the Fourth Amendment. So the Committee added a clarifying statement to the committee note, and she thought it had also revised the caption to try to signal more clearly its limited purpose. Similarly, if this amendment were misunderstood as overriding other laws, the Committee could then figure out the best way to clarify it.

Judge Nguyen asked if there were any more comments or concerns, and seeing none she thought that it would be appropriate to take a vote on the rule. It was helpful to have had the straw votes. She suggested a motion with the strikeouts and removal of brackets that had been

the subject of the straw votes. She asked Professor King to walk through and clarify the changes that had been agreed upon, to serve as a basis for a motion.

Professor King began on page 127 of the agenda book. She said the only change, from style, was moving "data" from the place we had added it in line 19. This put the tangible things together and the intangible things together. Professor King read the language: "… produce any item, including any books, papers, documents, data or other information." She noted this was a style change. She noted that there might be other style changes later.

On the next page, Professor King noted a substantive change on the next page, lines 24-26, which dealt with which proceedings were covered, and detention. She noted a hard copy had been distributed, and she also shared it on the screen for those attending remotely.

There were several concerns raised about this. The intent here was to say that you can use a subpoena for at least these enumerated proceedings, and the court has discretion to allow in additional proceedings not enumerated. The concern was that "[u]nless the court permits otherwise" was somewhat ambiguous on that point. The proposed change was dividing this into two sentences. The first sentence declared that a non-grand-jury subpoena was available for trial and hearings on detention, suppression, sentencing and revocation. The second stated that a judge could, in an individual case permit a non-grand-jury subpoena for additional hearings.

The first change was separating it into two sentences, making it clear that the enumerated list is the baseline. The discretion allows expanding to additional proceedings on a case by case basis but not restricting subpoenas for the listed proceedings. The courts must permit subpoenas not just for trials but for sentencing, and the other listed proceedings. That policy decision had been made. Judge Nguyen stated this was an attempt to clear up the ambiguity that Judge Bates pointed out.

A member asked about the choice of available versus permissible. Professor King said she had added the permissible because she thought a concern had also been raised that the text suggested that a subpoena must be available every time you ask for it. She thought the word permissible suggested the need to get permission.

Professor Beale responded that "available" did not suggest that the movant did not have to meet the other requirements of the rule. She was not sure "permissible" did more work, but the reporters had been trying to come up with something that would respond to a member's earlier comment. She suggested that unless they liked "permissible" much better, the Committee should stay with "available." The member who had raised the earlier concern said he preferred "available" as well, especially with the other changes that made it clearer.

When no one spoke in favor of "permissible," Professor King said she was deleting it. As to the division into two sentences, one member said she preferred it, and Judge Nguyen noted it cleared up the issue Judge Bates had raised. When no one objected, she said that would be approved as an addition to the draft.

Professor King turned to the bracket, noting it might not be an issue for the Committee. Her concern had been that Rule 12 of the 2254 Rules said, "The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to proceedings." So one basic reason why Rule 17 subpoenas should not be used in 2254 hearings is because the parties could use the Civil Rules of Procedure to get subpoenas. The concern is that by adding the invitation to judges to authorize Rule 17(c) subpoenas in additional or other proceedings it would preempt or conflict with Rule 12 of the 2254 Rules. She did not think that was a necessary reading, but it was a possible one.

A member suggested that the proposed language in the committee note already did the work in a cleaner way because it was more of a narrative. The member thought the suggested bracketed language was a little confusing.

Judge Nguyen suggested striking the bracketed language from the rule itself unless there was objection. There was no objection. And there was no further objection to the new language from the handout, which substituted for lines 24-26 of the redline.

Professor King then turned to the next change on line 31. The straw poll had favored "are or contain information that is likely to be admissible evidence" in the designated proceeding. (She noted style had a preference for "admissible evidence" rather than evidence that would be admissible.)

The next change on page 128 was on line 42, the provision on ex parte motions in (2)(c). It would read "the court must for good cause…."

The next change was page 129, deleting "or prospective witnesses in brackets" from lines 48, 51, 53, 57, and 58, and deleting the sentence in brackets ("Unless otherwise prohibited by law, the court may require giving notice to a prospective witness.")

Next, on page 129, line 64, the brackets around "unless the court orders otherwise" were deleted.

Professor King had no other changes to the text of the rule.

After consultation with the reporters regarding the form of the motion, Judge Nguyen asked if anyone would like to move to send the rule to the Standing Committee with a recommendation that it be published for comment. That motion was moved, seconded, and approved unanimously. There was spontaneous applause.

Judge Nguyen then asked Professor King to take the Committee through the changes in the committee note. The first, on page 133 of the agenda book, was based on a handout distributed at the meeting and displayed online. The first sentence clarified that non-grand-jury subpoenas are permitted to produce items for not only for trial but also for the proceedings where subpoenas are most likely to be needed, and presently used regularly in many districts or for which there is statutory or rule authority for parties to present evidence: detention hearings under the Bail Reform Act, sentencing hearings under Rule 32, pretrial suppression hearings, and revocations.

Professor Beale commented that the Committee had used the word "available" in the text, rather than "permissible," and she suggested using "available" in the note as well. Professor King agreed. There were no other comments on the first sentence.

Professor King returned to the portion of the note that said no other mechanism was available to compel evidence from third parties at these proceedings, even though both parties may need to do so. Some decisions had interpreted the prior text of the rule to bar the use of Rule 17 subpoenas to produce items at any hearing other than grand jury proceedings and trial. This change to the text of the rule expressly authorized the use of a non-grand-jury subpoena to obtain evidence for introduction at the listed hearings. In the draft note, she said, the next sentence had been changed to accommodate the removal of the unless clause. And there was a change taking revocation hearings from those not listed. And, at the bottom was the change about the habeas cases that the Committee had already discussed. Professor King asked if there were any suggestions for changes in this portion of the note.

Judge Bates quoted the language "to produce items in other evidentiary hearings," noting one of the examples was new trial hearings. He had a hard time imagining a new trial hearing. Professor King responded with the example of a new trial hearing for jury misconduct, or other things that happened at trial, where the judge was trying to find the facts of what occurred. Judge Bates asked if this would expand the record.

Judge Dever said Rob Cary from Williams and Connolly had given an example at the Phoenix meeting from the posttrial proceedings in the Elizabeth Holmes case, where after the trial, there had been was some kind of walk back by a person the defense contended was one of the key witnesses against her, and an effort to subpoena information and documents from this person. He thought the judge actually had a hearing on it. Judge Dever thought that the judge had quashed part of the subpoenas. It was a real-life example of trying to use subpoenas to get a large amount of information to support a theory for a new trial. And the judge pared it back, held a hearing, and then denied the new trial motion. That was one of those rare things that might generate a new trial hearing, along with juror misconduct.

Ms. Ralston commented that the defense might seek additional evidence to support a motion for a new trial on the basis of newly discovered evidence, for example, such as the discovery of evidence that might raise a claim of perjured testimony. In one case, there had been an allegation that there were multiple people with the same name and the government had presented a witness who may have been the wrong person, though the prosecutors were unaware. The defense sought evidence like various driver's license records to identify pictures of the various people over time. She said this did not happen frequently, but it was allowed by Rule 33.

A judge commented that she could see many reasons why there would be evidence apart from the record in a motion for new trial. She had seen many of them.

Judge Bates noted that this was just committee note language, but he asked whether it was contemplating that a subpoena would be available just upon a motion for a new trial being filed? Or even before the motion was filed to try to find support for filing a motion? Or when a hearing had been set? The note said it was in connection with an evidentiary hearing.

Professor King responded that the amendment preserved that principle that Rule 17 was not for discovery. The first part of the rule said that the subpoena had to identify the designated proceeding. There must be a proceeding, a hearing, to get a subpoena. Judge Bates asked if that meant you could not get a subpoena until the court had set a hearing. Professor King responded that the Subcommittee had not gotten into the weeds of exactly what had to happen before there was a hearing to designate. Neither the text nor the note stated the court had to docket or schedule a hearing before the parties could use subpoenas. Judge Bates replied this was like Congress saying we'll leave it to the judiciary to figure this out.

Professor King said the Subcommittee was always focused on and thinking proceeding, proceeding, proceeding—not discovery.

Judge Nguyen said that there was a little room there for district judges to slightly vary their practice in terms of how strictly to enforce the identified proceeding. The Subcommittee had left that slight ambiguity there on purpose.

Professor King said the next change in the note was on agenda book page 134, line 75, which should read (c)(1)(B)(iii). Judge Bates had caught that error, and a few other points where the same cross reference error had occurred. Next on line 77, the note would be revised to quote the text which style had slightly revised.

On page 135 of the agenda book, line 110, between the words "court" and "are adequate," "such as protective orders" was inserted with commas on either side.

There were brackets in lines 84-87, and Professor King said they would conform that section to the revised text that had been approved. But two things required decisions: brackets around the word "many" and in the first line "and very." Should these be retained or omitted? The first bracket was in the sentence stating that impeachment evidence should be available to a party by subpoena for use at trial when a party knows that a witness will or is likely to testify. Or should that be "very likely to testify"? Judge Nguyen said "likely" was preferable. She was not sure how much "very" really added. The other bracket was in the statement that the "likely to be admissible standard" was already used by "many" courts or just by "some courts." Professor Beale noted they had not done a count of the courts applying that standard, so it would be preferable to say "some," since they knew that to be correct.

Professor King reviewed the decisions: one line 82, "very" was omitted, line 85, "many" became "some," and on line 87 the brackets were omitted and the language would be conformed to the revised text.

Then on line 110 was the protective order addition previously mentioned, and on line 121 the corrected cross reference was Rule 17(c)(2)(B)(i).

On page 136 of the agenda book, line 123, it should be (2)(B)(ii), and on line 125 there was another section to conform to the revised text.

Next, on line 128, "may" became "must."

A member noted line 125 also mentions relevant to and likely. But that was not part of the final language. The reporters replied that would be conformed to the text.

Line 128, "may" became "must."

Line 129, "and under seal" was deleted.

Two typos were corrected. Line 134 should read "could lead to damage or loss." And on line 145, it should be "to implement" rather than "to implementing."

Judge Bates raised a question about line 141. Rule 17(c)(2)(D) actually referred to local rule or court order. Should we say absent a local rule or court order to do so? The reporters agreed the note should conform to the text. Professor King said she recalled that at some point in the past they had concluded that "order" would include both a local rule and a court order. Professor Beale thought that had been in connection with Rule 16. But both agreed it should be spelled out here, particularly since stating both in some parts of the rule would create a negative implication.

There was agreement to remove the highlighted language, which had been included just to draw the Committee's attention for purposes of the discussion.

One line 146, the bracketed language had been deleted.

Ms. Ralston noted that line 143 refers to subparagraph (A), but the second part of that sentence was now in subparagraph (B). There was agreement to add it at the end of the sentence now in subparagraph (B).

A member returned to the discussion of line 141, where Judge Bates had noted that it was a reference to local rules. He expressed concern that it would not read well if "local rule" were added without rephrasing.

Professor King agreed and said it would be revised to read "unless required by a local rule or court order, a party has no duty to inform when no motion is required."

Since there were no other changes in the proposed note, Judge Nguyen called for a motion to approve the committee note, as amended, for submission to the Standing Committee, with the recommendation that it be published for public comment.

The motion was made, seconded, and approved unanimously. There was a round of applause.

Professor Beale reminded the Committee that there might be additional style changes which would not require Committee approval, but the reporters would inform members if there were any changes suggested that they viewed as possibly substantive. Styles oversight is continuous and part of the Committee process.

Judge Dever thanked Judge Nguyen, the reporters, the members of the Subcommittee, and finally all Committee members for their work on a project that began when Judge Kethledge appointed Judge Nguyen to chair the subcommittee. The Committee began by trying to discern whether there really was a problem at the meeting in Phoenix two and a half years ago.

Professor Beale suggested that when the rule went out for publication the Committee might write to all the lawyers who had spoken at the Committee's meetings in Phoenix and New York, thanking them for their assistance and asking for their comments. She thought it would be desirable to express the Committee's appreciation to and get further input from people who had put a lot of work into coming to speak to the Committee, as well as those who spoke to the Subcommittee.

Judge Dever said the Committee would proceed very expeditiously through the remainder of the agenda.

Rule 49.1

Judge Harvey reported on the work of the Rule 49.1 Subcommittee. The Subcommitttee was considering two primary issues: the use of pseudonyms when referring to minors in public criminal filings, and full redaction of Social Security numbers, rather than inclusion of the last four digits, which the rule presently permitted. The Subcommittee was in agreement that we should make both changes. It had hoped to have draft language to present at this meeting, but it was unable to do so for several reasons. First, the Subcommittee had been presented with language approved by the style consultants. Members were concerned that the proposed language seemed to suggest a larger or more significant change than required by the proposal. Judge Harvey expressed confidence that the reporters would work with style to address those concerns and develop language that the Subcommittee could bring to the November meeting. The other issue was whether to treat taxpayer identification numbers the same as Social Security numbers in any change. At present, Rule 49.1 treats taxpayer identification numbers the same as Social Security numbers. Taxpayer identification numbers are issued to people who are unable to obtain Social Security numbers, and there are millions of them. They are used in the same way as Social Security numbers, and they raise similar privacy interests. The Subcommittee wanted additional research to determine the harm or risks from the inclusion of the last four digits of these numbers in public filings. Judge Harvey thanked Mr. Brinker for his initial research on the effect of including the last four digits of Social Security numbers, and additional research on taxpayer identification numbers. This research would provide the foundation for the Subcommittee to decide whether or not we should be treating tax identification numbers similar to Social Security numbers, requiring that they be fully redacted from any public filing.

Judge Harvey said he hoped to have a final report and recommendation for the next meeting. Professor Beale said they would also work with the sister committees, who also had an interest in these proposals. The Bankruptcy Committee wanted to retain the last four digits of the Social Security number, but it might be possible to get parallel proposals moving forward from the other committees. They expected to address any concerns about uniformity before bringing a recommendation to the Committee.

Rule 40

Next, Judge Harvey provided a report on the Rule 40 Subcommittee, which was considering proposals from Judge Bolitho and the Magistrate Judges Advisory Group (MJAG). The proposals requested clarification of what procedures are required when a defendant is arrested on an out of state warrant alleging a violation of condition of release pretrial, presentence, or while on appeal, or for failure to appear in an issuing district.

The primary focus of the Subcommittee's first meeting had been whether the magistrate judge in the district of arrest may, should, or could hold a detention or release hearing. Such a hearing would give defendants an opportunity to seek their release on the warrant with the condition that they report to the issuing district. Based on the two suggestions and the research to date, it appeared to be the common practice to permit such a hearing to allow a defendant to seek his release in the jurisdiction of arrest. But a very small number of districts, perhaps only in the Seventh Circuit, did not provide an opportunity for defendants in Rule 40 proceedings to seek their release. That potentially was of concern because it could take the marshal's service up to thirty days to deliver the person to the issuing district where they would have their first opportunity to seek release on the warrant. That was the minority position, which appeared to be based on these courts' reading of Rule 40, especially in relationship to Rule 5. He thought there was an emerging consensus that this issue should be addressed and clarified under Rule 40.

Judge Harvey thanked Mr. Brinker for his great research on these proposals as well. He had provided a research memorandum on past versions of Rule 40, focused at least in part on the availability of a hearing in the arresting jurisdiction. Mr. Brinker had concluded that although the rule had never been explicit in that regard, the availability of a hearing was implicit because the rule had routinely referenced the magistrate judge in the district of arrest setting bail. How, Judge Harvey asked, would you set bail unless you have held a hearing?

The proposals also raised other issues, many of which, in Judge Harvey's view, were not particularly controversial and could be easily corrected by amending Rule 40 to mirror Rule 32.1, which addresses violations of supervised release and includes a nice list of what should occur in the arresting jurisdiction when there is a removal proceeding. Although these would hopefully be less controversial, the Subcommittee had not discussed all of them.

The Subcommittee had identified additional issues to be researched in considering those other issues, and he looked forward to reporting more progress on Rule 40 at the next meeting.

Judge Harvey added that another issue had come up. Dean Fairfax suggested getting input from magistrate judges around the country to help the Subcommittee understand what differences in practices that may exist. He thought that was an excellent suggestion, but the Subcommittee would wait to pursue it until its enquiry was more focused.

On the need for more input, Professor Beale commented that one difference between the discussion of this issue and many others that had come before the Committee was that so much of this was squarely and almost exclusively in the bailiwick of the magistrate judges. Naturally, Judge Harvey did not want to be the only one who really could provide that sort of input. The

Subcommittee discussed various ways to get more input, and one possibility would be to plug into meetings scheduled for other purposes, such as the regular semiannual meetings of magistrate judges. She said they would definitely seek to supplement the input and reactions that the Committee was getting so that it would not miss something where it could get more help. For example, the Committee might want input on particular language or a set of particular questions.

Electronic Filing by Self-Represented Litigants

Judge Dever thanked Judge Harvey for chairing the two subcommittees, and turned next to two reports from Professor Struve, one on the electronic filing and service by self-represented litigants, which begins at page 157, and an oral report on the attorney admission proposal.

Judge Burgess, chair of the Subcommittee on pro se filing, began the discussion of this issue, thanking Professor Struve for an outstanding memo about possible rule changes to allow self-represented litigants to utilize the electronic filing system. A major goal of the project was to update the rules to reflect the primacy of service by electronic means in a modern court system. The suggested updates focused on two goals: (1) expanding availability of electronic filing for self-represented litigants except for case opening documents, and (2) updating requirements of service of documents filed by self-represented litigants, eliminating the need for paper service of filings that court staff had already uploaded electronically. The updates also proposed expanding the availability of electronic modes by which self-represented individuals can file documents with the court system.

Judge Burgess noted that Dr. Reagan had just published a Federal Judicial Center report describing the results of a survey of all district courts, which found that nearly two thirds of districts permitted self-represented litigants to file electronically. Indeed, one district required it unless you opted out. A number of districts required the court's permission. So although the approaches varied, many districts, if not most, offered the opportunity for self-represented litigants to seek permission to file electronically.

Judge Burgess said that this issue was very different in the criminal context than in the bankruptcy, civil, and appellate contexts. Because most criminal litigants who were self-represented would be incarcerated, it was difficult (if not a complete bar in many places) for incarcerated self-represented individuals to file electronically. One way around that was to appoint standby counsel, which then allowed use of the electronic case filing system. Judge Burgess then turned the discussion over to Professor Struve.

Professor Struve thanked Judge Burgess for the Subcommittee's work on this, and she thanked Ms. Lonchena who had also been tremendously helpful. Professor Struve said the project was proceeding in tandem with the other advisory committees. She reported that the Bankruptcy Rules Committee had decided at its spring meeting that it wanted to be included in the project, though they would still have some bankruptcy specific concerns. It was forming a subcommittee that would work over the summer in the hopes of solving their concerns and being in the project.

Professor Struve said they were hoping to work over the summer to be able present to this Committee and its counterparts at the fall meetings with proposals along the lines Judge Burgess had suggested. She recognized, as Judge Burgess had mentioned, that the population of self-represented litigants who could be affected by this in the core criminal process was vanishingly small. But the proposal would also affect the Section 2255 proceedings. Even there, as Judge Burgess mentioned, self-represented litigants were not likely to be getting into the CM/ECF system from their institution unless there was some prison library program making that possible. But it still would be very valuable for those litigants to have the relief from having to make paper service and pay for that from their prison account. That is where this project would probably have most of its effect in the settings governed by the Committee's sets of rules.

She asked for feedback going forward and said she expected to be working with Judge Burgess's Subcommittee over the summer if time permitted.

Professor King commented that it might be helpful for the people who had not been involved in that discussion to be aware that the draft rule for the criminal cases switched the presumption. She invited them to compare pages 170 and 173 of the agenda book. It was this particular change that generated the most conversation. The rule currently says a party not represented by an attorney may use electronic filing only if allowed by court order or local rule. The proposed change would be that a self-represented person may use the court's electronic filing system unless the court order or local rule prohibited the person. She asked if anyone had feedback on that, noting that everyone seemed okay with the proposal on service.

A member identified two reasons for permitting participation: the dignity of being a participant in a court proceeding and the efficiency of being able to do so. His final thought was although there were only a small number of self-represented defendants who were not incarcerated and could use electronic filing, since we did not know what would happen in the future, we might want to flip the burden, to encourage this. And then hopefully, as things moved forward, incarcerated defendants would be more able to use electronic case filing system—whether by sending it to the clerk's office by fax or by a court portal that can accept filings.

Judge Dever thanked Professor Struve for her report and continued work on that project.

Formatting of Pleadings, Incorporation of Local Rules, and Creation of a New Set of Common Rules

Next, Judge Dever asked Professor Beale to discuss the suggestions beginning on page 192 of the agenda book from Sai. Professor Beale said Sai had made four separate proposals, which were described briefly in that memo. She said that now the Appellate, Civil, and Bankruptcy Committees had removed these items from their agenda. She said she would briefly describe each, but she noted that the deck was stacked against the proposals because the other committees had already looked at them and decided not to move forward.

The first proposal was to prohibit putting names in pleadings in capitals and require correct diacritics. Sai provided a very thoughtful discussion of how many problems all capitals

and improper use of diacritics might create. It might be culturally insensitive. It might cause mistakes and create confusion between individuals.

But the current Federal Rules of Criminal Procedure did not get into any of these details, though they do say that indictments must be written. Professor Beale said it would be really quite a remarkable change to get into specifying the use of diacritics and capitals. As to the concern about the impact on sovereign citizen slash organized pseudo legal commercial type litigants, she said that the reporters were aware of no special criminal-related concerns from them.

The second proposal would move similar provisions from each set of local rules that govern the subjects to a single set of national rules, so that litigants could look in one place.

The third proposal was aimed at topics addressed in the Civil Rules, the Criminal Rules, and the Bankruptcy Rules. It proposed they be moved to a single set of common federal rules.

Professor Beale commented that the second and third proposals would be enormous projects. Adopting that structure initially might have been a good idea. But at this point, the other committees had all concluded it would be too big a lift for not enough benefit.

Finally, there was a proposal to standardize page equivalents for words and lines, but it appeared to relate only to certain sets of rules that did not include the Criminal Rules.

The question was whether the Committee should, like its counterparts, remove these suggestions from our agenda, or whether there was some enthusiasm for one or more of these proposals.

Hearing no discussion, Judge Dever said he would entertain a motion to remove it from the agenda. The motion to remove the suggestions from the Committee's agenda was moved, seconded, and removal from the agenda was approved unanimously.

Rule 15

Judge Dever recognized Professor Beale to give a report on the suggestions from Michael Kelly and Sergio Acosta, as well as Larry Krantz, who proposed amending Rule 15 to provide the defense with pretrial depositions for discovery. She noted that these two independent proposals were based on the same idea: there ought to be much more availability of depositions in criminal cases. The Kelly and Acosta proposal described in some detail their own experience in a particular case. In that case, they had demonstrated the need for and the value of depositions, but it was only because of a quirk in the particular case that the court authorized them to take depositions. Mr. Krantz came in from a different angle, describing a fairly common hypothetical fraud case and comparing the process depending on whether it was a civil or criminal proceeding. In a civil case, depositions would be available, and the client would be able to develop the evidence to support a defense. But in a criminal case, there would be no depositions, and the defendant would not be able to develop the defense. He argued a person whose liberty is at issue should have at least the same ability to defend himself as if it were just his money.

Both proposals sought at least a limited expansion of the ability to take a pretrial depositions. Kelly and Acosta explicitly sought only defense depositions, arguing that the government has many other means to collect information, including grand jury subpoenas. In exceptional cases, the proposal would permit the court to allow more than five depositions.

Professor Beale noted that the particulars were less important than the general proposal to consider expanding pretrial depositions. She noted that in the case of Rule 17, what the Committee had just adopted was not very close to what the New York bar first brought to the Committee. The question for both proposals was whether the Committee thought there might be a problem, did the Committee think an amendment could address it, and third—from the reporters' point of view—did the Committee have the bandwidth to pursue this now. Should we appoint a subcommittee now? Or would it perhaps be best to continue work on our other large projects and maybe put this off to one side with the ability to come back to it? She asked if Judge Dever might want to speak to that sequencing/scheduling issue.

Judge Dever said that in the past the Committee had placed some proposals on a study agenda to gather information before it made a decision whether to form a subcommittee. Based on the current committee work, he recommended placing these proposals on the study agenda. He noted that a number of states, though less than a majority, permitted depositions, some as a matter of right, and some with court approval, and that Judge Barbadoro had experience with that in New Hampshire.

A member asked what the study agenda was, and noted she had been intrigued to learn that thirteen states already do this. Professor Beale responded that the study agenda put proposals on hold while gathering information but not actively pursuing them, not appointing a subcommittee with a chair, and not setting meetings and deadlines. It would be a slower process, gathering some information while moving ahead with the Committee's other current projects. She observed that you can only do so much at one time, so this project might move more slowly while other projects already on the agenda were being actively pursued. Judge Dever agreed and thought there was time to learn more about the state practice, and once the Committee had more bandwidth to decide where to go with these thoughtful proposals. He noted that the Committee did have the ability to do additional research, and its existing subcommittees had benefitted greatly from Mr. Brinker's research.

Judge Dever asked whether anyone was opposed to placing the Rule 15 suggestions on the study agenda. Hearing no objections, he announced they would be placed on the study agenda.

Federal Judicial Center Report

Next, Judge Dever recognized Dr. Beth Wiggins, Director of the Research Division of the Federal Judicial Center (FJC). She drew the Committee's attention to the memo in the agenda book prepared by Dr. Tim Reagan and others. Its purpose was just to provide flavor of the kind of work the FJC was doing for other rules committees or other judicial conference committees and groups based on the research front, but also some of the educational activities related to the Committee's work. The report that Judge Burgess had described was a recent example. To get

more information about the experiences in various courts of allowing self-represented litigants to e-file, the FJC was preparing a court-to-court program on that issue. As part of that project, Dr. Reagan did an analysis of the local rules addressing the same issues.

Dr. Wiggins invited the Committee to let the FJC know if it wanted it to develop information that could inform its discussions. The FJC does a variety of different kinds of research, ranging from an analysis of local rules to quantitative types of studies, including surveying work.

Attorney Admissions

The Committee turned next to Professor Struve, who began with a brief introduction to the attorney admissions project. It arose from a suggestion to the various advisory committees by Alan Morrison and others, pointing out that among the 94 district courts, there are variations in attorney admission standards. Some districts are quite restrictive in their requirements. The Standing Committee formed a subcommittee, and Professor Struve expressed gratitude for the input Criminal Rules members Ms. Recker and Judge Birotte had provided on that subcommittee. The Subcommittee's research was ongoing, exploring possible national rulemaking responses that could address the more restrictive practices, which in the more restrictive districts required that an attorney be admitted to the state that encompassed the district to which they were seeking admission. That included districts in California, Delaware, and Florida, where that required taking the state bar exam. The Subcommittee has been conducting research on various facets of this, including how Appellate Rule 46 works out in the courts of appeals. It would be conducting outreach to a number of selected district judges to learn more about how things play out under these different approaches. She would have more information at the fall meeting. Judge Dever thanked Professor Struve for her report and her work on that project.

Closing Comments and Recognition of Outgoing Members

Judge Dever noted the last item on the agenda, drawing the Committee's attention to the next meeting on November 6, 2025, at a place to be determined. He thanked the outgoing members, Dean Fairfax, Judge Nguyen, and Ms. Recker, and invited them to make any final remarks.

Dean Fairfax said membership on the Committee had been an honor and a privilege. He expressed gratitude to Chief Justice Roberts for his initial appointment and reappointment, and to Judge Dever and Judge Kethledge for their leadership. The Rules Committee staff have been phenomenal, and he thanked the reporters for their hard work and their example. He said his journey to the Committee began when he clerked for a federal District Judge and a Circuit Judge, and particularly when he was a "baby prosecutor" in the Public Integrity Section at the Justice Department. He spent a lot of time in the grand jury, got very familiar with Rules 6 and 7. In the Eastern District of Virginia with its rocket docket he gained familiarity with many of the other Rules of Criminal Procedure. After working as a line prosecutor, and a stint in private practice,

he became a law professor. For his first article, he did archival research on the promulgation of the original Federal Rules of Criminal Procedure and learned all about this committee process, which was modeled on the Federal Rules of Civil Procedure, which had been adopted just a few years earlier. In his scholarship and teaching he had fallen in love with the Federal Rules of Criminal Procedure and the process for promulgating, studying, and revising them. Serving on the Committee had been a dream come true for him. He said he would miss everyone, and he said they all had an open invitation to the Howard University School of Law. He would love to host a mini conference or even a symposium on the eightieth anniversary of the federal Rules of Criminal Procedure in 2026. Dean Fairfax reiterated how grateful he was for everyone's hard work day in and day out. He said that anyone who was disillusioned about whether there was serious, sober, committed work being done in the public interest need look no further than this Committee.

Judge Dever told a brief story to illustrate Dean Fairfax's dedication. He had participated in one meeting via telephone while attending his daughter's final collegiate track meet. He was in the bleachers, the ultimate multitasker.

Judge Nguyen, noting she felt that the Committee had already heard enough from her for one day, said how thoroughly she had enjoyed her service on the Committee. She thanked everyone, saying it had been quite an education. She added extra thanks to the reporters and Judge Dever for their leadership and the benefit of their wisdom.

Ms. Recker said this was her second farewell speech, and she promised it would be her last one. She expressed gratitude for the six years she spent as a rules romanette member where she had the great fortune and honor to work on Rules 6, 62, and Rule 16 expert discovery. She said Rule 62 was something she would never forget. She was grateful for Judge Dever's and Judge Nguyen's leadership. She also thanked the reporters and expressed appreciation that they always took the time to listen. She was especially grateful for her bonus year. She thought Rule 17(c) exemplified the best of the rules committee process. The Committee drew on lived experience and developed a proposal making incremental changes. Judging by the day's consensus approving the rule unanimously, she thought everyone had a lot to be thankful for and proud of. All of the work would lend credibility, which was more important now than ever before.

Judge Dever again recognized and thanked Judge Bates for his work as Chair of the Standing Committee and his life of public service, noting he had modeled what being a true citizen is. Judge Dever thanked everyone, noting it was the last Criminal Rules meeting he would attend as chair. He reminded the Committee that the work would continue, and he looked forward to being on calls with everyone serving on a subcommittee as work continued over the summer. He expressed his gratitude to all of the former chairs: Judges Raggi, Molloy, and Kethledge on Criminal Rules, and Judges Sutton, Campbell, and Bates on the Standing Committee. He thanked the reporters. He said it had been a privilege to work with everyone for the last ten years, and said like a piece of tape stuck to your shoe he would see everyone at the next meeting but in a different chair.

Professor Beale presented Judge Dever with a card that everyone had signed and said that later he would receive a certificate. She noted everybody around the table wanted some way individually to thank you, and she initiated an enthusiastic round of applause.

Judge Dever congratulated everyone on Rule 17, thanked Judge Nguyen, and adjourned the meeting.

TAB 3

TAB 3A

MEMORANDUM

DATE: May 15, 2025

TO: Standing Committee on Rules of Practice and Procedure

FROM: Catherine T. Struve

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

I write to report on the project on service and electronic filing by self-represented litigants ("SRLs"), which has two basic goals. As to service, the project's goal is to eliminate the requirement of separate (paper) service (of documents after the case's initial filing) on a litigant who receives a Notice of Filing through the court's electronic-filing system or a court-based electronic-noticing program. As to filing, the idea is to make two changes compared with current practice: (1) to presumptively permit SRLs to file electronically (unless a court order or local rule bars them from doing so) and (2) to provide that a local rule or general court order that bars SRLs from using the court's electronic-filing system must include reasonable exceptions or must permit the use of another electronic method for filing documents and receiving electronic notice of activity in the case.

At the time of the Standing Committee's January 2025 meeting, the Appellate, Civil, and Criminal Rules Committees appeared open to working in tandem to move forward with proposed amendments, but the Bankruptcy Rules Committee had expressed concerns specific to the bankruptcy context.[1] Based on the Standing Committee's January 2025 discussion, I reported to the advisory committees that the path seemed clear to proceed with consideration of proposed amendments to the Civil, Appellate, and Criminal Rules even if corresponding amendments to the Bankruptcy Rules were not to be proposed. Accordingly, in memoranda to the advisory committees, I sketched possible amendments to the Civil, Criminal, and Appellate Rules that would achieve the twin goals of the project.[2] I also discussed two different packages of

1 My December 16, 2024 memo to the Standing Committee can be found starting at page 89 of the agenda book available here: https://www.uscourts.gov/forms-rules/records-rules-committees/agenda-books/committee-rules-practice-and-procedure-january-2025 .

2 My March 7, 2025 memo to the Advisory Committees on Civil, Criminal, and Appellate Rules can be found starting at page 165 of the agenda book available here: https://www.uscourts.gov/forms-rules/records-rules-committees/agenda-books/advisory-committee-civil-rules-april-2025 .

amendments to the Bankruptcy Rules – one that would parallel the proposed amendments that were to be considered by the Civil, Appellate, and Criminal Rules Committees, and an alternative that could be adopted if the Bankruptcy Rules Committee instead were to adhere to its decision not to implement the proposed filing and service changes.[3]

At its spring 2025 meeting, the Bankruptcy Rules Committee further discussed the project and decided that – in light of the fact that the Civil, Criminal, and Appellate Rules Committees were willing to proceed with proposed amendments – the Bankruptcy Rules Committee should attempt to participate as well. The Bankruptcy Rules Committee has referred the project to a subcommittee and has tasked the subcommittee with attempting to find ways to address the concerns that originally prompted the Bankruptcy Rules Committee to decide that the Bankruptcy Rules should not be included in the project's package of proposed amendments. The hope is that, if that work succeeds, all four advisory committees could consider proposed amendments at their fall 2025 meetings.

Meanwhile, the broader working group will also confer this summer on any adjustments to the draft amendments to the Civil, Criminal, and Appellate Rules that should be made in light of the Advisory Committees' spring 2025 discussions (accounts of which can be found in the minutes of each committee elsewhere in this agenda book).

3 Amendments to the Bankruptcy Rules would be necessary either way, given the interactions between the Bankruptcy Rules and the Civil and Appellate Rules. My March 7, 2025 memo to the Advisory Committee on Bankruptcy Rules can be found starting at page 103 of the agenda book available here: https://www.uscourts.gov/forms-rules/records-rules-committees/agenda-books/advisory-committee-bankruptcy-rules-april-2025 .

TAB 4

TAB 4A

TAB 4A1

Effective December 1, 2024

Current Step in REA Process:

- Effective December 1, 2024

REA History:

- Transmitted to Congress (Apr 2024)
- Transmitted to Supreme Court (Oct 2023)
- Approved by Standing Committee (June 2023 unless otherwise noted)
- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 32	Conforming proposed amendment to subdivision (g) to reflect the proposed consolidation of Rules 35 and 40.	AP 35, 40
AP 35	The proposed amendment would transfer the contents of the rule to Rule 40 to consolidate the rules for panel rehearings and rehearings en banc together in a single rule.	AP 40
AP 40	The proposed amendments address panel rehearings and rehearings en banc together in a single rule, consolidating what had been separate provisions in Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 would be transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination.	AP 35
Appendix: Length Limits	Conforming proposed amendments would reflect the proposed consolidation of Rules 35 and 40 and specify that the limits apply to a petition for initial hearing en banc and any response, if requested by the court.	AP 35, 40
BK 1007(b)(7) and related amendments	The proposed amendment to Rule 1007(b)(7) would require a debtor to submit the course certificate from the debtor education requirement in the Bankruptcy Code. Conforming amendments would be made to the following rules by replacing the word "statement" with "certificate": Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3) and 9006(c)(2).	
BK 7001	The proposed amendment would exempt from the list of adversary proceedings in Rule 7001, "a proceeding by an individual debtor to recover tangible personal property under § 542(a)."	
BK 8023.1 (new)	This would be a new rule on the substitution of parties modeled on FRAP 43. Neither FRAP 43 nor Fed. R. Civ. P. 25 is applicable to parties in bankruptcy appeals to the district court or bankruptcy appellate panel, and this new rule is intended to fill that gap.	AP 43
BK Restyled Rules	The third and final set of current Bankruptcy Rules, consisting of Parts VII-IX, are restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The first set of restyled rules (Parts I & II) were published in 2020, and the second set (Parts III-VI) were published in 2021. The full set of restyled rules is expected to go into effect no earlier than December 1, 2024.	
CV 12	The proposed amendment would clarify that a federal statute setting a different time should govern as to the entire rule, not just to subdivision (a).	

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Rule	Summary of Proposal	Related or Coordinated Amendments
EV 107	The proposed amendment was published for public comment as new Rule 611(d), but is now new Rule 107.	EV 1006
EV 613	The proposed amendment would require that, prior to the introduction of extrinsic evidence of a witness's prior inconsistent statement, the witness receive an opportunity to explain or deny the statement.	
EV 801	The proposed amendment to paragraph (d)(2) would provide that when a party stands in the shoes of a declarant or declarant's principal, hearsay statements made by the declarant or declarant's principal are admissible against the party.	
EV 804	The proposed amendment to subparagraph (b)(3)(B) would provide that when assessing whether a statement is supported by corroborating circumstances that clearly indicate its trustworthiness, the court must consider the totality of the circumstances and evidence, if any, corroborating the statement.	
EV 1006	The proposed changes would permit a properly supported summary to be admitted into evidence whether or not the underlying voluminous materials have been admitted. The proposed changes would also clarify that illustrative aids not admitted under Rule 1006 are governed by proposed new Rule 107.	EV 107

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Rule	Summary of Proposal	Related or Coordinated Amendments
AP 6	The proposed amendments would address resetting the time to appeal in cases where a district court is exercising original jurisdiction in a bankruptcy case by adding a sentence to Appellate Rule 6(a) to provide that the reference in Rule 4(a)(4)(A) to the time allowed for motions under certain Federal Rules of Civil Procedure must be read as a reference to the time allowed for the equivalent motions under the applicable Federal Rule of Bankruptcy Procedure. In addition, the proposed amendments would make Rule 6(c) largely self-contained rather than relying on Rule 5 and would provide more detail on how parties should handle procedural steps in the court of appeals.	BK 8006
AP 39	The proposed amendments would provide that the allocation of costs by the court of appeals applies to both the costs taxable in the court of appeals and the costs taxable in the district court. In addition, the proposed amendments would provide a clearer procedure that a party should follow if it wants to request that the court of appeals to reconsider the allocation of costs.	
BK 3002.1 and Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R	Previously published in 2021. Like the prior publication, the 2023 republished amendments to the rule are intended to encourage a greater degree of compliance with the rule's provisions. A proposed midcase assessment of the mortgage status would no longer be mandatory notice process brought by the trustee but can instead be initiated by motion at any time, and more than once, by the debtor or the trustee. A proposed provision for giving only annual notices HELOC changes was also made optional. Also, the proposed end-of-case review procedures were changed in response to comments from a motion to notice procedure. Finally, proposed changes to 3002.1(i), redesignated as 3002.1(i) are meant to clarify the scope of relief that a court may grant if a claimholder fails to provide any of the information required under the rule. Six new Official Forms would implement aspect of the rule.	
BK 8006	The proposed amendment to Rule 8006(g) would clarify that any party to an appeal from a bankruptcy court (not merely the appellant) may request that a court of appeals authorize a direct appeal (if the requirements for such an appeal have otherwise been met). There is no obligation to file such a request if no party wants the court of appeals to authorize a direct appeal.	AP 6
Official Form 410	The proposed amendment would change the last line of Part 1, Box 3 to permit use of the uniform claim identifier for all payments in cases filed under all chapters of the Code, not merely electronic payments in chapter 13 cases. The amended form went into effect December 1, 2024.	

Effective (no earlier than) December 1, 2025, unless otherwise noted

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Rule	Summary of Proposal	Related or Coordinated Amendments
CV 16	The proposed amendments to Civil Rule 16(b) and 26(f) would address the "privilege log" problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials.	CV 26
CV 16.1 (new)	The proposed new rule would provide the framework for the initial management of an MDL proceeding by the transferee judge. Proposed new Rule 16.1 would provide a process for an initial MDL management conference, submission of an initial MDL conference report, and entry of an initial MDL management order.	
CV 26	The proposed amendments to Civil Rule 16(b) and 26(f) would address the "privilege log" problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials.	CV 16

Effective (no earlier than) December 1, 2026

Current Step in REA Process:

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

REA History:

- Approved for publication by Standing Committee (Jan and June 2024 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 29	The proposed amendments to Rule 29 relate to amicus curiae briefs. The proposed amendments, among other things, would require all amicus briefs to include a concise description of the identity, history, experience, and interests of the amicus curiae, together with an explanation of how the brief and the perspective of the amicus will help the court. In addition, they would require an amicus that has existed for less than 12 months to state the date the amicus was created. With regard to the relationship between a party and an amicus, two new disclosure requirements would be added. Also, the proposed amendments would retain the member exception in the current rule, but limit the exception to those who have been members for the prior 12 months. Finally, the proposed amendments would require leave of court for all amicus briefs, not just those at the rehearing stage.	Rule 32; Appendix
AP 32	The proposed amendments to Rule 32 would conform to the proposed amendments to Rule 29.	Rule 29
AP Appendix	The proposed amendments to the Appendix would conform to the proposed amendments to Rule 29.	Rule 29
AP Form 4	The proposed amendments to Form 4 would simplify Form 4, with the goal of reducing the burden on individuals seeking in forma pauperis status (IFP) while providing the information that courts of appeals need and find useful when deciding whether to grant IFP status.	
BK 1007	The proposed amendments to Rule 1007(c)(4) eliminate the deadlines for filing certificates of completion of a course in personal financial management. The proposed amendments to Rule 1007(h) clarify that a court may require a debtor to file a supplemental schedule to report postpetition property or income that comes into the estate under § 115, 1207, or 1306 of the Bankruptcy Code.	
BK 3018	The proposed amendment to subdivision (c) would allow for more flexibility in how a creditor or equity security holder may indicate acceptance of a plan in a chapter 9 or chapter 11 case.	
BK 5009	The proposed amendments to Rule 5009(b) would provide an additional reminder notice to the debtors that the case may be closed without a discharge if the debtor's certificate of completion of a personal financial management course has not been filed.	
BK 9006	The proposed amendments conform to the proposed amendments to Rule 1007.	
BK 9014	The proposed amendment to Rule 9014(d) relaxes the standard for allowing remote testimony in contested matters to "cause and with appropriate	

Effective (no earlier than) December 1, 2026

Current Step in REA Process:

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

REA History:

- Approved for publication by Standing Committee (Jan and June 2024 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
	safeguards." The current standard, imported from the trial standard in Civil Rule 43(a), which is applicable across bankruptcy (in both contested matters and adversary proceedings) is cause "in compelling circumstances and with appropriate safeguards."	
BK 9017	The proposed amendment to Rule 9017 removes the reference to Civil Rule 43 leaving the proposed amendment to Rule 9014(d) to govern the standard for allowing remote testimony in contested matters, and Rule 7043 to govern the standard for allowing remote testimony in adversary proceedings.	
BK 7043	Rule 7043 is new and works with proposed amendments to Rules 9014 and 9017. It would make Civil Rule 43 applicable to adversary proceedings (though not to contested matters	
BK Official Form 410S1	The proposed changes would conform the form the pending amendments to Rule 3002.1 that are on track to go into effect on **December 1, 2025,** and would go into effect on the same date as the rule change.	
EV 801	The proposed amendment to Rule 801(d)(1)(A) would provide that all prior inconsistent statements admissible for impeachment are also admissible as substantive evidence, subject to Rule 403.	

TAB 4A2

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Committee or Standing Committee) met on January 7, 2025. New member Judge Joan N. Ericksen was unable to participate.

Representing the advisory committees were Judge Allison H. Eid (10th Cir.), Chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Rebecca Buehler Connelly, chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robin L. Rosenberg, Chair, Professor Richard L. Marcus, Reporter, Professor Andrew Bradt, Associate Reporter, and Professor Edward Cooper, consultant, Advisory Committee on Civil Rules; Judge James C. Dever III, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Jesse M. Furman, Chair and Professor Daniel Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; H. Thomas Byron III, the Standing Committee's Secretary; Bridget M. Healy and Scott Myers, Rules Committee Staff Counsel; Kyle Brinker, Law Clerk to the Standing Committee; John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, Federal Judicial Center; and Elizabeth J. Shapiro,

Deputy Director, Federal Programs Branch, Civil Division, Department of Justice, on behalf of Deputy Attorney General Lisa O. Monaco.

In addition to its general business, including a review of the status of pending rule amendments in different stages of the Rules Enabling Act process, the Standing Committee received and responded to reports from the five advisory committees. The Committee also received updates on joint committee business that involve ongoing and coordinated efforts in response to suggestions on: (1) expanding access to electronic filing by self-represented litigants, (2) adopting nationwide rules governing admission to practice before the U.S. district courts, and (3) requiring complete redaction of Social Security numbers (SSNs).

FEDERAL RULES OF APPELLATE PROCEDURE

Information Items

The Advisory Committee on Appellate Rules met on October 9, 2024. The Advisory Committee is considering several issues, including possible amendments to Rule 15 (Review or Enforcement of an Agency Order—How Obtained; Intervention) to address the "incurably premature" doctrine regarding review of agency action, Rule 4 (Appeal as of Right—When Taken) concerning reopening of the time to take a civil appeal, and Rule 8 (Stay or Injunction Pending Appeal) to address the purpose and length of administrative stays, and suggestions for a new rule governing intervention on appeal. The Advisory Committee removed from its agenda suggestions regarding standards of review, use of capital letters and diacritical marks in case captions, incorporation of widely adopted local rules into the national rules, and standardizing page equivalents for word limits. The Advisory Committee will hold a February 2025 hearing on its two proposals that are out for public comment; one proposal concerns Rule 29's amicus brief requirements and the other concerns the information required on Form 4 for seeking in forma pauperis status.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Form Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rule 2002 (Notices) and Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy) with a recommendation that they be published for public comment in August 2025. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 2002 (Notices)

The proposed amendment to Rule 2002(o) would simplify the caption of most notices given under Rule 2002 by requiring that they include only the court's name, the debtor's name, the case number, the chapter under which the case was filed, and a brief description of the document's character. Notably, most Rule 2002 notices would no longer be required to include the last four digits of the debtor's SSN or individual taxpayer identification number.

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

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

Information Items

The Advisory Committee on Bankruptcy Rules met on September 12, 2024. In addition to the recommendation discussed above, the Advisory Committee considered suggestions for an amendment to allow appointment of masters in bankruptcy cases and proceedings and for a new rule concerning random assignment of mega bankruptcy cases within a district, which the

Advisory Committee will revisit after the Committee on the Administration of the Bankruptcy System has concluded its consideration of potential related policy (*see* Report of the Committee on the Administration of the Bankruptcy System, at Agenda E-3). The Advisory Committee removed from its agenda a suggestion to add language concerning the possibility of unclaimed funds to the forms for orders of discharge in cases under chapters 7 and 13. After careful study of a suggestion to require complete redaction of SSNs (rather than redaction of all but the last four digits, as currently required by the national rules), and after considering bankruptcy stakeholders' expressed need for the last four digits of the SSN, the Advisory Committee decided to take no action on the suggestion at this time; however, the Advisory Committee will continue to monitor discussions of this suggestion in the other advisory committees.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Approved for Publication and Comment

The Advisory Committee on Civil Rules submitted proposed amendments to Rule 81 (Applicability of the Rules in General; Removed Actions) and Rule 41 (Dismissal of Actions) with a recommendation that they be published for public comment in August 2025. The Standing Committee unanimously approved the Advisory Committee's recommendation concerning Rule 81 (with a stylistic change) and offered feedback on the language of the proposed amendment to Rule 41. The Advisory Committee will bring the Rule 41 proposal back for approval at the Standing Committee's June 2025 meeting.

The proposed amendment to Rule 81(c) would provide that a jury demand must always be made after removal if no such demand was made before removal and a party desires a jury trial, and the Rule 41 proposal would clarify that Rule 41(a) is not limited to authorizing dismissal only of an entire action but also permits the dismissal of one or more claims in a multi-

claim case and that a stipulation of dismissal must be signed by only all parties who have appeared and remain in the action.

Information Items

The Advisory Committee on Civil Rules met on October 10, 2024. In addition to the recommendations discussed above, the Advisory Committee continued to discuss proposals to amend Rule 45 (Subpoena) regarding the manner of service of subpoenas and the tendering of witness fees at time of service. The Advisory Committee is also studying possible amendments concerning remote testimony; one possible amendment to Rule 45 would clarify the court's subpoena authority with respect to remote trial testimony, while a different possible amendment to Rule 43 (Taking Testimony) would relax the standards governing permission for remote trial testimony. The Advisory Committee heard updates from its subcommittee on Rule 7.1 (Disclosure Statement). The Advisory Committee also continues to study suggestions on Rule 55 (Default; Default Judgment), cross-border discovery, and the use of the term "master" in the Civil Rules, and has commenced a renewed study of the topic of third-party litigation funding. On the random assignment of cases, the Advisory Committee noted the Judicial Conference's March 2024 adoption of policy on this topic (JCUS-MAR 2024, p. 8) and will continue to study the districts' response to this policy.

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Items

The Advisory Committee on Criminal Rules met on November 6-7, 2024. The Advisory Committee continued to discuss a proposal to expand the availability of pretrial subpoenas under Rule 17 (Subpoena) and heard the views of 12 invited speakers who provided comments on a possible draft amendment. In addition, the Advisory Committee established two new subcommittees to consider proposals for amendments to clarify Rule 40 (Arrest for Failing to

Appear in Another District or for Violating Conditions of Release Set in Another District) and for amendments to Rule 43 (Defendant's Presence) to extend the district courts' authority to use videoconferencing with the defendant's consent.

The Advisory Committee is actively considering proposals to amend Rule 49.1 (Privacy Protection for Filings Made with the Court) to protect minors' privacy by requiring the use of pseudonyms and to require complete redaction of SSNs (rather than redaction of all but the last four digits).

The Advisory Committee decided to remove from its agenda a proposal to amend Rule 53 (Courtroom Photographing and Broadcasting Prohibited) to allow broadcasting of criminal proceedings under some circumstances and a proposal to revise the procedures for contempt proceedings under Rule 42 (Criminal Contempt).

FEDERAL RULES OF EVIDENCE

Information Items

The Advisory Committee on Evidence Rules met on November 8, 2024. The Advisory Committee discussed possible amendments relating to the admissibility of evidence generated by artificial intelligence. The discussion focused on two areas: the admissibility of machine-learning evidence offered without the accompanying testimony of an expert, and challenges to the admissibility of asserted "deepfakes" (that is, fake audio and/or visual recordings created through the use of artificial intelligence). To address the first topic, the Advisory Committee is developing a proposed new Rule 707 that would apply to machine-generated evidence standards akin to those in Rule 702 (Testimony by Expert Witnesses); the Advisory Committee will recommend to the Civil and Criminal Rules Committees that they consider any associated issues concerning disclosures relating to machine-learning evidence. The Committee is not currently intending to bring forward for

publication a proposal addressing the second topic (deepfakes) but will work on a possible amendment to Rule 901 (Authenticating or Identifying Evidence) that could be brought forward in the event that developments warrant rulemaking on the topic.

The Advisory Committee is considering a possible amendment to Rule 609 (Impeachment by Evidence of a Criminal Conviction) to tighten the standard for admission in criminal cases of evidence of a defendant's prior felony conviction. It has also begun to study a proposal to amend Rule 902 (Evidence That Is Self-Authenticating) to add federally recognized Indian tribes to Rule 902(1)'s list of governments the public documents of which are self-authenticating.

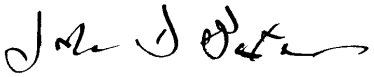
The Advisory Committee decided to remove from its agenda a proposal to amend Rule 702 (Testimony by Expert Witnesses) regarding peer review and a suggestion regarding a possible amendment or new rule to address allegations of prior false accusations of sexual misconduct. In addition, the Advisory Committee decided to table a suggestion for a proposed amendment to Rule 404 (Character Evidence, Other Crimes, Wrongs, or Acts) concerning evidence of other crimes, wrongs, or acts the relevance of which depends upon inferences about propensity. Finally, the Advisory Committee determined that the decisions in *Smith v. Arizona*, 602 U.S. 779 (2024), and *Diaz v. United States*, 602 U.S. 526 (2024), do not currently require any amendments to Rule 703 (Bases of an Expert's Opinion Testimony) or Rule 704 (Opinion on an Ultimate Issue), but it will monitor the lower court caselaw applying those decisions.

JUDICIARY STRATEGIC PLANNING

The Committee was asked by Chief Judge Michael A. Chagares (3d Cir.), the judiciary's planning coordinator, to identify any changes it believes should be considered in updating the *Strategic Plan for the Federal Judiciary* in 2025. Recommendations on behalf of the Committee

regarding the judicial workforce and preserving public trust in the judiciary were communicated to Chief Judge Chagares by letter dated January 15, 2025.

Respectfully submitted,



John D. Bates, Chair

Paul J. Barbadoro
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Patricia Ann Millett
Lisa O. Monaco
Andrew J. Pincus
D. Brooks Smith
Kosta Stojilkovic
Jennifer G. Zipps

TAB 4B

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

Ordered by most recent legislative action; most recent first

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Protecting Our Courts from Foreign Manipulation Act of 2025	**H.R. 2675** *Sponsor:* Cline (R-VA)	CV 26	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr2675/BILLS-119hr2675ih.pdf **Summary:** Would require additional disclosures under Civil Rule 26(a) for any non-party foreign person, foreign state, or sovereign wealth fund that has a right to receive payment that is contingent on the outcome of a civil action. Would also prohibit third-party ligation funding by foreign states and sovereign wealth funds.	04/07/2025: H.R. 2675 introduced in House; referred to Judiciary Committee
Sunshine in the Courtroom Act of 2025	**S. 1133** *Sponsor:* Grassley (R-IA) *Cosponsors:* Klobuchar (D-MN) Durbin (D-IL) Blumenthal (D-CT) Markey (D-MA) Cornyn (R-TX)	CR 53	**Most Recent Bill Text:** https://www.congress.gov/119/bills/s1133/BILLS-119s1133is.pdf **Summary:** Would permit court cases to be photographed, electronically recorded, broadcast, or televised, notwithstanding any other provision of law, after JCUS promulgates guidelines.	• 03/26/2025: Introduced in Senate; referred to Judiciary Committee
Trafficking Survivors Relief Act of 2025	**H.R. 1379** *Sponsor:* Fry (R-SC) *Cosponsors:* 15 bipartisan cosponsors	CR 29	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr1379/BILLS-119hr1379ih.pdf **Summary:** Would permit a person convicted of certain federal offenses as a result of having been a victim of trafficking to move the convicting court to vacate the judgment of conviction, to enter a judgment of acquittal, and to order that references the arrest and criminal proceedings be expunged from official records.	• 02/14/2025: H.R. 1379 introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Litigation Transparency Act of 2025	**H.R. 1109** *Sponsor:* Issa (R-CA) *Cosponsors:* 7 Republican cosponsors	CV 5, 26	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr1109/BILLS-119hr1109ih.pdf **Summary:** Would require a party or record of counsel in a civil action to disclose to the court and other parties the identity of any person that has a right to receive a payment or thing of value that is contingent on the outcome of the action or group of actions and to produce to the court and other parties any such agreement.	• 02/07/2025: H.R. 1109 introduced in House; referred to Judiciary Committee
Alexandra's Law Act of 2025	**H.R. 780** *Sponsor:* Issa (R-CA) *Cosponsors:* Kiley (R-CA) Obernolte (R-CA)	EV 410	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr780/BILLS-119hr780ih.pdf **Summary:** Would permit a previous nolo contendere plea in a case involving death resulting from the sale of fentanyl to be used as evidence to prove in an 18 U.S.C. § 1111 or § 1112 case that the defendant had knowledge that the substance provided to the decedent contained fentanyl.	• 01/28/2025 introduced in House; referred to Judiciary and Energy & Commerce Committees
Protect the Gig Economy Act of 2025	**H.R. 100** *Sponsor:* Biggs (R-AZ)	CV 23	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr100/BILLS-119hr100ih.pdf **Summary:** Would add a requirement to Civil Rule 23(a) that a member of a class may sue or be sued as representative parties only if "the claim does not allege the misclassification of employees as independent contractors."	• 01/03/2025 introduced in House; referred to Judiciary Committee

Legislation Requiring Only Technical or Conforming Changes
118th Congress
(January 3, 2023–January 3, 2025)

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Easter Monday Act of 2025	**H.R. 2951** *Sponsor:* Moore (R-WV) *Cosponsor:* McDowell (R-NC) **S. 1426** *Sponsor:* Schmitt (R-MO)	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr2951/BILLS-119hr2951ih.pdf https://www.congress.gov/119/bills/s1426/BILLS-119s1426is.pdf **Summary:** Would make Easter Monday a federal holiday.	• 04/17/2025: H.R. 2951 Introduced in House; referred to Oversight & Accountability Committee • 04/10/2025: S. 1426 Introduced in Senate; referred to Judiciary Committee
St. Patrick's Day Act	**H.R. 2119** *Sponsor:* Fitzpatrick (R-PA)	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr2119/BILLS-119hr2119ih.pdf **Summary:** Would make St. Patrick's Day a federal holiday.	• 03/14/2025: Introduced in House; referred to Oversight & Accountability Committee
Rosa Parks Day Act	**H.R. 964** *Sponsor:* Sewell (D-AL) *Cosponsors:* 62 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/bill/119th-congress/house-bill/964/text?s=3&r=2&q=%7B%22search%22%3A%22federal+holiday%22%7D **Summary:** Would make Rosa Parks Day a federal holiday.	• 02/04/2025: Introduced in House; referred to Committee on Oversight & Government Reform
Lunar New Year Day Act	**H.R. 794** *Sponsor:* Meng (D-NY) *Cosponsors:* 39 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr794/BILLS-119hr794ih.pdf **Summary:** Would make Lunar New Year Day a federal holiday.	• 01/28/2025: Introduced in House; referred to Committee on Oversight & Government Reform
Election Day Act	**H.R. 6267** *Sponsor:* Fitzpatrick (R-PA) *Cosponsors:* Dingell (D-MI) Wilson (R-SC) Houlahan (D-PA) Courtney (D-CT)	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr154/BILLS-119hr154ih.pdf **Summary:** Would make Election Day a federal holiday.	• 01/03/2025: Introduced in House; referred to Committee on Oversight & Government Reform

TAB 4C

Federal Judicial Center

Date: May 12, 2025

To: Standing Committee on Rules of Practice and Procedure

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

Re: Federal Judicial Center Research and Education

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

RESEARCH

Completed Research for Rules Committees

Results of Survey on Possible Amendment of Federal Rule of Bankruptcy Procedure 9031

At the request of the Bankruptcy Rules Committee, the Center surveyed bankruptcy judges on how and whether they would use masters if they had the authority to do that. The Center presented the results of its research at the committee's spring 2025 meeting.

Current Research for Rules Committees

Intervention on Appeal

At the request of the Appellate Rules Committee, the Center is conducting research on interventions on appeal.

Complex Criminal Litigation

As suggested by the Criminal Rules Committee, the Center is developing a collection of resources on complex criminal litigation as one of its curated websites.

Completed Research for Other Judicial Conference Committees

Redaction of Non-Government Party Names in Social Security and Immigration Case Documents

As part of its privacy study for the Committee on Court Administration and Case Management, the Center prepared a study of Social Security and immigration cases that (1) prepared a compilation of local rules and procedures on redacting non-government party names and (2) examined redaction in samples of publicly available dispositive documents (www.fjc.gov/content/391683/redaction-non-government-party-names-social-security-and-immigration-case-documents).

Current Research for Other Judicial Conference Committees

Evaluation of a Pilot Program in Which Comparative Sentencing Information Is Incorporated Into Presentence Investigation Reports

At the request of the Committee on Criminal Law, the Center is evaluating a two-year pilot program in which selected districts incorporated comparative sentencing information from the Sentencing Commission's Judiciary Sentencing Information (JSIN) platform into presentence investigation reports.

The Privacy Study: Unredacted Sensitive Personal Information in Court Filings

At the request of the Committee on Court Administration and Case Management, the Center is conducting research on unredacted personal information in public filings.

Case Weights for Bankruptcy Courts

The Center has collected data and is conducting analyses for updating bankruptcy-court case weights. Case weights are used in the computation of weighted caseloads, which in turn are used when assessing the need for judgeships. The research was requested by the Committee on Administration of the Bankruptcy System.

Other Completed Research

Condensed Report on 2023 Federal Judiciary Workplace Survey

This condensed report presents a detailed summary of the results of the 2023 Workplace Survey for the Federal Judiciary, which was conducted by the Federal Judicial Center for the Federal Judiciary Workplace Conduct Working Group (www.fjc.gov/content/392606/condensed-report-2023-federal-judiciary-workplace-survey). Center staff prepared this report at the working group's request to provide context for the working group's recommendations stemming from the survey results (*Report of the Federal Judiciary Workplace Conduct Working Group on the Judiciary's 2023 National Workplace Survey*, www.uscourts.gov/administration-policies/workplace-conduct-federal-judiciary#workinggroup). The survey

obtained information on the number of employees who said they had experienced wrongful conduct and input about how well the procedures for addressing wrongful conduct are working. It also obtained information about the judiciary's general working environment to inform the working group about the judiciary's progress toward the goal of its strategic plan, updated in 2020, to provide an "exemplary workplace free from discrimination, harassment, retaliation, and abusive conduct," where all employees are treated with dignity and respect.

United States District Courts' Local Rules and Procedures on Electronic Filing by Self-Represented Litigants

Prepared to supplement a planned episode of *Court to Court*, a documentary-style video program presented by the Center's Education Division, this report compiles local rules and procedures in the ninety-four district courts on electronic filing by self-represented litigants (www.fjc.gov/content/391989/united-states-district-courts-local-rules-and-procedures-electronic-filing-self). More than two thirds of the courts permit self-represented litigants to use the court's electronic filing system at least on a case-by-case basis.

JUDICIAL GUIDES

In Preparation

Manual for Complex Litigation

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

Reference Manual on Scientific Evidence

The Center is collaborating with the National Academies of Science, Engineering, and Medicine to prepare a fourth edition of the *Reference Manual on Scientific Evidence* (third edition, www.fjc.gov/content/reference-manual-scientific-evidence-third-edition-1).

Manual on Recurring Issues in Criminal Trials

The Center is preparing a seventh edition of what previously was called *Manual on Recurring Problems in Criminal Trials* (sixth edition, www.fjc.gov/content/manual-recurring-problems-criminal-trials-sixth-edition-0).

Benchbook for U.S. District Court Judges

The Center is preparing a seventh edition of its *Benchbook for U.S. District Court Judges* (sixth edition, www.fjc.gov/content/benchbook-us-district-court-judges-sixth-edition).

HISTORY

Exhibits

The Center's History website includes comprehensive exhibits presenting data about the federal judiciary at various points in its evolution aimed at helping a general-public audience understand these topics (www.fjc.gov/history/exhibits). Two recently posted exhibits are *Prohibition in the Federal Courts: A Timeline* (www.fjc.gov/history/exhibits/prohibition-in-federal-courts-timeline) and *The Judiciary Act of 1801* (www.fjc.gov/history/exhibits/judiciary-act-1801). In addition, the Center has updated *Demography of Article III Judges, 1789–2024* (www.fjc.gov/history/exhibits/graphs-and-maps/demography-article-iii-judges-1789-2024-introduction).

Spotlight on Judicial History

Since 2020, the Center has posted twenty-six short essays about judicial history on a variety of topics (www.fjc.gov/history/spotlight-judicial-history). Recently posted are "Supreme Court Meeting Places" (www.fjc.gov/history/spotlight-judicial-history/supreme-court-meeting-places) and "Tort Claims Against the United States" (www.fjc.gov/history/spotlight-judicial-history/tort-claims-against-united-states).

EDUCATION

Specialized Workshops

The Honorable Robert A. Katzmann Conference on Civics Education and the Federal Courts

This one-day national conference to be held every five years is focused on courts' civics-education efforts, with delegates from each circuit attending. It was named in honor of the late Second Circuit Judge Robert Katzmann, who held the first national conference on civics education and the federal courts at the Thurgood Marshall Courthouse in 2019. The 2025 conference was co-sponsored by the Administrative Office and the Judicial Branch Committee and hosted by the Eighth Circuit, the Eastern District of Missouri, and their Judicial Learning Center, in collaboration with the Federal Judicial Center. The FJC also has a curated website showing public-outreach and civics-education efforts by individual federal courts, as well as materials prepared by the Center and the Administrative Office (www.fjc.gov/content/388217/overview).

Emerging Issues in Neuroscience for Federal Judges

A two-day, in-person judicial seminar, held in cooperation with the American Association for the Advancement of Science, explored developments in neuroscience and the role that neuroscience may play in making legal determinations, from the admissibility of evidence to decisions about criminal culpability.

Reconstruction and the Constitution: A Historical Perspective

A two-day, in-person judicial workshop in Philadelphia on the Reconstruction Amendments included visits to the National Constitution Center and Independence Hall.

Distance Education

Evaluating Historical Evidence

The Center is offering judges a six-part interactive online series that provides tools for managing cases with significant historical evidence. Historians discuss historical methodology and provide practical tips on evaluating historical evidence, whether presented in the form of expert witnesses, amicus briefs, or litigant arguments. The first two episodes were "An Introduction: What Do Historians Do and How Do They Do It?" and "Researching the Law on the Ground: How Do Historians Research and Come to Understand Encounters with the Courts?"

Handling Cross-Border Bankruptcies

All bankruptcy judges were invited to attend this ninety-minute webcast on Chapter 15 bankruptcy cases.

Court Web

This monthly webcast included as recent episodes "The Bail Reform Act in Practice" (featuring Central District of Illinois Judge Jonathan E. Hawley and Middle District of Florida Magistrate Judge Anthony Porcelli) and "Honoring the Past, Inspiring the Future—the 100th Anniversary of the Federal Probation Act" (featuring Northern District of Illinois Judge Edmond Chang, chair of the Criminal Law Committee, and District of Maryland Chief Probation Officer Leon Epps).

Consumer Case-Law Update for Bankruptcy Judges

This quarterly webcast features retired Western District of Tennessee Bankruptcy Judge William H. Brown discussing the latest consumer-bankruptcy case-law updates.

Business Case-Law Update for Bankruptcy Judges

This quarterly webcast features Professor Bruce Markell (a retired bankruptcy judge).

A Review of Recent Ninth Circuit Bankruptcy Decisions

This annual webcast features judges on the Ninth Circuit Bankruptcy Judges Education Committee discussing significant decisions by the Supreme Court, the Ninth Circuit's court of appeals, and the Ninth Circuit's bankruptcy appellate panel.

Wm. Matthew Byrne, Jr., Judicial Clerkship Institute for Career Law Clerks

Presented in collaboration with the Wm. Matthew Byrne, Jr., Judicial Clerkship Institute at Pepperdine University's Caruso School of Law, this program was formerly conducted as a two-day, in-person program, but it was conducted in 2025 as four weekly online sessions. It offered information on managing high-profile cases and serving self-represented parties and summaries of pending Supreme Court cases.

General Workshops

National Workshops for Trial-Court Judges

Three-day workshops are held for district judges in even-numbered years and annually for magistrate judges and bankruptcy judges.

Circuit Workshops for U.S. Appellate and District Judges

The Center has recently put on a three-day workshop for Article III judges in the Ninth Circuit.

Orientation Programs

Orientation Programs for New Trial-Court Judges

The Center invites newly appointed trial-court judges to attend two one-week conferences focusing on skills unique to judging. The first phase includes sessions on trial practice, case management, and judicial ethics. In addition, district judges learn about the sentencing process, magistrate judges learn about search warrants, and bankruptcy judges learn about the bankruptcy code. The second phase includes sessions on such topics as civil-rights litigation, employment discrimination, security, self-represented litigants, relations with the media, and ethics.

Orientation for New Circuit Judges

Orientation programs for new circuit judges include a three-day program hosted by the Center and a program at New York University School of Law for both state and federal appellate judges.

Orientation for New Term Law Clerks

The Center offers online orientation to new term law clerks. Phase I is offered before the clerkship begins, and phase II is offered after the clerkship has begun.