ADVISORY COMMITTEE
ON
CIVIL RULES

October 10, 2024

AGENDA
Meeting of the Advisory Committee on Civil Rules
October 10, 2024

OPENING BUSINESS

ACTION ITEMS

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Meeting of the Advisory Committee on Civil Rules
October 10, 2024

ALMOST-ACTION ITEMS

INFORMATION ITEMS

Subcommittee Reports

Intercommittee Reports

Other Information Items

Recommendation to Drop from Agenda

UPDATE

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

H. Thomas Byron III, 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

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

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Honorable Brian M. Boynton Principal Deputy Assistant Attorney General (ex officio) United States Department of Justice Washington, DC	David J. Burman, Esq. Perkins Coie LLP Seattle, WA
Honorable Annie Christoff United States District Court Memphis, TN	Professor Zachary Clopton Northwestern University Pritzker School of Law Chicago, IL
Honorable David C. Godbey United States District Court Dallas, TX	Jocelyn D. Larkin, Esq. Impact Fund Berkeley, CA
Honorable M. Hannah Lauck United States District Court Richmond, VA	Honorable R. David Proctor United States District Court Birmingham, AL
Honorable Marvin Quattlebaum, Jr. United States Court of Appeals Greenville, SC	Joseph M. Sellers, Esq. Cohen Milstein Sellers & Toll PLLC Washington, DC
Honorable Manish S. Shah United States District Court Chicago, IL	David C. Wright III, Esq. Robinson, Bradshaw & Hinson, P.A. Charlotte, NC

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Honorable Catherine P. McEwen
(*Bankruptcy*)
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Tampa, FL

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University of Michigan Law School
Ann Arbor, MI

Clerk of Court Representative

Thomas G. Bruton
Clerk
United States District Court
Chicago, IL

ADVISORY COMMITTEE ON CIVIL RULES

Members	Position	District/Circuit	Start Date	End Date
Robin L. Rosenberg Chair	D	Florida (Southern)	Member: 2018 Chair: 2022	---- 2025
Cathy Bissoon	D	Pennsylvania (Western)	2021	2027
Jane Bland	JUST	Texas	2022	2025
Brian M. Boynton*	DOJ	Washington, DC	----	Open
David J. Burman	ESQ	Washington	2021	2026
Annie Christoff	M	Tennessee	2024	2027
Zachary D. Clopton	ACAD	Illinois	2023	2026
David C. Godbey	D	Texas (Northern)	2020	2026
Jocelyn D. Larkin	ESQ	California	2024	2027
M. Hannah Lauck	D	Virginia (Eastern)	2022	2025
R. David Proctor	D	Alabama (Northern)	2021	2027
A. Marvin Quattlebaum, Jr.	C	South Carolina	2024	2027
Joseph M. Sellers	ESQ	Washington, DC	2018	2025
Manish S. Shah	D	Illinois (Northern)	2023	2025
David C. Wright III	ESQ	North Carolina	2024	2027
Richard Marcus Reporter	ACAD	California	2023	2028
Andrew Bradt Associate Reporter	ACAD	California	2023	2028

Principal Staff: Allison Bruff

* Ex-officio - Acting Assistant Attorney General, Civil Division

ADVISORY COMMITTEE ON CIVIL RULES
SUBCOMMITTEES
(2024–2025)

Cross-Border Discovery Subcommittee Judge Manish S. Shah, Chair Professor Zachary Clopton Joshua Gardner, Esq. (DOJ) Judge Catherine P. McEwen (Liaison)	**Discovery Subcommittee** Judge David Godbey, Chair David Burman, Esq. Joe Sellers, Esq. Thomas Bruton, Clerk Rep
Multidistrict Litigation Subcommittee Judge R. David Proctor, Chair Judge M. Hannah Lauck David Burman, Esq. Joe Sellers, Esq.	**Rule 7.1 Subcommittee** Justice Jane N. Bland, Chair Judge Manish S. Shah David Burman, Esq.
Rule 41 Subcommittee Judge Cathy Bissoon, Chair Professor Zachary Clopton David Burman, Esq.	**Rule 43/45 Subcommittee** Judge M. Hannah Lauck, Chair Justice Jane Bland David Burman, Esq. Joe Sellers, Esq. Judge Benjamin Kahn (Liaison)
Joint Subcommittee on Attorney Admission Judge J. Paul Oetken, Chair Judge Andre Birotte Judge Michelle Harner Judge M. Hannah Lauck David Burman, Esq. Catherine Recker, Esq. Thomas Bruton, Clerk Rep	

RULES COMMITTEE LIAISON MEMBERS

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

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TAB 1

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

June 4, 2024

The Judicial Conference Committee on Rules of Practice and Procedure (the Standing Committee) met in a hybrid in-person and virtual session in Washington, D.C., on June 4, 2024. The following members attended:

Judge John D. Bates, Chair
Judge Paul J. Barbadoro
Elizabeth J. Cabraser, Esq.
Louis A. Chaiten, Esq.
Judge William J. Kayatta, Jr.
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 Jay S. Bybee, 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 Patrick J. Schiltz, 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; Allison A. Bruff, Esq., Bridget M. Healy, Esq., and S. Scott Myers, Esq., Rules Committee Staff Counsel; Shelly Cox and Rakita Johnson, Rules Committee Staff; Zachary Hawari, Law Clerk to the Standing Committee; Dr. Elizabeth C. Wiggins, Director, Research Division, 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 Bates, Chair of the Standing Committee, called the meeting to order and welcomed everyone, including the committee members and reporters who were attending remotely. Judge Bates also welcomed members of the public and press who joined as observers.

Judge Bates expressed sorrow at the loss of Judge Gene E.K. Pratter the prior month. She completed a full term on the Civil Rules Committee before joining the Standing Committee and she will be missed.

Professor Catherine Struve honored Judge Pratter's legacy as the quintessential Philadelphia lawyer and judge—incredibly skilled in lawyering and rhetoric—and a role model in the Philadelphia legal community. She began her career in 1975 at Duane Morris LLP where she became the firm's first general counsel and expert on legal ethics. She came to teach ethics and trial advocacy at the University of Pennsylvania Law School and served on its board of overseers. Professor Struve also recalled Judge Pratter's generosity and sense of humor.

Judge D. Brooks Smith noted how shocked he had been to learn of Judge Pratter's untimely passing. He came to know her as a friend and colleague when she became a judge, and he quickly learned of her abilities as a district judge. She also contributed greatly when she sat by designation on the court of appeals. He also remarked on Judge Pratter's wonderful sense of style and humor.

Judge Bates thanked Professor Struve and Judge Brooks and added that Judge Pratter will be remembered as an excellent judge who made countless contributions to justice, the federal judiciary, and the rules process in particular.

As this was Judge Kayatta's last meeting, Judge Bates thanked him for his work and recognized that he had been a wonderful contributor to the efforts of the Standing Committee and the rules process.

Judge Bates welcomed the incoming chairs for the Advisory Committees on Appellate Rules and Evidence Rules. Judge Allison Eid, who is from the Tenth Circuit and a former member of the Appellate Rules Committee, will be succeeding Judge Jay Bybee as chair of the Appellate Rules Committee. Judge Jesse Furman from the Southern District of New York, a former member of the Standing Committee, will be succeeding Judge Patrick Schiltz as chair of the Evidence Rules Committee. Judge Bates recognized the great work that Judge Bybee and Judge Schiltz had performed as chairs of their committees, which have been amazingly productive and done excellent work throughout their tenure.

Judge Bates noted that his term as Chair of the Standing Committee had been extended for another year.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the minutes of the January 4, 2024, meeting.**

Mr. Thomas Byron, Secretary to the Standing Committee, reported that the latest set of proposed rule amendments had been approved by the Supreme Court and transmitted to Congress. Those amendments will take effect on December 1, 2024, in the absence of congressional action.

Judge Bates noted that the Standing Committee's March 2024 report to the Judicial Conference begins on page 54 of the agenda book and the FJC's report on research projects begins on page 64. Dr. Tim Reagan explained that the FJC in January 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 the FJC's Education Division.

JOINT COMMITTEE BUSINESS

Electronic Filing by Self-Represented Litigants

Professor Struve reported that the working group hopes to bring proposals to the advisory committees in the fall.

Redaction of Social Security Numbers

Mr. Byron provided the report on several privacy issues, including redaction of social-security numbers. A memorandum from the Reporters' Privacy Rules Working Group begins on page 74 of the agenda book and outlines what the working group and Rules Committee Staff have done over the last several months. The advisory committees and their chairs were asked to provide feedback on this memorandum at their spring meetings.

As previously reported, the rules currently require filers to redact all but the last four digits of a social-security number in court filings, and Senator Ron Wyden suggested that the rules committees revisit whether to require complete redaction. A tentative draft of such an amendment appears on page 75 of the agenda book.

That draft is not being proposed as a rule amendment at this time because it makes sense to consider it in conjunction with other privacy rule proposals that have been received in the last year. As described in the memorandum, there are also other potential ambiguities and areas for clarification in the exemption and waiver provisions that may be worth addressing. The working group, with the help of the advisory committee chairs, will continue considering whether to address any of those issues—in addition to the suggestions from Senator Wyden and others—through the fall, and likely spring, meetings.

Joint Subcommittee on Attorney Admission

Professor Struve reported that there was robust discussion of the various options under consideration by the Joint Subcommittee on Attorney Admission at some of the advisory committees' spring meetings. The subcommittee will continue to consider that input as well as the feedback gathered during the Standing Committee's January meeting. The Subcommittee's consideration is also aided by the excellent research from the FJC regarding fees for admission to federal court bars as well as local counsel requirements for practice in federal district courts. Those FJC reports begin on page 78 of the agenda book. The subcommittee will next meet in July.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Bybee and Professor Hartnett presented the report of the Advisory Committee on Appellate Rules, which last met on April 10, 2024, in Denver, Colorado. The Advisory Committee presented four action items – two for final approval and two for publication and public comment – and one information item. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 126.

Action Items

Final Approval of Proposed Amendment to Rule 39 (Costs on Appeal). Judge Bybee reported on this item. The text of the proposed amendment appears on page 184 of the agenda book, and the written report begins on page 127.

The proposed amendment to Rule 39 would address allocating and taxing costs in the courts of appeals and the district courts. "Allocate" refers to which party bears the costs, and "tax" refers to the calculation of the costs. The Advisory Committee received two favorable comments, one comment that was not relevant, and one late-filed comment. Aside from some stylistic changes, the Advisory Committee did not believe changes were needed to the published version.

A practitioner member commented that he liked the terminology, which was in response to prior feedback from the Standing Committee, that is, "allocate" when describing who is being asked to pay and "tax" when describing what should be paid. He offered a tweak to Rule 39(a) on page 184, line 3, to say, "The following rules apply to allocating taxable costs…" Adding "taxable" would introduce both concepts. Judge Bybee agreed that the addition would signal exactly what the rule was doing, and, without objection, the addition was made.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 39.**

Final Approval of Proposed Amendment to Rule 6 (Appeal in a Bankruptcy Case). Judge Bybee reported on this item. The text of the proposed amendment begins on page 163 of the agenda book, and the written report begins on page 129.

This extensive revision of Rule 6 concerns appeals in bankruptcy cases. First, it addresses resetting the time to appeal as a result of a tolling motion in the district court, making clear that the shorter time period used in the Bankruptcy Rules for such motions applies. Second, it addresses direct appeals to the courts of appeals that bypass review by the district court or bankruptcy appellate panel. The amendments overhaul and clarify the provisions for direct appeal, making the rule largely self-contained. Judge Bybee thanked the Bankruptcy Rules Committee for its substantial assistance. There was only one comment during the comment period, and it supported the amendment.

Judge Bates commented that on page 173, line 184, the rule says that Bankruptcy Rule 8007 "applies" to any stay pending appeal, but elsewhere the rule uses "governs." He asked if there is a reason to say "applies" rather than "governs."

Professor Hartnett could not think of one but asked if the style consultants or bankruptcy representatives had a preference. Professor Garner commented that consistency is preferable and that "governs" seems to work. Judge Bybee noted that "applies" was used in the stricken language on line 203 and that the committee note on page 182, line 433, uses "governs." The rule and the note should be made consistent regardless of which word is used.

A judge member agreed with using "governs" if Rule 8007 is all-inclusive as to what controls the appeal. If another rule contains requirements for the appeal, however, Rule 8007 would not "govern," only "apply." Judge Connelly and Professor Gibson indicated that Rule 8007 is the only rule relevant to stays pending appeal.

Professor Struve noted that she had suggested the language change to "applies to" at the spring 2023 Advisory Committee meeting but that she did not object to reverting to "governs." Judge Bates called for a vote on the proposal with the minor change from "applies to" to "governs."

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 6.**

Publication of Proposed Amendment to Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis (IFP)). Judge Bybee reported on this item. The text of the proposed form appears on page 213 of the agenda book, and the written report begins on page 132.

This proposal is a change to streamline the way in which Appellate Form 4 collects information for purposes of seeking leave to appeal IFP. It does not affect the standard for whether to grant IFP status. The Advisory Committee has been considering this matter since 2019 and gave the courts of appeals, which have adopted various local versions of Form 4, an opportunity to weigh in on the changes.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Form 4 for public comment.**

Publication of Proposed Amendment to Rule 29 (Brief of an Amicus Curiae). Judge Bybee reported on this item. The text of the proposed amendment appears on page 192 of the agenda book, and the written report begins on page 135.

The Advisory Committee has been considering the proposal to amend Rule 29, regarding disclosures in amicus briefs, since 2019. In 2020, the Supreme Court received inquiries from Senator Whitehouse and Representative Johnson, which were referred to the Advisory Committee.

Judge Bybee expressed the Advisory Committee's appreciation for the substantial feedback from the Standing Committee. The Advisory Committee anticipates receiving a lot of public input, which will inform whether the rule strikes the right balance. It has already received some anticipatory comments that have been docketed as additional rules suggestions.

As explained in the written report, the Advisory Committee considered three difficult issues: (1) disclosure requirements concerning the relationship between a party and the amicus,

including contributions to an amicus that were not earmarked for the preparation of a brief; (2) disclosure requirements concerning the relationship between a nonparty and the amicus; and (3) an exception in the existing rule concerning earmarked contributions by members of an amicus organization.

Judge Bates thanked Judge Bybee and Professor Hartnett for providing an extensive discussion of the rule from various perspectives, including First Amendment considerations.

Much of the Standing Committee's discussion related to concerns about a change that would require leave of the court for non-governmental entities to file an amicus brief during the initial consideration of a case on the merits.

A practitioner member questioned the decision to move away from the Supreme Court's recent rule revision permitting amicus briefs to be filed without leave of the court or the consent of the parties. The Supreme Court's rule presumably reflects the view that the value of helpful amicus briefs outweighs the burden of unhelpful briefs. He wondered if there is actually an overabundance of amicus briefs in the courts of appeals. Even if this rule reduces the number of amicus briefs, there would be more motions for leave to file. He also struggled to see why recusal is an issue for courts of appeals considering that they can strike amicus briefs. If recusal is an issue, rather than limiting the circumstances in which a party can file an amicus brief, perhaps recusal should be addressed directly in the rule (for example, by providing that any amicus brief that would cause recusal of a judge would automatically be stricken) or addressed by the Code of Conduct for United States Judges.

Judge Bates recalled that these concerns were discussed at the Advisory Committee and some unique considerations came up with respect to some appellate courts.

Professor Hartnett remarked that the Supreme Court's rule removes even the very modest filter of consent, so adopting the approach taken in the current Supreme Court rule would require a change from the current Rule 29. One concern expressed at the Advisory Committee was that this completely open rule might result in what are effectively letters to the editor being filed as amicus briefs. However, the recusal issue was a far greater concern to the Advisory Committee. A judge member on the Advisory Committee had explained that the problem is particularly acute during a court's consideration of whether to grant rehearing en banc. When an amicus brief is filed at the en banc stage, no judge is in a position to strike an amicus brief that would require automatic recusal. There is also a recusal problem at the initial panel stage to the extent that the clerk may effectively recuse a judge on the basis of an amicus brief without any judge actually deciding whether the contribution of the amicus brief outweighs the fact that the brief will cause the recusal.

Judge Bybee added that the Advisory Committee's clerk representative was satisfied that this modest change in the rule would not dramatically increase the burden on the clerk's office. He also noted that a prior draft of this proposal followed the Supreme Court's rule and that the requirement of a motion for leave was a recent addition to the proposed amendment.

Multiple members expressed concerns about the increased burden on judges, amici, and parties resulting from a rule that requires a motion for leave to accompany every amicus brief. One judge member noted that motions tend to spawn additional filings—responses, motions for

extensions of time, and replies. She also pointed out that the motion for leave to file may come before a panel is assigned or publicly disclosed. And she was not sure on what basis, other than recusal, leave to file might be denied. Amicus briefs are a way for people to express their views to the court, which is an important part of the openness of the appellate process. If the parties consented to the amicus brief being filed, she did not know why the court would need to police it.

A practitioner member commented that there was a powerful case made at the Advisory Committee meeting about automatic recusal at the en banc petition stage—at least with respect to the Ninth Circuit—because no panel was assigned to decide whether to permit the amicus brief before the en banc petition vote. His reaction as to the panel stage, however, was similar to the judge member's reaction in that recusal prior to a panel assignment was uncertain, and there would be added costs for motions. Nevertheless, he was persuaded that allowing the public to comment on this proposal would reveal whether there is a problem, and a distinction might be drawn after publication between the panel and en banc stages.

Another practitioner member had a mild negative reaction to the added cost but recognized that the reaction from appellate practitioners—and those who pay for their services—during the public comment process will inform whether this procedure is worth the cost. In practice, she always consents to the filing of an amicus brief, even if it is unfavorable to her position. A judge member agreed that she had advised clients to consent to amicus briefs when she was in private practice.

A judge member remarked that, in her circuit, amicus briefs are often circulated before the vote on the petition for rehearing en banc, and an amicus brief is rejected if it would cause a judge to be recused. That said, her circuit does not have en banc proceedings as often as the Ninth Circuit.

Judge Bates invited Judge Bybee and Professor Hartnett to respond to the concerns expressed by some members of the Standing Committee about eliminating consent at the panel stage.

Professor Hartnett suggested that the proposal be published as-is. The proposal may be changed after the comment period to treat the panel and en banc stages differently, but the current structure of the rule was not amenable to making that change during this meeting. From a process perspective, he also explained that, if there is a substantial concern about the burden that a motion requirement will impose, that will come out during the comment period with the proposal in its current form. But, if the proposal were revised (for example, to retain the option of filings on consent), the Advisory Committee could miss out on that feedback. Judge Bybee added that he does not expect judges to comment on this proposal, and that, by publishing the version of the proposal that accommodates some judges' concerns about the en banc process, the rulemakers can elicit comments from the bar.

A judge member expressed skepticism about publishing the proposal with the motion requirement, considering that the appellate judges on the Standing Committee had expressed opposition. But, if the motion requirement were to remain, it would be practically useful for the judge who is considering the motion to have those disclosures in the motion itself, not only the brief.

Judge Bybee's initial reaction was to suspect that recusal issues would be identified by the parties in the motion and that the disclosures would inform the judge about how to weigh the brief. It was also noted that this proposal does not change the current rule with respect to disclosures being contained in the briefs, not motions. The judge member responded that who was contributing money could be relevant on whether to grant leave to file. Also, it has not been an issue because there is not currently a mandatory motion process.

To address disclosures in motions, a practitioner member suggested inserting "motion and" on page 198, line 113, so that the opening of new Rule 29(b) would read "An amicus motion and brief must disclose." Another practitioner member did not think that would capture everything and suggested adding a new Rule 29(a)(3)(C), on the bottom of page 193, to add the disclosures required by Rule 29(b), (c), and (e) to the information accompanying a motion for leave to file. Professor Struve added that Rule 29(a)(4)(A) also requires corporate amici to include a disclosure statement like that required of parties by Rule 26.1. With Judge Bybee's consent, the new subparagraph was added to require those disclosures in a motion for leave.

Regarding the motion requirement issue, a judge member asked about bracketing parts of the proposed rule. A practitioner member suggested bracketing "~~the consent of the parties or~~" on page 193, lines 15–16 and "~~or if the brief states that all parties have consented to its filing~~" on lines 18–19. Judge Bybee agreed with the concept of bracketing that language to call attention to the issue, although he and Professor Hartnett noted that, if that language were restored, it would require some changes later in the rule.

Following further discussion among chairs and reporters during a break, rather than bracketing the language, Professor Hartnett proposed adding language to the report included with the Preliminary Draft, specifically inviting public comment on whether motions should always be required for amicus briefs at the panel stage and whether rehearing should be treated differently. A judge member pointed out that there is language in the proposed committee note, defending the elimination of the consent provision, that would be inconsistent with this solicitation, and Judge Bates suggested that the new report language could refer to the committee note as well as at the rule text. The Standing Committee accepted this proposal.

A few minor changes were made to the proposed rule text and committee note.

First, a judge member questioned why the amicus brief was referred to as being of "considerable help" to the court, on page 192, line 10, whereas it was simply of "help" elsewhere. A practitioner member agreed with omitting "considerable," commenting that no one would want to argue in motions about whether something is of "considerable help" and that it could be an unintentional burden. Professor Hartnett indicated that the phrase was borrowed from the Supreme Court rule, and Judge Bybee indicated no objection to removing "considerable."

Second, Judge Bates asked what is being captured in the phrase "a party, its counsel, or any combination of parties or their counsel" and whether the "or" should be "and." Professor Hartnett indicated they were trying to capture a group of parties, a group of counsel, or a group that includes some counsel and some parties. Professor Struve offered "a party, its counsel, or any combination of parties, their counsel, or both." A practitioner member observed that this provision will cause anxiety, and it is better to be specific even if a little clunky. After further discussion and

with the style consultants' and Judge Bybee's acquiescence, the Standing Committee approved Professor Struve's suggested language.

Judge Bates also asked whether it was necessary to include the clause "but must disclose the date when the amicus was created" in Rule 29(e) when it is also required in Rule 29(a)(4)(E). Judge Bybee indicated the Advisory Committee felt that the repetition was warranted because it is closing a loophole. However, for consistency, the word "when" was removed from the clause in Rule 29(e).

Conforming changes and minor corrections to citations were also made to the proposed committee note. In addition, on page 206, the parentheses around "(or pledged to contribute)" and "(or pledges)" were removed because, as a judge member noted, pledges to contribute are as relevant as actual contributions.

Several issues were also discussed that did not result in changes to the proposal.

Judge Bates asked about the scope of the term "counsel" regarding the obligations placed on parties or their counsel. Professor Hartnett noted that it was not discussed because it is in the current rule, and no one has raised any concerns about it. Judge Bates asked the practitioner members if they had any concerns, and none were offered.

With respect to the disclosure period in Rule 29(b)(4) for "the prior fiscal year," a judge member asked why the period is not the prior or current fiscal year. Professor Hartnett responded that this provision was a compromise when the Advisory Committee was considering whether to use the calendar year or the 12 months prior to filing the brief. This compromise might leave open some strange situations in which there is a dramatic change in an amicus's revenue, but the provision was designed to make administration of the disclosure requirement as simple as possible. Professor Struve added that the contribution or pledge is captured in the numerator, that is the 12 months before the brief is filed, and that the denominator is set by the prior fiscal year. Plus, the total revenue of the current fiscal year may not be knowable.

A judge member commented that some amicus briefs are filed, not to bring anything new to the court's attention, but to notify the court of their support for a position on a policy issue. He added that it was not apparent to him what additional, useful information will be uncovered by this proposal that is not disclosed under the current rule or that is not obvious from the brief. Judge Bybee responded that the Advisory Committee has been weighing that foundational question, and there were some judges who felt very strongly about having this information. Professor Hartnett added that this is a disclosure requirement, not a filing requirement, and that disclosure also serves to inform the public about who is trying to influence the judiciary.

Finally, a judge member asked if there is urgency to publishing this rule now, given the changes made during the meeting. Professor Hartnett responded that the majority of the changes were stylistic and that the most significant change was to require information provided in the brief to also be provided in the motion. No changes were made to address the most serious concerns about the proposed requirement for a motion for leave. Instead, they will flag that issue in the report. Moreover, the Advisory Committee has already started receiving preemptive comments that have been docketed as rules suggestions, and there is a strong sense from the Advisory

Committee that it is time to get formal feedback after a very long time considering this issue. Judge Bates agreed that a substantial delay in publication is not warranted given the thoroughness of the examination that has taken place.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 29 for public comment.**

Publication of Proposed Amendments to Rule 32 (Form of Briefs, Appendices, and Other Papers); Appendix of Length Limits. Judge Bybee reported that the proposed amendment to Rule 29 required conforming changes to Rule 32 and the appendix on length limits. The text of the proposed amendments appears on page 210 of the agenda book.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendments to Rule 32 and the appendix of length limits for public comment.**

Information Item

Intervention on appeal. Judge Bybee reported that the Advisory Committee continues to consider intervention on appeal, but nothing new is being proposed right now.

Judge Bates thanked Judge Bybee and Professor Hartnett for their report and thanked Judge Bybee, in particular, for his fantastic and concerted work over the years.

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 April 11, 2024, in Denver, Colorado. The Advisory Committee presented action items for final approval of two rules and seven official forms, as well as publication of several proposed rule amendments. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 237.

Action Items

Final Approval of Proposed Amendments to Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case) and Proposed New Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R. Judge Connelly reported on this item. The text of the proposed amendments begins on page 253 of the agenda book, and the written report begins on page 239.

Rule 3002.1 applies in Chapter 13 cases and addresses notices from mortgage companies concerning postpetition mortgage payments. The proposed amendment to Rule 3002.1 provides for status updates during the case and enhances the notice at the end of the case. The six accompanying forms—which consist of two motions, one notice, and responses to them—provide a uniform mechanism to do this.

The Standing Committee approved the proposal for publication last year, and the Advisory Committee received a number of helpful, constructive comments. The comments guided the Advisory Committee in making clarifying changes in the proposed rule. The Advisory Committee unanimously approved Rule 3002.1 and the accompanying forms at its spring meeting.

Following a brief style discussion, Judge Bates called for a motion on a vote for final approval for the proposed amendment to Rule 3002.1 and the adoption of the six new official forms as presented in the agenda book. Mr. Byron and Professor Gibson clarified that the effective date for the official forms related to Rule 3002.1, if approved, would be the same as the proposed changes to the rule, December 1, 2025.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendments to Rule 3002.1 and new Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R.**

Final Approval of Proposed Amendment to Rule 8006(g) (Certifying a Direct Appeal to a Court of Appeals). Judge Connelly reported on this item. The text of the proposed amendment begins on page 291 of the agenda book, and the written report begins on page 241.

The proposed amendment to Rule 8006(g) clarifies that any party to the appeal may request that the court of appeals authorize a direct appeal. The Advisory Committee received only one comment during publication, and it was supportive. This change is related to, and consistent with, Appellate Rule 6(c)(2)(A), which was given final approval during the Appellate Rules Committee's report.

Professor Hartnett noted that this small amendment to Rule 8006 drove virtually all of the revisions to Appellate Rule 6, and he thanked the Bankruptcy Rules Committee for working closely with the Appellate Rules Committee.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 8006(g).**

Final Approval of Proposed Amendment to Official Form 410 (Proof of Claim). Judge Connelly reported on this item. The text of the proposed amendment begins on page 327 of the agenda book, and the written report begins on page 245.

The uniform claim identifier (UCI) is a bankruptcy identifier that was developed to facilitate electronic disbursements in Chapter 13 cases to certain large creditors. Official Form 410, which is the proof of claim form used by any creditor making a claim for payment in a bankruptcy case, currently provides for the creditor's disclosure of the UCI "for electronic payments in Chapter 13 (if you use one)." The proposed amendment would eliminate that restriction, thereby expanding the disclosure of the UCI to any chapter and for nonelectronic disbursements, as well as electronic disbursements. Following publication, the Advisory Committee received one favorable comment.

Mr. Byron and Professor Gibson clarified that, unlike the official forms related to Rule 3002.1, the amendment to Official Form 410, if approved, would take effect in the normal course on December 1, 2024.

Professor Coquillette asked if this identifier could cause any privacy issues. Judge Connelly responded that use of a UCI may enhance debtor privacy, as it does not require a full account number or Social Security number. It is a unique bankruptcy identifier for creditors that use it to identify the creditor, court, and debtor's claim.

An academic member asked what would happen if someone wanted to use Official Form 410 to file a proof of claim on behalf of someone else, such as a would-be class representative filing on behalf of members of a proposed class under Rule 7023. Judge Connelly commented that this form cannot address all circumstances but that this change would not be affected by who is filing the claim. She added that only parties who represent large institutions would be likely to use an accounting system that would involve a UCI. There are also safeguards in place to address false or duplicative claims.

One additional technical change was made to Official Form 410 to conform it to the restyled Bankruptcy Rules scheduled to go into effect on December 1, 2024: The reference to Bankruptcy Rule 5005(a)(2) in Part 3 of the form was changed to Rule 5005(a)(3).

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Official Form 410.**

Publication of Proposed Amendment to Rule 3018 (Chapter 9 or 11 – Accepting or Rejecting a Plan). Judge Connelly reported on this item. The text of the proposed amendment begins on page 334 of the agenda book, and the written report begins on page 245.

The Standing Committee approved this proposal for publication at its January 2024 meeting. After that meeting, Professor Struve and the Standing Committee's liaison to the Bankruptcy Rules Committee, among others, raised some concerns about the language that had been approved. The Advisory Committee considered those comments and approved some clarifying revisions at its spring meeting. It now seeks approval to publish this revised version for public comment.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 3018 for public comment.**

Publication of Proposed Amendments to Rules 9014 (Contested Matters), 9017 (Evidence), and new Bankruptcy Rule 7043 (Taking Testimony). Judge Connelly reported on this item. The text of the proposed amendments begins on page 341 of the agenda book, and the written report begins on page 247.

This proposal relates to the means of taking testimony in bankruptcy cases, and, if approved, would establish different standards for allowing remote testimony in bankruptcy adversary proceedings (separate lawsuits within the bankruptcy case analogous to a civil action in district court) and contested matters (a motion-based procedure that can usually be resolved

expeditiously by means of a hearing).[1] Under current Rule 9017, Civil Rule 43 applies to "cases under the Code." Civil Rule 43(a), in turn, provides that, at trial, a court may permit testimony by remote means if three criteria are present: (1) good cause, (2) appropriate safeguards, and (3) compelling circumstances. Many bankruptcy courts read Bankruptcy Rules 9014(d) and 9017 together to require that the three-part standard set forth in Civil Rule 43(a) must be met before allowing any remote testimony in a bankruptcy case, whether it is in a contested matter or an adversary proceeding.

This proposal would remove the reference to Civil Rule 43 in Rule 9017, but it would retain Rule 43(a)'s three-part standard for allowing remote testimony in adversary proceedings via a new Rule 7043. A separate amendment would be made to Rule 9014(d) that would incorporate most of the language in Civil Rule 43, but without the requirement to show "compelling circumstances" before a court could allow remote testimony in a contested matter. Good cause—now shortened by restyling to "cause"—and appropriate safeguards would continue to be required for a witness to testify remotely in contested matters.

When this proposal came before Advisory Committee during its fall 2023 meeting, it was pointed out that the Judicial Conference was considering amendments to the broadcast policy based on a recommendation—which has since been adopted—from the Committee on Court Administration and Case Management (CACM). The proposal was delayed so that the Advisory Committee could confer with the CACM Committee. A CACM subcommittee, with input from the Committee on the Administration of the Bankruptcy System, considered this bankruptcy rules proposal and indicated that the proposed amendments and their publication would not violate the new policy or interfere with the CACM Committee's ongoing work.

At the Advisory Committee's spring meeting, there was consensus to seek public comment on the proposal. There was also a question raised about whether this proposal represented a first step with the goal of allowing remote testimony more broadly in bankruptcy cases. Judge Connelly explained that it was not—and is not—the intent of the proposal to herald a broader change, although the Advisory Committee recognizes that adoption of this proposal might lead to future suggestions to adopt the less stringent standard for remote testimony beyond contested matters.

Judge Bates stated that remote proceedings and remote testimony are important issues across the judiciary, not only in the bankruptcy courts. He asked three questions. First, what is the current practice, and is remote testimony being taken already? Second, what are the expected effects of the proposed amendments? Third, what does the standard "for cause and with appropriate safeguards" mean?

As to the first question, Judge Connelly explained that she did not have hard data. Based on conversations with colleagues, she said that remote testimony has been occurring on an ad hoc

[1] Contested matters do not require the procedural formalities used in adversary proceedings, including a complaint, answer, counterclaim, crossclaim, and third-party practice or a discovery plan. They occur frequently 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.

basis following the pandemic. Her impression was that, although not unheard-of pre-pandemic, it has become more common to allow remote testimony in contested matters in Chapter 11 cases because these cases involve parties across the country or the world and the hearings tend to be more administrative and for the purpose of gathering information. She thought that permitting remote testimony for background information in consumer cases was rare pre-pandemic but that the practice has become more common post-pandemic—although some judges have told her that they feel they can no longer take remote testimony now that the pandemic has subsided.

As to expectations concerning the proposed amendments, Judge Connelly anticipates that remote testimony will become more common in contested matters, particularly consumer matters. She noted, however, that some bankruptcy judges have expressed concern about taking remote testimony and giving increased discretion to those judges is not likely to change their practice.

Judge Connelly said that "cause and appropriate safeguards" under proposed Rule 9014(d) means what "good cause" and "appropriate safeguards" mean under Civil Rule 43, adding that under the restyled Bankruptcy Rules "good cause" is restyled to "cause." Part of the reason for the proposed change, however, was that under most of the published opinions on Civil Rule 43 courts have held that the "compelling circumstances" element in Rule 43 is almost impossible to meet. Many courts have found that distance to the courthouse and financial concerns—two big issues in bankruptcy—are not compelling circumstances that would allow for remote testimony, though they might be enough to find cause to allow remote testimony.

Judge Bates expressed some concern about the prospect that the amendments would make remote testimony more common than it is under the existing rules, and wondered if it might be expected to overtake the general rule requiring in-person testimony. Judge Connelly stated that live testimony would, of course, remain the default under the rules. A party would need to request permission to testify remotely, and a judge would need to find cause.

Professor Marcus mentioned, for context, the Civil Rule 43(a) proposal on page 527 of the agenda book. The Civil Rules Committee has referred that proposal to a subcommittee, in which Judge Kahn is participating on behalf of the Bankruptcy Rules Committee. The practitioners who have proposed the amendment to Civil Rule 43 wish to significantly expand the availability of remote testimony in proceedings under the Civil Rules. While the bankruptcy proposal does not change the standard for adversary proceedings, the Civil Rules Committee would be very interested in seeing any comments on the bankruptcy proposal.

Professor Hartnett asked how often subpoenas are required in contested matters and whether bankruptcy has the same issues as civil with respect to Civil Rule 45 distance requirements. Judge Connelly responded that subpoenas are common in adversary proceedings but less so in contested matters.

A judge member inquired if the Advisory Committee contemplated a judge making a blanket order setting remote testimony as the default for certain categories of matters. He explained that there is a new courthouse that is not yet accessible to the public for security reasons, but the bankruptcy judges were able to move in because most things are done remotely. Judge Connelly responded that the Advisory Committee did not anticipate such blanket orders. If anything, she had heard from colleagues the opposite, that is, that they would generally not approve requests to

testify remotely. There might, however, be circumstances that prevent people from being able to access the courthouse—like security, the pandemic, or weather—and being able to conduct hearings in those circumstances is valuable to the system.

Ms. Shapiro asked why the CACM Committee did not think this would interfere with its work. Mr. Byron and others explained that the CACM Committee separates the ideas of using technology for broadcasting—making the courtroom more accessible to the public—from remote participation, such as allowing witnesses to testify remotely. Because the CACM Committee is focused on broadcasting, this proposal on remote testimony in contested matters is different in kind from, and does not impede, its work. Ms. Shapiro commented that, whether intended or not, some might conflate remote testimony and remote public access because proponents of cameras in the courtroom use a similar good cause and substantial safeguards standard.

Another judge member pointed out that the committee note for Civil Rule 43 has extensive discussion of what constitutes "good cause" and says that "good cause and compelling circumstances" may be established with relative ease if all parties agree that testimony should be presented by remote transmission. She asked if there should be more detail in the bankruptcy rule's note about it. Judge Bates wondered if that supports a cross-reference in the committee note to the explanation in the committee note to Civil Rule 43 about good cause. Judge Connelly responded that a cross-reference to the Rule 43 committee note might make sense, but she explained that unlike in a two-party dispute, it would be difficult in a contested bankruptcy matter to get the consent of every affected party, which technically could include all creditors in the bankruptcy case. So, while there may be consent of all hearing participants, that might not mean the same thing as consent of all parties in a civil case in district court.

Judge Bates later observed that Civil Rule 43 has been viewed as limiting remote proceedings whereas the proposed bankruptcy rule is intended to expand access to remote proceedings. Yet, they share most of the same language, including a reference in the note to Civil Rule 43, and the only change is the removal of the language requiring compelling circumstances.

Professor Bartell responded that both rules permit remote proceedings but only under very limited circumstances. The proposed bankruptcy rule will simply permit it in slightly broader circumstances. Judge Connelly added that, under both rules, the judge still has discretion and there must be cause. Professor Bartell also noted that, in jurisdictions with a large geographic scope, in-person attendance can be a significant burden on parties, whether on the debtor or creditor side. Presumably, jurisdictions with small geographic areas will have fewer situations calling for remote testimony. Judge Bates noted that the vast area explanation also comes up in other contexts like non-random case assignment.

A judge member commented that there will always be some basis for cause—convenience or lesser expense—so, as a practical matter, dropping compelling circumstances means that this decision will be left to the judge's discretion in contested matters. Judge Connelly noted that this could be another reason to cross-reference Civil Rule 43 for the cause standard.

A practitioner member remarked that the big question is whether this is the beginning of a larger creep toward allowing remote participation in proceedings more generally, and another practitioner member wondered if this proposal should be on the same timeline as the recent

suggestion concerning Civil Rule 43. An academic member pointed out that, while coordination is generally a good idea, the Bankruptcy Rules often adapt to new technology first, and that experience in that arena can inform the other rule sets.

Judge Connelly reiterated that this proposal does not affect Civil Rule 43's application in adversary proceedings; it only affects contested matters and only by removing the need to show compelling circumstances. That is a much more limited change than what is proposed to Civil Rule 43. Delaying the bankruptcy proposal might make things more complicated.

Several committee members felt it would be helpful to add language to the committee note giving a principled reason for why contested matters are being treated differently than adversary proceedings. For example, contested matters occur with routine frequency, often require the attendance of pro se litigants, are shorter, involve more affected parties which makes consent harder to obtain, and often involve testimony where credibility is less of an issue.

Judge Bates remarked that his sense of the Standing Committee's discussion was that it is not necessary to tie the timing of this proposal to that of the proposal concerning Civil Rule 43 but that some additional explanation in the committee note would be useful.

The committee briefly discussed how to incorporate this feedback without delaying publication for another year. A practitioner member asked if this could be handled via email in the coming days, and Judge Bates commented that an email vote is only used if there is some need to resolve the matter promptly. A judge member asked if remote testimony is being permitted around the country. Judge Connelly noted that remote testimony is taking place, although it was hard to tell how often, and there is some urgency in the need to provide clarity. She offered to provide the amendment to the note very promptly. Another judge member remarked that it would be enough for him if the note captured the explanation given during the meeting and that he would like to give the Advisory Committee leadership an opportunity to provide that without derailing the process entirely. Judge Bates emphasized that this would not create a precedent, but, with no opposition from the Standing Committee, he was comfortable with handling this matter by email.

Following the meeting, Judge Connelly and Professors Gibson and Bartell prepared a revised committee note for Rule 9014 that addresses the concerns raised during the Standing Committee meeting, explaining why contested matters are different from adversary proceedings. The Advisory Committee unanimously approved the revised committee note for publication. The revised committee note was circulated to the Standing Committee, which unanimously approved it, and the revised language was included in the agenda book posted on the judiciary's public website.

By email ballot and without opposition: **The Standing Committee gave approval to publish the proposed amendments to Rules 9014 and 9017 and proposed new Rule 7043 for public comment.**

Publication of Proposed Amendments to Rules 1007 (Lists, Schedules, Statements, and Other Documents; Time to File), 5009 (Closing a Chapter 7, 12, 13, or 15 Case; Declaring Liens Satisfied), and 9006 (Computing and Extending Time; Motions). The text of the proposed amendments begins on page 331 of the agenda book, and the written report begins on page 248.

By statute, most individual debtors must complete a course on personal financial management to receive a discharge. Rule 1007 provides the deadline for filing a certificate of course completion, and Rule 9006 provides for altering timelines. The proposal is to eliminate the deadline in Rule 1007 and the cross-reference in Rule 9006. The education requirement is a prerequisite for the discharge, but there is not a particular statutory deadline. But because there is a specific deadline in Rule 1007, some courts have denied a discharge even if the debtor completed the education after the deadline. The Advisory Committee seeks to publish this proposal to address the concern that the rule is making it unnecessarily difficult for debtors to obtain a discharge.

Relatedly, Rule 5009 directs the clerk to perform certain tasks, including sending a reminder notice to debtors who have not filed a certification of completion. This proposal would add a second reminder notice creating a two-tiered system with one notice early in the case when engagement is higher, and a second notice, if the certification of course completion has not been filed, before the case is closed.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendments to Rules 1007, 5009, and 9006 for public comment.**

Information Items

In the interest of time, Judge Connelly and the reporters referred the Standing Committee to the written materials, beginning on page 250 of the agenda book, for a report on four information items. The information items pertain to suggestions to remove partially redacted social-security numbers from certain filings, suggestions to allow the use of masters in bankruptcy cases, a description of technical amendments made to certain bankruptcy forms and form instructions to reflect the restyling of the Bankruptcy Rules, and a decision not to go forward with proposed amendments to two forms.

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 April 9, 2024, in Denver, Colorado. 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 375.

Judge Rosenberg reported that, in August 2023, proposed amendments to Rules 16 and 26, dealing with privilege log issues, and a new Rule 16.1 on multidistrict litigation (MDL) proceedings were published for public comment. Three public hearings were held on these changes in October 2023, January 2024, and February 2024, presenting the views of over 80 witnesses. The public comment period ended on February 16, 2024. On April 9, the Advisory Committee voted unanimously to seek final approval from the Standing Committee for both proposals.

Action Items

Final Approval of Proposed Amendments to Rules 16(b)(3) (Pretrial Conferences; Scheduling; Management) and 26(f)(3) (Duty to Disclose; General Provisions Governing Discovery). Judge Rosenberg reported on this item. The text of the proposed rule amendments begins, respectively, on page 530 and page 550 of the agenda book, and the written report begins on page 379.

In August 2023, amendments to Rules 26(f)(3)(D) and 16(b)(3)(B)(iv), the "privilege log" rule amendments, were published for public comment, and there was a lot of feedback from the viewpoints of both discovery "producers" and "requesters." Summaries of the testimony and written comments begin on page 391 of the agenda book. The Discovery Subcommittee recommended no change to the rule text, but it shortened the committee note considerably. The shortened committee note omitted observations about burdens, avoided language favoring either side, and took no position on controversial issues raised during the public comment process. As described in the Advisory Committee's written report, the subcommittee considered several other issues but ultimately did not recommend other changes to the proposal.

Professor Marcus emphasized that the Advisory Committee preferred an adaptable approach. Shortening the committee note was intended to allow judges to consider arguments from both sides without the note giving support to either.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendments to Rules 26(f)(3)(D) and 16(b)(3)(B)(iv).**

Final Approval of Proposed New Rule 16.1 (Multidistrict Litigation). Judge Rosenberg reported on this item. The text of the proposed new rule begins on page 533 of the agenda book, and the written report begins on page 414.

Judge Rosenberg acknowledged the long, hard work of many people on Rule 16.1, including contributions from Judge Proctor, the current chair of the MDL Subcommittee, and Judge Dow, the prior Chair of the MDL Subcommittee and the Advisory Committee. She also recognized the work of Judge Bates, the Advisory Committee members and reporters, the stylists, and the many organizations and individuals who have offered their feedback during this seven-year process.

The Advisory Committee heard from over 80 witnesses and received over 100 written comments, representing a diverse set of views and perspectives. The MDL transferee judges expressed strong, unanimous support for the proposed Rule 16.1 at the transferee judges conferences in October 2022 and 2023. In addition, the two judges who have been assigned perhaps the most MDLs and the largest MDL wrote letters in support of the version approved for public comment. The MDL Subcommittee and the full Advisory Committee weighed this feedback carefully.

As detailed in the written report, since publication, the proposed rule has been restructured to address both style and substantive feedback. The revised rule now has two lists of prompts to consider, differentiating topics calling for the parties' "initial" views, those topics where court action may be premature before leadership counsel is appointed, if that is to occur, from those

topics that frequently call for early action by the court. Additionally, the revised proposal omits a provision concerning the appointment of coordinating counsel, which generated negative feedback. Nothing in the revised rule precludes a judge from appointing coordinating or liaison counsel, but the negative public reaction to that provision resulted in its removal from the rule. The rule also highlights the need to decide early whether, and if so how, to appoint leadership counsel. The revised rule also reverses the default such that parties must address the matters listed in the rule unless the court directs otherwise.

The Advisory Committee concluded that republication was not required in light of these changes. Under the rules committees' governing procedures, republication is appropriate when an advisory committee makes substantial changes to a rule after publication unless it determines that republication would not be necessary to achieve adequate public comment and would not assist the work of the rules committees. The Advisory Committee concluded that the post-publication changes to proposed Rule 16.1 did not rise to the level of substantial changes. Moreover, the changes were discussed regularly throughout the hearings and rulemaking process, and the changes were made in light of the comments the Advisory Committee received.

Professor Marcus emphasized that the public comment period really works and that the rule proposal today is quite similar to the published version albeit rearranged after careful reconsideration. The support of the transferee judges is significant, and the alternative to something like this rule is to leave transferee judges with no indication of the parties' views going into the initial management conference. The Advisory Committee worked for seven years on this proposal, and the original MDL Subcommittee was appointed by Judge Bates when he was chair of the Advisory Committee.

Professor Bradt remarked that the process and outreach to practitioners, academics, and judges had been extraordinary. Although this rule may not include everything that any particular group would have wanted, it achieved consensus.

Professor Cooper added that this rule is discretionary, not a mandate, and is a terrific guide.

Judge Bates congratulated the Advisory Committee's current leadership, members, and predecessors for an outstanding effort in preparing this rule. It is a modest rule considering the initial proposals.

Judge Rosenberg explained that, shortly before the meeting, a judge member of the Standing Committee had suggested clarifying the term "judicial assistance" in the committee note regarding Rule 16.1(b)(3)(E). In response, Judge Rosenberg proposed the following change to the paragraph beginning on page 547, line 386:

> **Rule 16.1(b)(3)(E).** Whether or not the court has appointed leadership counsel, the court may consider measures to facilitate the resolution of some or all actions before the court ~~it may be that judicial assistance could facilitate the resolution of some or all actions before the transferee court. Ultimately, the question of whether parties reach a settlement is just that – a decision to be made by the parties. But the court may assist the parties in efforts at resolution.~~ In MDL proceedings, in addition to mediation and other dispute resolution alternatives, focused discovery orders, timely adjudication of principal legal issues,

> selection of representative bellwether trials, and coordination with state courts may facilitate resolution. Ultimately, the question of whether parties reach a settlement is just that – a decision to be made by the parties. But the court may assist the parties in efforts at resolution.

Judge Bates pointed out that the paragraph begins with "[w]hether or not the court has appointed leadership counsel" yet this provision is contained in a list that must wait for appointment of leadership counsel. Professor Marcus stated that Judge Bates identified a drafting challenge in that the question of leadership counsel informs a variety of other issues. A judge member suggested striking that introductory phrase, which Judge Rosenberg accepted. This change to the committee note—including the omission of "Whether or not the court has appointed leadership counsel"—was incorporated into the Rule 16.1 proposal.

With respect to proposed Rule 16.1(b)(2)(A)(iv), Judge Bates suggested adding "facilitating" before "resolution." That term reflects the language in proposed Rule 16.1(b)(3)(E) and the language in the committee note explaining that one purpose of item (iv) "is to facilitate resolution of claims." Judge Bates also suggested deleting "some of" in the committee note on page 539, line 140, because this is the only reason given for all of the items. With Judge Rosenberg's agreement and the input from the style consultants, "facilitating" was added to Rule 16.1(b)(2)(A)(iv), and the language in the committee note for Rule 16.1(b)(2) was changed to "court action on a matter ~~some of the matters~~ identified in Rule 16.1(b)(3)."

Judge Bates also commented that whether direct filings will be permitted is a threshold question for the transferee court, but the language in proposed Rule 16.1(b)(2)(D) ("how to manage the direct filing of new actions in the MDL proceedings") seems to presume that there would be direct filings. Judge Rosenberg explained that the current language served to notify the court that there will likely be actions filed directly in the transferee court in addition to those transferred as tagalongs by the Judicial Panel on Multidistrict Litigation (JPML). The use of "manage" in the rule is also intended to encourage parties to think about issues like choice of law and where a directly filed case would be remanded if less than the entire case is resolved in the MDL. Professor Bradt added that there will inevitably be actions filed directly in the transferee court even if there is no direct filing stipulation to waive venue and personal jurisdiction objections. It is the plaintiff's decision where to file in the first instance and the defendant's decision whether to challenge that decision by a Rule 12(b) motion. The current language avoids weighing in on whether a direct filing order pursuant to a defendant's stipulation is necessary, and he worried that it would create confusion if the rule were changed to suggest that the plaintiff could not file first in the MDL forum. Judge Bates said that he would defer to the Advisory Committee's judgment on the direct filing language.

A practitioner member pointed out that the transferee court may be a natural jurisdiction for trial purposes, so there will be direct filings. There could even be direct filings in MDLs involving class actions; she recalled one MDL in which over 400 class actions were filed. MDLs are inherently trans-substantive, and she was impressed by the balance that the Advisory Committee struck to give flexibility. She suggested removing "(g)" from "Rule 23(g)" on page 543, line 256, in response to a concern that she heard from antitrust and securities practitioners. They were concerned that the case management provisions in Rule 16 and 23 might be abrogated by Rule 16.1. Without objection, that change was made to the committee note.

Another practitioner member asked about the interplay of proposed Rule 16.1(b)(2)(D) and (E) and how to manage plaintiffs who file lawsuits outside the transferee court. Professor Marcus noted that such a case when filed in another federal district court is a tag-along, and it will be transferred to the transferee court unless the JPML chooses not to do so. Professor Bradt remarked that how to deal with tag-along actions is fairly regularized. The rule deals with direct filings because there is a lot of confusion that does not apply to tag-alongs. Another practitioner member added that the JPML has a set of detailed rules regarding tag-alongs, which is likely why it has not been brought up in this rule. Whether to transfer the tag-along case to the transferee district is up to the JPML, not the transferee court; so the issues that would actually come before the transferee court (rather than the JPML) are those in the categories described by (D) and (E).

Another practitioner member worried about the term "authority" in proposed Rule 16.1(b)(2)(A)(iv), referring to leadership counsel's "responsibilities and authority in conducting pretrial activities," and what it might suggest about leadership counsel's ability to bind other attorneys. Striking "and authority" would make it more consistent with the committee note, which speaks of duties and responsibilities, not authority. Professor Marcus responded that to say only "responsibilities" would leave out an important part of the appointment of leadership counsel; as proposed Rule 16.1(b)(2)(A)(vi) recognizes, a corollary to appointing leadership counsel often involves setting limits on activity by nonleadership counsel. Judge Rosenberg noted that one of her prior orders of appointment, which was based on a survey of other judges' orders, defined the "authority, duties, and responsibility" of plaintiffs' leadership.

After a review of all of the changes, Judge Bates called for a motion to approve proposed new Rule 16.1.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed new Rule 16.1.**

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 523 of the agenda book.

Rule 41 Subcommittee. The Rule 41 Subcommittee was formed in October 2022 in response to submissions identifying a circuit split on whether Rule 41 permits a unilateral, voluntary dismissal of something less than an entire action. The subcommittee has concluded that the rule should be revised to explicitly increase its flexibility so that parties can dismiss one or more claims from the case. That is consistent with the prevailing district court practice and the policy goal of narrowing the issues in the case. The subcommittee plans to put forth proposed text at the fall Advisory Committee meeting, changing "an action" to "a claim."

Discovery Subcommittee. The Discovery Subcommittee continues to work on two items—the manner of service for subpoenas, and filing under seal—that were reported on at the January Standing Committee meeting.

Rule 7.1 Subcommittee. The Rule 7.1 Subcommittee also hopes to put forward a proposal at the fall Advisory Committee meeting. The subcommittee has been considering whether to

expand the disclosures required of non-governmental organizations. Rule 7.1 disclosures inform judges when making recusal decisions under 28 U.S.C. § 455(b)(4). The Committee on Codes of Conduct recently issued guidance providing that judges should recuse themselves when they have a financial interest in a parent company that controls a party to a case before them. Professor Bradt added that the subcommittee is working on a rule that makes it as easy as possible for judges to implement this guidance.

Cross-Border Discovery Subcommittee. Cross-border discovery is a big issue, and the subcommittee is in an early, information-gathering stage. The subcommittee decided to focus first on handling discovery for use in litigation in the United States and the application of the Hague Convention.

Rule 43/45 Subcommittee. A number of plaintiff-side attorneys have suggested resolving a split in courts about the interaction of (i) Rule 45(c)'s limitations on where a witness must appear under subpoena and (ii) the possibility of remote testimony under Rule 43(a) from an unwilling witness whose presence at a distant place of testimony can be obtained only by subpoena. A new subcommittee has been created to look at this issue.

Professor Marcus noted that there are two subcommittees looking at Rule 45. The Rule 45 aspect of this remote testimony question appears easier to solve compared to the Rule 43 part. It is possible that the Advisory Committee will consider the Rule 45 issues together in a single proposal separate from the Rule 43 remote testimony question.

Random Case Assignment. The reporters continue to research this issue and monitor the effects of new Judicial Conference guidance that encourages random assignment of cases seeking nationwide or statewide injunctive relief. Professor Bradt added that he is researching Rules Enabling Act authority for a rule and what a rule might look like. The subcommittee will focus on monitoring the uptake of the new guidance over the summer.

Use of the Word "Master" in the Rules. The American Bar Association proposed removing the word "master" from the rules, particularly Rule 53, and substituting "court-appointed neutral." The Academy of Court-Appointed Neutrals (formerly the Academy of Court-Appointed Masters) supports the proposal. The Advisory Committee would appreciate the views of the Standing Committee on whether the word "master" should be discarded in the rules and, if so, what term should replace it. The term "master" appears in at least six other rules, the Supreme Court's rules, and at least one statute. Judges also use the term in making appointments to assist in the conduct of litigation even without relying on Rule 53.

Professor Marcus sought guidance, particularly from judges. The term "master" has been used in Anglo-American jurisprudence for a very long time, but it has also been used in a very harmful way in contexts mostly unrelated to judicial proceedings. Anecdotally, from the two judges he asked, he heard opposite views about whether a change is needed.

Hearing nothing, Judge Bates noted that the Standing Committee members could reach out to Professor Marcus after the meeting and commented that the Standing Committee would look forward to the Advisory Committee's views.

Demands for Jury Trials in Removed Actions. The Advisory Committee has not yet decided how to address the verb-tense change made during the restyling of Rule 81(c)(3)(A) and the potential issues that it may be causing in removed actions.

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

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Dever presented the report of the Advisory Committee on Criminal Rules, which last met on April 18, 2024, in Washington, D.C. The Advisory Committee presented four 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 573.

Information Items

Rule 17 and pretrial subpoena authority. The Rule 17 Subcommittee, chaired by Judge Nguyen, has been considering how information is gathered from third parties in criminal cases and has determined that there is a need to clarify the rule. The subcommittee has conducted a survey and gathered information showing that there is great disparity in actual practice regarding how Rule 17 has been interpreted by courts. The subcommittee has been working to draft language for the Advisory Committee to review and possibly to road test.

Rule 53 and broadcasting criminal proceedings. The Rule 53 Subcommittee is considering a suggestion from a consortium of media groups proposing to amend Rule 53 to give courts discretion to televise trials. The Rules Law Clerk has prepared a memorandum on the history of Rule 53, and the subcommittee is now in the process of gathering information about actual practice. Judge Michael Mosman, who joined the Advisory Committee to replace Judge Conrad after he was appointed Director of the Administrative Office of the U.S. Courts, will serve as a member of the Rule 53 Subcommittee.

The subcommittee is also coordinating with the CACM Committee. As Judge Dever commented during the discussion on remote testimony in contested bankruptcy matters, the CACM Committee draws a distinction between using technology to bring witnesses into court and using technology to expand the courtroom.

Rule 49.1 and references to minors by pseudonyms. The Advisory Committee recently received a suggestion from the Department of Justice to amend Rule 49.1 to protect the privacy of minors by using pseudonyms, instead of initials as is currently required. Judge Dever announced a new Privacy Subcommittee, headed by Judge Harvey, to consider this proposal as well as other issues under Rule 49.1, including the redaction of social-security numbers.

Ambiguities and gaps in Rule 40. Magistrate Judge Bolitho submitted a proposal to clarify Rule 40 as it applies when a defendant from outside the district is arrested for violating conditions of release. The Magistrate Judges Advisory Group recently submitted a comprehensive request concerning additional amendments to Rule 40 that would address several issues of concern, including the situation raised by Judge Bolitho. Judge Dever anticipates creating a new subcommittee.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Schiltz and Professor Capra presented the report of the Advisory Committee on Evidence Rules, which last met on April 19, 2024, in Washington, D.C. The Advisory Committee presented one action item and three information items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 96.

Action Item

Publication of Proposed Amendment to Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay). Judge Schiltz reported on this item. The text of the proposed amendment appears on page 102 of the agenda book, and the written report begins on page 97.

This proposal is related to a witness's prior inconsistent statements, which are introduced early and often at trials. In theory, under the current Rule, prior inconsistent statements can be used only to assess the credibility of a witness—not for the substance of the statement—unless the statement was made under oath at a formal proceeding. As a practical matter, prior inconsistent statements are likely being used by jurors for substantive purposes, and the proposed amendment would allow admissible prior inconsistent statements to be used for both credibility and substance.

Aside from prosecutors using grand jury testimony, prior inconsistent statements are rarely made under oath at a formal proceeding. Judges give instructions like the following: "You heard Joe testify that the light was red. You also heard that, a few months ago, Joe told his sister that the light was green. You may use Joe's statement to his sister in deciding whether Joe was being truthful in saying the light was red, but you may not use Joe's statement to his sister in deciding whether the light was red." But many trial judges believe jurors do not understand or follow such instructions, and attorneys often do not ask for these instructions.

As a matter of hearsay law, a prior inconsistent statement cannot be admitted unless the person who made it is on the stand, under oath, and subject to cross-examination; this proposal would not change that standard and would not result in jurors hearing anything new. Rather, the proposal would bring the rule into alignment with practice and spare judges from giving jury instructions that are likely not being followed. It would further bring the treatment of prior *inconsistent* statements into alignment with prior *consistent* statements, which may be considered for both purposes (substance and credibility). This would restore the rule to the version proposed by the original Advisory Committee before Congress, in enacting the Evidence Rules, changed Rule 801's approach to prior inconsistent statements. Additionally, about half of the states have more lenient treatment than the federal rules, and around 15 states allow the use of prior inconsistent statements for any purpose.

One of the practitioner members commented that the proposal was elegant, but the deletion of the limiting language in Rule 801(d)(1)(A) would raise questions about new types of evidence coming in as substantive evidence. For example, in a criminal case, witnesses are commonly confronted with prior statements memorialized in federal agent notes such as the FBI form FD-302. But those federal agent notes are not a transcript and would not themselves be admissible. He wondered whether the rule would encompass prior statements that cannot be easily verified; what if the witness states that they cannot recall what they previously told the agent? He suggested

adding "is otherwise admissible under these rules" in the rule or clarifying it in the committee note. Another practitioner member suggested that the committee note could provide a more fulsome cross-reference to the other rules to expressly clarify that the statement would need to be otherwise admissible.

Professor Capra explained that proving a prior inconsistent statement is done with extrinsic evidence under Rule 613(b), and the statement will be admitted as substantive proof only if there is admissible evidence. Judge Schiltz noted that this is not an affirmative rule of admissibility. The proposal simply lifts the hearsay bar as is already done with prior consistent statements. Judge Schiltz and Professor Capra pointed out that judges could still monitor the use of statements through Rule 403, and authenticity rules also still apply. Nevertheless, they agreed that a new paragraph could be added to the committee note to clarify this issue, and there was some discussion about whether to make that change now or after publication.

A judge member asked why we would only make this clarification (referring to otherwise admissible evidence) as to inconsistent statements and not to consistent statements. Professor Capra agreed that was a good point. The rules do not say that the evidence must be admissible every time there is an exception to the hearsay rule. The judge member asked if there had been issues with the change to consistent statements, and Professor Capra indicated there had not. The judge member stated that she would not limit any change to inconsistent statements, and Professor Capra worried about negative inferences for every other hearsay exception. Another judge member echoed this concern.

The first practitioner member commented that it would be sufficient to address this in the committee note. He reiterated that the note's statement that "[t]he rule is one of admissibility, not sufficiency" implies something that the Advisory Committee did not mean to imply. Professor Capra proposed removing that sentence from the note. The previous judge member indicated that would be acceptable, and that sentence in the note was deleted without opposition.

The practitioner member also suggested deleting the word "timing" on line 79 because Rule 613(b) is not just a matter of timing, and Professor Capra agreed. A conforming change was made in line 79 to make "requirement" plural. For consistency, Judge Bates also suggested adding "prior" before "inconsistent statement" in line 31, which Judge Schiltz agreed was a good idea.

Another judge member thought there was a convincing argument that this proposal will not make a practical difference in most cases. However, this change would make a substantive difference in cases where the out-of-court statement is the only piece of evidence to fill a hole in the sufficiency of the evidence.

Judge Schiltz agreed that it is theoretically possible for a case to be decided on only a prior inconsistent statement, but he found it difficult to produce real-life examples of that happening. Professor Capra added that, as state practice shows, this rule change will make a difference in some cases. He also noted that, when Congress was initially considering Rule 801, a senator objected to the third subparagraph of Rule 801(d)(1) on the ground that a prior identification, not made under oath, should not serve as the sole basis of conviction. Congress, however, revised its thinking because, like an excited utterance, this is a form of hearsay exception, and hearsay exceptions can

be sufficient evidence. The Evidence Rules address admissibility, not sufficiency, of evidence; concerns about sufficiency of evidence are beyond the purview of those rules.

Another judge member offered a hypothetical where five witnesses said that the light was green, and one witness gave an out-of-court hearsay statement that the light was red but recanted at trial, saying he was mistaken and could not recall. That case would now go to a jury. Judge Schiltz agreed that the case would go to the jury, but it is unlikely that jurors would credit the inconsistent statement over the five people who testified. There are already convictions based on out-of-court statements made by people who do not testify in court, such as excited utterances by victims in domestic violence cases. Under this proposal, the person who made the prior inconsistent statement would need to be in court, under oath, and subject to cross-examination.

Ms. Shapiro commented that Judge Schiltz made a compelling argument. As she had expressed to the Advisory Committee, the prosecutor community generally opposed this proposal. First, prior inconsistent statements are definitionally hearsay and unreliable. Such statements contradict what is being said on the stand. Second, prosecutors are concerned about collateral litigation around proving statements that the witness denies ever making. Finally, limiting instructions are common, and we presume juries understand and apply these instructions. Amending this rule because jurors do not understand limiting instructions could lead to many other rule changes. On the other hand, there were some prosecutors who came from states where this proposal was the rule, and they did not have issues. The Department's civil litigators were agnostic.

Professor Capra responded that the prior inconsistent statement may or may not be credible, but the reliability is guaranteed by the person being on the stand and subject to cross-examination. With respect to collateral litigation about extrinsic evidence, that already happens when a party seeks to admit the statement for impeachment purposes, and this is no different from proving any other fact. Finally, this proposal is not an attack on all limiting instructions. This limiting instruction is particularly hard to understand, which was also true in 2014 with respect to amendments addressing prior consistent statements.

Judge Bates asked Ms. Shapiro if prosecutors had a position on the agent notes issue that was raised earlier. Ms. Shapiro explained that federal agent interview notes, such as FBI FD-302 forms, are turned over during discovery as statements of the witness, but the notes are actually the work product of the agent. When an agent is testifying and there is something potentially inconsistent in the interview notes, there can be fights over whether the statement belongs to the witness or the agent. Judge Schiltz commented that these issues exist today, and this proposal does not create new problems in this respect.

Judge Schiltz and Professor Capra also noted that prosecutors coming from state courts that allow the use of prior inconsistent statements as substantive evidence say that the rule is very valuable in certain kinds of cases, like domestic violence and gang cases, where witnesses can be intimidated before the trial. And a panel of state prosecutors in California indicated several years ago that they could not bring many cases without this rule. There is also value to the defense side, and the Advisory Committee's public defender member voted in favor of publishing this rule.

Judge Bates noted that this proposal is only for publication and that further changes can be made later. He asked Judge Schiltz to clarify what the committee was voting on. Judge Schiltz

explained that the rule text is as proposed on pages 102–03 of the agenda book. The changes to the committee note are as follows: on page 103, line 31, "prior" was inserted before "inconsistent;" on page 105, line 77, the last sentence was deleted; on line 79, "timing" was deleted, and "requirement" became "requirements."

Upon motion by a member, seconded by another, and by show of hands: **The Standing Committee, with one abstention,[2] gave approval to publish the proposed amendment to Rule 801 for public comment.**

Information Items

Professor Capra reported on three topics being considered by the Advisory Committee. The written report begins on page 98 of the agenda book.

Artificial intelligence and machine-generated information. The Advisory Committee has convened two panels of experts to educate the committee about artificial intelligence and how it affects admissibility. The Advisory Committee is focusing on two issues: (1) reliability issues concerning machine learning and algorithms and (2) authenticity issues related to deepfake audio and visual presentations.

Regarding machine learning, the Advisory Committee is looking at Article VII of the Evidence Rules. Although the issue is still in its early stages: one possibility is a new Rule 707 treating machine outputs that are used like human experts the same as human expert testimony by applying *Daubert* and Rule 702 standards.

Regarding deepfakes, the problem is how to authenticate alleged fakes. The Advisory Committee is considering proposals to create a structure for resolving these disputes but is also considering waiting and monitoring the caselaw. A New York State Bar Association commission decided to wait to see what courts are doing. In 2010, with respect to social media and allegations of hacking, the Advisory Committee determined that the authenticity rules were sufficiently flexible, and courts handled it well. The question is whether deepfakes are a difference in kind as opposed to degree. Timing also presents a dilemma. If the rule is too specific, it may no longer be relevant in three years. But a rule that is too general may not be helpful.

Rule 609 (Impeachment by Evidence of a Criminal Conviction). Under Rule 609(a)(2), convictions that involve dishonesty or false statement are automatically admissible for impeachment. Rule 609(a)(1) allows a party to impeach with prior convictions that do not involve dishonesty or false statement. For non-falsity convictions, there are two balancing tests. In deference to a defendant's right to testify, Congress provided a more protective rule for defendants: the conviction is admissible only if the probative value outweighs its prejudicial effect. For all other witnesses, the admissibility is governed by Rule 403.

One professor urged the Advisory Committee to abrogate the entire rule because, as many academics argue, the rule does not make sense and is unfair. Many problematic convictions under

[2] Ms. Shapiro indicated that the DOJ would abstain for now and await publication.

Rule 609(a)(1) are being admitted against criminal defendants, particularly those similar to the crime being charged. Professor Capra explained that some Advisory Committee members felt that the problem was not with the rule but its application. On the other hand, if courts are misapplying the rule, then it may be a rule problem.

The Advisory Committee first considered eliminating Rule 609(a)(1) entirely and leaving only Rule 609(a)(2) for convictions that involve dishonesty or false statement. Some members felt that went too far so the Advisory Committee is focusing on a proposal to make the balancing test more protective for criminal defendants under Rule 609(a)(1)—the probative value must *substantially* outweigh the prejudice.

Some Advisory Committee members were also skeptical about whether this proposal would make a difference in how likely criminal defendants are to testify. Trying to determine whether, or to what extent, this rule impacts a defendant's decision to testify is difficult, and the FJC and Sentencing Commission will hopefully be able to help with data.

Evidence of prior false accusations made by complainants in criminal cases. The final information item related to false complaints, most often in sexual assault cases. This proposal came from a law professor who explained that courts are not using a consistent set of rules to handle the admissibility of false complaints of sexual assault. They might use Rule 404(b), Rule 608, or Rule 412. She proposed a new Rule 416 specifically addressing false complaints.

The proposal is in a nascent stage. Reducing confusion would be good. But states have much more experience handling false complaints of sexual assault, and the Advisory Committee resolved to first look at what states are doing. Professor Liesa Richter, Consultant to the Advisory Committee, is conducting a 50-state survey on this issue.

Judge Bates thanked Judge Schiltz and Professor Capra for the report and for Judge Schlitz's many years of excellent service.

OTHER COMMITTEE BUSINESS

The legislation tracking chart begins on page 606 of the agenda book. The Rules Law Clerk provided a legislative update, noting that the current legislative session will end shortly before the Standing Committee's next 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.

2024 Report on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002 (2024 Privacy Report). This was the last item on the meeting's agenda, and the draft 2024 Privacy Report is included in the agenda book starting on page 616. Mr. Byron asked for the

Standing Committee's approval of this draft with authorization for the Chair and Secretary to make minor changes based on feedback leading up to the Judicial Conference.

Judge Bates noted that the CACM Committee played a substantial role in preparing the 2024 Privacy Report. Mr. Byron added that the FJC also meaningfully contributed. The report describes the first phase of a study that the FJC conducted, which will assist both the CACM Committee and the Rules Committees in evaluating the adequacy of the privacy rules.

Without objection, the Standing Committee recommended that the Judicial Conference approve the 2024 Privacy Report, subject to any minor revisions approved by the Chair, and ask the AO Director to transmit it to Congress in accordance with law.

CONCLUDING REMARKS

Judge Bates thanked the Standing Committee members and other attendees. The Standing Committee will next convene on January 7, 2025, in a location to be announced.

TAB 2

Agenda E-19 (Summary)
Rules
September 2024

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

1. Approve the proposed amendments to Appellate Rules 6 and 39, as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 2-4

2. a. Approve the proposed amendments to Bankruptcy Rules 3002.1 and 8006, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law;

   b. Approve, effective December 1, 2025 and contingent on the approval of the above-noted amendments to Bankruptcy Rule 3002.1, the proposed amendments to Bankruptcy Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date; and

   c. Approve, effective December 1, 2024, the proposed amendments to Official Form 410, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date ..... pp. 7-9

3. Approve the proposed amendments to Civil Rules 16 and 26, and new Rule 16.1, as set forth in Appendix C, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 11-13

4. Approve the proposed 2024 Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002, as set forth in Appendix D, and ask the Administrative Office Director to transmit it to Congress in accordance with the law ..... pp. 16-18

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

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 4, 2024. All members participated.

Representing the advisory committees were Judge Jay S. Bybee, 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 Chief Judge Patrick J. Schiltz, Chair, and Professor Daniel J. 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; Allison A. Bruff, Bridget M. Healy, and Scott Myers, Rules Committee Staff Counsel; Zachary T. Hawari, Law Clerk to the Standing Committee; John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, Federal Judicial Center (FJC);

and Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, U.S. 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[1] process and pending legislation affecting the rules, the Standing Committee received and responded to reports from the five advisory committees. The Committee also received an update on the coordinated work among the Bankruptcy, Civil, and Criminal Rules Committees on attorney admission rules, and by those committees and the Appellate Rules Committee on electronic filing by pro se litigants and on the redaction of Social Security numbers (SSNs).

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules recommended for final approval proposed amendments to Appellate Rules 6 and 39. The Standing Committee unanimously approved the Advisory Committee's recommendations, with minor stylistic changes to each rule.

Rule 6 (Appeal in a Bankruptcy Case)

The proposed amendments to Rule 6 make changes to Rule 6(a) (dealing with appeals from judgments of a district court exercising original jurisdiction in a bankruptcy case) to clarify the time limits for post-judgment motions in bankruptcy cases and Rule 6(c) (dealing with direct appeals from bankruptcy court to the court of appeals) to clarify the procedures for direct appeals. The amendments also make stylistic changes to those provisions and to Rule 6(b) (dealing with appeals from a district court or bankruptcy appellate panel exercising appellate jurisdiction in a bankruptcy case). The proposed amendments to Rule 6(a) clarify the time for

[1]Please refer to Laws and Procedures Governing Work of the Rules Committees for more information.

filing certain motions that reset the time to appeal in cases where a district court is exercising original jurisdiction in a bankruptcy case. The proposed amendments provide that the reference in Appellate Rule 4(a)(4)(A) to the time allowed for motions under certain Federal Rules of Civil Procedure must be read in such cases as a reference to the time allowed for the equivalent motions under the applicable Federal Rules of Bankruptcy Procedure. The proposed amendments to Rule 6(c) clarify the procedure for handling direct appeals from a bankruptcy court to a court of appeals under 28 U.S.C. § 158(d)(2), providing more detail about how parties should handle initial procedural steps in the court of appeals once authorization for a direct appeal is granted. The Rule 6(c) amendments dovetail with the proposed amendment to Bankruptcy Rule 8006(g) described later in this report.

Rule 39 (Costs on Appeal)

The proposed amendments are in response to the Supreme Court's holding in *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021). In that case, the Court held that Rule 39, which governs costs on appeal, does not permit a district court to alter a court of appeals' allocation of costs, even those costs that are taxed by the district court.

The proposed amendments clarify the distinction between (1) the court of appeals deciding which parties must bear the costs and, if appropriate, in what percentages and (2) the court of appeals, the district court, or the clerk of either court calculating and taxing the dollar amount of costs upon the proper party or parties. In addition, the proposed amendments codify the holding in *Hotels.com*, providing 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, and establish a clearer procedure that a party should follow if it wants to ask the court of appeals to reconsider the allocation of costs. Finally, the proposed amendments clarify and improve Rule 39's parallel structure.

Recommendation: That the Judicial Conference approve the proposed amendments to Appellate Rules 6 and 39, as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules and Form Approved for Publication and Comment

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 29 and 32, and the Appendix of Length Limits, as well as Form 4, with a recommendation that they be published for public comment in August 2024. The Standing Committee unanimously approved the Advisory Committee's recommendation, with minor changes to the proposed amendments to Rule 29.

Rule 29 (Brief of an Amicus Curiae)

After much consideration, the Advisory Committee recommended publication for public comment of proposed amendments to Rule 29, dealing with amicus curiae briefs, along with conforming amendments to Rule 32(g) and the Appendix of Length Limits. In considering the proposed amendments, the Advisory Committee was mindful of First Amendment concerns and proposed legislation regarding amicus filings.

The proposed amendments require all amicus briefs to include, as applicable, a description of the identity, history, experience, and interests of the amicus curiae along with an explanation of how the brief will help the court. Also, the proposed amendments require an amicus entity that has existed for less than 12 months to state the date the entity was created.

The proposed amendments add two new disclosure requirements regarding the relationship between a party and an amicus curiae. Those disclosure requirements focus, respectively, on ownership or control of the amicus (if it is a legal entity), and contributions to the amicus curiae; in each instance the focus is on ownership, control, or contributions by (1) a party, (2) its counsel, or (3) any combination of parties, counsel, or both. The first provision would require the disclosure of a majority ownership interest in or majority control of

a legal entity submitting the brief. The second provision would require disclosure of contributions to an amicus curiae, with a threshold amount of 25 percent of annual revenue, with the reasoning that an amicus that is dependent on a party for one quarter of its revenue may be sufficiently susceptible to that party's influence to warrant disclosure.

In addition, the proposed amendments revise the disclosure obligation with respect to a relationship between a nonparty and an amicus curiae. The current rule requires disclosure of contributions intended to fund preparing or submitting the brief by persons "other than the amicus curiae, its members, or its counsel." The proposed amended rule would retain the member exception, but would limit that exception to persons who have been members of the amicus for at least the prior 12 months or who are contributing to an amicus that has existed for less than 12 months. (As noted above, an amicus that has existed for less than 12 months must state the date it was created.) These proposed amendments would require a new member making contributions earmarked for a particular brief to be effectively treated as a non-member for these purposes and would require disclosure.

The proposed amendments would also eliminate the option for a non-governmental entity to file an amicus brief based on the parties' consent during a court's initial consideration of a case on the merits, and would therefore require a motion for leave to file the brief.

Finally, the proposed amendments set the length limit for amicus briefs at 6,500 words (rather than one-half the maximum length authorized for a party's principal brief) to simplify the calculation for filers.

At its meeting, the Standing Committee made minor changes to the rule. The phrase "may be of considerable help to the court" was changed to "may help the court" both to improve the style and readability and because the Committee determined that including the word "considerable" could create an unintentional burden. The disclosures required by the rule were

added to the required contents of the motion for leave. And to promote clarity, the phrase "a party, its counsel, or any combination of parties or their counsel" was changed to "a party, its counsel, or any combination of parties, their counsel, or both." Other changes to improve style and consistency were made to the rule and the committee note.

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

The proposed amendments to Rule 32 conform Rule 32(g)'s cross-references to the proposed amendments to Rule 29.

Appendix of Length Limits

The proposed amendments to the Appendix of Length Limits conform the Appendix's list of length limits for amicus briefs to the proposed amendments to Rule 29.

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

The proposed amendments, in response to several suggestions, simplify Form 4 to reduce the burden on individuals seeking in forma pauperis (IFP) status (including the amount of personal financial detail required), while providing the information that courts of appeals need and find useful when deciding whether to grant IFP status.

Information Items

The Advisory Committee met on April 10, 2024. In addition to the recommendations discussed above, the Advisory Committee discussed a possible new rule regarding intervention on appeal, considered the possibility of improving the length and content of appendices, and discussed possible amendments to Rule 15 (Review or Enforcement of an Agency Order—How Obtained; Intervention). Also, the Advisory Committee removed from consideration a suggestion to eliminate PACER fees, because it is not a subject governed by the rules.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Forms Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules recommended for final approval: (1) amendments to Bankruptcy Rule 3002.1 and six new Official Forms related to those amendments; (2) amendments to Rule 8006; and (3) amendments to Official Form 410. The Standing Committee unanimously approved the Advisory Committee's recommendations.

Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case) and Related Official Forms

Rule 3002.1 is amended to encourage a greater degree of compliance with its provisions by adding an optional motion process the debtor or case trustee can initiate to determine a mortgage claim's status while a chapter 13 case is pending to give the debtor an opportunity to cure any postpetition defaults that may have occurred. The changes also add more detailed provisions about notice of payment changes for home-equity lines of credit.

Accompanying the proposed amendments to Rule 3002.1 is a proposal for adoption of six new Official Forms:

- Official Form 410C13-M1 (Motion Under Rule 3002.1(f)(1) to Determine the Status of the Mortgage Claim)
- Official Form 410C13-M1R (Response to [Trustee's/Debtor's] Motion Under Rule 3002.1(f)(1) to Determine the Status of the Mortgage Claim)
- Official Form 410C13-N (Trustee's Notice of Payments Made)
- Official Form 410C13-NR (Response to Trustee's Notice of Payments Made)
- Official Form 410C13-M2 (Motion Under Rule 3002.1(g)(4) to Determine Final Cure and Payment of Mortgage Claim)
- Official Form 410C13-M2R (Response to [Trustee's/Debtor's] Motion Under Rule 3002.1(g)(4) to Determine Final Cure and Payment of the Mortgage Claim)

Under Rule 3002.1(f), an official form motion (410C13-M1) can be used by the debtor or trustee over the course of the plan to determine the status of the mortgage. An official form response (410C13-M1R) is used by the claim holder if it disagrees with facts stated in the motion. If there is a disagreement, the court will determine the status of the mortgage claim. If

the claim holder fails to respond or does not dispute the facts set forth in the motion, the court may enter an order favorable to the moving party based on those facts.

Under Rule 3002.1(g), after all plan payments have been made to the trustee, the trustee must file the new official form notice (410C13-N) concerning disbursements made, amounts paid to cure any default, and whether the default has been cured. The claim holder must respond to the notice using the official form response (410C13-NR) to provide the required information. Rule 3002.1(g) also provides that either the trustee or the debtor may file a motion, again using an official form (410C13-M2), for a determination of final cure and payment. If the claim holder disagrees with the facts set out in the motion, it must respond using Official Form 410C13-M2R.

Stylistic changes are made throughout the rule, and its title and subdivision headings have been changed to reflect the amended content.

Rule 8006 (Certifying a Direct Appeal to a Court of Appeals)

Rule 8006 addresses the process for requesting that an appeal go directly from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). The proposed amendment to Rule 8006(g) clarifies that any party to the appeal may file a request that a court of appeals authorize a direct appeal. There is no obligation to do so if no party wishes the court of appeals to authorize a direct appeal. This amendment dovetails with the proposed amendments to Appellate Rule 6 discussed earlier in this report.

Official Form 410 (Proof of Claim)

The form is amended to permit use of the uniform claim identifier for all payments in cases filed under all chapters of the Bankruptcy Code, not merely electronic payments in chapter 13 cases. In addition, an amendment is made to the margin note in "Part 3: Sign Below" to conform to the restyled rules approved by the Judicial Conference in September 2023 (JCUS-SEP 2023, p. 24): the reference to Rule 5005(a)(2) is changed to Rule 5005(a)(3).

Recommendation: That the Judicial Conference approve the following:

a. Proposed amendments to Bankruptcy Rules 3002.1 and 8006, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law;

b. Effective December 1, 2025 and contingent on the approval of the above-noted amendments to Bankruptcy Rule 3002.1, the proposed amendments to Bankruptcy Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date; and

c. Effective December 1, 2024, the proposed amendments to Official Form 410, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

Rules Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to (1) Rule 3018; (2) Rules 9014, 9017, and new Rule 7043; and (3) Rules 1007, 5009, and 9006, with a recommendation that they be published for public comment in August 2024. The Standing Committee unanimously approved the Advisory Committee's recommendation, with changes to the language in the committee note to Rule 9014 addressing the different treatment of adversary proceedings and contested matters with respect to allowing remote testimony.

Rule 3018 (Chapter 9 or 11—Accepting or Rejecting a Plan)

The proposed amendments 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.

Rules 9014 (Contested Matters), 9017 (Evidence), and new Rule 7043 (Taking Testimony)

The proposed amendments would (1) amend Rule 9017 to eliminate the applicability of Fed. R. Civ. P. 43 (Taking Testimony) to bankruptcy cases generally; (2) create a new Rule 7043 (Taking Testimony) that would retain the applicability of Fed. R. Civ. P. 43 in

adversary proceedings—thereby authorizing remote witness testimony in adversary proceedings "for good cause in compelling circumstances and with appropriate safeguards"; and (3) amend Rule 9014 to allow a court in a contested matter to permit remote witness testimony "for cause and with appropriate safeguards" (i.e., eliminating the requirement of "compelling circumstances"). The effect of this proposal would be to provide bankruptcy courts greater flexibility to authorize remote testimony in contested matters. This proposed change rests on the difference between adversary proceedings and contested matters: whereas adversary proceedings resemble civil actions, contested matters proceed by motion and can usually be resolved less formally and more expeditiously by means of a hearing, often on the basis of uncontested testimony.[2]

Rules 1007 (Lists, Schedules, Statements, and Other Documents; Time to File), 5009 (Closing a Chapter 7, 12, 13, or 15 Case; Declaring Liens Satisfied), and 9006 (Computing and Extending Time; Motions)

Proposed changes to Rules 1007, 5009, and 9006 are made to reduce 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 upon completion of the course. The proposed amendments to Rule 1007, along with conforming amendments to Rule 9006, would eliminate the deadlines for filing the certificate of course completion. The proposed amendment to Rule 5009 would provide for two notices instead of just one, reminding the debtor of the need to take the course and to file the certificate of completion.

[2]The Advisory Committee on Bankruptcy Rules previously requested input on these proposed amendments from the Committees on Court Administration and Case Management (CACM Committee) and the Administration of the Bankruptcy System, which advised that the proposals would not appear to create any conflict with existing Judicial Conference policy regarding remote access or remote proceedings, nor impact the CACM Committee's ongoing consideration of potential revisions to the remote public access policy.

Information Items

The Advisory Committee on Bankruptcy Rules met on April 11, 2024. In addition to the recommendations discussed above, the Advisory Committee discussed a proposal to require redaction of the entire SSN in court filings; two suggestions to eliminate the requirement that all notices given under Rule 2002 include in the caption, among other things, the last four digits of the debtor's SSN; and a suggestion to allow the appointment of masters in bankruptcy cases and proceedings.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules recommended for final approval proposed amendments to Civil Rules 16 and 26, and new Rule 16.1. The Standing Committee unanimously approved the Advisory Committee's recommendations, with minor changes to the proposed amendments to new Rule 16.1.

Rule 16 (Pretrial Conferences; Scheduling; Management) and Rule 26 (Duty to Disclose; General Provisions Governing Discovery)

The proposed amendments would call for early identification of a method to comply with Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials. Specifically, the proposed amendment to Rule 26(f)(3)(D) would require the parties to address in their discovery plan the timing and method for complying with Rule 26(b)(5)(A). The proposed amendment to Rule 16(b) would provide that the court may address the timing and method of such compliance in its scheduling order.

After public comment, the Advisory Committee recommended final approval of the proposed amendments as published with minor changes to the committee notes.

New Rule 16.1 (Multidistrict Litigation)

Proposed new Rule 16.1 is designed to provide a framework for the initial management of multidistrict litigation (MDL) proceedings. After several years of work by its MDL subcommittee, extensive discussions with interested bar groups, consideration of multiple drafts, three public hearings on the published draft, and subsequent revisions based on public comment, the Advisory Committee unanimously recommended final approval of new Rule 16.1.

Rule 16.1(a) encourages the transferee court to schedule an initial MDL management conference soon after transfer, recognizing that this is currently regular practice among transferee judges. An initial management conference allows for early attention to matters identified in Rule 16.1(b), which may be of great value to the transferee judge and the parties. Because it is important to maintain flexibility in managing MDL proceedings, proposed new Rule 16.1(a) says that the transferee court "should" (not "must") schedule such a conference.

Rule 16.1(b)—a revised version of what was published as subdivision (c)—encourages the court to order the parties to submit a report prior to the initial management conference. The report must address any topic the court designates—including any matter under Rule 16—and unless the court orders otherwise, the report must also address the topics listed in Rules 16.1(b)(2)-(3). Rule 16.1(b)(2) directs the parties to provide their views on appointment of leadership counsel; previously entered scheduling or other orders; additional management conferences; new actions in the MDL proceeding; and related actions in other courts. Rule 16.1(b)(3) calls for the parties' "initial views" on consolidated pleadings; principal factual and legal issues; exchange of information about factual bases for claims and defenses; a discovery plan; pretrial motions; measures to facilitate resolving some or all actions before the court; and referral of matters to a magistrate judge or master. Because court action on some matters identified in paragraph (b)(3) may be premature before leadership counsel is appointed,

those topics are categorized separately from those in paragraph (b)(2). Rule 16.1(b)(4) permits the parties to address other matters that they wish to bring to the court's attention.

Rule 16.1(c) prompts courts to enter an initial MDL management order after the initial MDL management conference. The order should address the matters listed in Rule 16.1(b) and may address other matters in the court's discretion. This order controls the MDL proceedings unless and until modified.

Following public comment, the Advisory Committee made some minor changes to the proposed new rule as published. In response to extensive public input, it removed a provision inviting courts to consider appointing "coordinating counsel." For the reasons noted above, it restructured the list of matters to be included in the parties' report into the "views" called for by Rule 16.1(b)(2) and the "initial views" called for by Rule 16.1(b)(3), and it revised those provisions to direct parties to address the listed topics unless the court orders otherwise (rather than obligating the court to affirmatively set out minimum topics to be addressed). It also made stylistic changes based on input from the Standing Committee's style consultants.

At its meeting, the Standing Committee made minor changes to the rule and committee note to improve style and promote consistency. In the committee note, language was refined to clarify measures to facilitate resolution of MDL proceedings.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Civil Rules 16 and 26, and new Rule 16.1, as set forth in Appendix C, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Information Items

The Advisory Committee on Civil Rules met on April 9, 2024. In addition to the matters discussed above, the Advisory Committee discussed various information items, including potential amendments to Rule 7.1 (Disclosure Requirement) regarding disclosure of possible

grounds for recusal, Rule 28 (Persons Before Whom Depositions May Be Taken) regarding cross-border discovery, Rule 41(a) (Dismissal of Actions) regarding the dismissal of some but not all claims or parties, Rule 45(b)(1) (Subpoena) regarding methods for serving a subpoena, and Rule 81(c)(3)(A) (Applicability of the Rules in General; Removed Actions) regarding demands for a jury trial in removed cases. The Advisory Committee also discussed issues related to sealed filings and use of the word "master" in the rules, and was briefed on the random case assignment policy adopted by the Judicial Conference in March 2024 (*see* JCUS-MAR 2024, p. 8) and the importance of monitoring its implementation, as well as ongoing research related to rulemaking authority in this area. Finally, the Advisory Committee discussed a new proposal to amend Rule 43(a) (Taking Testimony) and Rule 45(c) (Subpoena) concerning the use of remote testimony in certain circumstances, and a new subcommittee was formed to consider this proposal.

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Items

The Advisory Committee on Criminal Rules met on April 18, 2024, and discussed several information items, including two new suggestions.

The Advisory Committee continues to consider a possible amendment to Rule 17 (Subpoena), prompted by a suggestion from the White Collar Crime Committee of the New York City Bar Association. The Advisory Committee's Rule 17 subcommittee is working to develop a draft of a proposed amendment to clarify the rule and expand the scope of parties' authority to subpoena material from third parties before trial. The subcommittee has tentatively concluded that any proposed amendment should provide for case-by-case judicial oversight of each subpoena application, express authorization of ex parte subpoenas, and different standards or levels of protection for personal or confidential information and other information.

Last year, the Advisory Committee received two suggestions regarding Rule 53 (Courtroom Photographing and Broadcasting Prohibited) and proceedings in the cases of *United States v. Donald J. Trump*. The Advisory Committee concluded that it did not have the authority to exempt specific cases or parties from the rule's prohibition on broadcasting, and it acknowledged that any amendment under the Rules Enabling Act process would likely take three or more years. The Advisory Committee determined, however, that further examination of the proposal to amend Rule 53 was warranted, and, as previously reported to the Judicial Conference, a subcommittee was formed. The subcommittee is in early stages of its consideration of potential amendments and will coordinate with other committees evaluating issues of remote public access to federal judicial proceedings.

The Advisory Committee also discussed two new suggestions. The Department of Justice has submitted a suggestion to amend Rule 49.1 (Privacy Protection For Filings Made with the Court) to require the use of pseudonyms—instead of initials—to mask the identity of minors in court filings. A new subcommittee was formed to consider this proposal as well as other privacy issues under Rule 49.1. The Advisory Committee received another suggestion to clarify Rule 40 (Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District) as it applies when a defendant from outside the district is arrested for violating conditions of release. The Advisory Committee recently received a related submission (from the Administrative Office's Magistrate Judges Advisory Group) which includes a comprehensive proposal for additional amendments to Rule 40. Consideration of these proposals will continue.

FEDERAL RULES OF EVIDENCE

Rule Approved for Publication and Comment

The Advisory Committee on Evidence Rules submitted a proposed amendment to Rule 801(d)(1)(A) with a recommendation that it be published for public comment in August 2024. The Standing Committee (with the Department of Justice representative abstaining) approved the Advisory Committee's recommendation, with minor amendments to the committee note.

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

The proposed amendment provides that all prior inconsistent statements admissible for impeachment are also admissible as substantive evidence, subject to Rule 403. The current Rule 801(d)(1)(A) includes a very limited exemption from the hearsay rule for prior inconsistent statements of a testifying witness, providing that a prior statement is substantively admissible only when it was made under oath at a formal proceeding.

Information Items

The Advisory Committee met on April 19, 2024. In addition to the recommendation discussed above, the Advisory Committee held a panel discussion on artificial intelligence and machine-generated information, and the possible impact of artificial intelligence on the Federal Rules of Evidence. The Advisory Committee also discussed a possible amendment to Rule 609(a) (Impeachment by Evidence of a Criminal Conviction) and a possible new rule to address evidence of prior false accusations made by alleged victims in criminal cases.

PROPOSED 2024 REPORT OF THE JUDICIAL CONFERENCE ON THE ADEQUACY OF PRIVACY RULES PRESCRIBED UNDER THE E-GOVERNMENT ACT OF 2002

The E-Government Act of 2002 directed the judiciary to promulgate rules, under the Rules Enabling Act, "to protect privacy and security concerns relating to electronic filing of documents and the public availability … of documents filed electronically." Pub. L.

No. 107-347, § 205(c)(3)(A)(i). Pursuant to this mandate, the "privacy rules"—Appellate Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1—took effect on December 1, 2007. Section 205(c)(3)(C) of the E-Government Act directs that, every two years, "the Judicial Conference shall submit to Congress a report on the adequacy of [the privacy rules] to protect privacy and security." The most recent prior report was completed in June 2022. This report covers the period from June 2022 to June 2024. The Committee considered and approved the proposed draft 2024 report of the Judicial Conference on the Adequacy of the Privacy Rules Prescribed under the E-Government Act of 2002, subject to revisions approved by the chair in consultation with the Rules Committee Staff.

Part I of the 2024 report describes the consideration of several proposed rule changes that include privacy-related issues. The Bankruptcy, Civil, and Criminal Rules Committees are reconsidering the need for the last four digits of SSNs in court filings, and they are also considering whether the privacy rules need to remain uniform with respect to the level of redactions applied to SSNs. One suggestion noted in the 2022 report resulted in the proposed amendments to Appellate Form 4 (discussed earlier in this report) that will be published for comment in August 2024. Several more recent privacy-related suggestions are in the beginning stages of consideration. Part II of the 2024 report describes ongoing judiciary implementation efforts to protect privacy in court filings and opinions. Among other things, the CACM Committee sent a memorandum to the courts in May 2023 sharing suggested practices to protect personal information in court filings and opinions and encouraging continued outreach and educational efforts. The memorandum also reminded courts about the possible inclusion of sensitive information in Social Security and immigration opinions and reminded courts of a software fix implemented in 2020 that can mask certain information in extracts of Social Security and immigration opinions. Part II also reports that the CACM Committee asked

the Administrative Office and the FJC to explore other ways to increase awareness of the need to protect privacy in court filings and opinions. This has led the Administrative Office to update the judiciary's internal and external websites, and the FJC to consider increased ways to address privacy issues in educational materials for new judges and other judiciary officials. Part III of the 2024 report, in turn, discusses the FJC's 2024 update of its studies in 2010 and 2015 concerning the rate of compliance with existing privacy rules regarding unredacted SSNs in court filings, conducted at the request of the CACM Committee. The FJC's 2024 study reveals that instances of non-compliance remain very low. Upcoming FJC studies addressing other aspects of the privacy rules will be considered by the rules committees and the CACM Committee in the coming years and will be addressed in future privacy reports.

The CACM Committee considered the draft report at its May 2024 meeting and endorsed a recommendation that the Judicial Conference approve the 2024 report and ask the AO Director to transmit it to Congress in accordance with the law.

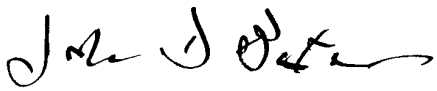
> **Recommendation:** That the Judicial Conference approve the proposed 2024 Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002, as set forth in Appendix D, and ask the Administrative Office Director to transmit it to Congress in accordance with the law.

JUDICIARY STRATEGIC PLANNING

The Committee was asked to provide input on the proposed process for the 2025 review and update of the *Strategic Plan for the Federal Judiciary*. The Committee's views were

communicated to Judge Scott Coogler (N.D. Ala.), the judiciary planning coordinator, by letter dated June 17, 2024.

Respectfully submitted,



John D. Bates, Chair

Paul Barbadoro
Elizabeth J. Cabraser
Louis A. Chaiten
William J. Kayatta, Jr.
Edward M. Mansfield
Troy A. McKenzie
Patricia Ann Millett
Lisa O. Monaco
Andrew J. Pincus
D. Brooks Smith
Kosta Stojilkovic
Jennifer G. Zipps

* * * * *

TAB 3

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Transmitted to Congress (Apr 2024)

REA History:

- 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).	
EV 107	The proposed amendment was published for public comment as new Rule 611(d), but is now new Rule 107.	EV 1006

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Transmitted to Congress (Apr 2024)

REA History:

- 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
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

Effective (no earlier than) December 1, 2025

Current Step in REA Process:

- Approved by Standing Committee (June 2024 unless otherwise noted)

REA History:

- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 6	The proposed amendments would address resetting the time to appeal in cases where a district court is exercising original jurisdiction in a bankruptcy case by adding a sentence to Appellate Rule 6(a) to provide that the reference in Rule 4(a)(4)(A) to the time allowed for motions under certain Federal Rules of Civil Procedure must be read as a reference to the time allowed for the equivalent motions under the applicable Federal Rule of Bankruptcy Procedure. In addition, the proposed amendments would make Rule 6(c) largely self-contained rather than relying on Rule 5 and would provide more detail on how parties should handle procedural steps in the court of appeals.	BK 8006
AP 39	The proposed amendments would provide that the allocation of costs by the court of appeals applies to both the costs taxable in the court of appeals and the costs taxable in the district court. In addition, the proposed amendments would provide a clearer procedure that a party should follow if it wants to request that the court of appeals to reconsider the allocation of costs.	
BK 3002.1 and Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R	Previously published in 2001. 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. If approved, the amended form would go into effect December 1, 2024.	

Effective (no earlier than) December 1, 2025

Current Step in REA Process:

- Approved by Standing Committee (June 2024 unless otherwise noted)

REA History:

- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

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 safeguards." The current standard, imported from the trial standard in Civil Rule	

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
	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 4

Legislation That Directly or Effectively Amends the Federal Rules
118th Congress
(January 3, 2023–January 3, 2025)

Ordered by most recent legislative action; most recent first

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Marijuana Misdemeanor Expungement Act	**H.R. 8917** *Sponsor:* Carter (D-LA) *Cosponsor:* Armstrong (R-ND)	CR; CV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr8917/BILLS-118hr8917ih.pdf **Summary:** Would require the Supreme Court to prescribe rules, within one year of enactment, for the review, expungement, sealing, sequester, and redaction of official records related to certain marijuana misdemeanors and civil infractions.	• 07/02/2024: H.R. 8917 introduced in House; referred to Judiciary Committee
Closing Bankruptcy Loopholes for Child Predators Act of 2024	**H.R. 8077** *Sponsor:* Ross (D-NC) *Cosponsor:* Tenney (R-NY)	BK 2004, 9018	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr8077/BILLS-118hr8077ih.pdf **Summary:** Would directly amend BK 2004 and 9018 to provide additional procedures in cases related to the alleged sexual abuse of a child.	• 04/18/2024: H.R. 8077 introduced in House; referred to Judiciary Committee
Bankruptcy Threshold Adjustment Extension Act	**S. 4150** *Sponsor:* Durbin (D-IL) *Cosponsors:* 5 bipartisan cosponsors	BK 1020; BK Forms 101 & 201	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s4150/BILLS-118s4150is.pdf **Summary:** Would extend the CARES Act definition of debtor in Section 1182(1) with its $7.5m subchapter V debt limit for a further two years.	• 04/17/2024: S. 4150 introduced in Senate; referred to Judiciary Committee
Bankruptcy Venue Reform Act **SHOP Act**	**H.R. 1017** *Sponsor:* Lofgren (D-CA) *Cosponsors:* 7 Democratic & 2 Republican cosponsors **S. 4095** *Sponsor:* McConnell (R-KY) *Cosponsors:* Cotton (R-AR) Tillis (R-NC)	BK	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1017/BILLS-118hr1017ih.pdf https://www.congress.gov/118/bills/s4095/BILLS-118s4095is.pdf **Summary:** Would require the Supreme Court to prescribe rules through the Rules Enabling Act process to allow government attorneys to appear and intervene in Title 11 proceedings without charge, and without meeting any requirement under any local court rule relating to attorney appearances or the use of local counsel, before any bankruptcy court, district court, or bankruptcy appellate panel.	• 04/10/2024: S. 4095 introduced in Senate; referred to Judiciary Committee • 02/14/2023: H.R. 1017 introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Supreme Court Ethics, Recusal, and Transparency Act of 2023	**H.R. 926** *Sponsor:* Johnson (D-GA) *Cosponsors:* 136 Democratic cosponsors **S. 359** *Sponsor:* Whitehouse (D-RI) *Cosponsors:* 43 Democratic or Democratic-caucusing cosponsors	AP, BK, CV, CR	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr926/BILLS-118hr926ih.pdf https://www.congress.gov/118/bills/s359/BILLS-118s359rs.pdf **Summary:** Would require the Supreme Court and JCUS to issue and prescribe—through an expedited Rules Enabling Act process— (a) codes of conduct for justices and judges; (b) rules of procedure requiring certain disclosures by parties and amici; and (c) rules of procedure for prohibiting or striking an amicus brief that would result in disqualification of a justice, judge, or magistrate judge.	• 09/05/2023: S. 359 placed on Senate Legislative Calendar under General Orders • 07/20/2023: S. 359 reported with an amendment from Senate Judiciary Committee • 02/09/2023: S. 359 introduced in Senate; referred to Judiciary Committee • 02/09/2023: H.R. 926 introduced in House; referred to Judiciary Committee
Government Surveillance Transparency Act of 2023	**H.R. 5331** *Sponsor:* Lieu (D-CA) *Cosponsor:* Davidson (R-OH)	CR 41	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr5331/BILLS-118hr5331ih.pdf **Summary:** Would amend CR 41(f)(1)(B) by adding that an inventory shall disclose whether the provider disclosed to the government any electronic data not authorized by the court and whether the government searched persons or property without court authorization. Would provide for public access to docket records for certain criminal surveillance orders in accordance with rules promulgated by JCUS.	• 09/01/2023: H.R. 5331 introduced in House; referred to Judiciary Committee
Protecting Our Democracy Act	**H.R. 5048** *Sponsor:* Schiff (D-CA) *Cosponsors:* 160 Democratic cosponsors	CR 6; CV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr5048/BILLS-118hr5048ih.pdf **Summary:** Would require the Supreme Court and JCUS to prescribe rules—through an expedited Rules Enabling Act process—to ensure the expeditious treatment of a civil action brought to enforce a congressional subpoena. Would preclude any interpretation of CR 6(e) to prohibit disclosure to Congress of certain grand-jury materials related to individuals pardoned by the President.	• 07/28/2023: H.R. 5048 referred to the subcommittee on Economic Development, Public Buildings, and Emergency Management • 07/27/2023: H.R. 5048 introduced in House; referred to Oversight & Accountability, Judiciary, Administration; Budget, Transportation & Infrastructure, Rules, Foreign Affairs, Ways & Means, and Intelligence Committees

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Back the Blue Act of 2023	**H.R. 355** *Sponsor:* Bacon (R-NE) *Cosponsors:* 19 Republican cosponsors **H.R. 3079** *Sponsor:* Bacon (R-NE) *Cosponsors:* 21 Republican cosponsors **S. 1569** *Sponsor:* Cornyn (R-TX) *Cosponsors:* 41 Republican cosponsors	§ 2254 Rule 11	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr355/BILLS-118hr355ih.pdf https://www.congress.gov/118/bills/hr3079/BILLS-118hr3079ih.pdf https://www.congress.gov/118/bills/s1569/BILLS-118s1569is.pdf **Summary:** Would amend Rule 11 of the Rules Governing Section 2254 Cases by adding: "Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code."	• 05/11/2023: S. 1569 introduced in Senate; referred to Judiciary Committee • 05/05/2023: H.R. 3079 introduced in House; referred to Judiciary Committee • 01/13/2023: H.R. 355 introduced in House; referred to Judiciary Committee
Restoring Artistic Protection (RAP) Act of 2023	**H.R. 2952** *Sponsor:* Johnson (D-GA) *Cosponsors:* 33 Democratic cosponsors	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2952/BILLS-118hr2952ih.pdf **Summary:** Would amend the Federal Rules of Evidence by adding a new Rule 416 to limit the admissibility of evidence of a defendant's creative or artistic expression against such defendant.	• 04/27/2023: Introduced in House; referred to Judiciary Committee
Sunshine in the Courtroom Act of 2023	**S. 833** *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/118/bills/s833/BILLS-118s833is.pdf **Summary:** Would permit district court cases to be photographed, electronically recorded, broadcast, or televised, notwithstanding any other provision of law, after JCUS promulgates guidelines.	• 03/16/2023: Introduced in Senate; 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
Election Day Holiday Act of 2024 **Election Day Act** **Freedom to Vote Act**	**H.R. 7329** *Sponsor:* Eshoo (D-CA) **H.R. 6267** *Sponsor:* Fitzpatrick (R-PA) **H.R. 11** *Sponsor:* Sarbanes (D-MD) **S.1; S. 2344** *Sponsor:* Klobuchar (D-MN) Each bill has several Democratic or Democratic-caucusing cosponsors.	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr7329/BILLS-118hr7329ih.pdf https://www.congress.gov/118/bills/hr6267/BILLS-118hr6267ih.pdf https://www.congress.gov/118/bills/hr11/BILLS-118hr11ih.pdf https://www.congress.gov/118/bills/s1/BILLS-118s1is.pdf https://www.congress.gov/118/bills/s2344/BILLS-118s2344is.pdf **Summary:** Would make Election Day a federal holiday.	• 02/13/2024: H.R. 7329 introduced in House • 11/07/2023: H.R. 6267 introduced in House • 07/25/2023: S. 1 introduced in Senate • 07/18/2023: S. 2344 introduced in Senate • 07/18/2023: H.R. 11 introduced in House • Among others, house bills referred to Oversight & Accountability Committee; senate bills referred to Committee on Rules & Administration
Indigenous Peoples' Day Act	**H.R. 5822** *Sponsor:* Torres (D-AL) *Cosponsors:* 86 Democratic cosponsors **S. 2970** *Sponsor:* Heinrich (D-NM) *Cosponsors:* 13 Democratic or Democratic-caucusing cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr5822/BILLS-118hr5822ih.pdf https://www.congress.gov/118/bills/s2970/BILLS-118s2970is.pdf **Summary:** Would replace the term "Columbus Day" with the term "Indigenous Peoples' Day" as a legal public holiday.	• 09/28/2023: H.R. 5822 introduced in House; referred to Oversight & Accountability Committee • 09/28/2023: S. 2970 introduced in Senate; referred to Judiciary Committee
Patriot Day Act	**H.R. 5366** *Sponsor:* Fitzpatrick (R-PA) *Cosponsors:* Gottheimer (D-NJ) Malliotakis (R-NY)	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr5366/BILLS-118hr5366ih.pdf **Summary:** Would make Patriot Day a federal holiday.	• 09/08/2023: Introduced in House; referred to Oversight & Accountability Committee

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Diwali Day Act	**H.R. 3336** *Sponsor:* Meng (D-NY) *Cosponsors:* 15 Democratic & 1 Republican cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr3336/BILLS-118hr3336ih.pdf **Summary:** Would make Diwali (a/k/a Deepavali) a federal holiday.	• 05/15/2023: Introduced in House; referred to Oversight & Accountability Committee
September 11 Day of Remembrance Act	**H.R. 2382** *Sponsor:* Lawler (R-NY) *Cosponsors:* 4 Democratic & 2 Republican cosponsors **S. 1472** *Sponsor:* Blackburn (R-TN) *Cosponsor:* Wicker (R-MS)	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2382/BILLS-118hr2382ih.pdf https://www.congress.gov/118/bills/s1472/BILLS-118s1472is.pdf **Summary:** Would make September 11 Day of Remembrance a federal holiday.	• 05/04/2023: S. 1472 introduced in Senate; referred to Judiciary Committee • 03/29/2023: H.R. 2382 introduced in House; referred to Oversight & Accountability Committee
Workers' Memorial Day	**H.R. 3022** *Sponsor:* Norcross (D-NJ) *Cosponsors:* 11 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2382/BILLS-118hr2382ih.pdf **Summary:** Would make Workers' Memorial Day a federal holiday.	• 04/28/2023: Introduced in House; referred to Oversight & Accountability Committee
St. Patrick's Day Act	**H.R. 1625** *Sponsor:* Fitzpatrick (R-PA) *Cosponsor:* Lawler (R-NY)	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1625/BILLS-118hr1625ih.pdf **Summary:** Would make St. Patrick's Day a federal holiday.	• 03/17/2023: Introduced in House; referred to Oversight & Accountability Committee
Lunar New Year Day Act	**H.R. 430** *Sponsor:* Meng (D-NY) *Cosponsors:* 58 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr430/BILLS-118hr430ih.pdf **Summary:** Would make Lunar New Year Day a federal holiday.	• 01/20/2023: Introduced in House; referred to Oversight & Accountability Committee
Rosa Parks Day Act	**H.R. 308** *Sponsor:* Sewell (D-AL) *Cosponsors:* 115 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr308/BILLS-118hr308ih.pdf **Summary:** Would make Rosa Parks Day a federal holiday.	• 01/12/2023: Introduced in House; referred to Oversight & Accountability Committee

TAB 5

MINUTES
CIVIL RULES ADVISORY COMMITTEE
Denver, CO
April 9, 2024

The Civil Rules Advisory Committee met in Denver, Colorado, on April 9, 2024. 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, Judge Jennifer Boal, Brian Boynton, David Burman, Professor Zachary Clopton, Judge Kent Jordan, Judge M. Hannah Lauck, Judge R. David Proctor, Joseph Sellers, Judge Manish Shah, Ariana Tadler, and Helen Witt. Professor Richard L. Marcus participated as Reporter, Professor Andrew D. Bradt as Associate Reporter, and Professor Edward H. Cooper as Consultant. Judge John D. Bates, Chair, Judge D. Brooks Smith, Liaison (remotely), 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 Carmelita Shinn also participated**.** The Department of Justice was also represented by Joshua Gardner. The Administrative Office was represented by H. Thomas Byron III, Allison Bruff, and Zachary Hawari. 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 then acknowledged the invaluable contributions of several committee members whose terms will expire prior to the Advisory Committee's next meeting: Judge Kent Jordan, Judge Jennifer Boal, Joseph Sellers, Carmelita Shinn, Ariana Tadler, and Helen Witt. Judge Rosenberg thanked each of them for their commitment to and hard work for the committee. Judge Rosenberg also acknowledged Rakita Johnson, a new Administrative Analyst on the Rules Committee Staff at the Administrative Office and thanked her for her work in organizing the logistics for the meeting.

With respect to reports on the January 2024 meeting of the Standing Committee and the March 2024 meeting of the Judicial Conference of the United States, Judge Rosenberg referred members to the materials included in the agenda book. With respect to the status of proposed amendments to the Federal Rules, Allison Bruff pointed members to a detailed chart in the agenda book showing the progress of various rule amendments. In particular, she directed members' attention to page 54 of the agenda book, which notes that the recent amendment to Rule 12 has been approved by the Supreme Court and would be transmitted to the Congress by May 1. Rules Law Clerk Zachary Hawari then directed members to a chart in the agenda book detailing pending legislation that would directly or effectively amend the Federal Rules. Mr. Hawari indicated, however, that there was no legislation that would demand the committee's attention at the meeting.

Action Items

Review of Minutes

Judge Rosenberg then turned to the first action item: approval of the minutes of the October 17, 2023 Advisory Committee meeting, held at the Administrative Office. The draft minutes included in the agenda book were unanimously approved, subject to corrections by the Reporter as needed.

Final Approval of Amendments to Rules 16(b)(3) and 26(f)(3)

Judge Rosenberg then turned to the next action item: final approval by the Advisory Committee of the amendments to Rules 16(b)(3) and 26(f)(3), which require the parties to address any possible issues regarding privilege logs early in the litigation and to report any areas of disagreement to the judge.

Both proposed amendments had been approved for publication by the Standing Committee at its June 2023 meeting with only minor changes to shorten the committee note. At that meeting, there had been some discussion of adding a cross-reference to Rule 26(f) in Rule 26(b)(5)(A), but the Standing Committee opted against it and instead approved the rule as proposed for publication.

With Discovery Subcommittee Chair Judge David Godbey unable to attend the meeting due to an ongoing trial, Judge Rosenberg asked Professor Marcus to describe the events since publication. Professor Marcus then explained that the advisory committee had held three public hearings on the proposed amendments. The testimony offered at those hearings is summarized at pages 107-131 of the agenda book, as are the comments received during the publication period. Professor Marcus noted that the testimony and comments confirmed a stark division in attitude regarding how much detail a privilege log should contain among lawyers who typically find themselves as "requesters" of discovery material and those who are typically "producers." Neither the amended rule nor the committee note takes a side on these contentious matters. Rather, the goal of the rule is to prompt parties to address the issue and agree on a protocol up front in the litigation and to bring any disagreements to the judge's attention as early as possible. Moreover, Professor Marcus noted that the committee note directs the parties to notify the judge if they are not yet capable of getting into all of the details at an early status conference. Professor Marcus ended his presentation by noting that this should be an easy matter to approve, thanks in large part to the attorney members of the subcommittee, who had done astonishing work over a long period of time.

Judge Rosenberg then sought comment from subcommittee members and committee members, but none were offered. A motion to approve the rule followed. The motion was seconded and approved unanimously.

Final Approval of New Rule 16.1

Judge Rosenberg then introduced proposed new Rule 16.1 for final approval by the Advisory Committee. Prior to getting into the substance, Judge Rosenberg acknowledged that the work of many people had brought us to this moment, including Judge Bates, former Advisory

Committee and MDL Subcommittee Chair Judge Robert Dow, the attorney members of the subcommittee, the style consultants, and the reporters. This was the best possible rule because of the efforts of so many people. The subcommittee has listened and learned an enormous amount over the seven-year gestation of this rule. The subcommittee held three public hearings, received extensive commentary on the draft from attorneys, organizations, and judges, including seasoned MDL transferee judges including Judge Charles Breyer (N.D. Cal.) and Judge M. Casey Rodgers (N.D. Fla.), an esteemed group of California state court judges, and the Federal Magistrate Judges Association.

Judge Rosenberg then noted that the latest draft of the rule varies in non-substantive ways from the rule approved for publication in response both to testimony and to comments provided to the Advisory Committee, and the input of the style consultants. Aside from the removal of the provision related to coordinating counsel (discussed below), all of the changes are structural.

Judge Rosenberg then turned the presentation over to the subcommittee's chair, Judge Proctor. He thanked all those integrally involved in the process of drafting the rule. He thanked the style consultants, Joseph Kimble and Bryan Garner, whose suggestions were very helpful.

Judge Proctor then recounted the public-comment period, including three public hearings and many written submissions. He also noted that the subcommittee received some submissions after the close of the formal comment period, but that those submissions were considered equally with those that were timely submitted. In particular, Judge Proctor cited "en masse" support for the rule from MDL transferee judges, with whom he met in October 2022 and October 2023. The transferee judges are of the view that the set of prompts in the rule will facilitate better early case management in MDLs, particularly for first-time transferee judges. The Chair of the Judicial Panel on Multidistrict Litigation, Judge Karen K. Caldwell (E.D. Ky.), is a strong supporter of the rule and indicated that it would be the focus of trainings at future MDL Transferee Judges Conferences.

Turning to the final draft,[1] Judge Proctor noted that the draft rule now contains two lists of issues, in subsections (b)(2) and (b)(3). Subsection (b)(2) includes issues that the parties should discuss their views on early in the proceeding, including appointment of leadership counsel, if warranted. Subsection (b)(3) lists issues on which the parties should state their initial views to assist the judge in getting acquainted with the case. These are not two separate "tiers" of issues in terms of importance. Rather, the goal was to provide significant flexibility to transferee judges in addressing issues as they become pertinent in the proceeding. In particular, subsection (b)(3) focuses on "initial views" of the parties, in recognition that more definitive views of these matters before leadership is appointed may not be possible, but judges may nevertheless be able to learn a fair bit about the case from the parties' initial views on these matters. The changes to the rule do not change the substance.

Post-publication, the provision calling for the appointment of coordinating counsel for purposes of preparing a report for the initial management conference was deleted. This proposal

[1] The version referred to as the "final draft" was added to the end of the agenda book for the April 9, 2024 committee meeting. For the benefit of the committee members and public observers, the final draft was projected onto a screen in the meeting room and shared via Microsoft Teams, and the minor style changes from previous versions of the rule were summarized.

was criticized both by lawyers who typically represent plaintiffs and by those who typically represent defendants as adding an unnecessary and potentially complicating layer of process. Based on the lack of support for this provision, it was dropped. The only other change to the rule after publication was "reversing the default" to require the parties to address the issues listed in the rule unless the judge says otherwise.

Professor Marcus added his view that this rule had been worked on for seven years and the subcommittee's main conclusion was that for MDL proceedings, one size does not fit all. Judges require the flexibility to tailor arrangements to the circumstances of each MDL. This rule aims to provide them the information to do so in a productive way at the outset of MDL proceedings.

Judge Rosenberg then sought comment from subcommittee members. One attorney member offered two observations: (1) MDLs come in all shapes and sizes, so any rule that would accommodate all of them demanded "movement in the joints;" (2) in response to feedback from some lawyers the subcommittee has made clear that Rule 16.1 does not preempt Rule 23 in class actions transferred into an MDL. Judge Rosenberg added that the note makes clear that Rule 16.1 does not preempt any other rule, including Rule 23.

Another attorney subcommittee member added support for the rule and confirmed that the changes since publication were primarily stylistic. This member noted that although the subcommittee did not adopt all commenters' suggestions, "the perfect is the enemy of the good and the enemy of done." In this member's view, the subcommittee had done stellar work.

Another attorney subcommittee member agreed that the rule was excellent and expressed appreciation for the collegiality of the subcommittee, many of whose members started in different places but eventually reached consensus. This member also lauded the flexibility in the rule for judges, lawyers, and litigants. The rule gives parties the ability to ask the judge to do things differently to suit the needs of a particular MDL. In this member's view, the proposed rule is as close to perfect as a rule covering an area this broad and diverse could be.

A judge member of the subcommittee added that this was one of the most remarkable group efforts she had seen and was honored to be a part of this prodigious and thoughtful work.

Judge Rosenberg then sought input from those representing the Standing Committee. Judge Bates began by noting his presence at the inception of this project when he was Chair of the Advisory Committee and formed a subcommittee under the leadership of Judge Dow. The Standing Committee will of course have to review the rule if it is approved by the Advisory Committee, but it is a wonderful effort. Judge Bates noted that the division of issues in subsections (b)(2) and (b)(3) was an important change because it recognizes that there will be some issues on which the parties may not yet be prepared to take firm positions at the initial management conference. Judge Bates agreed that because of the variety of MDL proceedings, the task of creating a rule that would fit them all was a challenge, and he applauded the effort and the excellence of the product. Professor Struve added her gratitude for the excellent sustained work and her admiration for the expertise that has gone into it.

Judge Rosenberg then sought feedback from other members of the Advisory Committee. One judge member declared that he was a "relatively enthusiastic yes," despite continuing reservations about a rule that is largely precatory, in that it is more like a series of suggestions rather than a mandatory rule in the traditional sense. Nevertheless, this judge was persuaded by the widespread support for the rule among transferee judges; if the judges tasked with handling the most complex cases are in favor, that is of great importance. Another judge member indicated her support of the rule but sought clarification of the use of the word "actions" in the rule – the reporters responded that because only entire civil actions are transferred into an MDL, the use of that term should not create confusion.

Another committee member sought clarification on the "early exchange of information" provision of the rule and how it might interact with discovery and initial disclosures. Professor Marcus responded that because initial disclosures usually do not occur in some MDLs, it was better to draft the rule to provide flexibility for the transferee judge. A judge member added that such an early exchange could be considered discovery in some cases, but it is best left to the transferee judge how to address the issue in the context of a particular case. Judge Proctor agreed with that observation. Professor Cooper added that one size does not fit all when it comes to early exchange of information, and the rule allows for such flexibility. Judge Rosenberg added that the goal of the rule was to get these issues before the transferee judge early so that she may decide the best course of action in a particular MDL. Professor Bradt opined that what the rule requires is a *report* from the parties on these issues; it does not mandate any particular course of action for the transferee judge or displace any other civil rule.

Judge Bates then stated that the Standing Committee would benefit from the views of the Advisory Committee on whether the changes to the rule since publication required republication. Judge Rosenberg responded that the relevant standard for republication is whether substantial changes have been made since publication, unless republication would not assist the work of the rules committees. In her view, these changes are not sufficiently substantial to trigger the republication requirement, and even if they were, after the lengthy process of generating this rule, republication would not be helpful.

Professor Marcus agreed that these are not substantial changes contemplated by the republication provision. The main change to the rule was omitting the coordinating counsel provision in response to public comment. All other changes were organizational and stylistic in nature. Professor Marcus noted other examples of changes made after publication of proposed rules that were greater than those made to this rule, but republication was not required, including post-publication changes to Rule 37(e), Rule 34, Rule 23(e), and Rule 30(b)(6). Professor Marcus added that even if these were substantial changes, the committee would not gain anything from additional input. Professor Cooper then noted that the string of anecdotes of changes to rules after publication that did not require republication could go on. He cited the omission of required lists of disputed issues from a proposed amendment to Rule 56, and the omission of proposed procedural changes to Rule 23. In neither case did dropping a portion of a proposed amendment demand republication. Professor Bradt agreed that after seven years' worth of extensive public outreach that engaged all of the experts in this area republication would be unlikely to yield any new information that would affect the proposed rule.

Judge Proctor noted that the subcommittee had considered an array of possible provisions, including early vetting of claims, case censuses, mandatory interlocutory appeal, judicial supervision of settlement, disclosure of any third-party funding, and protocols for leadership appointments and bellwether trials. Adding any of those provisions to the rule at this point would surely require republication. But, aside from the deletion of coordinating counsel, this rule is substantively the same as the one published for public comment. In his view, therefore, the post-publication changes to the rule are neither substantial, nor would the committee benefit from additional public comment.

A judge member then asked Judge Bates how the Standing Committee approaches the question of republication. He responded that the Standing Committee would make its own judgment under the applicable standard, but that it would benefit from the views of the Advisory Committee expressed at this meeting. Professor Struve agreed and confirmed that omission of coordinating counsel should not raise concerns because omissions in response to negative feedback are typical. The only remaining change that might trigger republication is reversing the default that parties must include each listed item in their report unless the judge orders otherwise. In her view, however, such a change would not require republication, both because the change is sufficiently subtle and because it was discussed during the public-comment period, meaning that lawyers would not consider the change an "ambush."

Judge Rosenberg added that the subcommittee had thoroughly considered the question of republication. At each meeting, the reporters raised the question, and the subcommittee discussed it. The subcommittee concluded that, aside from omitting coordinating counsel, the content of the rule is unchanged. The judge has the same discretion to decide which issues must be addressed in the report. Moreover, the subcommittee concluded that there was nothing more it could learn that would be helpful in developing *this* rule. The process has been transparent and collaborative. Given the extensive outreach to the bench and bar since the subcommittee's creation in 2017, all relevant parties have had sufficient opportunity to be heard.

A motion was then made for final approval of the rule. The motion was seconded and approved unanimously.

Information Items

Report of the Discovery Subcommittee

Judge Rosenberg began by noting that the Discovery Subcommittee had been exceptionally busy with the hearings and post-publication comments on the privilege-log amendments, but that it had not lost momentum on the other items on its agenda. She again thanked the attorney members of the subcommittee for their efforts and thanked those members whose terms are expiring.

With Judge Godbey not in attendance, Professor Marcus presented on behalf of the subcommittee. The subcommittee had two information items on the agenda on which it sought feedback: manner of service of a subpoena and rules issues related to filing under seal.

(1) Manner of serving a subpoena. Rule 45(b)(1) says that serving a subpoena requires "delivering a copy to the named person." There are different interpretations of the rule, particularly about whether in-hand service is required. These varying interpretations create real problems for lawyers that ought to be avoidable. As demonstrated by a memorandum prepared for the subcommittee by former Rules Law Clerk Christopher Pryby, there are many different approaches to the method of service required in the states, so there is no dominant model for the Federal Rules to follow. One approach an amended rule could take would be to add the language from the venerable *Mullane* case defining the notice required by the Due Process Clauses, with a provision explicitly allowing courts to adopt more specific methods by order or local rule. One judge member expressed support for including the *Mullane* language because it appears to be a stable holding and it would not hurt to explicitly inform lawyers that due process is implicated here. Professor Marcus also noted that the current rule does not include a time period for notice, partly because it does not differentiate between a subpoena for deposition and one for trial or hearing, which may be more urgent. Professor Marcus asked for views of committee members on these issues, especially those of departing members.

One subcommittee attorney member expressed that another problem created by the current rule is the requirement to tender travel fees if the subpoena requires the person's attendance. Tendering such fees may not be easily accomplished alongside some electronic methods of service, such as email, which are reliable and should be encouraged. Having to tender the fees via a process separate from service can be a hassle and a rule amendment should take account of modern technology. Another attorney subcommittee member agreed with these comments and reiterated that any new rule should not constrain modern methods of reaching people electronically, although it should also continue to permit service "the old-fashioned way."

A judge member confirmed that there can be expensive litigation involving tendering fees, especially when the person being subpoenaed is "ducking" service and suggested that the rule permit tendering fees when the subpoenaed party produces documents or appears. With respect to the amount of time to produce documents in response to a subpoena, the judge suggested a "reasonable" time, such as 14 days, especially if the documents must be produced for a scheduled trial or hearing. Recipients of such subpoenas need ample time to both prepare to respond and perhaps seek a protective order. This judge also indicated that a bright-line deadline would have benefits, especially for pro se litigants who may benefit from clear guidance, but that such deadlines may also enable sharp tactics.

Judge Bates asked whether a new rule would include provisions facilitating waiver of service, as in Rule 4(d), with mandatory consequences for a person who refuses to waive service. Professor Marcus responded that the subcommittee had not yet discussed that question but would consider it.

(2) Filing Under Seal. Professor Marcus noted that the Advisory Committee had received several submissions urging that issuance of a protective order under Rule 26(c) be assessed under a "good cause" standard quite distinct from the more demanding standards that the common law and First Amendment require for sealing court files. As Professor Marcus noted, district and circuit courts understand well that the standard for filing under seal is more demanding than what is required to issue a protective order, but that tests and standards vary across courts. One mechanism for such a change, outlined in the agenda book at page 262, would be to amend Rule

26(c) to provide that filings may be made under seal pursuant only to a new Rule 5(d). Such a new rule would state that unless filing under seal is mandated by a federal statute or these rules, no paper shall be filed under seal unless it would be justified and consistent with the common law and First Amendment rights of public access to court filings.

Professor Marcus then referred to an array of other issues, outlined in the agenda book at pages 265-267, including: procedures for filing under seal, who may seek to unseal documents and when, and the like. There is an array of local rules on these topics, and any rule that would address all issues related to sealing could be quite complicated. For instance, the suggested rule submitted by the Sedona Conference was seven single-spaced pages long. Professor Marcus added that these are issues of great significance to lawyers, especially if they find themselves under time pressure due to a court deadline. Questions such as whether the motion to seal may itself be filed under seal, whether documents may -- pending the decision on the motion to file under seal -– be filed under a provisional seal, and how such documents might be redacted can be critical. Moreover, there are complex questions about who may intervene to unseal documents, and what happens to sealed documents after a case has concluded.

One judge member opined that both judges and litigants would benefit from a uniform rule addressing at least some of these issues. This judge reported that the rules committee of the Federal Magistrate Judges Association (FMJA) had met and agreed that a beneficial rule would make clear that absent a statute or order, nothing should be filed under seal without a preceding motion and that such a motion should be recorded on the docket. The FMJA committee did not, however, reach consensus on what should happen to documents delivered to the clerk's office if a motion to seal is denied, or what should happen to the documents at the close of a case. The FMJA did however urge that clerks' offices be consulted on any possible change since implementing any such rule could prove logistically challenging.

Another judge member agreed that this was a serious issue but urged a "less is more" approach to any rule amendment. This judge expressed concern that the endless array of circumstances in which sealing issues could arise would make drafting a national rule a challenge. Such a rule would have to be very general to cover all possible circumstances but may then be too general to provide any benefit. An attorney member agreed with these concerns.

A different judge offered the local rule of that judge's district as a potential model. It provides that documents proposed to be filed under seal go to the judge for in camera inspection. The judge might deny the motion, in which case the documents are not filed and go back to the party seeking sealing. Alternatively, the judge might grant the motion, or do so provisionally pending a hearing.

Another judge indicated that many states have a higher bar for sealing than mandated by the common law or First Amendment, and that those statutes should be considered, as well.

With respect to the practical challenges created by a diverse set of standards across different courts, one attorney member reiterated the additional challenges time pressure often creates. This attorney expressed concerns both about attempting to file under seal but not receiving permission in advance of a filing deadline and the converse problem of receiving documents from adversaries that are so heavily redacted as to be useless. Another attorney

member confirmed these observations and added that while he often views his adversaries as "overdesignating" documents for sealing, they often don't fight over it because of other more pressing matters. This attorney also noted additional questions regarding documents received from third parties and whether those parties must be notified before their materials are filed.

With respect to redaction practices, several committee members weighed in. One judge suggested an approach whereby documents are filed under seal but the attorneys need to prepare a redacted version for the public record that would at least inform non-parties of what's confidential and what's not. Another judge indicated that such a practice is common among magistrate judges. A different judge, however, noted that while redacting a brief is usually relatively simple, redacting appendices of exhibits, which can sometimes run into the thousands of pages, is far more burdensome.

Ms. Shinn offered a perspective from clerks' offices noting that differences in nomenclature in this area can create difficulties. For instance, a "sealed" document may mean a document that is filed but never referenced on the docket at all, a "restricted" document that is docketed on CM/ECF but is accessible only to court staff and the parties, or a document that is referenced on the docket but cannot be accessed by anyone.

Judge Bates added his perspective that courts will likely go along with what the parties want to do, so long as there is a public redacted version of anything filed. But when a judicial opinion requires reference to documents filed under seal, there is an additional problem because judges need to be able to tell the world on what materials they are basing their decisions. He gives parties 24 hours' notice before releasing an opinion that cites to sealed material, but this practice may not work in every district. Districts have distinct issues and cultures, so crafting a national rule could be quite challenging.

Rule 41 Subcommittee

Judge Bissoon reported on the work of the Rule 41(a) subcommittee. This committee, which has been examining potential amendments to Rule 41 to clarify issues related to voluntary dismissal, hopes to present draft rule language at the next Advisory Committee meeting. Professor Bradt noted that the subcommittee had reached a consensus that the rule should be amended to make clear that a plaintiff may dismiss one or more claims under the procedures outlined in the rule, as opposed to the entire action. This flexibility is both consistent with the policy of narrowing claims and issues during the pendency of the litigation and the practice of many district courts. Professor Bradt added that his research indicated that such increased flexibility was consistent with the original intent of the rule, based on contemporaneous evidence. Professor Coquillette agreed, noting that the history of the original Federal Rules supports the view that the drafters likely intended parties to be able to voluntarily dismiss one or more claims in the litigation.

Moreover, the subcommittee continues to consider an amendment to the rule that would clarify that only current parties to a litigation need to sign a stipulation of dismissal, as opposed to all parties who have *ever* been part of the litigation, as the Eleventh Circuit has recently held. One attorney member expressed support for a change in the rule that would increase flexibility,

especially with respect to stipulations. This member suggested going even further than the above proposal by requiring only the signatures of parties to the claim they seek to dismiss.

Rule 7.1 Subcommittee

Judge Rosenberg introduced the issues currently being investigated by the Rule 7.1 subcommittee, chaired by Justice Jane Bland. Judge Rosenberg noted that this subcommittee, formed after the March 2023 Advisory Committee meeting, is considering expanding the corporate disclosures mandated by Rule 7.1(a)(1) to better inform judges of financial interests in a party that would trigger the statutory requirement to recuse. Although the subcommittee is not yet at the point of circulating draft rule language, it would benefit from feedback from Advisory Committee members.

Justice Bland noted that shortly after the subcommittee's most recent meeting, on February 23, 2024, the Judicial Conference Codes of Conduct Committee issued a new advisory opinion providing judges new guidance on their recusal obligations based on their financial interest in a party. The new guidance endorses the current rule to the extent that it uses 10% ownership of a party as a proxy for financial interest, because 10% ownership creates a rebuttable presumption of "control" of a party. The goal of Rule 7.1 is aimed less at providing guidance on whether to recuse than to ensure that judges have the information necessary to make that judgment, consistent with the recusal statute and canons of judicial conduct. The goal is to align the disclosure requirement as much as possible with the considerations prompted by the guidance.

Professor Bradt noted that it is likely impossible to craft a rule that would ensure that all possible financial interests are disclosed. Indeed, too great a reporting burden would not only be onerous, it would be unlikely to yield useful information in many cases. Moreover, the more disclosure that is required, the more likely it may be that the only relevant information disclosed is overlooked. The subcommittee has been looking at various possibilities to ensure the optimal amount of disclosure, drawing on numerous examples from state and local rules. One possible approach is to require parties to disclose what is currently required by the rule and any "beneficial owners" with the power to exercise control over the disclosing party.

One attorney member noted that corporations have "many arms and legs," including constantly evolving corporate forms and structures that judges are unlikely to invest in. On the other hand, as such investment vehicles proliferate, it may not be a safe assumption that judges would not hold any stake.

Professor Cooper, who was Reporter for the most recent revision of Rule 7.1, stated that he was taken aback by the new guidance from the Codes of Conduct Committee, particularly its emphasis on "control" of a party as a proxy for financial interest. Not only was the rule not drafted with that concept in mind, 10% may in many cases not be consistent with control at all (as in a joint venture among three parties, two of which each have 45% control and the other only 10%). Professor Cooper also noted the array of potential structures and the dynamic nature of both corporate ownership and judges' investments.

Justice Bland thanked committee members for their valuable feedback and noted that the subcommittee would be working on draft rule language and seeking outreach to the bar.

Cross-Border Discovery Subcommittee

Judge Rosenberg introduced the work of the Cross-Border Discovery Subcommittee, chaired by Judge Manish Shah. This subcommittee was created after the October 2023 Advisory Committee meeting to address issues raised in a recent Judicature article by former Advisory Committee members Judge Michael Baylson and Professor Steven Gensler. The subcommittee held its first meeting on January 30, 2024.

Judge Shah reported that the subcommittee had begun its work, using the Baylson/Gensler article as a jumping-off point. The first question the subcommittee is considering is whether there is a problem that can be profitably addressed by a federal rule. Parties in cross-border cases can find themselves at the intersection of the Federal Rules and foreign law, especially with respect to whether discovery in a foreign nation should be conducted according to the rules or the Hague Convention. The problem can become especially challenging if the discovery is illegal in the country or the subject of a "blocking statute" prohibiting disclosure. One question is whether a rule mandating consideration of these issues at a case-management conference would be helpful. The subcommittee has begun initial research and outreach to the bench and bar, including feedback from the Department of Justice and the Federal Magistrate Judges Association (FMJA). The subcommittee will also follow up with the Sedona Conference and the ABA's cross-border institute.

Professor Marcus added that he has received several overtures from groups monitoring what we are doing. There seems to have been a significant increase in cross-border discovery in recent years. Because U.S. discovery remains an outlier, conflicts with other countries are prevalent.

Magistrate Judge Boal noted that there was not significant support from the FMJA to add cross-border discovery to the list of topics to be discussed at a pretrial conference, because the issues come up naturally.

Joshua Gardner, of the DOJ, stated that the consensus in the Department is that current Rules 16 and 26(f) are sufficient to allow parties to raise cross-border discovery issues if they are relevant in a particular case.

Professor Marcus noted that perhaps there are sufficient tools for judges to address these issues as they arise. The intersection of the rules and the Hague Convention is a "labyrinth" but perhaps consultation and collaboration can solve specific problems better than a rule.

Random Case Assignment

The Advisory Committee has been asked to consider a rule requiring random district-judge assignment in cases seeking injunctions mandating or prohibiting enforcement of federal law. The proposal arises from concerns about a specific form of "judge-shopping," whereby a party files a case in a division with only one sitting judge. In some districts, that judge will receive all cases filed in the division, meaning that the choice to file there carries with it the

choice of the presiding judge. At the October 2023 Advisory Committee meeting, Professor Bradt was tasked with researching questions related to rulemaking authority in this area, and whether the supersession clause of the Enabling Act would need to be invoked, given that there is currently a federal statute, 28 U.S.C. § 137, that delegates the power to assign cases to the districts. Professor Bradt indicated that these were complex questions and that his research would continue over the summer.

Judge Rosenberg indicated that this is an extraordinarily important issue that will remain on the Advisory Committee's agenda. But several weeks before the Advisory Committee meeting, the Judicial Conference Committee on Court Administration and Case Management issued guidance to the district courts suggesting random assignment of the same cases that would likely be the focus of a new rule. This guidance is not, however, mandatory, and it is unclear how many districts will choose to comply. Professor Bradt reported that he, with the assistance of Rules Law Clerk Zachary Hawari, will monitor the districts' responses to the guidance over the coming months.

Brian Boynton, representing the Department of Justice, which recently submitted an extensive suggestion supporting a rule change, endorsed the approach of monitoring the district courts to see if they uniformly follow the Judicial Conference guidance. If they do not, in his view, rulemaking may be necessary, so research should continue on the viability of such a rule.

Professor Bradt stated that his research would continue in earnest over the summer and that he would report findings to the Advisory Committee at its next meeting.

Social Security Numbers

Rules Committee Chief Counsel Thomas Byron reported on recent developments concerning the redaction of Social Security numbers (SSN). Senator Wyden has asked for a reexamination of the current provisions in the privacy rules (including Civil Rule 5.2) that allow filings to include only the last four digits of the SSN. Redaction of the entire SSN may be preferable, and because such a shift would require amendments across all sets of federal rules, Mr. Byron has convened several meetings of all committee reporters to consider the issue as a working group. A memo in the agenda book, at page 342, outlines possible rule amendments. One question, however, is whether all of the privacy rules should be reexamined, since they have not received a close look in around 20 years. Mr. Byron indicated that such a reexamination could be undertaken by a joint subcommittee, the reporters' working group, or one advisory committee, which could take the lead.

Professor Marcus noted the importance of uniformity across the federal rules on these issues. There may not be a strong need for any SSN to appear in a civil filing, but there may be such a need in bankruptcy cases, in which case the needs of the bankruptcy courts may take precedence. Professor Marcus also took note of Civil Rule 5.2(h), which waives privacy protections for documents that are filed without redaction and not under seal. The clerk's office liaison added that any changes regarding privacy rules should take special consideration of the burdens of redacting personal information on court reporters.

Mr. Byron indicated that work would be ongoing on this issue and thanked the Advisory Committee for its feedback.

E-filing by pro-se litigants

Professor Struve presented on the ongoing effort to consider access to electronic filing by pro se litigants. She noted that a proposal would not be forthcoming at this meeting, but that the working group intended to convene with the aim to develop a proposal this summer.

Unified District Court Bar Admission

Professor Struve and Professor Bradt reported on the Joint Subcommittee on Unified District Court Bar Admission, chaired by Judge Paul Oetken (S.D.N.Y.). This subcommittee was formed in response to a proposal from Dean Alan Morrison and others supporting more seamless admission to federal district court bars. The subcommittee has met and is still in early stages of investigating the issue, and this was the first opportunity to seek feedback from the Advisory Committee. Although Dean Morrison's initial proposal was to create a national bar of the federal district courts, overseen by the Administrative Office, there was a lack of momentum for this idea in both the joint subcommittee and the Standing Committee at its January 2024 meeting. As a result, the subcommittee has instead turned toward considering less adventurous options, such as potentially preempting the requirement in some districts that applicants to the district court bar be members of the bar of the state in which the district is situated. Other possibilities remain under consideration, such as pro hac vice admissions and the potential impact of any rule change on the fees districts receive from bar applications. The subcommittee is also examining other possible effects of loosening bar-admission requirements, such as, perhaps, increased expectations of local counsel.

Professor Struve reported that at its January meeting, several members of the Standing Committee expressed support for the general idea of facilitating bar membership for lawyers with significant federal-court practices spanning multiple states, particularly lawyers of limited means or those who must move around a lot, such as military spouses. But some Standing Committee members expressed some skepticism, emphasizing the importance of districts' control over the quality of lawyering in their courts and the diversity of admission requirements reflecting aspects of local district culture. The subcommittee's next steps include: investigating the scope on Enabling Act authority for rulemaking in this area, examining closely relevant local rules, and working with the Appellate Rules Advisory Committee to better understand the effectiveness of Fed. R. App. P. 46, which takes a relatively permissive approach to admissions to Court of Appeals bars.

Professor Marcus asked about whether this project might affect a district's ability to require that its bar members adhere to its state's rules of professional responsibility. This concern prompted Professor Marcus to remind the committee of the prior unsuccessful effort to generate nationwide rules of professional responsibility for the federal courts. Professor Coquillette added his own view that such efforts were "a complete disaster," and should not be repeated, in part because the intersection between state rules of professional responsibility and applicable statutes barring unauthorized practice of law is an "absolute thicket." Professor Struve responded that

national rules of attorney conduct are not on the subcommittee's agenda, but that this prior experience is instructive.

A judge member of the committee asked why this would be an appropriate topic for rulemaking at all. Instead, in this judge's view, this is a topic best left to the districts and states because they have the on-the-ground responsibility of ensuring quality of lawyering in their courts. This judge also contested the use of the relatively lax appellate rule as a viable comparison because an appellate argument is a one-time, brief affair, while attorneys in the district court will inevitably appear more often. This judge also expressed concerns that too many nonlocal lawyers would water down the sense of community among lawyers and judges within the district.

Another judge member expressed similar reservations, noting that each district has a specific culture. One example is the oath bar members must take in this judge's district, which has not been modernized so as to better preserve a tangible link to past generations. This judge inquired whether pro hac vice admission was insufficient to address rulemaking proponents' concerns. A third judge agreed, noting that often bar-admission requirements are determined as much by local practitioners as judges, such as lawyers who may sit on district courts' local rules committees. This judge also noted that there may be valid reasons that some bars do not want local attorneys to be displaced by outsiders.

Professor Struve thanked Advisory Committee members for their feedback and promised to report it to the joint subcommittee investigating these issues.

Rule 81(c)

As presented previously to the Standing Committee, it has been proposed that an amendment to Rule 81(c) be considered because, as restyled in 2007, it could create confusion about whether a jury trial must be demanded after removal from state court if there has not yet been such a demand in the state court proceedings. As restyled, Rule 81(c)(3)(A) says that no demand for jury trial need be made after removal "[i]f the state law *did* not require an express demand for a jury trial" (emphasis added). The rule is arguably ambiguous with regard to states in which a jury-trial demand is required, but the deadline for such a demand had not yet passed at the time of removal. The rule appears to have been designed to excuse jury-trial demands after removal when the state from which the case was removed would *never* have required such a demand. This motivation for the rule was clearer under the rule prior to restyling, which provided that no federal jury demand would be necessary "i[f] the state law *does* not require an express demand for jury trial" (emphasis added). In sum, the change of verb tense creates an ambiguity in the applicability of the rule.

As Professor Marcus noted, courts seem to interpret the restyled rule as having the same effect as the prior rule, i.e., that a federal jury demand is required after removal unless it would never have been necessary in the state court from which the case was removed. Professor Marcus suggested two possible fixes that are under review: (1) reverting to the old language, which would make clear that a post-removal jury demand is required if none has been made before removal whenever a jury demand is required under the practice of the pertinent state court; or (2) removing the exemption for those states that do not require a jury demand and making clear that

an express jury demand must be made post-removal in every case if none was made post removal. Professor Marcus cautioned, however, that many lawyers practice only rarely in federal court so the Advisory Committee should be mindful that a change in the rule might unfairly surprise some practitioners. One lawyer member stated that this is an important issue and any such rule should strive to be as unambiguous as possible and therefore leaned toward the option that would require a jury demand in all cases after removal. The clerk's office liaison to the committee indicated that in their state there is no jury-demand requirement, so any such change would have to be accompanied by extensive outreach efforts in similar states to inform the local bar. The Advisory Committee has not yet decided which course to pursue.

Remote Testimony

Professor Marcus presented the following new issue: Several plaintiff-side lawyers recently submitted a proposal to resolve a split in the courts about the interaction of Rule 45(c)'s limitations on where a witness must appear under subpoena and the possibility of remote testimony under Rule 43(a) from an unwilling witness whose presence can be secured only by subpoena. The proposal was prompted by a Ninth Circuit decision, In re Kirkland, 75 F.4th 2030 (9th Cir. 2023), that even when Rule 43(a) authorizes remote testimony a subpoena may not be used to compel an unwilling witness to provide such testimony within the range authorized by Rule 45(c). The committee note to Rule 45, as amended in 2013, states that a subpoena could be used for such a purpose, but the Ninth Circuit held that it could not. The proposal also sought amendments to Rule 43(a) that would significantly relax present limitations on remote testimony in trials or hearings.

Professor Marcus noted that in the wake of the CARES Act and the pandemic, some rules regarding remote testimony may now look "antique," and revisiting them may be worthwhile. Rule 43 was amended in 1996 with an emphasis on the value of face-to-face communication when possible. But the Ninth Circuit's conclusion nevertheless seems odd in that under its interpretation the rule cannot compel remote testimony across the street from the subpoenaed person's home.

One attorney member expressed support for the proposed amendment, citing positive experiences with remote testimony in recent arbitrations in which the Federal Rules of Evidence applied. In this member's view, remote testimony worked well.

Another attorney member noted, however, that there are significant concerns about remote testimony with respect to witnesses perhaps receiving off-camera assistance in their testimony. A judge member agreed, noting the possible effects of artificial intelligence and "deep fakes." Professor Marcus indicated that it is not clear the changes to Rules 43 and 45 must be considered in tandem, but it will be important that considering changes to one of those rules take account of the effect those changes could have on the other rule.

Judge Bates queried whether a change to Rule 45(c) would effect a significant difference in how Rule 43(a) is applied. Professor Marcus indicated that any changes to Rules 43 and 45 would have to be considered in tandem. Professor Cooper noted that the first step would be to decide whether we simply want to have the district judge decide whether to permit remote

testimony; if so, the subsequent question will be figuring out how to tell the witness how to comply.

Because the interplay of changes to Rules 43 and 45 would be quite complicated, Judge Bates suggested formation of a subcommittee. Based on her experience serving on a similar project in Texas, Justice Bland volunteered to serve on the subcommittee, noting that remote testimony can be very useful if the integrity of the process is well safeguarded.

Subsequent to the Advisory Committee meeting, such a subcommittee was formed, to be chaired by Judge M. Hannah Lauck.

Deletion of the Word "Master" in the Rules

Professor Marcus introduced this proposal by the American Bar Association to eliminate the use of the word "master" in the rules and to replace it with "court-appointed neutral." The word "master" has been employed in Anglo-American legal systems for centuries and appears throughout the rules, most prominently in Rule 53. Professor Marcus also noted that there is a concurrent proposal to similarly amend Bankruptcy Rule 9031 to allow Rule 53 to apply in bankruptcy proceedings. Prior to the Advisory Committee meeting, the Association of Court-Appointed Neutrals submitted a letter in support of the ABA proposal.

Professor Marcus noted that while there does not appear to be any connection between the use of the word "master" in the rules and slavery, updating rule language to keep up with prevailing norms is not an unprecedented project. For instance, in the 1980s, the rules were updated to use gender-neutral language. Professor Struve noted that there is also an Appellate Rule using the term master, so any efforts should consult that committee. Another judge questioned whether the Standing Committee might take jurisdiction over this matter if the word master needed to be changed across all of the rule sets.

One judicial member stated that there was unlikely to be significant confusion if the language were to change since Rule 53 is more "task-driven," and nothing turns on the terminology used. Professor Struve reported that there is some precedent for this from the "synonym subcommittee" that looked at the entire universe of terminology employed in the federal rules, but that subcommittee ultimately did not act.

One judge asked whether this change could be applied to Rule 16.1, which uses the word "master." Judge Bates replied that such a change to the now-approved rule should not be made, and that if this project goes forward it would be better to amend 16.1 in the normal course.

FJC Research Projects

Dr. Emery Lee and Dr. Tim Reagan (remotely) presented on current research projects of the Federal Judicial Center, as reflected in a memo in the agenda book at page 653. Dr. Lee stated that while such reports had been typical, the practice had fallen into desuetude. His hope was that reintroducing the practice of reporting on FJC projects would highlight the role the FJC plays in supporting the rules committees and other Judicial Conference committees. Dr. Lee also indicated that an FJC study on unredacted private information would be forthcoming this summer, and that the report could inform the reporters' working group looking at SSN redaction.

Judge Rosenberg noted the importance and reliability of the work of the FJC, including on the ongoing revision of the Manual for Complex Litigation, on whose board of editors Judge Rosenberg serves. The FJC is working tirelessly on that complex project, alongside the valuable work it does for the rules committees.

Conclusion

Judge Rosenberg thanked the Administrative Office staff for its tireless work and incredible responsiveness in support of the Advisory Committee. Judge Rosenberg then thanked Judge Bates for this support of the committee. Prior to the meeting's adjournment, Judge Bates took a moment to congratulate Judge Rosenberg on receiving the 2024 Distinguished Federal Judicial Service Award presented by the Chief Justice of the Supreme Court of Florida. Judge Rosenberg then adjourned the meeting.

Respectfully submitted,

Andrew Bradt
Associate Reporter

TAB 6

6. Rule 81(c) – Demand for Jury Trial After Removal

During the Committee's April 2024 meeting, there was discussion but no final action on whether or how to amend Rule 81(c). There are basically two ways to amend the rule, and discussions at previous Advisory Committee meetings have indicated that – as presently "restyled" – the rule is potentially misleading to some lawyers. But no decision about which course to take was made at that time.

The problem was originally raised in 2015 by attorney Mike Wray, who argues that a change of verb tense made during the "restyling" of the whole set of Civil Rules in 2007 inadvertently produced a change to Rule 81(c) that created a trap for litigants about whether they need to make a prompt demand for a jury trial after removal from state court. As Mr. Wray puts it, his client lost a right to jury trial due to the "botched 'style' changes of 2007." In support of his submission, he cites records of the rules committees reflecting opposition in the bar to the overall restyling project. His suggestion is posted as 15-CV-A.

The issue is only now coming up for decision because in 2016 two members of the Standing Committee proposed that Rule 38 be amended in a way that would have obviated considering a change to Rule 81(c). After a thorough investigation of that question by the FJC, it was dropped, bringing the Rule 81(c) issue back onto the agenda.

Investigation has not revealed the reason for the restyling change in verb tense. But the potential for confusion was noted by Committee members during the October 2023 meeting. As restyled, Rule 81(c)(3)(A) says that no demand for jury trial need be made after removal "[i]f the state law *did* not require an express demand for a jury trial * * * unless the court orders the parties to do so within a specified time." Thus, the rule seems to have excused jury demands (absent a court order to make a demand) only after removal from state courts in which there is never a requirement to demand a jury trial, and not in instances of removal from a state court in which a jury demand must be made under state practice, but was not yet required as of the time of removal. In that way, it presumes that lawyers in states in which jury demands are required at some point will realize they need to worry about when that is required in federal court after removal. For those unaccustomed to ever having to demand a jury, the requirement that the court set a deadline for such demands is protective in calling their attention to this federal-court requirement. But that was surely clearer before restyling, when the rule required a jury demand after removal if no such demand had been made before removal "[i]f the state law *does* not require an express demand for a jury trial." The change to "did" muddied the waters, at least for Mr. Wray.

The style change could be read to indicate that the question under the restyled rule is whether *at the time of removal* state court practice already required a jury demand. Because there is often a short fuse on removing, which may require that a notice of removal be filed and served before an answer is due in state court (particularly if defendant obtains an extension of time to answer), it may often happen that no jury demand has been made in state court at the time of removal. That was Mr. Wray's problem in the case that prompted this submission. He found that courts in the Ninth Circuit did not treat the style change as changing the meaning of the rule, which the Ninth Circuit had held excuses a demand under Rule 38 (absent a demand before removal) only if the state practice never required such a demand.

Rules Law Clerk research has shown (a) that there seems to be some states in which a jury trial demand need not be made in state court, and (b) that federal courts continue to interpret Rule 81(c) as requiring a jury demand within the time allowed under Rule 38 if none were made before removal unless state law never requires a jury trial demand. The memos from Rules Law Clerk Zachary Hawari dated Feb. 28, 2024, and June 26, 2024, are in this agenda book.

Since the restyled rule has been in effect for nearly two decades, it might be well enough to leave it as it is. But amendment seems warranted by the risk of confusion.

So there seem two routes—reverting to the pre-restyling version of the rule, or commanding that a timely demand must be made in all removed cases if no jury trial demand was made before removal in all cases, whether or not a demand would be required in the state court from which the case was removed.

The first option might sometimes leave attorneys uncertain whether the case was removed from a state court in which a jury trial demand is required to ensure a jury trial. (There was some uncertainty among experienced judges in Minnesota, for example, about whether it is a state in which no demand is needed.) But to the extent there is reason to believe that lawyers in states without a jury demand requirement might be lulled into thinking they don't need to make one after removal, taking the second approach might be a surprise to them.

The earlier memo from Rules Law Clerk Zachary Hawari shows that could mean reverting to the pre-2007 verb tense would nonetheless leave lawyers uncertain whether they need to demand a jury in accordance with Rule 38 after removal. Thus, though some 30 states have jury-demand rules similar to Rule 38 the number of days allowed for making the demand varies from Rule 38's requirement that it be made "no later than 14 days after the last pleading directed to the issue is served." State practices in various states range from 10 days to 30 days to demand a jury trial. (As the memo notes, however, unless state practice includes an analogue to Rule 6 on weekends or holidays Rule 38's 14-day requirement might be as long as a state court 10-day requirement, or even possibly longer.

Beyond that, states that require a jury demand based on when pleadings are served trigger that requirement in different ways. Connecticut and Tennessee say that the focus is on the last pleading raising "an issue *of fact*," which might be different from Rule 38's provision.

Moreover, some states do not tie the jury demand requirement to when pleadings are filed. There may also be differences for different levels of state courts in a given state (e.g., district, circuit, municipal, and justice courts may use different jury-trial procedures).

So returning to the pre-2007 rule might not mean that determining whether or when one needs to demand a jury trial after removal is entirely clear in all removal situations.

But returning to the former rule would seem to preserve something it assured—if a given state *never* required a jury trial, lawyers in that state might be surprised to find that after removal they had to make one in federal court. That seems to be the function of the current rule's provision that after removal from the courts of such states "a party need not make [a jury demand] after removal unless the court orders the parties to do so within a specified time." To require a demand

in all removed cases, then, would materially change things for lawyers in those states that never require a jury demand.

The Hawari memo shows that there appear to be such states. As indicated on the chart included in the memo, it seems that Arizona, Georgia, Minnesota, Mississippi, Missouri, Nebraska, Oklahoma, and Oregon have no requirement to demand a jury trial to obtain one. (Some of these states seem to require a jury trial in every case unless the parties affirmatively waive jury trial.)

Whether all these states really excuse jury demands is not entirely clear, however. For one thing, it would seem that the clerk's office would need to know whether to summon jurors for a given trial, and sometimes there is a requirement that parties desiring a jury trial post jury fees in advance. For another, inquiry to experienced judges in at least one of these states (Minnesota) revealed some uncertainty about whether parties could really get jury trials without making a jury demand some time before the day jury selection is to begin.

On the other hand, the later memo from Rules Law Clerk Hawari confirms that federal courts still apply Rule 81(c) as though the verb tense remained as it was before 2007 (as Mr. Wray discovered in the case that prompted this submission). So leaving the rule as is could be a trap for the unwary. In sum, protecting the right to jury trial is important, so there may be reason for caution in pursuing Alternative 2, which could mean that lawyers in states that never require a jury demand would be deprived of an "exemption" from having to demand a jury trial after removal. But if that is a serious concern it might one that could be illuminated by comments during the public comment period, and the invitation for public comment could even mention the alternative of changing the rule back to what it said before 2007.

This memo therefore offers two alternatives for discussion. Unless Committee members would like additional information in making a choice about whether to propose amendment of the rule, or which option to adopt, the question seems ripe for decision.

Alternative 1 – Change back to present tense

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

* * * * *

(c) Removed Actions.

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

* * * * *

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

(A) *As Affected by State Law.* A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law does ~~did~~ not require an express demand for a jury trial, a party need not make one after removal unless the court orders the

parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.

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

(i) it files a notice of removal; or

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

Committee Note

As restyled in 2007, Rule 81(c) was changed from excusing a jury demand (absent a court order requiring a jury demand) whenever a state court "does" not require an express jury demand to requiring a jury demand unless state court practice "did" not require an express demand. Before 2007, the rule was interpreted to excuse a jury demand upon removal from state courts that never require such a demand, but the change in verb tense might have suggested that no such demand need be made after removal if the time for making a jury demand in the state court had not yet arrived. Removal often must occur very early in a case in state court. See 28 U.S.C. § 146(b)(1). As the Committee Note regarding the 2007 amendment stated, "[t]hese changes are intended to be stylistic only." In order to avoid confusion on whether a jury demand is required after removal, this amendment changes the verb tense back to what it was before 2007.

Alternative 2 – Demand always required

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

* * * * *

(c) Removed Actions.

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

* * * * *

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

(A) *As Affected by State Law.* A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. ~~If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.~~ If no such demand is made before removal, Rule 38(b) governs a demand for jury trial. If all [necessary] pleadings have been

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

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

(i) it files a notice of removal; or

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

Committee Note

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

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

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

TAB 6A

MEMORANDUM

To: Professor Marcus, Reporter

From: Zachary Hawari, Rules Law Clerk

Re: Rule 81 and State Jury Demand Procedures

Date: February 28, 2024

Jury Demand Procedures in State Courts

The Civil Rules Committee is considering whether to revert a verb tense change made during the restyling to Rule 81. Rule 81(c) provides procedures for state cases removed to federal court, and (c)(3), specifically, relates to jury demands. Under the federal rules, a party waives the right to a jury trial on any issue triable of right by a jury unless the party serves and files a written demand no later than 14 days after service of the last pleading directed to the issue. Fed. R. Civ. P. 38.

I have conducted a brief survey of states' rules and statutes, looking for when, if at all, a jury demand is required under their procedures. The concern is that a party in a removed case might be surprised if the originating state's procedures either presume a jury trial or do not require a jury demand be made until very late in the case. This survey aims only to get a rough sense of state procedures, and it does not reflect judicial opinions interpreting rules and statutes; subject-matter specific procedures; or differences in jury trials among levels of state courts (district, circuit, municipal, and justice courts sometimes use different jury procedures). Additionally, the methods for counting days in a period can vary, and a 10-day period in some states is not always shorter than the 14-day period in the federal rules. *See generally* Fed. R. Civ. P. 6, 2009 advisory committee note.

The full survey results can be found in the chart below.

To summarize, thirty states (plus the District of Columbia) are similar to the federal rule in requiring a jury demand within a certain number of days after service of the last pleading directed to a jury-triable issue.[1] Those states also have a provision roughly analogous to the federal rule's waiver provision. Seventeen states have a 10-

[1] Connecticut and Tennessee refer to the last pleading raising "an issue of fact."

day deadline; eleven states have a 14- or 15-day deadline; Pennsylvania has a 20-day deadline; and Alabama has a 30-day deadline.

Nine states require a jury demand but use a different measuring event. Indiana and Michigan, respectively, require a demand not later than 10 days after the first responsive pleading and not later than 28 days after the filing of the answer or a timely reply. Nevada requires a demand by the order "first setting the case for trial;" Washington requires the demand to be made "[a]t or prior to the time the case is called to be set for trial;" and Wisconsin requires the demand "at or before the scheduling conference or pretrial conference, whichever is held first." Alaska and Texas, respectively, require a demand 20 days and (at least) 30 days before the trial date. Maine requires a jury demand but does not include a specific deadline.

Another eight states either do not require a jury demand or require some affirmative waiver of a jury trial. Some of these states deem it a waiver when a party fails to appear at the trial or enters into a trial before the court without objection.[2]

Finally, California, Illinois, New Hampshire, and New York have procedures that are too unique or complex to categorize here.

[2] Rule text notwithstanding, brief research suggests that courts sometimes require a party to request a jury trial or object to a bench trial. For example, Minnesota courts recognize an obligation to demand a jury sometime prior to trial despite the rule's lack of a hard deadline. Nebraska appellate courts appear to presume that a jury trial was waived when no one objects to a bench trial.

Juris-diction	Cite	Text	Due X days after pleading	Waiver[3]	No demand required
Fed.	Fed. R. Civ. P. 38	(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved to the parties inviolate. (b) Demand. On any issue triable of right by a jury, a party may demand a jury trial by: (1) serving the other parties with a written demand—which may be included in a pleading—**no later than 14 days after the last pleading** directed to the issue is served; and (2) filing the demand in accordance with Rule 5(d). … (d) Waiver; Withdrawal. **A party waives a jury trial unless its demand is properly served and filed.** A proper demand may be withdrawn only if the parties consent.	14	Y	N
Ala.	Ala. R. Civ. P. 38	(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and **not later than thirty (30) days after the service of the last pleading** directed to such issue.	30	Y	N
Alaska	Alaska R. Civ. P. 38	(b) Demand. — Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and **not later than 10 days after the service of the last pleading** directed to such issue.	10	Y	N
Ariz.[4]	Ariz. R. Civ. P. 38	(a) ... On any issue triable of right by a jury, **a party need not file a written demand** or take any other action in order to preserve its right to trial by jury. (b) Waiver. **The parties may be deemed to have waived,** under these rules, a right to trial by jury **only if they affirmatively waive that right by filing a written stipulation, signed by all parties who appear at trial, at any time after the action is commenced, but no later than 30 days before the trial is scheduled to begin.** ...	–	**N**	**Y**

[3] Is there a waiver provision analogous to the Federal Rules? Yes (Y) / No (N) / Roughly (R)

[4] This is apparently a fairly recent change from the demand regime. *See Ansley v. Metro. Life Ins. Co.*, 215 F.R.D. 575, 579 n.7 (D. Ariz. 2003) (deciding whether a jury demand was timely in a removed case under Fed. R. Civ. P. 81 and discussing Ariz. R. Civ. P. 38(b)). The rule contains additional requirements for stipulations.

Juris-diction	Cite	Text	Due X days after pleading	Waiver[3]	No demand required
Ark.	Ark. R. Civ. P. 38	(a) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by filing with the clerk a demand therefor in writing at any time after the commencement of the action and **not later than 20 days prior to the trial date.**	–	Y	N
Cal.[5]	Cal Code Civ Proc § 631	(a) ... In civil cases, a jury may only be waived pursuant to subdivision (f). (b) At least one party demanding a jury on each side of a civil case shall pay a nonrefundable fee of one hundred fifty dollars ($150) ... (c) The fee described in subdivision (b) shall be due on or before the date scheduled for the initial case management conference in the action, except as follows: ... (2) If no case management conference is scheduled in a civil action...the fee shall be due no later than 365 calendar days after the filing of the initial complaint. … (f) A party waives trial by jury in any of the following ways: (1) By failing to appear at the trial. (2) By written consent filed with the clerk or judge. (3) By oral consent, in open court, entered in the minutes. (4) **By failing to announce that a jury is required, at the time the cause is first set for trial, if it is set upon notice or stipulation, or within five days after notice of setting if it is set without notice or stipulation. ...**	–	R	N
Colo.	C.R. C.P. 38	(b) Demand. Any party may demand a trial by jury of any issue triable by a jury by filing and serving upon all other parties, pursuant to Rule 5 (d), a demand therefor at any time after the commencement of the action but **not later than 14 days after the service of the last pleading** directed to such issue, except [for mandatory arbitration].	14	Y	N

[5] California's rules are unusual. A demand needs to be made around the time the cause is set for trial, but it seems possible for a jury fee to be due sooner than that in some cases. It seems possible that a case could be removed before a party is required to make a jury demand. There are also expedited jury trial procedures.

Juris-diction	Cite	Text	Due X days after pleading	Waiver[3]	No demand required
Conn.	Conn. Practice Book § 14-10	Conn. Practice Book § 14-10: All claims of cases for the jury shall be made in writing, served on all other parties and filed with the clerk within the time allowed by General Statutes § 52-215. ... General Statute Sec. 52-215. When, in any of the above-named cases an issue of fact is joined, the case may, **within ten days after such issue of fact is joined, be entered in the docket as a jury case upon the request of either party made to the clerk**; and any such case may at any time be entered in the docket as a jury case by the clerk, upon written consent of all parties or by order of court.	**10*** [6]	R	N
Del.	Del. Super. Ct. R. Civ. P. 38	(b) Demand. Any party may demand a trial by jury of an issued triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and **not later than 10 days after the service of the last pleading** directed to such issue.	10	Y	N
Fla.	Fla. R. Civ. P. 1.430	(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other party a demand therefor in writing at any time after commencement of the action and **not later than 10 days after the service of the last pleading** directed to such issue.	10	Y	N
Ga.[7]	O.C.G.A. § 9-11-39	9-11-39. Consent to trial by court; jury trial on court order. (a) The parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, **may consent to trial by the court sitting without a jury.**	–	**N**	**Y**
Haw.	Haw. R. Civ. P. 38	(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and **not later than 10 days after the service of the last pleading** directed to such issue...	10	Y	N

[6] It is not clear whether Connecticut's "issue of fact" standard is the same as the "any triable issue" standard used by most other courts.

[7] In Georgia, the various rules of procedure are codified in the Official Code of Georgia Annotated. *See* Title 9: Civil Practice.

Juris-diction	Cite	Text	Due X days after pleading	Waiver[3]	No demand required
Idaho	I.R.C. P. Rule 38	(b) Demand for jury. On any issue triable of right by a jury, a party may demand a jury trial.... The demand may be made by: (1) serving the other parties with a written demand, which may be included in a pleading, **no later than 14 days after the last pleading** directed to the issue is served...	14	Y	N
Ill.	735 Ill. Comp. Stat. 5/2-1105	(a) **A plaintiff** desirous of a trial by jury **must file a demand** therefor with the clerk **at the time the action is commenced**. **A defendant** desirous of a trial by jury must file a demand therefor **not later than the filing of his or her answer.** Otherwise, the party waives a jury. **If an action is filed seeking equitable relief** and the court thereafter determines that one or more of the parties is or are entitled to a trial by jury, **the plaintiff, within 3 days** from the entry of such order by the court, or **the defendant, within 6 days** from the entry of such order by the court, may file his or her demand for trial by jury with the clerk of the court.	** [8]	R	N
Ind.	Ind. Trial R. 38	(B) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by filing with the court and serving upon the other parties a demand therefor in writing at any time after the commencement of the action and **not later than ten (10) days after the first responsive pleading** to the complaint, or to a counterclaim, crossclaim or other claim if one properly is pleaded; and if no responsive pleading is filed or required, **within ten (10) days after the time such pleading otherwise would have been required.**	** [9]	Y	N
Iowa	Iowa R. Civ. P. 1.902	Rule 1.902 Demand for jury trial. (2) A party desiring a jury trial of an issue must make written demand therefor **not later than ten days after the last pleading** directed to that issue.	10	Y	N
Kan.	Kan. Stat. Ann. § 60-238	(b) Demand. On any issue triable of right by a jury, a party may demand a jury trial by: (1) Serving the other parties with a written demand, which may be included in a pleading, **no later than 14 days after the last pleading** directed to the issue is served; …	14	Y	N

[8] Illinois is very different from the federal system. The plaintiff needs to make a demand very early, but a defendant has until the answer.

[9] Rule 6 says that a "responsive pleading required under these rules, shall be served within twenty [20] days after service of the prior pleading."

Juris-diction	Cite	Text	Due X days after pleading	Waiver[3]	No demand required
Ky.	Ky. R. Civ. P. 38.02	Rule 38.02. Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and **not later than 10 days after the service of the last pleading** directed to such issue.	10	Y [10]	N
La.	La. C.C.P. Art. 1733	C. The pleading demanding a trial by jury shall be filed **not later than ten days after either the service of the last pleading** directed to any issue triable by a jury**,** or the granting of a motion to withdraw a demand for a trial by jury.	10	R	N
Me.	Me. R. Civ. P. 38	(b) Demand. In an action in the Superior Court, any plaintiff may **demand a trial by jury of any issue triable of right by a jury by filing a demand** and paying the fee therefor as required… (d) Waiver. The failure of a party to make a demand and pay the fee as required by this rule constitutes a waiver by that party of trial by jury; **provided that for any reason other than a party's own neglect or lack of diligence, the court may allow a party to file and serve a demand upon all other parties within such time as not to delay the trial**.	–	R	N [11]
Md.	Md. R. 2-325	(a) Demand. — Any party may elect a trial by jury of any issue triable of right by a jury by filing a demand therefor in writing either as a separate paper or separately titled at the conclusion of a pleading and immediately preceding any required certificate of service.(b) Waiver. — The failure of a party to **file the demand within 15 days after service of the last pleading filed by any party** directed to the issue constitutes a waiver of trial by jury.(c) Actions from district court. — When an action is transferred from the District Court by reason of a demand for jury trial, a new demand is not required.	15	Y	N

[10] Waiver is in Rule 38.04.

[11] A jury demand needs to be made, but it is not clear when the deadline is. A prior version of Me. R. Civ. P. 16(b) apparently provided that a plaintiff had 15 days from service of an answer to file a pretrial scheduling statement, including whether a jury trial is demanded. *Solomon v. Brooklawn Mem'l Park, Inc.*, 600 A.2d 1113, 1114 (Me. 1991).

Juris-diction	Cite	Text	Due X days after pleading	Waiver[3]	No demand required
Mass.	Mass. R. Civ. P. 38	(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and **not later than 10 days after the service of the last pleading** directed to such issue. ...	10	Y	N
Mich.	MCR 2.508	(B) Demand for Jury. (1) A party may demand a trial by jury of an issue as to which there is a right to trial by jury by filing a written demand for a jury trial **within 28 days after the filing of the answer or a timely reply**. The demand for jury must be filed as a separate document. The jury fee provided by law must be paid at the time the demand is filed.	– [12]	Y	N
Minn.	Minn. R. Civ. P. 38.02	In actions arising on contract, and by permission of the court in other actions, any party thereto may waive a jury trial by: (a) failing to appear at the trial; (b) written consent, by the party or the party's attorney, filed with the court administrator; or (c) oral consent in open court, entered in the minutes. **Neither the failure to file any document requesting a jury trial nor the failure to pay a jury fee shall be deemed a waiver of the right to a jury trial.**	–	**N**	**Y*** [13]
Miss.	M.R.C. P. 38	(b) Waiver of jury trial. — Parties to an action may w**aive their rights to a jury trial by filing with the court a specific, written stipulation that the right has been waived** and requesting that the action be tried by the court. The court may, in its discretion, require that the action be tried by a jury notwithstanding the stipulation of waiver.	–	**N** [14]	**Y**
Mo.	Mo. Rev. Stat. § 510.190; Mo. Sup. Ct. R. 69.01	1. ... In particular, **any issue as to whether a release, composition, or discharge of plaintiff's original claim was fraudulently or otherwise wrongfully procured shall be tried by jury unless waived**. 2. **Parties shall be deemed to have waived trial by jury:** (1) By failing to appear at the trial; (2) By filing with the clerk written consent in person or by attorney; (3) By oral consent in court, entered on the minutes; (4) By entering into trial before the court without objection.	–	**N**	**Y**

[12] The deadline runs from answer or reply, which is somewhat like Indiana.

[13] Notwithstanding the rule, courts have said that a jury demand before the trial day is necessary.

[14] This seems to be one of the stricter affirmative waiver requirements. *Cf.* Missouri.

Juris-diction	Cite	Text	Due X days after pleading	Waiver[3]	No demand required
Mont.	Mont. R. Civ. P. 38	On any issue triable of right by a jury, a party may demand a jury trial by: (1) serving the other parties with a written demand — which may be included in a pleading — **no later than 14 days after the last pleading** directed to the issue is served; and	14	Y	N
Neb.	Neb. Rev. Stat. § 25-1126	The **trial by jury may be waived** by the parties in actions arising on contract and with assent of the court in other actions (1) **by the consent of the party appearing, when the other party fails to appear at the trial** by himself or herself or by attorney, (2) **by written consent**, in person or by attorney, filed with the clerk, and (3) **by oral consent** in open court entered upon the record.	–	**N** [15]	**Y**
Nev.	N.R.C. P. 38	(b) On any issue triable of right by a jury, a party may demand a jury trial by: (1) serving the other parties with a written demand—which may be included in a pleading—at any time after the commencement of the action and **not later than the time of the entry of the order first setting the case for trial**...	– [16]	Y	N

[15] Where no one objects to a bench trial, the appellate court will presume that a jury trial was waived. *MFA Ins. Cos. v. Mendenhall*, 205 Neb. 430, 432, 288 N.W.2d 270, 272 (1980).

[16] This is also true for justice courts. Nev. JCRCP 38.

Juris-diction	Cite	Text	Due X days after pleading	Waiver[3]	No demand required
N.H.	N.H. Super. Ct. R. 8, 9; N.H. Cir. Ct. Dist. Div. R. 3.8, 3.9	N.H. Super. Ct. R. Rule 8. (c) A plaintiff entitled to a trial by jury and desiring a trial by jury shall so **indicate upon the first page of the Complaint at the time of filing**, or, if there is a counterclaim, at the time plaintiff files an **Answer to such counterclaim**. Failure to request a jury trial in accordance with this rule shall constitute a waiver by the plaintiff thereof. N.H. Cir. Ct. Dist. Div. R. 3.8. Complaint. (c) A plaintiff against whom a counterclaim is filed and who is entitled to a trial by jury and desiring a trial by jury shall so indicate at the time plaintiff files an Answer to such counterclaim. Failure to request a jury trial in accordance with this rule shall constitute a waiver by the plaintiff thereof. N.H. Super. Ct. R. Rule 9 & N.H. Cir. Ct. Dist. Div. R. 3.9. Answers; defenses; forms of denials. (c) To preserve the right to a jury trial, a defendant entitled to a trial by jury must indicate his or her request for a jury trial upon the first page of the Answer at the time of filing. Failure to request a jury trial in accordance with this rule shall constitute a waiver by the defendant thereof.	** [17]	Y	N
N.J.[18]	N.J. Ct. R. 4:35-1	N.J. Court Rules, R. 1:8-1 (b) Civil Actions. Issues in civil actions triable of right by a jury shall be so tried only if a jury trial is demanded by a party in accordance with R. 4:35-1 or R. 6:5-3, as applicable, and is not thereafter waived. Rule 4:35-1. [Superior Court, Law and Chancery Divisions, the surrogate's courts and the Tax Court] Demand for jury trial. (a) Demand; Time; Manner. Except as otherwise provided by R. 4:67-4 (summary actions), any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing **not later than 10 days after the service of the last pleading** directed to such issue.	10	Y	N

[17] The deadlines seem to go with the complaint/answer. Based on the difference between the Superior Court and Circuit Court rules, it seems that a plaintiff can only get a jury trial in the Superior Court unless there is a counterclaim.

[18] There are slightly different rules for the Law Division of the Superior Court. *See* N.J. Court Rules, R. 6:5-3.

Juris-diction	Cite	Text	Due X days after pleading	Waiver[3]	No demand required
N.M.[19]	Rule 1-038, NMRA	A. Jury demand. In civil actions any party may demand a trial by jury of any issue triable of right by serving upon the other parties a demand therefor in writing after the commencement of the action and **not later than ten (10) days after service of the last pleading** directed to such issue...	10	Y	N
N.Y.[20]	N.Y. C.P.L.R. 4101-4103 (Consol.)	§ 4101. Issues triable by a jury revealed before trialIn the following actions, the issues of fact shall be tried by a jury unless a jury trial is waived or a reference is directed under section 4317, except that equitable defenses and equitable counterclaims shall be tried by the court: ... § 4102. Demand and waiver of trial by jury; specification of issues(a) Demand. Any party may demand a trial by jury of any issue of fact triable of right by a jury, by serving upon all other parties and filing a note of issue containing a demand for trial by jury. Any party served with a note of issue not containing such a demand may demand a trial by jury by serving upon each party a demand for a trial by jury and filing such demand in the office where the note of issue was filed **within fifteen days after service of the note of issue**. § 4103. Issues triable by a jury revealed at trial; demand and waiver of trial by juryWhen it appears in the course of a trial by the court that the relief required, although not originally demanded by a party, entitles the adverse party to a trial by jury of certain issues of fact, the court shall give the adverse party an opportunity to demand a jury trial of such issues.	–	R	N

[19] For a magistrate court, NMRA Rule 2-602 provides: "B. Demand. Either party to an action may demand trial by jury. The demand shall be made in the complaint if made by the plaintiff and in the answer if made by the defendant, …"

[20] NY is unique. It appears that a party must filed a "note of issue" after discovery selecting a jury or nonjury trial and, if a nonjury trial, the other parties have 15 days to demand a jury trial. *See Ramirez-Hernandez v. Bloomingdale*, 166 N.Y.S.3d 825, 826 (Sup. Ct.) ("When discovery is complete and the matter is ready for trial any party may file a certificate of readiness with a note of issue to place the matter on the trial calendar. When one party files a note of issue demanding a nonjury trial, court rules require any other party to the matter who desires a jury trial to file such a demand within 15 days. Failure to timely demand a jury trial constitutes a waiver by operation of CPLR 4102 (a) (the right to a trial by jury shall be deemed waived by all parties) and Uniform Rules for Trial Courts (22 NYCRR) § 202.21 (c) (shall constitute a waiver by all parties and the action or special proceeding shall be scheduled for nonjury trial).").

Juris-diction	Cite	Text	Due X days after pleading	Waiver[3]	No demand required
N.C.	N.C. Gen. Stat. § 1A-1, R. 38	(b) Demand. — Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after commencement of the action and **not later than 10 days after the service of the last pleading** directed to such issue.	10	**Y**[21]	N
N.D.	N.D.R. Civ.P. 38	(b) Demand. On any issue triable of right by a jury, a party may demand a jury trial by: (1) serving the other parties with a written demand - which may be included in a pleading - **no later than 14 days after the last pleading** directed to the issue is served; and...	10	Y	N
Ohio	Ohio Civ. R. 38	(B) Demand. Any party may demand a trial by jury on any issue triable of right by a jury by serving upon the other parties a demand therefore at any time after the commencement of the action and **not later than fourteen days after the service of the last pleading** directed to such issue.	14	Y	N
Okla.	12 Okl. St. § 591	The **trial by jury may be waived** by the parties, in actions arising on contract, and with the assent of the court in other actions, **in the following manner:** By the **consent of the party appearing, when the other party fails to appear at the trial** by himself or attorney. **By written consent**, in person or by attorney, filed with the clerk. **By oral consent**, in open court, entered on the journal.	–	**N**	**Y**

[21] N.C. Gen. Stat. § 1A-1, R. 38(c) provides: "Waiver. — **Except in actions wherein jury trial cannot be waived**, the failure of a party to serve a demand as required by this rule … constitutes a waiver by him of trial by jury."

Juris-diction	Cite	Text	Due X days after pleading	Waiver[3]	No demand required
Or.	ORCP 51; UTCR 6.130	ORCP 51 C. ISSUES OF FACT; HOW TRIED The trial of all issues of fact **shall be by jury unless**: C.(1) The parties or their attorneys of record, by **written stipulation** filed with the court or by an oral stipulation made in open court and entered in the record, **consent to trial without a jury;** or C.(2) The court, upon motion of a party or on its own initiative, finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of this state. Ore. Uniform Trial Court Rules 6.130. **No waiver of trial by jury in civil cases in circuit court shall be deemed to have occurred unless the parties notify the court of such a waiver before 5:00 p.m. of the last judicial day before tria**l. Thereafter, a jury trial may not be waived without the consent of the court. ...	–	**N**	**Y**
Pa.	Pa. R.C.P. No. 1007.1	(a) Demand. In any action in which the right to jury trial exists, that right shall be deemed waived unless a party files and serves a written demand for a jury trial **not later than twenty days after service of the last permissible pleading**.	20	Y	N
R.I.[22]	R.I. Super. Ct. R. Civ. P. 38	(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by: (1) Serving upon the other parties a demand therefor in writing at any time after the commencement of the action and **not later than ten (10) days after the service of the last pleading** directed to such issue; and...	10	Y	N
S.C.	S.C. R. Civ. P. 38	(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and **not later than 10 days after the service of the last pleading** directed to such issue.	10	Y	N
S.D.	S.D. Codified Laws § 15-6-38(b)	Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and **not later than ten days after the service of the last pleading** directed to such issue.	10	Y	N

[22] On appeal from the district court to the Superior Court, a party demanding a jury trial shall serve a demand therefor not later than ten (10) days after certification on appeal unless such demand was made in the District Court; a docket notation that the action is a jury case does not suffice. R.I. Super. Ct. R. Civ. P. 81.

Juris-diction	Cite	Text	Due X days after pleading	Waiver[3]	No demand required
Tenn.	Tenn. R. Civ. P. 38.02	Any party may demand a trial by jury of any issue triable of right by jury by demanding the same in any pleading specified in Rule 7.01 or by endorsing the demand upon such pleading when it is filed, or by written demand filed with the clerk, with notice to all parties, **within fifteen (15) days after the service of the last pleading raising an issue of fact.**	**15*** [23]	Y	N
Tex.	Tex. R. Civ. P. 216	Rule 216. [RULES OF PRACTICE IN DISTRICT AND COUNTY COURTS] Request and Fee for Jury Trial. a. Request. No jury trial shall be had in any civil suit, unless a written request for a jury trial is filed with the clerk of the court **a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than thirty days in advance.**	–	R	N
Utah	U.R.C. P. 38	(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by paying the statutory jury fee and serving upon the other parties a demand therefor in writing at any time after the commencement of the action and **not later than 14 days after the service of the last pleading** directed to such issue.	14	Y	N
Vt.	Vt. R. Civ. P. 38	(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and **not later than 14 days after the service of the last pleading** directed to such issue...	14	Y	N
Va.	Va. Sup. Ct. R. 3:21	(b) Demand. — Any party may demand a trial by jury of any issue triable of right by a jury in the complaint or by (1) serving upon other parties a demand therefore in writing at any time after the commencement of the action and **not later than 10 days after the service of the last pleading** directed to the issue...	10	Y [24]	N

[23] It is not clear whether "an issue of fact" is the same as "any issue triable of right by a jury." *See also* Rule 38.03. Demand -- Cases Removed to Trial Court: If the case is removed to chancery or circuit court, a written demand for a jury trial must be filed "within ten (10) days after the papers are filed with the clerk."

[24] Va. Code Ann. § 8.01-336: B. Waiver of jury trial. — In any action at law in which the recovery sought is greater than $20, exclusive of interest, unless one of the parties demands that the case or any issue thereof be tried by a jury, or in a criminal action in which trial by jury is dispensed with as provided by law, the whole matter of law and fact may be heard and judgment given by the court.

Juris-diction	Cite	Text	Due X days after pleading	Waiver[3]	No demand required
Wash.	Wash. Super. Ct. Civ. R. 38	(b) Demand for jury. **At or prior to the time the case is called to be set for trial**, any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing, by filing the demand with the clerk...	–	Y	N
W. Va.	W. Va. R. Civ. P. 38	(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and **not later than 10 days after the service of the last pleading** directed to such issue...	10	Y	N
Wis.	Wis. Stat. 8 05.01	(2) Demand. Any party entitled to a trial by jury or by the court may demand a trial in the mode to which entitled **at or before the scheduling conference or pretrial conference, whichever is held first**. The demand may be made either in writing or orally on the record.	–	Y	N
Wyo.	Wyo. R. Civ. P. 38	(b)(1) By Whom; Filing. — Any party may demand a trial by jury of any issue triable of right by a jury by (A) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and **not later than 14 days after service of the last pleading** directed to such issue...	14	Y	N
DC	D.C. Super. Court. Civ. R. 38	On any issue triable of right by a jury, a party may demand a jury trial by: (1) serving the other parties with a written demand—which may be included in a pleading—**no later than 14 days after the last pleading** directed to the issue is served…	14	Y	N

TAB 6B

MEMORANDUM

To: Professor Marcus, Reporter

From: Zachary Hawari, Rules Law Clerk

Re: Whether a Jury Demand Is Required After Removal

Date: June 26, 2024

The Civil Rules Committee is considering whether to revert a verb tense change made during the restyling to Rule 81(c)(3)(A): "If the state law ~~does~~ did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time." This memorandum reviews whether other circuits take a similar approach to the Ninth Circuit's position in *Lewis v. Time, Inc.*, 710 F.2d 549 (9th Cir. 1983), regarding the interpretation of Rule 81(c).

Courts of appeals[1]—and, in the absence of binding circuit precedent,[2] district courts[3]—have consistently interpreted the former present-tense language to turn on *whether* a jury trial demand must be made at all in state court, not *when* in the case

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[1] *See Cascone v. Ortho Pharm. Corp.*, 702 F.2d 389, 391 (2d Cir. 1983); *Malbon v. Pa. Millers Mut. Ins. Co.*, 636 F.2d 936, 938 (4th Cir. 1980) (explaining that the possibility of escape under a provision of Rule 81(c) was foreclosed because the Virginia code required a jury demand even though the custom and usage of the local court was to require a demand at least five days prior to trial); *Duncan v. First Nat'l Bank*, 597 F.2d 51, 54 (5th Cir. 1979) (holding that the Georgia Constitution does not provide a right to a jury trial in equitable proceedings and that the appellant failed to make a jury demand as required by the relevant statute) (this former Fifth Circuit opinion is also binding in the Eleventh Circuit); *Bruns v. Amana*, 131 F.3d 761, 762 (8th Cir. 1997); *Lewis v. Time, Inc.*, 710 F.2d 549, 556 (9th Cir. 1983).

[2] *Cf. Davis v. Bath Iron Works*, No. 92-1023 (1st Cir. June 19, 1992) (unpublished) (noting that certain portions of Rule 81(c) were not relevant because, among other things, "this was not a case where a jury trial would have been automatically granted in state court without an express demand.").

[3] *See Bonney v. Canadian N. R. Co.*, 100 F.R.D. 388, 392 (D. Me. 1983) (First Circuit); *Henderson v. Harrah's Marina Hotel Casino*, 110 F.R.D. 66, 67 (E.D. Pa. 1986) (Third Circuit); *Williams v. Shell Oil Co.*, 487 F. Supp. 81, 84 (E.D. Mich. 1980) (Sixth Circuit); *Kay Beer Distrib. v. Energy Brands, Inc.*, No. 07-C-1068 (E.D. Wis. June 12, 2009) (Seventh Circuit); *Trimble v. FedEx Office & Print Servs.*, No. 22-cv-433 (N.D. Okla. Jan. 17, 2024) (Tenth Circuit).

the demand must be made. In other words, in states where a jury trial is the default, that presumption carries over to a removed federal case unless a court orders otherwise.[4] For purposes of this memorandum, that is referred to as the traditional view.

Some parties have argued that the change from present-tense "does" to past-tense "did" in 2007 suggests that a jury demand is also no longer required in federal court if a jury demand was *not yet due* when the case was removed from state court. This issue seems to matter most in states which require an affirmative jury demand but not until fairly late in the proceedings. This is referred to as the expansive interpretation.

Prior to restyling, some courts grappled with a similar argument, particularly in states like New York, which fell "within a gray area not covered by Rule 81(c)" because, "[i]n essence, the decision as to whether or not a case should be tried by a jury need not be made in New York state courts until a case is actually ready for trial." *Cascone v. Ortho Pharm. Corp.*, 702 F.2d 389, 391 (2d Cir. 1983).[5] The distinction between state law and local practice has also come up in states like Virginia.[6] Nevertheless, those courts arrived at the traditional view, mostly in cases from the 1970s and 80s. Although it does not appear that any court of appeals has

[4] Apparently, some districts embracing states that do not have a jury demand requirement have nevertheless created or interpreted their local rules to require a jury demand be made within a certain time. Courts have interpreted these local rules to be consistent with Rule 81 under the exception for when "the court orders the parties to [make a jury demand] within a specified time." *See O'Malley v. United States Fid. & Guar. Co.*, 776 F.2d 494, 501-02 (5th Cir. 1985) (examining a local rule in the Southern District of Mississippi); *Trimble v. FedEx Office & Print Servs.*, No. 22-cv-433 (N.D. Okla. Jan. 17, 2024) (collecting cases on the "unpublished case law in this district" addressing this practice).

[5] In recognition of this gray area, federal courts in the Second Circuit use a more lenient, multi-factor standard in considering whether to grant an untimely demand for a jury trial in cases from removed from New York state court. *See generally Quinlan v. Stryker Corp.*, 09-cv-7284 (S.D.N.Y. Dec. 10, 2009).

[6] *See Malbon*, 636 F.2d at 938; *see also Wertz v. Grubbs*, No. 93-2355 (4th Cir. Jan. 5, 1995) (unpublished) (rejecting a party's argument that his request for a jury demand was not untimely under Rule 81(c) because the demand would have been timely under Virginia state law and local custom and practice).

revisited this issue since restyling, many district courts have continued to apply the traditional view.[7]

Some district courts have expressly rejected the expansive interpretation—although not without some hesitation. For example, in *Kay Beer Distributing*, the district court observed that:

> The language of the current Rule 81 is ambiguous. At least one court has observed that the Rule is "poorly crafted." *Cross v. Monumental Life Ins. Co.*, 2008 U.S. Dist. LEXIS 109235, 2008 WL 2705134, *1 (D. Ariz. July 8, 2008). This court agrees. The use of the past tense – "If state law did not require an express demand" – without any qualification, makes it unclear whether the exception is intended to apply to cases in which a demand for a jury under state law was not yet due when the case was removed, or to cases in which a demand is not required at all. Kay's interpretation of Rule 81(c)(3)(A) thus has some merit.

Kay Beer Distrib. v. Energy Brands, Inc., No. 07-C-1068 (E.D. Wis. June 12, 2009). Nevertheless, after reviewing the amendment history and committee note to Rule 81, the district court concluded that "Rule 81(c)(3)(A) only applies when the applicable state law does not require a jury demand at all. It has no application when, as in this case, the applicable state law requires an express demand, but the time for making the demand has not yet expired when the case is removed." *Id. See also Greystone Condo. at Blackhawk Owners Ass'n v. AmGUARD Ins. Co.*, No. 19-cv-768 (W.D. Wis. July 27, 2020) (magistrate judge order).

District courts in the Ninth Circuit have reached a similar conclusion. *Sardinas v. United Airlines, Inc.,* No. 19-cv-0257 (W.D. Wash. May 3, 2019) (collecting cases).

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[7] For example, the district court in *Awugah* explained that, under Maine's procedures, the time to file a jury demand is set by scheduling order, and a demand is not made in the initial complaint. As a result, "[t]he time for demanding a jury trial in a case removed to federal court from state court has bedeviled lawyers" in the District of Maine. *Awugah v. Key Bank Nat'l Ass'n*, No. 2:12-cv-97 (D. Me. July 18, 2012) (noting that Rule 81(c) had been "somewhat reworded" since *Bonney v. Canadian N. R. Co.*, 100 F.R.D. 388, 392 (D. Me. 1983), "but not affecting this issue"). Nevertheless, district courts have found an express demand requirement under Maine's procedures and have seemingly rejected the expansive interpretation. *Id. See Capak v. Epps*, 673 F. Supp. 3d 425, 428 (S.D.N.Y. 2023); *Branham v. Dolgencorp, Inc.*, No. 6:09-cv-037 (W.D. Va. Aug. 10, 2009).

TAB 7

7. Rule 55 – Requirement of Action by Clerk Rather than Court

This matter was brought to the Committee's agenda by an informal comment by a judge concerned about whether the rule inappropriately uses the mandatory "must" regarding the duties of court clerks in possible default situations. For the assistance of the Committee the FJC has prepared the report that follows in this agenda book.

For some time, the Committee has been considering whether the mandatory language of Rule 55(a) and Rule 55(b)(1) really are appropriate. Below is a sketch of a possible rule change that might be useful to avoid arguments clerks are required to do things they are not comfortable doing. In light of the FJC report, it may be time to decide whether to proceed with drafting an amendment for formal presentation at the Spring 2025 meeting, or to drop this matter from the agenda on the ground that it has not caused actual difficulties.

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 [upon finding that the party has failed to plead or otherwise defend].

(b) Entering a Default Judgment.

(1) ***By the Clerk.*** If the clerk determines that 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.

* * * * *

The FJC's study of practice under Rule 55 shows that there is some diversity in practice in different districts. In the "overwhelming majority" of districts, the clerk enters defaults under Rule 55(a) without a judge's involvement, though in some districts entry of default is done in chambers. Entry of judgment by the clerk without judicial involvement is not so routine.

Sometimes the clerk may consult with chambers if there is a question about whether service was accomplished properly. That might be most important where questions regarding service on a foreign defendant arise. The possible changes above might address this reality by changing the verb in 55(a) from "must" to "may," and possibly adding the requirement that the clerk "find" that the party has failed to plead.

Another thing that might be addressed is whether an "application" is sufficient or a "motion" is necessary. Under Rule 7(b)(1), "[a] a request for a court order must be made by motion." Rule 55(a) does not say entry of default involves a court order. Entry of default might often involve court orders—consider entry of default under Rule 37 for disobedience of a discovery order.

The FJC report says that Rule 55(b)(1) motions are scarce, and that in some districts the clerks may treat all motions for entry of default judgment as Rule 55(b)(2) motions calling for judicial action. It finds that there is a "kind of 'drift' away from the national rule to something like a de facto treatment of all motions for default judgment as Rule 55(b)(2) motions." So perhaps it might make sense to abrogate Rule 55(b)(1) altogether.

For a recent example, consider *Savoia-McHugh v. Glass*, 95 F.4th 1337, 1340 (11th Cir. 2024):

> On July 9, the McHughs moved for the entry of a clerk's default and a default judgment against Glass. A clerk's default was entered immediately, but the requested judgment was not.

The explanation why the judgment was not entered immediately appeared in a footnote (id. at 1340 n.6):

> Entry of the default must precede entry of a default judgment. Fed. R. Civ. P. 55(a)-(b). Pursuant to Fed. R. Civ. P. 55(b)(2), in order to determine the amount of the default judgment when it is not a sum certain (or capable of computation to make it such). "[t]he court may conduct hearings or make referrals" to "conduct an accounting;" "determine the amount of damages" that the defaulting defendant must pay; "establish the truth of any allegation by evidence;" or "investigate any other matter."

In this case, defendant eventually filed a motion to vacate the entry of default on the ground of lack of notice. The court (not the clerk) denied that motion, finding that defendant had sufficient notice and found that he "intentionally or recklessly disregarded judicial proceedings." By that time, defendant had not only failed to answer the complaint but also failed to obey at least one order compelling responses to discovery. Though the case does not seem to involve a claim for a liquidated sum, it does seem to show that district courts do not precipitously sustain defaults entered by clerks.

It is not difficult to imagine that in some cases there is room for debate about whether judgment is for an amount certain, particularly if it can be made certain only by "computation." It seems that in the 1930s the idea was that the path to entry of default judgments against debtors should be eased, or that judges should not have to be involved in those cases. In ancient history, something like that was the reason for adopting summary judgment—to permit the creditor to pierce phony defenses by the debtor.

Some local rules already direct that all motions for entry of default judgment be referred to the judge. See FJC report at 7 (referring to a local rule in the E.D.N.C. saying that "The clerk may submit any motion for default judgment to the presiding judge for review.") Under a literal interpretation of the use of "must" in 55(b)(1), there might an argument that such a local rule violates Rule 83(a) because it is not "consistent with . . . rules adopted under [the Enabling Act]."

The FJC Report also discusses (at pp. 9-10) some related matters not directly addressed by Rule 55. In general, the rules seek to ensure that filed cases move forward. Thus, Rule 4(m) specifies a time limit for service. And Rule 41(b) permits dismissal for failure to prosecute. Rule

12(a)(1) sets a time limit for defendant to respond after service. Rule 16(b) directs the court to enter a scheduling order early on to set deadlines for at least some litigant activities.

But all of these directives are largely subject to the parties' actions. What if plaintiff does serve defendant and defendant does not answer but plaintiff does not seek entry of default? The rules do not specifically direct courts to monitor compliance with Rule 4(m), though CM/ECF has that capability. And some districts do monitor nonprogressing cases. There can be uncertainty, however, about whether plaintiff has granted an extension of time that does not appear in the court's docket.

It does not seem that there is a strong need for additional rule provisions to prompt monitoring of cases, and it certainly does not seem that Rule 55 itself is designed to do that.

Figures 1 and 2 in the FJC Report (pp. 24-25) do not seem to indicate there is a problem with current default practice in terms of case monitoring. To the contrary, they indicate that between 1998 and 2023 the proportion of cases ending in default judgments declined quite dramatically, so that by 2023 they constituted only 2% of all civil terminations. Figure 2 shows also that around 2000-2001 there was a spike in defaults in collection cases, but that abated thereafter. (On this point, it might be noted that in 2020 the Pew Charitable Trusts did a study of state-court litigation that found that collection actions in state courts routinely end in defaults by unrepresented debtors.)

The FJC study gives the Committee a wealth of information, but does not firmly answer the question whether there is a problem to be solved. It could be said that the study shows that though district practices under Rule 55 are not exactly identical the rule seems to be working reasonably well. The time may have come to drop this item from the agenda.

TAB 7A

Default and Default Judgment Practices in the District Courts

Prepared for the Judicial Conference Advisory Committee on Civil Rules

Emery G. Lee III and Jason A. Cantone

March 2024

This Federal Judicial Center publication was undertaken in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. While the Center regards the content as responsible and valuable, this publication does not reflect policy or recommendations of the Board of the Federal Judicial Center.

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Contents

Executive Summary

The Advisory Committee on Civil Rules (Committee) requested the Federal Judicial Center (Center) to study actual practices with respect to Federal Rule of Civil Procedure 55, focusing on how many districts' practices differ from those outlined in the rule with respect to allocation of authority to clerks of court to enter defaults and default judgments.[1] Center researchers reviewed each district court's website (including procedures on the intranet sites when access was available), local rules, and recently entered default judgments. After reviewing these materials, Center researchers contacted court staff to inquire about district practices.

Rule 55(a) entry of defaults. Most districts follow the national rule: the clerk of court enters the default, with or without consultation between the clerk's office and chambers. In four districts, district judges enter defaults in the ordinary run of cases.

Rule 55(b)(1) entry of default judgments for a sum certain. District court practice varies with respect to this rule. First, Rule 55(b)(1) motions for default judgment are less common in some districts; several districts reported that "sum certain" motions are rarely filed. Second, in 34 districts, all motions for default judgment, including Rule 55(b)(1) motions, are referred to the assigned judge for determination. In another 18 districts, the clerk's office almost never enters a default judgment, even though there is no local rule or policy against doing so in sum certain cases.

Monitoring deadlines. In general, clerk's offices do not monitor answer deadlines in civil cases in a centralized, automated fashion. Courtroom deputies or law clerks often monitor deadlines in chambers, and deadlines can be monitored using reporting features in CM/ECF by chambers staff.

1. Minutes, Advisory Committee on Civil Rules, October 5, 2021 [hereinafter October 2021 Minutes], at 24, https://www.uscourts.gov/sites/default/files/final_-_minutes_civil_rules_committee_fall_2021_0.pdf.

Background

Rule 55 provides for a confusing two-step process for entry of defaults and default judgments. Before entry of a default judgment, a default must typically be entered. Rule 55(a) provides: "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 must enter the party's default." Rule 55(b)(1) in turn provides:

> 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.[2]

Before entering a default, the clerk (or the clerk's designee) must review both the affidavit submitted by the plaintiff and the docket to determine that the requirements for entering a default have been satisfied. Although this is usually routine, in some cases the clerk may be required to exercise some judgment (discretion) in deciding whether a nonanswering party is in default. The Committee reporter suggested that "a failure 'to otherwise defend' may not be apparent, since such events as pre-answer settlement negotiations or a request for an extension of time to answer often do not appear in the record."[3] Furthermore, questions may arise regarding service of process.

Cases sometimes refer to the clerk's entry of default judgment under Rule 55(b)(1) as "automatic,"[4] in line with the perception that duties of the clerks of court are primarily

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2. In addition, Fed. R. Civ. P. 77(c)(2)(B) states that "the clerk may enter a default," and Fed. R. Civ. P. 77(c)(2)(C) that "the clerk may enter a default judgment under Rule 55(b)(1)."

3. Agenda Book, Advisory Committee on Civil Rules, Mar. 29, 2022, at 317. It is not absolutely clear that pre-answer settlement negotiations are covered by the "otherwise defend" in Rule 55(a):

> [W]hen a defendant makes a strategic choice to forego the filing of a timely response in an attempt to avoid litigation expense—and even if that choice is made in conjunction with an attempt to effect a settlement—it is well within the discretion of a district court to deem the default willful and refuse to set it aside.

Martie v. M&M Bedding, LLC, 528 F. Supp. 3d 1252, 1254 (M.D. Fla. 2021) (magistrate judge's report and recommendation on motion to set aside default). *See also* Annon Consulting, Inc. v. BioNitrogen Holdings Corp., 650 F. App'x 729, 732 (11th Cir. 2016) (holding that the district court did not abuse its discretion in granting default judgment when defendant's "failure to file an answer was due to litigation strategy: to effect a settlement and avoid proceeding with the litigation").

Even if settlement negotiations are ongoing, a party can still file, on the record, for an extension of time to answer. The magistrate judge in *Martie* viewed this as a matter of respect: "If M&M Bedding had an appropriate respect for the courts and legal process, it would have paid appropriate heed to the summons and timely filed either a response to the complaint or a motion for more time to respond." 528 F. Supp. 3d at 1256. The footnote further elaborated on the appropriate procedures in such circumstances:

> When pre-answer settlement negotiations appear likely to resolve the matter, defendants who have not appeared but are nevertheless mindful of their obligations to the Court request that plaintiff counsel file a joint motion to extend the answer deadline. But M&M Bedding held fast to its decision to act as if the deadline in the summons did not exist.

Id. at n.3.

4. *See, e.g.*, Graham v. Forever Young Oregon, LLC, No. 03:13-CV-01962-HU, 2014 WL 3512498, at *2 (D. Or. July 14, 2014) ("Because the court must conduct further investigation in order to determine the amount of damages, the court finds Graham has not met the requirements for automatic entry of default judgment by the Clerk of Court pursuant to Rule 55(b)(1)."); Branch Banking & Tr. Co. v. PJ Servs. Catastrophe Sols., Inc., No. 1:12-CV-04351-AT, 2013 WL 12209837, at *1 (N.D. Ga. June 26, 2013) ("In addition, although Rule 55(b)(1) also allows for automatic

nondiscretionary,[5] ministerial duties such as the keeping of records.[6] But the practice of investing "a chief scribe, or secretary . . . with . . . judicial powers" is an old one, the historical source of equity courts in the Middle Ages.[7] There is little question that, at times, clerks of court perform discretionary acts, and the clerks' responsibilities under Rule 55 can straddle the line.[8] The Committee's reporter suggested that entering a default "is not purely a ministerial act."[9] Moreover, the clerk's entering of a default judgment pursuant to Rule 55(b)(1) is less ministerial than the entry of default, as it may call for greater "responsibilities to inquire" into the facts of the case and to determine the amount of damages.[10]

As might be expected whenever discretion is involved, Rule 55 practices vary a great deal among district courts. The Committee's questions regarding Rule 55 stemmed from the observation that some courts' practices diverge from the letter of the rule. For example, as discussed at a Committee meeting, in the Northern District of Illinois, the clerk's office does not typically enter defaults; instead, this is done only by the assigned judge. The same is true of Rule 55(b)(1) default judgments for a sum certain.[11]

On a more fundamental level, the Committee reporter asked, "why was the rule written as it is?"[12] To help answer this question, Appendix A to this report excerpts the transcript of the Committee's November 1935 meeting discussing a draft of what would become Rule 55, with extensive commentary on the varying practices in the states. From the excerpt, it appears that the Committee's initial decision to authorize the clerk to enter default judgments for liquidated claims was based on existing state practices and a concern for efficiency. In terms of efficiency, then-Committee chair, former Attorney General of the United States William D. Mitchell, stated:

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entry of default by the Clerk where the amount sought 'can be made certain by computation,' here Plaintiff failed to demonstrate such computation.").

5. The lack of discretion is central to the definition of "ministerial":

> Of, relating to, or involving an act that involves obedience to instructions or laws instead of discretion, judgment, or skill; of, relating to, or involving a duty that is so plain in point of law and so clear in matter of fact that no element of discretion is left to the precise mode of its performance <the court clerk's ministerial duties include recording judgments on the docket>.

Black's Law Dictionary 1192 (11th ed. 2019).

6. *Cf.* Hobby v. United States, 468 U.S. 339, 344–45 (1984) (grand jury foreperson's duties, including keeping records of grand jury proceedings, are ministerial). *See also* Lucia v. SEC, 138 S. Ct. 2044, 2057 (2018) (Thomas, J., concurring) ("The Founders considered individuals to be officers even if they performed only ministerial statutory duties—including recordkeepers, clerks, and tidewaiters (individuals who watched goods land at a customhouse)."). The words "clerical" and "clerk" share the same root.

7. Joseph Story, Commentaries on Equity Jurisprudence, as Administered in England and America, Vol. I, at 40 (1836, Arno Press 1972).

8. This seems to arise most often in the absolute immunity context, typically in suits against clerks in the state courts. *See* Lowe v. Letsinger, 772 F.2d 308, 312–13 (7th Cir. 1985) ("Courts have held that a court clerk enjoys absolute immunity in rare instances where he is performing nonroutine, discretionary acts akin to those performed by judges . . . such as setting bail" (citing Williams v. Wood, 612 F.2d 982, 985 (5th Cir. 1980); Kane v. Yung Won Han, 550 F. Supp. 120, 122–23 (E.D.N.Y. 1982); Denman v. Leedy, 479 F.2d 1097, 1098 (6th Cir. 1973))).

9. "Entering a default," in the words of the Committee reporter, "is not purely a ministerial act." *See* October 2021 Minutes, *supra* note 1, at 24.

10. *See id.* at 24.

11. *See id.* at 24–25 ("Judge Dow noted that in his court a judge enters the default as well as a default judgment.").

12. *Id.* at 23. For a general discussion of the history of Rule 55, see Charles Alan Wright et al., Federal Practice & Procedure Civ. § 2681 (2023).

> Let us look at it from a practical standpoint. In the administration of justice, the courts are overworked. Now, we have two systems to choose from in the case of default on a liquidated sum under contract. Either you can take five or ten minutes of the court's time to make an order or under the other system, you would file an affidavit with the clerk for a liquidated claim where the demand is a sum certain and save five or ten minutes of the judge's time. Now, that is the practice. My experience has been that where you have this Code system in a liquidated claim in an action under contract for a sum certain and the clerk can enter judgment on an affidavit and no answer is filed. It works perfectly and saves five or ten minutes of the judge's time.

This sentiment was echoed by then-Committee member (another former Attorney General of the United States) George M. Wickersham: "Yes, there is no use using the time of the court. He does not use any more judgment in those cases than the clerk; and the defendant retains a remedy. He can make an application to the court to reopen the judgment."

Appendix B to this report summarizes court data on default judgments terminating civil cases for fiscal years 1988–2023. Appendix C includes districts' local rules with respect to default judgments in civil cases.

Approach

Center researchers reviewed each district court's website (including procedures on the intranet sites when access was available), local rules, and default judgments, which were identified using the Civil Integrated Data Base (IDB). In addition, Center researchers reviewed the Administrative Office's District Clerk's Manual, a nonpublic resource that includes instructions for entry of defaults and default judgments. This report omits information drawn exclusively from nonpublic materials; however, members of the Committee may be able to access these materials, including the District Clerk's Manual, on JNet.

After reviewing these materials, Center researchers contacted court staff from every district by email to inquire about district practices; in most cases, the initial communication included the researchers' initial assessment of district practices, given the local rules and procedures as well as recent cases in which default judgments had been entered. Center researchers generally reached out to clerks of court or chief deputy clerks, but in a few cases, researchers contacted judges or court staff with whom they had previously worked. Most of the communications were conducted by email, but telephone interviews were conducted with some court staff. If initial inquiries were unsuccessful, follow-up emails were sent at least once to every district. Responses were received from 88 districts.

Rule 55(a) Defaults

Rule 55(a) specifies that the defaulting party's failure to "plead or otherwise defend" must be "shown by affidavit or otherwise." This showing is almost always accomplished by an affidavit stating the grounds for the entry of default. For example, the affidavit form used in the Eastern District of Michigan requires the affiant to attest to the date and form of service, that the defaulting party has not pleaded or otherwise defended pursuant to Rule 12, and that the defaulting party is

not a minor, incompetent person, or member of the armed forces.[13] These criteria follow those outlined in the District Clerk's Manual.

In general, the clerk or clerk's designee reviews the application and accompanying affidavit to ensure that the defaulting party was properly served, that the time to plead has passed, and that the defaulting party has not pleaded or otherwise defended. In some districts, instructions specify that the application should be forwarded to the assigned judge if there are questions regarding whether service of process was proper or whether the defendant in question has appeared in the case. The instructions related to determining proper service are more detailed in some districts than in others.

Many issues may arise in the review of an application for default. For example, extensions of time to file a responsive pleading may create some uncertainty regarding whether a particular defendant is in default. In at least one district, the instructions specify that, in the situation when an extension was granted but has since elapsed, the defendant has not defended the action, and in another district the instructions require the clerk's office to check whether a motion for extension of time to answer has been filed. The affidavit found in the attorney handbook for the Western District of Pennsylvania (a public document), for example, specifically addresses whether the defendant's time to answer or otherwise plead has been extended.[14] The Central District of California clerk's office uses a Notice of Deficiency form for both defaults and default judgments, and sets out more extensive reasons for why "[t]he Clerk cannot enter the requested Default":

- No declaration as required by Fed. R. Civ. P. 55(a)
- No proof of service/waiver of service on file
- The name of the person served does not exactly match the person named in complaint
- Proof of Service is lacking required information
- Waiver of Service lacking the signature of the sender and/or the person acknowledging receipt
- Time to respond has not expired
- Answer and/or Motion for Summary Judgment and/or Motion to Dismiss on file
- Request for Entry of Default has been forwarded to the assigned judge
- Party dismissed from action
- Case terminated[15]

Clerks of court enter Rule 55(a) defaults in the overwhelming majority of districts, at least in routine civil cases, without a district judge's order. Although there are circumstances in which

13. Eastern District of Michigan, Request for Clerk's Entry of Default, https://www.mied.uscourts.gov/PDFFIles/Req_ClerksEntryDefault_PDF.pdf.

14. Western District of Pennsylvania, Attorney Handbook, at Appendix I. https://www.pawd.uscourts.gov/sites/pawd/files/ATTORNYHANDBOOK.pdf.

15. *E.g.*, Notice of Deficiency—Default/Default Judgment, LA Alliance for Human Rights v. City of Los Angeles, No. 2:20-cv-02291-DOC-KES (C.D. Cal. May 27, 2021) (doc. no. 322), https://www.cacd.uscourts.gov/deficiency-re-notice-default-and-app-entry-default-judgment-document-322.

district judges may order the entry of default[16] in these districts (e.g., where questions regarding the service of a foreign defendant arise), the usual policy is for default to be entered by the clerk, consistent with the wording of Rule 55(a).

The Center's review identified three districts in which defaults are entered by district judges in the ordinary run of cases—Illinois Northern, Puerto Rico, and Texas Southern.[17] However, even in these districts, the practices of individual judges vary, as some judges prefer that the clerk's office enter defaults in routine cases. In addition, district judge-entered defaults are the norm in the Urbana Division of Illinois Central; in the district's other divisions (Peoria and Rock Island), defaults are typically entered by a magistrate judge.[18] It is also likely that individual judges in other districts reserve to themselves the entry of defaults.

Moreover, in other districts the clerk's office typically consults with chambers before entering Rule 55(a) defaults, even when no deficiencies appear on the face of the application. In our communications with districts, about a dozen respondents offered that consultation between the clerk's office and chambers is typical prior to entry of default. Consultation with chambers does not necessarily mean consultation with the judge; in at least one district, internal operations procedures require the courtroom deputy to check with the judge's law clerk prior to any entry of default. It is difficult to say exactly how widespread consultation between clerk's office and chambers is, as it probably varies by judge as well as by district or office. One district judge offered that she is cautious about entering defaults, and that, in her experience, service is often the problem. For this reason, she reviews the *motions* for default, which show up on her daily CM/ECF report.

One final point on the entry of default: courts vary in how they describe the request for an entry of default. In some courts, the request is regularly designated as a motion for entry of default on the docket, even though it may be handled by the clerk of court. However, in many courts, it is called an application for entry of default (e.g., District of Arizona). As one interviewee explained, "motions" are directed to chambers in many districts' CM/ECF systems, so requests for entry of default, which are directed to the clerk's office, must be assigned another event type.[19] In at least two districts' CM/ECF systems, it is possible for a plaintiff to file either an application for default,

16. To be clear, district judges possess the authority to enter defaults. As the Second Circuit explained in City of New York v. Mickalis Pawn Shop, LLC, 645 F.3d 114 (2d Cir. 2011), "Although Rule 55(a) contemplates that entry of default is a ministerial step to be performed by the clerk of court, a district judge also possesses inherent power to enter a default." *Id.* at 128 (internal citations omitted).

17. The practice of judges routinely entering defaults seems to be *very* long-standing in at least two of these districts. For Northern Illinois, we were able to find this example, from the mid-1980s: "The default was entered pursuant to [Fed. R. Civ. P.] 55(a) which authorizes the clerk of the court, and impliedly the court itself, to enter a default against a nonresponding defendant. In its May 24 order, this court set prove-up of damages for September 5, 1985. . . ." Allen Russell Pub., Inc. v. Levy, 109 F.R.D. 315, 316 (N.D. Ill. 1985). Similarly, the policy was already in place in 1980 in Texas Southern, according to an internal memorandum shared with the authors.

18. *See, e.g.*, Order of Default, Hudson Ins. Co. v. Rex Express Inc., No. 1:22cv01019 (C.D. Ill. Aug. 5, 2022) (docket entry 32) (order of default entered by magistrate judge in Peoria division). Arguably, entry of the default by a magistrate judge is more like entry by the clerk of court than entry by the district judge. Defaults are commonly ordered by magistrate judges in other districts, such as Oregon. *See, e.g.*, Order of Default, Smith v. Opportunity Fin., LLC, No. 3:22-cv-00140 (D. Or. Jan. 26, 2022) (docket entry 7) ("ORDER issued by Magistrate Judge Jolie A. Russo: Granting Plaintiff's Motion for Entry of Default as to Defendant Opportunity Financial, LLC.").

19. *See also* S.D.N.Y. CM/ECF R. 16.1, providing instructions for filing for entry of default. https://www.nysd.uscourts.gov/sites/default/files/pdf/ecf_rules/ECF%20Rules%2020221101%20FINAL.pdf.

which is directed to the clerk's office, or a motion for default, which is directed to the judge. This difference in nomenclature regarding what to call requests for entry of default carries through into other contexts. For example, a district's local rules may exempt certain motions from a general requirement of an accompanying memorandum of law and list "application for default" as one such motion.[20]

Rule 55(b)(1) Default Judgments

Case law applying Rule 55(b)(1) is scarce, but reflects the rule's origin in debt-collection actions (as described in Appendix A).[21] Regarding the sum certain requirement, "a claim is not a sum certain unless there is no doubt as to the amount to which a plaintiff is entitled as a result of the defendant's default."[22] "Any damages that require exercise of the Court's discretion are not sum certain."[23] Specifically, Rule 55(b)(1) applies in contract disputes in which damages are "calculated by the method of computation provided in the agreement,"[24] such as where the agreement provides for liquidated damages,[25] and in cases involving "money judgments, negotiable instruments, or similar actions where the damages sought can be determined without resort to extrinsic proof."[26] In general, Rule 55(b)(1) does not apply in personal injury actions,[27]

20. *See, e.g.*, S.D. Fla. Civ. R. 7.1, https://www.flsd.uscourts.gov/sites/flsd/files/Local_Rules_Effective_120121_FINAL.pdf#page=22.

21. *See* Collex, Inc. v. Walsh, 74 F.R.D. 443, 450 (E.D. Pa. 1977) ("[T]he cases discussing the sum certain requirements of Rule 55 are few and far between and rather exiguous in their reasoning"); *see also* Byrd v. Keene Corp., 104 F.R.D. 10, 12 (E.D. Pa. 1984) ("Relatively few cases have raised the question of what qualifies as a 'sum certain' for the purposes of Rule 55(b)."). These may be older cases, but the proposition for which they are cited still stands.

22. KPS & Assocs., Inc. v. Designs By FMC, Inc., 318 F.3d 1, 19 (1st Cir. 2003).

23. Genus Lifesciences Inc. v. Tapasaya Eng'g Works Pvt. Ltd., No. 20-3865, 2021 WL 5631771 (E.D. Pa. Nov. 29, 2021), at *2. Interestingly, computation is not discretionary, so prejudgment interest may be an available remedy in some Rule 55(b)(1) default judgments, as "a sum that can be made certain by computation." In diversity actions, the availability of prejudgment interest depends on state law, however, because courts have uniformly held the remedy to be substantive rather than procedural. *See* Dustin K. Palmer, Comment, *Should Prejudgment Interest Be a Matter of Procedural or Substantive Law in Choice-of-Law Disputes?*, 69 U. Chi. L. Rev. 705, 706 (2002) ("Federal courts . . . unanimously construe prejudgment interest rules as substantive under *Erie* . . . because of their outcome-determinative nature. Thus, federal courts follow the characterizations of the states in which they sit.") (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)). If, then, under state law the award of prejudgment interest is left to the discretion of the judge, applying equitable principles, it is not available in Rule 55(b)(1) default judgments entered by the clerk.

24. *Collex*, 74 F.R.D. at 451.

25. *Id.* at 450.

26. Interstate Food Processing Corp. v. Pellerito Foods, Inc., 622 A.2d 1189, 1193 (Me. 1993). The First Circuit noted the "paucity" of case law applying Rule 55(b)(1) and thus relied in its analysis on "states whose rules of procedure mirror the Federal Rules," *KPS & Assocs.*, 318 F.3d at 19. *See also* HB Prods., Inc. v. Falzan, No. 19-00487, 2020 WL 3504427, at *3 (D. Haw., June 29, 2020) ("where extrinsic evidence is required, Rule 55(b)(1) does not apply"). *See also* Banilla Games, Inc. v. AKS Va., LLC, No. 3:22CV131, 2022 WL 16747288, at *1 (E.D. Va. Nov. 7, 2022) ("Generally, the principal and interest on a loan are sums certain within the meaning of Rule 55(b)(1).").

27. *See Byrd*, 104 F.R.D. at 12.

or when the plaintiff seeks reasonable attorney fees,[28] or statutory [29] or punitive damages.[30] As a result, litigants may move for Rule 55(b)(1) default judgment in cases when Rule 55(b)(2) would have been appropriate—i.e., when the claim is not for a sum certain.

Motions for default judgment pursuant to Rule 55(b)(1) appear to be much less common than motions pursuant to Rule 55(b)(2). In our canvas, 17 respondents, some in relatively large districts, offered that Rule 55(b)(1) motions are rarely filed in their districts. The scarcity of Rule 55(b)(1) motions in these districts creates uncertainty as to whether they follow the national rule—with the clerk's office independently entering default judgments for sums certain—or treat all motions for default judgment as Rule 55(b)(2) motions, directed to the assigned judge. Indeed, in our canvas we found that, in many districts, the clerk's office rarely, if ever, enters default judgments without the assigned judge's approval, even when the district does not have a local rule or policy against the clerk's office doing so. Overall, we found that 36 districts follow the national rule, 18 districts follow the national rule in theory (though in practice the clerk's office rarely, if ever, enters default judgments), and 34 districts follow the judge-centered procedure of Rule 55(b)(2) for all default judgments.

In districts in which clerks of court do not routinely handle the entry of Rule 55(b)(1) default judgments, clerk's offices and judges both expressed some hesitation regarding this delegation of responsibility. One chief deputy clerk stressed that the clerk's office did not have a policy against entering default judgments; if a particular judge on the court directed it to do so, when appropriate, in her cases, the clerk's office (and its staff) would do so, though with hesitation. In another district, the clerk of court noted that, although the court had no policy against the clerk's office entering default judgments—indeed, there were local internal operating procedures for doing so—the clerk's office had not, in fact, been doing so, but had instead been forwarding all such motions to the assigned judges' chambers for resolution. This kind of "drift" away from the national rule to something like a de facto treatment of all motions for default judgment as Rule 55(b)(2) motions appears to be relatively common.

Some local rules acknowledge the practice of referring Rule 55(b)(1) motions to the district judge, even when the clerk of court is authorized to enter judgments. For example, the relevant local rules for North Carolina Eastern include the following proviso: "The clerk may submit any motion for default judgment to the presiding judge for review."[31] Similarly, the relevant local rule in Missouri Western states: "Notwithstanding the provisions of Federal Rule of Civil Procedure 55(b)(l), the Clerk of Court may refer any request for entry of default judgment to the Court for review prior to formal entry."[32]

28. *See* Cennox Reactive Field Servs., LLC v. Cash Cloud, Inc., No. 6:22-CV-03274, at *1, 2022 WL 18411315, at *1 (W.D. Mo. Dec. 28, 2022) ("Federal courts have generally recognized that to the extent a party seeks to recover 'reasonable attorney's fees' as it may be entitled to do in any given case, the party's claim is not then for a 'sum certain' as that term is used in Rule 55(b)(1)."). *See also* Branded Online Inc. v. Holden LLC, No. 15-0390, 2016 WL 8849024, at *1 (C.D Cal. Jan. 8, 2016); Combs v. Coal & Mineral Mgmt. Servs., Inc., 105 F.R.D. 472, 475 (D.D.C. 1984).

29. *See* Butler v. Experian Info. Sols., No. 14-07346, 2016 WL 4699702, at *1 n.2 (E.D. Pa. Sept. 7, 2016).

30. *See* Royal v. Lee, No. 1:17cv261, 2018 WL 10772683, at *1 (E.D. Va. Nov. 6, 2018).

31. E.D.N.C. Civ. R. 55.1(b)(2)(F).

32. W.D. Mo. Civ. R. 55.1(b)(2).

In districts in which clerks of court routinely enter Rule 55(b)(1) default judgments, the clerk's office instructions typically require that the docket be reviewed for entry of default pursuant to Rule 55(a) prior to entry of default judgment. In general, any discrepancy between the amount claimed in the complaint and in the supporting affidavits will defeat a motion for default judgment pursuant to Rule 55(b)(1).[33] This was a point made in interviews with clerk's office staff. In one large court, for example, motions for default judgment for a sum certain are reviewed to make sure that the amount claimed in the affidavit is the same as in the complaint; the amounts must match (and the computations be provided). The clerk's office will not go beyond what is in the complaint and affidavit. If in a sum certain case there is a discrepancy, the intake person would go to her supervisor, who would then send the motion to chambers. In another large court, the clerk's office instructions make clear that the amount included in the judgment must be the same as that sought in the complaint.

It may be useful to refer again to the Notice of Deficiency form used by the Central District of California clerk's office for both defaults and default judgments. For default judgments, the form provides the following reasons why "[t]he Clerk cannot enter the requested Default Judgment":

- No Entry of Default on File
- No declaration as required by Fed. R. Civ. P. 55(b)
- The name of the person for which Default Judgment is requested does not exactly match the person named in the complaint
- Amounts requested differ or exceed the amounts prayed for in the demand for judgment in the most recently filed complaint
- A declaration establishing the amount due must accompany the plaintiff's request for default judgment
- No judgment by default may be entered by the Clerk against the United States or an incompetent person. The Request for Entry of Default has been forwarded to the assigned Judge
- Amount sought is not for a sum certain or cannot be computed to a sum certain
- Attorney Fees sought not in compliance with Local Rule 55-3
- Amount sought for costs is incorrect
- Case terminated[34]

33. *See* KPS & Assocs., Inc. v. Designs By FMC, Inc., 318 F.3d 1, 20 (1st Cir. 2003) ("the inconsistencies and inaccuracies in the complaint and the supporting affidavit amply demonstrate [that] KPS's claims are not capable of simple mathematical computation"); *see also* United States v. Simon, No. 4:17cv27, 2017 WL 6032955, at *1 (E.D. Va. Aug. 14, 2017) ("Rule 55(b)(1) is proper when the amount owed is calculable on the face of the documents presented"). *See also* Fed. R. Civ. P. 54(c) ("A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings.").

34. Notice of Deficiency, *supra* note 15.

Active Auditing of Potential Defaults and Default Judgments

The Committee's reporter also asked "whether there are courts in which the clerk actively audits the files for cases that seem to be in default, as opposed to waiting for a request from a party."[35] The short answer is yes, the capability to monitor deadlines in cases exists, but districts' practices in this area vary a great deal. Some clerk's offices, and some judges, are more active in monitoring deadlines than others. A few courts indicated that it was primarily plaintiffs' responsibility to note the passing of deadlines and to file an application for default.

CM/ECF includes the functionality (the Service and Answer Report) to enable court users in either the clerk's office or chambers to generate case activity reports to identify cases in which service (90-day report) or answer (full report) deadlines have expired. The 90-day report lists cases in which defendants have not been served within 90 days of the complaint's filing. The full report lists cases in which defendants have not yet filed an answer. The availability of these reporting features in CM/ECF is probably the primary means by which deadlines related to defaults are monitored.

As the CM/ECF Service and Answer Report shows, dockets can be monitored for both the filing of proofs of service[36] or for the filing of responsive pleadings. If a plaintiff fails to serve in a timely manner, the case may be dismissed for failure to prosecute. Even if the plaintiff serves in a timely manner, the court may dismiss for failure to prosecute if the plaintiff does not apply for a default against an unresponsive defendant. Rules 55 and 41(b) are thus related in spurring plaintiffs to move their cases forward. Consider, for example, Ohio Southern L.R. 55.1 (Defaults and Default Judgments):

> (a) If a party makes proper service of a pleading seeking affirmative relief but, after the time for making a response has passed without any response having been served and filed, that party does not request the Clerk to enter a default, the Court may by written order direct the party to show cause why the claims in that pleading should not be dismissed for failure to prosecute.
> (b) If a party obtains a default but does not, within a reasonable time thereafter, file a motion for a default judgment, the Court may by written order direct the party to show cause why the claims upon which default was entered should not be dismissed for failure to prosecute.
> (c) Nothing in this Rule shall be construed to limit the Court's power, either under Fed. R. Civ. P. 41 or otherwise, to dismiss a case or one or more claims or parties for failure to prosecute.[37]

35. October 2021 Minutes, *supra* note 1, at 25.

36. Fed. R. Civ. P. 4(m), "Time for Service," requires the court to dismiss an action against a defendant that has not been served with 90 days after the complaint is filed. *See, e.g.*, Newbridge Sec. Corp. v. China Recycling Energy Corp., No. 2:22-cv-551 (D. Nev. June 30, 2022) (docket entry) ("NOTICE of intent to dismiss pursuant to FRCP 4(m). The *Complaint* in this action was filed on *3/31/2022.* To date no proper proof of service has been filed").

37. S.D. Ohio L.R. 551, https://www.ohsd.uscourts.gov/sites/ohsd/files//Local%20Rules%20Effective%202022-02-07.pdf#page=27. For an example of the local rule in application, see Barber v. Xpert Restoration Columbus LLC, No. 2:22-cv-910 (S.D. Ohio June 2, 2022) (docket entry) ("SHOW CAUSE ORDER: Plaintiff is ORDERED to SHOW CAUSE why his claims against [defendant] should not be dismissed for want of prosecution WITHIN FOURTEEN (14) DAYS of the date of this Order unless he has applied for an entry of default").

Consider an illustrative docket entry from Tennessee Eastern, which orders the plaintiff to show cause why the action should not be dismissed and provides that an application for entry of default may be filed instead of a response to the show-cause order:

> ORDER TO SHOW CAUSE: The Court ORDERS Plaintiff TO SHOW CAUSE on or before September 1, 2022 why this action should not be dismissed under Federal Rule of Civil Procedure 41(b) for failure to prosecute. In lieu of responding to the Order to Show Cause, Plaintiff may file an application for default. A failure to timely respond to this Order or file an application for default will result in dismissal of this action. Show Cause Response due by 9/1/2022. . . .[38]

Or a similar docket entry from the District of New Jersey:

> Our records indicate that a proof of service has been filed in this civil action and that the time for ALL defendants to Answer has expired. You are hereby directed to move this civil action, by requesting that default be entered as to ALL DEFENDANTS or submitting an extension to answer out of time, within ten (10) days from the date hereof. Should you fail to do so, this action shall be listed for dismissal . . . .[39]

A review of docket entries in default judgment cases found that show-cause orders similar to these are relatively common. Center researchers identified such show-cause orders (or similar filings) in 53 districts, or about 56%, with respect to service of process, the application for default, or motion for default judgment.[40] Moreover, there were filings in some cases that were excluded from these counts that could, under a more expansive definition, have been included—for example, the entry of default setting a deadline for filing of motion for default judgment, or an order to a defendant to answer or be found in default (in general, only orders directed at the plaintiff were included). It is not always clear whether the clerk's office enters such orders independently or only alerts chambers to the issue. One clerk of court indicated that, even if someone in the clerk's office noted a missed deadline, they would notify chambers, but that it would be up to chambers staff to take any further action.

Finally, there is also an ambiguity as to what counts as "the clerk," or the clerk's office. One of the more common responses in our canvas of districts was that case deadlines are monitored by the courtroom deputies. Courtroom deputies are employees of the clerk's office who typically serve as liaisons between it and the chambers to which they are assigned. It is difficult to say whether the monitoring of deadlines by courtroom deputies is performed in chambers (the courtroom deputy may work closely with chambers) or the clerk's office (the courtroom deputy is an employee of the clerk's office).

38. Ballard v. Resurgent Capital Servs., LP, No. 2:22cv65 (E.D. Tenn. Aug. 18, 2022) (docket entry 6).

39. Cruz v. Joergens, No. 2:22-cv-259 (D.N.J. July 19, 2022) (docket entry).

40. From a PACER review, conducted by Center researchers, of the dockets of cases filed in the first six months of 2022 and terminated by default judgments.

APPENDIX A: Drafting of Rule 55

The following excerpt is taken from pages 214–34 of the first volume of the "Proceedings of Conference of Advisory Committee Designated by the United States Supreme Court to Draft Uniform Rules of Civil Procedsure for the District Courts of the United States and the Supreme Court of the District of Columbia Under the Act of Congress Providing for Such Uniform or Unified Rules," November 14, 1935.41 The primary interlocutors are members of the original Committee:

- William D. Mitchell, Chair, former attorney general, from New York
- Wilbur H. Cherry, Professor, University of Minnesota School of Law
- Charles E. Clark, Dean, Yale School of Law, committee member and reporter
- Robert C. Dodge, attorney from Boston, Massachusetts
- George Donworth, attorney from Seattle, Washington
- Monte E. Lemann, attorney from New Orleans, Louisiana
- Scott M. Loftin, attorney from Jacksonville, Florida
- Warren Olney, attorney from San Francisco, California
- Edson R. Sunderland, Professor, University of Michigan School of Law
- George M. Wickersham, former attorney general, from New York

Also speaking is Edward H. Hammond, an attorney from the Department of Justice. The Committee is reviewing a discussion draft of the rules.

Mr. Mitchell. But now about Rule 17, as to default. I was wondering whether this rule and all of these that we are considering make sufficient provision for default in practice by providing how the plaintiff shall prove the default and get a judgment entered without action by the court.

Mr. Lemann. Does not Rule 17 contemplate a pleading? Suppose I enter my appearance.

Dean Clark. Yes. Now, on the appearance, I had a rule that covers that, that filing an answer shall be an appearance. But in the case of other parties under Rule 16, they can enter their appearance. That is quite the point that Mr. Mitchell has in mind.

Mr. Mitchell. No. You say here if a defendant does not file an answer, the plaintiff may take a default against him. And therefore, the action shall be preceded with ex parte. Now, my experience has been that where there is lack of answer in default, the rule under the Code statutes should provide for the entry of judgment. And in cases where the claim is liquidated, the clerk enters the judgment. If it is an unliquidated claim, there has to be machinery provided for the ascertainment

41. The transcript of these proceedings is available at https://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-november-1935-vol-i.

of the amount of damages. And I was wondering whether the drafting committee has covered these alternatives.

Mr. Donworth. Do you think the clerk under any circumstances should have the right to enter a judgment? Under our practice, it is always done by the judge. I do not know how extensive the practice is, if it exists at all, about the clerk entering the real judgment.

Mr. Mitchell. Well, when I talked about the Code states, I was referring to states like Minnesota, Iowa, and North Dakota, and perhaps a number of those states in the Northwest. And their statutes provide that a case is in default, and the summons in the first place has to be either for a liquidated sum stated in the complaint, or an unliquidated damage claim. If it is an action on a note, for instance, for a specific sum, you file your affidavit with the clerk, following the answer, and the clerk pro forma enters judgment in the amount of the claim. But when the claim is an unliquidated claim for damages, for malicious prosecution or personal injury, then the statutes provide for the assessment of damages, and the clerk can enter judgment on default if the claim is of a liquidated type like a note.

Mr. Donworth. I see the distinction, but there is [a?] little difference in the two forms of action. But in any case, the proceeding is before the judge.

Dean Clark. Well, we did not cover that. We had a little hesitation about doing it. If the committee thinks it should be covered, of course it can be very easily done along the line suggested. The equity rules do not cover it. This is in effect the equity rules taken over. The equity rules say the order shall be taken *pro confesso*. Of course, that is if it is liquidated.

Professor Southerland. In our state, it is a question of how you ascertain it.

Mr. Mitchell. When a party or his lawyer is in default, I think it ought to be like a liquidated judgment.

Mr. Morgan. It ought to be covered one way or another.

Mr. Loftin. In our state, we also have the practice of entering judgment on liquidated damages. Do they do that in Massachusetts, Mr. Dodge?

Mr. Dodge. Yes.

Mr. Lehman. That is done by the clerk, is it?

Mr. Mitchell. Yes. The set of rules prepared by the bar association of the state of Minnesota provide, and it is generally the same in the Middle West: "Default judgments: It shall be the duty of the defendant to appear and file in the clerk's office a demurrer or answer to the complaint within twenty days after the service of the summons, or such additional time is allowed by law, unless the time shall be enlarged by stipulation of counsel or by a judgment by the court for cause shown. In default thereof, judgment may be entered as of course upon the filing of an affidavit of

no answer in actions upon contract for the payment of money only, in which there is a demand for some certain. In all other actions after default, the plaintiff may apply to the court to have the relief to which he is entitled, ascertained either by the court or by a jury or reference for that purpose and when so ascertained judgment may be entered therefore." Now, that, generally speaking, is the problem I wanted to bring up, and I could not see anything here about it.

Dean Clark. We just did not make express provision as to how the court would fix the judgment. If it is to be done by the clerk, without action by the court, a few words here may be changed: "The plaintiff may take a default against him, and the action shall be proceeded in ex parte as to him, and the clerk may enter judgment for the appropriate relief, subject to the power of the court to reopen the case as here and after provided."

Mr. Mitchell. They would apply to the judge in every case for default. Strike. In every case for judgment by default.

Mr. Morgan. Do I understand that in Louisiana the judge merely enters an order?

Mr. Lemann. We enter a judgment and the clerk gets in on the minutes, and two days later we appear and move to confirm that default. If it is a promissory note, we offer it in open court.

Mr. Morgan. And what does the judge do?

Mr. Lehman. The judge says, "Let there be judgment."

Mr. Morgan. He signs the judgment.

Mr. Lehman. Yes, he signs the judgment, just like he does in a contested case.

Mr. Morgan. He does not in a contested case in many states.

Mr. Wickersham. Why is not the equity rule a good one to follow? It could be adapted to common law practice. If it is an equity case, the rule says the plaintiff may take an order as of course that the bill be taken *pro confesso*; that is, in other words, the decree that the defendant is in default and that judgment shall be entered.

Mr. Lemann. Is that not signed by the judge?

Mr. Wickersham. No, that means by the clerk. Now, when the bill is taken *pro confesso*, the court may proceed to final decree and so on. There you have got the distinction. First the decree *pro confesso*, which is taken in a common law action judgment by default, then, if there's anything to be shown in the way of damages, that proceeds ex parte and the judge enters the final judgment.

Dean Clark. Yes, that is what follows. The only difference would be to put in the expression. We could have it as I have indicated and after the, "the action shall be proceeded in ex parte as to him and," then put in this expression "and the court may proceed to final judgment."

Mr. Mitchell. Well, under that rule, there is a question in my mind as how you will get judgment. Will you have to go to the court and get an order or get a judgment as a matter of form from the clerk?

Mr. Donworth. Under our practice, even on a promissory note, the twenty days have expired and you go into court one morning and the judge says, are there any motions? And you say, yes, I have an action in which the defendant is in default. It is always with the judge, but as I say, the other method is all right. We have followed the same practice in unliquidated cases as well as liquidated cases, except that the judge will require proof of an unliquidated claim and on a liquidated one, he would say, what is this about? And you would say a promissory note and he would give judgment.

Mr. Mitchell. I think the other raises the question as to who will settle what is to be done.

Mr. Lemann. In some cases it is done one way and in other places it is done in other ways.

Mr. Mitchell. That is what I am getting at.

Mr. Lemann. The usual rule may be for the clerk to do it and I can see where it would be objectionable to put it on the judge and perhaps we might compromise and fix it so that the clerk could enter what corresponds to *pro confesso* or preliminary default.

Mr. Wickersham. Well, if there is a default and there is no question of unliquidated damages and the action is on a promissory note, for example, why should not the order on that be entered by the clerk? For example, in Pennsylvania they have a practice by which a man who borrows $500 and gives a promissory note, what we call a shirttail note, there is a provision that in the event of failure to pay, the maker of the note constitutes any attorney in the state as an attorney for the purpose of entering judgment against him, so that when that note becomes due, if it is not paid on presentation, any lawyer who is the holder of the note goes over to the court and presents the form, and the clerk signs and stamps it, and that is the judgment.

Mr. Lemann. Now is there to be a distinction in law cases and equity cases? In our state we have a preliminary judgment by default *pro confesso* and a final judgment. Now in law actions generally under the Code you do not have that.

Mr. Loftin. not where it is a liquidated sum under contract; that could not be equity.

Mr. Lemann. I understand that. Now so far as it is a tort action and there is a default—in case of personal injuries where the person was run over by an automobile, what happens?

Mr. Loftin. There would be no preliminary judgment.

Mr. Lemann. You would not get your judgment right off.

Mr. Lofton. That is it.

Mr. Lemann. Whereas, under our statute you would have a period of grace to come in and defend, except that equity allows a large period of grace and we allow a small one. Now, it seems to me that these uniform rules are intended to reconcile these differences; that is the first thing to decide.

Mr. Loftin. What good does that period of grace do?

Mr. Lemann. For instance, if you have a default taken, you had better go down and do something about it.

Mr. Loftin. In our state, you cannot enter judgment by default unless you have a notice. But in our state, the defendant never answered until you got a judgment against him. And then if he did not answer and the court passed a rule that they could put in a default judgment—and the legislature repealed that rule the next term, you see, it is just another reason for delay. I think interlocutory judgments are just a stench.

Mr. Mitchell. Let us look at it from a practical standpoint. In the administration of justice, the courts are overworked. Now, we have two systems to choose from in the case of default on a liquidated sum under contract. Either you can take five or ten minutes of the court's time to make an order or under the other system, you would file an affidavit with the clerk for a liquidated claim where the demand is a sum certain and save five or 10 minutes of the judge's time. Now, that is the practice. My experience has been that where you have this Code system in a liquidated claim in an action under contract for a sum certain and the clerk can enter judgment on an affidavit and no answer is filed. It works perfectly and saves five or 10 minutes of the judge's time.

Mr. Lemann. What would you do with unliquidated claims?

Mr. Mitchell. In unliquidated claims, you file an action and by court action, get the assessment of damages.

Mr. Lemann. You would have no period of grace.

Mr. Mitchell. No.

Mr. Lemann. Then what do you do with days of grace and equity if you are going to have but one system? I suppose that goes out.

Mr. Mitchell. Yes, that goes out. You could file an affidavit that no answer had been filed strike has been filed, and it shows a default, and the court goes on and has summary hearing to see whether you were entitled to the relief sought.

Mr. Lemann. But here you have a final judgment because you get that judgment right off the bat. Is that right?

Mr. Mitchell. No, there have been two decrees.

Dean Clark. I think there are two different questions that need that need not necessarily be taken up at one time. One is the question of the affidavit to be used with the clerk. The other is to use stamps, even if the clerk does it. Now, under the question of whether you have two steps, how about the situation where default is entered for something other than non-appearance? It is now provided in the rules that a failure to comply with the rules may result in the entry of a default semicolon. And then you should provide that notice must be given of that entry of default semicolon. In that case, you would not have it in two steps.

Mr. Morgan. You might have it in two steps. This notice might be merely to make a motion to have the judgment set aside, for neglecting, and so on.

Dean Clark. Yes.

Mr. Donworth. I would like to ask Mr. Mitchell to state the practice in Minnesota. Does it have to be on notice and does the court have to pass on it?

Mr. Mitchell. No.

Mr. Donworth. That is on a promissory note, or something of that kind.

Mr. Mitchell. That is an unliquidated claim for damages, such as damages for personal injury, and there you have to have the court rule on the amount.

Mr. Wickersham. Well, ought not the rule to set forth the proceedings when the suit is for a fixed sum of money?

Mr. Mitchell. Yes.

Mr. Wickersham. Whether or not it is unliquidated or for other relief?

Mr. Mitchell. Yes. You have a choice of putting it up to the court and getting an order from the court in every case. The other is to have in certain types of cases judgment entered by the clerk and in the other entered by the court.

Mr. Wickersham. Well, with regard to liquidated claims, where there is no question of judicial action in acting in the amount of relief to be granted, but it is a pure matter of computation, ought not that not to be entered as of course by the clerk. Then when you come to liquidated damages, you must have proceedings by the court, and when you come to the proceedings followed in equity, then you must have an injunction.

Mr. Mitchell. That is the Western Code system.

Mr. Wickersham. That is a logical system.

Mr. Mitchell. It works well and saves a lot of time for the court.

Mr. Wickersham. Yes, there is no use using the time of the court. He does not use any more judgment in those cases than the clerk; and the defendant retains a remedy. He can make an application to the court to reopen the judgment.

Dean Clark. I think it is quite all right; but I think that it's a definite change from the federal procedure. I suppose we can change the form of proof. In fact, I was rather inclined to argue in general that we could change the rules.

Mr. Morgan. I understand that is the rule.

Dean Clark. But as I understand the rule now, the clerk does not enter judgment.

Mr. Mitchell. If the court thinks it wants to be relieved of that, I see no reason why it should not be.

Mr. Lemann. In your federal courts, do the clerks enter judgment?

Mr. Dodge. No.

Mr. Lemann. On a liquidated claim?

Mr. Dodge. No, it has to be approved by the judge.

Mr. Lemann. And the judge signs the order?

Mr. Dodge. He does not sign anything; he directs action.

Mr. Donworth. How about Minnesota? Does the judge perform the action?

Dean Clark. Well, I am more familiar with it in our state. In our state courts, it is done. The federal court clerk says he never enters the order.

Mr. Morgan. He follows the usual rule that he has got to have either a rule of the court or a statute. Otherwise, the clerk has no power to enter judgment.

Mr. Donworth. How about a foreclosure?

Mr. Mitchell. The rule is the same. A foreclosure action is heard on motion day.

Professor Sunderland. There are two steps on that.

Mr. Mitchell. Not two steps in a foreclosure. You get an order for a judgment of foreclosure. Of course, there is a second rule. I think when he reaches that stage, the thing for him to do is take a rest. He cannot do the impossible. It is a matter of discretion.

. . . .

Mr. Lemann. How would it do to pass this with the understanding that the reporter will make an investigation as to the actual practice in the federal courts with regard to entering judgments and report on that at our next session? I do not at all oppose the idea of entering judgment on liquidated claims if that is done. I do say that this is not, that that is not usually done in federal courts today.

Mr. Olney. It is done in our courts.

Mr. Wickersham. Would not the court follow the local practice?

Mr. Olney. Certainly it is done in California.

Dean Clark. It is not a uniform practice. I wonder if it would not necessarily follow the Uniformity Act anyway. It is a matter of evidence.

Mr. Mitchell. My attention has been called by Mr. Hammond to the fact that the federal courts follow the state practice and in our state they do allow default in liquidated cases. It follows the rule of Minnesota.

Dean Clark. Is there a local rule?

Mr. Mitchell. Yes, there is a local rule.

Mr. Morgan. We have a local federal court rule.

Mr. Mitchell. I thought we could find out from the secretary of this conference. You do not know Mr. Hammond, do you?

Mr. Hammond. No, I would not know that.

Mr. Dobie. Suppose the investigation shows that the practice is not uniform and under the Uniformity Act the court would not permit the clerk to enter judgment. We want the clerk to enter judgment in the case of liquidated claims. Is that the idea?

Mr. Morgan. The judge is willing to have it done where it is the federal court practice and saves considerable expense.

Mr. Olney. In what cases are they allowed to permit judgments to go without proper default? That means in those cases judgment is a purely ministerial thing and requires no judicial action in any sense but can be left to the clerk instead of being ordered by the judge. In cases of that kind I am not willing to permit judgment to go merely upon default. Judicial action is required and there should be some kind of a hearing before the judge and this should be along that line.

Mr. Mitchell. Yes, and we ought not to be hidebound by the practice. Where the system is entry of judgment by the clerk and it is an efficient and satisfactory one, we ought to insist upon it and not be too timid about upsetting the old system in the federal courts.

Mr. Lemann. Why not refer the question to the reporter with instructions to draft something along that line?

Mr. Mitchell. Well, is there any motion?

Mr. Morgan. Is there any doubt that this group thinks that where the claim for a liquidated amount, no judicial action is really necessary?

Mr. Lemann. I thought everybody was agreed upon about that but let us keep a record for the reporter. Let us make a record of that fact.

Mr. Mitchell. Suppose you make the motion to raise the question.

Mr. Lemann. Yes, I make that motion.

Mr. Morgan. I second the motion.

Dean Clark. Would you require then an affidavit or would it simply require a showing of the instrument of indebtedness?

Mr. Morgan. An affidavit of default.

Dean Clark. That is what I supposed. That is the plaintiff files an affidavit of indebtedness and shows the instrument if there is one.

Mr. Mitchell. That is right and then he gets a judgment by default.

Mr. Wickersham. Where the claim is in a fixed sum which is ascertainable by ready and easy computation.

Mr. Mitchell. Yes, you will find that in our Code.

Dean Clark. Yes, Judge Olney suggested that this was a ministerial act because there was nothing more than a default and he did not mean that it requires any kind of proof other than the affidavit.

Mr. Mitchell. Other than the affidavit; but I think you will find in many states that if it is on a note, you are required to file the document.

Mr. Cherry. That is by rule of the court.

Mr. Mitchell. That is a matter of detail that can be worked out. Well, the motion is clear. All in favor of that will signify by saying "aye." Those opposed, "no."

[The Minutes note the motion was voted upon and unanimously adopted.]

Mr. Lemann. I think the affidavit should also bring out the amount of difference.

Mr. Mitchell. It has to show, the form of affidavit, non-appearance, and I suppose they have to show the sum claimed, and that there is no appearance.

Mr. Olney. May I inquire if this affidavit that you have in mind is an affidavit as to the merits?

Mr. Mitchell. No.

Mr. Olney. That is the affidavit simply of default.

Mr. Mitchell. The affidavit states the sum under contract and gives the amount with interest and states that there is no appearance and no answer. And on that affidavit, the clerk makes entry and gives judgment for the exact sum.

Mr. Lemann. It is not an affidavit on the merits in the final sense.

Mr. Mitchell. No.

Mr. Lemann. You shake your head, so that is not settled.

Mr. Cherry. In Minnesota, you stick that in your bill of costs, but it is not sworn to.

Mr. Donworth. You make an affidavit of non-appearance.

Mr. Cherry. That is all.

Mr. Olney. If a man has not answered in the prescribed time, that is the end of the matter.

Mr. Mitchell. Yes, if he has not, that ends it.

Mr. Olney. The clerk adds the interest and includes it in the judgment.

Mr. Mitchell. Yes, it is purely a ministerial act.

Mr. Morgan. And the clerk also taxes the costs at that time. If a person is in default, he is not entitled to notice of default.

Mr. Lemann. Well, there are two kinds of claims. If it is a liquidated claim, you get it from the clerk. If it is an unliquidated claim, you get it from the judge.

Dean Clark. In cases where the judgment is not for failure to originally appear, but for some subsequent default . . .

Mr. Wickersham. (interposing) There should be an entry of an order from the judge.

Mr. Donworth. It is only for non-appearance.

Mr. Mitchell. There is only one thing, that your affidavit is merely for non-appearance. In New York, in the state procedure, you do not have to file a verified claim.

Mr. Wickersham. Of course you have to file a verified claim.

Mr. Mitchell. My impression is that is not as it is done in Minnesota.

Mr. Wickersham. In New York, the verified complaint sets forth a cause of action. If it is on a note, the proceeding is of the simplest character. Nevertheless, it is a verified pleading.

Dean Clark. Now the complaint does not have to be verified unless the clerk chooses. In this case, it would have to be verified.

Mr. Wickersham. In this case, it would have to be verified. Otherwise, he would have to go to court and prove his claim.

Mr. Mitchell. In Minnesota, the clerk can give judgment for the sum when an affidavit is filed.

Mr. Lemon. If the man does not come in and put in an appearance.

Mr. Morgan. Yes, you are answering it on his non-appearance, and not default. And by not answering the thing, he has personally confessed it; just as by answering only on allegation, you can take judgment on the other.

Dean Clark. I think in some respects, Minnesota is better than New York.

Mr. Wickersham. Mr. Hammond calls my attention to one variation of that rule in New York. You can serve a summons with notice, and that notice is a demand for a fixed sum with interest. In that case, you do not have to file a complaint if there is no appearance or answer; you can take judgment by default.

Dean Clark. Do you not have to file a verified complaint in that case?

Mr. Wickersham. No, that is a variation.

Mr. Mitchell. We can provide that he can file it where it is for a definite sum.

Mr. Wickersham. In New York, we have that variation of a summons on a note. That is, that in the summons he says, Take notice that the plaintiff demands the sum of ___ dollars with interest on such a date. Now, if there is no appearance and no answer to that, then you may enter judgment by default. But ordinary cases, you have to serve a complaint and verify it before you can get judgment.

Mr. Donworth. Well, this clause remains, by which, after mentioning these things, it says it may be rescinded or suspended by the court on special cause stated.

Mr. Cherry. In Minnesota, you issue a summons and you state the consequences of default. And if it is a liquidated amount that you will take judgment.

Mr. Wickersham. That is substantially the same as our notice in New York.

Mr. Morgan. If you say you are going to demand the relief stated in the complaint.

Mr. Mitchell. If you have a liquidated claim, then you could take judgment for a stated sum plus interest from a certain date. And it works very well.

APPENDIX B: Court Statistics on Civil Cases Terminated by Default Judgment

The following figures are based on data in the Civil Integrated Data Base (IDB),[42] which is in turn based on data regularly reported to the Administrative Office of the U.S. Courts. The courts do not report data on entry of Rule 55(a) defaults, but they do report relevant information on civil cases terminated by default judgment. However, the reported data are not fine-grained enough to distinguish between Rule 55(b)(1) and (b)(2) defaults.

Over the last three decades, default judgments have declined both as a percentage of all civil terminations and in absolute terms. **Figure 1** shows the percentage of all civil terminations reported by the courts as default judgments and the percentage of civil terminations in which no responsive pleading was ever filed ("issue not joined") reported as default judgments for fiscal years 1988–2023. Because default judgments are most likely in cases in which defendants never respond to the complaint, it makes sense to examine how many of the "issue not joined" terminations end with a default judgment. In the late 1980s, about 1 in every 10 civil terminations was a default judgment. In recent years, the comparable figure is 1 in every 50. No one, to our knowledge, has ever bemoaned the vanishing default judgment, but the rate at which civil cases terminate by default judgment has moved in the same direction as the rate at which civil cases terminate by jury trial since the late 1980s.

The same pattern can be seen in **Figure 2**, which shows the number of default judgments reported by the courts for fiscal years 1988–2023, limited to cases in which no responsive pleading was ever filed. Many default judgments in this period were reported in government collection actions (mostly defaulted student loan cases), which account for the large spikes in the solid line.[43] But even excluding collection actions, there is a clear decline in the number of default judgments reported by the courts over the period. In the most recent fiscal year, 2023, fewer than 2,800 default judgments were reported by the courts in civil terminations in which no responsive pleading was filed.

42. https://www.fjc.gov/research/idb/civil-cases-filed-terminated-and-pending-sy-1988-present.

43. *See* Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 Stan. L. Rev. 1275, 1287 (2005) (noting "the federal government's use of the federal courts to collect on defaulted student loans" and the resolution of these cases through default judgments).

Figure 1: Default Judgments as Percentage of Civil Terminations, Fiscal Years 1988–2023 (Source: Civil Integrated Data Base)

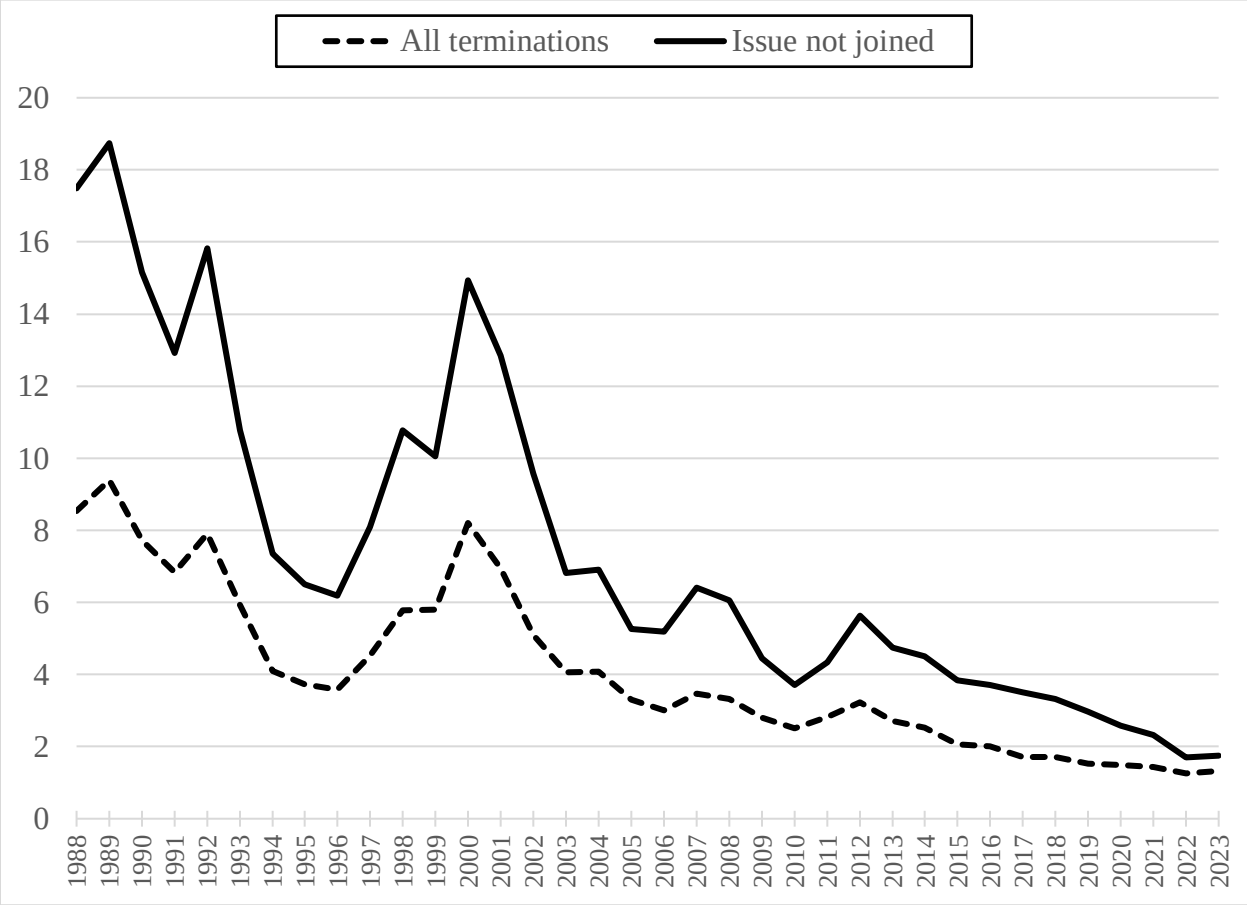
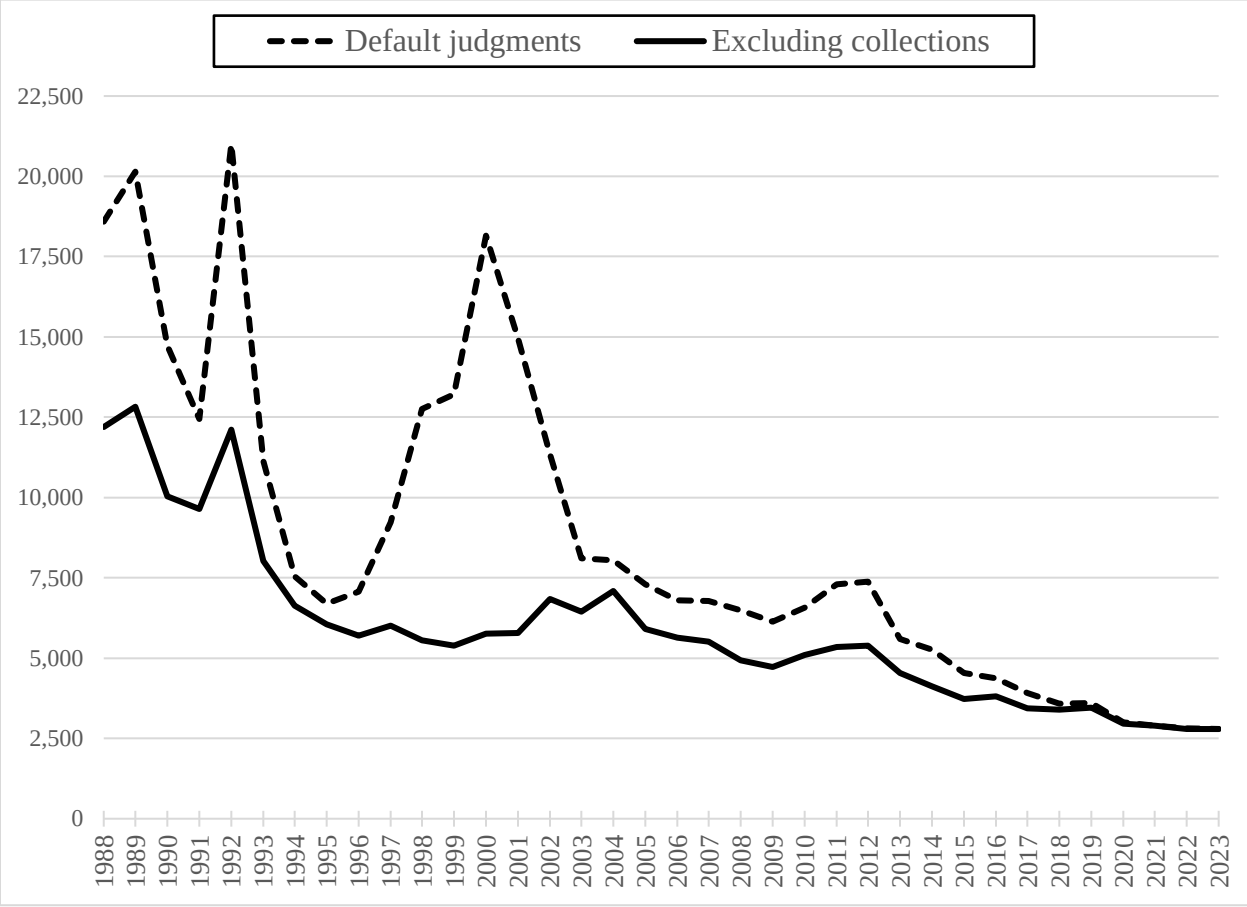


Figure 2: Counts of Default Judgments, Issue Not Joined Only, Fiscal Years 1988–2023 (Source: Civil Integrated Data Base)



APPENDIX C: Local Rules by Circuit and District

Local rule text is included if our search located a rule governing procedures in defaults and default judgments in civil cases, generally. More limited default and default judgment local rules are noted, and rules are quoted where deemed relevant.

DISTRICT OF COLUMBIA CIRCUIT

District of Columbia (90)
No local rule
https://www.dcd.uscourts.gov/sites/dcd/files/local_rules/Local%20Rules%20Mar_2022.pdf

FIRST CIRCUIT

District of Maine (00)
No local rule
https://www.med.uscourts.gov/sites/med/files/LocalRules.pdf

District of Massachusetts (01)
No local rule, but from the district's attorney handbook:
DEFAULT JUDGMENT: STANDING ORDER
The clerk's office may enter a Standing Order Regarding Motions for Default Judgment following the issuance of a notice of default. A sample of the Standing Order may be found on the court website.
https://www.mad.uscourts.gov/attorneys/pdf/Attorney_Handbook.pdf#page=26
https://www.mad.uscourts.gov/resources/pdf/DefaultStandingOrder.pdf

District of New Hampshire (02)
D.N.H. Civ. R. 55.1 Default
(a) Entry by Clerk. The clerk shall enter a default against any party who fails to respond to a complaint, crossclaim, or counterclaim within the time and in the manner provided by Fed. R. Civ. P. 12. The serving party shall give notice of the entry of default to the defaulting party by regular mail sent to the last known address of the defaulted party and shall certify to the court that notice has been sent.
(b) Damages. Any motion for a default judgment pursuant to Fed. R. Civ. P. 55(b) shall contain a statement that a copy of the motion has been mailed to the last known address of the party from whom such damages are sought. If the moving party knows, or reasonably should know, the identity of any attorney thought to represent the defaulted party, the motion shall also state that a copy has been mailed to that attorney.
(§ (a) amended 1/1/97; §§ (a) and (b) amended 1/1/01)
https://www.nhd.uscourts.gov/pdf/2021%20Combined%20Local%20Rules.pdf#page=57

District of Rhode Island (03)

D.R.I. Civ. R. 55 DEFAULT AND DEFAULT JUDGMENT

(a) Default. The Clerk shall enter a default upon an application by a party that conforms to the requirements of Fed. R. Civ. P. 55(a).

(b) Default Judgment. Not less than 14 days after filing of a motion for entry of default judgment made against a party not represented by counsel, the moving party shall file with the Court a certification that:

(1) The party against whom a default judgment is sought is not in the military service of the United States as defined by the Servicemembers Civil Relief Act of 2003, as amended; and

(2) Notice of the motion was sent to the party against whom the judgment is sought by first class mail and certified mail, return receipt requested, at the address where the party was served with process, and the party's last known address, if different. The certificate shall include the return receipt, or, if unavailable, a statement of the measures taken to attempt service and verify receipt by the defaulted party.

Effective 12/1/16: §§(a), (b), and (c) deleted; new §§(a) and (b) added. Effective 12/2/13: §(c) amended

https://www.rid.uscourts.gov/sites/rid/files/documents/LocalRules120119_0.pdf#page=100

District of Puerto Rico (04)

D.P.R. Civ. R. 55 DEFAULT

(a) Damages.

Any motion for a default judgment pursuant to Fed. R. Civ. P. 55(b) shall contain a statement that a copy of the motion has been mailed to the last known address of the party from whom such damages are sought. If the moving party knows, or reasonably should know, the identity of any attorney thought to represent the defaulted party, the motion shall also state that a copy has been mailed to that attorney.

(b) Collection or Foreclosure Actions.

Motions for default judgment in any civil action brought for the collection of monies or foreclosure of mortgage filed by a financial institution or government agency, shall be accompanied, when applicable, by the following documents:

(1) A verified statement of account signed by plaintiff's authorized representative, indicating the principal amount and interest due, plus any other amount to which the plaintiff is entitled;

(2) an affidavit or declaration under penalty of perjury as to the defendant's competency and military service;

(3) original or certified copies of all promissory notes;

(4) copies of all mortgage deeds;

(5) a certification from the Registry of the Property or a verified title search.

https://www.prd.uscourts.gov/sites/default/files/local_rules/20230714-USDCPR-Local-Rules.pdf

SECOND CIRCUIT

District of Connecticut (05)

No local rule

https://www.ctd.uscourts.gov/sites/default/files/Revised-Local-Rules-11-22-2021_0.pdf

New York Northern (06)

N.D.N.Y. Civ. R. 55.1 Clerk's Certificate of Entry of Default

A party applying to the Clerk for a certificate of entry of default pursuant to Fed. R. Civ. P. 55(a) shall submit an affidavit showing that (1) the party against whom it seeks a judgment of affirmative relief is not an infant, in the military, or an incompetent person (2) a party against whom it seeks a judgment for affirmative relief has failed to plead or otherwise defend the action as provided in the Federal Rules of Civil Procedure and (3) it has properly served the pleading to which the opposing party has not responded.

N.D.N.Y. Civ. R. 55.2 Default Judgment (amended January 1, 2022)

(a) By the Clerk. Prior to filing a request for a default judgment for a sum certain, the party must first obtain a Clerk's Certificate of Entry of Default as required by L.R. 55.1. When a party is entitled to have the Clerk enter a default judgment pursuant to Fed. R. Civ. P. 55(b)(1), the party shall submit, with the form of judgment, the Clerk's certificate of entry of default, a statement showing the principal amount due, not to exceed the amount demanded in the complaint, giving credit for any payments, and showing the amounts and dates of payment, a computation of the interest to the day of judgment, a per diem rate of interest, and the costs and taxable disbursements claimed. An affidavit of the party or the party's attorney shall be appended to the statement showing that

1. The party against whom it seeks judgment is not an infant or an incompetent person;
2. The party against whom it seeks judgment is not in the military service, or if unable to set forth this fact, the affidavit shall state that the party against whom the moving party seeks judgment by default is in the military service or that the party seeking a default judgment is not able to determine whether or not the party against whom it seeks judgment by default is in the military service;
3. The party has defaulted in appearance in the action;
4. Service was properly effected under Fed. R. Civ. P. 4;
5. The amount shown in the statement is justly due and owing and that no part has been paid except as set forth in the statement this Rule requires; and
6. The disbursements sought to be taxed have been made in the action or will necessarily be made or incurred.

The Clerk shall then enter judgment for principal, interest and costs. If, however, the Clerk determines, for whatever reason, that it is not proper for a sum certain default judgment to be entered, the Clerk shall forward the documents submitted in accordance with L.R. 55.2(a) to the assigned district judge for review. The assigned district judge shall then promptly notify the Clerk as to whether the Clerk shall properly enter a default judgment under L.R. 55.2(a).

(b) By the Court. Prior to filing a motion for default judgment, the party must first obtain a Clerk's Certificate of Entry of Default as required by L.R. 55.1.A party shall accompany a motion to the Court for the entry of a default judgment, pursuant to Fed. R. Civ. P. 55(b)(2), with a clerk's certificate of entry of default in accordance with Fed. R. Civ. P. 55(a), a proposed form of default judgment, and a copy of the pleading to which no response has been made. The moving party shall also include in its application an affidavit of the moving party or the moving party's attorney setting forth facts as required by L.R. 55.2(a).
https://www.nynd.uscourts.gov/sites/nynd/files/local_rules/Local%20Rules%202022_Final.pdf#page=56

New York Southern (07) and New York Eastern (08) share local rules
E.D.N.Y. & S.D.N.Y. Civ. R. 55.1. Certificate of Default
A party applying for entry of default under Fed. R. Civ. P. 55(a) shall file:
(a) a request for a Clerk's Certificate of Default; and
(b) an affidavit demonstrating that:
(1) the party against whom a notation of default is sought is not an infant, in the military, or an incompetent person;
(2) the party has failed to plead or otherwise defend the action; and
(3) the pleading to which no response has been made was properly served.
A proposed Clerk's Certificate of Default form must be attached to the affidavit.

COMMITTEE NOTE
The Committee believes that Local Civil Rule 55.1 is helpful in setting forth the contents of the affidavit to be submitted by a party seeking a certificate of default pursuant to Fed. R. Civ. P. 55(a).
2018 COMMITTEE NOTE
The revision to Local Rule 55.1 incorporates the revised ECF Rule requiring the electronic filing of a request for a Clerk's Certificate of Default.

E.D.N.Y. & S.D.N.Y. Civ. R. 55.2. Default Judgment
(a) By the Clerk. Upon issuance of a Clerk's certificate of default, if the claim to which no response has been made only sought payment of a sum certain, and does not include a request for attorney's fees or other substantive relief, and if a default judgment is sought against all remaining parties to the action, the moving party shall submit an affidavit showing the principal amount due and owing, not exceeding the amount sought in the claim to which no response has been made, plus interest, if any, computed by the party, with credit for all payments received to date clearly set forth, and costs, if any, pursuant to 28 U.S.C. § 1920.
(b) By the Court. In all other cases the party seeking a judgment by default shall apply to the Court as described in Fed. R. Civ. P. 55(b)(2), and shall append to the application:
(1) the Clerk's certificate of default,
(2) a copy of the claim to which no response has been made, and
(3) a proposed form of default judgment.

(c) Mailing of Papers. Unless otherwise ordered by the Court, all papers submitted to the Court pursuant to Local Civil Rule 55.2(a) or (b) above shall simultaneously be mailed to the party against whom a default judgment is sought at the last known residence of such party (if an individual) or the last known business address of such party (if a person other than an individual). Proof of such mailing shall be filed with the Court. If the mailing is returned, a supplemental affidavit shall be filed with the Court setting forth that fact, together with the reason provided for return, if any.

COMMITTEE NOTE
Although Fed. R. Civ. P. 55(b) does not require service of notice of an application for a default judgment upon a party who has not appeared in the action, the Committee believes that experience has shown that mailing notice of such an application is conducive to both fairness and efficiency, and has therefore recommended a new Local Civil Rule 55.2(c) providing for such mailing.
https://www.nysd.uscourts.gov/sites/default/files/local_rules/2021-10-15%20Joint%20Local%20Rules.pdf#page=56

Western District of New York (09)
W.D.N.Y. Civ. R. 55 DEFAULT JUDGMENT
The procedure for Default Judgment under Fed.R.Civ.P. 55 is a two-step process: (a) entry of default by the Clerk of Court (Fed.R.Civ.P. 55(a)); and (b) entry of default judgment, by the Clerk of Court when the claim is for a sum certain pursuant to Fed.R.Civ.P. 55(b)(1) and by the Court in all other instances pursuant to Fed.R.Civ.P. 55(b)(2):

(a) Entry of Default. The documents required for obtaining entry of default are:
(1) Request for Clerk's Entry of Default;
(2) Affidavit (or Declaration) in Support of Request of Entry of Default;
(3) Proposed form for Clerk's Entry of Default; and
(4) A Certificate of Service indicating that these documents were served upon defendant.

(b) Default Judgment.
(1) By the Clerk of Court. A party entitled to a default judgment when the claim is for a sum certain, pursuant to Fed.R.Civ.P. 55(b)(1), shall submit to the Clerk of Court:
(A) Request for Entry of Default Judgment for Sum Certain;
(B) an affidavit by the party seeking default judgment or the party's attorney showing that: (i) the party against whom judgment is sought is not an infant or an incompetent person; (ii) the party has defaulted in appearance in the action; (iii) the amount shown by the statement is justly due and owing and no part thereof has been paid except as therein set forth; and (iv) the disbursements sought to be taxed have been made in the action or will necessarily be made or incurred therein;
(C) a statement showing the principal amount due, which shall not exceed the amount demanded in the complaint, giving credit for any payments and showing the amounts and dates thereof, a computation of the interest to the day of judgment, and the costs and taxable disbursements claimed;

(D) a proposed judgment containing the last known address of each judgment creditor and judgment debtor and, if any such address is unknown, an affidavit by the party seeking default judgment or the party's attorney stating that the affiant has no knowledge of the address; and
(E) a Certificate of Service indicating that these documents were served upon the defendant. Upon confirming the submission is in compliance with the Federal and Local Rules, the Clerk of Court shall enter judgment for principal, interest, and costs.
(2) By the Court. An application to the Court for the entry of a default judgment, pursuant to Fed.R.Civ.P. 55(b)(2), shall reference and include the docket numbers of the Clerk's Entry of Default and the pleading to which no response has been made.

(c) Notwithstanding the above, the Court, on its own initiative, may enter default or direct the Clerk of Court to enter default.
https://www.nywd.uscourts.gov/sites/nywd/files/2022%20Civil%20Local%20Rules%20FINAL%20with%20SIGNATURES.pdf#page=43

District of Vermont (10)
D. Vt. Civ. R. Default Judgment.
(a) Clerk's Entry of Default. When a party is entitled to default judgment under Fed. R. Civ. P. 55(b)(1) or Fed. R. Civ. P. 55(b)(2), that party must first obtain a clerk's entry of default under Fed. R. Civ. P. 55(a). An application for a clerk's entry of default must include a statement explaining the basis for entitlement to an entry of default.
(b) By the Clerk.
(1) Documents to Submit. When a party is entitled to default judgment under Fed. R. Civ. P. 55(b)(1), that party must submit:
(A) an application for entry of default judgment;
(B) a proposed default judgment with a statement containing the following:
(i) the amount due, not exceeding the amount of the original demand; and
crediting any payments, showing the amounts and dates of them;
(ii) a computation of accrued interest as of the proposed judgment date; and
(iii) any claimed costs and taxable disbursements.
(C) an affidavit containing the following:
(i) the party against whom judgment is sought is not an infant, an incompetent person, or in the military;
(ii) the party against whom judgment is sought has defaulted by not appearing or defending;
(iii) the amount shown in the statement is justly due and no amount has been paid except as stated; and
(iv) the disbursements sought to be taxed have been made or necessarily will be made in the future.
(2) Consultation and Referral to District Judge. If the clerk determines that it may not be appropriate to enter a default judgment under Fed. R. Civ. P. 55(b)(1), the clerk may confer with a district judge. The district judge will advise the clerk whether default judgment under Rule 55(b)(1) is appropriate. If such a judgment is not appropriate, the clerk shall so notify the applicant, who may then proceed to move for default judgment under Fed. R. Civ. P. 55(b)(2), in accordance with subsection (c).

(c) By the Court. When a party requests the court enter a default judgment, that party must submit the following documents:
(1) a copy of the clerk's entry of default;
(2) a motion for entry of default judgment; and
(3) a proposed default judgment order.
https://www.vtd.uscourts.gov/sites/vtd/files/LocalRules.pdf#page=34

THIRD CIRCUIT

District of Delaware (11)

D. Del. Civ. R. 77.2. Orders and Judgments by the Clerk.

(a) Orders by the Clerk. The Clerk is authorized, without further direction of a judge, to sign and enter orders specifically delineated as allowed to be signed by the Clerk under the Fed. R. Civ. P., and also the following:
(1) Orders specifically appointing persons to serve process in accordance with Fed. R. Civ. P. 4.
(2) Orders on consent noting satisfaction of a judgment, providing for the payment of money, withdrawing stipulations, annulling bonds, exonerating sureties or setting aside a default.
(3) Orders of dismissal on consent, with or without prejudice, except in cases to which Fed. R. Civ. P. 23, 23.1 or 66 apply.
(4) Orders entering default for failure to plead or otherwise defend in accordance with Fed. R. Civ. P. 55.
https://www.ded.uscourts.gov/sites/ded/files/local-rules/District%20of%20Delaware%20LOCAL%20RULES%202016.pdf#page=35

District of New Jersey (12)

No local rule (there is an *in rem* rule)
https://www.njd.uscourts.gov/sites/njd/files/CompleteLocalRules.pdf

Pennsylvania Eastern (13)

No local rule
https://www.paed.uscourts.gov/sites/paed/files/documents/locrules/civil/cvrules.pdf

Pennsylvania Middle (14)

No local rule (mentioned as a sanction)
https://www.pamd.uscourts.gov/sites/pamd/files/LR120114.pdf

Pennsylvania Western (15)

No local rule
https://www.pawd.uscourts.gov/sites/pawd/files/lrmanual20181101.pdf

Virgin Islands (91)

No local rule
https://www.vid.uscourts.gov/sites/vid/files/local_rules/LocalRulesofCivilProcedure2021.pdf

FOURTH CIRCUIT

Maryland (16)

D. Md. Civ. R. 108. JUDGMENTS

2. Default

a) Entry of Default

To obtain an entry of default pursuant to Fed. R. Civ. P. 55(a), the plaintiff must file a written request with the Court. This request shall contain the last known address of the defendant. Promptly upon the entry of default, the Clerk shall mail the entry of default to the defendant at the address stated in the request and to the defendant's attorney of record, if any, together with a notice informing the defendant that default has been entered and that the defendant may move to vacate the entry of default within 30 days.

b) Default Judgment

To obtain a default judgment pursuant to Fed. R. Civ. P. 55(b), the plaintiff must file a written request with the Court supported by an affidavit stating whether the defendant is a minor, an incompetent person, or in military service, with supporting facts pursuant to 50 U.S.C. § 3931(b)(1). If it appears that the defendant is a minor or an incompetent person, the Court shall not enter a default judgment unless a general guardian, conservator, or other fiduciary has appeared on behalf of the defendant. If it appears that the defendant is in military service, the Court shall not enter a default judgment until after it appoints an attorney to represent the defendant pursuant to 50 U.S.C. § 3931(b)(2).

https://www.mdd.uscourts.gov/sites/mdd/files/LocalRules.pdf#page=39

North Carolina Eastern (17)

E.D.N.C. Civ. R. 55.1 Entry of Default and Default Judgment

(a) Entry of Default by Clerk.

To obtain an entry of default pursuant to Fed. R. Civ. P. 55(a), a party must file a motion for entry of default and a proposed order. The moving party shall serve, in the manner provided in Fed. R. Civ. P. 5, any party that has failed to appear, and all other parties, with the motion for entry of default, and proposed order. Such service shall also be made on any attorney the moving party knows, or reasonably should know, represents the party against which default is sought. The motion shall be supported by an affidavit that describes with specificity how each allegedly defaulting party was served with process in a manner authorized by Fed. R. Civ. P. 4 and the date of such service. Following the 21-day response time provided under Local Civil Rule 7.1(f)(1), the motion shall be submitted to the presiding judge if it is opposed or if the allegedly defaulting party has filed a responsive pleading. Otherwise, the motion shall be referred to the clerk and if the clerk is satisfied that the moving party has effected service of process, the clerk shall enter a default.

(b) Default Judgment.

(1) General Requirements. Any motion for default judgment shall be served on every party that has appeared in the action and be supported by an affidavit stating that each party against which judgment is sought is not an infant, an incompetent person, or in the military service of the United States as defined in the Servicemembers Civil Relief Act of 2003, as amended.

(2) By the Clerk. A motion seeking default judgment pursuant to Fed. R. Civ. P. 55(b)(1) shall be accompanied by a proposed order and the supporting affidavit. If a party files a motion for default judgment prior to entry of default, the moving party must also serve the party against which default is sought pursuant to subsection (a) of this rule. The supporting affidavit shall show:
(A) the party against which judgment is sought has not appeared in the action;
(B) the principal amount due, giving credit for any payments and showing the amounts and dates of payment;
(C) the information enabling the principal amount due to be calculated as a sum certain, if it is not already a sum certain;
(D) the information enabling the computation of the interest to the date of judgment;
(E) the proposed post-judgment interest rate and the reasons for using it if the moving party claims that a post-judgment interest rate other than that provided by 28 U.S.C. § 1961 applies; and
(F) the amount of any costs claimed.
Additionally, if a claim is based on a contract, the moving party shall cite the relevant contract provisions in the motion for default judgment or supporting memorandum, if any, and file a copy of the contract as an attachment to the motion for default judgment. The clerk may submit any motion for default judgment to the presiding judge for review.
(3) By the Court. A motion seeking default judgment pursuant to Fed. R. Civ. B. 55(b)(2) shall include the docket entry number of the clerk's entry of default.
https://www.nced.uscourts.gov/pdfs/Local%20Civil%20Rules%202023.pdf#page=58

North Carolina Middle (18)
No local rule
https://www.ncmd.uscourts.gov/sites/ncmd/files/2021_June_21_CIVRulesEffective.pdf

North Carolina Western (19)
No local rule
https://www.ncwd.uscourts.gov/sites/default/files/local_rules/Revised_Local_Rules_1.pdf

South Carolina (20)
DISTRICT COURTS AND CLERKS
D.S.C. Civ. R. 55.01: Orders and Judgments. The clerk of court is authorized to enter judgments by default as provided for in Fed. R. Civ. P. 55(a) and 55(b)(1) without further direction of the court pursuant to Fed. R. Civ. P. 58. However, such action may be suspended, altered, or rescinded by the court for good cause shown.
https://www.scd.uscourts.gov/Rules/Civil%20Rules%20-%20Current.pdf#page=44

Virginia Eastern (22)
No local rule (*in rem* actions)
https://www.vaed.uscourts.gov/sites/vaed/files/LocalRulesEDVA.pdf

Virginia Western (23)
No local rule
https://www.vawd.uscourts.gov/sites/Public/assets/File/court/local_rules.pdf

West Virginia Northern (24)
No local rule
https://www.wvnd.uscourts.gov/sites/wvnd/files/Local%20Rules%20-%20Final%20July%202010%20JPB_1.pdf

West Virginia Southern (25)
No local rule
https://www.wvsd.uscourts.gov/court-info/local-rules-and-orders/local-rules

FIFTH CIRCUIT

Louisiana Eastern (3L)
No local rule
https://www.laed.uscourts.gov/sites/default/files/local_rules/2022%20CIVIL%20RULES%20LAED%20w%20Amendments%203.1.22.pdf

Louisiana Middle (3N)
M.D. La. Civ. R. 41 - DISMISSAL OF ACTIONS
. . .
(b) Dismissal for Failure to Prosecute.
(1) A civil action may be dismissed by the Court for lack of prosecution as follows:
(A) Where no service of process has been made within 90 days after filing of the complaint;
(B) Where no responsive pleadings have been filed or no default has been entered within sixty days after service of process, except when Fed. R. Civ. P. 12(a)(3) applies or a dispositive motion is pending; . . . . .
https://www.lamd.uscourts.gov/sites/default/files/pdf/2022%20Local%20Rules%20Revisions%208-18-2022.pdf#page=22

M.D. La. Civ. R. 55 - DEFAULT
In addition to the provisions of Fed. R. Civ. P. 55, the following rules apply to default judgments:
• All requests for entry of default shall be made to the Clerk of Court in writing;
• The clerk shall provide notice of entry of default to each defendant or the defendant's attorney at the last known address;
• A judgment of default shall not be entered until fourteen days after entry of default.
https://www.lamd.uscourts.gov/sites/default/files/pdf/2019LocalRules.pdf#page=30

Louisiana Western (36)
W.D. La. Civ. R. 55 - DEFAULT
W.D. La. Civ. R. 55.1 Default Judgment
In addition to the provisions of FRCvP 55, the following rules apply to default judgments:

A. All requests for entry of default shall be made to the clerk in writing;
B. The clerk shall mail by regular mail notice of entry of default to each defendant or his or her attorney at his or her last known address;
C. A judgment of default shall not be entered until 14 calendar days after entry of default.
Amended June 28, 2002 and December 1, 2009
https://www.lawd.uscourts.gov/sites/lawd/files/UPLOADS/localrules.WDLA.2021Oct06.pdf#page=25

Mississippi Northern (37)
No local rule (attachment and *in rem*)
https://www.msnd.uscourts.gov/sites/msnd/files/forms/2021-%20MASTER%20COPY%20-%20CIVIL%20FINAL.pdf

Mississippi Southern (38)
No general provision (*in rem* actions)
https://www.mssd.uscourts.gov/sites/mssd/files/2021_MASTER_COPY_CIVIL_FINAL.pdf

Texas Northern (39)
N.D. Tex. Civ. R. 55.1 Failure to Obtain Default Judgment.
If a defendant has been in default for 90 days, the presiding judge may require the plaintiff to move for entry of a default and a default judgment. If the plaintiff fails to do so within the prescribed time, the presiding judge will dismiss the action, without prejudice, as to that defendant.

N.D. Tex. Civ. R. 55.2 Default Judgments by the United States. [REPEALED]

N.D. Tex. Civ. R. 55.3 Request for Entry of Default by Clerk.
Before the clerk is required to enter a default, the party requesting such entry must file with the clerk a written request for entry of default, submit a proposed form of entry of default, and file any other materials required by Fed. R. Civ. P. 55(a).
https://www.txnd.uscourts.gov/sites/default/files/documents/CIVRULES.pdf#page=23

Texas Eastern (40)
No local rule (*in rem* actions)
https://www.txed.uscourts.gov/sites/default/files/HR_Docs/Local%20Rules%202021.pdf

Texas Southern (41)
No local rule, but referenced in
S.D. Tex. Civ. R. 5.5 Service of Pleadings and Other Papers. All motions must be served on all parties. Motions for default judgment must be served on the defendant-respondent by certified mail (return receipt requested). (Amended by General Order 2004-10, effective September 7, 2004.)
https://www.txs.uscourts.gov/sites/txs/files/LR%20May%202020%20Reprint.pdf#page=7

Texas Western (42)
W.D. Tex. Civ. R. 55 Failure to Obtain Default Judgment (Deleted)
https://www.txwd.uscourts.gov/wp-content/uploads/Documents/Local%20Court%20Rules/Local%20Court%20Rules%20(Full)%20062421.pdf#page=3

SIXTH CIRCUIT

Kentucky Eastern (43) and Kentucky Western (44)
Joint local rules have no specific rule on defaults and default judgments

Eastern District of Michigan (45)
E.D. Mich. Civ. R. 55.1 Clerk's Entry of Default
Requests for, with affidavits in support of, a Clerk's Entry of Default shall contain the following information:
(a) A statement identifying the specific defendant who is in default.
(b) A statement attesting to the date the summons and complaint were served upon the defendant who is in default.
(c) A statement indicating the manner of service and the location where the defendant was served.
https://www.mied.uscourts.gov/altindex.cfm?pagefunction=localRuleView&lrnumber=LR55.1

E.D. Mich. Civ. R. 55.2 Clerk's Entry of Judgment by Default
Requests for a Clerk's Entry of Judgment by Default must be accompanied by an affidavit which sets forth:
(a) The sum certain or the information necessary to allow the computation of a sum certain.
(b) The name of the defendant who is subject to default.
(c) A statement that the defendant is not:
(1) an infant or an incompetent person, or
(2) in the military service.
(d) A statement that a default has been entered because the defendant failed to plead or otherwise defend in accordance with Fed. R. Civ. P. 55(a).
COMMENT: The Clerk's Office has forms for requests for a Clerk's Entry of Judgment by Default and Affidavit of Sum Certain to assist parties and attorneys in complying with LR 55.2.
https://www.mied.uscourts.gov/altindex.cfm?pagefunction=localRuleView&lrnumber=LR55.2

Western District of Michigan (46)
No local rule
https://www.miwd.uscourts.gov/court-info/local-rules-and-orders/local-civil-rules

Ohio Northern (47)
No local rule
https://www.ohnd.uscourts.gov/court-info/local-rules-and-orders

Ohio Southern (48)

S.D. Ohio Civ. R. 55.1 Defaults and Default Judgments

(a) If a party makes proper service of a pleading seeking affirmative relief but, after the time for making a response has passed without any response having been served and filed, that party does not request the Clerk to enter a default, the Court may by written order direct the party to show cause why the claims in that pleading should not be dismissed for failure to prosecute.

(b) If a party obtains a default but does not, within a reasonable time thereafter, file a motion for a default judgment, the Court may by written order direct the party to show cause why the claims upon which default was entered should not be dismissed for failure to prosecute.

(c) Nothing in this Rule shall be construed to limit the Court's power, either under Fed. R. Civ. P. 41 or otherwise, to dismiss a case or one or more claims or parties for failure to prosecute.

https://www.ohsd.uscourts.gov/sites/ohsd/files//Local%20Rules%20Effective%202022-02-07.pdf#page=27

Tennessee Eastern (49)

No local rule

https://www.tned.uscourts.gov/sites/tned/files/localrules.pdf

Tennessee Middle (50)

M.D. Tenn. Civ. R. 55.01 – MOTIONS FOR ENTRY OF DEFAULT.

Motions for entry of default under Fed. R. Civ. P. 55(a) must be accompanied by an unsworn declaration under penalty of perjury under 28 U.S.C. § 1746 verifying: (i) proof of service; (ii) the opposing party's failure to plead or otherwise defend; (iii) if the opposing party is an individual, that the opposing party is not a minor or incompetent person; and, (iv) if the opposing party is an individual, that the opposing party is not in the military service, as required by 50 U.S.C. § 3931(b)(1). Evidence from the Defense Manpower Data Center, or other reliable source, confirming that the opposing party is not in the military service must be appended to the unsworn declaration.

https://www.tnmd.uscourts.gov/court-info/local-rules-and-orders/local-rules

Tennessee Western (51)

No local rule

https://www.tnwd.uscourts.gov/pdf/content/LocalRules.pdf

SEVENTH CIRCUIT

Illinois Northern (52)

No default judgment rule but LR41.1, the "inactive cases" screening mechanism:

N.D. Ill. Civ. R. 41.1. Dismissal for Want of Prosecution or By Default

Cases which have been inactive for more than six months may be dismissed for want of prosecution. An order of dismissal for want of prosecution or an order of default may be entered if counsel fails to respond to a call of the case set by order of court. Notice of the court call shall

be by publication or as otherwise provided by the court. In the Eastern Division publication shall be in the Chicago Daily Law Bulletin unless the court provides otherwise.
https://www.ilnd.uscourts.gov/_assets/_documents/_rules/LRRULES.pdf#page=36

There is an *in rem* rule
https://www.ilnd.uscourts.gov/_assets/_documents/_rules/LRRULES.pdf#page=89

Illinois Central (53)
No local rule
https://www.ilcd.uscourts.gov/sites/ilcd/files/November%201%2C%202021%20ILCD%20Local%20Rules%20%28Final%29%20%28Revisions%202.4.2022%29.pdf

Illinois Southern (54)
S.D. Ill. Civ. R. 55.1 DEFAULT JUDGMENT
(a) Entry by Clerk. The Clerk of Court shall enter a default against any party who fails to respond to a complaint, crossclaim, or counterclaim within the time and in the manner provided by Federal Rule of Civil Procedure 12. The serving party shall give notice of the entry of default to the defaulting party by regular mail sent to the last known address of the defaulted party and shall certify to the Court that notice has been sent.
(b) Default Judgment. Any motion for default judgment pursuant to Federal Rule of Civil Procedure 55(b) shall contain a statement that a copy of the motion has been mailed to the last known address of the party from whom default judgment is sought. If the moving party knows, or reasonably should know, the identity of an attorney thought to represent the defaulted party, the motion shall also state that a copy has been mailed to that attorney.
https://www.ilsd.uscourts.gov/Forms/2021LocalRules.pdf#page=27

Indiana Northern (55)
No local rule
https://www.innd.uscourts.gov/sites/innd/files/LocalRules11182019.pdf

Indiana Southern (56)
No local rule
https://www.insd.uscourts.gov/sites/insd/files/Local%20Rules%2012-1-21.pdf

Wisconsin Eastern (57)
E.D. Wis. Civil L. R. 41. Dismissal of Actions.
. . .
(b) Dismissal Where No Answer or Other Pleading Filed. In all cases in which a defendant has failed to file an answer or otherwise defend within 6 months from the filing of the complaint and the plaintiff has not moved for a default judgment, the Court may on its own motion, after 21 days' notice to the attorney of record for the plaintiff, or to the plaintiff if pro se, enter an order dismissing the action for lack of prosecution. Such dismissal must be without prejudice.

https://www.wied.uscourts.gov/sites/wied/files/documents/Local_Rules_2010-0201_Amended_2022-0103.pdf#page=43

Wisconsin Western (58)
No local rule
https://www.wiwd.uscourts.gov/local-rules

EIGHTH CIRCUIT

Arkansas Eastern (60)
No local rule
https://www.are.uscourts.gov/sites/are/files/local_rules/All_LR.pdf

Arkansas Western (61)
No local rule
https://www.arwd.uscourts.gov/sites/arwd/files/local_rules/ARWD%20local%20rules.pdf

Iowa Northern (62) and Iowa Southern (63)
N.D. Iowa Civ. R. 41 DISMISSALS OF ACTIONS
a. Involuntary Dismissals. After giving the parties the notice prescribed in section (c) of this rule, the Clerk of Court will, in the following circumstances, enter an order dismissing a civil action without prejudice:
1. Where service has not been made on any defendant within 90 days after the filing of the complaint, and the plaintiff has failed to file a statement in writing within 97 days after the filing of the complaint setting forth good cause for why service has not been made; or
2. As to a particular defendant, where service has been made upon that defendant and neither an answer nor a request for other action has been filed as to that defendant within 30 days after the date the answer was due; or
3. Where a default has been entered and a motion for entry of judgment by default in accordance with Federal Rule of Civil Procedure 55(b) has not been made within 30 days after the entry of default, unless the plaintiff advises the Clerk of Court that further court action is necessary before a default judgment can be sought; or
4. Where a deadline set for the performance of any act required by the Federal Rules of Civil Procedure, the Local Rules, or an order of the court has been exceeded by more than 30 days and an extension of time has been neither requested nor granted.
https://www.iasd.uscourts.gov/sites/iasd/files/Local%20Rules%20-%20Final%2012142020.pdf#page=42

Minnesota (64)
No local rule
https://www.mnd.uscourts.gov/court-info/local-rules-and-orders

Missouri Eastern (65)

No local rule (*in rem* and as sanction).
https://www.moed.uscourts.gov/sites/moed/files/CMECF_localrule.pdf

Missouri Western (66)

W. D. Mo. Civ. R. 55.1 DEFAULT JUDGMENT

Obtaining a default judgment is a two-step process: (1) a party must first file a motion for entry of default and obtain a Clerk's Entry of Default, and (2) a party must then file a motion for default judgment.

(a) Entering a Default. Upon motion, the Clerk of Court shall enter the default of any party against whom a judgment for affirmative relief is sought and who has failed to plead or otherwise defend.

1. Notice Required. Written notice of the intention to move for entry of default must be provided to counsel or, if counsel is unknown, to the party against whom default is sought, regardless of whether counsel or the party have entered an appearance. Such notice shall be given at least 14 days prior to the filing of the motion for entry of default. If notice cannot be provided because the identity of counsel or the whereabouts of a party are unknown, the moving party shall inform the Clerk of Court in the declaration or affidavit.

2. Declaration or Affidavit Required. The moving party must show (a) that the party against whom default is sought was properly served with the summons and complaint in a manner authorized by Federal Rule of Civil Procedure 4; (b) that the party has failed to timely plead or otherwise defend; and (c) that proper notice of the intention to seek an entry of default, as described above, has been accomplished.

3. No Notice of Hearing Required. The Clerk shall enter default upon the filing of a properly supported motion for entry of default.

4. Court Review. Notwithstanding the provisions of Federal Rule of Civil Procedure 55(a), the Clerk of Court may refer any request for entry of default judgment to the Court for review prior to formal entry.

(b) Entering a Default Judgment.

1. Motion Practice. All applications and requests for default judgment shall be conducted by motion practice. No motion for default judgment shall be filed unless an entry of default has been entered by the Clerk of Court. By declaration or affidavit, the moving party must (A) specify whether the party against whom judgment is sought is an infant or an incompetent person and, if so, whether that person is represented by a general guardian, conservator, or other like fiduciary; and (B) attest that the Servicemembers Civil Relief Act, 50 U.S.C. App. §§ 501-597b, does not apply.

2. Court Review. Notwithstanding the provisions of Federal Rule of Civil Procedure 55(b)(l), the Clerk of Court may refer any request for entry of default judgment to the Court for review prior to formal entry.

https://www.mow.uscourts.gov/sites/mow/files/DC-Local_Rules.pdf#page=37

Nebraska (67)

D. Neb. Civ. R. 55.1 Default Judgment.

(a) Clerk's Entry of Default.

To obtain a clerk's entry of default under Federal Rule of Civil Procedure 55(a), a party must:

(1) file a motion for the clerk's entry of default; and
(2) e-mail a proposed clerk's entry of default to the clerk at clerk@ned.uscourts.gov. This clerk's entry of default should state that a default is being entered for failure to plead or otherwise defend under Federal Rule of Civil Procedure 55(a).
(b) Clerk's Entry of Default Judgment.
If a party requests the clerk to enter a default judgment under Federal Rule of Civil Procedure 55(b)(1), the party must:
(1) file a motion for clerk's judgment by default;
(2) file an affidavit (a) stating the amount, for a sum certain or that can by computation be made certain, and that does not exceed the amount asked for in the complaint plus the exact computation of interest and costs, and (b) stating that the defendant against whom judgment is to be entered is not an infant or incompetent person as stated in Federal Rule of Civil Procedure 55(b)(1); and
(3) e-mail a proposed clerk's judgment for the clerk's signature to clerk@ned.uscourts.gov.
(c) Court's Entry of Default Judgment.
If a party requests a judgment from the court under Federal Rule of Civil Procedure 55(b)(2), the party must, after obtaining a clerk's entry of default under Federal Rule of Civil Procedure 55(a) and Nebraska Civil Rule 55.1(a):
(1) file a motion for default judgment;
(2) file an affidavit stating that the party against whom the default judgment is requested is (a) not an infant or incompetent person as stated in Federal Rule of Civil Procedure Rule 55(b)(2) or (b) meets the exceptions stated in Federal Rule 55(b)(2);
(3) e-mail to the judge's chambers a proposed judgment; and
(4) in cases in which damages must be proved, request an evidentiary hearing before the trial judge.
https://www.ned.uscourts.gov/internetDocs/localrules/NECivR.2021.pdf#page=47

North Dakota (68)
No local rule
https://www.ndd.uscourts.gov/lci/Local_Rules.pdf

South Dakota (69)
No local rule on procedures (mentioned in taxation of costs rule)
https://www.sdd.uscourts.gov/sites/sdd/files/local_rules/CIVIL%20RULES%20%202015.pdf

NINTH CIRCUIT

Alaska (7-)
D. Alaska Civ. R. 55.1 Entry of Default and Default Judgment
(a) Entry of Default. Motions for entry of default must include proof of service of the complaint per Fed. R .Civ. P. 4 and notice to appearing parties.
(b) Judgment Following Default.

(1) Attorney's Fees. For purposes of Fed. R. Civ. P. 55(b)(1), a claim for "reasonable attorney's fees" is not a claim for a sum certain.
(2) Supporting Evidence. Motions for judgment following entry of default must be supported by declarations and evidence establishing the right to relief, including but not limited to:
(A) calculations supporting the amount of judgment;
(B) relevant contract documents;
(C) the facts supporting any claim for prejudgment interest, including the applicable interest rate and calculation of interest due, see 28 U.S.C. § 1961;
(D) the facts supporting any claim for attorney's fees, including the amount of fees sought, the actual time spent, and actual fees incurred; and
(E) compliance with the Service Members Civil Relief Act, 50 USC §§ 3901-4043.
https://www.akd.uscourts.gov/sites/akd/files/local_rules/Local_Civil_Rules_12-2020.pdf#page=39

Arizona (70)
No local rule
https://www.azd.uscourts.gov/sites/azd/files/local-rules/Local%20Rules%20Master%20File%202023.pdf#page=119

California Northern (71)
No local rule
https://www.cand.uscourts.gov/wp-content/uploads/2023/10/CAND_Civil_Local_Rules_10-19-2023.pdf

California Eastern (72)
No local rule (*in rem*)
https://www.caed.uscourts.gov/caednew/assets/File/EDCA%20LOCAL%20RULES%20EFF%203-1-2022%20.pdf#page=211

Central District of California (73)
C.D. Cal. Civ. R. 55-1 Default Judgments. When application is made to the Court for a default judgment, the application shall be accompanied by a declaration in compliance with F.R.Civ.P. 55(b)(1) and/or (2) and include the following:
(a) When and against what party the default was entered;
(b) The identification of the pleading to which default was entered;
(c) Whether the defaulting party is an infant or incompetent person, and if so, whether that person is represented by a general guardian, committee, conservator or other representative;
(d) That the Servicemembers Civil Relief Act (50 U.S.C. App. § 521) does not apply; and
(e) That notice has been served on the defaulting party, if required by F.R.Civ.P. 55(b)(2).

C.D. Cal. Civ. R. 55-2 Default Judgment - Unliquidated Damages. If the amount claimed in a judgment by default is unliquidated, the applicant may submit evidence of the amount of damages

by declarations. Notice must be given to the defaulting party of the amount requested. The party against whom judgment is sought may submit declarations in opposition.

C.D. Cal. Civ. R. 55-3 Default Judgment - Schedule of Attorneys' Fees. When a promissory note, contract or applicable statute provides for the recovery of reasonable attorneys' fees, those fees shall be calculated according to the following schedule:

Amount of Judgment	Attorneys' Fees Awards
$0.01 - $1,000	30% with a minimum of $250.00
$1,000.01 - $10,000	$300 plus 10% of the amount over $1,000
$10,000.01 - $50,000	$1200 plus 6% of the amount over $10,000
$50,000.01 - $100,000	$3600 plus 4% of the amount over $50,000
Over $100,000	$5600 plus 2% of the amount over $100,000

This schedule shall be applied to the amount of the judgment exclusive of costs. An attorney claiming a fee in excess of this schedule may file a written request at the time of entry of the default judgment to have the attorney's fee fixed by the Court. The Court shall hear the request and render judgment for such fee as the Court may deem reasonable.
https://www.cacd.uscourts.gov/sites/default/files/documents/LocalRules_Chap1_12_20_0.pdf#page=91

California Southern (74)

S.D. Cal. Civ. R. 55.1 Default Judgments

If plaintiff(s) fail(s) to move for default judgment within thirty (30) days of the entry of a default, the Clerk will prepare, with notice, an order to show cause why the complaint against the defaulted party should not be dismissed.
https://www.casd.uscourts.gov/_assets/pdf/rules/2021.07.5%20Local%20Rules.pdf#page=44

S.D. Cal. Civ. R. 77.2 Orders Grantable by Clerk

The Clerk is authorized to sign and enter orders specifically allowed to be signed by the Clerk under the Fed. R. Civ. P. and is, in addition, authorized to sign and enter the following orders without further direction of a judge:

a.

. . . .

d. Orders entering default for failure to plead or otherwise defend in accordance with Fed. R. Civ. P. 55(b)(1).
https://www.casd.uscourts.gov/_assets/pdf/rules/2021.07.5%20Local%20Rules.pdf#page=54

Local rule for defaults in actions *in rem* (including maritime)
https://www.casd.uscourts.gov/_assets/pdf/rules/2021.07.5%20Local%20Rules.pdf#page=71

Guam (93)

D. Guam Civ. R. 77 Clerk's Authority.

(a) Orders Grantable by Clerk. The Clerk of Court is authorized to grant, sign, and enter the following orders without further direction by the Court. Any orders so entered may be suspended, altered, or rescinded by the Court for cause shown:

. . .

(2) Orders . . . entering defaults for failure to plead or otherwise defend, in accordance with Fed. R. Civ. P. 55, Federal Rules of Civil Procedure . . .

https://www.gud.uscourts.gov/sites/gud/files/civil_rules_effective_20190722_0.pdf#page=27

Hawaii (75)

No local rule

https://www.hid.uscourts.gov/files/order532/2019_08_26_administrative_Order%20Amending%20the%20Local%20Rules%20eff%202019_09_01(1).pdf?PID=11&MID=47

Idaho (76)

No local rule

https://www.id.uscourts.gov/content_fetcher/print_pdf_packet.cfml?Court_Unit=District&Content_Type=Rule&Content_Sub_Type=Civil

Montana (77)

No local rule (other than in prisoner cases)

https://www.mtd.uscourts.gov/sites/mtd/files/LocalRules_2022.pdf#page=34

Nevada (78)

D. Nev. Civ. R. 77-1. JUDGMENTS AND ORDERS GRANTABLE BY THE CLERK

. . .

(b) The clerk must:

. . .

(2) Enter default for failure to plead or otherwise defend under Fed. R. Civ. P. 55(a);

(3) Enter judgments by default in the circumstances authorized by Fed. R. Civ. P. 55(b)(1);

https://www.nvd.uscourts.gov/wp-content/uploads/2020/04/Local-Rules-of-Practice-Amended-2020.pdf#page=78

Northern Mariana Islands (94)

No local rule

https://www.nmid.uscourts.gov/documents/localrules/LR20171101.pdf

Oregon (79)

D. Or. Civ. R. 55-1 Conference Required Prior to Filing for Default

If the party against whom an order or judgment of default pursuant to Fed. R. Civ. P. 55 is sought has filed an appearance in the action, or has provided written notice of intent to file an appearance

to the party seeking an order or judgment of default, then LR 7-1 and LR 83-8 apply, and the parties must make a good faith effort to confer before a motion or request for default is filed.
Practice Tip: The requirement to confer is in addition to the requirement in Fed. R. Civ. P. 55(b)(2) that, "If a party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 7 days before the hearing."
https://www.ord.uscourts.gov/index.php/rules-orders-and-notices/local-rules/civil-procedure/1803-lr-55-default

Specific cross-reference to this:
D. Or. Civ. R. 83-8 Cooperation Among Counsel
(a) Counsel must cooperate with each other, consistent with the interests of their clients, in all phases of the litigation process and be courteous in their dealings with each other, including matters relating to scheduling and timing of various discovery procedures.
(b) The Court may impose sanctions if it finds that counsel has been unreasonable in not accommodating the legitimate requests of opposing counsel. In a case where an award of attorney fees is applicable, the Court may consider lack of cooperation when setting the fee.
https://www.ord.uscourts.gov/index.php/rules-orders-and-notices/local-rules/civil-procedure/1777-lr-83-rules-and-directives-by-the-district-court

Washington Eastern (80)
E.D. Wash. Civ. R. 55 DEFAULT; DEFAULT JUDGMENT
Obtaining a default judgment is a two-step process: (1) a party must first file a motion for entry of default and obtain a Clerk's Order of Default, and (2) a party must then file a motion for default judgment.
(a) Entering a Default. Upon motion, the Clerk of Court shall enter the default of any party against whom a judgment for affirmative relief is sought and who has failed to plead or otherwise defend.
(1) Notice Required. Written notice of the intention to move for entry of default must be provided to counsel or, if counsel is unknown, to the party against whom default is sought, regardless of whether counsel or the party have entered an appearance. Such notice shall be given at least 14 days prior to the filing of the motion for entry of default. If notice cannot be provided because the identity of counsel or the whereabouts of a party are unknown, the moving party shall inform the Clerk of Court in the declaration or affidavit.
(2) Declaration or Affidavit Required. The moving party must show (a) that the party against whom default is sought was properly served with the summons and complaint in a manner authorized by Federal Rule of Civil Procedure 4; (b) that the party has failed to timely plead or otherwise defend; and (c) that proper notice of the intention to seek an entry of default, as described above, has been accomplished.
(3) No Notice of Hearing Required. The Clerk shall enter default upon the filing of a properly supported motion for entry of default.
(b) Entering a Default Judgment.
(1) Motion Practice. All applications and requests for default judgment shall be conducted by motion practice. No motion for default judgment shall be filed unless an order of default has been

entered by the Clerk of Court. A motion for default judgment shall be filed and noted for hearing in accordance with LCivR 7. By declaration or affidavit, the moving party must (A) specify whether the party against whom judgment is sought is an infant or an incompetent person and, if so, whether that person is represented by a general guardian, conservator, or other like fiduciary; and (B) attest that the Servicemembers Civil Relief Act, 50 U.S.C. App. §§ 501-597b, does not apply.
(2) Court Review. Notwithstanding the provisions of Federal Rule of Civil Procedure 55(b)(l), the Clerk of Court may refer any request for entry of default judgment to the Court for review prior to formal entry.
(c) through (d) [Reserved]
https://www.waed.uscourts.gov/sites/default/files/localrules/LocalCivilRules.pdf#page=25

Washington Western (81)

W.D. Wash. Civ. R. 55 DEFAULT; DEFAULT JUDGMENT

(a) Entry of Default
Upon motion by a party noted in accordance with LCR 7(d)(1) and supported by affidavit or otherwise, the clerk shall enter the default of any party against whom a judgment for affirmative relief is sought but who has failed to plead or otherwise defend. The affidavit shall specifically show that the defaulting party was served in a manner authorized by Fed. R. Civ. P. 4. A motion for entry of default need not be served on the defaulting party. However, in the case of a defaulting party who has entered an appearance, the moving party must give the defaulting party written notice of the requesting party's intention to move for the entry of default at least fourteen days prior to filing its motion and must provide evidence that such notice has been given in the motion for entry of default.
(b) Judgment on Default
(1) No Default Judgment Absent a Default. No motion for judgment by default should be filed against any party unless the court has previously granted a motion for default against that party pursuant to LCR 55(a) or unless default otherwise has been entered.
(2) Supporting Evidence Required. Plaintiff must support a motion for default judgment with a declaration and other evidence establishing plaintiff's entitlement to a sum certain and to any nonmonetary relief sought.
(A) Plaintiff shall provide a concise explanation of how all amounts were calculated, and shall support this explanation with evidence establishing the entitlement to and amount of the principal claim, and, if applicable, any liquidated damages, interest, attorney's fees, or other amounts sought. If the claim is based on a contract, plaintiff shall provide the court with a copy of the contract and cite the relevant provisions.
(B) If plaintiff is seeking interest and claims that an interest rate other than that provided by 28 U.S.C. § 1961 applies, plaintiff shall state the rate and the reasons for applying it. For prejudgment interest, plaintiff shall state the date on which prejudgment interest began to accrue and the basis for selecting that date.
(C) If plaintiff seeks attorney's fees, plaintiff must state the basis for an award of fees and include a declaration from plaintiff's counsel establishing the reasonable amount of fees to be awarded, including, if applicable, counsel's hourly rate, the number of hours worked, and the tasks performed.

(3) By the Clerk. The clerk may not enter judgment by default in the case of a defaulting party who has entered an appearance, or who is an infant or incompetent, or who is or may be in the military service. In addition, a claim for "reasonable attorney's fees" is not for a sum certain under Fed. R. Civ. P. 55(b)(1) unless the complaint states the amount of fees sought. Motions to have the clerk enter a default judgment shall be noted in accordance with LCR 7(d)(1). A motion for entry of default judgment by the clerk need not be served on the defaulting party.
(4) By the Court. In all other cases, including instances where a defaulting party has entered an appearance, is an infant or incompetent, or is or may be in the military service, a motion for entry of a judgment by default must be addressed to the court. If there has been no appearance in the action by the defaulting party, the motion shall be noted in accordance with LCR 7(d)(1), but it need not be served on the defaulting party and notice of the motion need not be given to the defaulting party. If the defaulting party has appeared, the motion shall be noted in accordance with LCR 7(d)(3), and service of all papers filed in support of the motion must be made at the defaulting party's address of record and shall also be served by electronic means if available. In the absence of an address of record, service shall be made at the defaulting party's last known address and shall also be served by electronic means if available. The court may conduct such hearing or inquiry upon a motion for entry of judgment by default as it deems necessary under the circumstances of the particular case.
https://www.wawd.uscourts.gov/sites/wawd/files/WAWD%20All%20Local%20Civil%20Rules%20Clean%202022.pdf#page=97

TENTH CIRCUIT

Colorado (82)
D. Colo. Civ. R. 55.1 DEFAULT JUDGMENT FOR A SUM CERTAIN
(a) Required Showing. To obtain a default judgment under Fed. R. Civ. P. 55(b)(1), a party shall show by motion supported by affidavit:
(1) that the defendant who has been defaulted:
(A) is not a minor or an incompetent person;
(B) is not in the military service, as set forth in the Servicemembers Civil Relief Act, 50 U.S.C. § 3931, Protection of Servicemembers Against Default Judgments;
(C) has not made an appearance; and
(2) the sum certain or the sum that can be made certain by computation.
(b) Form of Judgment. The moving party shall submit a proposed form of judgment that recites:
(1) the party or parties in favor of whom judgment shall be entered;
(2) the party or parties against whom judgment shall be entered;
(3) when there are multiple parties against whom judgment shall be entered, whether the judgment shall be entered jointly, severally, or jointly and severally;
(4) the sum certain consisting of the principal amount, prejudgment interest, and the rate of postjudgment interest; and
(5) the sum certain of attorney fees enumerated in the document on which the judgment is based.
http://www.cod.uscourts.gov/Portals/0/Documents/LocalRules/2021_Final_Local_Rules.pdf?ver=2022-02-16-135206-217#page=30

Kansas (83)

D. Kan. Civ. R. 77.2 ORDERS AND JUDGMENTS GRANTABLE BY CLERK

(a) Orders and Judgments. The clerk may grant the following orders and judgments without direction by the court:

. . .

(6) Entry of default and judgment by default as provided for in Fed. R. Civ. P. 55(a) and 55(b)(1).
https://ksd.uscourts.gov/sites/ksd/files/MASTER%20COPY%20updated%2010-25-23.pdf#page=55

New Mexico (84)

No local rule
https://www.nmd.uscourts.gov/sites/nmd/files/local_rules/Local%20Rules%20of%20Civil%20Procedure%20Adopted%20October%201%2C%202020_0.pdf

Oklahoma Northern (85)

N.D. Okla. Civ. R. 55 – Default; Default Judgment

N.D. Okla. Civ. R. 55-1 Procedure for Obtaining Default Judgment.

(a) Entry of Default by Court Clerk. To obtain an entry of default pursuant to Fed. R. Civ. P. 55(a), the party must provide the Court Clerk with a "Motion for Entry of Default by the Clerk." The motion shall recite the facts that establish service of process, be accompanied by affirmations concerning non-military service, and state that the individual is neither an infant nor an incompetent person. Once a proper motion has been filed, the Court Clerk will prepare and enter default, after independently determining that service has been effected, that the time for response has expired, and that no answer or appearance has been filed.

(b) Entry of Default Judgment. In its discretion, the Court may set a hearing on the motion with respect to which notice shall be provided by the party moving for default judgment in accordance with the requirements of Fed. R. Civ. P. 55(b).
https://www.oknd.uscourts.gov/sites/default/files/madcap/Default.htm#lcvr55.htm%3FTocPath%3DCIVIL%2520RULES%7C_____23

Oklahoma Eastern (86)

E.D. Okla. Civ. R. 55.1 Procedure For Obtaining Default Judgment.

(a) Entry of Default by Court Clerk. To obtain an entry of default pursuant to Fed. R. Civ. P. 55(a), the party must provide the Court Clerk with a "Motion for Entry of Default by the Clerk." The motion shall recite the facts that establish service of process, and be accompanied by affirmations concerning non-military service and that the individual is neither an infant nor an incompetent person. Once a proper motion has been filed, the Court Clerk will prepare and enter default, after independently determining that service has been effected, that the time for response has expired and that no answer or appearance has been filed.

(b) Entry of Default Judgment. In cases where a plaintiff's claim is for a sum certain or a sum that can be made certain by computation, a plaintiff may request the Court Clerk to enter a default judgment under Fed.R.Civ.P. 55(b)(1). The plaintiff must file a motion for default judgment

accompanied by a concise brief, a form of judgment, and an affidavit (1) stating the amount for a sum certain or that can by computation be made certain and (2) stating that the defendant against whom judgment is to be entered is not an infant or an incompetent person. In all other cases, a party must apply to the Court for a default judgment pursuant to the provisions of Fed.R.Civ.P. 55(b)(2). In its discretion, the Court may set a hearing on a motion for default judgment with respect to which notice shall be provided by the party moving for default judgment in accordance with the requirements of Fed.R.Civ.P. 55(b)(2).
https://www.oked.uscourts.gov/sites/oked/files/Local_Civil_Rules.pdf#page=33

Oklahoma Western (87)

W.D. Okla. Civ. R. 55.1 Application for Default Judgment.

No application for a default judgment shall be entertained absent an affidavit in compliance with the Servicemembers Civil Relief Act.
https://www.okwd.uscourts.gov/wp-content/uploads/Local_Rules_05-26-2021.crs-edit.pdf#page=39

District of Utah (88)

D. Utah Civ. R. 55-1 DEFAULTS AND DEFAULT JUDGMENTS

The procedure for obtaining a default judgment under Fed. R. Civ. P. 55 is a twostep process: (a) entry of default by the clerk pursuant to Fed. R. Civ. P. 55(a); and (b) entry of default judgment, by the clerk when the claim is for a sum certain pursuant to Fed. R. Civ. P. 55(b)(1), and by the court in all other instances pursuant to Fed. R. Civ. P. 55(b)(2).

Entry of Default.

To obtain an entry of default pursuant to Fed. R. Civ. P. 55(a), a party must file a "motion for entry of default" and a proposed order. The motion must describe with specificity the method by which each allegedly defaulting party was served with process in a manner authorized by Fed. R. Civ. P. 4, and the date of such service. The clerk will independently determine whether service has been effected, that the time for response has expired, and that party against whom default is sought has failed to plead or otherwise defend. Should the clerk determine that entry of default is not appropriate for any reason, the clerk will issue an order denying entry of default. An order denying entry of default is reviewable by the court upon motion.

Default Judgment.

No motion for default judgment must be filed unless a certificate of default has been entered by the clerk. If a party obtains a certificate of default but does not, within a reasonable time thereafter, file a motion for default judgment, the court may direct the party to show cause why the claims upon which default was entered should not be dismissed for failure to prosecute.

(1) By the Clerk.

(A) In cases where a claim is for a sum certain or a sum that can be made certain by computation, a party may request the clerk enter a default judgment against any party other than the United States, its officers, or its agencies, by filing a motion for default judgment under Fed. R. Civ. P. 55(b)(1). The motion must clearly identify that the party is seeking default judgment from the clerk under Fed. R. Civ. P. 55(b)(1). The motion must be accompanied by a concise brief, a form of

judgment, and an affidavit stating: (i) the amount due; (ii) that the defendant has failed to appear; and (iii) that the defendant is not a minor or an incompetent person.
(B) If the clerk determines that it may not be appropriate to enter a default judgment under Fed. R. Civ. P. 55(b)(1), the clerk may confer with the presiding judge. The presiding judge will advise the clerk whether default judgment by the clerk is appropriate. If such a judgment is not appropriate, the motion for default judgment will be addressed by the presiding judge.
(2) By the Court. In all cases not falling under DUCivR 55-1(b)(1), a party must apply to the court for a default judgment in accordance with Fed. R. Civ. P. 55(b)(2). The motion for default judgment must include the clerk's certificate of default and a proposed form of default judgment. In cases against the United States, its officers, or its agencies, the claimant must establish a claim or right to relief by evidence that satisfies the court in compliance with Fed. R. Civ. P. 55(d). Upon receipt of the motion, the court may conduct further proceedings to enter or effectuate judgment as it deems necessary.
(3) Affidavit Required by Servicemembers Civil Relief Act. All motions for default judgment must be accompanied by an affidavit: (i) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or (ii) 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.
https://www.utd.uscourts.gov/sites/utd/files/Dec%202021%20Civil%20Rules.pdf#page=64

District of Wyoming (89)
No local rule
https://www.wyd.uscourts.gov/sites/wyd/files/local_rules/localrules-cv22.pdf

ELEVENTH CIRCUIT

Alabama Northern (26)
No local rule
https://www.alnd.uscourts.gov/sites/alnd/files/ALND%20Local%20Rules%20Revised%2012-04-2019.pdf

Alabama Middle (27)
No local rule
https://www.almd.uscourts.gov/sites/default/files/forms/ALMD%20Local%20Rules.pdf

Alabama Southern (28)
S.D. Ala. Civ. R. 41. Dismissal of Actions
. . .
(b) Dismissal Where No Answer or Other Pleading Filed. Whenever a served Defendant has failed to answer or otherwise defend within six (6) months from the filing of the complaint and the Plaintiff has not sought default and default judgment, the Court upon notice may dismiss the action for failure to prosecute, in accordance with applicable law.
https://www.alsd.uscourts.gov/sites/alsd/files/local-rules.pdf#page=48

In rem actions
https://www.alsd.uscourts.gov/sites/alsd/files/local-rules.pdf#page=56

Florida Northern (29)
No general local rule
Attachment actions:
https://www.flnd.uscourts.gov/sites/flnd/files/local_rules/local_rules_0.pdf#page=46
In rem actions:
https://www.flnd.uscourts.gov/sites/flnd/files/local_rules/local_rules_0.pdf#page=49

Florida Middle (3A)
M.D. Fla. Civ. R. 1.10 Filing Proof of Service of Process; Deadline for Default
(a) PROOF OF SERVICE. Within twenty-one days after service of a summons and complaint, a party must file proof of service.
(b) APPLICATION FOR A DEFAULT. Within twenty-eight days after a party's failure to plead or otherwise defend, a party entitled to a default must apply for the default.
(c) APPLICATION FOR A DEFAULT JUDGMENT. Within thirty-five days after entry of a default, the party entitled to a default judgment must apply for the default judgment or must file a paper identifying each unresolved issue — such as the liability of another defendant —necessary to entry of the default judgment.
(d) FAILURE TO ACT TIMELY. Failure to comply with a deadline in this rule can result in dismissal of the claim or action without notice and without prejudice.
https://www.flmd.uscourts.gov/sites/flmd/files/local_rules/flmd-united-states-district-court-middle-district-of-florida-local-rules.pdf#page=17

Florida Southern (3C)
Similar to Florida Northern—rules for attachments and *in rem* actions, no general rule
https://www.flsd.uscourts.gov/sites/flsd/files/Local_Rules_Effective_120121_FINAL.pdf#page=77

Georgia Northern (3L)
N.D. Ga. Civ. R. 55: DEFAULT
N.D. Ga. Civ. R. 55.1 MAGISTRATE JUDGES: DEFAULT JUDGMENTS
(A) Pretrial Matters on Reference from Judge. The magistrate judges may, in appropriate cases, enter default judgments and review motions to set aside default judgments.
https://www.gand.uscourts.gov/sites/gand/files/local_rules/NDGARulesCV_2.pdf#page=60

Georgia Middle (3G)
No local rule
https://www.gamd.uscourts.gov/sites/gamd/files//Local_Rules_3-7-22.pdf

Georgia Southern (3J)
No local rule
https://www.gasd.uscourts.gov/court-info/local-rules-and-orders/local-rules

TAB 8

8. Rule 41(a) – Voluntary Dismissal

After a lengthy period of study, research, outreach, and deliberation, the Rule 41 Subcommittee, chaired by Judge Cathy Bissoon, seeks approval for publication of amendments to the rule.

By way of background, this Subcommittee was formed at the March 2022 Advisory Committee Meeting to address what appeared to be a mismatch between the language of the rule and some courts' interpretations of it. In sum, the Rule is entitled "Dismissal of Actions," and describes the circumstances under which a plaintiff may dismiss an "action," whether unilaterally prior to service of an answer or a motion for summary judgment, by stipulation, or by request for court order. Research revealed, however, that while some circuits allow the rule to be used only to dismiss an entire action, in most courts, parties and judges use this rule to dismiss less than the entire action, such as all claims against one of multiple defendants, or individual claims, leaving others pending in the case. In sum, in the majority of circuits the Rule is not deployed only to dismiss "actions," but rather some but not all claims in the action.

The Subcommittee has reached consensus that the rule should be amended to permit dismissal of individual claims. Not only would the rule then become consistent with the practice of the majority of federal courts, such an amendment would also further satisfy the general policy in the rules in favor of narrowing the issues in a case during pretrial proceedings. The language referring to "actions" has been unchanged since the rule was promulgated in 1938. Even at the time of the Rule's promulgation, one of its drafters indicated that one of several "causes of action" asserted in a complaint could be dismissed under the Rule.[1] But since then the prevalence of multiparty, multiclaim litigation has grown exponentially, as has the importance of judicial case management, as reflected in Rule 16. A more flexible rule that permits dismissal of individual claims would further support the goal of simplifying complex cases.

Over the course of the last year, the Subcommittee has conducted extensive outreach, meeting with representatives from Lawyers for Civil Justice, the American Association for Justice, and the National Employment Lawyers Association. The Subcommittee also sought feedback from federal judges, via a letter to the Federal Judges Association. The consistent message that emerged from this outreach was that most district judges were far more flexible about dismissing individual claims than the text of the rule suggests, and that such activity was helpful in narrowing the issues involved in cases during pretrial proceedings. There was no opposition voiced to making the rule more flexible.

The Subcommittee has also reached consensus around a second amendment to the rule regarding who must sign a stipulation of dismissal of a claim. Currently, the rule states that "all parties who have appeared" must sign such a stipulation. The Eleventh Circuit, however, recently held that the plain text of the rule demands signatures not only from the parties currently involved in the litigation, but also former parties who have departed from the case. The Subcommittee concluded that such a requirement is unnecessary and that the text of the rule should be clarified to require that only *current* parties to the litigation must sign a stipulation of dismissal of a claim.

[1] Remarks of Edgar B. Tolman, *Proceedings of the Institute on Federal Rules, Cleveland, Ohio, July 21-23, 1938* at 348-350.

The Subcommittee considered narrowing this requirement further to require signatures only by the parties to the claim to be dismissed (leaving out other existing parties to the case) but concluded that this would potentially sacrifice notice to all existing parties of the dismissal. In a case in which dismissing a claim may affect other parties, the Subcommittee concluded that seeking the signatures of all existing parties served important purposes of notifying both the court and all parties of the potential dismissal. Should one or more parties in the case refuse to sign a stipulation of dismissal, the court may of course still order that dismissal under Rule 41(a)(2).

The draft amended rule and committee note is as follows:

Rule 41. Dismissal of ~~Actions~~ Claims

(a) Voluntary Dismissal.

(1) ***By the 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 [any][2] plaintiff may dismiss ~~an action~~ a [any] claim [or 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~~ a [any] claim [or claims] may be dismissed at the 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.

* * * * *

(d) Costs of a Previously Dismissed ~~Action~~ Claim. If a plaintiff who previously dismissed ~~an action~~ a claim in any court files an action based on or including the same claim against the same defendant, the court:

(1) may order the plaintiff to pay all or part of the costs of that previous action; and
(2) may stay the proceedings until the plaintiff has complied.

[2] Under current style conventions "a" is regarded as including "any," but in this case, the committee may conclude that "any" is more appropriate, perhaps in both places where "a" is suggested above.

Committee Note

References to "action" have been replaced with "[a] 'any claim or claims,'" in order to clarify that this rule may be used to effect the dismissal of one or more claims in a multi-claim case, whether by the plaintiff prior to an answer or motion for summary judgment, 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. Rule 41(d) has been amended to reflect that this rule may be used to dismiss one or more claims rather than only 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 are no longer parties. Such a requirement in most cases is overly burdensome and an unnecessary obstacle to narrowing the scope of a case; signatures of the existing parties at the time of the stipulation provide both sufficient notice to those involved in the case and better facilitate formulating and simplifying the issues and eliminating claims that the parties agree to resolve.

TAB 9

9. Rule 45(c) – Subpoena to Provide Remote Trial Testimony

During its April 2024 meeting, the Committee had an initial discussion of 24-CV-B (included in this agenda book) from 13 prominent plaintiff-side lawyers. Much of the submission focused on the limits Rule 43(a) places on using remote testimony at trial, including a requirement that "compelling circumstances" be shown and that there be "appropriate safeguards." In 1996, Rule 43(a) was amended to permit remote testimony at trial (which was previously not authorized), subject to these strict limitations. The proposal in 24-CV-B is to recast Rule 43(a) to make justifying use of remote testimony at trial easier. The "compelling circumstances" requirement would be dropped, and the rule would instead direct that the court must permit remote testimony if "in-person testimony at trial cannot be obtained." As discussed during the April meeting, this appeared to propose a dramatic change in use of remote trial testimony.

The submission also proposed a change to Rule 45(c), prompted by the Ninth Circuit's decision in *In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023) (also included in this agenda book), that even when the demanding requirements of Rule 43(a) are met a subpoena cannot command a witness to provide remote testimony. That decision noted that the Committee Note accompanying a comprehensive amendment to Rule 45 in 2013 said that a subpoena could be used to command a witness to provide remote testimony when Rule 43(a) was satisfied, but the court found that comment insufficient because it was not in the rule itself.

The Ninth Circuit decision was the first court of appeals case to reach the conclusion that a subpoena could not be used to compel remote trial testimony, but a number of district court decisions have taken the view that the current limitations in Rule 45(c) on how far a subpoena can command a witness to travel to provide testimony could prevent remote testimony even though the court has found it justified. See, e.g., *Moreno v. Specialized Bicycle Components, Inc.*, 2022 WL 1211582 (D. Wyo. April 25, 2022) (holding that out-of-state witnesses could not be compelled to provide remote trial testimony); *Ashton Woods Holdings L.L.C. v. USG Corp.*, 2021 WL 8084334 (N.D. Cal. April 5, 2021) (holding that plaintiffs' request to present remote trial testimony of out-of-state witnesses "is precluded by Rule 45").

The Lawyers for Civil Justice submitted 24-CV-N (also included in this agenda book), opposing the amendment proposals in 24-CV-B. The LCJ submission focuses primarily on Rule 43(a), emphasizing that when the rule was amended in 1996 it retained the strong presumption in favor of in-person trial testimony. In LCJ's view, the Rule 43(a) proposal would make "radical changes" by removing the strict limits on remote trial testimony. LCJ also supported the Ninth Circuit interpretation of Rule 45, arguing that the proposed changes to that rule would "abolish the well-established 100-mile jurisdictional limit on subpoenas, replacing it with what amounts to nationwide subpoena power for testimony."[1]

[1] As explained later in this report, the 2013 amendments to Rule 45 did provide that a subpoena from the court presiding over the action "may be served at any place within the United States." At the same time, the amendments to Rule 45(c) protected witnesses against undue burden by directing that if they were commanded to appear for a trial, hearing, or deposition they ordinarily could not be required to travel more than 100 miles from their place of residence to comply.

At the end of the April meeting, a subcommittee chaired by Judge Lauck was appointed to address these issues. Since the April meeting, the Rule 43/45 Subcommittee has met three times – on May 17, July 18, and August 14. Notes from all those meetings are in this agenda book. Despite the considerable work done by the Subcommittee, it has found that questions remain. A list of questions is included at the end of this report, and the Subcommittee particularly hopes (either during the October meeting or by email) to hear Committee members' views on these subjects. As often happens, possible complications emerge when rule changes are studied.

As introduced during the April meeting, the proposed changes to Rule 43(a) on remote trial testimony appear in the submission's proposal:

> **(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,~~ In the event in-person testimony at trial cannot be obtained, the court, with appropriate safeguards, must require witnesses to testify ~~may permit testimony~~ in open court by contemporaneous transmission from a different location unless precluded by good cause in compelling circumstances or otherwise agreed by the parties. The existence of prior deposition testimony alone shall not satisfy the good cause requirement to preclude contemporaneously transmitted trial testimony.

As presented in the agenda book for the April meeting, this Rule 43(a) proposal raised a number of issues with respect to other rules including, for example, trial testimony versus testimony for hearings, admissibility of "unavailable" witness testimony, and "attendance" in court which are addressed elsewhere in the rules. For the assistance of Committee members, this agenda book also includes charts presenting the pertinent provisions of Rules 43 and 45, and other possibly relevant rules that address "place of trial," "unavailability," and "attendance" that bear on the issues before the Subcommittee. Here are the points made in the April agenda book:

> in the event in-person testimony at trial cannot be obtained: As proposed, this language could implicate Rule 32(a)(4), regarding the use of deposition testimony as substantive evidence if the witness is unavailable and is more than 100 miles from the place of trial and attendance of the witness is unavailable and cannot be procured by subpoena. Rule 32(c)(4) also mentions infirmity, age, or imprisonment as unavailability factors.
>
> requiring witnesses to testify by remote means: As noted, one of the unavailability factors in Rule 32(a)(4) focuses on whether a subpoena can be used to compel attendance at trial. Unless that is possible (depending perhaps on an amendment to Rule 45(c)), it is not clear how the court is to "require" the witness to testify by remote means unless by means of a subpoena. But Rule 45 addresses subpoenas, not Rule 43(a).

The LCJ submission also urged that revising Rule 43(a) would lead to controversy about requiring trial testimony from "apex witnesses" – often high-ranking corporate officers with little or no first-hand knowledge of the matters in dispute in a lawsuit.

importance of witness relevant? This amendment might be conditioned on at least a finding that the testimony of the witness is important, if not "necessary" or "essential." Fed. R. Evid. 403 surely permits a judge to limit cumulative testimony by multiple witnesses present in the courtroom to testify to the same circumstances. If substitute witnesses could also attest to those circumstances (particularly if they do not relate to key disputes) it would be odd for a rule to say the court must require remote testimony from all those witnesses. Perhaps "in-person testimony cannot be obtained" takes account of this sort of situation; Rule 403 could be noted in a Committee Note to an amendment to Rule 43(a). To take the *Kirkland* case, it seems that their testimony and credibility might be central to the trial in bankruptcy court. That is probably not true as to every potential remote witness. But indifference to the importance of the testimony of the proposed remote witness might prompt problems like the ones the LCJ submission mentions involving "apex witnesses."

switching the burden of proof on compelling circumstances: Current Rule 43(a) seems to require that the proponent of remote testimony demonstrate compelling circumstances, rather than making the opponent of such testimony show that compelling circumstances cut against remote testimony.

burden with regard to appropriate safeguards: Current Rule 43(a) does not impose on the court the obligation to devise safeguards, but instead to treat that as part of the showing supporting the remote testimony that must be offered by the proponent of remote testimony. This amendment might be read to say that the court "must" devise the safeguards itself.

prior deposition testimony: In the *Kirkland* case, the prior testimony was in a jury trial, not a deposition. In terms of Rule 45, it is somewhat odd that a subpoena seemingly can compel the distant witness to show up within 100 miles of her residence to testify and be videotaped, but not to testify remotely in a trial, even though that may sometimes be more helpful to the trier of fact than bits and snatches of videotaped deposition testimony. The last sentence sounds, however, much more like a Committee Note observation than a rule provision. And it is worth noting that the 1996 Committee Note about the addition of the remote testimony possibility to Rule 43(a) said: "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." Since then, amendments to Rule 45 have authorized nationwide service of subpoenas, subject to Rule 45(c)'s limits, and technology for remote testimony has markedly improved. But those developments may not suffice to support a rule provision declaring that the existence of deposition testimony cannot be a ground for denying a Rule 43(a) motion for remote testimony.

Subcommittee deliberations to date

The Subcommittee held its first meeting on May 17. During that meeting, the Subcommittee concluded that immediate action on the Rule 43(a) issues was not possible, but also that the Rule 45 issues deserve immediate attention and, if possible, a prompt rule-amendment proposal to resolve the existing divergence among district courts (now fortified by the Ninth

Circuit ruling). The Ninth Circuit recognized that this Committee could change the rules in a way that would undo its holding: "[A]ny changes to Rule 45 [are] 'for the Rules Committee and not for [a] court.'" 75 F.4th at 1047.

Since then, the Standing Committee has authorized publication of an amendment to the Bankruptcy Rules that would remove the "compelling circumstances" requirement for remote participation in "contested matters" in Bankruptcy Court, but not for trials in adversary proceedings.[2] That proposed amendment has been published for public comment which is open through February 2025. It may be that this public comment on the Bankruptcy Rule amendment proposal will provide insights useful to this Subcommittee as it considers whether to propose that the Rule 43(a) requirements be modified. One question therefore for the Committee to consider is whether we want to see the comments on the Bankruptcy Rule proposal before proceeding with possible Rule 43(a) amendments.

Bankruptcy Judge Kahn, a member of the Bankruptcy Rules Advisory Committee, is also a member of this Subcommittee and has provided valuable insights to this Subcommittee.

But the question whether Rule 43(a) should be revised to relax the limits on remote trial testimony is not a reason to defer action to respond to the Rule 45 issue illustrated by the cases cited above. Because the Discovery Subcommittee is already considering whether Rule 45(b)(1) should be amended to address methods for serving subpoenas, prompt action on this Rule 45(c) amendment also seems wise. Though it does not appear that the Rule 45(b) issues and the Rule 45(c) issues are particularly related to one another, it is desirable for the Committee not to propose changes to a given rule in a *seriatim* fashion.

With that objective in mind, the Subcommittee focused its July 18 and August 14 meetings on how best to fashion a rule change that would make it clear that a subpoena may command a distant witness to provide remote testimony when the demanding standard of Rule 43(a) is met.

Though the objective was clear, the best route to that goal was not. Various complications were identified. One was presented by Rule 43(c), which permits use of "oral testimony" (as well

[2] Specifically, the proposal is to amend Bankruptcy Rule 9014(d) to replace the current rule's direction that testimony on contested matters be taken in the same way it would be taken in an adversary proceeding (subject to the Rule 43(a) limits on remote testimony). Under a new Rule 7043, Civil Rule 43 – including the "compelling circumstances" requirement – would apply in adversary proceedings. But proposed Rule 9014(d)(1) would permit remote testimony "[f]or cause and with appropriate safeguards," but not subject to the "compelling circumstances" requirement. The Committee Note to the proposed amendment recognizes that an adversary proceeding "is procedurally like a civil action in district court," and offers the following explanation for treating contested matters differently:

> A contested matter, however, is a motion procedure that can usually be resolved expeditiously by means of a hearing. Contested matters do not require the procedural formalities used in adversary proceedings * * * . 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 operation costs in support of a motion to use estate assets to maintain business operations.

as affidavits or depositions) for hearings on motions. It does not seem that this provision received much attention when the possibility of remote trial testimony was added to Rule 43(a) in 1996. Rule 43(c) does not seem to place any limitations on the use of oral testimony, and does not address the possibility that it might be provided remotely.

And – as the Ninth Circuit pointed out in its *Kirkland* decision – there might be ramifications for permitting subpoenas for remote trial testimony on the application of the "unavailability" criterion for use at trial of depositions under Rule 32(a)(4) and of admissibility of former testimony under Fed. R. Evid. 804(a)(5). Those rules treat the ability to obtain the witness's attendance by subpoena. If an amendment to Rule 45 makes that possible (though dependent on first obtaining authorization under Rule 43(a) for remote trial testimony), that change to Rule 45 might affect admissibility of deposition or other prior recorded testimony at trial on the ground that the proponent could have obtained remote trial testimony from the witness.

As the notes of the August 14 meeting show, the Subcommittee has immersed itself in these issues and remains convinced that a prompt amendment to make clear that the subpoena power can be used to command remote trial testimony is desirable.

Possible Amendment Ideas Under
Consideration by Subcommittee

During its second and third meetings, the Subcommittee considered a number of approaches to amending the rules to respond to the Ninth Circuit decision and clarify that Rule 45 does permit a subpoena for remote testimony so long as the witness need not travel more than 100 miles to provide the remote testimony. Choosing among these possible amendment routes (or others) depends significantly on the answers to the questions presented at the end of this report. So there are a variety of possible responses under consideration:

Simple change to Rule 45(c)(1)

Rule 45. Subpoena

* * * * *

Alternative 1

(c) Place of compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition—<u>in person or by contemporaneous transmission from a different location</u>—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 and would not incur substantial expense.

[**(C)** *Service of Rule 43(a) order with subpoena for remote trial testimony.* If remote trial testimony is commanded, the order authorizing such testimony under Rule 43(a) must be served on the witness with the subpoena.]

* * * * *

Alternative 2
[based on submission 24-CV-B]

(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 and would not incur substantial expense.

[(C) by contemporaneous transmission from anywhere within the United States, provided the location commanded for transmission complies with 45(c)(1)(A) or (B). [If remote trial testimony is commanded, the order authorizing such testimony under Rule 43(a) must be served on the witness with the subpoena.]

This is a very simple change. A Committee Note could stress that it responds to decisions raising questions about whether a subpoena can be used to compel remote testimony when the witness need not travel more than 100 miles to provide it. Given considerable attention to the *Kirkland* decision, it might be desirable for the Committee Note to cite the case and say that the amendment changes the result. The Ninth Circuit said in its opinion that a rule change could do just that.

Bracketed (C) in Alternative 1 adds a requirement that, if remote trial testimony is required, the serving party must serve the court's order directing remote trial testimony. As a matter of sequence, given the rigorous "compelling circumstances" standard for remote trial testimony, it seems best that a court's authorization be obtained first. Attorneys can issue subpoenas without advance court authorization. Bracketed (C) adds a requirement that could further this objective. It

could also support a Committee Note saying that the amendment does not imply that any particular showing is required to support a subpoena to provide testimony on a motion.

Bracketed language in (C) in Alternative 2, using the proposed rule change in the submission, addresses the same point.

Both alternatives address (in different ways) something the court stressed in *Kirkland* – that a witness can "attend" a trial by remote transmission from another location. Alternative 1 says so as part of 45(c)(1). Alternative 2 says so by adding in (C) that a person can "attend" (what 45(a)(1) says a subpoena can be used to command) by contemporaneous transmission. It may be that saying "anywhere within the United States" could be a problem if, for example, U.S. embassies are regarded as part of the U.S. Recall the question in 2008 about whether John McCain was born in the U.S. though he was born in the Canal Zone.

Focusing only on trial testimony

It is not clear that there has been any actual difficulty with subpoenas for remote testimony on a motion. So another alternative might be to address only that:

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, or to provide trial testimony from a remote location [when authorized under Rule 43(a)]—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, of 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.

[**(C)** *Serving the Rule 43(a) order with the subpoena.* For remote trial testimony, the order authorizing remote testimony under Rule 43(a) must be served on the witness with the subpoena. {The subpoena must state that it is ineffective unless the order is also served.}]

* * * * *

This approach could make clear that this amendment does not say anything about the need for a court order for remote "oral testimony" for a hearing or motion under Rule 43(c). The Committee Note could make that point, and also stress that the amendment does not change the criteria for a Rule 43(a) decision whether to authorize remote trial testimony. Again, requiring service of the Rule 43(a) order shows that it must be obtained before the subpoena is served. The command in braces that the subpoena say that service of the order is required somewhat imitates Rule 45(a)(1)(A)(iv). But that rule states something that must be in all subpoenas, and requiring this additional statement in only some subpoenas may be undesirable.

Adding explicit authority to require remote testimony on a motion

A new Rule 45(c)(1)(D) could be added to focus on remote testimony at a hearing. Rule 45(c)(1) already authorizes a subpoena to attend a hearing. But there is nothing in Rule 43(c) about remote testimony at a hearing. That may well be unnecessary, since the court may also rely on affidavits and depositions, so the problem might be limited to remote hearing testimony commanded from witnesses who reside too far away. An amendment to Rule 45(a)(1) could be sufficient to make it clear that remote testimony is included. Here is a possible (D):

> **(D)** ***Remote Testimony on a Motion Under Rule 43(c).*** A subpoena may command a person to attend a hearing on a motion by remote means.

Setting this forth separately could support a Committee Note that points out that no court order is required to permit such remote testimony. If the Rule 45(c)(1) amendment makes it clear all by itself that remote testimony may be used, this may be unnecessary. But given the somewhat strict literalness of the *Kirkland* court's reading of Rule 45, making sure this is clear may be worthwhile.

Amending Rule 43(a) as well

The *Kirkland* decision stresses the need for trial witnesses to be in the courtroom. One could say that Rule 43(a) adequately addresses that idea because it says it authorizes the court to "permit testimony in open court *by contemporaneous transmission from another location*." That says such testimony is "in open court," so the witness is testifying in the courtroom even though located somewhere else. But this literalness might be a reason to amend 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 the witness to attend and provide testimony in open court by contemporaneous transmission from a different location. [But the possibility of remote testimony does not affect the determination whether the witness is "unavailable" under Rule 32(a)(4) or Fed. R. Evid. 804(a).]

* * * * *

In the alternative, amending Rule 45(a)(1) to say that a witness can be commanded by subpoena to "attend a trial—in person or by contemporaneous transmission from a different location" could do the job that this amendment to Rule 43(a) seeks to do.

It's worth noting that proposing any amendment of Rule 43(a) may encounter resistance on the ground that this amendment does not deal with the tricky questions raised by the 24-CV-B proposal originally made to alter significantly the criteria for remote trial testimony, shifting from a strong presumption against ("compelling circumstances") to something resembling a presumption in favor of such trial testimony. Perhaps that is a reason not to touch Rule 43(a) unless that is necessary.

Background for current issues

It is useful to review the background for the present issues, starting with the 1996 amendment to Rule 43(a) permitting remote trial testimony even though the rule directs that trial testimony be taken "in open court."

1996 amendment to Rule 43(a)

In 1996, the possibility of remote trial testimony was added as the second sentence of Rule 43(a): "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 the rule change mainly addressed the strong preference for in-person trial testimony. It noted that video depositions may provide a superior way of securing the testimony of a distant witness. The question whether that is superior remains important to addressing the Rule 43(a) issues. But for present purposes, the Subcommittee is not proposing any amendment to the criteria for authorizing remote trial testimony under Rule 43(a).

The 1996 Committee Note also said that a deposition may be a superior means of presenting trial testimony of a witness "who is beyond that reach of a trial subpoena." At that time, Rule 45 required that a subpoena be obtained from the district court for the district in which the witness was commanded to appear, and served in that district. As explained, the 2013 revision of Rule 45 changed that, but courts continue to find that distant witnesses are "beyond the court's subpoena power." In *Kirkland*, the Ninth Circuit used that idea in support of its interpretation of Rule 45.

Comparison to Rule 43(c)

It appears that the 1996 amendment process involving Rule 43(a) gave no significant attention to Rule 43(c). That 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.

There are several notable differences between Rule 43(a) and Rule 43(c). First, Rule 43(c) does not require any showing, much less "compelling circumstances," to support a court's consideration

of "oral testimony" in ruling on a motion. Second, it is not about trials. In contrast, Rule 43(a) makes clear that it applies "[a]t trial." Third, Rule 43(a) does not say that such "oral testimony" under Rule 43(a) must be taken "in open court." Finally, unlike Rule 43(a), Rule 43(c) does not say anything about authorizing remote testimony; the method of providing "oral testimony" during a motion hearing is not addressed.

Arguably Rule 77(b) has a role to play:

> Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom. Any other act or proceeding may be done or conducted by a judge in chambers, without the attendance of the clerk or other court official, and anywhere inside or outside the district. But no hearing—other than one ex parte—may be conducted outside the district unless all the affected parties consent.

As discussed by the Subcommittee during its Aug. 14 meeting, the question whether there is a clear dividing line between "trials" and "motion" proceedings presents challenges in some situations. Motions challenging the court's jurisdiction may rely on affidavits, etc. There is a body of law, for example, on whether the court should permit discovery before deciding such motions, but the court surely need not hold a "trial" to decide them. And courts do not routinely permit discovery in regard to such motions raising issues of personal or subject-matter jurisdiction. See 8 Fed. Prac. & Proc. § 2008.3.

But other motions seem to belong in a different category. One immediate example would be motions for a preliminary injunction. Those motions can prompt immediate court action "on the merits" that is of great consequence. Hence the exception to the final judgment rule for appeals from such rulings. See 28 U.S.C. § 1292(a)(1). Indeed, Rule 65(a)(2) permits the court—even after the motion hearing has gotten under way—to "advance the trial on the merits and consolidate it with the hearing."

Motions for summary judgment may similarly lead to final judgment; to say that "oral testimony" may be relied upon in making such rulings might mean that something a lot like "trial" testimony could be presented without the need to satisfy the standards of Rule 43(a).

Yet other sorts of motions might involve "oral testimony" but not be akin to trials. Rule 37 motions for sanctions (sometimes including dismissal or default) could involve factual issues on which testimony might be important, for example.

In short, there could be considerable uncertainty in some circumstances about whether a given matter is a "trial" for purposes of Rule 43(a). Since Rule 43(c) says nothing about finding "compelling circumstances" to support remote testimony, while Rule 43(a) does require such a showing for remote testimony at trial, there may be grounds for concern about muddying the waters by combined treatment of these different situations. But the 1996 amendment does not shed much useful light on these issues.

The Rule 45 Project and 2013 amendments

The Rule 45 Project made changes directly pertinent to the matter on which the Subcommittee thinks prompt action is needed to clarify that a witness subpoenaed to provide remote testimony must show up to provide that testimony if it can be provided within 100 miles.

Around 2010, the Advisory Committee undertook this project to revise Rule 45. The project led to many amendments to the rule that went into effect in 2013. Three are important to the present topic:

(1) Rule 45(a)(2) now provides that the subpoena is issued by the court in which the action is pending.

(2) Rule 45(b)(2) now provides that such a subpoena may be served anywhere in the United States.

(3) Rule 45(c)(1) now provides the geographical limits on what the person subject to a subpoena for a trial, hearing, or deposition must do to comply. Rule 45(c)(1)(A) limits the obligation to 100 miles from the person's residence or a place where the person regularly transacts business in person. And Rule 45(c)(1)(B) extends that to any place in the state where the witness resides for parties and party officers, and for trial witnesses who would not incur substantial expense as a result of having to travel more than 100 miles.

The net effect of these changes is to extend the range of the court's subpoena power, which is no longer limited to the district in which the court sits, and to empower the court presiding over the action to issue a subpoena that can be served anywhere in the United States and that can command attendance at a deposition anywhere in the United States. For production of documents, Rule 45(c)(2) now permits a subpoena issued by the court presiding over the action to require production within 100 miles of the person's place of residence or business. These Rule 45(c) provisions are designed to protect witnesses.

These changes to Rule 45 did not alter the Rule 43(a) limitations on remote trial testimony, which are designed to protect the integrity of the trial process, not to protect the witness against undue burdens. But the Committee Note to the 2013 amendments to Rule 45 did address the issue now before this Committee: "When an order under Rule 43(a) authorizes testimony from a remote location, the witness can be commanded to testify from any place described in Rule 45(c)(1)." That Committee Note did not persuade the Ninth Circuit.

In re Kirkland

The *Kirkland* decision held that the Note was inconsistent with the command of Rule 45(d)(3)(A)(ii), which says that the court must quash a subpoena that "requires a person to comply beyond the geographical limits specified in Rule 45(c)." Accordingly, the Committee Note could not prevail over what the court took to be the express requirement in the rule for quashing a subpoena.

In that case, the subpoena commanded the witnesses to travel much less than 100 miles to provide remote testimony, and the party that served the subpoena urged that as a consequence the rule did not command that the subpoena be quashed (75 F.4th at 1045):

> [I]nterpreting "place of compliance" as the witness's location when the witness testifies remotely is contrary to Rule 45(c)'s plain language that trial subpoenas command a witness to "attend *a trial*." Fed. R. Civ. P. 45(c)(1) (emphasis added). A trial is a specific event that occurs in a specific place: where the court is located. See Fed. R. Civ. P. 77(b) ("Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom."). No matter where the witness is located, how the witness "appears," or even the location of the other participants, *trials* occur in a court. This requirement is expressed in Rule 43(a)'s requirement that witnesses—even remote witnesses—must provide their testimony "in open court."

The court also said that "a court can only compel witnesses who are within the scope of its subpoena power. Rule 43 does not give courts broader *power* to compel remote testimony; it gives courts *discretion* to allow a witness otherwise within the scope of its authority to appear remotely if the requirements of Rule 43(a) are met." Id. at 1044. But under Rule 45(b)(2), the court's "subpoena power" is now nationwide, subject to the witness-protective geographical limitations of Rule 45(c). And Rule 43(a) recognizes that remote witness trial testimony is presented "in open court," so remote testimony can occur from another location. As noted above, however, other courts have similarly read Rule 45 to preclude using a subpoena to compel a witness to provide remote trial testimony.

The Ninth Circuit also reasoned that Rule 32(a)(4) confirmed its view because that rule permits admission of deposition testimony when the witness is "more than 100 miles from the place of hearing or trial" (id. at 1044):

> [N]either the text of the rules nor the advisory committee's notes establish that the 100-mile limitation is inapplicable to remote testimony or that the "place of compliance" under Rule 45 changes the location of the trial or other proceeding to where the witness is located when a witness is allowed to testify remotely.

Since *Kirkland*, in at least one reported case a distant witness served with a subpoena for production of documents urged that the issuing court should quash the subpoena because the witness was located beyond the court's subpoena power. That argument was rejected:

> Rayford International [the nonparty subject to the subpoena] argues vehemently that its motion to quash this subpoena for the production was properly filed in this district based on the Ninth Circuit's decision regarding the place of compliance for a motion to quash a subpoena to testify at trial. [But] the Ninth Circuit determined that the place of compliance for testifying remotely at trial is the physical courthouse hosting the trial because "[n]o matter where the witness is located, how the witness 'appears,' or even the location of other participants, *trials* occur in a court." In emphasizing the unique circumstance of a trial subpoena, the Ninth Circuit expressly differentiated the place of compliance for trial subpoenas and the

place of compliance for depositions or document production subpoenas. [emphasis in original]

York Holding, Ltd. v. Waid, 345 F.R.D. 626, 629-30 (D. Nev. 2024).

Related issues

(1) Diluting the showing requirement under Rule 43(a)

There has been some uneasiness that making it clear that a subpoena can be used to command a witness to provide remote trial testimony will somehow dilute the strictures under Rule 43(a) on authorization for such testimony. A Committee Note could make that clear, and an amendment to Rule 45(a) that requires the service of the Rule 43(a) order along with the subpoena would seem to go a long way toward avoiding that problem. Insisting that the subpoena itself inform the witness that the order is to be served on the witness simultaneously could reinforce that conclusion.

(2) "Unavailability" criterion for admissibility of hearsay at trial

The Ninth Circuit also referred to the "unavailability" provisions of Rule 32(a)(4) and Fed. R. Evid. 804(a). The bracketed sentence above seeks to deflect such arguments, but it seems worth addressing them here.

Rule 32(a)(4) complications?

Rule 32(a)(2) says: "Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purposes allowed by the Federal Rules of Evidence." That would seem unaffected by remote testimony, so long as remote testimony is "testimony given by the deponent," which it would seem to be.

Rule 32(a)(4)(B) permits a deposition to be used for any purpose (e.g., as substantive evidence) if the witness is "unavailable" because "the witness is more than 100 miles from the place of hearing or trial." The situation with which we are concerned involves remote testimony by witnesses who can be more than 100 miles from the place of hearing or trial. As noted above, Rule 43(a) could be amended to say that for the purposes of Rule 43(a) in such circumstances the testimony is taken in the courtroom in which the trial is proceeding. That does not mean that the witness is within 100 miles of the place of trial. It may seem an oddity that the witness can testify "in the courtroom" despite being located more than 100 miles away from the place of trial.[3]

[3] It might be noted that a witness located more than 100 miles from the place of trial might be subject to a subpoena requiring attendance at the trial in one of our larger states. Rule 45(c)(1)(B) authorizes a subpoena to command a party or a party's officer to attend a trial within the state where the person resides. In California and a number of other states that might be quite a bit more than 100 miles from the place of trial. It also authorizes a subpoena to command an in-state nonparty witness to attend a trial if the witness "would not incur substantial expense."

Rule 32(a)(4)(D) also permits the use of the deposition for any purpose if "the party offering the deposition could not procure the witness's attendance by subpoena." Arguably changing Rule 45(c) so that a subpoena can (with a 43(a) order) command remote testimony could be interpreted to provide "the witness's attendance." But it can be contended that the remote witness, though testifying in the trial, is not really "attending" it within the meaning of Rule 32(a)(4)(D).

Further attention (particularly from the lawyer members of the Subcommittee) would be useful. It might be reasonable to regard the deposition as inadmissible as substantive evidence under the hearsay rule if remote live testimony is justified under Rule 43(a).[4] Perhaps this might be a reason to think that amending Rule 45 intrinsically implicates Rule 43(a). If there is uncertainty about whether remote testimony under Rule 43(a) or deposition testimony should be preferred, one could argue that admitting the deposition over a hearsay objection should still be warranted. But one might also say that, from the perspective of a jury, this difference—between "substantive" and "impeachment" admissibility of the deposition testimony of the witness testifying remotely under Rule 43(a)—is really splitting hairs. Maybe it would matter under Rule 50(a) or (b), but otherwise it does not seem weighty.

(3) Fed. R. Evid. 804(a)(5) "attendance" issues?

A similar issue could arise as to Fed. R. Evid. 804(a)(5), which says that former testimony is admissible over a hearsay objection if the proponent of the evidence could not obtain "the declarant's attendance." Perhaps under that rule one could argue about whether remote testimony authorized under Rule 43(a) constitutes the declarant's "attendance" and means that the prior testimony is not admissible because it is hearsay. But as noted above, it seems that hair-splitting difference would not matter much to a jury, though it might matter to a Rule 50(a) or (b) motion.

Moreover, Fed. R. Evid. 801(d)(1)(A), provides that when the witness "testifies and is subject to cross-examination about the prior statement," the statement is "not hearsay" if given under penalty of perjury in a deposition and "inconsistent with the declarant's testimony." [Rule 801(a)(1)(B) permits use of deposition testimony "consistent with the declarant's testimony" only when offered to rebut a charge of recent fabrication or to rehabilitate the witness's credibility.]

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[4] There has been at least one decision that cites *Kirkland*'s discussion of Rule 32 in finding that the possibility of remote testimony did not make a deposition of a witness located more than 100 miles from the courthouse inadmissible. Plaintiff intended to use deposition testimony of witnesses located more than 100 miles away in a prisoner case. *Bush v. Santoro*, 2024 WL 363714 (E.D. Cal., Jan. 31, 2024). Defendants objected. The court rejected defendants' argument (id. at *4):

> Though Defendants note that it is "illogical that a party can claim that a witness is 'unavailable' because the witness is too far away," when the parties have stipulated to allow testimony by videoconference, they "concede this is a somewhat novel issue, and have been unable to find a case directly on point." In *In re Kirkland*, 75 F.4th 1030, 1044 (9th Cir. 2023), the Ninth Circuit determined that the 100-mile limitation for the issuance of a trial subpoena is effective even when the witnesses would be allowed to testify remotely. *Kirkland* noted, "A trial is a specific event that occurs in a specific place: where the court is located . . . No matter where the witness is located, how the witness 'appears,' or even the location of the other participants, trials occur in a court."

The question whether prior testimony under oath should be excluded on hearsay grounds has long been a tricky part of evidence law. Determining whether the prior statement is "consistent" or "inconsistent" with the testimony at trial can itself be tricky. Telling the jury that the witness's prior statement may only be considered with regard to the credibility of the witness—but not as substantive evidence—if it is "consistent" may ask the jury to do more than jurors are able to do.

It is also worth noting that in August a proposed amendment to Fed. R. Evid. 801(d)(1)(A) was published to expand the substantive (v. impeachment) admissibility of prior statements by the witness. The amendment would delete the present requirement that the statement have been made "under penalty of perjury at a trial, hearing, or other proceeding or in a deposition." The draft Committee Note says that so long as the witness testifies and is subject to cross-examination the hearsay dangers are "largely nonexistent." It is not entirely certain how that new Evidence Rule would deal with remote "live" testimony and cross-examination at trial by remote transmission from another location. The public comment period runs through mid-February 2025.

Questions for the Committee

So this report has introduced a *pot pourri* of possible rule-amendment approaches to accomplish the goal it sees as important—ensuring that a subpoena can be used to compel a witness to provide remote trial testimony so long as the court has determined that the demanding "compelling circumstances" requirements of Rule 43(a) are satisfied. Here are some questions on which the Subcommittee seeks guidance:

(1) Should amendments focus only on trial testimony (governed by Rule 43(a)) or also on "oral testimony" at hearings under Rule 43(c)? Is testimony by remote witnesses used during motion hearings? If so, are subpoenas used to compel those witnesses to provide that testimony?

(2) With remote trial testimony, is it important for a rule to say that the party serving the subpoena first obtain a Rule 43(a) order (using the "compelling circumstances" standard) before serving the subpoena? If so, should the rule also say that the order must be served on the witness along with the subpoena? (That would reinforce the sequence point, but might invite the witness to contest the Rule 43(a) order.)

(3) Would "blending" Rule 43(a) trial testimony and Rule 43(c) testimony at a motion hearing in a Rule 45 amendment (a) weaken the "compelling circumstances" requirement for trial testimony, or (b) suggest that some such showing is necessary to permit remote "oral testimony" during a motion hearing as authorized by Rule 43(c)?

(4) Is there a real difference between "trials" and motion hearings? At least some examples (such as jurisdictional questions or preliminary injunctions) suggest that the dividing line is difficult to draw. But Rules 43(a) and (c) now seem premised on that distinction. Should the rules be amended to clarify what the distinction is? That could move far beyond the objective of changing the result reached in the *Kirkland* case.

(5) Would changing the result in the *Kirkland* case cause problems in the application of Rule 32(a)(4)(B) or Fed. R. Evid. 804(a)(5)? If there is a concern, would it be sufficient for a Committee Note to say those rules are not affected by the change to Rule 45, or should that be in

the rule itself. [Note that the Ninth Circuit in *Kirkland* held that the Committee Note to the 2013 amendment to Rule 45 saying that a subpoena could command an unwilling witness to travel up to 100 miles to provide remote testimony was unimportant because Rule 45(d) said something else and a Committee Note is not a rule.]

(6) Would a change to Rule 43(a) saying that the remote trial witness is "attending" the trial by providing remote testimony be a valuable addition to an amendment package? [Note that making this change would not address the expansive proposed changes to Rule 43(a) included in the submission that prompted the creation of this Subcommittee, and that it might present the issues under Rule 32(a)(4)(B) and Fed. R. Evid. 804(a)(5) mentioned just above.]

This probably does not exhaust the possible questions, but it does show why the Subcommittee is seeking the advice of the full Committee.

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The Subcommittee looks forward to receiving input from the full Committee on these issues.

Notes of Teams Meeting
Rule 43/45 Subcommittee
Advisory Committee on Civil Rules
Aug. 14, 2024

The Rule 43/45 Subcommittee of the Advisory Committee on Civil Rules met by Teams on Aug. 14, 2024. Those participating included Judge Hannah Lauck (Subcommittee Chair), Judge Robin Rosenberg (Advisory Committee Chair), Justice Jane Bland, Bankruptcy Judge Benjamin Kahn (liaison to Bankruptcy Rules Advisory Committee), Joseph Sellers, and David Burman. Members of the Discovery Subcommittee also attended as observers, including Judge Jennifer Boal, Helen Witt and Clerk Liaison Thomas Bruton. Also participating were Prof. Richard Marcus (Advisory Committee Reporter), Prof. Andrew Bradt (Advisory Committee Assoc. Reporter), Edward Cooper (consultant) and Allison Bruff (A.O.) Ariana Tadler was present at the beginning of the meeting but was called away, and submitted some thoughts after the meeting ended.

Before the meeting, Prof. Marcus circulated a memorandum with discussion and drafting ideas. That memo is attached to these notes as Appendix A. Judge Kahn responded to that memo with a further suggestion (discussed below) that was embodied in Appendix B. The Aug. 14 discussion went beyond these memos.

At its July 18 meeting, the Subcommittee decided to focus primarily on the Rule 45 subpoena problem raised by the Ninth Circuit's decision in *In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023). As evidenced by *York Holding, Ltd. v. Waid*, 345 F.R.D. 626 (D. Nev. 2024), the *Kirkland* ruling has been cited already in situations to which it clearly does not apply, since it is limited to subpoenas for remote testimony at trial. On the other hand, at least one submission to the Advisory Committee (24-CV-N, from LCJ) has supported the *Kirkland* result.

The general question of relaxing the limits on remote testimony, also raised by the submission received by the Advisory Committee, seems to present more difficult questions not suitable for immediate amendment solutions. Experience may identify promising ways to handle requests to permit remote testimony. The Texas state courts, for example, are innovating in the area. In addition, in August 2024 a proposed amendment to the Bankruptcy Rules is being published for public comment that may shed light on the promise and risks of remote testimony. This proposed amendment would not relax the standards for remote testimony in adversary proceedings (somewhat analogous to trials in district court), but would remove the "compelling circumstances" requirement for remote testimony in "contested matters" in Bankruptcy Court. The public comment on this proposal (open for public comment from August 2024 through February 2025) may inform this Subcommittee's consideration of whether to relax the requirements of Rule 43(a) on remote trial testimony.

One starting point was that the Ninth Circuit's reading of the rules was inconsistent with the current version of the rules. In particular, it took the view that a subpoena could not require a witness to appear to provide remote testimony because trials occur in court, and the witness providing remote testimony by definition does not appear in person in court. One might say this represents a constricted view of what Rule 43(a) says. Before amendment in 1996, it did say that trial testimony "must be taken in open court." That might have been understood before 1996 to mean in-person attendance in the courtroom by the witness.

But the 1996 amendment said that when very demanding requirements are met "the court may permit *testimony in open court by contemporaneous transmission from a different location*." On its face, then, the 1996 amendment says that the testimony is occurring "in open court" even though the person providing the testimony is located in "a different location." As suggested by the Committee Note to the 2013 amendments to Rule 45, that should justify a subpoena requiring that the witness go to a remote location to provide such trial testimony, just as it authorizes a subpoena commanding the witness to go to a remote location for a deposition or to produce documents (the issue in the *York Holding* case from the D. Nev.).

There was consensus within the Subcommittee that the Subcommittee's immediate goal should be to clarify the rule to ensure that the court's subpoena power could require remote testimony from witnesses when the court has found that the exacting requirements of Rule 43(a) are met and that remote trial testimony is justified.

During the Subcommittee's discussions, however, an additional issue (not addressed in the submissions to the Advisory Committee) has arisen—Rule 43(c) seems to adopt a different standard for testimony at a motion hearing:

> 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.

This provision does not say that the "oral testimony" must be delivered "in open court." And this rule also permits the court to rely on affidavits or depositions, so it is hardly limited to in-person testimony.

During the July 18 Subcommittee meeting, it was noted that testimony did occur often in some sorts of motion hearings. Prime examples are class certification motions and motions raising issues about admissibility of expert testimony under Fed. R. Evid. 702. But the witnesses presented at these hearings almost universally need not be subpoenaed.

More generally, the question whether there is a clear dividing line between "trials" and "motion" proceedings presents challenges in some situations. Motions challenging the court's jurisdiction may rely on affidavits, etc. There is a body of law, for example, on whether the court should permit discovery before deciding such motions, but the court surely need not hold a "trial" to decide them. And courts do not routinely permit discovery in regard to such motions raising issues of personal or subject-matter jurisdiction. See 8 Fed. Prac. & Proc. § 2008.3.

But other motions seem to belong in a different category. One immediate example would be motions for a preliminary injunction. Those motions can prompt immediate court action "on the merits" that is of great consequence. Hence the exception to the final judgment rule for appeals from such rulings. Indeed, Rule 65(a)(2) permits the court—even after the motion hearing has gotten under way—to "advance the trial on the merits and consolidate it with the hearing."

Motions for summary judgment may similarly lead to final judgment; to say that "oral testimony" may be relied upon in making such rulings might mean that something a lot like "trial" testimony could be presented without the need to satisfy the standards of Rule 43(a).

It is possible that—in a rough way—this distinction between "trials" and "motions" maps onto the distinction made by the current Bankruptcy Rule amendment proposals between adversary hearings and "contested matters." But for this Subcommittee one important consideration is that we have not heard that Rule 43(c) motion hearings have presented the sorts of difficulties raised by the *Kirkland* decision.

For present purposes, what seems of immediate importance is the Rule 45 issue, which seems quite different from the question when or whether the court should authorize remote trial testimony. Rule 43(a) has stringent requirements to protect the trial process. But that is not what Rule 45(c) is designed to protect. It is designed to protect the witness from having to travel a great distance to appear and testify. If the remote testimony location is nearby, that concern drops out. That is why Rule 45(d), on which the Ninth Circuit relied, commands the court to quash the subpoena if it requires the witness to travel beyond the limits Rule 45(c) specifies. To the extent in-person testimony is critical to the trial process, it might be undermined no matter whether the subpoenaed witness testifies remotely from across the street or across the nation. But the *Kirkland* holding creates a risk that the court cannot compel a witness to provide remote trial testimony even when the exacting standards of Rule 43(a) have been satisfied.

Against this background, there is a consensus on the Subcommittee that changing the outcome in the *Kirkland* case is an important and immediate goal. At the same time, it might be wise to avoid trying to unravel the distinction between "trials" and "motion" hearings. It is also important to avoid complicating things or inviting sandbagging of parties that want to rely on deposition testimony by contending that under Rule 32 it should not be admissible as substantive evidence because the "attendance" of the witness could be obtained by subpoena.

In short, as often happens, the issues turn out to be more complicated than initially appeared.

Accordingly, an attorney member observed that the initial goal was to ensure that the subpoena rule could be used to ensure remote live testimony when that was found to be warranted. On the other hand, it's difficult to say that hearings and trials are so different from each other that only trials raise serious concerns about remote testimony. Motions can lead to dispositive rulings and even final judgment, so that looks a lot like a trial in terms of consequences. A key consideration is whether witness credibility important; if so, in-person testimony is very important. That may be particularly important if there is a jury trial; perhaps a rule could be fashioned that articulated the most demanding standard for remote testimony for jury trials. But concluding that even when a demanding standard is met the court is without power to compel the distant witness to appear near her home to provide remote testimony does not make sense. Perhaps the best solution is Judge Kahn's "place of attendance" provision.

A judge observed that the remote testimony concern arises more frequently in criminal than in civil cases. On the other hand, election law issues may in the near future provide occasions for in-person testimony.

Another lawyer participant disagreed with regarding jury trials as a distinctive concern. Whether it's a judge or a jury, in person testimony is critical for reliable credibility determinations. And trying to write a rule that only applies when a jury trial actually occurs, or at least only when

a jury trial is demanded, would be tricky. Under Rule 39(b), even when no timely jury demand has been made the court may nevertheless order a jury trial. So the fact no jury trial has been demanded in a timely manner need not always mean that no jury trial will occur.

Regarding the distinction between trials and hearings, one participant suggested that treating these as the same could ease the task of drafting.

A question arose: During the amendment to Rule 43(a) in 1996 to add the provision for remote trial testimony, was there any consideration of remote hearing testimony under Rule 43(c)? The answer was that there was no thought given to that. For instance, one can (at least in theory) have oral testimony on a motion for summary judgment.

There was a further question: How do these issues bear on the pending Bankruptcy Rule amendments for "contested matters"? The response was that, even as to contested matters good cause is required, and the difference is that "compelling circumstances" would not be required. Rule 43(c) authorizes reliance on "oral testimony," affidavits or depositions. It does not say anything about prerequisites to using such sources.

Another difference was noted: Rule 43(a) commands that witness testimony be "in open court," while Rule 43(c) does not say that. But another participant observed that Rule 43(a) might support an inference that at least some testimony bearing on a motion must occur in open court. A reaction to this point was that 43(a) begins by saying that it only applies to testimony "at trial.

This discussion was summarized as indicating that there is really something of a gap here. Back in 1996, it seems that nobody focused on 43(c) when the remote testimony at trial possibility was added to 43(a). Only in 2013 was Rule 45 amended to authorize the court presiding over the action to issue a subpoena for witness testimony but also, in Rule 45(c), to place limits on the distance the witness must travel to provide deposition or trial testimony. That change seems not to have been much noted in the *Kirkland* decision, which mentions the "limits on the subpoena power." Before 2013, those limits were quite different from the present day.

An attorney participant reacted to this discussion by saying "there are a lot of issues swirling around, but we should only take on things we know to be actual problems." There does seem to be a poor fit between 43(a) and 43(c), and also a hazy distinction between a trial and a hearing in terms of remote testimony.

One possibility would be to devise an amendment that responds specifically to *Kirkland*, perhaps even mentioning in the Committee Note that the amendment does what the *Kirkland* opinion says a rule change could do—change Rule 45 to change the command the Ninth Circuit found in the current rule. A judge noted that *Kirkland* has caused difficulties in the Ninth Circuit, and an attorney participant affirmed that it is causing difficulties for lawyers on cases in the Ninth Circuit. There is some urgency here. That urgency means that action on the Rule 45 front should not await resolution of the many tricky issues about whether to change Rule 43(a) to relax the current limitations on remote trial testimony.

It was noted that this approach could emphasize that the amendment has no effect on the requirements of Rule 43(a) for remote trial testimony. A Committee Note might even say that there are unsettled issues about other matters that are not the focus of the present amendment effort. But

an attorney worried that a Note saying there are "unsettled issues" might unduly invite judges to fashion their own rules. An alternative locution was proposed: the Committee is "continuing to explore" possible changes to the criteria for authorizing remote testimony. Another participant noted that the Committee occasionally retains a matter on its agenda and monitors the issue, without either drafting a proposed amendment or removing the topic from its agenda. Perhaps simply saying that the current amendment in no way alters the standards for authorizing remote trial testimony is sufficient.

The monitoring possibility drew a caution: because mandamus probably would have to be used (as in *Kirkland*), there is not likely to be much development in the federal courts. We might have a long wait to see whether other courts of appeals take the *Kirkland* view. This participant is leaning toward Judge Kahn's proposal that an amendment saying that the place of attendance is where the witness gives testimony.

The question how to proceed in advance of the October full Committee meeting drew the suggestion that the best course is to fashion a report that focuses on the concerns the Subcommittee has identified. It may well be that Judge Kahn's solution is the wisest.

At the same time, the desirability of insisting that the court first authorize remote testimony under Rule 43(a) before the subpoena is served seems important. It would not be good for litigants to subpoena distant witnesses willy-nilly for remote testimony without an advance approval by the court.

Another point was that there might be cases in which the parties could agree about how to handle these matters. That seems preferable to a bracketed suggestion in the materials for this meeting that the testimony come from a district court if one is located within the range permitted by Rule 45(c). A judge agreed that requiring a court order provides protection for the witness and makes the process orderly.

If there is a requirement of an order in advance, it was suggested that there also be a requirement that the order provide an explanation for the judge's decision to permit remote testimony. This suggestion drew the reaction that if a rule says certain "magic words" must be included, that invites challenges by witnesses. The judge is bound to follow Rule 43(a), so saying the judge must say she did so does not seem useful. Judges issue lots of orders based mainly on the presentations in the papers, particularly for such things as how a trial is to be handled; introducing complicated requirements for some such orders could work mischief.

The situation was summed up: It is important promptly to draft an amendment that would change the outcome reached in *Kirkland*, whether or not it is useful also to say that the decision is wrong. But though that objective is clear, the best method to get there is not certain. There seem to be a number of possibilities and also some questions on which the Subcommittee should pursue. Ideally, those concerns can also form the basis for a discussion at the full Committee's October meeting.

Regarding the October meeting, one point to emphasize is that although the Subcommittee has invested a great deal of time and effort in evaluating these issues, the topic occupied only a small part of the discussion during the April meeting. A report to the full Committee should

therefore provide sufficient background to enable other members to grapple with the issues now under discussion.

There were email exchanges of drafting ideas among Subcommittee members. The consensus was that Prof. Marcus would try to develop drafting choices and also raise questions to which the full Committee could respond during the October meeting. But the introduction of those questions should rather carefully provide the background that is familiar to the members of the Subcommittee but not to other members of the full Committee. The goal presently is for Prof. Marcus to prepare a draft Subcommittee report for the October agenda book that would provide the needed background, offer the drafting choices presently under consideration, and identify issues to be resolved. That should provide a basis for full Committee discussion in October. Then Subcommittee members with reactions could use the "reply all" feature of email to exchange views.

APPENDIX A

Memo to: Rule 43/45 Subcommittee

CC: Judge Rosenberg, Andrew Bradt, Edward Cooper, Discovery Subcommittee, Allison Bruff

From: Rick Marcus

Date: July 30, 2024

Re: Aug. 14 meeting

This memorandum builds on the Subcommittee's discussion during its July 18 meeting, which tentatively resolved to proceed now with considering amendments to Rule 45 to address the issues raised by the 9th Circuit's *Kirkland* decision but not to proceed presently on the Rule 43(a) proposals to relax the requirements for remote trial testimony. At the same time, the question whether a small change to Rule 43(a) would be needed to make clear that the subpoena power extends to compelling remote trial testimony is carried forward as a live issue. To advance this discussion, this memo offers possible rule amendments that may accomplish these objectives. At the end, it also presents some concerns that probably can be evaluated more effectively by judges and practicing lawyers than by academics.

First, however, I convey two items which came to my attention since July 18 and may be pertinent.

D. Nev. Rule 45 ruling

York Holding, Ltd. v. Waid, 345 F.R.D. 626 (D.Nev. 2024), may shed light on the need for prompt action in response to the *Kirkland* decision, and certainly shows that litigants are sometimes doing odd things with subpoenas. In case of use, a copy should accompany this memo.

In this action in the D. Nev., defendant served a subpoena on Rayford International, a New Hampshire company, purporting to require that company to produce documents in Las Vegas. Protesting that it had never had any contacts with Nevada, the company filed a motion to quash in Nevada.

The court ruled that this motion was filed in the wrong place because, under Rule 45(c), Rayford International could be required to produce only in New Hampshire. It noted that there is some division among courts about how to interpret Rule 45(c)'s provision saying that a motion to quash should be filed in the district "where compliance is required." Given what the subpoena said, that would seem to be Nevada. But the Magistrate Judge, in a thoughtful opinion quoting the Committee Note to the 2013 amendment to Rule 45, concluded that the proper place to file the motion is "the location of the subpoenaed party." So she denied it without prejudice to refiling in the District of New Hampshire.

One might instead have concluded that the Nevada court could quash the subpoena because it sought to compel production beyond the scope of Rule 45(c). But it is notable that the subpoena target relied on *Kirkland* to support filing its motion in Nevada (id. at 629-30):

> Rayford International argues vehemently that its motion to quash this subpoena for the production was properly filed in this district based on the Ninth Circuit's decision regarding the place of compliance for a motion to quash a subpoena to testify at trial. [But] the Ninth Circuit determined that the place of compliance for testifying remotely at trial is the physical courthouse hosting the trial because "[n]o matter where the witness is located, how the witness 'appears,' or even the location of other participants, *trials* occur in a court." In emphasizing the unique circumstance of a trial subpoena, the Ninth Circuit expressly differentiated the place of compliance for trial subpoenas and the place of compliance for depositions or document production subpoenas. [emphasis in original]

There seems no reason to try to unravel any dissonance in courts' interpretation of the place of compliance [which may attest to the ability of lawyers to complicate the application of even straightforward rule language], but this example may portend mischief that the *Kirkland* decision could invite.

LCJ submission

Also accompanying this memorandum should be submission 24-CV-N, from Lawyers for Civil Justice, supporting the *Kirkland* decision and arguing against any change to either Rule 43 or Rule 45. This Subcommittee has heretofore regarded the Rule 43(a) and 45(c) issues as essentially separate, but the LCJ submission seems to treat them as connected.

One reaction to the LCJ submission is that it does not take account to the 2013 amendments to Rule 45. Since those amendments, Rule 45(a)(2) has said that the court where the action is pending must issue the subpoena, and Rule 45(b)(2) has provided that such subpoenas "may be served at any place within the United States." So the submission's discussion on "jurisdictional limits" of the court's subpoena power do not seem in keeping with the current provisions of Rule 45.

Another point made in the submission (at p. 8) is to emphasize the "apex witness" issue. Ordinarily this is a deposition issue; plaintiffs may want to take the deposition of a high level governmental or corporate officer of a party, and the organizational party objects that this high official has no actual knowledge about the issues in the case, or has not knowledge not also available from lower-level employees.

Ordinarily, this sort of dispute is addressed under Rule 26(c) on protective orders. See 8A Fed. Prac. & Pro. § 2037 at ftn. 20-21 (collecting cases about protection against depositions of high government officers and corporate officers). But this does not seem to be a subpoena issue. In terms of high corporate officers, Rule 37(d) provides that failure of an officer, director, or managing agent to appear for a noticed deposition supports sanctions against that corporate party. See 8A Fed. Prac. & Pro. § 2107. Though there may frequently be disputes about the need for testimony from such persons, this does not seem to be a subpoena issue. Indeed, it seems ordinarily

to come up at the deposition stage rather than the trial stage, and not to relate to the 100-mile limit in Rule 45(c), since the deposition surely can be had within 100 miles of the high officer's place of residence.

With those information matters out of the way, we can turn to the issues brought forward on July 18.

Amending Rule 45(c) to address trial testimony
and (perhaps separately) testimony at a hearing

A version of the following possible amendment was circulated before the July 18 meeting, and it prompted a simpler alternative. Both alternatives are presented below.

Rule 45. Subpoena

* * * * *

(c) Place of compliance.

Alternative 1

(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, of 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.

* * * * *

(3) ***For Remote Trial Testimony Ordered Under Rule 43(a).*** When the court that issued the subpoena has granted an order under Rule 43(a) for remote testimony by the witness, the subpoena may command the witness to appear to provide remote testimony at any location [not beyond the geographical limits specified in Rule 45(c)(1)] {within 100 miles of where the person resides, is employed, or regularly transacts business in person or—if the witness is a party or a party's officer—within the state where the person resides}. [The court order authorizing remote testimony under Rule 43(a) must be served on the witness.] [Unless there is no district court within 100 miles of the person's residence, the remote testimony should be provided from such a court.]

Alternative 2

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition, or to provide testimony at a trial or hearing from a remote location [when permitted under Rule 43(a) for trial testimony] 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, of 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.

(C) *Service of Rule 43(a) order with subpoena for remote trial testimony.* If remote trial testimony is commanded, the order authorizing such testimony under Rule 43(a) must be served on the witness with the subpoena. [If there is a United States district court [within 100 miles of the witness's residence] {where the witness could be compelled to attend and testify} the remote trial testimony should be provided from such a court.][5]

* * * * *

Draft Committee Note

Subdivision (c)(3). Rule 45(c) is amended to clarify that—when the court finds that testimony by contemporaneous transmission from a remote location is warranted under Rule 43(a)—a subpoena can be used to require the witness to appear at a remote location within the geographical scope of Rule 45(c) to provide remote trial testimony. As amended in 2013, Rule 45(a)(2) permits the court presiding over the action to issue a subpoena, and Rule 45(b)(2) provides that such a subpoena may be served at any place within the United States. Rule 45(c) protects the witness from undue burden by limiting the distance the witness must travel to comply with the subpoena.

[5] Alternative 2 would be simpler without adding (C), but it may be important to require service of the Rule 43(a) order along with the subpoena, both to drive home the need to get the 43(a) order before serving the subpoena and to alert the witness to the grounds urged in support of the Rule 43(a) order. That may prompt some witnesses to object to entry of the Rule 43(a) order, but such witnesses are likely to find out what it says anyway and to object anyway. Moreover, getting those objections addressed before trial seems better than having the witness not show up and then contest the order.

Since the 2013 amendments, courts have disagreed on whether a subpoena could command a witness to provide remote trial testimony from a location within the geographical limits of Rule 45(c)(1) but more than 100 miles from the courthouse. This amendment makes clear that the issuing court does have authority to command the witness to appear at the designated location and provide remote trial testimony. [The amendment also directs that if there is a district court within 100 miles of the residence of the witness the remote testimony should be taken from that district court. It is the responsibility of the party seeking the remote testimony to make arrangements for transmission from that court.]

This amendment in no way relaxes the showing required under Rule 43(a) to support remote testimony at trial. The "compelling circumstances" requirement under that rule recognizes that in-person testimony at trial is presumed unless compelling circumstances make that impossible. These exacting requirements are designed to protect the integrity of the trial process.

Rule 45(c), on the other hand, is designed to protect the witness. Only when the issuing court has determined that Rule 43(a) is satisfied may a subpoena be used to compel the witness to provide remote trial testimony. [The amendment also requires that the party serving the subpoena serve a copy of the court's order under Rule 43(a).] But when the court finds Rule 43(a) satisfied, the witness's remote testimony is, as that rule says, "in open court."

When the presiding court has determined that remote testimony is justified under Rule 43(a), however, this amendment makes clear that an unwilling witness—like any witness commanded by subpoena to provide in-person testimony in court—may be compelled to provide remote testimony from a location within the scope of Rule 45(c). [Rule 43(a) is amended to clarify this point.][6]

* * * * *

Commingling trial and hearing testimony as Alternative 2 does might produce confusion. One reason is that no prior court order is required for hearing testimony on a motion. That is likely not often important. Assuming recurrent examples of such testimony are class certification hearings and *Daubert* hearings, one would think that ordinarily the parties have no need for subpoenas to obtain attendance from their witnesses. And to the extent that there is a question whether, under Rule 43(c), remote testimony can be used at a motion hearing, the availability of a subpoena to compel such remote testimony seems unimportant. [Below there is discussion of a possible amendment to Rule 43(c) to make clear that—in addition to relying on depositions affidavits—the court may rely on oral testimony, without worrying about whether that is in-person testimony.

[6] This sentence presumes that we go forward with a proposed amendment to Rule 43(a), as outlined below.

Adding hearing testimony under Rule 43(c)
to Alternative 1

If commingling trial and hearing testimony would create problems, another approach might be to treat motion hearings separately under Alternative 1 above as a new Rule 45(c)(1)(4):

(4) ***Remote Testimony on a Motion Under Rule 43(c).*** A subpoena may command a person to [attend] {testify at} a hearing on a motion by remote means. [Unless there is no district court within 100 miles of the person's residence, the remote testimony should be provided from such a court.]

Draft Committee Note

Subdivision (c)(4). Subdivision (c)(4) is added to clarify that the court also has authority to subpoena a person to provide remote testimony at a hearing on a motion. Under Rule 43(c), the court may receive "oral testimony" at a hearing on a motion, and Rule 45(c)(1) authorizes a subpoena to attend a hearing. But the distance limits of Rule 45(c) may preclude a subpoena requiring in-person testimony from such a witness at a motion hearing. This amendment makes it clear that—subject to the limitations of Rule 45(c)—a subpoena may command such a witness to provide remote testimony.

[The amendment also directs that if there is a district court within 100 miles of the residence of the witness the remote testimony should be taken from that district court. It is the responsibility of the party seeking the remote testimony to make arrangements for transmission from that court.]

* * * * *

Whether this amendment is needed might be debated, since Rule 45(c) already permits a subpoena to command a person to appear at a hearing. Perhaps nothing more is needed. But perhaps one could use the absence of a reference to remote testimony in Rule 43(c), while remote testimony is mentioned in Rule 43(a), as indicating that there is no authority to use remote testimony at a hearing. That seems an overly literal treatment of the rules, since Rule 43(c) clearly permits use of an affidavit or deposition. But though one might say the *Kirkland* decision is unduly literal, one might be concerned about other courts being similarly literal. So that could be a reason to amend Rule 43(c) to make explicit the implicit latitude given the court about the manner of "oral testimony" at a hearing.

Amending Rule 43(a) as well

The Subcommittee is not prepared to attempt to resolve many questions about relaxing the tethers on permitting remote testimony at trials. The Bankruptcy Rules Committee is publishing a proposed amendment to those rules to permit remote testimony for good cause without "compelling circumstances" for "contested matters" but not adversary proceedings. The following amendment may be important in addition to an amendment to Rule 45(c):

Rule 43. Taking Testimony

Alternative 1

(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 testimony in open court by contemporaneous transmission from a different location. When the court permits trial testimony by contemporaneous transmission from a different location, for purposes of this rule that testimony is taken in the courtroom in which the trial is proceeding. [But the possibility of remote testimony does not affect the determination whether the witness is "unavailable" under Rule 32(a)(4) or Fed. R. Evid. 804(a).][7]

Alternative 2

(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 the witness to attend and provide testimony in open court by contemporaneous transmission from a different location. [But the possibility of remote testimony does not affect the determination whether the witness is "unavailable" under Rule 32(a)(4) or Fed. R. Evid. 804(a).]

The purpose of such a small change to Rule 43(a) would be to ensure that it makes clear that the remote testimony is in open court and that the (for purposes of this rule) the witness is "attending" the trial. The Ninth Circuit's view (75 F.4th at 1045):

> [I]nterpreting "place of compliance" as the witness's location when the witness testifies remotely is contrary to Rule 45(c)'s plain language that trial subpoenas command a witness to "attend *a trial*." A trial is a specific event that occurs in a specific place: where the court is located. See Fed. R. Civ. P. 77(b) ("Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom.") No matter where the witness is located, how the witness "appears," or even the location of the other participants, *trials* occur in a court.

Alternative 2 may be sufficient, though it does seem that the Ninth Circuit entirely disregarded what Rule 43(a) already says: "the court may permit testimony in open court from a remote location." Perhaps Alternative 1 drives the point home.

Either amendment could be accompanied by a brief Committee Note along the following lines:

[7] Whether this sort of addition is needed is also addressed below in the memorandum. In addition, the draft Committee Note attempts to make the same point, but some might contend that saying this in the rule is important and that a Committee Note comment is not sufficient.

Draft Committee Note

Subdivision (a). Rule 43(a) is amended to clarify that when the court authorizes testimony from a remote location the testimony is taken in the courtroom in which the trial is proceeding for purposes of Rule 43(a)[, whether the witness is located across the street or across the nation].[8] [This amendment does not affect the determination whether a witness is "unavailable" within the meaning of Rule 32(a)(4) or Fed. R. Evid. 804(a).][9]

This amendment does not relax the rule's requirement that trial testimony must be taken in open court unless the court finds that compelling circumstances and appropriate safeguards justify permitting remote testimony. [Remote testimony under Rule 43(c) is not subject to Rule 43(a)'s requirement that such testimony be "taken in open court."][10]

Related issues

On July 18, the Subcommittee did not reach additional issues that might bear on this amendment approach. To some extent, these issues have already been addressed above, but it seems useful to present them again.

Rule 32(a)(4) complications?

Rule 32(a)(2) says: "Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purposes allowed by the Federal Rules of Evidence." That would seem unaffected by remote testimony, so long as remote testimony is "testimony given by the deponent," which it would seem to be.

Rule 32(a)(4)(B) permits a deposition to be used for any purpose (e.g., as substantive evidence) if the witness is "unavailable" because "the witness is more than 100 miles from the place of hearing or trial." The situation with which we are concerned involves remote testimony by witnesses who can be more than 100 miles from the place of hearing or trial. As noted above, Rule 43(a) could be amended to say that for the purposes of Rule 43(a) in such circumstances the testimony is taken in the courtroom in which the trial is proceeding. That does not mean that the witness is within 100 miles of the place of trial. It may seem an oddity that the witness can testify "in the courtroom" though being located more than 100 miles away from the place of trial.[11]

[8] Is this comment unduly combative?

[9] The draft rule amendments above offer ways to address these questions in the rule itself. Including this sentence in the Committee Note could deflect arguments about admissibility of deposition testimony that the proponent might have obtained by remote means. It also preserves the issue whether – as suggested in the 1996 amendment to Rule 34(a) – deposition testimony should be preferred to remote live testimony.

[10] Is this addition, which merely recognizes that Rules 43(a) and 43(c) say, useful?

[11] It might be noted that a witness located more than 100 miles from the place of trial might be subject to a subpoena requiring attendance at the trial in one of our larger states. Rule 45(c)(1)(B) authorizes a subpoena to command a party or a party's officer to attend a trial within the state where the person resides. It also authorizes a subpoena to command

Rule 32(a)(4)(D) also permits the use of the deposition for any purpose if "the party offering the deposition could not procure the witness's attendance by subpoena." Arguably changing Rule 45(c) so that a subpoena can (with a 43(a) order) command remote testimony could be interpreted to provide "the witness's attendance." But it can be contended that the remote witness, though testifying in the trial, is not really "attending" it within the meaning of Rule 32(a)(4)(D).

Further attention (particularly from the lawyer members of the Subcommittee) would be useful. It might be reasonable to regard the deposition as inadmissible as substantive evidence under the hearsay rule if remote live testimony is justified under Rule 43(a). Perhaps this is a reason to think that amending Rule 45 intrinsically implicates Rule 43(a). If there is uncertainty about whether remote testimony under Rule 43(a) or deposition testimony should be preferred, one could argue that admitting the deposition over a hearsay objection should still be warranted. But one might also say that—from the perspective of a jury—this difference between "substantive" and "impeachment" admissibility of the deposition testimony of the witness testifying remotely under Rule 43(a)—is really splitting hairs. Maybe it would matter under Rule 50(a) or (b), but otherwise it does not seem weighty.

Fed. R. Evid. 804(a) issues?

A similar issue could arise as to Fed. R. Evid. 804(a)(5), which says that former testimony is admissible over a hearsay objection if the proponent of the evidence could not obtain "the declarant's attendance." Perhaps under that rule one could argue about whether remote testimony authorized under Rule 43(a) constitutes the declarant's "attendance" and means that the prior testimony is not admissible because it is hearsay. But as noted above, it seems that hair-splitting difference would not matter much to a jury, though it might matter to a Rule 50(a) or (b) motion.

Moreover, Fed. R. Evid. 801(d)(1)(A), provides that when the witness "testifies and is subject to cross-examination about the prior statement," the statement is "not hearsay" if given under penalty of perjury in a deposition and "inconsistent with the declarant's testimony." [Rule 801(a)(1)(B) permits use of deposition testimony "consistent with the declarant's testimony" only when offered to rebut a charge of recent fabrication or to rehabilitate the witness's credibility.]

The question whether prior testimony under oath should be excluded on hearsay grounds has long been a tricky part of evidence law. Determining whether the prior statement is "consistent" or "inconsistent" with the testimony at trial can itself be tricky. Telling the jury that the witness's prior statement may only be considered with regard to the credibility of the witness—but not as substantive evidence—if it is "consistent" may ask the jury to do more than jurors are able to do.

It might be noted that the Evidence Rules Committee is proposing to publish for public comment an amendment to Rule 801(d)(1)(A) deleting the present requirement that the statement have been made "under penalty of perjury at a trial, hearing, or other proceeding or in a deposition." The draft Committee Note says that so long as the witness testifies and is subject to

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an in-state nonparty witness to attend a trial if the witness "would not incur substantial expense." In California and a number of other states that might be quite a bit more than 100 miles from the place of trial.

cross-examination the hearsay dangers are "largely nonexistent." See agenda book for June 4, 2024, Standing Committee meeting at 102-04. It is not entirely certain how that new Evidence Rule would deal with remote "live" testimony and cross-examination at trial.

Misgivings about wading into the Rule 32(a)(4) or Fed. R. Evid. 804(a) issues

As noted above, judges and lawyers would be better attuned to possible gamesmanship resulting from rule amendments than law professors long removed from the litigation front lines. So these closing comments are particularly speculative, but might deserve mention on Aug. 14.

Risk of gamesmanship? At least some possibilities of gamesmanship have come to mind. Suppose, for example, that one side wants to rely on a deposition at trial, either under Rule 32(a)(4) or Rule 801(a), on the ground that the distant witness is beyond subpoena range. Can the other side object that the proponent of the deposition testimony did not try to utilize remote testimony and therefore that the deposition should not be admissible either? Recall that in *Kirkland*, before the bankruptcy court decision that led to the Ninth Circuit grant of mandamus, the bankruptcy court (on motion by the trustee, who sought to compel the remote testimony) had excluded the Kirklands' deposition and trial testimony before ordering them to provide remote live testimony. That does suggest that there may be a tension between remote live testimony and use of deposition testimony (or testimony from the trial of a related matter, as with the Kirklands). So it seems gamesmanship is already going on, and the question is whether a rule amendment will enable more gamesmanship.

Tension with relaxing constraints on remote testimony under Rule 43(a)? The present Subcommittee view is that the Rule 45 problem should be addressed now even though more work must be done to analyze the Rule 43(a) issues. But if that work led the Subcommittee ultimately to embrace the view that relying on deposition testimony is preferable to relying on live testimony by remote means, would mentioning Rule 32 and Fed. R. Evid. 801(a) invite arguments that the Advisory Committee has already rejected that position? Recall that one feature of the original Rule 43(a) submission was that the rule itself state: "The existence of prior deposition testimony alone shall not satisfy the good cause requirement to preclude contemporaneously transmitted trial testimony."

APPENDIX B

Judge Kahn Simplification

Rule 45. Subpoena

* * * * *

(c) Place of compliance.

Alternative 1

(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, of 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.

* * * * *

(3) ***Place of attendance.*** Under Rule 45(c)(1), the place of attendance is the place the person is commanded to [physically appear] {appear in person}.

Draft Committee Note

Subdivision (c)(3). Rule 45(c) is amended to clarify that a subpoena can command a witness to appear at a location within the geographical scope of Rule 45(c) to provide remote testimony. As amended in 2013, Rule 45(a)(2) permits the court presiding over the action to issue a subpoena, and Rule 45(b)(2) provides that such a subpoena may be served at any place within the United States. Rule 45(c) protects the witness from undue burden by limiting the distance the witness must travel to comply with the subpoena. The amendment therefore makes clear that the court that issued the subpoena can compel the witness to appear within the geographical limits of Rule 45(c) even though a subpoena could not command the witness to appear in the issuing court because it is located outside those limits.

[Since the 2013 amendments, courts have disagreed on whether a subpoena could command a witness to provide remote trial testimony from a location within the geographical limits of Rule 45(c)(1) but more than 100 miles from the courthouse. This amendment makes clear

that the issuing court does have authority to command the witness to appear at the designated location and provide remote trial testimony.][12]

This amendment in no way relaxes the showing required under Rule 43(a) to support remote testimony at trial. The "compelling circumstances" requirement under that rule recognizes that in-person testimony at trial is presumed unless compelling circumstances make that impossible. These exacting requirements are designed to protect the integrity of the trial process.

* * * * *

This approach is much simpler than the one outlined in the memo for the Aug. 14 meeting. Whether it would solve the problem brought to the Committee's attention might be debated. It might be said to shift the focus too much to remote testimony at hearings, as opposed to trials, though the focus of the *Kirkland* decision was testimony at trial, which is also the focus of Rule 43(a).

Here are some thoughts about the simplification:

1. It does not condition the service of the subpoena on prior authorization by the court under Rule 43(a) when trial testimony is sought. That might be a virtue. But an argument can be made that it is important to make clear that when trial testimony is sought prior court approval must be sought from the court. There is some indication that unilateral service of subpoenas sometimes overlooks such niceties. Requiring that court approval be obtained first seems more orderly, since attorneys can issue subpoenas on their own without court involvement.

2. In the same vein, it does not require that—with remote trial testimony—the order be served on the witness. That could have the advantage of eliciting objections to remote testimony in a timely manner.

3. It seems designed to facilitate "oral testimony" at motion hearings under Rule 43(c), but not directly to address the Ninth Circuit's *Kirkland* decision, which is (by its own terms, as noted in the D. Nev. decision) limited to trial testimony.

4. In the same vein, it is not clear that there has been a problem with subpoenas or with permitting remote testimony at motion hearings. If the prominent examples of such hearings are class certification and *Daubert* hearings, one would expect that the witnesses would willingly show up without a subpoena. If we are talking about motions for preliminary injunctions, that might involve distant reluctant witnesses, but examples have not been provided to us so far. To the extent that compelled remote testimony is required at preliminary injunction hearings, something like draft Rule 45(c)(4) (lines 277-82) may be valuable to authorize a subpoena to compel the witness to show up to provide the testimony. And an amendment to Rule 43(c) (suggested in note 10 below) might be in order also.

[12] The bracketed Committee Note material is probably unnecessary for the more limited proposal to add the 45(c)(3), but it does seem to provide a useful reminder of things the Ninth Circuit panel appeared to overlook in its *Kirkland* decision.

5. The simplified proposal does not seem directly to deal with the Ninth Circuit's assertion that trials are events that occur (perhaps unlike motion proceedings) at a specific location – the courtroom in which the trial is occurring. The possible Rule 43(a) amendment is designed to deal with that, though it may be unnecessary.

6. It does not say that the trial witness should ordinarily provide remote testimony from a courthouse. Whether to say that (assuming a courthouse is available within 100 miles) is subject to debate. But it might be a desirable thing to include. Maybe that would also be a desirable thing to say about remote testify on a motion, as in draft 45(a)(4).

7. It does not seem (without the proposed Rule 45(c)(4) at lines 277-82) to fill a possible gap on whether remote testimony can be used in a motion hearing. Rule 77(b) does not command that motions be "conducted in open court," but it does direct that "no hearing * * * may be conducted outside the district" without the parties' consent. If the rule says the "place of attendance" is where the witness is directed to show up, does that mean the hearing is being "conducted" where the witness is located? That is surely not the purpose, but one might say the *Kirkland* decision on where trials occur gives pause.

8. Does the simplified draft clearly say that the court can by subpoena command the witness to show up to provide remote testimony at a hearing? Rule 43(a) does authorize use of remote testimony, and Rule 45(c)(1) does authorize a subpoena to command a person to "attend a * * * hearing." Do we need a rule authorizing remote testimony at motion hearings? Draft proposed 45(c)(4) (lines 277-82) says a subpoena can command the distant witness to show up to provide remote testimony for a motion hearing.

9. Is there a risk that – by commingling trial and motion testimony – this draft could be said to limit the subpoena power for motion hearings by requiring that Rule 43(a) must be satisfied even though it's a motion hearing rather than a trial? Alternative 1 (lines 154-69) is limited to remote trial testimony. That is, of course, what the *Kirkland* case involved. Alternative 2 (lines 176-78) does somewhat commingle remote hearing and trial testimony. Perhaps the Committee Note could be more specific about authority to subpoena a witness for remote testimony at a motion hearing. But that's what draft 45(b)(4) explicitly does, and it seems to avoid commingling that with remote trial testimony, which is dealt with under Alternative 1 for draft 45(c)(3).

10. To the extent there is a potential problem with testimony at motion hearings required to occur in open court, perhaps what is needed may be an amendment to Rule 43(c) along the following lines:

> **(c)** ***Evidence on a Motion.*** When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony—<u>including by contemporaneous transmission from a remote location—</u> or on depositions.

This sort of amendment might be accompanied by a Committee Note along the following lines:

> **Subdivision (c).** Rule 43(c) is amended to clarify that the oral testimony a court may consider during a motion hearing includes testimony by contemporaneous transmission from a remote location. Under Rule 43(a) such remote testimony is permitted at trial only

when justified by compelling circumstances and with appropriate safeguards. But remote testimony at a motion hearing does not require that showing, and Rule 45(c)(4) is added to make clear that a subpoena may be sued to command a witness to appear to provide such remote testimony.

11. For production of documents, it is notable that Rule 45(d)(2)(A) says that the person subject to the subpoena need not appear in person. So it seems better to say that proposed 45(c)(3) be limited to Rule 45(c)(1) and not address Rule 45(c)(2).

Notes of Teams Meeting
Rule 43/45 Subcommittee
Advisory Committee on Civil Rules
July 18, 2024

The Rule 43/45 Subcommittee of the Advisory Committee on Civil Rules met by Teams on July 18, 2024. Those participating included Judge Hannah Lauck (Subcommittee Chair), Judge Robin Rosenberg (Advisory Committee Chair), Justice Jane Bland, Bankruptcy Judge Benjamin Kahn (liaison to Bankruptcy Rules Advisory Committee), Joseph Sellers, and David Burman. Members of the Discovery Subcommittee also attended as observers, including Chief Judge David Godbey (Chair of the Discovery Subcommittee), Judge Jennifer Boal, Ariana Tadler, Helen Witt and Clerk Liaison Thomas Bruton. Also participating were Prof. Richard Marcus (Advisory Committee Reporter), Prof. Andrew Bradt (Advisory Committee Assoc. Reporter), Edward Cooper (consultant) and Allison Bruff (A.O.)

Addressing only Rule 45 at present

An initial question was whether the Subcommittee ought limit its immediate consideration to Rule 45, and in particular the concerns raised by the 9th Circuit's *Kirkland* interpretation of that rule.

One reaction from an attorney member was that for purposes of completeness in responding to *Kirkland* it might be important to add something to Rule 43(a) that would emphasize that when the court authorizes remote testimony under Rule 43(a) that remote testimony constitutes "attendance" at the trial even though the witness is testifying from another location. [As noted below, the consensus at the end of the meeting was to carry forward this possibility.]

A reaction to that suggestion was that Rule 43(c) somewhat muddies the waters in ways that might cause confusion. Rule 43(c) says that, when hearing a motion, the court may consider "oral testimony." It does not clarify whether that testimony must be in-person testimony. The dividing line between "trials" (governed by Rule 43(a)) and motion hearings under Rule 43(c) might be murky at times. An "evidentiary hearing," for example, might be an in-between situation. There is caselaw directing that hearings on motions for contempt be treated under Rule 43(a) rather than Rule 43(c).

Another participant opined that the Rule 43(a) and Rule 45 issues seem completely separate. Rule 43(a) is about whether the court can authorize remote testimony. The Rule 45 question before us today is not about that, but whether Rule 45 can be used to compel an unwilling witness to appear within 100 miles of the witness's residence or place of business and provide that remote testimony when the court finds remote testimony justified.

The reason this is important is that the Ninth Circuit's *Kirkland* decision casts a shadow over the use of remote testimony. To the extent the Ninth Circuit decision stands for the proposition that a subpoena can compel a witness to testify at trial only when the witness is within the court's subpoena authority seems not to take account of the 2013 amendment to Rule 45, which permits the court presiding over the action to issue a subpoena and also provides that the subpoena may be served anywhere within the country.

The questions raised by remote testimony more generally appear much more challenging than the Rule 45 subpoena issues. One illustration is the upcoming publication for public comment of Bankruptcy Rule amendments that would remove the "compelling circumstances" constraint on remote testimony with regard to "contested matters" in Bankruptcy Court.

The pending Bankruptcy Court amendment proposals will be published for public comment in August, with comment running to mid-February 2025. Though adversary proceedings (more analogous to trials in district court) are not included in those proposals, public comment on those proposals may be informative on the question whether to relax the requirements in Rule 43(a) for remote trial testimony.

At the same time, the Bankruptcy Rule proposals are not the same as the Rule 43(a) proposal this Committee received. From the Bankruptcy Court perspective, then, the handling of adversary proceedings will continue to be governed by Rule 43(a).

A question was asked: How often do hearings under Rule 43(c) involve live witness testimony? The response was: quite often. Leading examples are class certification hearings and *Daubert* hearings. Preliminary injunction hearings also may involve live witness testimony.

A follow up question was asked: Are subpoenas used to obtain that testimony at motion hearings? The response was that they are not ordinarily needed, as these witness are willing and support the position of the party calling them.

Returning to the question whether it is necessary to confront the "gordian knot" of evaluating the wisdom of relaxing Rule 43(a)'s current limitations on remote testimony, it was urged that those concerns are separate from the subpoena power question. To take the Bankruptcy Courts as an example, there is substantial variation among Bankruptcy Judges about how to approach requests for remote testimony on a case-by-case basis.

The consensus was that addressing only the Rule 45 concerns presently makes sense.

Focusing on 45(c) or 45(d)

Rule 45(d), which the Ninth Circuit emphasized, implements Rule 45(c), which is designed to protect the witness against undue burdens in complying with the subpoena. Rule 43(a), on the other hand, is concerned with the integrity of the trial process. The strict limits on remote testimony reflect concerns about trial integrity. One reading of the Ninth Circuit's decision is that even if the subpoena commands the witness to provide remote testimony (as ordered by the court) from within 100 miles of the courthouse it cannot be enforced because it does not command testimony in person in the courtroom.

Assuming a focus only on Rule 45, the question was: Where in the rule? The consensus was the focusing on Rule 45(c) made more sense. The materials for the meeting presented a possible new Rule 45(c)(3):

> **(3)** ***For Remote Trial Testimony Ordered Under Rule 43(a).*** When the court that issued the subpoena has granted an order under Rule 43(a) for remote testimony by the witness, the subpoena may command the witness to appear to provide remote

testimony at any location [not beyond the geographical limits specified in Rule 45(c)(1)] {within 100 miles of where the person resides, is employed, or regularly transacts business in person or—if the witness is a party or a party's officer—within the state where the person resides}. [The court order authorizing remote testimony under Rule 43(a) must be served on the witness.] [Unless there is no district court within 100 miles of the person's residence, the remote testimony should be provided from such a court.]

But this formulation prompted a question – why is it limited to testimony at trial? Shouldn't there be clear authority to subpoena a witness to testify at a hearing? Rule 43(c) permits presentation of witness testimony at hearings. Perhaps that is usually from willing witnesses, but some may be unwilling. A possibility was presented in the memo for the meeting (though focused on rule 45(d) rather than Rule 45(c)):

(4) ***Remote Testimony on a Motion Under Rule 43(c).*** A subpoena may command a person to [attend] {testify at} a hearing on a motion.

A further suggestion was that a subpoena commanding testimony under Rule 43(a) and 43(c) be combined in one rule provision, perhaps a new Rule 45(c)(3). This prompted a concern. The Rule trial testimony proposal focuses on the court order under Rule 43(a) authorizing remote testimony. A bracketed provision even requires that the Rule 43(a) order be served on the witness. Rule 43(c), on the other hand, has no predicate requirement that a court order be obtained and specifies no criteria for deciding whether to issue such an order if one is sought.

So there may be a reason for the rule to separate trial testimony from testimony at motion proceedings. That possibility prompted a question: Does it ever really happen that witnesses are subpoenaed to attend motion hearings and provide remote testimony? The basic answer was more generally that it does not occur with any frequency. Most courts would require some advance authorization (whether or not the Civil Rules so provide). But there have been some intimations that litigants may sometimes serve subpoenas for remote testimony without first obtaining court approval. Could the subpoena rule require that sort of predicate process even though Rule 43(c) does not?

A simple model of such a combined rule provision was proposed for Rule 45(c)(1) was proposed:

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend trial, hearing, or deposition, or to provide testimony at a trial or hearing from a remote location when permitted under Rule 43(a) only:

* * * * *

(C) if remote trial testimony is commanded the order under Rule 43(a) must be served on the witness. [If there is a United States district court [within 100 miles of the witness's residence] {where the witness could be compelled to attend and testify} the remote trial testimony should be provided from such a court.]

Some questions arose about the bracketed directing that testimony be provided at a district court if feasible. Is that done for remote testimony now? Might this be an imposition on the court involved? Are there any limits otherwise on where the witness may be compelled to appear to testify? Are there any limitations on where a subpoena can compel a witness to appear for a deposition?

One reaction to these questions was that sometimes the court insists that the parties develop a protocol for remote testimony, and that protocol may address these concerns.

Continuing to focus also on Rule 43(a)

Separately from the proposals in the submission the Committee received about Rule 43(a), there may be reason to make a slight addition to the current rule to make certain that it is clear that our amendments undo the Ninth Circuit interpretation of these Rules. The proposal was to add a sentence to Rule 43(a) as follows:

> **(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 testimony in open court by contemporaneous transmission from a different location. When the court permits testimony by contemporaneous transmission from a different location, for purposes of this rule that testimony is taken in the courtroom in which the trial is proceeding.

A simpler alternative was offered:

> **(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 the witness to attend and provide testimony in open court by contemporaneous transmission from a different location.

The purpose of such a small change to Rule 43(a) would be to ensure that it makes clear that the remote testimony is in open court and that the (for purposes of this rule) the witness is "attending" the trial. The Ninth Circuit's view (75 F.4th at 1045):

> [I]nterpreting "place of compliance" as the witness's location when the witness testifies remotely is contrary to Rule 45(c)'s plain language that trial subpoenas command a witness to "attend *a trial*." A trial is a specific event that occurs in a specific place: where the court is located. See Fed. R. Civ. P. 77(b) ("Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom.") No matter where the witness is located, how the witness "appears," or even the location of the other participants, *trials* occur in a court.

The consensus was that this possibility should be preserved for the next round of drafting. It was suggested that a Committee Note could emphasize (if the Subcommittee decided to proceed with this amendment idea) that the amendment makes no change to the rule's existing criteria for authorizing remote trial testimony.

Need for prompt action on Rule 45

Relevant to the question whether to bifurcate the Subcommittee's work and proceed first with Rule 45(c) (and perhaps also the small Rule 45(a) change mentioned just above) is a sense of some urgency about responding promptly to the Ninth Circuit's *Kirkland* decision. In at least some quarters, that decision came as a surprise and, as the first court of appeals decision on the question it may be influential.

Moreover, the many concerns about remote testimony suggest that careful consideration of relaxing Rule 43(a)'s constraints will take considerable time. Waiting until that "gordian knot" is unraveled would stymie prompt action on the Rule 45 issues.

Implications for Rule 32(a)(4) and Fed. R. Evid. 804(a)

Additional matters addressed in the memo for this meeting were the possible implications of making changes of the sort under discussion for Rule 32(a)(4) and Fed. R. Evid. 804(a), which condition the use of deposition testimony and prior testimony on whether the witness is "unavailable," making the witness's remote location a ground for a finding of unavailability. The discussion on July 18 did not reach these issues.

Future steps

The discussion turned to next steps. It should be possible to draft and circulate a discussion draft for a next meeting. The agenda book materials for the October meeting are due in the A.O. around Sept. 12. If the Subcommittee wants to have a full proposal for the full Committee, then, it must be developed in time to meet that submission deadline.

A tentative idea was to try to convene a Subcommittee meeting during the **week of Aug. 12, 2024**. This possibility will be investigated.

Notes of Teams Meeting
Rule 43/45 Subcommittee
Advisory Committee on Civil Rules
May 17, 2024

The Rule 43/45 Subcommittee of the Advisory Committee on Civil Rules met by Teams on May 17, 2024. Those participating included Judge Hannah Lauck (Subcommittee Chair), Judge Robin Rosenberg (Advisory Committee Chair), Justice Jane Bland, Bankruptcy Judge Benjamin Kahn (liaison to Bankruptcy Rules Advisory Committee), Joseph Sellers, and David Burman. Also participating were Prof. Richard Marcus (Advisory Committee Reporter), Prof. Andrew Bradt (Advisory Committee Assoc. Reporter), and Zachary Hawari (A.O.)

This first Subcommittee meeting was introduced as intended mainly to chart a course for progress. One thought to have in mind is that although this Subcommittee is focusing on Rule 45(c), the Discovery Subcommittee is focusing on the method of service under Rule 45(b). There will be some transition in the membership of the Discovery Subcommittee, but in any event it makes sense to try to coordinate the two projects so that if proposed amendments to Rule 45 are published they are published at the same time.

A starting point is to consider the possibility that the Rule 45 issue will prove simpler to address than the Rule 43(a) issues, which seem fairly challenging. But that depends on a determination that changes to Rule 45(c) and Rule 43(a) are sufficiently separate that changing one rule does not cause "ripple effects" on the other rule. Already a concern has been raised about the possibility that a change to Rule 45 might enable an end run around the requirements of Rule 43(a).

Another starting point is the view that a change to Rule 45 should not by itself weaken the requirements under Rule 43(a) for authorizing remote testimony. Instead, given that there is much reason to favor in-person witness testimony as the "gold standard," at least when some issues of credibility exist, the only Rule 45(c) question is whether – even when it finds Rule 43(a) satisfied with regard to a certain witness – the court is powerless to compel the witness to testify by using its subpoena power unless the witness is located within the court's "subpoena power."

The Rule 45(c) issue has divided the courts. See 9 Fed. Prac. & Pro. § 2461 at nn. 9-11 (citing conflicting decisions). *In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023), makes this point apparent unless the goal is to deprive the court of the authority to compel the remote witness to show up to testify somewhere near home.

Rule 45 was extensively reorganized effective 2013 to make a number of changes, and it is useful to recall some of the rule's features before that amendment. At that time, the subpoena had to issue from the court where compliance was commanded, and to be served in that district. Those multiple overlapping requirements came to be known as the "three-ring circus" of Rule 45 during the Rule 45 project.

If a litigant jumped through all the hoops under the former rule, however, the subpoena was effective to require the witness to show up in the local court no matter whether the witness was present only briefly at the time of service and actually resided on the other side of the country.

The 2013 amendments made a fundamental change – thenceforward the subpoena would issue from the court where the action was proceeding, so it need not be issued by the court where compliance was sought. In a sense, that makes subpoenas for civil cases somewhat more like subpoenas to testify at a hearing or trial of a criminal cases, in which the subpoena power is nationwide. See Fed. R. Crim. P. 17(e)(1).

Prior to 2013, there were fairly intricate limitations on where a subpoena could compel a witness to show up, and they were sprinkled in many parts of the rule.. Given the possibility that a witness from New York temporarily in San Francisco could be compelled by subpoena to return to San Francisco to testify at a trial if served there with a subpoena issued from the federal court in San Francisco, there seemed to be limited protection for witnesses even though protecting nonparty witnesses was an objective of the Rule. See Rule 45(d) ("Protecting a Person Subject to a Subpoena").

Rule 45(c) was thus an effort to build in protections for the person subject to the subpoena, generally permitting the court presiding over the action to issue the subpoena but limiting the command to the witness to somewhere "within 100 miles of where the person resides, is employed, or regularly transacts business in person." The amendment also concentrated in one subdivision of the rule all the provisions about place of compliance.

The Committee Note addressed the issue presented by the *Kirkland* decision: "When an order under Rule 43(a) authorizes testimony from a remote location, the witness can be commanded to testify from any place described in Rule 45(c)(1)." That would seem to include any place within 100 miles of the witness's residence.

The Ninth Circuit found that the Note did not support the result the Note endorsed because the rule forbids it by commanding in Rule 45(d)(3)(A)(ii) that the court quash any subpoena that requires compliance beyond the bounds of Rule 45(c). See 75 F.4th at 1043. It found the obstacle to be what Rule 45 now says, and said that any changes to the rule must come from the rules committee, not by court interpretation. See id. at 1047.

One could observe that the Ninth Circuit approach may not fully appreciate the impact of the 2013 amendments. Thus, it says that "a court can only compel witnesses who are within the scope of its subpoena power." Id. at 1044. (See also id. at 1045, referring to "long-distance witnesses that are not subject to the court's subpoena power.") But the 2013 amendment *did* give the court presiding over the civil action power to subpoena a witness anywhere in the country, but not to command the witness to comply beyond the scope of Rule 45(c). So the "scope of subpoena power" idea seems largely inapplicable under the amended rule.

The Ninth Circuit also emphasized that even though the court could command a distant witness to produce documents or appear for deposition within 100 miles of the witness's residence, attending a trial is different. "A trial is a specific event that occurs in a specific place: where the court is located." Id. at 1045. But when a witness testifies remotely under the authority of Rule 43(a), it would seem that the witness is testifying in the court where the trial is occurring. Moreover, this reasoning could forbid use of a subpoena to compel a nearby witness to "appear" at trial anywhere but in the courtroom. One can imagine that disability or other reasons might justify compelling an unwilling witness to testify at trial, though by remote means designed to

protect the health of the witness. Consider, for example a very ill witness confined to a hospital bed in the city in which the court sits. There might be logistical challenges to having the witness testify remotely, but it seems odd to say the court is powerless to use a subpoena to compel the testimony because the testimony is during a trial.

Actually, the march of technology since 1938 has included some innovative ways of participating in court hearings and trials. For example, the 1980 amendment to Rule 30 authorized the court to order a deposition by telephone. And in 1993, Rule 30(b) was further amended to permit the noticing party to choose to record the deposition by audiovisual means. (The court reporters objected to rule-based permission to use video for depositions, but the rule change went through anyway.)

When the pandemic hit, there was considerable consideration about whether to amend Rule 30(b)(4) to empower the noticing party to take a deposition by remote means, but it seemed that courts were regularly ordering such remote depositions and a formal amendment of the rule would not be necessary.

Finally, the rules do prefer videotaped depositions for use at trial rather than stenographers' transcripts. See Rule 32(c) ("On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise.").

So one could view the Rule 45 question addressed in the Ninth Circuit case as part of a natural progression – that when in-person testimony is not possible there is a hierarchy of methods of proof. Overall, it might be said that the hierarchy is as follows:

(1) Live, in-person testimony by the witness, which remains the "gold standard." (Indeed, under the Confrontation Clause in criminal cases it seems constitutionally required with regard to prosecution witnesses.)

(2) Live remote testimony by witnesses whose testimony is justified under Rule 43(a). One might say this is preferable to deposition testimony, which is taken a considerable time before the trial occurs and is likely not organized in the way trial testimony is organized, making it harder for the jury to follow the chopped up (edited) video of the deposition.

(3) A video of a deposition. This method may not be organized in the way trial testimony is organized, but it ought at least give the jury a way to assess the witness's demeanor. The Committee Note to the 1996 amendment to Rule 43(a) noted that a video deposition was often a good alternative to remote testimony. It may be, however, that the technology of the present day makes remote testimony much more reliable than it was in 1996.

(4) A traditional stenographic transcript of deposition testimony.

This possible hierarchy drew a reaction – it's not necessarily true that remote testimony is preferable to a videotaped deposition. Assuming the deposition occurred in a room with both sides present, the risk of coaching, etc., would be minimized, while remote testimony often, perhaps inevitably, presents coaching worries. We must be careful about embracing this hierarchy without thorough evaluation.

However one ranks the options after option (1) above, there was consensus that live in-person testimony remains the gold standard. That being true, there is considerable reason for caution about changes to Rule 43(a). The proposed amendment submitted to the Advisory Committee might "reverse the default" about whether in-person testimony is routinely required. The Bankruptcy Rules Committee is considering removing the "compelling circumstances" requirement for remote testimony for certain hearings, but not adversary proceedings. Hence – unlike Rule 45 – the Rule 43(a) issues seem quite challenging. But as a starting point the Subcommittee remains committed to the "gold standard" of in-person, in-court testimony.

As the Committee Note accompanying the 1996 amendment to Rule 43(a) regarding remote testimony observed, the formality and solemnity of the courtroom can play an important role in prompting truthful testimony. That Note also mentioned use of a deposition as an alternative to remote testimony, perhaps reinforcing the point made above that no. 2 and n. 3 on the list above are really on par with one another.

An initial question addressed Rule 43(a) – is there really a difference between "good cause" and "compelling circumstances"? It might seem that the rule is almost redundant. A reply was that the FJC did research on that exact point before the pandemic. It found considerable judicial disagreement on what constituted compelling circumstances, but wide agreement that it required more than the "good cause" standard standing alone. For one thing, the cost of traveling to testify live would not suffice. Perhaps stipulation by all parties should routinely suffice. But the compelling circumstances requirement sets a higher bar.

This prompted a thought – won't reluctant witnesses often challenge a subpoena for remote testimony on the ground that the showing made did not really satisfy Rule 43(a) even though the judge held that it did? After all, such a witness might say "What's so special about my testimony, even if I don't have to leave my own living room to provide it?"

One reaction to this question was that the proposal to amend Rule 43(a) seems to give no weight to the importance of the witness's testimony while also removing the compelling circumstances requirement. It may be that good cause by itself calls for a showing that the witness's testimony is critical, or at least important. But the amendment proposal we received does not seem to include a need for such a showing.

On the other hand, but for the distance problem it is not routinely true that witnesses can defeat subpoenas on the ground that their testimony is not really needed. True, for high governmental officers and corporate CEOs there is what's called the "apex doctrine" under which the court may quash a deposition (and presumably a subpoena) on the ground that this particular witness's testimony is not urgently needed.

The pandemic introduced greater flexibility in handling various matters that previously had depended on in-court in-person interaction. All or most motion proceedings occurred via Zoom or by similar methods. Small dollar matters often relied on such methods. Indeed, that might be very valuable to litigants who could not take a day off work. And for lawyers who did not want to fly across the country for a 15-minute status conference, remote video participation was a godsend.

Moreover, during the pandemic there were trials or trial-type events that were entirely remote. On many occasions that may have been by stipulation, but the point is that it occurred and worked well. There may be technological methods to enhance reliability of remote testimony. For example, it may be possible for the judge to see the whole room in which the witness is located, minimizing the risk of coaching.

That discussion focused attention on the Rule 43(a) requirement for "adequate safeguards" in addition to "compelling circumstances." Perhaps we could specify what would suffice.

One caution was that foreseeing what new methods may emerge in the future is risky. So is assuming the current methods really work well; new information may show that they do not. In Texas, where the state courts have a considerable experience with remote proceedings, ultimately the guidance was through the court administration office, not included in a statute or a rule.

There is also an access to justice aspect, particularly with self-represented litigants. In bankruptcy court proceedings, "most debtors testify from their cars." But those are not trials in the traditional sense, and there is much reason for great caution about easing the path for remote testimony in trials.

In ordinary federal civil cases, there may be less "access to court" concern. It is true that there are low value federal-court cases. Consider traffic infractions on federal land, for example. But most federal-court cases are not like that; for the most part federal courts are not small claims courts.

A reaction was that perhaps, in regard to 43(a), there might be thought about what categories of cases for greater flexibility. A starting point might be when all parties agree to remote participation. Perhaps one could relax the "compelling circumstances" requirement for those cases. But describing them might be difficult. It also might reinforce an argument about "second class justice" and raise questions about substance-specific rules. One way that might not relate to substance-specific rules would be to accommodate mobility-challenged witnesses. It might be that some example factors like that one could be identified. On the other hand, it could also be noted that Texas Rule 21d(e) lists nine factors. That seems like a large number. And one might want to make sure there is some sort of catch all invitation for unforeseen circumstances.

Turning to plans for further Subcommittee activity, there was a consensus that Rule 45 should receive relatively immediate attention. But a key question to have in mind during discussion of the Rule 45 issue is whether it can be done without also resolving the Rule 43(a) issues. The plan is for Professor Marcus to produce some sort of introductory memo and for the Subcommittee then to meet, but probably that can't be done before mid-June.

TAB 9A

75 F.4th 1030
United States Court of Appeals, Ninth Circuit.

IN RE: John C. KIRKLAND; Poshow Ann Kirkland, as Trustee of the Bright Conscience Trust dated September 9, 2009. John C. Kirkland; Poshow Ann Kirkland, as Trustee of the Bright Conscience Trust dated September 9, 2009, Petitioners,

v.

United States Bankruptcy Court for the Central District of California (Los Angeles), Respondent, Jason M. Rund, Chapter 7 Trustee, Real Party in Interest.

No. 22-70092
|
Argued and Submitted October 4, 2022 Pasadena, California
|
Filed July 27, 2023

Synopsis

Background: Chapter 7 trustee filed adversary complaint against outside counsel for Chapter 7 debtor investment company and trust established by counsel and his wife that was funded by loans to investment company, seeking to avoid fraudulent transfers that occurred as part of debtor's alleged Ponzi scheme and to disallow or equitably subordinate trust's proofs of claim. Counsel asserted his right to jury trial on fraudulent-transfer claims. The District Court, Dale S. Fischer, J., 594 B.R. 423, granted defendants' motion to withdraw reference to bankruptcy court, bifurcated fraudulent-transfer claims against defendant counsel for trial from other claims asserted against trust, dismissed trustee's equitable-subordination claim against counsel after jury returned verdict in his favor, and returned claims against trust to bankruptcy court. Counsel and his wife who was trustee for trust were served with trial subpoenas, and they moved to quash them on basis court did not have power to compel them to testify. The United States Bankruptcy Court for the Central District of California, Ernest M. Robles, J., denied defendants' motions to quash and motion to certify immediate interlocutory appeal, or, alternatively, for leave to file interlocutory appeal in district court. Defendants petitioned Court of Appeals for writ of mandamus directing bankruptcy court to quash their trial subpoenas.

Holdings: The Court of Appeals, Forrest, Circuit Judge, held that:

[1] on issue of first impression, bankruptcy court's order compelling witnesses in United States Virgin Islands to testify remotely by contemporaneous video transmission despite falling outside geographic limitations of power of Central District of California to compel witness to testify at trial or other proceeding clearly violated 100-mile limitation under governing Federal Rule of Civil Procedure;

[2] witnesses who currently lived in United States Virgin Islands could not be compelled to testify in person at trial in California;

[3] issue of whether witnesses in United States Virgin Islands could be compelled to testify remotely despite falling outside geographic limitations of power of Central District of California to compel witness to testify at trial or other proceeding was important issue;

[4] granting mandamus relief was warranted on basis that bankruptcy court's order was clearly erroneous as matter of law and court's order raised new and important problems, or issues of law of first impression;

[5] failure of witnesses to seek interlocutory review did not mandate denial of petition for mandamus relief;

[6] bankruptcy court's error could not be fully remedied through normal post-judgment appeal; and

[7] whether case involved oft-repeated error did not have to be analyzed in depth to determine whether mandamus relief was warranted.

Petition granted.

Procedural Posture(s): Petition for Writ of Mandamus; Motion to Quash or Vacate a Subpoena.

West Headnotes (39)

[1] Federal Courts Writs in general

Under All Writs Act, Court of Appeals has authority to issue writs of mandamus to lower courts. 28 U.S.C.A. § 1651(a).

[2] **Federal Courts** Writs in general

Authority of Court of Appeals to issue writs of mandamus to lower courts under the All Writs Act extends to those cases which are within its appellate jurisdiction although no appeal has been perfected. 28 U.S.C.A. § 1651(a).

[3] **Mandamus** Jurisdiction and authority

Court of Appeals' mandamus jurisdiction over bankruptcy courts mirrors its mandamus authority over district courts, and it can issue writs of mandamus directly to bankruptcy courts because they are courts within its appellate jurisdiction. 28 U.S.C.A. §§ 151, 158(d), 1651(a).

[4] **Mandamus** Nature and scope of remedy in general

Mandamus Exercise of judicial powers and functions in general

Mandamus Matters of discretion

Mandamus is an extraordinary remedy appropriate only in exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion. 28 U.S.C.A. § 1651(a).

[5] **Mandamus** Nature and scope of remedy in general

In determining whether issuance of a writ of mandamus is appropriate, the court weighs the five *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650, factors: (1) the party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires; (2) the petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) the district court's order is clearly erroneous as a matter of law; (4) the district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules; and (5) the district court's order raises new and important problems, or issues of law of first impression. 28 U.S.C.A. § 1651(a).

1 Case that cites this headnote

[6] **Mandamus** Nature and scope of remedy in general

Weighing the five Bauman v. U.S. Dist. Ct., 557 F.2d 650, factors, in determining whether issuance of a writ of mandamus is appropriate, is not a mechanical analysis; the factors are weighed holistically to determine whether, on balance, they justify the invocation of that extraordinary remedy. 28 U.S.C.A. § 1651(a).

[7] **Mandamus** Discretion as to grant of writ

Issuance of mandamus relief is discretionary; Court of Appeals is neither compelled to grant writ when all five factors are present, nor prohibited from doing so when fewer than five, or only one, are present. 28 U.S.C.A. § 1651(a).

1 Case that cites this headnote

[8] **Mandamus** Nature of questions involved

Absence of clear error as matter of law is dispositive of a petition for a writ of mandamus relief and will always defeat the petition. 28 U.S.C.A. § 1651(a).

[9] **Mandamus** Nature of questions involved

Mandamus relief can be appropriate to resolve novel and important procedural issues. 28 U.S.C.A. § 1651(a).

[10] **Mandamus** Exercise of judicial powers and functions in general

Mandamus is particularly appropriate when the Court of Appeals is called upon to determine the construction of a federal procedural rule in a new context. 28 U.S.C.A. § 1651(a).

[11] **Mandamus** Proceedings in civil actions in general

Although the Court of Appeals cannot afford to become involved with daily details of discovery or trial, it may rely on mandamus to resolve new questions that otherwise might elude appellate review. 28 U.S.C.A. § 1651(a).

[12] **Mandamus** Exercise of judicial powers and functions in general

The clear-error standard for granting a writ of mandamus is highly deferential and typically requires prior authority from the Court of Appeals that prohibits the lower court's action. 28 U.S.C.A. § 1651(a).

[13] **Mandamus** Exercise of judicial powers and functions in general

The clear-error standard for granting a writ of mandamus is met even without controlling precedent if the plain text of the statute prohibits the course taken by the district court. 28 U.S.C.A. § 1651(a).

[14] **Mandamus** Exercise of judicial powers and functions in general

Mandamus Matters of discretion

On a petition for a writ of mandamus, the Court of Appeals must be left with a firm conviction that the lower court misinterpreted the law or committed a clear abuse of discretion.

[15] **Witnesses** Particular cases

Bankruptcy court's order to compel witnesses in United States Virgin Islands to testify remotely by contemporaneous video transmission despite falling outside geographic limitations of power of Central District of California to compel witness to testify at trial or other proceeding clearly violated 100-mile limitation under governing Federal Rule of Civil Procedure, in trustee's adversary proceeding against trust that had been funded by loans to Chapter 7 debtor investment company seeking to disallow or equitably subordinate trust's proofs of claim; geographical limitation could not be recalibrated to location of remote witness rather than location of trial and courts could not avoid consequences of witness unavailability by ordering remote testimony. 28 U.S.C.A. § 1651(a); Fed. R. Civ. P. 43(a), 45(c).

[16] **Federal Civil Procedure** Construction and operation in general

As with a statute, Court of Appeals interpreting a Federal Rule of Civil Procedure begins with the text and gives the Rule its plain meaning.

[17] **Federal Civil Procedure** Construction and operation in general

If the language at issue in a Federal Rule of Civil Procedure has a plain and unambiguous meaning with regard to the particular dispute in the case, Court of Appeals' inquiry ceases.

[18] **Witnesses** Distance limitations in general

Persons cannot be required to attend a trial or hearing that is located more than 100 miles from their residence, place of employment, or where they regularly conduct in-person business. Fed. R. Civ. P. 45(c)(1)(A).

1 Case that cites this headnote

[19] **Witnesses** Particular cases

Witnesses who currently lived in United States Virgin Islands could not be compelled to testify in person at trial in California, in trustee's adversary proceeding against trust that had been funded by loans to Chapter 7 debtor investment company seeking to disallow or equitably subordinate trust's proofs of claim, since witnesses did not live, work, or regularly conduct in-person business in California any longer. Fed. R. Civ. P. 45(c)(1)(A).

[20] **Federal Civil Procedure** Construction and operation in general

The Court of Appeals may look to the advisory committee's notes to the Federal Rules of Civil Procedure to apply the Rules because they provide a reliable source of insight into their meaning.

[21] **Federal Civil Procedure** Construction and operation in general

The text of the Federal Rules of Civil Procedure control their application; the advisory committee notes cannot change the meaning that the Rules otherwise would bear.

[22] **Witnesses** Persons Who May Be Required to Testify; Persons Subject to Subpoena

A federal court can compel only those witnesses who are within the scope of its subpoena power. Fed. R. Civ. P. 45.

1 Case that cites this headnote

[23] **Witnesses** Distance limitations in general

The 100-mile limitation under Federal Rule of Civil Procedure defining the "place of compliance" for subpoenas and the geographical scope of a federal court's power to compel a witness to testify at a trial or other proceeding is applicable to remote testimony, and the "place of compliance" does not change the location of the trial or other proceeding to where the witness is located when a witness is allowed to testify remotely. Fed. R. Civ. P. 43, 45.

2 Cases that cite this headnote

[24] **Witnesses** Distance limitations in general

The geographical limits under the Federal Rule of Civil Procedure defining the "place of compliance" for subpoenas and the geographical scope of a federal court's power to compel a witness to testify at a trial or other proceeding define the scope of a court's power to compel a witness to participate in a proceeding. Fed. R. Civ. P. 45(c).

1 Case that cites this headnote

[25] **Courts** Construction and application of rules in general

Statutes Plain Language; Plain, Ordinary, or Common Meaning

A court generally seeks to discern and apply the ordinary meaning of a text of a statute or rule at the time of its adoption.

[26] **Witnesses** Distance limitations in general

Reference to attending "a trial," in the Federal Rule of Civil Procedure defining the "place of compliance" for subpoenas and the geographical scope of a federal court's power to compel a witness to testify at a trial or other proceeding, refers to the location of the court conducting the trial. Fed. R. Civ. P. 45.

[27] **Federal Civil Procedure** Construction and operation in general

Court of Appeals is bound by text of the Federal Rules of Civil Procedure.

[28] **Mandamus** Evidence, witnesses, and depositions

Issue of whether witnesses in United States Virgin Islands could be compelled to testify remotely despite falling outside geographic limitations of power of Central District of California to compel witness to testify at trial or

other proceeding was important issue, weighing in favor of granting writ of mandamus from bankruptcy court's order in trustee's adversary proceeding against trust that had been funded by loans to Chapter 7 debtor investment company seeking to disallow or equitably subordinate trust's proofs of claim, since issue raised by petition was ripe for consideration and was new and far reaching question of major importance, resolution of which would add importantly to efficient and orderly administration of district courts, given recent proliferation of video-conference technology in all types of judicial proceedings. 28 U.S.C.A. § 1651(a); Fed. R. Civ. P. 45.

[29] **Mandamus** Evidence, witnesses, and depositions

Granting mandamus relief was warranted on issue of whether witnesses in United States Virgin Islands could be compelled to testify remotely despite falling outside geographic limitations of power of Central District of California to compel witness to testify at trial or other proceeding, in trustee's adversary proceeding against trust that had been funded by loans to Chapter 7 debtor investment company seeking to disallow or equitably subordinate trust's proofs of claim, merely on basis that bankruptcy court's order was clearly erroneous as matter of law and court's order raised new and important problems, or issues of law of first impression. 28 U.S.C.A. § 1651(a); Fed. R. Civ. P. 43, 45.

[30] **Mandamus** Existence and Adequacy of Other Remedy in General

Availability of relief through ordinary review process weighs against granting mandamus relief. 28 U.S.C.A. § 1651(a).

[31] **Federal Courts** Preliminary proceedings; depositions and discovery

Order denying motion to quash subpoena generally cannot be immediately appealed. Fed. R. Civ. P. 45.

[32] **Contempt** Decisions reviewable

Mandamus Evidence, witnesses, and depositions

Absent discretionary interlocutory review, to obtain effective review of an order denying motion to quash subpoena, a litigant generally must either seek mandamus, or disobey the order and then appeal the resulting contempt citation. Fed. R. Civ. P. 45.

[33] **Federal Courts** Certification and Leave to Appeal

In the ordinary civil case, interlocutory appellate review is available by certification from the district court. 28 U.S.C.A. § 1292.

[34] **Bankruptcy** Petition for leave; appeal as of right; certification

In a bankruptcy case, a party may seek leave to appeal an interlocutory bankruptcy court order from the district court or from the Bankruptcy Appellate Panel (BAP) with the consent of all the parties. 28 U.S.C.A. §§ 158(a)(3), 158(b)(1).

[35] **Bankruptcy** Petition for leave; appeal as of right; certification

Court of Appeals has discretion to hear interlocutory appeals from bankruptcy court orders if a lower court grants certification. 28 U.S.C.A. § 158(d)(2).

[36] **Mandamus** Modification or vacation of judgment or order

Failure of witnesses to seek interlocutory appeal in district court of bankruptcy court's order to compel them to testify remotely despite falling

outside geographic limitations of power of Central District of California to compel witness to testify at trial or other proceeding did not mandate denial of petition for mandamus relief, in trustee's adversary proceeding against trust that had been funded by loans to Chapter 7 debtor investment company seeking to disallow or equitably subordinate trust's proofs of claim, since district court heard and rejected witnesses argument challenging validity of their trial subpoenas, and therefore interlocutory review likely would have been futile. 28 U.S.C.A. § 158(a)(3).

[37] **Mandamus** Existence and Adequacy of Other Remedy in General

The possibility of certification, standing alone, is not a bar to mandamus relief. 28 U.S.C.A. § 1651(a).

[38] **Mandamus** Modification or vacation of judgment or order

Clear violation of Federal Rule of Civil Procedure defining "place of compliance" for subpoenas and geographical scope of federal court's power to compel witness to testify remotely at trial or other proceeding, by bankruptcy court in Central District of California requiring witnesses in United States Virgin Islands to give testimony when it did not have any authority to compel them to do so, could not be fully remedied through normal post-judgment appeal, weighing in favor of granting writ of mandamus from bankruptcy court's order in trustee's adversary proceeding against trust that had been funded by loans to Chapter 7 debtor investment company seeking to disallow or equitably subordinate trust's proofs of claim. 28 U.S.C.A. § 1651(a); Fed. R. Civ. P. 43(a), 45(c).

[39] **Mandamus** Evidence, witnesses, and depositions

Whether case involved oft-repeated error did not have to be analyzed in depth to determine whether mandamus relief was warranted on collateral issue of whether witnesses in United States Virgin Islands could be compelled to testify remotely despite falling outside geographic limitations of power of Central District of California to compel witness to testify at trial or other proceeding, in trustee's adversary proceeding against trust that had been funded by loans to Chapter 7 debtor investment company seeking to disallow or equitably subordinate trust's proofs of claim, since issue presented was important and novel, confusion over issue in district courts was ongoing, and issue likely would continue to evade review. 28 U.S.C.A. § 1651(a); Fed. R. Civ. P. 43(a), 45(c).

***1036** Petition for a Writ of Mandamus, B.C. No. 2:12-ap-02424-ER

Attorneys and Law Firms

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Corey R. Weber (argued), Ryan F. Coy, and Steven T. Gubner, BG Law LLP, Woodland Hills, California, for Real Party in Interest Jason M. Rund, Chapter 7 Trustee.

Before: Danielle J. Forrest and Gabriel P. Sanchez, Circuit Judges, and Nancy D. Freudenthal, * District Judge.

OPINION

FORREST, Circuit Judge:

Petitioners John and Poshow Ann Kirkland moved to quash trial subpoenas issued by the United States Bankruptcy Court for the Central District of California, requiring them to testify via contemporaneous video transmission from their home in the U.S. Virgin Islands. The bankruptcy court denied their motions, and the Kirklands seek mandamus

relief from this court. The Kirklands argue that Federal Rule of Civil Procedure 45(c)(1) prohibits the bankruptcy court from compelling them to testify, even remotely, where they reside out of state over 100 miles from the location of the trial. Mindful of the "extraordinary nature" of mandamus relief, *In re Williams-Sonoma, Inc.*, 947 F.3d 535, 538 (9th Cir. 2020), we conclude that it is warranted here as the Kirklands present a novel issue involving the interplay of two Federal Rules of Civil Procedure that has divided district courts across the country and that is likely to have significant continued relevance in the wake of technological advancements and professional norms changing how judicial proceedings are conducted. Moreover, because the scope of the court's subpoena power is a collateral matter, this issue is likely to evade direct appellate review. *See* *Perry v. Schwarzenegger*, 591 F.3d 1147, 1158–59 (9th Cir. 2010). Therefore, we grant the Kirklands' mandamus petition and order the bankruptcy court to quash their trial subpoenas.

I. BACKGROUND

The underlying litigation has a lengthy and complex history. We summarize only those facts relevant to the Kirklands' mandamus petition.

A. EPD Investments' Bankruptcy

The Kirklands are a married couple. Between 2007 and 2009, Mr. Kirkland invested in EPD Investments (EPD) by making a series of loans to this entity (EPD Loans). The negotiations for the EPD Loans occurred in California where the Kirklands lived at the time. In September 2009, the Kirklands created the Bright Conscience Trust (BC Trust) for their minor children, and Mr. Kirkland assigned the EPD Loans to BC Trust. Mrs. Kirkland is the sole trustee for BC Trust. Also ***1037** in 2009, Mr. Kirkland began serving as EPD's lawyer.

In December 2010, EPD's creditors forced it into involuntary Chapter 7 bankruptcy. Mr. Kirkland initially represented EPD in the bankruptcy proceedings. BC Trust filed proofs of claim in EPD's bankruptcy case based on the EPD Loans; Mr. Kirkland did not file an individual proof of claim.

The bankruptcy court appointed a Chapter 7 trustee. In October 2012, the trustee initiated the adversary proceeding underlying this petition against Mr. Kirkland and BC Trust in the United States Bankruptcy Court for the Central District of California. Four years later, the trustee filed the operative fourth amended complaint, seeking to disallow or equitably subordinate BC Trust's proofs of claim and to avoid allegedly fraudulent transfers that EPD made to Mr. Kirkland and BC Trust in the form of mortgage payments on the Kirklands' home. Specifically, the trustee alleged that EPD was a Ponzi scheme and that Mr. Kirkland, while acting as its outside counsel, was aware of and engaged in inequitable conduct to hide the company's insolvency. The trustee further alleged that Mr. Kirkland's misconduct should be imputed to BC Trust and the trust's proofs of claim disallowed or subordinated because BC Trust did not separately invest in EPD and was merely the assignee of Mr. Kirkland's interests in EPD. By 2014, the Kirklands had moved to the U.S. Virgin Islands. Nonetheless, they agreed to be deposed in Los Angeles in June 2017.

After Mr. Kirkland asserted his right to a jury trial on the fraudulent-transfer claims asserted against him, the district court withdrew the reference of the entire adversary proceeding from the bankruptcy court because of the commonality and overlap between the claims asserted against Mr. Kirkland and BC Trust. *In re EPD Inv. Co.*, 594 B.R. 423, 426 (C.D. Cal. 2018). The district court then bifurcated for trial the fraudulent-transfer claims against Mr. Kirkland from the other claims asserted against BC Trust. The Kirklands both testified in person at Mr. Kirkland's fraudulent-transfer trial held in California, and the jury returned a verdict in his favor.

Afterwards, the district court dismissed the trustee's equitable-subordination claim against Mr. Kirkland and returned the claims against BC Trust to the bankruptcy court. The district court explained that the bankruptcy court could rely on the testimony provided during the jury trial in adjudicating the claims against BC Trust but "[i]f the [b]ankruptcy [c]ourt determines that it needs substantial testimony from non-parties that would not be necessary if this [c]ourt were to try the matter ..., the parties may seek reconsideration of [the return] on that ground." In the proceedings against BC Trust, Mrs. Kirkland is a party in her capacity as sole trustee and Mr. Kirkland is a non-party witness.

B. The Kirklands' Trial Subpoenas

The bankruptcy court determined that it was necessary for the Kirklands to testify at BC Trust's trial, and it authorized the trustee to serve the Kirklands with trial subpoenas by certified mail and publication commanding them to testify remotely via video transmission from the U.S. Virgin Islands. The Kirklands each moved to quash their trial subpoenas, primarily arguing that they violated Federal Rule of Civil Procedure 45(c)'s geographic limitations.

The bankruptcy court denied the Kirklands' motions to quash, concluding that "good cause and compelling circumstances" warranted requiring their testimony "by way of contemporaneous video ***1038** transmission" under Federal Rule of Civil Procedure 43(a). The bankruptcy court analyzed the split among district courts regarding "whether Civil Rule 45's geographical restriction applies if a witness is permitted to testify by videoconference from a location chosen by the witness." [1] The bankruptcy court recognized that it could not compel the Kirklands to attend the trial in person because they now live in the Virgin Islands. And it reasoned that "[w]here a witness has been ordered to provide remote video testimony transmitted from the witness's home (or another location chosen by the witness)" under Rule 45(c), "that witness has not been compelled to attend a trial located more than 100 miles from the witness's residence." Thus, the bankruptcy court found that the challenged subpoenas satisfied Rule 45(c) because "the purpose of [Rule 45] is to protect witnesses from the burden of extensive travel."

The bankruptcy court heavily relied on its prior ruling granting the trustee's motion in limine to exclude transcripts of the Kirklands' depositions and testimony given in Mr. Kirkland's trial. BC Trust had informed the bankruptcy court that it intended to introduce these transcripts because the Kirklands were unwilling to travel to California to testify at BC Trust's trial and they could not be compelled to testify because they live more than 100 miles from the bankruptcy court. BC Trust argued that the Kirklands were "unavailable" under Federal Rule of Evidence 804, and the transcripts of their prior testimony were therefore admissible hearsay. The bankruptcy court disagreed that a hearsay exception applied because it concluded that the Kirklands' "unavailability ... has been engineered by the BC Trust for purely strategic purposes."

The bankruptcy court also reasoned that "the prior transcripts would be insufficient because certain testimony relevant to the equitable subordination claim was not introduced" at Mr. Kirkland's trial, and additional testimony was necessary. Additionally, in determining whether BC Trust engaged in any inequitable conduct, the bankruptcy court concluded that it needs to "assess the credibility of [the Kirklands], which [it] cannot do based solely on transcripts."

After the bankruptcy court made its in limine ruling, the Kirklands moved the district court to reconsider its return order and withdraw reference to the bankruptcy court. The district court denied the Kirklands' motion, explaining that in returning the proceedings to the bankruptcy court, it did not mandate that the bankruptcy court rely only on prior testimony and explicitly acknowledged that additional testimony may be needed in adjudicating the claims against BC Trust. The district court further directed that if the Kirklands failed to attend trial, the bankruptcy court would be "entitled to make whatever adverse findings it sees fit."

***1039** Lastly, the bankruptcy court detailed its positive experience with witnesses appearing remotely at proceedings conducted during the COVID-19 pandemic. The bankruptcy court explained that, in its view, remote testimony is an adequate substitute for in-person testimony because with technological advancements "there is little practical difference between in-person testimony and testimony via videoconference." For all these reasons, the bankruptcy court concluded that "good cause and compelling circumstances" warranted ordering the Kirklands to testify remotely.

C. The Kirklands' Attempted Appeal

After the bankruptcy court refused to quash the trial subpoenas, the Kirklands moved the bankruptcy court to certify an immediate interlocutory appeal to this court under 28 U.S.C. § 158(d)(2), or to the district court under § 158(a)(3). The bankruptcy court also denied this motion. The bankruptcy court concluded that the circumstances did not "justify an interlocutory appeal that would result in yet more delay." The bankruptcy court acknowledged that there was no controlling authority establishing that Rule 45 applies to remote testimony, but it nonetheless determined that the utility of certifying an interlocutory appeal was outweighed by the "need to finally bring this litigation to an end." The bankruptcy court also reasoned that certification was inappropriate because its denial of the Kirklands' motions to quash was based on factual findings related to its "compelling circumstances" and "good cause" analysis, not just legal conclusions.

The bankruptcy court denied the Kirklands' alternative request for leave to file an interlocutory appeal in the district court as "highly unusual" where the district court's decision would not be binding beyond the subject case and one of the main purposes of certification is to produce binding authority on unresolved questions of law. The Kirklands did not seek leave from the district court or the Ninth Circuit Bankruptcy Appellate Panel (BAP) to pursue an interlocutory appeal in either of those forums, as allowed under 28 U.S.C. § 158(a)(3), (b)(1).

D. Petition for a Writ of Mandamus

In May 2022, the Kirklands petitioned this court for a writ of mandamus directing the bankruptcy court to quash their trial subpoenas.[2] They argue that Rule 45(c) limits the subpoena power over both parties and non-parties who reside within 100 miles of the trial location unless they are employed or regularly transact business in the state where the trial occurs. The Kirklands contend that the bankruptcy court erred by relying on Rule 43(a) in ordering them to testify remotely because "Rule 43(a) governs the mechanical question of taking testimony, not the substantive question of which witnesses may be compelled to testify." They argue that whether remote testimony is permissible under Rule 43(a) "is entirely irrelevant to whether a party can be compelled to comply with a subpoena under Rule 45(c)."

The trustee, as the real party in interest, opposes the Kirklands' petition. The trustee argues that the bankruptcy court's order does not raise a purely legal issue regarding the scope of the subpoena power under Rule 45(c), as the Kirklands contend, but instead is based on a factual finding of "good cause in compelling circumstances" under Rule 43(a). The trustee also argues that although no court of appeals ***1040** "has considered the interplay between Rule 43(a) and Rule 45(c)," any such interplay is immaterial and mandamus relief is unwarranted because the advisory committee's notes to Rule 45 make clear that when remote testimony is authorized under Rule 43(a), "the witness can be commanded to testify from any place described in Rule 45(c)(1)."

We invited the bankruptcy court to respond to the Kirklands' mandamus petition, and it explained that it denied leave for the Kirklands to file a direct appeal because of the already long extended proceedings. But the bankruptcy court acknowledged that it would be appropriate for us "to exercise supervisory mandamus jurisdiction to resolve the undecided question of whether Civil Rule 45's geographical restriction applies where a witness is ordered to testify by means of remote video transmission from a location selected by the witness." For the same reasons that it articulated in denying the Kirklands' motions to quash, the bankruptcy court urged us to find that Rule 45's geographical limitations do not apply here. Pointing to a survey of bankruptcy attorneys and a working group convened by the Judicial Council of California, the bankruptcy court highlights that "the litigation landscape has permanently shifted towards the greater use of videoconference technology" and that witnesses, court staff, attorneys, and judges have had positive experiences with remote testimony in court proceedings.

II. DISCUSSION

[1] **[2]** **[3]** Under the All Writs Act, we have authority to issue writs of mandamus to lower courts. 28 U.S.C. § 1651(a); *see* *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004). This authority "extends to those cases which are within [our] appellate jurisdiction although no appeal has been perfected." *FTC v. Dean Foods Co.*, 384 U.S. 597, 603, 86 S.Ct. 1738, 16 L.Ed.2d 802 (1966) (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25, 63 S.Ct. 938, 87 L.Ed. 1185 (1943)). While writs of mandamus are most often issued to district courts, bankruptcy courts "constitute a unit of the district court," 28 U.S.C. § 151, and we hear appeals from bankruptcy courts through several avenues. *See* 28 U.S.C. § 158(d). Therefore, structurally, our mandamus jurisdiction over bankruptcy courts mirrors our mandamus authority over district courts, and we can issue writs of mandamus directly to bankruptcy courts because they are courts within our appellate jurisdiction.

[4] **[5]** **[6]** **[7]** **[8]** Mandamus is an "extraordinary remedy" appropriate only in "exceptional circumstances amounting to a judicial usurpation of power" or a "clear abuse of discretion." *Cheney*, 542 U.S. at 380, 124 S.Ct. 2576 (internal quotation marks and citations omitted). In determining whether issuance of a writ of mandamus is appropriate, we weigh the five *Bauman* factors:

> (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires. (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. (This guideline is closely related to the first.) (3) The district court's order is clearly erroneous as a matter of law. (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules. (5) The district court's order raises new and important problems, or issues of law of first impression.

In re Mersho, 6 F.4th 891, 897–98 (9th Cir. 2021) (quoting *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650, 654–55 (9th Cir. 1977)). This is not a mechanical analysis; we weigh the factors holistically "to determine whether, ***1041** on balance, they justify the invocation of 'this extraordinary remedy.' " *In re Sussex*, 781 F.3d 1065, 1071 (9th Cir. 2015) (citation omitted). Moreover, issuance of mandamus relief is discretionary; we are "neither compelled to grant the writ when all five factors are present, nor prohibited from doing so when fewer than five, or only one, are present." *Id.*; *see also* *Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Ct. for Dist. of Mont.*, 408 F.3d 1142, 1146 (9th Cir. 2005) ("[I]ndeed, the fourth and fifth will rarely be present at the same time."). But absence of clear error as a matter of law is dispositive and "will always defeat a petition for mandamus." *See* *In re Williams-Sonoma*, 947 F.3d at 538 (citation omitted).

[9] **[10]** **[11]** Mandamus relief can be appropriate to resolve novel and important procedural issues. For example, in *Schlagenhauf v. Holder*, the Supreme Court granted mandamus relief where the petitioner asserted that a district court order requiring a party to undergo a mental and physical examination exceeded the district court's authority and "the challenged order ... appear[ed] to be the first of its kind in any reported decision in the federal courts under [the governing Federal Rule of Civil Procedure]." 379 U.S. 104, 110, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964). We likewise have exercised mandamus authority to address "particularly important questions of first impression" regarding discovery, evidentiary, and other procedural issues. *Perry*, 591 F.3d at 1157 (listing cases); *see also* *In re U.S. Dep't of Educ.*, 25 F.4th 692, 705–06 (9th Cir. 2022) (issuing writ of mandamus to quash deposition subpoena); *Mondor v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 910 F.2d 585, 586–87 (9th Cir. 1990) (issuing writ of mandamus where district court's denial of petitioner's demand for a jury trial upon removal was inconsistent with the governing Federal Rule of Civil Procedure). Indeed, "[m]andamus is particularly appropriate when we are called upon to determine the construction of a federal procedural rule in a new context." *Valenzuela-Gonzalez v. U.S. Dist. Ct. for Dist. of Ariz.*, 915 F.2d. 1276, 1279 (9th Cir. 1990). Therefore, "[a]lthough 'the courts of appeals cannot afford to become involved with the daily details of discovery [or trial],' we may rely on mandamus to resolve 'new questions that otherwise might elude appellate review ....' " *Perry*, 591 F.3d at 1157 (citation omitted).

A. Error

[12] **[13]** **[14]** We start with the third *Bauman* factor because satisfaction of this factor "is almost always a necessary predicate for the granting of the writ." *In re U.S. Dep't of Educ.*, 25 F.4th at 698. The clear-error standard is highly deferential and typically requires prior authority from this court that prohibits the lower court's action. *In re Williams-Sonoma*, 947 F.3d at 538. However, this standard is met even without controlling precedent "if the 'plain text of the statute prohibits the course taken by the district court.' " *In re Mersho*, 6 F.4th at 898 (quoting *Cohen v. U.S. Dist. Ct. for N. Dist. of Cal.*, 586 F.3d 703, 710 (9th Cir. 2009)); *see also* *In re U.S. Dep't of Educ.*, 25 F.4th at 698. We must be left with "a firm conviction that the [lower] court misinterpreted the law ... or committed a clear abuse of discretion." *In re Walsh*, 15 F.4th 1005, 1009 (9th Cir. 2021) (second alteration in original) (internal quotation marks and citation omitted); *Valenzuela-Gonzalez*, 915 F.2d at 1279. We have also stated that "[w]here a petition for mandamus raises an important issue of first impression, ... a petitioner need show only 'ordinary (as opposed to clear) error.' " *Barnes v. Sea Haw. Rafting, LLC*, 889 F.3d 517, 537

(9th Cir. 2018) ***1042** (citation omitted); *see also* *Perry*, 591 F.3d at 1158–59; *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1305–07 (9th Cir. 1982). We do not take the opportunity to address the difference between clear error and ordinary error here because we conclude that mandamus relief is warranted under either standard.

[15] **[16]** **[17]** The issue raised by the Kirklands is narrow: whether Federal Rule of Civil Procedure 45(c)'s 100-mile limitation applies when a witness is permitted to testify by contemporaneous video transmission. As with a statute, we begin with the text and "give the Federal Rules of Civil Procedure their plain meaning." *Bus. Guides, Inc. v. Chromatic Commc'ns Enters.*, 498 U.S. 533, 540, 111 S.Ct. 922, 112 L.Ed.2d 1140 (1991) (citation omitted). If "the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case" our inquiry ceases. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002) (citation omitted). And while the Supreme Court has instructed that "[t]he Federal Rules of Civil Procedure should be liberally construed," it has also cautioned that "they should not be expanded by disregarding plainly expressed limitations." *Schlagenhauf*, 379 U.S. at 121, 85 S.Ct. 234.

Federal Rule of Civil Procedure 45(c) defines the "place of compliance" for subpoenas and the geographical scope of a federal court's power to compel a witness to testify at a trial or other proceeding. [3] There are two metrics. First, a person can be commanded to attend trial "within 100 miles of where the person resides, is employed, or regularly transacts business in person." Fed. R. Civ. P. 45(c)(1)(A). Second, a person can be commanded to attend a trial "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) ... would not incur substantial expense." Fed. R. Civ. P. 45(c)(1)(B). If a trial subpoena exceeds these geographical limitations, the district court "*must* quash or modify" the subpoena. Fed. R. Civ. P. 45(d)(3)(A)(ii) (emphasis added).

[18] **[19]** Here, the trustee subpoenaed the Kirklands to testify at a trial in California where it is undisputed the Kirklands no longer live, work, or regularly conduct in-person business. Therefore, we focus on the first metric—Rule 45(c)(1)(A)'s 100-mile limitation. For in-person attendance, the plain meaning of this rule is clear: a person cannot be required to attend a trial or hearing that is located more than 100 miles from their residence, place of employment, or where they regularly conduct in-person business. The Federal Rules of Bankruptcy Procedure incorporate this same limitation: "Although [Bankruptcy] Rule 7004(d) authorizes nationwide service of process, [Federal Rule of Civil Procedure 45] *limits the subpoena power to the judicial district and places outside the district which are within 100 miles of the place of trial or hearing.*" Fed. R. Bankr. P. 9016 advisory committee's note to 1983 amendment (emphasis added). Thus, we have no difficulty concluding that the Kirklands could not be compelled to testify *in person* at a trial in California. The question here is how Rule 45(c) applies when a person is commanded to testify at trial *remotely.*

The trustee argues that Federal Rule of Civil Procedure 43(a) avoids Rule 45(c)'s 100-mile limitation as applied to remote testimony. Specifically, the trustee (and the bankruptcy court) assert that remote testimony moves the "place of compliance" ***1043** under Rule 45(c) from the courthouse to wherever the witness is located, so long as that location is within 100 miles of the witness's home or place of business. Federal Rule of Civil Procedure 43, titled "Taking Testimony," provides that "testimony must be taken in open court" unless a federal statute or rule provides otherwise. Fed. R. Civ. P. 43(a). But it permits courts to allow remote testimony "[f]or good cause in compelling circumstances and with appropriate safeguards." *Id.*

On its face, Rule 43(a) does not address the scope of a court's power to compel a witness to testify or reveal any overlap with Rule 45. Rather, Rule 43(a) establishes *how* a witness must provide testimony at trial: "in open court" unless the law allows otherwise or there is sufficient basis for allowing remote testimony. *Id.* Stated another way, Rule 45(c) governs the court's power to require a witness to testify at trial, and Rule 43(a) governs the mechanics of how trial testimony is presented. And logically, determining the limits of the court's power to compel testimony precedes any determination about the mechanics of how such testimony is presented.

[20] **[21]** The trustee argues that the advisory committee's notes indicate that there is interplay between Rules 43 and 45 and that courts have the power to compel remote testimony beyond Rule 45(c)'s 100-mile limitation. We may look to the advisory committee's notes because they "provide a reliable source of insight into the meaning of a rule." *United States v. Vonn*, 535 U.S. 55, 64 n.6, 122 S.Ct. 1043, 152 L.Ed.2d 90 (2002); *see also* *Tome v. United States*, 513 U.S. 150, 167,

115 S.Ct. 696, 130 L.Ed.2d 574 (1995) (Scalia, J., concurring) (recognizing the advisory committee's notes are "*the* most persuasive" authority on the meaning of the Federal Rules of Civil Procedure as "they display the 'purpose,' or 'intent,' of the draftsmen" (cleaned up)). Indeed, we considered the advisory committee's notes in interpreting the "undue burden or expense" clause in Rule 45(c)(1). *See* *Mount Hope Church v. Bash Back*, 705 F.3d 418, 425, 427–28 (9th Cir. 2012). However, it is the text of the rules that control, and "the [n]otes cannot ... change the meaning that the Rules would otherwise bear." *Tome*, 513 U.S. at 168, 115 S.Ct. 696 (Scalia, J., concurring); *see also United States v. Bainbridge*, 746 F.3d 943, 947 (9th Cir. 2014).

The only express reference to interplay between Rules 43(a) and 45(c) is in the notes to Rule 45, which state: "When an order under Rule 43(a) authorizes testimony from a remote location, the witness can be commanded to testify from *any place described in Rule 45(c)(1)*." Fed. R. Civ. P. 45 advisory committee's note to 2013 amendment. This note does not do the work that the trustee contends it does. The *places* described in Rule 45(c)(1) are "a trial, hearing, or deposition" that are located within prescribed geographical proximity to where the witness lives, works, or conducts in-person business. Fed. R. Civ. P. 45(c)(1). The note does not state that Rule 43(a) changes the "place described in Rule 45(c)(1)" from the location of the proceedings to the location of the witness. And even if it did, it would not control because it would be contrary to the text of Rule 45(c)(1). *Tome*, 513 U.S. at 168, 115 S.Ct. 696 (Scalia, J., concurring); *Bainbridge*, 746 F.3d at 947. The note clarifies that Rule 45(c)'s geographical limitations apply even when remote testimony is allowed, and a witness is not required "to attend" a trial or other proceedings in the traditional manner.

The advisory committee's notes to Rule 43 reinforce this conclusion by explaining that remote testimony is the exception, and live, in-person testimony is strongly ***1044** preferred. *See* Fed. R Civ. P. 43(a) advisory committee's note to 1996 amendment. These notes state: "The importance of presenting live testimony *in court* cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling." *Id.* (emphasis added); *see also* *Draper v. Rosario*, 836 F.3d 1072, 1081–82 (9th Cir. 2016) (holding the district court properly disallowed remote video testimony under Rule 43 given the importance of "live testimony in court" (citing Fed. R Civ. P. 43(a) advisory committee's note to 1996 amendment)). These notes further instruct that "[t]he most persuasive showings of good cause and compelling circumstances [justifying remote testimony] are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place." Fed. R Civ. P. 43(a) advisory committee's note to 1996 amendment. "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." *Id.* The strong preference for in-person testimony would be greatly undermined if the rules were interpreted to impose fewer limits on a court's power to compel remote testimony than on its power to compel in-person testimony.

[22] **[23]** Federal Rule of Civil Procedure 32(a)(4) also supports the conclusion that the Kirklands fall outside the bankruptcy court's subpoena power because it defines witnesses who are "more than 100 miles from the place of ... trial" as "unavailable." Again, there is no indication in this rule that the geographical limitation can be recalibrated under Rule 43(a) to the location of a remote witness rather than the location of trial, nor is there any indication that courts can avoid the consequences of a witness's unavailability by ordering remote testimony. The fact remains that *all* witnesses —even those appearing remotely—must be compelled to appear, and a court can only compel witnesses who are within the scope of its subpoena power. Rule 43 does not give courts broader *power* to compel remote testimony; it gives courts *discretion* to allow a witness otherwise within the scope of its authority to appear remotely if the requirements of Rule 43(a) are satisfied. That is, neither the text of the rules nor the advisory committee's notes establish that the 100-mile limitation is inapplicable to remote testimony or that the "place of compliance" under Rule 45 changes the location of the trial or other proceeding to where the witness is located when a witness is allowed to testify remotely.

[24] No doubt there is intuitive appeal to the trustee's argument and bankruptcy court's view that the "place of compliance" under Rule 45(c) should be based on where the witness is located given that a primary concern underlying the Rule's geographical limitations is unfairly burdening witnesses with travel, *see generally* Fed. R. Civ. P. 45(c) advisory committee's notes to 1991 and 2013 amendments, but grafting this interpretation onto Rule 45(c) is unfounded for several reasons. First, it would essentially render Rule 45(d)(3)(A)(ii)—the requirement that courts quash subpoenas that reach "beyond the geographical limits specified in

Rule 45(c)"—a nullity as related to remote testimony. *See* *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' " (citations omitted)). Rule 45(d)(3)(A)(ii) plainly instructs that courts *must* "quash or modify" subpoenas ***1045** that exceed Rule 45(c)'s "geographical limits," reinforcing the conclusion that these limits define the scope of a court's *power* to compel a witness to participate in a proceeding, *see* *Hill v. Homeward Residential*, 799 F.3d 544, 553 (6th Cir. 2015) (concluding Rule 45 and its "geographic limitations" should be interpreted and enforced "as written").

Second, interpreting "place of compliance" as the witness's location when the witness testifies remotely is contrary to Rule 45(c)'s plain language that trial subpoenas command a witness to "attend *a trial*." Fed. R. Civ. P. 45(c)(1) (emphasis added). A trial is a specific event that occurs in a specific place: where the court is located. *See* Fed. R. Civ. P. 77(b) ("Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom."). No matter where the witness is located, how the witness "appears," or even the location of the other participants, *trials* occur in a court. [4] This concept is expressed in Rule 43(a)'s requirement that witnesses—even remote witnesses—must provide their testimony "in open court." *Id.* For this reason, application of Rule 45(c)'s 100-mile limitation to both trial and deposition subpoenas is not internally inconsistent because unlike trials, there is no ordinary or mandated location for depositions. The "place of compliance" for a deposition subpoena can be any appropriate location "within 100 miles of where the [witness] resides ...." Fed. R. Civ. P. 45(c)(1)(A). [5]

[25] **[26]** Perhaps one could argue that the "place" of trial, like other proceedings, is changing with modern technology. But we "generally seek[ ] to discern and apply the ordinary meaning of [a text] at the time of [its] adoption," *BP P.L.C. v. Mayor and City Council of Balt.*, —— U.S. ——, 141 S. Ct. 1532, 1537, 209 L.Ed.2d 631 (2021), and there is no indication that Rule 45's reference to attending "a trial" was intended to refer to anything other than the location of the court conducting the trial. *Cf.* *Valenzuela-Gonzalez*, 915 F.2d at 1281 ("Absent a determination by Congress that closed circuit television may satisfy the presence requirement of the [criminal] rules, we are not free to ignore the clear instructions of [the] Rules."). Indeed, the advisory committee reinforced the importance of focusing on the location of the proceeding in discussing the 2013 amendment to Rule 45 that resolved a split in authority about whether a party (as opposed to a non-party) who resided more than 100 miles from where the trial was held could be compelled to testify: "These changes resolve a conflict that arose after the 1991 amendment about a court's authority to compel a party or party officer to travel long distances to testify at trial; such testimony may now be required only as specified in new Rule 45(c)."

Third, if the "place of compliance" for a trial subpoena could change from the courthouse to the witness's location, there would be no reason to consider a long-distance witness "unavailable" or for the rules to provide an alternative means for presenting evidence from long-distance witnesses that are not subject to the court's subpoena power. Courts could simply find, as the bankruptcy court did here, that live testimony from a witness located ***1046** outside the geographical limitations of Rule 45 was nonetheless necessary, which constitutes "good cause in compelling circumstances" to justify compelling their remote testimony. Fed. R. Civ. P. 43(a).

Here, the trustee moved in limine to prevent BC Trust from introducing transcripts of the Kirklands' prior sworn testimony at trial as inadmissible hearsay. BC Trust argued that the transcripts were admissible because the Kirklands are not subject to the bankruptcy court's subpoena power and are therefore "unavailable" under Federal Rule of Evidence 804(a)(5). The bankruptcy court concluded that the transcripts were inadmissible because the Kirklands' unavailability was "engineered by the BC Trust for purely strategic purposes." *See* Fed. R. Civ. P. 32(a)(4)(B) (a witness's deposition transcript may not be used at trial if "the witness's absence was procured by the party offering the deposition"); Fed. R. Evid. 804(a) (a prior sworn statement of an unavailable witness is not admissible "if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying"). We need not address the validity of this evidentiary ruling because it is immaterial to the question before us regarding the bankruptcy court's subpoena power. Whether or not the Kirklands are properly considered "unavailable" for evidentiary purposes, it is undisputed that they reside and work more than 100 miles from the bankruptcy court conducting the subject trial.

In sum, accepting the trustee's and bankruptcy court's reasoning in this case would stretch the federal subpoena power well beyond the bounds of Rule 45, which focuses on the *location of the proceeding* in which a witness is compelled to testify.

[27] Before the proliferation of videoconference technology, Rule 45's strict geographical limitation was simple: if a witness was located further from the courthouse than Rule 45 proscribes, the witness could not be compelled to testify at trial. *See, e.g.*, *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1019 (9th Cir. 2004) (recognizing that a witness who lived more than 100 miles from the court was "outside of the court's subpoena power" and therefore "unavailable" under Federal Rule of Civil Procedure 32 and Federal Rule of Evidence 804); *McGill v. Duckworth*, 944 F.2d 344, 353–54 (7th Cir. 1991) (noting that the court's subpoena power to compel trial witnesses is "limited to its district and a 100-mile radius around the courthouse," and that a court does not have any " 'inherent powers' to compel the attendance of a witness who is outside the court's subpoena power"), *overruled on other grounds by* *Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994); *In re Guthrie*, 733 F.2d 634, 637 (4th Cir. 1984) ("[A] nonparty witness outside the state in which the district court sits, and not within the 100-mile bulge, may not be compelled to attend a hearing or trial, and the only remedy available to litigants, if the witness will not attend voluntarily, is to take his deposition ...."); *Jaynes v. Jaynes*, 496 F.2d 9, 10 (2nd Cir. 1974) (noting that district courts have the power only to subpoena witnesses in civil cases who "reside within the district or without the district but within 100 miles of the place of hearing or trial"). While technology and the COVID-19 pandemic have changed expectations about how legal proceedings can (and perhaps should) be conducted, the rules defining the federal subpoena power have not materially changed. We are bound by the text of the rules. *See* *Amchem Prods. v. Windsor*, 521 U.S. 591, 620, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) ("The text of a rule ... limits judicial inventiveness."). Notwithstanding the ***1047** bankruptcy court's positive experiences with videoconferencing technology, any changes to Rule 45, is one "for the Rules Committee and not for [a] court." *Swedberg v. Marotzke*, 339 F.3d 1139, 1145 (9th Cir. 2003); *see also* *In re Cavanaugh*, 306 F.3d 726, 731–32 (9th Cir. 2002) ("Congress enacts statutes, not purposes, and courts may not depart from the statutory text because they believe some other arrangement would better serve the legislative goals.").

Therefore, we conclude that the bankruptcy court "misinterpreted the law" in its construction of Rule 45(c) as applied to witnesses allowed to testify remotely under Rule 43(a) and the third *Bauman* factor weighs in favor of granting mandamus relief. *In re Walsh*, 15 F.4th at 1009 (internal quotation marks and citation omitted); *see also* *In re Cavanaugh*, 306 F.3d at 731–32 (issuing the writ where the district court "went off the statutory track").

B. Important Issue of First Impression

[28] The fifth *Bauman* factor also weighs in favor of granting mandamus relief. This factor "considers whether the petition raises new and important problems or issues of first impression." *In re Mersho*, 6 F.4th at 903; *see also* *In re Cement Antitrust Litig.*, 688 F.2d at 1304. As previously stated, "[m]andamus is particularly appropriate when we are called upon to determine the construction of a federal procedural rule in a new context." *Valenzuela-Gonzalez*, 915 F.2d at 1279. Whether a witness can be compelled to testify remotely despite falling outside Rule 45's geographic limitations is an important issue given the recent proliferation of videoconference technology in all types of judicial proceedings. Indeed, the bankruptcy court acknowledges that this issue is likely to arise with greater frequency following the COVID-19 pandemic.

Our system's previously noted strong preference for live, in-person testimony has a long pedigree. *See* *Crawford v. Washington*, 541 U.S. 36, 43, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) ("The common-law tradition is one of live testimony in court subject to adversarial testing[.]"); *Coy v. Iowa*, 487 U.S. 1012, 1017–20, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988) (explaining—in terms of the Confrontation Clause—that the right to "face-to-face confrontation" and cross-examination "ensure the integrity of the factfinding process" (cleaned up) (citation omitted)); *Donnelly v. United States*, 228 U.S. 243, 273–76, 33 S.Ct. 449, 57 L.Ed. 820 (1913) (discussing the important safeguards associated with "in person" testimony); *United States v. Thoms*, 684 F.3d 893, 905 (9th Cir. 2012) (noting "the Supreme Court and our

court have repeatedly cited the value of live testimony with respect"). The rules were written with both an understanding of and agreement with this historical view. *See* Fed. R. Civ. P. 43(a) advisory committee's note to 1996 amendment ("The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition."). As evidenced by the diverging views in the district courts, application of the rules to testimony provided via contemporaneous video transmission has been perplexing and likely will continue to be so. Therefore, we conclude that the issue raised by the Kirklands' petition is ripe for our consideration and is "a new and far reaching question of major importance ... [the] resolution [of which] would add importantly to the efficient and orderly administration of the district courts." *In re Cement Antitrust Litig.*, 688 F.2d at 1305; *see also* *Perry*, 591 F.3d at 1158–59; ***1048** *Nat'l Right to Work Legal Def. & Educ. Found., Inc. v. Richey*, 510 F.2d 1239, 1243 (D.C. Cir. 1975) (recognizing that mandamus review is appropriate "where the decision will serve to clarify a question that is likely to confront a number of lower court judges in a number of suits before appellate review is possible, as, for example, where the district judges are in error, doubt, or conflict on the meaning of a rule of procedure").

C. Remaining *Bauman* Factors

[29] The third and fifth *Bauman* factors are sufficient on their own to warrant granting mandamus relief in this case. *See* *In re Sussex*, 781 F.3d at 1076 (issuing the writ based on a strong showing of *Bauman* factors three and five); *Portillo v. U.S. Dist. Ct.*, 15 F.3d 819, 822 (9th Cir. 1994) (similar). Nonetheless, we consider the remaining factors.

1. Alternative Means of Relief

[30] The first *Bauman* factor considers whether a petitioner seeking mandamus relief has other means of attaining the desired relief. *In re United States*, 884 F.3d 830, 834 (9th Cir. 2018). The availability of relief through the ordinary review process weighs against granting mandamus relief. *See* *In re Orange, S.A.*, 818 F.3d 956, 963–64 (9th Cir. 2016); *Cole v. U.S. Dist. Ct. for the Dist. of Idaho*, 366 F.3d 813, 820 (9th Cir. 2004).

[31] **[32]** Here, the Kirklands' challenge to their subpoenas is a collateral matter, and an "order[ ] denying a motion to quash a Rule 45 subpoena generally cannot be immediately appealed." *United States v. Acad. Mortg. Corp.*, 968 F.3d 996, 1006 (9th Cir. 2020). Instead, absent discretionary interlocutory review, discussed further below, to obtain effective review a litigant generally must "either seek mandamus, or disobey the order and then appeal the resulting contempt citation." *In re Grand Jury Investigation*, 966 F.3d 991, 994 (9th Cir. 2020). Because we have not required a litigant to "incur a sanction, such as contempt, before it may seek mandamus relief," there is support for the first *Bauman* factor. *United States v. Fei Ye*, 436 F.3d 1117, 1122 (9th Cir. 2006); *see also* *SG Cowen Sec. Corp. v. U.S. Dist. Ct. for N. Dist. of Cal.*, 189 F.3d 909, 913–14 (9th Cir. 1999) (noting third parties "could not be expected" to seek review through contempt proceedings).

[33] However, the availability of interlocutory review warrants specific consideration here given that this petition arises from a bankruptcy case. In the ordinary civil case, interlocutory appellate review is available by certification from the district court under 28 U.S.C. § 1292. *ICTSI Oregon, Inc. v. Int'l Longshore & Warehouse Union*, 22 F.4th 1125, 1130 (9th Cir. 2022). Under this statute, if the district court certifies that an interlocutory order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation," we have discretion to exercise interlocutory review. 28 U.S.C. § 1292(b); *Bank of N.Y. Mellon v. Watt*, 867 F.3d 1155, 1159 (9th Cir. 2017). We have held that failing to seek certification under § 1292(b) does not bar granting mandamus relief. *Cole*, 366 F.3d at 817 n.4; *see also* *In re Orange, S.A.*, 818 F.3d at 963.

[34] **[35]** In bankruptcy cases, there are three additional means for seeking interlocutory review. 28 U.S.C. § 158(a)(3), (b)(1), (d)(2); *see also* *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 252–54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). Primarily, a party may seek leave to appeal an

interlocutory bankruptcy court order from (1) the district court, or (2) "with the consent of ***1049** all the parties," from the BAP. 28 U.S.C. § 158(a)(3), (b)(1). [6] We also have discretion to hear interlocutory appeals from bankruptcy court orders if a lower court grants certification under 28 U.S.C. § 158(d)(2). *Bullard v. Blue Hills Bank*, 575 U.S. 496, 508, 135 S.Ct. 1686, 191 L.Ed.2d 621 (2015); *Bank of N.Y. Mellon*, 867 F.3d at 1159. Under § 158(d)(2), the bankruptcy court, the district court, or the BAP may, "acting on its own motion or on the request of a party," certify that:

> (i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance; (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; *or* (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken.

28 U.S.C. § 158(d)(2)(A)(i)–(iii) (emphasis added).

[36] **[37]** Here, the Kirklands moved the bankruptcy court to certify an interlocutory appeal to this court under § 158(d)(2) and alternatively to the district court under § 158(a)(3). The bankruptcy court denied both requests. But the Kirklands did not seek leave from the district court to file an interlocutory appeal. [7] The Kirklands justify this failure by asserting that "[t]here is no exhaustion requirement" for seeking mandamus relief and that decisions from the district court and the BAP bind only the parties and provide no procedural guidance to lower courts. The Kirklands' argument fails to appreciate that the availability of alternate means for obtaining relief weighs against mandamus relief where the Supreme Court has clearly instructed that the writ of mandamus is not to be used "as a substitute for the regular appeals process." *Cheney*, 542 U.S. at 380–81, 124 S.Ct. 2576. And the district court and the BAP, not this court, are chiefly charged with reviewing interlocutory bankruptcy orders. *See* 28 U.S.C. § 158(a)(3); *Bullard,* 575 U.S. at 508, 135 S.Ct. 1686. Thus, we do not treat lightly the Kirklands' failure to seek interlocutory review in the district court. But we nonetheless conclude that their failure does not mandate denial of mandamus relief under the unique circumstances of this case. [8]

***1050** The Kirklands did seek relief from the district court related to the specific issue raised in this petition by filing a motion in the district court. We previously recognized a narrow futility exception to the no-alternate-means-of-relief limitation. *See* *Cole*, 366 F.3d at 820. In *Cole*, the petitioner failed to seek reconsideration of a magistrate judge's non-dispositive order with the district court under 28 U.S.C. § 636(b)(1)(A). *Id.* at 816. We explained that the "general rule" that mandamus relief is warranted only where the petitioner has no other means for seeking relief "may give way to an exception if the petitioner can convincingly demonstrate that reconsideration by the district court would have been futile." *Id.* at 820; *see also* *id.* at 819 n.9 (discussing a Third Circuit case that recognized "a narrow exception to the general rule requiring review of the magistrate judge's non-dispositive orders by the district court before mandamus relief can be issued"). But we ultimately concluded that the petitioner failed to establish futility in that case. *Id.* at 820.

Unlike in *Cole*, where the petitioner had an "absolute right to seek district court reconsideration of the magistrate judge's decision" and did not pursue *any* review before seeking mandamus relief in this court, *id.* at 816, 818, the Kirklands did attempt to obtain review of the bankruptcy court's decision before seeking relief in this court. Mrs. Kirkland, as trustee of BC Trust, unsuccessfully sought review in the district court of the scope of the bankruptcy court's subpoena power by seeking reconsideration of the district court's reference of BC Trust's case to the bankruptcy court. Because the district court denied the motion for reconsideration, the Kirklands argue that requiring them to seek further interlocutory review in the district court would be futile. We agree.

When the district court referred the claims against BC Trust to the bankruptcy court, it stated that the bankruptcy

court could "rely on the testimony provided during the jury trial" in Mr. Kirkland's prior trial conducted in district court but that "[i]f the [b]ankruptcy [c]ourt determines that it needs substantial testimony from non-parties that would not be necessary if th[e district] [c]ourt were to try the matter (presumably because the [district c]ourt observed the testimony given at the jury trial) ..., the parties may seek reconsideration of [the reference] on that ground." Mrs. Kirkland sought reconsideration from the district court after the bankruptcy court ruled that BC Trust could not introduce transcripts of the Kirklands' prior testimony and required the Kirklands to present live testimony. Specifically, the motion for reconsideration argued, in part, that the Kirklands "cannot be compelled to appear at trial because they reside in the U.S. Virgin Islands, which is more than 100 miles from the Court." The district court denied reconsideration, stating that if the Kirklands "fail[ ] to attend trial, the [b]ankruptcy [c]ourt is entitled to make whatever adverse findings it sees fit." Because the district court heard and rejected the Kirklands' argument challenging the validity of their trial subpoenas, we are persuaded that requiring the Kirklands to seek interlocutory review in the district court likely would be futile.

For these reasons, we conclude that the first *Bauman* factor does not weigh against granting mandamus relief in this case. [9]

*1051 2. Likelihood of Irreparable Harm

[38] Our inquiry under the second *Bauman* factor is closely related to the first—the Kirklands must demonstrate that they will suffer harm that cannot be remedied through normal post-judgment appeal. *See* *In re Orange, S.A.*, 818 F.3d at 963–64. The Kirklands contend that they will be harmed by having to testify at BC Trust's trial after they have already given testimony in the underlying proceeding twice. They also contend that testifying remotely would be "inadequate[ ]," and that if they are forced to wait to challenge the bankruptcy court's denial of their motions to quash until after BC Trust's trial, the error of being wrongly forced to testify will be irremediable.

Recently, we concluded that the harm suffered from having to comply with an invalid deposition subpoena was "the intrusion of the deposition itself," which was "not correctable on appeal, even if [the deponent's] testimony is excluded at trial." *In re U.S. Dep't of Educ.*, 25 F.4th at 705. The same reasoning applies here. If the Kirklands comply with their subpoenas and testify at trial, the violation of having to give testimony when the bankruptcy court has no authority to compel them to do so cannot be fully remedied post-judgment. Therefore, the second *Bauman* factor also supports granting mandamus relief.

3. Oft-Repeated Error

[39] Finally, the fourth *Bauman* factor "looks to whether the case involves an 'oft-repeated error.' " *In re Mersho*, 6 F.4th at 903 (citation omitted). The fourth and fifth factors are rarely present at the same time. *Id.*; *Admiral Ins. Co. v. U.S. Dist. Ct. for Dist. of Ariz.*, 881 F.2d 1486, 1491 (9th Cir. 1989). However, we have recognized that the fourth and fifth factors can both be present when a procedural rule is being applied in a new context because this situation presents "a novel question of law that is simultaneously likely to be 'oft-repeated.' " *Valenzuela-Gonzalez*, 915 F.2d at 1279; *see also* *Cohen v. U.S. Dist. Ct. for N. Dist. of Cal.*, 586 F.3d 703, 711 (9th Cir. 2009). Because we conclude that the fifth factor strongly weighs in favor of exercising our mandamus authority, we do not analyze the fourth factor in depth and simply reiterate that, given the importance and novelty of the issue presented and the ongoing confusion in the district courts, providing guidance regarding Rule 45's application to remote testimony is warranted, especially where this collateral issue is likely to continue to evade review. *See* *Perry*, 591 F.3d at 1159.

III. CONCLUSION

We conclude that mandamus relief is warranted. We have not previously addressed the application of Rule 45(c)'s geographical limitations to testimony provided via remote video transmission, which is a question of increasing import given the recent proliferation of such technology in judicial proceedings. Moreover, we conclude that despite changes in technology and professional norms, the rule governing the court's subpoena power has not changed and does not except remote appearances from the geographical limitations on the power to compel a witness to ***1052** appear and testify at

trial. Because the bankruptcy court concluded otherwise, we grant the Kirklands' petition and issue a writ of mandamus ordering the bankruptcy court to quash their trial subpoenas. *See* *Cheney*, 542 U.S. at 380, 124 S.Ct. 2576.

PETITION GRANTED. [10]

All Citations

75 F.4th 1030, 23 Cal. Daily Op. Serv. 7582, 2023 Daily Journal D.A.R. 7683

Footnotes

* The Honorable Nancy D. Freudenthal, United States District Judge for the District of Wyoming, sitting by designation.

1 There appear to be three different approaches regarding whether a witness may be compelled to testify remotely from a location that is beyond Rule 45(c)'s 100-mile geographic limitation. *See, e.g.,* *Off. Comm. of Unsecured Creditors v. CalPERS Corp. Partners LLC*, 2021 WL 3081880, at *2 (D. Me. July 20, 2021) (listing cases). First, some courts have held that Rule 45(c)'s geographic limitation is firm, and Rule 43(a) cannot be an end-run around it. *Id.* Second, some courts have held that an order requiring remote appearance under Rule 43(a) automatically satisfies Rule 45(c)'s geographical limitation because it does not compel the witness to travel more than 100 miles. *Id.* And third, some courts have held that Rule 43(a) may be used to compel remote testimony from a location within 100 miles of the witness's residence, but only upon a showing of good cause in compelling circumstances. *Id.*

2 The bankruptcy proceeding is stayed pending our determination of the Kirklands' petition.

3 Rule 45 applies to subpoenas in bankruptcy proceedings. Fed. R. Bankr. P. 9016.

4 It is nonsensical to say that a trial is occurring in a witness's living room when a witness is allowed to appear "by contemporaneous transmission" but that a trial is occurring in a courtroom the rest of the time. *See* Fed. R. Civ. P. 43(a).

5 *See also* Fed. R. Civ. P. 45(c)(2) (providing that "[a] subpoena may command ... production of documents ... or tangible things *at a place within 100 miles of*" the person's residence or place of business (emphasis added)).

6 Because obtaining interlocutory review from the BAP under § 158(b)(1) depends on agreement of the parties, we focus our analysis on the Kirklands' ability to seek interlocutory review from the district court under § 158(a)(3).

7 Although the bankruptcy court stated that it "can certify an appeal of an interlocutory order to the [d]istrict [c]ourt rather than [this court]" under § 158(d)(2)(A), there is no support for that assertion. Certification under § 158(d)(2) is directed only to a court of appeals. *Bullard*, 575 U.S. at 508, 135 S.Ct. 1686. Interlocutory review in the district court arises under § 158(a)(3), which is a separate procedure. Leave under § 158(a)(3) must be sought *from the district court*, not the bankruptcy court. *See* 28 U.S.C. § 158(a)(3); Fed. R. Bankr. P. 8004 (outlining procedure for seeking leave from the district court or the BAP to

appeal an interlocutory bankruptcy order). Thus, the Kirklands erroneously sought leave to seek interlocutory review in the district court from the bankruptcy court.

8 We do not address whether review by the district court under 28 U.S.C. § 158(a)(3) is sufficiently analogous to certification to the court of appeals under § 1292(b) such that our rule that "the possibility of certification, standing alone, is not a bar to mandamus relief" should also apply in this context. *In re Orange, S.A.*, 818 F.3d at 963; *see In re Belli*, 268 B.R. 851, 858 (B.A.P. 9th Cir. 2001) ("We look for guidance to standards developed under 28 U.S.C. § 1292(b) to determine if leave to appeal should be granted [under § 158(a)(3)], even though the procedure is somewhat different."); *Ad Hoc Comm. of Holders of Trade v. PG&E Corp.*, 614 B.R. 344, 351 (N.D. Cal. 2020) (same); *see also* 1 *Collier on Bankruptcy* ¶ 5.08[4] (16th ed. 2023) (noting that § 1292(b) is the closest analogy to seeking leave to appeal under § 158(a)(3)).

9 Even if the first *Bauman* factor did weigh against mandamus relief, we have granted mandamus relief where this factor is lacking, especially where "the fifth *Bauman* factor (novel issue of circuit law) is satisfied," as it is here. *Cole*, 366 F.3d at 820 n.10; *see, e.g., San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1099–100 (9th Cir. 1999) (issuing the writ where the second, third, and fifth *Bauman* factors were satisfied, despite finding that the "first *Bauman* factor tip[ped] against mandamus relief" because a direct appeal was available).

10 The trustee's Request for Judicial Notice, Dkt. No. 10, is DENIED.

End of Document

TAB 9B

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February 13, 2024

H. Thomas Byron III, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, D.C. 20544
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Re: Proposed Amendments to Rules 43 and 45 of the Federal Rules of Civil Procedure

Dear Secretary Byron:

We respectfully submit the enclosed proposal to amend Rules 43(a) and 45(c) of the Federal Rules of Civil Procedure for the consideration of the Advisory Committee on Civil Rules.

The proposed changes (i) make live trial testimony via contemporaneous transmission under Rule 43(a)—not deposition video—the preferred alternative for witnesses whose in-person attendance at trial cannot be secured, and (ii) clarify the ability of courts to issue subpoenas compelling a witness to testify via live contemporaneous transmission from any location within the geographic limitations of Rule 45(c), i.e., that the 100-mile limit applies to the location where the witness will sit for the contemporaneous transmission, not the courthouse where the trial is held.

The proposed amendments effectuate a long overdue modernization of civil trial practice and promote the just, speedy, and inexpensive determination of civil actions promised by Rule 1. They also resolve a growing split among federal district courts as to the applicability of Rule 45(c)'s 100-mile limit to testimony via live contemporaneous transmission under Rule 43(a)—a question first considered by a court of appeals last July in *In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023). There, the Ninth Circuit concluded that, "[w]hile technology and the COVID-19 pandemic have changed expectations about how legal proceedings can (and perhaps should) be conducted, the rules defining the federal subpoena power have not materially changed," which is an issue "for the Rules Committee and not for [a] court." *Id.* at 1046–47.

This proposal does not seek to change the preference for live, in-person trial testimony that is a longstanding value of our legal tradition. But there is little dispute among lawyers and judges

that testimony via contemporaneous live transmission better promotes the truth-seeking goal of trials than videotaped deposition testimony, particularly with recent advances in videoconferencing technology. But, contrary to these uncontroversial principles, courts continue to interpret Rules 43 and 45 and their Advisory Committee notes as requiring them to conduct trials in which juries are subjected to hours (if not days) of testimony presented in the form of spliced, disjointed video clips from depositions taken during the discovery phase. Replacing deposition testimony with testimony via live contemporaneous transmission (from a location remote from the trial court but otherwise within the limitations of Rule 45(c)) for witnesses whose physical presence at trial cannot be obtained will greatly enhance the truth-seeking function of our civil justice system, reduce the costs and increase the efficiency of civil litigation, and promote justice by maximizing access to evidence.

The proponents of these amendments are listed below. For the convenience of the Committee, all communications can be directed to the undersigned at tom@hbsslaw.com, copying racheld@hbsslaw.com.

Respectfully submitted,

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PROPOSED AMENDMENTS TO RULES 43 AND 45 OF THE FEDERAL RULES OF CIVIL PROCEDURE

EXECUTIVE SUMMARY

This proposal seeks to modify Rules 43 and 45 of the Federal Rules of Civil Procedure to: (1) ensure that courts can require witnesses unable or unwilling to testify live in person at trial to testify live via contemporaneous transmission under Rule 43(a), and (2) clarify that the place of compliance for subpoenas for live trial testimony via contemporaneous transmission is the location from which the testimony is transmitted, not the courthouse where the trial is conducted. The specific proposed textual changes are set forth in the next section.

It is axiomatic that live witness testimony is essential to the truth-seeking mission of trial. There is no real debate that jurors' ability to evaluate witness demeanor and credibility is best served by the presentation of live witnesses in open court subject to real-time cross-examination in the physical presence of the jury. But courts and litigants also have long recognized that, when a witness cannot be physically present at trial, the next best option is for that witness to testify live via contemporaneous transmission. Indeed, some courts have questioned whether there is any meaningful difference between in-person and remote testimony, particularly in light of advancements in videoconferencing and courtroom technology necessitated by the COVID-19 pandemic. Testimony by deposition, in contrast, not only undermines juror interest and engagement, but it is often taken during the discovery phase of the case, when the litigants often have not yet narrowed the case to the triable issues. Yet Rule 43 and its accompanying Advisory Committee notes continue to favor the presentation of pre-recorded deposition video over live testimony via contemporaneous transmission.

The Advisory Committee sought to remedy this with the 2013 amendments to Rule 45 permitting nationwide service of subpoenas. Read in tandem with Rule 43(a), the amended version of Rule 45(c) was intended to empower courts to issue subpoenas compelling trial testimony via contemporaneous transmission from any place within 100 miles of the witness's location. However, since the 2013 amendments went into effect, federal courts have reached starkly different conclusions about the place of compliance for subpoenas for trial testimony via contemporaneous transmission, with a significant and growing minority of courts concluding that the 1996 amendments to Rule 43(a) preclude them from ordering remote trial testimony from witnesses outside Rule 45's 100-mile limit. The confusion has created costly uncertainties for litigants, unnecessarily burdened trial courts with time-consuming disputes, and enabled litigants to game the Federal Rules to shield inculpatory witnesses from trial. The proposed amendments, if implemented, would eliminate this confusion, enhance the truth-seeking mission of trials, and promote more efficient, cost-effective, and just civil litigation.

PROPOSED TEXTUAL CHANGES

RULE 43

The proposed amendments to Rule 43(a) below maintain the gold standard of live, in-person trial testimony, but promote the use of live testimony via contemporaneous submission, rather than deposition testimony, as the default alternative.

> (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,~~ In the event in-person testimony at trial cannot be obtained, the court, with appropriate safeguards, ~~may~~must ~~permit testimony~~require witnesses to testify in open court by contemporaneous transmission from a different location unless precluded by good cause in compelling circumstances or otherwise agreed by the parties. The existence of prior deposition testimony alone shall not satisfy the good cause requirement to preclude contemporaneously transmitted trial testimony.

RULE 45

The proposed amendments to Rule 45(c) below clarify that the "place of compliance" for subpoenas for testimony via contemporaneous transmission is the location from which that testimony is transmitted, not the location of the courthouse where the transmitted testimony will be received.

> (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 and would not incur substantial expense~~.~~; or
> >
> > (C) by contemporaneous transmission from anywhere within the United States, provided the location commanded for the transmission complies with 45(c)(1)(A) or (B).

BACKGROUND & POINTS IN SUPPORT OF PROPOSED AMENDMENTS

A. Rule 43(a) should make live trial testimony by contemporaneous transmission, not prerecorded deposition video, the alternative to live, in-person trial testimony.

1. With modern videoconferencing technology, live testimony via contemporaneous transmission offers the same benefits as in-person testimony.

The "inherent goal of our system of justice established by our forefathers" is to ensure "the 'powerful force of truth-telling.'"[1] It is universally recognized that this goal is best served through the presentation of live, in-person testimony.[2] As the Advisory Committee's notes to the 1996 amendments to Rule 43(a) emphasize, "The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition."

But courts and practitioners have long recognized that, when a witness cannot be physically present in the courtroom, testimony by contemporaneous video transmission satisfies many of the goals of in-person testimony, providing an opportunity for live cross-examination and enabling the factfinder to evaluate the witness's demeanor and credibility in real time.[3] And this is more true now than ever: the COVID-19 pandemic spurred dramatic improvements to videoconferencing technology and accelerated federal courts' already

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[1] *In re Actos (Pioglitazone) Prods. Liab. Litig.*, No. 12-cv-64, 2014 WL 107153, at *6 (W.D. La. Jan. 8, 2014) (quoting Fed. R. Civ. P. 43(a) advisory committee's note to 1996 amendment); *see also In re Vioxx Prods. Liab. Litig.*, 439 F. Supp. 2d 640, 644 (E.D. La. 2006).

[2] *See Actos*, 2014 WL 107153, at *5 ("Ideally, all witnesses would appear in Open Court and testify before the trier of fact . . . ."); *Vioxx*, 439 F. Supp. 2d at 644 ("[L]ive, in-person testimony, is optimal for trial testimony."); Fed. R. Civ. P. 43 advisory committee's note to 1996 amendment ("The importance of presenting live testimony in court cannot be forgotten.").

[3] *See Warner v. Cate,* No. 12-cv-1146, 2015 WL 4645019, at *1 (E.D. Cal. Aug. 4, 2015) ("Because a witness testifying by video is observed directly with little, if any, delay in transmission, . . . courts have found that video testimony can sufficiently enable cross-examination and credibility determinations, as well as preserve the overall integrity of the proceedings."); *Actos*, 2014 WL 107153, at *8 ("[U]se of 'live' contemporaneous transmission grants the trier of fact—here, the jury—the added advantage inherent in observing testimony in open court that is *truly contemporaneous* and part of the whole trial experience, [and] thus better reflects the *fluid dynamic* of the trial they are experiencing, and, better serves the goal of 'truth telling.'"); *Lopez v. NTI, LLC*, 748 F. Supp. 2d 471, 480 (D. Md. 2010) *(*"The use of videoconferencing . . . will not prejudice Defendants. Each of the witnesses will testify in open court, under oath, and will face cross-examination. . . . With videoconferencing, a jury will also be able to observe the witness'[s] demeanor and evaluate his credibility in the same manner as traditional live testimony."); *Sallenger v. City of Springfield*, No. 03-cv-3093, 2008 WL 2705442, at *1 (C.D. Ill. July 9, 2008) ("Video conferencing allows the jury to view the witness as he testifies, and thus, it satisfies many of the goals of in person testimony . . . ."); *Vioxx*, 439 F. Supp. 2d at 644 ("By allowing for contemporaneous transmission, the Court allows the jury to see the live witness along with his 'hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration,' and, thus, satisfies the goals of live, in-person testimony . . . ." (quoting *Arnstein v. Porter*, 154 F.2d 464, 470 (2d Cir. 1946)).

"consistent sensitivity to the utility of evolving technologies that may facilitate more efficient, convenient, and comfortable litigation practices,"[4] requiring them to become more adept at and comfortable with remote proceedings and improve the technological capacities of courtrooms. Numerous federal courts seamlessly conducted entire trials remotely during the pandemic.[5] Indeed, technological advancements have led many courts to question whether there is any practical difference between live testimony and contemporaneous video transmission.[6]

2. Trial testimony via contemporaneous transmission unquestionably better serves the fact-finding mission of trial than pre-recorded deposition video.

At minimum, "there is little doubt that live testimony by contemporaneous transmission offers the jury better quality evidence than a videotaped deposition."[7] In 1939, Judge Learned Hand remarked that "[t]he deposition has always been, and still is, treated as a substitute, a second-best, not to be used when the original is at hand," and that to hold otherwise "is not to help the reform of procedure, but to introduce an irrational and unfair exception, until deposition become competent regardless of the accessibility of the deponents at trial."[8] Federal

[4] Charles A. Wright et al., 9A *Federal Practice and Procedure* § 2414 (4th ed. 2008 & 2022 Supp.).

[5] *See* Christopher Robertson, *The Jury Trial Reinvented*, 9 Tex. A&M L. Rev. 109, 120–21 (2021).

[6] *See Liu v. State Farm Mut. Auto. Ins. Co.*, 507 F. Supp. 3d 1262, 1266 (W.D. Wash. 2020) ("[G]iven the clarity and speed of modern videoconference technology, there will be no discernable difference between witnesses' 'live' versus 'livestreamed' testimony . . . ."); *Lopez*, 748 F. Supp. 2d at 480 ("With videoconferencing, a jury will . . . be able to observe the witness's demeanor and evaluate his credibility in the same manner as traditional live testimony."); *FTC v. Swedish Match N. Am., Inc.*, 197 F.R.D. 1, 2 (D.D.C. 2000) ("[T]o prefer live testimony over testimony by contemporaneous video transmission is to prefer irrationally one means of securing the witness's testimony which is exactly equal to the other."); Suppl. Order Answering Pet. for Writ of Mandamus at 4–5, *In re Kirkland*, No. 22-70092 (9th Cir. June 29, 2022), Dkt. No. 9 ("*Kirkland* Mandamus Pet. Resp.") ("Technology has advanced to the point where the Court can discern no meaningful difference between taking testimony in-person versus taking testimony by videoconference."). Interestingly, in one study of remote jury trials, some mock jurors "felt it was easier to judge witness credibility" when the witness testified remotely "because they had a closer view of the witness rather than looking across a courtroom." Online Courtroom Project, *Online Jury Trials: Summary and Recommendations* at 8 (2020).

[7] *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 19-md-2885, 2021 WL 2605957, at *5 (N.D. Fla. May 28, 2021); *see also In re Xarelto (Rivaroxaban) Prods. Liab. Litig.*, MDL No. 2592, 2017 WL 2311719, at *4 (E.D. La. May 26, 2017) (finding live testimony by video "preferable to a year-old video deposition"); *Actos*, 2014 WL 107153, at *8 (concluding that live witness testimony via contemporaneous transmission "more fully and better satisfy the goals of live, in-person testimony" than deposition video); *Swedish Match*, 197 F.R.D. at 2 ("The court will have a greater opportunity through the use of live video transmission to assess the credibility of the witness than through the use of deposition testimony. . . . I am mystified as to why anyone would think that forcing a person to travel across the continent is reasonable when his testimony can be secured by means which are . . . preferable to reading his deposition into evidence."); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, MDL No. 551, 1988 WL 525314, at *2 (W.D. Wash. Aug. 9, 1988) ("Presentation of witnesses under Court-controlled visual electronic methods provides a better basis for jurors to judge credibility and content than does use of written depositions."); *In re San Juan Dupont Plaza Hotel Fire Litig.*, 129 F.R.D. 424, 425–26 (D.P.R. 1989) (finding trial testimony via contemporaneous transmission a "viable, and even refreshing, alternative" to the "droning recitation of countless transcript pages of deposition testimony read by stand-in readers in a boring monotone").

[8] *Napier v. Bossard*, 102 F.2d 467, 469 (2d Cir. 1939) (Hand, L.).

courts have echoed this sentiment for decades.[9] Witness testimony presented in the form "spliced, edited, and recompiled clips of deposition that took place over multiple days"[10] results in an "unavoidable esthetic distance"[11] that reduces jurors' comprehension, engagement, and interest and impairs their ability to evaluate witness credibility. As one court aptly commented:

> To best fulfill its fact-finding duties, a jury should be engaged and highly sensitive to each witness. As this Court knows all too well, the deposition, whether read into the record or played by video has the opposite effect. It is a sedative prone to slowly erode the jury's consciousness until truth takes a back seat to apathy and boredom.[12]

Parties forced to present testimony from key witnesses through dated and immutable depositions may also be prejudiced. Depositions are usually taken during the discovery phase and thus may not address what are ultimately the critical factual issues for trial. And trials are "dynamic, ever evolving process[es]" with "inevitable, unexpected developments and shifts"[13] to which static deposition testimony is ill-suited to respond.

B. Rule 45(c) should unambiguously empower trial courts to issue subpoenas for trial testimony via contemporaneous transmission from any place within 100 miles of the witness's location.

1. The 2013 amendments to Rule 45 sought to allow nationwide service of subpoenas, including for Rule 43 live trial testimony via contemporaneous transmission.

The 2013 amendments removed the geographics limits of Rule 45(b)(2) to allow service of subpoenas "at any place within the United States."[14] Accordingly, trial courts may issue a nationwide subpoena commanding "a person to attend a trial, hearing, or deposition" within

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[9] *See, e.g.*, *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 511 (1947) ("Certainly to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to court, jury or most litigants."); *Mazloum v. D.C. Metro. Police Dept.*, 248 F.R.D. 725, 728 (D.D.C. 2008) (urging the parties to reach an arrangement allowing for a key witness to testify live at trial because "tediously reading deposition excerpts into the record" would be "highly unsatisfactory"); *Paul v. Int'l Precious Metals Corp.*, 613 F. Supp. 174, 179 (S.D. Miss. 1985) (finding videotaped deposition "particularly unappealing" and an inadequate substitute for the live testimony of a key witness); *Kolb v. Suffolk Cnty.*, 109 F.R.D. 125, 129 (E.D.N.Y. 1985) ("Clearly, testimony by deposition is less desirable than oral testimony and should be used as a substitute only under very limited circumstances."); *B.J. McAdams, Inc. v. Boggs*, 426 F. Supp. 1091, 1105 (E.D. Pa. 1977) ("A party should not be forced to rely on 'trial by deposition' rather than live witnesses.").

[10] *Mullins v. Ethicon, Inc.*, No. 12-cv-2952, 2015 WL 8275744, at *2 (S.D.W. Va. Dec. 7, 2015).

[11] *Actos*, 2014 WL 107153, at *8.

[12] *In re Vioxx Prods. Liab. Litig.*, 438 F. Supp. 2d 664, 668 (E.D. La. 2006).

[13] *Actos*, 2014 WL 107153, at *8.

[14] Fed. R. Civ. P. 45 & advisory committee's note to 2013 amendment.

"100 miles of the person of where the person resides, is employed, or regularly transacts business in person."[15]

The Advisory Committee intended the amended version of Rule 45 to be read with Rule 43(a) to allow courts to issue subpoenas compelling trial testimony via contemporaneous transmission from any location within 100 miles of the witness's location. It squarely addressed this issue in its responses to public comments to the proposed 2013 amendments. One of the comments, from a lawyer in Hawaii, observed the persistent difficulty he faced in persuading courts to enforce subpoenas for witnesses with a "transient presence in paradise" to testify at trials in Hawaii from the mainland by means of contemporaneous transmission under Rule 43(a).[16] The Discovery Subcommittee agreed that a Rule 45 subpoena "is properly issued for this [very] purpose"—to compel a witness outside the trial court's subpoena power to testify at trial via Rule 43 contemporaneous transmission from "a place within the limits imposed by Rule 45," i.e., within 100 miles of the witness's location.[17] The Advisory Committee concurred and determined that its note to the 2013 amendment should "confirm this plain reading of the revised Rule 45 text."[18] The note was therefore revised to state, "When an order under Rule 43(a) authorizes testimony from a remote location, the witness can be commanded to testify from any place described in Rule 45(c)(1)."[19] The note also makes clear that Rule 45(c)'s geographic limits were intended to protect witnesses from the burden of *traveling* more than 100 miles[20]—a concern not implicated by testimony remotely transmitted under Rule 43(a).

In recommending adoption of the 2013 amendments in full, the Committee on Rules of Practice and Procedure "concurred" with all the Advisory Committee's Rule 45 recommendations, including its "clarify[ing]" note "confirm[ing] that, when the issuing court has made an order for remote testimony under Rule 43(a), a subpoena may be used to command the *distant* witness to attend and testify within the geographical limits of Rule 45(c)."[21]

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[15] Fed. R. Civ. P. 45(c)(1).

[16] Paul Alston, Comment to Committee on Rules of Practice and Proc. Regarding Revisions to Fed. R. Civ. P. 45 (Jan. 25, 2012), https://www.uscourts.gov/file/16846/download.

[17] Minutes of Civil Rules Advisory Committee Meeting at 13 (Mar. 22–23, 2012), https://www.uscourts.gov/file/15074/download.

[18] *Id.*

[19] Fed. R. Civ. P. 45 advisory committee's note to 2013 amendment.

[20] *Id.* ("Rule 45(c)(1)(A) does not authorize a subpoena for trial to require a party or party officer *to travel* more than 100 miles . . ." (emphasis added)); *id.* ("Under Rule 45(c)(1)(B)(ii), nonparty witnesses can be required *to travel* more than 100 miles within the state where they reside, are employed, or regularly transact business in person only if they would not, as a result, incur 'substantial expense.'" (emphasis added)).

[21] Summary of the Report of the Judicial Conference, Committee on Rules of Practice and Procedure at 21, 23 (Sept. 2012), https://www.uscourts.gov/file/14521/download (emphasis added).

2. Since the 2013 amendments, federal courts have split on whether Rule 45 permits them to issue subpoenas for trial testimony via contemporaneous transmission to witnesses located more than 100 miles from the trial court.

Since the 2013 amendments, a majority of federal courts have—as the Advisory Committee intended—interpreted Rule 45(c)'s 100-mile limit to apply to the place from which remote testimony is transmitted.[22] For example, in *Walsh*, the District of Massachusetts observed that the 100-mile limit of Rule 45(c), as amended, "restricts the place of *compliance* with the subpoena, not the location of the court from which the subpoena issues."[23] The court concluded, based on "the plain language of Rules 43 and 45 and their accompanying Advisory Committee notes," that it could "issue a subpoena under Rule 45, upon a finding of good cause and compelling circumstances, for a witness to provide remote testimony from any place within 100 miles of her residence, place of employment, or place where she regularly conducts business."[24] Similarly, in *3M Combat Arms Earplug Products Liability Litigation*, the Northern District of Florida held that Rules 43(a) and 45 were to be read in "tandem" to permit a party to "use a Rule 45 subpoena to compel remote testimony by a witness from anywhere so long as the place of compliance (where the testimony will be given by the witness and not where the trial will take place) is within the geographic limitations of Rule 45(c)."[25]

However, a growing minority of courts have held that Rule 45(c)'s geographic limits prohibit them from issuing subpoenas for testimony via contemporaneous transmission to anyone located more than 100 miles from the trial court.[26] In so holding, these courts have often relied exclusively on the Advisory Committee's notes to Rule 43 without considering its notes to

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[22] *See, e.g.*, *Walsh v. Tara Constr., Inc.*, No. 19-cv-10369, 2022 WL 1913340, at *2 (D. Mass. June 3, 2022); *In re Taxotere (Docetaxel) Prod. Liab. Litig.*, No. 16-17039, 2021 WL 6202422, at *3 (E.D. La. July 26, 2021); *Off. Comm. of Unsecured Creditors v. Calpers Corporate Partners LLC*, No. 18-cv-68, 2021 WL 3081880, at *3 (D. Me. July 20, 2021); *United States v. $110,000 in U.S. Currency*, No. 21-cv-981, 2021 WL 2376019, at *3 (N.D. Ill. June 10, 2021); *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 19-md-2885, 2021 WL 2605957, at *3–4 (N.D. Fla. May 28, 2021); *Int'l Seaway Trading Corp. v. Target Corp.*, No. 20-mc-00086, 2021 WL 672990, at *4–5 (D. Minn. Feb. 22, 2021); *In re Newbrook Shipping Corp.*, 498 F. Supp. 3d 807, 815 (D. Md. 2020), *vacated on other grounds by* 31 F.4th 889 (4th Cir. 2021); *Redding v. Coloplast Corp.*, No. 19-cv-1857, slip op. at 3 (M.D. Fla. Aug. 28, 2020); *Diener v. Malewitz*, No. 18-cv-85, 2019 WL 13223871, at *7 (D. Wyo. Oct. 18, 2019); *In re NCAA Grant-in-Aid Cap Antitrust Litig.*, No. 14-md-2541, slip op. at 5–6 (N.D. Cal. Aug. 31, 2018); *Xarelto*, 2017 WL 2311719, at *4–5; *In re DePuy Orthopaedics, Inc. Pinnacle Hip Implant Prods. Liab. Litig.*, MDL No. 11-2244, 2016 WL 9776572, at *2 (N.D. Tex. Sept. 9, 2016); *Actos*, 2014 WL 107153, at *8–10.

[23] 2022 WL 1913340, at *2.

[24] *Id.*

[25] 2021 WL 2605957, at *3–4.

[26] *See, e.g.*, *Moreno v. Specialized Bicycle Components, Inc.*, No. 19-cv-1750, 2022 WL 1211582, at *1–2 (D. Colo. Apr. 25, 2022); *Singh v. Vanderbilt Univ. Med. Ctr.*, No. 17-cv-400, 2021 WL 3710442, at *2 (M.D. Tenn. Aug. 19, 2021); *Ashton Woods Holdings LLC v. USG Corp.*, No. 15-cv-1247, 2021 WL 8084334, at *1 (N.D. Cal. Apr. 5, 2021); *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig.*, No. 17-md-2785, 2021 WL 2822535, at *4–6 (D. Kan. July 7, 2021); *Black Card LLC v. Visa USA Inc.*, No. 15-cv-27, 2020 WL 9812009, at *2 (D. Wyo. Dec. 2, 2020); *Roundtree v. Chase Bank USA, N.A.*, No. 13-cv-239, 2014 WL 2480259, at *1 (W.D. Wash. June 3, 2014); *Lin v. Horan Cap. Mgmt., LLC*, No. 14-cv-5202, 2014 WL 3974585, at *1 (S.D.N.Y. Aug. 13, 2014).

the 2013 amendments to Rule 45. In *Black Card*, for instance, the District of Wyoming concluded that "a full reading of Rule 43 and the committee notes"—including their instructions that the "good cause" standard "is anticipated for witnesses who are already expected to attend the trial" and "[o]rdinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena"—demonstrated that "subpoenas for live video testimony under Rule 43 are subject to the same geographic limits as a trial subpoena under Rule 45."[27] The *Moreno* and *EpiPen* decisions, similarly, were predicated only on the notes to the 1996 amendments to Rule 43.[28]

3. The Ninth Circuit's 2023 *Kirkland* decision underscores the urgent need for clarification of Rules 43 and 45.

The need for clarifying amendments has grown more critical in the wake of the recent *In re Kirkland* decision,[29] the first from a United States Court of Appeals to address the interplay between Rule 45(c)'s 100-mile limit and subpoenas for trial testimony via contemporaneous transmission under Rule 43(a).

In *Kirkland*, the Ninth Circuit considered a petition from John and Poshow Ann Kirkland for a writ of mandamus directing the United States Bankruptcy Court for the Central District of California to quash trial subpoenas directing them to testify via contemporaneous submission from their homes in the U.S. Virgin Islands. The Ninth Circuit found that the petition "present[ed] a novel issue involving the interplay between two Federal Rules of Civil Procedure that has divided district courts across the country and that is likely to have significant continued relevance in the wake of technological advancements and professional norms changing how judicial proceedings are conducted," but one that was "likely to evade direct appellate review."[30]

In its response to the petition, the bankruptcy court agreed that mandamus jurisdiction was necessary to resolve two "conflicting lines of authority" with "equally plausible interpretations" of Rules 43 and 45 and urged the Ninth Circuit to side with the majority of courts concluding that Rule 45(c)'s 100-mile limit does not apply to witnesses ordered to testify by means of contemporaneous transmission under Rule 43.[31] Citing its own experience conducting trials with testimony taken exclusively by remote video transmission, the bankruptcy court argued that "[t]echnology has advanced to the point where the Court can discern no meaningful difference between taking testimony in-person versus taking testimony by videoconference" and that remote video testimony allows juries "to assess the demeanor and credibility of the [remote] witnesses to the same extent as would have possible had [they] been

[27] 2020 WL 9812009, at *2–3.

[28] *See Moreno*, 2022 WL 1211582, at *1–2; *EpiPen*, 2021 WL 2822535, at *4.

[29] 75 F.4th 1030, 1051–52 (9th Cir. 2023).

[30] *Id.* at 1036.

[31] *Kirkland* Mandamus Pet. Resp. at 2–3.

physically present in the courtroom."[32]

The Ninth Circuit disagreed, concluding that "neither the text of the rules nor the advisory committee's notes establish that the 100-mile limitation is inapplicable to remote testimony or that the 'place of compliance' under Rule 45 changes the location of the trial or other proceeding to where the witness is located when a witness is allowed to testify remotely."[33] The Ninth Circuit dismissed the Advisory Committee's notes to the 2013 amendments to Rule 45 because "it is the text of the rules that control, and 'the [n]otes cannot . . . change the meaning that the Rules would otherwise bear'"[34] and reasoned that the term "trial" as used in Rule 45 necessarily meant "a specific event that occurs in a specific place: where the court is located," regardless of where or how the witness may "appear."[35] While the Ninth Circuit acknowledged that "technology and the COVID-19 pandemic have changed expectations about how legal proceedings can (and perhaps should) be conducted," it concluded that "the rules defining the federal subpoena power have not materially changed" and it was "bound by the text of the rules."[36] The issue, therefore, was "one 'for the Rules Committee and not for [a] court.'"[37]

C. The proposed amendments ensure more efficient, cost-effective, and fair civil trials.

1. The proposed amendments maximize access to evidence in multidistrict litigation, which is rarely confined to the jurisdiction of a single federal district court.

The need for trial testimony via contemporaneous transmission is arguably most acute in multidistrict litigation, which has become the primary vehicle for the resolution of complex civil cases and is designed for the efficient management of large numbers of similar claims that often involve multiple parties and evidence dispersed nationwide. In such cases, witnesses

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[32] *Id.* at 4-5. The bankruptcy court also cited a 2022 survey it conducted on "hearings or trials conducted by videoconference," in which 65% of respondents stated they had not experienced "any problems with remote hearings or trials in the past" and only 1 of 287 reported encountering any issues with remote cross-examination. *Id.* at 5.

[33] *Kirkland*, 75 F.4th at 1044.

[34] *Id.* at 1043 (alterations in original) (quoting *Tome v. United States*, 513 U.S. 150, 168, (1995) (Scalia, J., concurring)).

[35] *Id.* at 1043–44; *see also id.* at 1045 ("[T]here is no indication that Rule 45's reference to attending 'a trial' was intended to refer to anything other than the location of the court conducting the trial."). In reaching this conclusion, the Ninth Circuit did not consider the body of cases concluding that Rule 77(b) expressly permits a fully virtual civil jury trial with no fixed location. *See, e.g.*, *Le v. Reverend Dr. Martin Luther King, Jr. Cnty.*, 524 F. Supp. 3d 1113, 1115 (W.D. Wash. 2021) (construing Rule 77 as allowing a fully virtual civil jury trial with no fixed location because "Rule 77(b) sets forth the caveat 'so far as convenient,' which is in stark contrast to the imperative 'must,' used in connection with 'open court'" and therefore "offers the flexibility to conduct trials in 'non-traditional ways'" (quoting *Gould Elecs. Inc. v. Livingston Cnty. Rd. Comm'n*, 470 F. Supp. 735, 738 (E.D. Mich. 2020))); *see also id.* at 1116 ("Nothing about a virtual jury trial is inconsistent with the principles underlying Rules 43(a) and 77(b).").

[36] *Kirkland*, 75 F. 4th at 1046.

[37] *Id.* at 1047 (quoting *Swedberg v. Marotzke*, 339 F.3d 1139, 1145 (9th Cir. 2003)).

relevant to all parties' claims and defenses are unlikely to be confined to a single federal district. Geographic limitations on MDL courts' ability to subpoena testimony via contemporaneous transmission can therefore unfairly handicap plaintiffs, who must make a no-win forum selection choice at the outset when the identities and locations of key trial witnesses are unknown. Such limits also undermine the purpose of bellwether trials, which are intended to present the best evidence to juries to obtain outcomes representative for all underlying actions. Without access to critical witness testimony, verdicts in bellwether trials are inaccurate predictors of the merits of the remaining claims, undermining their ability to facilitate productive settlement discussions and global resolutions of claims.

2. The proposed amendments minimize, if not eliminate, litigants' ability to exploit the Rules to unfairly immunize adverse witnesses and evidence from jury consideration.

Rule 45's 100-mile limit can be exploited by litigants to unfairly shield adverse evidence from trial in several ways. Defendants may take advantage of plaintiffs' lack of knowledge regarding the identity and location of essential witnesses by urging the JPML to centralize the litigation in a jurisdiction outside the 100-mile range of those witnesses. Litigants can also hand-pick the witnesses within their control whose testimony will be most favorable to their claims or defenses, forcing the opposing party to rely on inferior deposition testimony for witnesses outside the 100-mile limit at trial, thereby hindering that party's ability to effectively present its best evidence to the jury.[38] Litigants can even intentionally relocate critical witnesses outside the subpoena reach of the trial court. The proposed amendments would minimize, if not eliminate, such gaming tactics.[39]

3. The proposed amendments will save time and money for both litigants and courts.

Resolving disputes over deposition designations is time consuming and a wasteful drain of judicial resources. As explained in the *Manual on Complex Litigation*, "[u]nless the parties can reach substantial agreement on the form and content of the videotape to be shown to the jury,

[38] *See, e.g.*, *3m Combat Arms Earplug*, 2021 WL 6327374, at *5 (concluding that defendants sought a tactical advantage by preventing two witnesses essential to the case from testifying live at trial just after one of them made statements contradicting his prior testimony); *Vioxx*, 439 F. Supp. 2d at 643 (finding that the defendant's refusal to produce a witness "possess[ing] information highly relevant to the plaintiff's claims" and "damaging to [the defendant's] position" for trial was "for a purely tactical advantage," namely, "to eliminate any unpredictability and limit [the witness's] trial testimony to his 'canned' deposition testimony"); *Wash. Pub. Power Supply*, 1998 WL 525314, at *2 ("Defendants do not claim they cannot get witnesses to appear voluntarily [at trial] for 'live' testimony. They rely instead on the tactical advantage they have in not being required to do so, while at the same time indicating that they intend to call the same witnesses in person [in] their own case.").

[39] Litigants faced with an order requiring witnesses to testify via contemporaneous transmission have also been known to thereafter produce the at-issue witness in person for trial. *See Wash. Pub. Power Supply*, 1998 WL 525314, at *2; *accord* Cathaleen A. Roach, *It's Time to Change the Rule Compelling Witness Appearance at Trial: Proposed Revisions to Federal Rule of Civil Procedure 45(e)*, 79 Geo. L.J. 81 (1990).

the process of passing on objections can be so burdensome and time-consuming as to be impractical for the court."[40] Live testimony by contemporaneous transmission, on the other hand, "ensure[s] efficient use of judicial resources" because it relieves the court "of the burden of reviewing voluminous transcripts of multi-day depositions, analyzing hours of edited videos submitted for trial, and then ruling on objections to those videos."[41]

Promoting the use of testimony by contemporaneous transmission would also provide courts with greater precision and flexibility in trial scheduling, avoiding the constraints of individual witness availabilities and travel schedules. Litigants would benefit from the reduced costs of witness travel. And assurance that witnesses outside the 100-mile limit could be compelled to testify remotely at trial, if necessary, would likely reduce the number and attendant costs of depositions taken during discovery.

[40] *Manual for Complex Litigation (Fourth)* § 12.333.

[41] *Mullins*, 2015 WL 8275744, at *2; *see also Actos*, 2014 WL 107153, at *6 (criticizing the defendants' inability to secure the in-person attendance of important witnesses at trial, which "result[ed] in the parties still taking discovery depositions" and "a large number of motions" needing resolution on the eve of trial and "the parties' continu[ing] to present disputed video depositions for evidentiary resolution" and declaring that "this Court simply will not be able to rule on the very large number of additional video transcripts and objections that would be required it the Plaintiffs were not permitted to use the procedures established in Rules 43 and 45 to present live testimony at trial via contemporaneous transmission").

TAB 9C

COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES
and its
REMOTE TESTIMONY SUBCOMMITTEE

July 25, 2024

DON'T TOUCH THE REMOTE: THE FRCP ARE PROVIDING APPROPRIATE GUIDANCE FOR REMOTE TESTIMONY AND SHOULD NOT BE AMENDED

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Advisory Committee on Civil Rules ("Advisory Committee") and its Remote Testimony Subcommittee ("Subcommittee").

INTRODUCTION

Rules 43 and 45 of the Federal Rules of Civil Procedure ("FRCP") provide appropriate guidance for handling the issues inherent in using remote testimony in trials. In 1996, the Advisory Committee expressly adopted a preference for in-person testimony when it amended Rule 43, and the reasons for that preference still exist today. In 2020, the Advisory Committee took a fresh look at the rules governing remote proceedings in light of the COVID-19 pandemic, and it concluded that the rules worked well. Now, a group of plaintiff-side lawyers is urging the Advisory Committee to make radical changes to the rules so judges "must require" remote testimony "unless precluded by good cause."[2] The Sobol proposal would essentially allow remote participation in all cases and abolish the well-established 100-mile jurisdictional limit for subpoenas, replacing it with what amounts to nationwide subpoena power for testimony. Enabling such unfettered remote participation in trials would undermine the right of parties to

[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 38 years, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] Letter from Thomas M. Sobol, et. al, to H. Thomas Byron III, Secretary, Committee on Rules of Practice and Procedure, Feb. 13, 2024, ("Sobol proposal") https://www.uscourts.gov/sites/default/files/24-cv-b_suggestion_from_hagens_berman_-_rules_43_and_45.pdf.

confront witnesses in the physical presence of fact finders and interfere with the ceremony of trial, which the Advisory Committee warned decades ago "cannot be forgotten."[3] Moreover, the Sobol proposal could also engage the Advisory Committee in a widespread, divisive dispute about forcing top corporate executives – "apex" witnesses − to testify in tort cases and would embroil federal courts in more satellite litigation about the topic. FRCP amendments are unnecessary, and re-inventing the rules governing remote testimony would disrupt a balance that is working well now, upset long-held notions of the importance and sanctity of trial, and create unintended negative consequences.

I. THE CURRENT RULES PROVIDE THE RIGHT BALANCE FOR COURTS HANDLING DISPUTES OVER REMOTE TESTIMONY

A. The Historic Preference for In-Court Testimony Should Remain in Place

In-person testimony provides the court, the jury, and the parties with the best opportunity to evaluate testimony. The Committee Note to the 1996 amendment of Rule 43(a) reflects this understanding:

> Contemporaneous transmission of testimony from a different location is permitted only on showing good cause in compelling circumstances. The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.[4]

Neither the advances in remote technology, nor the increased voluntary use of that technology as a consequence of the COVID-19 pandemic, have altered this rationale.[5] Any suggestions to change the status quo should, at a minimum, await the advent of academic studies to assess how remote participation has impacted the administration of justice in our court systems. But no study is necessary to know that the prospect of trials conducted materially or entirely via video is a dramatic departure from the well-formed traditions of American litigation.

[3] Fed. R. Civ. P. 43(a) advisory committee's note to 1996 amendment.
[4] Fed. R. Civ. P. 43(a) advisory committee's note to 1996 amendment.
[5] Only last month the MDL judge in *In re Chrysler Pacifica Fire Recall Prods. Liab. Litig.*, ___ F. Supp.3d ___, 2024 WL 3048495 (E.D. Mich. June 18, 2024), rejected a blanket remote deposition request, recognizing that "the defendant aptly raises concerns that remote depositions, despite being a more widely used tool in the post-pandemic era, pose unique disadvantages that examining counsel may struggle to overcome in order to achieve an effective examination. Federal courts have recognized such concerns as legitimate. *Id.* at *5. *See Radiant Global Logistics, Inc. v. BTX Air Express of Detroit, LLC*, 2020 WL 1933818, at *4 (E.D. Mich. Apr. 22, 2020) (for depositions of "corporate officers," "it would approach legal malpractice for . . . counsel to conduct those depositions remotely").

B. The Advisory Committee's CARES Act Subcommittee Concluded that the Current Rules on Remote Testimony Worked Well During the Pandemic

Only three years ago, the Judicial Conference authorized the use of video and teleconference systems for certain proceedings.[6] After the exigent circumstances of the COVID-19 pandemic abated, the Advisory Committee's CARES Act Subcommittee examined how the courts handled remote testimony in civil proceedings and considered whether rules changes were needed. The Subcommittee concluded that Rule 43(a) is sufficiently flexible to allow courts to handle the issue in the future. The Advisory Committee's report to the Standing Committee stated, "Experience during the COVID-19 pandemic suggests that the present rules are well designed to meet needs for remote proceedings."[7] The Advisory Committee further explained:

> [T]he inherent discretion and flexibility of the Civil Rules, coupled with existing provisions for relying on remote technology, have served the courts and parties well during the COVID-19 pandemic.[8]

No new facts have arisen since the Advisory Committee's report that change this conclusion or warrant a radical revision of the FRCP.

C. The FRCP's Existing Remedy for Unavailable Witnesses Is Well Accepted

Rule 43 provides a remedy for situations where a witness is unavailable at trial: deposition testimony. Although the use of depositions is not a perfect substitute for in-person testimony, it is widely used and well accepted. The Committee Note to the 1996 amendment to Rule 43 states:

> 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, or of resolving difficulties in scheduling a trial that can be attended by all witnesses. Deposition procedures ensure the opportunity of all parties to be represented while the witness is testifying.[9]

Nothing, including the availability of new technologies, has changed this conclusion. The remedy of remote testimony is available either by agreement or upon good cause shown.[10] This should heighten the Subcommittee's caution to avoid creating unintended consequences that are worse than the status quo. Creating a rules-based presumption that remote testimony is always superior to using deposition testimony for all witnesses in all trials would up-end over a century

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[6] *Judiciary Authorizes Video/Audio Access During COVID-19 Pandemic*, available at: https://www.uscourts.gov/news/2020/03/31/judiciary-authorizes-videoaudio-access-during-covid-19-pandemic.
[7] Memo from the Advisory Committee on Civil Rules to the Committee on Rules of Practice and Procedure, Dec. 7, 2020, Agenda Book, Committee on Rules of Practice and Procedure, Jan. 5, 2021, at 176, https://www.uscourts.gov/sites/default/files/2021-01_standing_agenda_book.pdf.
[8] Memo from the Advisory Committee on Civil Rules to the Committee on Rules of Practice and Procedure, Dec. 7, 2020, Agenda Book, Committee on Rules of Practice and Procedure, Jan. 5, 2021, at 165, https://www.uscourts.gov/sites/default/files/2021-01_standing_agenda_book.pdf.
[9] Fed. R. Civ. P. 43(a) advisory committee's note to 1996 amendment.
[10] *E.g.*, *Mayfield v. City of Madison*, 2020 WL 13252053, at *2 (S.D. Miss. Dec. 9, 2020) ("find[ing] good cause to order that the depositions of [third-parties] be taken by remote means").

of established precedent and would cause many foreseeable problems for judges, parties, lawyers, and witnesses. A rule specifically stating that deposition testimony "shall not satisfy the good cause requirement," as the Sobol proposal urges,[11] is a particularly heavy-handed limitation on judicial discretion.

D. The *In Re Kirkland* Decision Is Correct and Should Not Be "Reversed" by Rulemaking

The Ninth Circuit's *Kirkland* decision correctly held that Rule 43 does not allow a district court in California to require a witness in the Virgin Islands to testify in a California trial. The contested subpoena in *Kirkland* was served in the Virgin Islands on a witness who "undisputed[ly] . . . no longer live[d], work[ed], or regularly conduct[ed] in-person business" in California, and therefore violated Rule 45(c)'s 100-mile geographic limitation.[12] The prior trial testimony of the witness was available.[13]

Kirkland follows the majority rule. "[D]espite changes in technology and professional norms, the rule governing the court's subpoena power has not changed and does not except remote appearances from the geographical limitations on the power to compel a witness to appear and testify at trial."[14] Most courts agree.[15] In *Coblin v. DePuy Orthopaedics, Inc.,*[16] the Eastern District of Kentucky relied on the decisions of "several courts" that had "agreed that any textual reading reaches this mandatory conclusion."[17] Any other construction would "compel[] actions by a witness well beyond its jurisdictional limits simply because technology has eased the practical burdens."[18] "Federal courts remain one of limited jurisdiction and practical concerns cannot drive the Court to ignore such fundamental principles."[19]

In Broumand v. Joseph,[20], cited in *Coblin*, the court agreed that the current reading of Rules 43 and 45 is appropriate, concluding that a *requirement* for remote testimony would exempt federal district courts from all "geographical limitations."[21] That result – the same being urged to the Advisory Committee – would "bestow upon any [district court] sitting anywhere in the country

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[11] Sobol proposal, *supra* n. 2.
[12] *In re Kirkland*, 75 F.4th 1030, 1042 (9th Cir. 2023).
[13] *Id.* at 1038.
[14] *Id.* at 1051-52.
[15] Those that do not are primarily MDL courts that, with respect to this issue (and others), have failed to follow the FRCP. In the *Pinnacle Hip* MDL, for example, while the remote deposition order survived mandamus review, one of the panel members specifically noted that "the district court misapplied Rules 43(a) and 45(c)." *In re Depuy Orthopaedics, Inc.*, No. 16-11419, order at 1 (5th Cir. Sept. 27, 2016) (Jolly, J. concurring).
[16] *Coblin v. DePuy Orthopaedics, Inc.,* 2024 WL 1357571 (E.D. Ky. Mar. 29, 2024).
[17] *Id.* at *2 (citing *Bioconvergence LLC v. Attariwala*, 2023 WL 4494020, at *2 (S.D. Ind. June 29, 2023); *Rochester Drug Cooperative, Inc. v. Campanelli*, 2023 WL 2945879, at *2 (S.D.N.Y. Apr. 14, 2023); *Broumand v. Joseph*, 522 F. Supp.3d 8, 10 (S.D.N.Y. 2021); *In re Epipen (Epinephrine Injection, USP) Marketing, Sales Practices & Antitrust Litigation*, 2021 WL 2822535, at *4-6 (D. Kan. July 7, 2021); *Black Card LLC v. Visa USA Inc.*, 2020 WL 9812009, at *4 (D. Wyo. Dec. 2, 2020)).
[18] *Coblin*, 2024 WL 1357571, at *3.
[19] *Id.* at *5 (citation omitted).
[20] *Broumand v. Joseph*, 522 F. Supp.3d 8, 10 (S.D.N.Y. 2021).
[21] 522 F. Supp.3d at 23-24.

the unbounded power to compel remote testimony from any person residing anywhere in the country."[22]

The *EpiPen* decision, likewise followed in *Coblin*, discussed the clear drawbacks of universal remote subpoena power at some length, making the following points:

- That a party has a "tactical advantage" because they control their witnesses' testimony is no basis to stretch judicial jurisdiction, since "this circumstance occurs all the time and does not present a 'compelling circumstance.'"[23] "[I]f defendants later call the witness to testify live during their case, then plaintiff will enjoy the opportunity to "cross-examine these individuals live in front of the jury."[24] Thus, this "tactical advantage," to the extent it exists, is available to "both parties" with respect to their own witnesses.[25]
- "[W]hile live testimony is generally preferable to videotaped testimony, the absence of such testimony, even from a key witness, is only minimally prejudicial when that witness is adverse and when there is a videotaped deposition that can be introduced in lieu of live testimony."[26]
- Plaintiffs choose where to litigate. Thus, in the *EpiPen* case, they "made the strategic decision to file their lawsuits in our court" and then to seek MDL centralization. Thus, the lack of jurisdiction over the witnesses was of plaintiffs' own making.[27]

The Sobol proposal's approach would effectively abolish judicial districts in connection with trial testimony:

> If this provision is construed to mean that a person residing anywhere (at least anywhere within the United States) can be compelled to provide testimony by videoconference from a spot (with videoconferencing capabilities) within 100 miles of their home, that would mean virtually everyone in the United States could be compelled to 'attend' trial in this manner.[28]

Numerous additional courts agree that the existing rule guidance on remote trial testimony recognized in *Kirkland* is both the majority rule and is based on sound practical reasons.[29]

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[22] *Id.* at 24.
[23] *Id.* at 5 (citation and quotation marks omitted).
[24] *Id.* (citation and quotation marks omitted).
[25] *Id.* at *6 (citation and quotation marks omitted).
[26] *Id.*
[27] *Id.*
[28] *Singh v. Vanderbilt University Medical Center*, 2021 WL 3710442, at *3 (M.D. Tenn. Aug. 19, 2021).
[29] *Hightower v. Ingerman Management Co.*, 2022 WL 19266260, at *3 n.2 (D.N.J. May 26, 2022) ("allowing a party to compel the attendance of a witness for remote testimony via Rule 43 would eviscerate . . . geographical limitations); *Moreno v. Specialized Bicycle Components, Inc.*, 2022 WL 1211582, at *2 (D. Colo. Apr. 25, 2022) ("nothing . . . permits this court to compel the testimony of an individual who is indisputably outside the reach of its subpoena power"; following advisory committee notes to the 1996 amendment to Rule 43); *Orbital Engineering, Inc. v. Buchko*, 2022 WL 170043, at *2 (W.D. Pa. Jan. 19, 2022) (that a witness' "employer is based in [the forumstate] is not sufficient to compel their appearance"; following "plain language" of Rule 45(c)); *Official Comm.*

II. RULE 43 SHOULD NOT BE AMENDED TO REVERSE THE PRESUMPTION IN FAVOR OF LIVE, IN-COURT TESTIMONY OR TO REDUCE JUDICIAL DISCRETION

Rule 43 requires that only for good cause and under compelling circumstances should a trial witness's testimony be permitted via contemporaneous transmission from a different location.[30] The rule reflects, among other things, the fundamental principle of Federal Rule of Evidence 801 that testimony of a witness who is not sitting in the witness chair is considered hearsay (absent specific exceptions).[31] The 1975 Advisory Committee Notes to FRE 801(c)(1) explain: "Testimony given by a witness in the course of court proceedings is excluded [from hearsay] since there is compliance with all the *ideal conditions* for testifying."[32] Those ideal conditions include the factfinder's ability to see and perceive the witness to judge the veracity of the testimony. Reversing Rule 43's presumption by permitting (or requiring judges to permit) remote testimony regardless of the importance of any particular witness, including whether substitute witnesses are available, or factoring in other unique circumstances of a particular case,[33] would have significant unintended consequences. A fundamental reason why judges need discretion over when to permit (or require) remote testimony is that not all witnesses are equally important to the case, let alone "necessary" or "essential," as defined by Federal Rule of Evidence 403. Eliminating that discretion would reduce judges' control over their courtrooms, interfere with parties' litigation strategies, force some people to testify who otherwise would not, and substitute some witnesses who expect to testify for someone else. The merits of such decisions cannot be contemplated in advance or otherwise mandated by a blanket rule such as the one proposed.

Nor should these decisions be made by judges in the first instance. The current Federal Rules of Civil Procedure appropriately allow and/or put the onus on the parties to work out agreements for remote testimony. For example, Rule 30(b)(4) allows parties to stipulate, or courts to order, that a deposition be taken by remote means. This is appropriate because there are often numerous factors that go into the equation of whether remote testimony is appropriate for a

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of Unsecured Creditors v. Calpers Corp. Partners LLC, 2021 WL 3081880, at *3-4 (D. Me. July 20, 2021) (movant failed to establish "good cause" to justify a remote trial deposition); *Lin v. Horan Capital Management LLC*, 2014 WL 3974585, at *23 (S.D.N.Y. Aug. 13, 2014) ("Rule 43(a)'s thrust concerns the reception of evidence in a trial court, and does not operate to extend the range or requirements of a subpoena"); *Roundtree v. Chase Bank USA, N.A.*, 2014 WL 2480259, at *2 (W.D. Wash. June 3, 2014) (remote depositions "presuppose[] a witness willing or compelled to testify at trial" rejecting argument that remote testimony "transport[s]" the courthouse to the site of the deposition); *Lea v. Wyeth LLC*, 2011 WL 13195950, at *1 (E.D. Tex. Nov. 22, 2011) (remote witnesses "are under no obligation to cooperate"; "nothing in the language of Rule 43(a) that permits this court to compel the testimony of an individual who is indisputably outside the reach of its subpoena power").

[30] Fed. R. Civ. P. 43.

[31] Fed. R. Ev. 801(c)(1) emphasis added.

[32] Fed. R. Ev. Advisory Committee Notes to Rule 801(c), 1975.

[33] *See Chrysler Pacifica*, 2024 WL 3048495 at *5 (particular witnesses demonstrated "good cause" for a remote deposition order, after rejecting demand for across-the-board remote depositions).

particular witness; consistent with usual meet-and-confer practices for discovery issues in federal court, parties should attempt to agree before turning to the judge.[34]

III. RULE 45 SHOULD NOT BE AMENDED TO ALLOW NATIONWIDE SUBPOENA POWER

Rule 45(c)(1) appropriately limits subpoenas for trials, hearings, and depositions to "within 100 miles of where the person resides, is employed, or regularly transacts business in person" or, if the person is a party or a party's officer or would not incur a substantial expense, "within the state where the person where the person resides, is employed, or regularly transacts business in person."[35] These limitations remains sensible, not only because of the strong reasons that favor live, in-person testimony, but also to protect witnesses from the burdens and disruptions inherent in appearing as a witness at a trial. The Advisory Committee is being urged to amend Rule 45(c)(1) by measuring the distance from the witness to the location of a virtual transmission rather than the location of the trial.[36] That is no limitation at all. It would allow parties to subpoena witnesses virtually anywhere within the United States and would effectively eliminate any geographic limitations and create nationwide subpoena power in all federal litigation. The potential for abuse and gamesmanship with such an approach is very high. Jurisdictional limitations for judicial districts provide a logical, fair, and predictable playing field for all parties when it comes to planning for and participating in trials, and it has worked without serious problems for decades.

Several practical questions would arise with nationwide subpoena power. For example, who would 'issue' these subpoenas, and how are such subpoenas to be enforced? Remote enforcement of non-party subpoenas could entail far-away trial judges needing the assistance of local judiciary and court personnel. Remote depositions or testimony could also be extremely burdensome in terms of costs and allocation of resources, as witnesses must be entitled to the availability of counsel with them when they testify.

The proposed amendment would have wide-ranging ramifications on the judiciary, parties, and especially witnesses. The Subcommittee must contemplate that any new rule will become the new default routine practice rather than assuming it will be employed only rarely. The suggested rule change could cause most if not all future trials to feature remote testimony, and people will be forever subject to the subpoena power of every federal district judge in the country. Imposing this novel regime on every trial, on every witness, in every civil case, is a vastly over-expansive action out of proportion to any problem.

[34] *Id.* ("that depositions by remote means may be an economical and appropriate tool in some instances, at least where the parties agree on the means . . ., does not mean that good cause has been shown to compel the taking of depositions by remote means across the board").
[35] Fed. R. Civ. P. 45(c)(1).
[36] Sobol proposal, *supra* n. 2.

IV. THE PROMULGATION OF FRCP AMENDMENTS RELATING TO REMOTE TESTIMONY WILL EMBROIL THE COMMITTEE IN A HEATED DISPUTE ABOUT APEX WITNESSES

Any rule changes relating to remote testimony would have broad effect on many witnesses and have significant impact on fights over so-called apex witnesses—high-ranking corporate or organizational leaders who could conceivably, but usually do not, have any first-hand knowledge of the facts and circumstances of a particular dispute. Satellite litigation over the appropriateness of apex witnesses is as contentious as it is common.[37] As the cases cited above in footnote 37 demonstrate, most states restrict apex witness depositions to a greater or lesser extent, however the standards vary markedly by state. The suggestion to change the rules so judges "must require" remote testimony—without respect to the witness' importance to the case, the existence of deposition testimony, or the availability of other witnesses with similar or greater knowledge—and to create nationwide service of subpoenas is a very thinly veiled attempt to put apex witnesses on the stand in every federal trial, thus embroiling the federal courts even more deeply in disputes over the propriety of such testimony, starting with the knotty question of whether state or federal law applies in the absence of any federal rule directly on point.

V. THE SUBCOMMITTEE SHOULD MONITOR THE RESPONSE TO THE PROPOSED BANKRUPTCY RULES AMENDMENTS RELATING TO REMOTE TESTIMONY BEFORE TAKING ACTION TO MODIFY THE FRCP

The Advisory Committee on Bankruptcy Rules will hear public comment this year on its proposed changes to the rules governing remote testimony in Bankruptcy proceedings.[38] The public comment will be germane to the Subcommittee's work because the Bankruptcy proposals include adopting FRCP 43 as written for adversary proceedings while adopting the rule minus the "compelling circumstances" test for contested proceedings. The experience and views expressed during the public comment period are highly likely to inform the Subcommittee's work, so proceeding to develop FRCP amendments without the benefit of those comments is likely to deprive the Subcommittee of important information. Therefore, the Subcommittee

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[37] Most state appellate courts have restricted depositions of "apex" corporate officers. *See*, *e.g.*, *National Collegiate Athletic Association v. Finnerty*, 191 N.E.3d 211, 221-23 (Ind. 2022) (order allowing apex deposition reversed and remanded); *General Motors, LLC v. Buchanan*, 874 S.E.2d 52, 64-66 (Ga. 2022) (same); *In re Amendments to Florida. Rule of Civ. Procedure 280*, 324 So.3d 459, 461-63 (Fla. 2021) (codifying apex deposition doctrine); *State ex rel. Massachusetts Mutual Life Insurance Co. v. Sanders*, 228 W. Va. 749, 760, 724 S.E.2d 353, 363-64 (2012) (order allowing apex deposition reversed and remanded); *Crest Infiniti, II, LP v. Swinton*, 174 P.3d 996, 1004-05 (Okla. 2007) (same); *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 607-09 (Mo. 2002) (same); *Crown Central Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 127-28 (Tex. 1995) (adopting apex deposition doctrine); *Alberto v. Toyota Motor Corp.*, 796 N.W.2d 490, 494 (Mich. App. 2010) (same); *Liberty Mutual Insurance Co. v. Superior Court*, 13 Cal. Rptr.2d 363, 367 (Cal. App. 1992) (same); *but see Stratford v. Umpqua Bank*, 534 P.3d 1195, 1201-03 (Wash. 2023) (declining to adopt apex deposition doctrine).

[38] Agenda Book, Committee on Rules of Practice and Procedure, June 4, 2024, 656, https://www.uscourts.gov/sites/default/files/2024-06_agenda_book_for_standing_committee_meeting_final_6-21-24.pdf.

should consider the public comment on the Bankruptcy proposals before drafting or advancing any FRCP amendments on this topic.

CONCLUSION

The current FRCP provisions regarding remote testimony are working well and strike the appropriate balance for courts and parties, including the presumption in favor of in-person testimony and the ability to use deposition testimony when witnesses are unavailable for trial or for "good cause" shown. Changing those rules would indisputably reduce courts' discretion and change litigation strategies. The proposal before the Advisory Committee threatens to alter the nature of trials by creating a new presumption that witnesses will participate by remote means. Because there is no need to change the rules, and the risks of doing so are high, the Advisory Committee should not amend the FRCP provisions governing remote testimony.

TAB 9D

Civil Rules 43/45

Rule 43 Taking Testimony	Rule 43 Taking Testimony	Rule 45 Subpoena	Rule 45 Subpoena - Service
(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 testimony in open court by contemporaneous transmission from a different location.	**(c) EVIDENCE ON A MOTION.** When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.	**(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 and would not incur substantial expense.	**(b) SERVICE.** (1) ***By Whom and How; Tendering Fees.*** 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 and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. (2) *Service in the United States.* A subpoena may be served at any place within the United States. (3) *Service in a Foreign Country.* 28 U.S.C. §1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country. (4) *Proof of Service.* ***

TAB 9E

Rules Addressing "Place for Trial", "Unavailability", and "Attendance"

Civil Rule 77 Conducting Business	Civil Rule 32 Depositions	Evidence Rule 804 (a) Hearsay Exceptions Declarant Unavailable	Evidence Rule 801 Definitions Exclusions from Hearsay
(b) PLACE FOR TRIAL AND OTHER PROCEEDINGS. Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom. Any other act or proceeding may be done or conducted by a judge in chambers, without the attendance of the clerk or other court official, and anywhere inside or outside the district. But no hearing—other than one ex parte—may be conducted outside the district unless all the affected parties consent.	a) USING DEPOSITIONS. (1) *In General.* At a hearing or trial, all or part of a deposition may be used against a party on these conditions: * * * * (2) ***Impeachment and Other Uses.*** Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence. * * * * (4) ***Unavailable Witness.*** A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds: * * * * **(B)** that the witness is more than 100 miles from the place of	(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant: * * * * **(5)** is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure: **(A)** the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or **(B)** the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).	(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; **N.B.: An amendment is being proposed to expand the substantive (versus impeachment) admissibility of prior statements by the witness. It would delete the requirement that**

Civil Rule 77 Conducting Business	Civil Rule 32 Depositions	Evidence Rule 804 (a) Hearsay Exceptions Declarant Unavailable	Evidence Rule 801 Definitions Exclusions from Hearsay
	hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition * * * * (D) that the party offering the deposition could not procure the witness's attendance by subpoena; or	But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying. * * * * (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 and would not incur substantial expense.	**the statement have been made "under penalty of perjury at a trial, hearing, or other proceeding or in a deposition"**

TAB 10

10. Rule 45(b)(1) – Service of Subpoena

The Discovery Subcommittee has been considering the problems sometimes resulting from Rule 45(b)(1)'s directive that service of a subpoena depends on "delivering a copy to the named person." In addition, the Subcommittee has focused on the requirement that, when the subpoena requires attendance by the person served the witness fees and mileage be "tendered" to the witness.

This matter was discussed during the Committee's April 2024 meeting. Since then the Subcommittee has done further work, and it met by Teams on Aug. 19, 2024. Notes of that meeting are included in this agenda book.

By way of background, the pending discussion draft for a possible Rule 45(b)(1) amendment at the time of the April 2024 meeting was as follows:

> **(1)** ***By Whom and How; Tendering Fees.*** 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, including using any means of service authorized under Rule 4(d), 4(e), 4(f), 4(h), or 4(i), or authorized by court order [in the action] [or by local rule] {if reasonably calculated to give notice} and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law.

The Aug. 19 meeting began with this discussion draft and addressed a number of issues, largely reaching consensus on most of them, as introduced in greater detail in the notes of the meeting in terms of the list of issues presented in the memo for the meeting:

> 1. Should service of a subpoena be treated as parallel to service of a summons, which is what Rule 4 governs? Recurrent proposals to amend Rule 45(b)(1) over the last two decades have proposed invoking Rule 4 methods.

As described in no. 5 below, the emerging consensus was not to adopt state law methods for service of a summons in the subpoena context, but also not to adopt state law provisions for service of a subpoena (which could include the telephone call from the coroner). That prompted the suggestion that the methods endorsed for service of a summons in Rule 4(e)(2) (not depending on state law) could be used in Rule 45(b)(1) and might be better than saying "in-hand service."

A recurrent theme was that serving subpoenas is different from serving the summons and complaint. Subpoenas may often come with a "short fuse" that is not true of Rule 4 service of a complaint. They may come "out of the blue" in a way that may often not be the case with a defendant who can see a lawsuit coming. (Remember that Rule 37(e) invokes existing common law rules that require preservation of potential evidence by the defendant before suit when there is a likelihood of suit. Potential witnesses are less likely to be alert to their potential involvement in litigation than potential defendants.)

In addition, at least some of the Rule 4 methods simply don't seem to work in the subpoena setting. For example, waiver of service under Rule 4(d) could be regarded as inconsistent with Rule 45(b)(1)'s requirement that the subpoena actually be served on the witness (though in reality service is probably waived frequently by agreement between counsel). And if the witness does not

execute the waiver one has to start over. Moreover, the timelines in the rule often do not fit the subpoena setting because they require too much lead time before the witness must decide whether to waive service.

2. Should service provisions for subpoenas vary for different types of subpoenas (e.g., to testify at trial, to testify in a deposition, to produce documents)?

The consensus was that trying to distinguish among the many purposes for which subpoenas can be used is not practical. For one thing (as illustrated by some of the deliberations of the Rule 43/45 Subcommittee regarding the difference between subpoenas for trial testimony under Rule 43(a) and "oral testimony" at a motion hearing under Rule 43(c)), there sometimes is not a clear dividing line between hearings and trials. Another example is a subpoena for a deposition that directs the witness to bring along documents. A subpoena for production of documents is possible without a deposition, and a subpoena for a deposition is possible without a document request. Would we need three different categories for these different discovery subpoenas (putting aside trying to differentiate between subpoenas for "trials" and for "hearings")?

More basically, trying to draft and craft subpoena rules that differentiate between these various sorts of events for which subpoenas may command witnesses to show up or permit something would be quite a challenge. And it could invite much disputation about what is "right" for a deposition subpoena but not a "hearing" subpoena. The Rule 45 project a little more than a decade ago presented many challenges, and trying to desegregate the provisions in current Rule 45 and distribute them in various subpoena rules for different events would be unduly difficult.

3. Should Rule 4(d) on waiving service of the summons and complaint be one of the methods of serving a subpoena?

The consensus was that invoking Rule 4(d) is not suitable in the subpoena context. As noted above, the timing and waiver provisions in Rule 4(d) are out of step with what Rule 45(b)(1) says is required – service of the subpoena – and the timing aspects of Rule 4(d) are ill-suited to the subpoena context.

4. Should there be some sort of notice requirement – a minimum period for the requirement that the witness show up or produce documents?

Going forward, there should be an effort to include a notice requirement. It can be noted that Rule 45(d)(2)(B) says that an objection to a document subpoena "must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served." So that provision – not applicable to a subpoena that only commands the person to show up and testify – places a time limit of 14 days on objections but contemplates that the subpoena may command compliance in fewer than 14 days. That same time period might be suitable under Rule 45(b)(1).

5. Should the rule for service of a subpoena invoke state law provisions on service, as Rule 4(e)(1) does for service of the summons and complaint?

The consensus was that invoking state law is inconsistent with the effort to have a clear nationwide rule. Moreover, given the current directive of Rule 45(a)(2) that the subpoena issue from the court before which the action is pending even though it is served in another state and

calls for the witness to show up and testify in that state, trying to invoke state law seems to invite confusion and controversy.

The very thorough Rules Law Clerk research (included in a prior agenda book) showed a very wide range of subpoena methods in state courts. The 2013 amendment to the Rule providing that the subpoena issue from the court where the action is pending but that it may be served anywhere in the nation could introduce uncertainty about *which* state's law applies, adding an unwelcome complication to service of a subpoena.

The goal is to adopt a clear national rule for serving subpoenas, and adopting state law is inconsistent with that effort.

6. Should the rule authorize local rules that permit service by additional means?

The consensus was that local rules are blunt instruments to deal with service issues across the board, and that case-specific orders (no. 7 below) would be a better choice.

7. Should the rule authorize the court to enter an order authorizing service by additional means?

The consensus was that – in addition to a relatively narrow series of nationally-authorized methods of service the court should have authority to enter such a case-specific order. One analogy is provided by Rule 4(f)(2), which permits the court in some cases to authorize service of summons and complaint outside this country "by a method that is reasonably calculated to give notice."

The general idea is that this should not be a first resort, but that it is desirable to empower the court – upon a suitable showing that the authorized methods did not work – to permit additional methods on a case-by-case basis. In cases under Rule 4(f)(2), courts have developed experience in evaluating whether a sufficient effort has been made to effect service by customary means, and also determining whether the substitute means are reasonably calculated to provide notice.

8. If a court order may authorize additional methods of service, should the rule say this must be an order "in the action"?

The consensus was that this would be surplusage and should not be included.

9. How should the amendment treat the current rule requirement that fees and mileage be "tendered," seemingly along with service?

The consensus was that this seems an antiquated requirement. An effort should be made to remove it from the service effort while preserving the right of the witness to receive compensation for this cost. One possibility would be a rule that states the serving party is obligated to tender the fees and mileage at the time of service or at the time the witness shows up to testify.

The draft below therefore offers two options – providing that the fee must be tendered but also that the serving party need not tender it until the witness shows up as commanded, or deleting the requirement altogether.

10. If a court order may authorize additional methods of service, should the rule say these additional means must be "reasonably calculated to give notice"?

The seeming consensus was that including this phrase seems likely to say what courts would do anyway, so including it seems a good idea to the extent it provides guidance. It's already in Rule 4(f)(1) for service of summons outside this country and in Rule 87 for service in emergency conditions. The main issue for a court order authorizing additional methods for serving a subpoena is likely to be the question of whether the authorized methods have been attempted with sufficient vigor, not what alternatives should be employed when the authorized methods don't work.

Against the background described in greater detail in the notes of the Aug. 19 meeting, the current working draft (with bracketed choices and at least one footnote) is as follows:

Rule 45. Subpoena

* * * * *

(b) Service.

Alternative 1 – retaining obligation to tender fees but not as a part of service

(1) ***By Whom and How; <u>Notice Period;</u> Tendering Fees.***

<u>(A)</u> <u>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] {individual} personally or leaving a copy at the person's dwelling or usual place of abode with someone of suitable age and discretion. For good cause, the court may by order authorize serving a subpoena in another manner reasonably calculated to give notice.</u>[13]

[13] Ed Cooper has suggested the following alternative to (A):

(A) 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 a copy to the [person] {individual} personally;

(ii) mailing a copy to the person[‘s last known address];(iii) leaving a copy at the person's dwelling or usual place of abode with someone of suitable age and discretion [who resides there]; or

(iii) another means authorized by the court and reasonably calculated to give notice.

Ed adds the following notes:

(B) ~~and,~~ I~~i~~f the subpoena requires that the named person~~'s~~ attend~~ance,~~ a trial, hearing, or deposition, unless the court orders otherwise [for good cause], 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 commencement of the trial, hearing, or deposition. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies.

Alternative 2 – deleting obligation to tender fees

(1) ***By Whom and How; Notice Period ~~Tendering Fees~~.*** 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] {individual} personally or leaving a copy at the person's dwelling or usual place of abode with someone of suitable age and discretion. For good cause, the court may by order authorize serving a subpoena in another manner reasonably calculated to give notice. ~~and,~~ I~~i~~f the subpoena requires that the named person~~'s~~ attend~~ance,~~ a trial, hearing, or deposition, unless the court orders otherwise [for good cause], the subpoena must be served at least 14 days before the date on which the person is commanded to attend. ~~tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies.~~

Draft 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

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(a) "delivering" carries forward the ambiguity that some courts resolve by allowing delivery by mail. "to the person personally" reduces the ambiguity, but seems clunky. One alternative would be "delivering a copy to the person in hand," but that has not found favor.

(b) if we want to include commercial carries [cf. Appellate Rule 25] this might be: "sending a copy to the person['s last known address] by mail or commercial carriers." Commercial carriers may be more reliable than mail.

(c) The bracketed phrases were taken from Rule 5(b)(2)(C) {last known address} and 4(e)(2)(B) {who resides there}. Leaving with a transient guest or worker may be reasonable, at least if the named person is hiding behind whoever answers the door . . . .

current rule's use of "delivering," these methods of service also are familiar methods that ought easily adapt to the subpoena context.

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 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.

Alternative 1

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 and permitting tender to occur instead at the commencement of the trial, hearing, or deposition. 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.

Alternative 2

The amendment deletes the requirement that the party serving the subpoena also tender the witness fee for 1 day's attendance and the mileage allowed by law when serving the subpoena. Experience has shown that requiring this tender in addition to service of the subpoena can unduly complicate the service process. The amendment does not affect the obligation imposed by 28 U.S.C. § 1821, but does remove this complication from the process of serving the subpoena.

* * * * *

Besides loose ends obvious above, there are other loose ends that seem worth mentioning.

(1) Alternative of service by mail or commercial carrier: During the Aug. 19 meeting, some support was expressed for authorizing these methods as well, at least if a return receipt is required. Under the law of some states (such as California) service by mail is authorized for a summons when the defendant is located outside the state. It may well be that this mode of service will often be inexpensive and sufficiently prompt.

At the same time, it is hardly immediate. Rule 6(d) still has a three-day extension for motions served by mail in at least some circumstances. The proposed 14-day notice requirement may respond to concerns about service by mail. But U.S. mail may often not give actual notice. Recall what we were told during the public comment period on the proposal to amend Rule

23(c)(2)(B) for providing individual notice to members of a (b)(3) class of class certification to make clear that U.S. mail was not the only way to give individual notice – for a lot of Americans, particularly younger ones, U.S. mail is a terrible way to notify them of anything.

A different concern is about service by "commercial carrier." The big players like FedEx and UPS are surely as reliable most of the time as U.S. mail. But how about "Fast Frank's Delivery Service"? Should that qualify as a commercial carrier?

(2) Service by electronic means: As in the Wikileaks case mentioned during the Aug. 19 meeting, notice by electronic means may often be approved by the court in a given case. Indeed, something like that was involved in the amendment of Rule 23(c)(2)(B) that went into effect in 2018 – the court should focus on what method would actually be effective to reach the members of this class. And a class of Social Security recipients probably would differ from a class of video gamers. So trying by rule to adopt an all-purpose electronic means seems risky. And the evolution of methods of electronic communication means that a rule would have to be pretty open-ended to include methods unknown today that may be familiar in decade. The court order possibility seems a better way to support electronic service.

(3) Rule 4(e)(2) uses "individual" ("to the individual personally") perhaps to avoid the clumsy "person personally" that is introduced by the draft amendment above. But Rule 45 presently refers to "the named person" and it might not be desirable to change that to "the named individual."

(4) Rule 4(e)(2)(C) also permits service of a summons and complaint on the defendant's authorized agent for service of process. That does not seem suitable in the subpoena situation.

* * * * *

The Subcommittee looks forward to the Committee's reactions and insights.

Notes of Discovery Subcommittee Teams meeting
Aug. 19, 2024

On August 19, 2024, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a meeting via Teams. Some members of the Rule 43/45 Subcommittee also attended as observers. Those present included Chief Judge David Godbey (Chair, Discovery Subcommittee), Judge Robin Rosenberg (Chair, Advisory Committee), Judge Hannah Lauck (Chair, Rule 43/45 Subcommittee), Magistrate Judge Jennifer Boal, Justice Jane Bland, Helen Witt, Joseph Sellers, David Burman, and Clerk Liaison Thomas Bruton. Also participating were Prof. Richard Marcus and Prof. Andrew Bradt (Reporters to the Advisory Committee) and Prof. Edward Cooper (consultant to the Advisory Committee). Shelly Cox represented the Administrative Office.

The meeting focused on the most recent draft of possible changes to Rule 41(b)(1):

> **(1)** ***By Whom and How; Tendering Fees.*** 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, including using any means of service authorized under Rule 4(d), 4(e), 4(f), 4(h), or 4(i), or authorized by court order [in the action] [or by local rule] {if reasonably calculated to give notice} and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law.

As introduced in the memo for the meeting, this draft raises a variety of questions that this meeting can discuss and perhaps resolve:

1. Should service of a subpoena be treated as parallel to service of a summons, which is what Rule 4 governs? Recurrent proposals to amend Rule 45(b)(1) over the last two decades have proposed invoking Rule 4 methods.

2. Should service provisions for subpoenas vary for different types of subpoenas (e.g., to testify at trial, to testify in a deposition, to produce documents)?

3. Should Rule 4(d) on waiving service of the summons and complaint be one of the methods of serving a subpoena?

4. Should there be some sort of notice requirement – a minimum period for the requirement that the witness show up or produce documents?

5. Should the rule for service of a subpoena invoke state law provisions on service, as Rule 4(e)(1) does for service of the summons and complaint?

6. Should the rule authorize local rules that permit service by additional means?

7. Should the rule authorize the court to enter an order authorizing service by additional means?

8. If a court order may authorize additional methods of service, should the rule say this must be an order "in the action"?

9. How should the amendment treat the current rule requirement that fees and mileage be "tendered," seemingly along with service?

10. If a court order may authorize additional methods of service, should the rule say these additional means must be "reasonably calculated to give notice"?

An additional introductory point was that problems with service of subpoenas probably occur on only a small proportion of all depositions, hearings, or trials. Particularly with party-affiliated witnesses, usually counsel will not want to insist that the other side serve the witnesses (perhaps at home or at another inconvenient time).

But there are problem cases, as illustrated by *Susana v. NY Waterway*, 662 F.Supp.3d 477 (S.D.N.Y. 2023), and *Brewer v. Town of Eagle*, 663 F.Supp.3d 939 (E.D. Wis. 2023), which involved very expansive efforts to serve deposition subpoenas on witnesses who seemed to be ducking service.

So though the ambiguity of the current rule's requirement that the subpoena be "delivered" to the named person, there are many questions about what should be said more specifically about the permissible ways of doing that by amending the rule.

An initial reaction was from an attorney member who was generally uneasy with borrowing rules on service of the summons and complaint for the subpoena situation. Though the risk of default may seem dire, inventiveness can call for a variety of methods of service of summons. For example, in a suit against Wikileaks the problem was that there was no bricks and mortar location for the party. But after earnest efforts to serve by means identified in Rule 4, the presiding judge authorized an online alternative.

In this connection, it was later observed that, though default is a somewhat dire consequence, one cannot be held in contempt for failure to respond to a complaint. Rule 45(g), on the other hand, does authorize the court to hold in contempt a person who "fails without adequate excuse to obey the subpoena." In a sense, there may be a shorter fuse with a larger adverse consequence.

And even if service of summons is truly analogous, this attorney's initial view was that Rule 4(d) should not be included. For one thing, it is optional with the defendant; if the defendant does not waive service there has been no service. Indeed, since the rule deals with "waiving" service it is in a sense inconsistent with Rule 45(b)(1), which affirmatively calls for service. Moreover, Rule 4(d)(1)(F) requires that the recipient have at least 30 days to decide whether to waive service. That may be fine in regard to most deposition subpoenas, but as mentioned above usually deposition timing and location issues are worked out between counsel, particularly for party-affiliated witnesses.

A final reaction from this lawyer was that invoking varying state law provisions is out of step with the goal of a single national rule on how to serve subpoenas. A Rules Law Clerk survey of state law provisions on service of subpoenas showed great variety. Some were striking. For example, in at least one state a phone call from the coroner is sufficient. Now that Rule 45(a)(2) says that the subpoena is issued by the court presiding over the action, invoking the rules of that state for serving a subpoena might confuse things for a witness in another state.

A hypo was offered to illustrate. Assume a suit in Arkansas arising from a car crash in Arkansas that a bystander visitor from California saw. Should a telephone call to the Californian from a coroner in Arkansas be sufficient to "serve" a deposition subpoena requiring the Californian to appear near the witness's home (thereby satisfying the Rule 45(c) requirements)?

Relatedly, there could be what might be called "choice of law" issues. Rule 4(e)(1) authorizes following state law "for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made." Before the 2013 amendments, Rule 45 required that the subpoena issue from the district court where the witness was located, but the 2013 amendments changed that. To take the Arkansas/California hypo above, there could be a dispute about whether Arkansas or California service rules should apply.

On the other hand, empowering the presiding judge to authorize additional means of service is attractive. That would key to the circumstances of the given case, like the Wikileaks case mentioned above. That case-specific latitude seems superior to an across-the-board approach, and could be compatible with a rule that has only a few across-the-board methods of service subject to expanding by the assigned judge.

Another attorney member agreed that a nationwide rule would be superior to a rule that authorized use of varying state service provisions. The original goal was to eliminate the ambiguity created by the current rule. A simpler rule, particularly with the escape valve of a court order, would be better than incorporating the variety of state law provisions we have heard about.

The rule's current requirement that the witness fee and mileage be tendered as part of service could actually be the trickiest part. For example, in the *Brewer* case (cited above), after about a dozen efforts at service by a variety of means, the recalcitrant witness was able to persuade the judge that service had not been effected because the witness fee was not tendered.

This member strongly supports clarifying the rule, and also supports simplifying it, which would not be accomplished by invoking divergent state laws on service.

One possibility was suggested: Amend the rule to say that only in-hand service is enough, along with authorizing the court to permit additional methods if in-hand service was attempted and shown to be ineffective with a witness in hiding. A reaction was that enough people will duck service so this seems too limited.

Another attorney member suggested that perhaps the standard should be demonstrating actual notice. To take the Wikileaks service of summons example above, in that instance it was possible to demonstrate that the online method of service worked because it could be shown that the recipient opened the message.

This point was related to question 10 above – use of the due process standard from the *Mullane* case for service of summons. Even there, the due process standard only requires a method "reasonably calculated" to give notice. It's not a requirement of actual success in every instance.

The requirement that the witness fee and mileage be tendered as part of service prompted another attorney to ask whether this is really outdated. Is this really important to the person subject

to the subpoena in real life nowadays, particularly given the 100-mile limit in Rule 45(c)? Some people drive that far in their daily commutes.

One reaction was that perhaps the tender of fees requirement should be dropped altogether. Another idea that has been mentioned is that when electronic means are used to serve the subpoena, it could be that electronic means are also available to tender the fee. But this drew the point that – particularly with nonparty witnesses – the serving party probably does not have access to Venmo or similar methods to tender the fee. Several participants agreed that it would be desirable to remove the tendering of the fee as an extra step that can trip up the service effort, as in the *Brewer* case.

A judge opined that a time limit or notice period would be desirable. Too often there are motions to quash or for protective orders with regard to subpoenas that call for the witness to show up the day after service or the day after that. Rule 45(a)(4) requires the serving party to give notice to the other parties to the action before serving the subpoena, but nothing also requires that the witness have substantial prior notice.

In terms of a notice period, it might be that trial subpoenas would actually call for very different time limits from deposition subpoenas. Perhaps subpoenas for a motion hearing are somewhat like trial subpoenas. But on the other hand, the pretrial disclosure requirements of Rule 26(a)(3) usually should give plenty of notice to the parties about who will be called to testify at trial, so requiring service of subpoenas well in advance of trial could make sense except for unanticipated developments. And if there are unanticipated developments, that would likely be the sort of thing that the court would accommodate on request.

Another judge opined that serving subpoenas seems not to be precisely analogous to serving a summons. Perhaps some but not all of the Rule 4 methods should be borrowed.

Another judge offered some partial conclusions. On incorporating Rule 4(d) on waiver of service all agree that it is not suitable for Rule 45(b)(1). On incorporating local practices on serving subpoenas, this judge favored including state methods, but was not strongly in favor of that position. An attorney noted that it seemed odd to permit state law methods for service of the summons, but not a subpoena. One ground for doing that, however, might be that – at least for personal jurisdiction disputes – it is necessary to satisfy both the long-arm statute of the given state and also the "minimum contacts" due process requirements. So Rule 4(e)(1) may partly be acknowledging that in personal jurisdiction terms state law matters in federal court. Since the 2013 amendments to Rule 45, that's not similarly true for subpoenas.

Another view was expressed: Having a uniform national rule authorizing service by mail and perhaps commercial carrier, with service dependent on return receipt, seems modest and desirable. Perhaps the thing to do in Rule 45 would be a rule that incorporates state law on service of subpoenas rather than summons. At least a local rule might do that.

Another reaction was that following state law has attractive features. In Illinois, for example, service by electronic means is permitted when authorized by the assigned judge. An attorney pointed out that this could fit a narrow and specific revision of Rule 45(b)(1) regarding

nationally-approved methods, but with a proviso that the assigned judge could authorize additional methods.

A question that might matter is whether the rule should say that additional methods are to be authorized only if the methods spelled out in the rule have been attempted and have not worked. That could be a headache for judges regularly pestered by requests to authorize additional methods and called upon to determine whether a sufficient effort has been made to employ the methods sanctioned in the rule.

An attorney endorsed the idea of a rule that called for in-hand service and authorized the court to permit additional methods for good cause. At least with service of summons, there are a lot of entities with without a bricks and mortar presence anywhere. In the N.D. Ill. as much as 7% to 10% of civil cases involve a "party" like that. Coping with service on such entities has almost become routine, but it's done by case-specific orders.

A judge pointed out that Flock cameras (with car license plate readers) have been the focus of some litigation, and these also present service of summons issues. More pertinent to the Rule 45 issues, it's notable that finding a representative to testify is causing a lot of litigation.

A reaction to this discussion was that a rule requiring in-hand service would seem to narrow the methods permitted for serving subpoenas as compared with the current authorization for "delivering" the subpoena to the person. Presumably in-hand service would always satisfy that standard, but other methods can as well.

An example of an emerging problem area was offered – patent cases. Often the "party" is a website. The alleged infringers are often shell entities, so it's difficult to find any individual to serve with a subpoena.

An attorney noted that service of a subpoena must be more "nimble" than service of a summons. Often depositions (and testimony in court) must occur much sooner than the timing requirements for filing an answer.

Additional comparisons were offered. Rule 87(c)(1) regarding emergency conditions says that the court may authorize service "by a method that is reasonably calculated to give notice." That may be a useful locution for a court order in a given case. Another comparison is provided by 28 U.S.C. § 1783(b), which authorizes a U.S. federal court to issue a subpoena for testimony by a U.S. national in another country and says that "[s]ervice of the subpoena . . . shall be effected in accordance with the provisions of the Federal Rules of Civil Procedure relating to service of process on a person in a foreign country" – i.e., Rule 4(f)(2) – "reasonably calculated to give notice." But none of this requires proof of actual notice.

On the possibility of a court order for additional methods of service, it was suggested that such additional methods might be limited to local methods for serving subpoenas. Expanding to methods for service of a summons would not be desirable. The purpose of a summons is simply different, and the analogy ought not be controlling.

The question was raised: What have we resolved? Returning to the questions presented by the memo, a summary suggested the following:

1. Should service of a subpoena be treated as parallel to service of a summons, which is what Rule 4 governs? Recurrent proposals to amend Rule 45(b)(1) over the last two decades have proposed invoking Rule 4 methods.

The emerging consensus was not to adopt state law methods for service of a summons in the subpoena context, but also not to adopt state law provisions for service of a subpoena (which could include the telephone call from the coroner). That prompted the suggestion that the methods endorsed for service of a summons in Rule 4(e)(2) (not depending on state law) could be used in Rule 45(b)(1) and might be better than saying "in-hand service."

2. Should service provisions for subpoenas vary for different types of subpoenas (e.g., to testify at trial, to testify in a deposition, to produce documents)?

The consensus was that trying to distinguish among the many purposes for which subpoenas can be used is not practical.

3. Should Rule 4(d) on waiving service of the summons and complaint be one of the methods of serving a subpoena?

The consensus was that invoking Rule 4(d) is not suitable in the subpoena context.

4. Should there be some sort of notice requirement – a minimum period for the requirement that the witness show up or produce documents?

Going forward, there should be an effort to include a notice requirement. It can be noted that Rule 45(d)(2)(B) says that an objection to a document subpoena "must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served." So that provision – not applicable to a subpoena that only commands the person to show up and testify – places a time limit of 14 days on objections but contemplates that the subpoena may command compliance in fewer than 14 days.

5. Should the rule for service of a subpoena invoke state law provisions on service, as Rule 4(e)(1) does for service of the summons and complaint?

The consensus was that invoking state law is inconsistent with the effort to have a clear nationwide rule. Moreover, given the current directive of Rule 45(a)(2) that the subpoena issue from the court before which the action is pending even though it is served in another state and calls for the witness to show up and testify in that state, trying to invoke state law seems to invite confusion and controversy.

6. Should the rule authorize local rules that permit service by additional means?

The consensus was that local rules are blunt instruments to deal with service issues across the board, and that case-specific orders (no. 7 below) would be a better choice.

7. Should the rule authorize the court to enter an order authorizing service by additional means?

The consensus was that – in addition to a relatively narrow series of nationally-authorized methods of service the court should have authority to enter such a case-specific order.

8. If a court order may authorize additional methods of service, should the rule say this must be an order "in the action"?

The consensus was that this would be surplusage and should not be included.

9. How should the amendment treat the current rule requirement that fees and mileage be "tendered," seemingly along with service?

The consensus was that this seems an antiquated requirement. An effort should be made to remove it from the service effort while preserving the right of the witness to receive compensation for this cost. One possibility would be a rule that states the serving party is obligated to tender the fees and mileage at the time of service or at the time the witness shows up to testify.

10. If a court order may authorize additional methods of service, should the rule say these additional means must be "reasonably calculated to give notice"?

The seeming consensus was that including this phrase seems likely to say what courts would do anyway, so including it seems a good idea to the extent it provides guidance. It's already in Rule 4(f)(1) for service of summons outside this country and in Rule 87 for service in emergency conditions. The main issue for a court order authorizing additional methods for serving a subpoena is likely to be the question of whether the authorized methods have been attempted with sufficient vigor, not what alternatives should be employed when the authorized methods don't work.

* * * * *

Since there will be a transition in Advisory Committee membership at the end of September, after the agenda materials for the October meeting must be submitted to the A.O., ideally a redraft can be circulated and evaluated by the Discovery Subcommittee before the agenda materials go in. In any event, it would be good (if possible) for the "emeritus" Subcommittee members to try to "attend" the October meeting by Teams or Zoom (whichever is used).

TAB 11

11. Rule 53 (and other rules) – Substituting new term for "master"

The American Bar Association has submitted 24-CV-A, proposing that the word "master" be removed from Rule 53 and from any other rule that refers to the possibility of appointing a "master." The ABA suggests substituting "court-appointed neutral." Shortly before the Advisory Committee's April 2024 meeting, the Academy of Court-Appointed Neutrals (formerly the Academy of Court-Appointed Masters), submitted 24-CV-J, supporting the ABA proposal. Both these submissions are in this agenda book. In addition, the American Association for Justice has recently submitted 24-CV-S, also in this agenda book. This submission includes the following: "While not opining on textual drafting options at this time, AAJ supports eliminating the terms 'court appointed master,' 'special master' and related phrases using the term 'master' from the Federal Rules of Civil Procedure and in the federal courts more generally."

This matter was on the agenda for the April 2024 meeting and was discussed briefly. It was also mentioned during the Standing Committee's June 2024 meeting. To date, there has not been a consensus on this proposed change in terminology, though it is agreed that the change in terminology is not intended to produce a change in practice.

One might also question whether this proposed change results from a problem that has arisen in practice. If a key starting point is such a problem, then it could be concluded that this trigger for an amendment effort is not present at present. The ABA proposal asserts that this change is needed to "clarify an ambiguity in the existing rules." But it seems that is because judges may make appointments that are not of "masters" under Rule 53. Indeed, when Rule 16.1 was under consideration, one point that was made was that judges do appoint "masters" without invoking Rule 53 on occasion, and a question was raised about whether the reference to possible appointment of a "master" under Rule 16.1(b)(3)(F) is limited to appointments under Rule 53. If a change in rule nomenclature is made in response to the current submission, this new rule must be changed along with the other rules (listed below) in which the term "master" appears.

A related thought is that more experience may provide either a basis for concluding there is a real need in practice, or for selecting a substitute term. As noted below, the ABA and the Academy propose the term "court-appointed neutral." Another term that has emerged from some discussions is "court-appointed adjunct." As the FJC study done two decades ago showed, quite a variety of terms has been used.

The question at present is whether to proceed with this set of proposed rule changes, and whether there is a method of obtaining more information that could inform a decision whether to propose this change. One piece of additional information, mentioned below, might be a more complete compilation of statutory provisions that use the term "master" or "special master." Initial Rules Law Clerk research has identified some such statutory provisions, but a comprehensive listing could be a challenge to compile. And in any event, a change in the Civil Rules would not itself change those statutory uses of the term. Accordingly, whether to pursue this research about statutory references to "special masters" or "masters" is one consideration going forward.

The term is also used by the Supreme Court. See, e.g., *Delaware v. Pennsylvania*, 598 U.S. 115, 126 (2023) ("We consolidated the actions and appointed a Special Master."). Obviously, a change in the Civil Rules would not affect the Supreme Court's practice.

Another place one might look for use of the term is district court local rules. It may be that, under Rule 83, a change in the terminology used in the national rules would call for a change in the terminology used in local rules as well. But since the change is not intended to be substantive, it may be that Rule 83 need not command such changes. Separately, courts may appoint individuals to undertake tasks that they call "masters" or "special masters." For example, during the long consideration of rulemaking regarding MDL proceedings there were many examples given of masters appointed to play various roles, and (as noted above) new Rule 16.1 refers to possible appointment of a "master."

The following discussion largely tracks what was in the agenda book for the April 2024 meeting, but adds details on how amended rules would look and a draft Committee Note that could possibly be used for these changes. This report introduces the issues again. Guidance from the Advisory Committee on (a) whether to proceed presently with a proposed amendment, (b) what substitute term might be employed, and (c) what additional information would be useful in determining whether and how to proceed would be helpful.

A possible precedent – the 1987 "technical" amendments to "gender-neutralize" the rules

Allison Bruff has unearthed materials on the 1987 amendments to the Civil Rules. As reported in a July 7, 1986, memo to Reporter Paul Carrington, the effort responded to a desire to propose "stylistic amendments gender-neutralizing the Federal Rules of Civil Procedure." The memo addresses changes to Rules 8(a)(3), 8(e)(2), 12(a), 13(a), 15(c), 17(a), 26(f)(5), 32(a)(4), 36(a), 36(b), 37(b)(2)(E),37(c), 38(c), 41(b), 44.1, 45(f), 46, 51, 53(a), 53(d), 63, 68, 71, 81(c), F(5), and F(6).

The minutes of the July 9, 1986, meeting of the Standing Committee include the following at p. 10:

> The Committee next considered a number of changes to the gender-neutralizing amendments previously approved by the Committee. The changes were designed to clarify the gender-neutralizing amendments and not to affect substance. The changes were suggested by a subcommittee of the Advisory Committee consisting of Professor Maurice Rosenberg and Ms. Larrine S. Holbrooke. [A motion to approve the changes was adopted.]

These rules were amended in 1987, removing "he" and "him" and "his" from these rules. Each of the amendments was accompanied by a Committee Note that said in full: "The amendments are technical. No substantive change is intended."

The present proposal

The ABA proposal offers four reasons in support of this proposal:

(1) Master is a very poor term and a very poor description. It can be a positive when used to describe accomplishments, such as "chess master" and "master of the art." But "master" also can have a negative connotation when used in "situations involving power relationships." There,

"[i]t refers to one (male) person who has control or authority over another; and the most obvious example of that is slavery."

It does not seem that "master" is to be disapproved in all contexts. Most or perhaps all U.S. universities offer degrees that include the term "master." Law schools have the LLM degree. Graduate programs offer MA, MS, and MBA degrees. The word "master" is also used in other contexts. For example, one can be recognized as a "master" or even "grandmaster" in chess. There are certainly other uses of the term. To take a nonfrivolous example, consider Ibsen's play *The Master Builder*.

At the same time, use of the word "master" also has unsavory associations, partly due to the use of that term in relation to slavery. Responding to some such concerns, according to online research, many realtors say "primary bedroom" rather than "master bedroom" to avoid racist or sexist implications. Somewhat similarly, the ABA reports that these negative connotations have prompted some universities to stop using "master" for the title of the head of a residential college. Various professional organizations have stopped using "master," and many others are actively considering removing the word from their lexicon. We may be mid-stream in a societal shift in terminology.

It seemingly is also suggested that the use of "master" has negative associations in regard to court appointments in litigation. It is reported that at least three states – Maryland, Delaware, and Pennsylvania – have substituted a different term from their rules on positions similar to the position recognized in Rule 53.

Another suggestion that has been made is that – while it is appropriate to use the word "master" in relation to academic degrees or chess proficiency – the use in court is different because it does not signify any accomplishment of the person so appointed. That may sometimes be true, but in general it might be hoped that judges would choose people to serve due to their track records, so it might be said that past accomplishment plays a role in appointment as a "master," due to their mastery of pertinent skills. At least in regard to the Supreme Court's appointment of masters, that seems to be the case.

And the longstanding use of the term "master" in the Anglo-American legal tradition does not seem to refer to slavery or sexism.

In short, whether or not use of "master" in litigation settings involves recognition of past accomplishment by the person so designated is open to discussion. And it may be noted that Rule 53 surely does give persons appointed to be "masters" considerable authority over the litigants and the lawyers, as noted below. That's part of why the rule was revised two decades ago to strengthen the procedures for appointment and regulate the interactions between masters and the parties and between masters and the court.

(2) <u>"Court-Appointed Neutral" is a Much More Accurate Term.</u> The term "master" has ancient roots. As Magistrate Judge Brazil wrote in 1983: "The office of master in chancery . . . is one of the oldest institutions in Anglo-American law." Brazil, Referring Discovery Tasks to Special Masters, Is Rule 53 a Source of Authority and Restrictions, 8 ABA Res. J. 143.

But (putting aside the slavery connection) the history is not entirely glowing. Thus, Professor Levine has commented that "[t]he early history of specials masters' fees can be fairly described as sordid." Levine, Calculating Fees of Special Masters, 37 Hast. L.J. 141, 144 (1985). Indeed, Dickens' *Bleak House* included apt descriptions of disreputable activities in the offices of masters in the English courts. See id. at 147 & n.23.

Rule 53 uses the term "master," but Supreme Court Rule 37(3) uses "Special Master." State legislatures have used a variety of terms, including adjunct, special magistrate, hearing examiner, special facilitator, discovery facilitator, appointed mediator, monitor, court advisor, investigator, claims administrator, claims evaluator, court mediator, case evaluator, referee, receiver, commissioner, and others.

Court-appointed neutral, the submission urges, is superior to "master" because it "better describes a professional appointed as a special officer to help, rather than to take over specific functions in a litigation."

It is hardly the only alternative term that has been used in the federal courts, however. As noted below, the 2000 FJC report prepared in connection with the comprehensive revision of Rule 53 in 2003 to reflect then-current practice, found many terms in use.

(3) <u>"Court-Appointed Neutral" is becoming the Standard Term.</u> The ABA has in its Resolution 517, adopted in August 2023, adopted a Model Rule it is urging courts to adopt, defining "court-appointed neutral" as:

> a disinterested professional appointed as an adjunct special officer appointment to assist a court in its case-management, adjudicative or post-resolution responsibilities in accordance with the provisions of this Rule and any standards established by this Court for qualification to hold such an appointment.

This evolution is reportedly occurring right now, and it is not clear whether we are at the beginning, in the middle, or (perhaps) at the end of a partial change in terminology.

(4) <u>Adopting "Court-Appointed Neutral" Will Clarify an Ambiguity in the Existing Rules.</u> The submission says that the ambiguity results from the use of different terms for persons appointed to perform tasks like the ones described in Resolution 517. If the court calls the neutral a "master," "it is clear that Rule 53 applies to the appointment."

But the application of Rule 53 to appointment of a "monitor," a "referee," or a "discovery facilitator" presents the question whether Rule 53 applies. The submission says that any appointment not under Rule 53 should be "carved out of Rule 53." But as the ABA submission notes (pp. 5-6), the federal courts have long been recognized to have inherent authority to appoint people to provide assistance to the court. It does not seem that the current proposal seeks to limit that authority, but if it did would that is a concern the Committee should consider.

According to the ABA submission, this ambiguity can be cured by changing the term used in Rule 53 and the other rules that presently use "master." If some appointments of neutrals should not follow the strictures of Rule 53, the ABA urges that they be subject to a "carve out" in the rules.

This report attempts to provide an introduction to some of the issues raised by this submission.

Background on current Rule 53

As originally adopted in 1938, Rule 53 was a modification of the Equity Rule on references to masters. As Magistrate Brazil's 1983 article (quoted above) said, it had been used for centuries in Anglo-American law. In 1983, Rule 53 was amended, and some attention was given to terminology. Thus, the Committee Note to that amendment explained:

> The term "special master" is retained in Rule 53 in order to maintain conformity with 28 U.S.C. § 646(b)(2), authorizing a judge to designate a magistrate "to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure of the United States District Courts."

Rule 53 was extensively revised and reorganized in 2003 based on work done by a subcommittee chaired by Judge Shira Scheindlin. The FJC did an extensive study, Special Masters' Incidence and Activity (FJC 2000), which also addressed terminology on p. 1:

> Throughout this report, the term "special master" is used in an expansive sense to refer to adjuncts appointed to address a court's need for special expertise in a particular case. The titles most often given to such adjuncts are "special Master" and "court-appointed expert." Other names given to judicial adjuncts include auditors, assessors, appraisers, commissioners, examiners, monitors, referees, and trustees. On occasion because of interest in their specific use, court-appointed experts appointed pursuant to Federal Rule of Evidence 706 will be discussed as a separate subgroup of the special master group.

This 125-page report—including appendices—can be accessed via the following hyperlink: https://www.uscourts.gov/sites/default/files/specmast.pdf.

The 2003 Committee Note explained that the revision of the rule done on the basis of the study recognized "changing practices in using masters." The word "special" no longer appears in the rule. The different types of masters described in Rule 53(a) (based on the study of current use of masters) included consent masters (Rule 53(a)(1)(A)), trial masters (Rule 53(a)(1)(B)), and pretrial and posttrial masters (Rule 53(a)(1)(C)).

The 2003 Committee Note also included the following acknowledgement of problems of terminology:

> **Expert Witness Overlap.** This rule does not address the difficulties that arise when a single person is appointed to perform overlapping roles as master, and as court-appointed expert witness under Evidence Rule 706. Whatever combination of functions is involved, the Rule 53(a)(1)(B) limit that confines trial masters to issues to be decided by the court does not apply to a person who also is appointed as an expert witness under Evidence Rule 706.

In addition, the Note observed that "Special masters are appointed in many circumstances outside the Civil Rules." On that subject, consider 9C Fed. Prac. & Pro. § 2602 at 538-40, discussing use of masters to assist in the administration of complex settlements or enforcement of a judgment or consent decree:

> Some federal courts explicitly make such appointments in these cases under the aegis of Rule 53; however, as the activities of these masters often do not meet the procedural standards set out by Rule 53, these appointments may more appropriately be authorized by the inherent traditional equity powers of a federal court to seek assistance in discharging their duties rather than the rule. Courts may also use special masters to help assess the fair market value of stock.

ABA Bankruptcy Rules Submission

At the same time the ABA submitted 24-CV-A, it also submitted 24-BK-C. Presently, Bankruptcy Rule 9031, entitled "Masters Not Authorized," says: "Rule 53, FRCiv.P, does not apply in cases under the Code." An earlier submission (24-BK-A), from Bankruptcy Judge Michael Kaplan proposed that Rule 9021 be revised as follows: "Rule 53, FRCiv.P, ~~does not apply~~ applies in cases or proceedings under the Code." The ABA proposes that the word "master" not be used in the Bankruptcy Rules for reasons very similar to the reasons for its proposal to amend Rule 53.

Connection to slavery

There seems little doubt that the word "master" had a prominent role in relation to slavery. But it does not immediately appear that the use of the word in Anglo-American law has any connection to the disreputable use of the same word in regard to slavery. Instead, as pointed out by Wayne Brazil, it seems to antedate the African slave trade.

Instead, it appears that the legal term "master" may have been introduced into England around the time of William the Conqueror. That does not mean the office of "master" in England was always a shining beacon to the world. Indeed, as one of my colleagues wrote, "[t]he early history of special masters' fees can be fairly described as sordid." Levine, Calculating Fees for Special Masters, 37 Hast. L.J. 141, 144 (1985). The position was so lucrative that it was sold for large sums. "The practice became so abusive that one Lord Chancellor, Lord Macclesfield (Thomas Parker) was impeached in 1725 for, among other things, taking money for granting permission for the sale of the office of master." Id. at 145-46. See also id. at 146-47 (referring to the depiction of the masters in Dickens' *Bleak House*).

But brief research does not reveal any connection between this judicial position and slavery. Perhaps more careful research would cast more light on the subject.

Power relationships

The ABA submission says the term has particularly negative connotations when used in situations that involve power relationships. Rule 53(c) shows that Rule 53 masters do sometimes wield power over the parties. Rule 53(c)(1)(C) permits masters to compel, take, and record evidence. Rule 53(c)(2) permits a master by order to impose on a party any noncontempt sanction

provided by Rule 37 and to recommend a contempt sanction against a party and also recommend sanctions against a nonparty. Rule 53(f)(5) says "the court may set aside a master's ruling on a procedural matter only for an abuse of discretion."

Urgency

On this topic, it is notable that in 2019 the ABA adopted ABA Resolution 100, capping 18 months of effort by a Working Group including many prominent judges, including Judge Shira Scheindlin, who chaired the Advisory Committee's Rule 53 Subcommittee that produced the 2003 amendments and Judge Michelle Childs. Resolution 100 approved the resulting "Guidelines on the Appointment and Use of Special Masters in Federal and State Civil Litigation." Guideline 1 said: "It should be an accepted part of judicial administration in complex litigation and in other cases that create particular needs that a special master might satisfy, for courts and the parties to consider using a special master and to consider using special masters not only after particular issues have developed, but at the outset of litigation."

ABA Resolution 516 (adopted in August 2023) retitled these guidelines and also supports the present proposal to amend the Civil Rules. According to the submission, there is widespread change in nomenclature for these quasi-judicial positions. To the extent this movement gains momentum, that may provide this Committee with useful insights.

Statutory use of term "master"

As noted above, at least one provision in title 28 of the United States Code using the term "master" emerged from the initial examination of this proposal before the April meeting. The agenda book report for that meeting mentioned that a more disciplined search would be needed to identify such instances. Zachary Hawari, former Rules Law Clerk, began such an effort before he had to leave his position to take up another post in the A.O. His initial work produced a list (included in this agenda book) of uses of the term "master" in Titles 18 and 28 that do not also include the terms "vessel" or "vehicle." Although the references to a "master" jury wheel, etc., are irrelevant to our concerns, this initial research shows that the term appears in multiple places in Titles 18 and 28. Thus far, no effort has been made to locate use of the term in other parts of the United States Code. A copy of the July 16, 2024, memo from Hawari is included in this agenda book.

Zachary Hawari's initial research has identified a number of places in Titles 18 and 28 where the term is used in a seemingly relevant manner, as detailed in the memo included in this agenda book:

18 U.S.C. § 1836 – "The court may appoint special . . . master to locate and isolate all misappropriated trade secret information . . .

18 U.S.C. § 2248 – the court may "refer any issue arising . . . connection with a proposed order of restitution to a magistrate or special master for proposed findings . . ."

18 U.S.C. § 2259 – the court may "refer any issue arising . . . connection with a proposed order of restitution to a magistrate or special master for proposed findings . . ."

18 U.S.C. § 3507 – special master at foreign deposition.

18 U.S.C. § 3524 – appointment of special master for protection of witnesses.

18 U.S.C. § 3926 – appointment of special master in regard to issues on postsentence administration.

18 U.S.C. § 3664 – appointment of special master to make proposed findings of fact and recommendations in regard to enforcement of an order for restitution.

28 U.S.C. § 636(b)(2) – A judge may appoint a magistrate judge to act as a special master without regard to the provisions of Rule 53. [Already mentioned in connection with the Committee Note to the 2003 revision of Rule 53].

28 U.S.C. § 957 – The clerk may not appoint "a commissioner, master, referee or receiver in any case, unless there are special reasons requiring such appointment which are recited in the order of appointment.

28 U.S.C. § 1605A(e)(1) – In terrorism cases, the courts of the United States may appoint special masters to hear damage claims brought under this section.

28 U.S.C. § 2284 – In matters required to be heard by a three-judge court, when there is an application for a preliminary injunction a single judge "shall not appoint a master."

Rules Clerk Hawari looked only at Titles 18 and 28. He did brief additional research as his term as Rules Law Clerk ended, indicating that the term may appear in relevant ways in other titles of the United States Code. If the Committee decides to proceed with this amendment project, a careful review of additional titles of the United States Code might turn up multiple additional uses of the term in the U.S. Code. Zachary provided some initial insights about how such an omnibus search might be done, but did not have time to try to do it during his term as Rules Law Clerk.

But it is not clear whether such an omnibus search of the United States Code would assist the Committee in deciding how or whether to proceed. Rule changes don't change statutes, although the supersession clause does mean that a rule change is valid even though different from an existing statute. It might be that a Committee Note to a rule change could say that the term "master" has been used in many statutes and that use of the new term should be regarded as equivalent for purposes of the statute.

At the same time, the frequent appearance of the term in various statutory settings may underscore how long it has been a feature of Anglo American jurisprudence. It does not seem that there is a move afoot in Congress to change the statutory references, but that need not mean that changing the term in the Civil Rules would cause difficulty in applying these statutes.

Other sets of rules

Mention has already been made above of the ABA submission to the Bankruptcy Rules Advisory Committee. It does not appear that "master" is used in the Criminal Rules, but Appellate Rule 48 (entitled "Masters") does use the term seven times.

It appears that the term "master" appears 196 times in the Rules of the United States Court of Federal Claims (including multiple times in Rule 53 of that set of rules). It may be that revision of the terminology in the Civil Rules would prompt revision of the rules of the Court of Federal Claims.

Local Rules

It is not clear whether the term "master" often appears in local rules. A check of the local rules for the four districts in California indicates that only one (the S.D. Cal.) uses the term, and that only in passing. A more comprehensive review of the local rules of the other 90 district courts might yield information useful to the Committee.

Reference to a master for
appointments not under Rule 53

As noted above, courts often refer matters to a "master" without using Rule 53 authority, perhaps relying on their inherent authority. Presumably no change to Rule 53 would limit that activity. If the goal is to prevent use of the word "master," amending Rule 53 may be only a partial solution. It is not likely that an amendment to Rule 53 could limit the inherent authority of judges to make such appointments using that title.

It may well be that most of the statutory references above are not under Rule 53. The references in Title 18, for example, must not be under Rule 53 because it only applies in civil cases. As already noted, the Criminal Rules do not mention the term "master." So it seems that, whatever happens to Rule 53, some of the reported ambiguity will recur.

Selecting a new term

The ABA urges that "court-appointed neutral" is a good substitute term, and says that this term is "becoming the standard term." Whether this term has meanings that should be scrutinized before it is put into the Civil Rules calls for careful evaluation of other uses of "neutral." One example from the N.D. Cal. is a program called "Early Neutral Evaluation," adopted in that district in the 1980s. For discussion, see Brazil, Kahn, Newman & Gold, Early Neutral Evaluation, 69 Judicature 279 (1986); Levine, Early Neutral Evaluation: The Second Phase, 1989 J. Disp. Resol.

This N.D. Cal program involved a process for lawyers to qualify to serve as Early Neutral Evaluators and receive appointment to that position by the court. Then they could be referred cases through the program. It is not presently clear whether other districts have used the term "neutral" in the same way, but since those who qualified in the N.D. Cal. were (at least in a sense) "court-appointed," they might seem to fall within the term if it were substituted in Rule 53.

And a similar term seems to be used in the ADR community. For example, it appears that JAMS calls its providers (many of them retired judges) "neutrals." JAMS appointment of such neutrals is different from court appointed, so saying "court-appointed neutrals" would not seem to include these persons.

As noted above, a great many other terms have also been used. Whether they have also gained currency is presently uncertain, as is whether they those terms would work as well as the

ancient term "master" in the Civil Rules where "master" now appears would need to be evaluated. Another that has been suggested is "court-appointed adjunct."

For the present, however, the term "court-appointed neutral" will be used below. If another term seemed a better choice it could be substituted.

Revising Rule 53 to remove "master"

The following is what might be published as an amended version of Rule 53 using the term proposed by the ABA:

Rule 53. Court-Appointed Neutrals ~~Masters~~

(a) Appointment.

(1) ***Scope.*** Unless a statute provides otherwise, a court may appoint a court-appointed neutral ~~master~~ only to:

(A) perform duties consented to by the parties;

(B) hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by:

(i) some exceptional condition; or

(ii) the need to perform an accounting or resolve a difficult computation of damages; or

(C) address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.

(2) ***Disqualification.*** A court-appointed neutral ~~master~~ must not have a relationship to the parties, attorneys, action, or court that would require disqualification of a judge under 28 U.S.C. § 455, unless the parties, with the court's approval, consent to the appointment after the court-appointed neutral ~~master~~ discloses any potential grounds for disqualification.

(3) ***Possible Expense or Delay.*** In appointing a court-appointed neutral ~~master~~, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.

(b) Order Appointing a Court-Appointed Neutral ~~Master~~.

(1) ***Notice.*** Before appointing a court-appointed neutral ~~master~~, the court must give the parties notice and an opportunity to be heard. Any party may suggest candidates for appointment.

(2) ***Contents.*** The appointing order must direct the court-appointed neutral ~~master~~ to proceed with all reasonable diligence and must state:

(A) the court-appointed neutral's ~~master's~~ duties, including any investigation or enforcement duties, and any limits on the court-appointed neutral's ~~master's~~ authority under Rule 53(c);

(B) the circumstances, if any, in which the court-appointed neutral ~~master~~ may communicate ex parte with the court or a party;

(C) the nature of the materials to be preserved and filed as the record of the court-appointed neutral's ~~master's~~ activities;

(D) the time limits, method of filing the record, other procedures, and standards for reviewing the court-appointed neutral's ~~master's~~ orders, findings, and recommendations; and

(E) the basis, terms, and procedure for fixing the court-appointed neutral's ~~master's~~ compensation under Rule 53(g).

(3) ***Issuing.*** The court may issue the order only after:

(A) the court-appointed neutral ~~master~~ files an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455; and

(B) if a ground is disclosed, the parties, with the court's approval, waive the disqualification.

(4) ***Amending.*** The order may be amended at any time after notice to the parties and an opportunity to be heard.

(c) Court-Appointed Neutral's ~~Master's~~ Authority.

(1) ***In General.*** Unless the appointing order directs otherwise, a court-appointed neutral ~~master~~ may:

(A) regulate all proceedings;

(B) take all appropriate measures to perform the assigned duties fairly and efficiently; and

(C) if conducting an evidentiary hearing, exercise the appointing court's power to compel, take, and record evidence.

(2) ***Sanctions.*** The court-appointed neutral ~~master~~ may by order impose on a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.

(d) Court-Appointed Neutral's ~~Master's~~ Orders. A court-appointed neutral ~~master~~ who issues an order must file it and promptly serve a copy on each party. The clerk must enter the order on the docket.

(e) Court-Appointed Neutral's ~~Master's~~ Reports. A court-appointed neutral ~~master~~ must report to the court as required by the appointing order. The master must file the report and promptly serve a copy on each party, unless the court orders otherwise.

(f) Action on the Court-Appointed Neutral's ~~Master's~~ Order, Report, or Recommendations.

(1) ***Opportunity for a Hearing; Action in General.*** In acting on a court-appointed neutral's ~~master's~~ order, report, or recommendations, the court must give the parties notice and an opportunity to be heard; may receive evidence; and may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions.

(2) ***Time to Object or Move to Adopt or Modify.*** A party may file objections to—or a motion to adopt or modify—the court-appointed neutral's ~~master's~~ order, report, or recommendations no later than 21 days after a copy is served, unless the court sets a different time.

(3) ***Reviewing Factual Findings.*** The court must decide de novo all objections to findings of fact made or recommended by a court-appointed neutral ~~master~~, unless the parties, with the court's approval, stipulate that:

(A) the findings will be reviewed for clear error; or

(B) the findings of a court-appointed neutral ~~master~~ appointed under Rule 53(a)(1)(A) or (C) will be final.

(4) ***Reviewing Legal Conclusions.*** The court must decide de novo all objections to conclusions of law made or recommended by a court-appointed neutral ~~master~~.

(5) ***Reviewing Procedural Matters.*** Unless the appointing order establishes a different standard of review, the court may set aside a court-appointed neutral's ~~master's~~ ruling on a procedural matter only for an abuse of discretion.

(g) Compensation.

(1) ***Fixing Compensation.*** Before or after judgment, the court must fix the court-appointed neutral's ~~master's~~ compensation on the basis and terms stated in the appointing order, but the court may set a new basis and terms after giving notice and an opportunity to be heard.

(2) ***Payment.*** The compensation must be paid either:

(A) by a party or parties; or

(B) from a fund or subject matter of the action within the court's control.

(3) ***Allocating Payment.*** The court must allocate payment among the parties after considering the nature and amount of the controversy, the parties' means, and the extent to which any party is more responsible than other parties for the reference to a court-appointed neutral ~~master~~. An interim allocation may be amended to reflect a decision on the merits.

(h) Appointing a Magistrate Judge. A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge states that the reference is made under this rule.

Draft Committee Note

Rule 53 is amended to substitute the term "court-appointed neutral" for the term "master." No substantive change is intended. [The term "master" appears in various provisions of the United States Code. When appropriate, it should be regarded as synonymous with the term "court-appointed neutral" under Rule 53.]

Note: The second sentence mirrors what was said in 1987, when it appears that gender-neutral terminology changes were made. Perhaps the same Committee Note could be used (with the pertinent rule number inserted) for all the other rules needing change, set forth below.

Removing references to "master" in the Civil Rules outside Rule 53

Removing the word "master" from Rule 53 would not remove it from the other places where it appears in the Civil Rules. It seems that those other rules are:

Rule 16(c)(2)(H): "referring matters to a magistrate judge or a court-appointed neutral ~~master~~;"

Rule 23(h)(4): "The court may refer issues related to the amount of the award to a court-appointed neutral ~~special master~~ or a magistrate judge, as provided in Rule 54(d)(2)(D)."

Rule 52(a)(4): "**Effect of a Court-Appointed Neutral's ~~Master's~~ Findings.** A court-appointed neutral's ~~master's~~ findings, to the extent adopted by the court, assayed be considered the court's findings."

Rule 54(a): "A judgment should not include recitals of pleadings, a court-appointed neutral's ~~master's~~ report, or a record of prior proceedings."

Rule 54(d)(2)(D):

Special Procedures by Local Rule; Reference to a Court-Appointed Neutral ~~Master~~ or a Magistrate Judge. By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings. Also, the court may refer issues concerning the value of services to a court-appointed neutral ~~special master~~ under Rule 53 without regard to the limitations of Rule 53(a)(1), and may refer a motion for attorney's fees to a magistrate judge under Rule 72(b) as if it were a dispositive matter.

Rule 71.1(h)(2)(D):

Commission's Powers and Report. A commission has the powers of a court-appointed neutral ~~master~~ under Rule 53(c). Its action and report are determined by a majority. Rule 53(d), (e), and (f) apply to its action and report.

Rule 16.1(b)(3)(F): [This rule was approved by the Standing Committee at its June 2024 meeting and may go into effect on Dec. 1, 2025. Accordingly, it is included here.] "whether any matters should be referred to a magistrate judge or a court-appointed neutral ~~master~~."

Further work may identify additional rules outside Rule 53 that use the term "master."

* * * * *

This report introduces the issues presented and also presents what might be published as a preliminary draft of amendments to Rule 53, identifying also the other Civil Rules that use the term "master." Probably changes to those other rules could (as was done in the 1980s adoption of gender-neutral terms) have relatively identical Committee Notes. Perhaps, as with those changes, it could be said that the change is "technical."

As noted, at least some statutes using that term have been identified, but the Rules Law Clerk initial review included in this agenda book is probably not a complete list. How frequently the term "master" is used in other sets of rules (e.g., the Supreme Court's rules or local rules or state court provisions) remains uncertain. But it is also uncertain whether changing the term in the Civil Rules would have a disruptive effect in any of these other statutory schemes.

As introduced at the beginning of this report, the basic questions at present are: (a) whether to proceed presently with a proposed amendment, (b) what substitute term might be employed, and (c) what additional information would be useful in determining whether and how to proceed would be helpful. Perhaps one could add (d) whether the consideration of this submission should be paused so the Committee can take account of developments elsewhere. As noted in the submission from the ABA, there is reportedly a move afoot to make similar changes in many places. We have not received any report that Congress is contemplating a change in the various statutory provisions noted above (or on others outside Titles 18 and 28 that we have not identified). And it is worth noting that both the ABA and the Academy of Court-Appointed Neutrals continued to use the term "master" until pretty recently. There may be time for reflection.

TAB 11A

AMERICAN BAR ASSOCIATION

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February 12, 2024

H. Thomas Byron III,
Secretary Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Room 7-300
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: Amendment of the Federal Rules of Civil Procedure to Substitute the Use of the Phrase "Court-Appointed Neutral" for "Court-Appointed Master"

Dear Mr. Byron:

The American Bar Association (ABA) respectfully requests that the Judicial Conference of the United States recommend that the Federal Rules of Civil Procedure be amended to substitute the term "court-appointed neutral" for "court-appointed master" both in Federal Rule of Civil Procedure 53 and in other rules that reference potentially appointing a "master."

Background

At its Midyear Meeting in January 2019, the ABA House of Delegates approved ABA Resolution 100.[1] This Resolution approved "Guidelines on the Appointment and Use of Special Masters in Federal and State Civil Litigation" (the "Guidelines") and urged that Bankruptcy Rule 9031 be amended "to permit courts responsible for cases under the Bankruptcy Code to use special masters in the same way as they are used in other federal cases."

This 2019 Resolution resulted from 18 months of effort by a Working Group that included representatives of the National Conference of Federal Trial Judges, the National Conference of State Trial Judges, the Lawyers Conference, the ABA Standing Committee on the American Judicial System, and the ABA's Litigation, Business Law, Dispute Resolution, Intellectual Property Law, Tort Trial and Insurance Practice, and Antitrust Sections on best practices concerning the use, selection, administration, and evaluation of "special masters."

[1] www.americanbar.org/content/dam/aba/administrative/board_of_governors/greenbook/greenbook.pdf at 227. Under ABA Policy, ABA Resolutions themselves are official policies of the Association. Reports that accompany resolutions are not adopted as official policy, and are treated as guidance provided by resolutions' drafters.

The Working Group that drafted the 2019 Resolution included retired Southern District of New York Judge Shira Scheindlin, who chaired the Subcommittee of the Advisory Committee on the Federal Rules of Civil Procedure that drafted the 2003 version of Federal Rule of Civil Procedure 53; then District of South Carolina Federal District Court Judge (now District of Columbia Circuit Judge) J. Michelle Childs; a former chair of the ABA Business Law Section, the then chairs of the ABA Litigation and Intellectual Property Law Sections; two former chairs of the ABA Section on Dispute Resolution; two former chairs of the ABA Antitrust Section; one former, and one now, state supreme court justice and numerous other judges and practitioners.

The central principle of the Guidelines enunciated in Guideline 1 is that "[i]t should be an accepted part of judicial administration in complex litigation and in other cases that create particular needs that a special master might satisfy, for courts and the parties to consider using a special master and to consider using special masters not only after particular issues have developed, but at the outset of litigation."[2] Over the decades courts have become increasingly involved in case management. Expanding the understanding of how neutrals might assist with case management benefits both the courts and the parties. While court-appointed neutrals may be appointed to serve quasi-adjudicative functions (e.g., discovery referees), they can also serve in non-adjudicative roles such as performance management (e.g., monitoring a decree), facilitation (e.g., working with the parties to resolve discovery disputes without motion), advisory (e.g., providing expertise to assist the court in assessing the adequacy of expert reports); information gathering (e.g., a forensic accountant, who reports to the court on where money went from a trust); or a liaison (e.g., providing a distillation of information to the court without exposing the court to settlement discussions or privileged material).[3]

In the three and one-half years following the adoption of Resolution 100, the ABA examined approaches to implementing these precepts. This process required thousands of hours of discussion, involving at least 14 of the ABA's sections, divisions and forums, and over 20 organizations outside of the ABA. It has resulted in the drafting of two other resolutions co-sponsored by both the Judicial Division and the Section of Dispute Resolution and their approval by the ABA House of Delegates in August 2023:

> Resolution 516, which is the focus of this request, provides:
>
> RESOLVED, That the American Bar Association amends the *ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation* ("Guidelines"), adopted January 2019 (Resolution 100, 19M100), by retitling the Guidelines, "*ABA Guidelines for the Appointment and Use of Court-Appointed Neutrals in Federal and State Civil Litigation*" and replacing the terms "Special Master" and "Master" with "Court-Appointed Neutral;"
>
> FURTHER RESOLVED, That the American Bar Association further amends ABA Resolution 100, 19M100, to urge that Bankruptcy Rule 9031 and other provisions of rules or law related to Bankruptcy be amended to permit courts

[2] *See* ABA Resolution 100 Guideline 1.

[3] *See, id.* Guideline 4.

> responsible for cases under the Bankruptcy Code to use court-appointed neutrals (whether identified as "masters" or otherwise) in the same way as they are used in other federal cases; and
>
> FURTHER RESOLVED, That the American Bar Association supports rule and legislative changes designed to replace the term "master" or "special master" with "court-appointed neutral."[4]

In addition, Resolution 517 adopts and urges state, local, territorial, and trial courts to adopt a Model Rule on the use of Court-Appointed Neutrals. (Although this resolution is not directed to amending federal rules, it may be helpful to have as background and also because it includes a definition of "court-appointed neutral.")[5]

This Request

This request seeks to make the changes necessary to use "court-appointed neutral" rather than "master" in the Federal Rules of Civil Procedure. The ABA is submitting a separate letter today requesting that the Federal Rules of Bankruptcy Procedure be amended to permit the use of "court-appointed neutrals" in proceedings under the Bankruptcy Code. For convenience, that letter is attached.

Rationale for Having the Term "Court-Appointed Neutral" Replace "Master" in the Federal Rules.

(1) "Master" is a very poor term and a very poor description.

The term "master" has both positive and negative connotations. It can refer to admirable qualities, like expertise, proficiency, accomplishment, scholarship, or leadership to which others can aspire and usually obtained through years of effort. In the context of calling someone a "chess master" or a "master of the art" it does convey one of those meanings.

The situation, however, is very different when "master" is used to identify people invested by a court with some measure of authority over parties. Although no one suggests that the use of "master" in court settings was intended to have a negative meaning, "master" carries an extremely negative connotation in situations involving power relationships. It refers to one (male) person who has control or authority over another; and the most obvious example of that is slavery.

In recent years, many organizations, in many contexts, have been considering whether they should use a different term – especially in situations that describe arguable control over others or invoke images of dominance and subservience. For example, electrical and software engineers are discussing whether they should continue (as they have for decades) to use master and slave to

[4] www.americanbar.org/content/dam/aba/directories/policy/annual-2023/516-annual-2023.pdf

[5] https://www.americanbar.org/content/dam/aba/directories/policy/annual-2023/517-annual-2023.pdf

refer to situations in which one device exercises asymmetric control over others. Colleges, including Harvard, Yale, and Rice have stopped using "master" as an academic title or the name for the head of a residential college. Many real estate professionals have decided that "master" bedroom is not the best name. The wine industry is debating whether to delete the term "master" from "master sommelier."

By supporting "rule and legislative changes designed to replace the term "master" or "special master" with "court-appointed neutral," in ABA Resolution 516, and using the term "court-appointed neutrals" in Resolution 517 for a model state, local, tribal, and territorial rule, the ABA joined in an active effort already underway to change the term used by many courts. At least three states – Maryland,[6] Delaware[7] and Pennsylvania[8] – have changed court rules in recent years to substitute a different term for "masters." In Pennsylvania's case, the move followed a resolution of the Philadelphia Bar Association that raised a number of concerns about appointing someone called a "master."[9] The resolution noted that the term "creates a sense of separation, anxiety, and confusion" because it suggests that some people are subject to others."[10]

As the Philadelphia Bar Resolution reflects, even the positive connotation of "master" is a poor description of the role. In this setting, it suggests someone who is put on a pedestal to take charge, not someone who is brought in to help, and certainly not someone to assist the parties in a self-determined process to resolve differences.

Even before these latest movements, some settings have highlighted the difficulty in using the term "master." For example, after years of litigation, one court approved a consent decree in *Pigford v. Glickman*,[11] – a case that resulted ultimately in payment of billions of dollars to settle allegations of discrimination against black farmers in United States Department of Agriculture programs. The consent decree called for neutrals in various capacities. But none of them was called a "master" – a name that would be particularly inappropriate.[12]

Numerous organizations have now recognized that what was inappropriate in *Pigford* may be equally inappropriate, if less obvious, in other settings. In 2022, the ABA's Judicial Division's Lawyers Conference committee that had been leading the effort to implement the Guidelines changed its name from the "Special Masters Committee" to the "Court-Appointed Neutrals

[6] *See* https://www.courts.state.md.us/news/new-rule-changes-masters-magistrates.

[7] *See* https://legis.delaware.gov/BillDetail?LegislationId=140635.

[8] *See* https://law.justia.com/cases/pennsylvania/supreme-court/2023/744-civil-procedural-rules-docket.html.

[9] *See* https://philadelphiabar.org/?pg=ResNov20_1

[10] *Id.*

[11] 185 F.R.D. 82 (D.D.C. 1999).

[12] https://media.dcd.uscourts.gov/pigfordmonitor/orders/19990414consent.pdf

Committee."[13] The Academy of Court-Appointed Masters changed its name to the Academy of Court-Appointed Neutrals.[14] The National Association of Women Judges adopted a Resolution in Support of Ceasing to Use the Term "Master" or "Special Master" in favor of using the term "Court-Appointed Neutrals."[15]

Since the ABA adopted these resolutions, many organizations either have already or are currently considering similar changes or have urged their members to use "court-appointed neutral" rather than "master" on resumes, websites and business cards. The American Arbitration Association has stopped using the term "master" for neutrals appointed to assist in arbitration. The Institute of Inclusion in the Legal Profession has announced its support for the change from "master" to "court-appointed neutral." We have also learned that organizations that are actively considering similar name changes include the American Judges Association, the National Council of Juvenile and Family Court Judges, the National Association for Court Management, the National Bar Association, the National Asian Pacific American Bar Association, the International Institute for Conflict Prevention and Resolution, and Judicial Arbitration and Mediation Services.

(2) "Court-Appointed Neutral" Is a Much More Accurate Term

The use of a court-appointed neutral to assist adjudicators has a very long history. "The office of master in chancery, of French origin and imported [to England] with the Norman Conquest, is one of the oldest institutions in Anglo-American law."[16] Some historians trace the practice to "civilian judex of the Roman Republic and Early Empire – a private citizen appointed by the praetor or other magistrate to hear the evidence, decide the issues and report to the [appointing] court."[17] The United States Supreme Court appointed a committee of neutrals to assist in deciding the very first case filed on its docket.[18] And over 100 years ago, the Court wrote that the inherent power of the judiciary "includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause. From the commencement of our government, federal courts have exercised authority,

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[13] https://www.americanbar.org/groups/judicial/conferences/lawyers_conference/committees/court-appointed-neutrals/committee-name-change/

[14] *See* *www.courtappointedneutrals.org/acam/assets/file/public/namechange/on%20becoming%20the%20academy%20of%20court-appointed%20neutrals.pdf*

[15] Available at www.nawj.org/uploads/files/resolutions/resolutionsupportingcourtappointedneutrals10-22-2022.pdf

[16] Wayne D. Brazil, "Referring Discovery Tasks to Special Masters: Is Rule 53 a Source of Authority and Restrictions?," 8 American Bar Foundation Research Journal, 143 at n.31 and accompanying text (Winter 1983).

[17] *Id.*

[18] *Vanstophorst v. Md.*, 2 U.S. 401 (1791).

when sitting in equity, by appointing either with or without the consent of the parties, special masters, auditors, examiners, and commissioners."[19]

Despite the long history of courts appointing neutrals, courts and rule-makers have never completely settled on a single term to refer to a neutral appointed by a court to perform one or more of these functions or to serve in one or more of these roles. Since 2003, Federal Rule of Civil Procedure 53, and state rules that adopt the federal language, have used the term "master." However, the Supreme Court rules use the term "special master."[20] And states legislatures and courts have used dozens of other terms that often have their own meanings in other contexts. These terms include "adjunct," "special magistrate," "hearing examiner," "special facilitator," "discovery facilitator," "appointed mediator," "monitor," "court advisor," "investigator," "claims administrator," "claims evaluator," "court mediator," "case evaluator," "referee," "receiver," "commissioner," and others.[21]

Court-appointed neutrals have these different titles because they can fill very different roles depending on case needs. Where the term "master" suggests someone brought in to adjudicate, court-appointed neutrals are a multipurpose tool that could be used for quasi-adjudicative work, but could also be used for facilitative, investigative, intermediary, informatory, administrative, monitoring, implementing or various other purposes.

Calling someone "Master" suggests that their role is to make decisions or recommendations to the court. That mischaracterizes someone who is used to facilitate or otherwise assist the parties in reaching their own resolution of differences; or to offer expertise about science, or industries like construction, forensic accounting or computer forensics. Indeed, even when the role is ostensibly quasi-adjudicative, a significant benefit from appointing a neutral can come from helping the parties resolve differences without the need for motions in the first place.

"Court-Appointed Neutral" better describes a professional appointed as a special officer to help, rather than to take over specific functions in a litigation. It makes it easier for parties to appreciate that this is a multi-faceted tool and to focus the consideration on whether and which facet might be useful in a particular case and whether the benefit from using the tool in a particular case outweighs the costs.

(3) "Court-Appointed Neutral" Is Becoming the Standard Term.

As noted above, the inaccurate term "master" has never gained universal acceptance and, with three states already specifically rejecting the term, it never can be expected to serve as a unifying term. By contrast, "court-appointed neutral," is an accurate description. It captures the wide variety of names that jurisdictions use for this tool. And it is also becoming a term of art.

Both the main professional organization of those who serve courts as appointed neutrals (the Academy of Court-Appointed Neutrals) and the main Committee of the ABA Judicial Division

[19] *In re Peterson,* 253 U.S. 300, 312 (1920).

[20] *See* Sup. Ct. R. 33(1)(g); 37(1).

[21] *See* ABA Resolution 100, Report at 1 n.1.

(the "Court-Appointed Neutrals" Committee) have adopted this term. The ABA has standardized the use of the term "Court-Appointed Neutrals" in a Model Rule that it is urging state, local, territorial and tribal courts to adopt.[22] That Model Rule defines "court-appointed neutral" as:

> a disinterested professional appointed as an adjunct special officer appointment to assist a court in its case-management, adjudicative or post-resolution responsibilities in accordance with the provisions of this Rule and any standards established by this Court for qualification to hold such an appointment.[23]

(4) Adopting "Court-Appointed Neutral" Will Clarify an Ambiguity in the Existing Rules.

In discussions concerning Proposed Federal Rule of Civil Procedure 16.1, the Advisory Committee on the Federal Rules noted an important ambiguity in Rule 53. Neither Rule 53, nor any of the other rules that use the term "master" define the term. Under the current rule, if a court in a civil case appoints a neutral that the court calls a "master," it is clear that Rule 53 applies to the appointment. But if the court appoints someone as a "monitor," or "referee" or "discovery facilitator" the application of the rule is unclear.[24]

Standardizing and defining the term "court-appointed neutral" to encompass the broad roles of a neutral clarifies these rules. If there are appointments of neutrals (for example, referrals to court-based mediation programs or the appointment of a mediator outside of a court-based referral program) that should *not* follow the strictures of Rule 53, then they should be carved out of Rule 53, instead of leaving courts and parties to guess what rules apply. The ABA Proposed Model Rule for state, local, territorial, and tribal courts, contains such a carve out. It permits courts to

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[22] Resolution 517.

[23] *Id.* Subpart (a).

[24] (Draft) Minutes of the Civil Rules Advisory Committee (reporting on Subcommittee Discussions), March 28, 2023 at 7. Available at https://www.uscourts.gov/sites/default/files/2023-03_advisory_committee_on_civil_rules_meeting_minutes_final_0.pdf ("[t]here has been, and to some extent still is, substantial disagreement about the necessity of following the entire Rule 53 procedure every time there is a need for such an appointment."). Indeed, a significant reason for considering and adopting the 2003 rules was that before the 2003 version of Rule 53 was adopted, the rule discussed only the use of "masters" or "special masters" to conduct trials and "[b]y the end of the twentieth century, the use and practice of appointing special masters had grown beyond the then-current version of Rule 53," Shira A. Scheindlin and Jonathan A. Redgrave, "Revisions in Federal Rule 53 Provide New Options for Using Special Masters in Litigation," 76 N.Y. ST. BAR ASS'N J. 18, 19 (January 2004), to include appointments based on inherent authority to conduct pre- and post-trial functions that the preexisting Rule 53 did not discuss. *See* Advisory Committee Notes on 2003 Amendments to Federal Rule of Civil Procedure 53. Courts making those types of appointments before the 2003 Amendments were doing so as a matter of inherent authority, which existed regardless of what Rule 53 provided. *See* Brazil, *supra* n.16.

make appointments in appropriate cases "[u]nless law or the court provides otherwise, and subject to any court rules, procedures (including the provisions of any court-based alternative dispute resolution program) and principles of ethics applicable to the services being performed."[25]

(5) The Changes Are Non-Substantive and Relatively Simple to Implement.

The ABA is not proposing at this time to make substantive changes to Federal Rule of Civil Procedure 53. The Model Rule is directed to state, local, territorial and tribal courts. The changes proposed to the Federal Rules of Civil Procedure relate only to changing the name.

Including the index and headings, the term "master" currently appears 42 times in the Federal Rules of Civil Procedure, each time used in the context of a person appointed by the court. (Some comments on Proposed Rule 16.1 use the term "master complaint" to reference what the proposed rule identifies as a "consolidated" complaint). The change could be made by adding a definition of court-appointed neutral to Rule 53, with an appropriate carve-out and changing the term "master" to "court-appointed neutral" where it appears throughout the rules.

We appreciate the Judicial Conference's consideration of these changes and are of course available to address any concerns. Attached for reference is a copy of the request the ABA has submitted today to enable the use of court-appointed neutrals in bankruptcy proceedings.

Sincerely,

Mary Smith

Mary Smith
President, American Bar Association

[25] https://www.americanbar.org/content/dam/aba/directories/policy/annual-2023/517-annual-2023.pdf, subpart (c).

TAB 11B

April 5, 2024

By Electronic Delivery

H. Thomas Byron III,
Secretary Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: American Bar Association Rule Suggestion 24-CV-A Substitution "Court-Appoint Neutral" for "Master"

Dear Mr. Byron:

I am writing on behalf of the Academy of Court-Appointed Neutrals (ACAN) to express our strong support for the American Bar Association's (ABA's) Suggestion that the Federal Rules of Civil Procedure be amended to substitute the term "court-appointed neutral" for "master"[1] and also to update some of the information that the ABA provided in connection with its Suggestion in advance of the Advisory Committee's meeting on Tuesday April 9, 2024.

The Academy of Court-Appointed Neutrals (ACAN)

The Academy of Court-Appointed Neutrals was formerly the Academy of Court-Appointed Masters. We are a national organization of people who serve, are interested in serving, or are interested in the use of what Federal Rule of Civil Procedure 53 currently calls "masters." Our members include former federal and state court judges, lawyers, practitioners, ADR professionals and other thought leaders on the creative use of court-appointed neutrals as tools to assist in the administration of justice. ACAN's members have dedicated themselves to helping:

- People become court-appointed neutrals
- Court-appointed neutrals become better and
- The profession better serve justice.

In July 2022, our board and members voted to take the extraordinary step of renaming our Academy and working to rename our profession to stop referring to people who courts appoint to positions of authority as "masters," and to standardize "court-appointed neutrals" as a name that much

[1] American Bar Association Rule Suggestion 24-CV-A, available at https://www.uscourts.gov/file/78168/download

1400 VILLAGE SQ BLVD, STE 3 #155 • TALLAHASSEE, FL 32312
TEL: (850) 328-7835 | FAX: (301) 990-9771

better describes what these professionals do. We did this because the term "master" ill-serves the administration of justice and ill-describes our profession in a way that leads to confusion about what these appointees do and can do to assist courts.[2]

American Bar Association Suggestion 24-CV-A

ABA Suggestion 24-CV-A asks that the Federal Rules of Civil Procedure be amended to substitute the term "court-appointed neutral" for "master." It also seeks to clarify what we mean by the term we are using in the rule by offering a definition of "court-appointed neutral" and language to make clear that the procedures set forth in Rule 53 do not apply to supplant other uses courts may make of neutrals (for example, as part of ADR programs run by the court as whole) and are subject to ethical principles and other local rules. ABA President Mary Smith's February 12, 2024 letter making this Suggestion outlines the rationale for it in detail and we join it without need to repeat it.

However, we would like to add five observations that may help the Advisory Committee's consideration of this suggestion and update some of the points ABA President Smith makes.

(1) Substituting "court-appointed neutral" for "master" is not just about semantics. As the ABA's Suggestion explains, the word "master" carries numerous meanings, some of them positive and others extremely negative, but none of them helpful in understanding this role. Just this past week the American Judges Association Journal, Court Review, published an article by our organization's Executive Director, explaining the layers of confusion fostered by the continued use of the term "master" (a term that connotes someone brought in to take over) to describe someone brought in to help.[3]

(2) Substituting "court-appointed neutral" for "master" is not, at all, about politics. As neutrals we are more than sensitive to the fact that we live in an extraordinarily politicized age. As an organization that, for 18 of its 20 years, called itself the Academy of Court-Appointed Masters**,** we are also more than sensitive to the fact that people of good will have used the terms "master" or "special master" in this context for hundreds of years and in our Federal Rules for decades. This Suggestion does not criticize people for using a term in the past or for, themselves, finding the term to be inoffensive. It recognizes that continuing to use a term the ***misdescribes*** these court appointees and creates confusion does not become appropriate because term may offend "only" ***some*** people and, perhaps, not others.

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[2] *See* "Why We Became The Academy of Court-Appointed Neutrals," *https://www.courtappointedneutrals.org/acam/assets/file/public/namechange/on%20becoming%20the%20academy%20of%20court-appointed%20neutrals.pdf*

[3] Merril Hirsh, "What's In a Name? Reinventing 'Special Masters' as 'Court-Appointed Neutrals,'" COURT REVIEW, v. 60, Issue 1, 28 (2024), available at https://nationalcenterforstatecourts.app.box.com/v/AmJudgesCourtReviewArchive/file/1474739593997 ACAN asked Mr. Hirsh to serve as its Executive Director effective September 2021 after he had already served for five years as the Chair of what is now the ABA Judicial Division Lawyers Conference Court-Appointed Neutrals Committee and had also served as the convener of a Working Group of judges, formers judges, court-appointed neutrals and other ADR professionals, practitioners (including Judge Shira Scheindlin and other current or former chairs of the ABA Business Law, Antitrust, Intellectual Property Law and Dispute Resolution Section, the then Chair of the National Conference of Federal Trial Judges), that drafted what are now called the ABA Guidelines on the Appointment and Use of Court-Appointed Neutrals in Federal and State Civil Litigation. http://www.americanbar.org/content/dam/aba/directories/policy/midyear-2019/100-midyear-2019.pdf

(3) The suggestion to substitute "court-appointed neutral" for "master" is the product of a very broad consensus. ACAN is also sensitive to the fact that court-appointed neutrals are not an end in themselves, but a means to an end of improving the administration of justice. The fact that the ABA suggested this change based on a resolution drafted by a committee in its Judicial Division with representatives across the wide spectrum its sections, divisions, forums and conferences, co-sponsored by both the Judicial Division and the Section of Dispute Resolution, and then approved (on a voice vote with no apparent opposition) by the ABA House of Delegates is testament by itself to broad support obtained for this change before the ABA made its suggestion.

Moreover, as the ABA Suggestion notes,[4] it is not merely the ABA and ACAN that urge the substitution of "court-appointed neutral" for "master." In October 2022, before the ABA adopted its August 2023 Resolution 23A516 urging the change,[5] the National Association of Women Judges adopted a Resolution in Support of Ceasing to Use the Term "Master" or "Special Master" in favor of using the term "Court-Appointed Neutrals."[6] Since the ABA adopted Resolution 23A516:

- The Board of the National Asian Pacific American Bar Association adopted a "Statement Supporting Replacing the Term "Master" or "Special Master" with "Court-Appointed Neutral," Broadening Pool of Candidates, and Supporting Skills Development."[7]

- The Board of the National Council of Juvenile and Family Court Judges adopted a Resolution In Support of The National Academy Of Court Appointed Neutrals Regarding Ceasing To Use The Term "Master" Or "Special Master" And [Using] "Court-Appointed Neutrals";[8] and,

- The Institute for Inclusion in the Legal Profession issued an open letter supporting the change to "court-appointed neutral."[9]

We understand that the American Judges Association, which recently published the article cited in n.3 above, is also considering a resolution and that in addition to the three states that as ABA reported previously changed their rules to stop using the term "master,"[10] at least two other states are currently in the process of considering amending rules to use the term "court-appointed neutrals." Efforts are underway to raise the issue for consideration by still other states.

(4) "Court-appointed neutral" is the term the Rules should use. As the ABA letter explains,[11] still more confusion arises from the fact that the term "master" has never become standard. "Master" is merely the most common of dozens of terms used for the role. These terms carry different confusing connotations about the role these neutrals perform. The lack of a standardized term

[4] https://www.uscourts.gov/file/78168/download at 5.
[5] www.americanbar.org/content/dam/aba/directories/policy/annual-2023/516-annual-2023.pdf
[6] Available at www.nawj.org/uploads/files/resolutions/resolutionsupportingcourtappointedneutrals10-222022.pdf
[7] https://cdn.ymaws.com/www.napaba.org/resource/resmgr/policy/resolutions/DR_Committee_Resolution_APPR.pdf
[8] Available at https://www.linkedin.com/feed/update/urn:li:activity:7181704438149980160
[9] Available at https://www.linkedin.com/posts/iilp_iilp-letter-support-of-academy-of-court-appointed-activity-7159275995949129728-Pi-4?utm_source=share&utm_medium=member_desktop
[10] Maryland, Pennsylvania and Delaware. *See* https://www.uscourts.gov/file/78168/download at 4.
[11] *Id.* at 6.

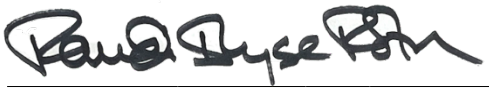
impedes the effective consideration of when to use a neutral and even when rules should or should not apply in the first place.

"Court-appointed neutral" is a generic term that accurately describes the position, that is in the process of becoming the standard term of art. We support the ABA's Suggestion[12] to address the confusion by adopting "court-appointed neutral" as the term, defining it as the ABA suggests, and specifying that the rule applies "[u]nless law or the court provides otherwise, and subject to any court rules, procedures (including the provisions of any court-based alternative dispute resolution program) and principles of ethics applicable to the services being performed."

(5) We should substitute "court-appointed neutral" for "master" now. Amending the Federal Rules of Civil Procedure is an essential part of the process of coalescing on a proper term for this role that does not offend or confuse. Judges whose lives are devoted to providing equal justice under law should not have to use a term that understandably offends a segment of the population in order to apply a rule as drafted. Nor should these judges, who are also required to secure the just, speedy and inexpensive resolutions of every action, need to remind parties that we are using the term "master" to refer to people whose role can be purely to facilitate the parties' own discussion, or to advise, or to serve as a liaison. People who do these roles are not "masters." They are court-appointed neutrals.

The Federal Rules should not use continue to use a term that some states have already abandoned, others are considering changing and organizations invested in the administration of justice have decried. Our Federal Rules should reflect this sensible change.

Respectfully submitted,



Randi Ilyse Roth, ACAN President

[12] *Id*. at 6-8.

TAB 11C

AMERICAN ASSOCIATION FOR JUSTICE®
The Association for Trial Lawyers

September 10, 2024

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: ABA Rules Suggestion 24-CV-A to Substitute the Use of "Court Appointed Neutral" for "Court Appointed Master"

Dear Committee on Rules of Practice and Procedure:

The American Association for Justice (AAJ) submits this comment to express general support for the ABA Rules Suggestion 24-CV-A, which was briefly discussed by the Committee on Rules of Practice and Procedure (Standing Committee) at its June 6, 2024 meeting. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, civil rights cases, consumer cases, class actions, and other civil actions, and regularly use the Federal Rules of Civil Procedure in their practice. While not opining on textual drafting options at this time, AAJ supports eliminating the terms "court appointed master," "special master" and related phrases using the term "master" from the Federal Rules of Civil Procedure and in the federal courts more generally.

As you may know, AAJ has over 100 designated litigation groups which provide plaintiff-side practitioners a forum to share knowledge about specialized practices and dangerous products. After the most recent Standing Committee meeting, AAJ asked the chairs of the litigation groups that focus on practices and products targeting communities of color for their views on the ABA proposal. The chairs of these litigation groups hold police departments accountable when officers kill and injure unarmed black and brown people and hold corporations accountable for cancers and other harms caused by hair relaxer, talcum powder, and other products marketed and sold to women of color. There was strong agreement that the term "master" is negative, hurtful, and triggering, and that a more neutral term would be beneficial to the practice of law.

It is imperative to ensure that those most impacted by historical harm have been consulted. Having sought the opinions of AAJ members most likely impacted, AAJ strongly urges the Advisory Committee to update the rules, just as other industries have done, to reflect the thoughtfulness, decency, and decorum that is so important to civil society and where federal courts can provide leadership.

AAJ supports rule changes that would replace the term "court appointed master" and related use of "special master" in civil cases with more neutral terminology. Please direct any questions regarding these comments to Susan Steinman, Senior Director of Policy & Senior Counsel, at susan.steinman@justice.org.

Respectfully submitted,

Lori Andrus
President
American Association for Justice

Christopher H. Fitzgerald
Chair, Minority Caucus
American Association for Justice

TAB 11D

These are the uses of "master" in Titles 18 and 28 that do not include the terms vessel or vehicle.

18 USC 1836
Civil proceedings.
TITLE 18: CRIMES AND CRIMINAL PROCEDURE / PART I: CRIMES / CHAPTER 90: PROTECTION OF TRADE SECRETS (June 26, 2024)
... . (iv) Appointment of special **master**.—The court may appoint a special ... master to locate and isolate all misappropriated trade secret information and to facilitate the return of ... unrelated property and data to the person from whom the property was seized. The special **master** appointed by ...

18 USC 2248
Mandatory restitution.
TITLE 18: CRIMES AND CRIMINAL PROCEDURE / PART I: CRIMES / CHAPTER 109A: SEXUAL ABUSE (June 26, 2024)
...) Reference to Magistrate or Special **Master**.—The court may refer any issue arising in ... connection with a proposed order of restitution to a magistrate or special **master** for proposed findings of ...

18 USC 2259
Mandatory restitution.
TITLE 18: CRIMES AND CRIMINAL PROCEDURE / PART I: CRIMES / CHAPTER 110: SEXUAL EXPLOITATION AND OTHER ABUSE OF CHILDREN (June 26, 2024)
...) Reference to Magistrate or Special **Master**.—The court may refer any issue arising in ... connection with a proposed order of restitution to a magistrate or special **master** for proposed findings of ...

18 USC 2327
Mandatory restitution.
TITLE 18: CRIMES AND CRIMINAL PROCEDURE / PART I: CRIMES / CHAPTER 113A: TELEMARKETING AND EMAIL MARKETING FRAUD (June 26, 2024)
...) Reference to Magistrate or Special **Master**.—The court may refer any issue arising in ... connection with a proposed order of restitution to a magistrate or special **master** for proposed findings of ...

18 USC Ch. 223
Front Matter.
TITLE 18: CRIMES AND CRIMINAL PROCEDURE / PART II: CRIMINAL PROCEDURE / CHAPTER 223: WITNESSES AND EVIDENCE (June 26, 2024)
... . 3507.Special **master** at foreign deposition ...

18 USC 3507
Special master at foreign deposition.
TITLE 18: CRIMES AND CRIMINAL PROCEDURE / PART II: CRIMINAL PROCEDURE / CHAPTER 223: WITNESSES AND EVIDENCE (June 26, 2024) ... 18 USC 3507: Special **master** at foreign deposition ... 18 USC 3507: Special **master** at foreign deposition ... §3507. Special **master** at foreign deposition ... pending may, to the extent permitted by a foreign country, appoint a special **master** to carry out at a ... law, a special **master** appointed under this section shall not decide questions of privilege under ...

18 USC 3524
Child custody arrangements.
TITLE 18: CRIMES AND CRIMINAL PROCEDURE / PART II: CRIMINAL PROCEDURE / CHAPTER 224: PROTECTION OF WITNESSES (June 26, 2024) ... case of such a request, the court shall appoint a **master** to act as arbitrator, who shall be experienced ... appointed under this paragraph. The court and the **master** shall, in determining the dispute, give substantial ... , the court and the **master** shall apply the law of the State in which the court order was issued or, in ...

18 USC 3626
Appropriate remedies with respect to prison conditions.
TITLE 18: CRIMES AND CRIMINAL PROCEDURE / PART II: CRIMINAL PROCEDURE / CHAPTER 229: POSTSENTENCE ADMINISTRATION / SUBCHAPTER C: IMPRISONMENT (June 26, 2024) ... respect to prison conditions, the court may appoint a special **master** who shall be disinterested and ...) The court shall appoint a special **master** under this subsection during the remedial phase of the action ... of a special **master** is necessary, the court shall request that the defendant institution and the ... plaintiff each submit a list of not more than 5 persons to serve as a special **master** ... . (C) The court shall select the **master** from the persons remaining on the list after the operation of ...

18 USC 3664
Procedure for issuance and enforcement of order of restitution.
TITLE 18: CRIMES AND CRIMINAL PROCEDURE / PART II: CRIMINAL PROCEDURE / CHAPTER 232: MISCELLANEOUS SENTENCING PROVISIONS (June 26, 2024) ... magistrate judge or special **master** for proposed findings of fact and recommendations as to disposition ...

28 USC 509
Functions of the Attorney General.
TITLE 28: JUDICIARY AND JUDICIAL PROCEDURE / PART II: DEPARTMENT OF JUSTICE / CHAPTER 31: THE ATTORNEY GENERAL (June 26, 2024)
... resourceful, elusive, worldwide enemy. Admiral Mahan, the **master** naval strategist, described this handicap ...

28 USC 957
Clerks ineligible for certain offices.
TITLE 28: JUDICIARY AND JUDICIAL PROCEDURE / PART III: COURT OFFICERS AND EMPLOYEES / CHAPTER 57: GENERAL PROVISIONS APPLICABLE TO COURT OFFICERS AND EMPLOYEES (June 26, 2024)
... shall not be appointed a commissioner, **master**, referee or receiver in any case, unless there are special ... Appeals could not be appointed a commissioner, **master**, or referee in any case. ...

28 USC 1605A
Terrorism exception to the jurisdictional immunity of a foreign state.
TITLE 28: JUDICIARY AND JUDICIAL PROCEDURE / PART IV: JURISDICTION AND VENUE / CHAPTER 97: JURISDICTIONAL IMMUNITIES OF FOREIGN STATES (June 26, 2024)
... under paragraph (1). Any amount paid in compensation to any such special **master** shall constitute an item ...

28 USC 1827
Interpreters in courts of the United States.
TITLE 28: JUDICIARY AND JUDICIAL PROCEDURE / PART V: PROCEDURE / CHAPTER 119: EVIDENCE; WITNESSES (June 26, 2024)
... . (3) The Director shall maintain a current **master** list of all certified interpreters and otherwise ... shall maintain a current **master** list of all interpreters certified by the Director and shall report ...

28 USC Ch. 121
Front Matter.
TITLE 28: JUDICIARY AND JUDICIAL PROCEDURE / PART V: PROCEDURE / CHAPTER 121: JURIES; TRIAL BY JURY (June 26, 2024)
... . 1864.Drawing of names from the **master** jury ... , "Drawing of names from the **master** jury wheel; completion of juror qualification form" for "Manner ...

28 USC 1863
Plan for random jury selection.
TITLE 28: JUDICIARY AND JUDICIAL PROCEDURE / PART V: PROCEDURE / CHAPTER 121: JURIES; TRIAL BY JURY (June 26, 2024)
... are placed in a **master** jury wheel; and shall ensure that each county, parish, or

similar political ... subdivision within the district or division is substantially proportionally represented in the **master** jury ... proportional representation in the **master** jury wheel, either the number of actual voters at the last general ... . (4) provide for a **master** jury wheel (or a device similar in purpose and function) into which the ... placed initially in the **master** jury wheel, which shall be at least one-half of 1 per centum of the total ...

28 USC 1864
Drawing of names from the master jury wheel; completion of juror qualification form.
TITLE 28: JUDICIARY AND JUDICIAL PROCEDURE / PART V: PROCEDURE / CHAPTER 121: JURIES; TRIAL BY JURY (June 26, 2024)
... 28 USC 1864: Drawing of names from the **master** jury wheel; completion of juror ... 28 USC 1864: Drawing of names from the **master** jury wheel; completion of ... §1864. Drawing of names from the **master** jury wheel; completion of juror qualification form ... from the **master** jury wheel the names of as many persons as may be required for jury service. The clerk ... master jury wheel. Any list so prepared shall not be disclosed to any person except pursuant to the ...

28 USC 1865
Qualifications for jury service.
TITLE 28: JUDICIARY AND JUDICIAL PROCEDURE / PART V: PROCEDURE / CHAPTER 121: JURIES; TRIAL BY JURY (June 26, 2024)
... from the **master** jury wheel. If a person did not appear in response to a summons, such fact shall be ...

28 USC 1866
Selection and summoning of jury panels.
TITLE 28: JUDICIARY AND JUDICIAL PROCEDURE / PART V: PROCEDURE / CHAPTER 121: JURIES; TRIAL BY JURY (June 26, 2024)
... and shall place in such wheel names of all persons drawn from the **master** jury wheel who are determined ... forms during the period, specified in the plan, between two consecutive fillings of the **master** jury ...

28 USC 1867
Challenging compliance with selection procedures.
TITLE 28: JUDICIARY AND JUDICIAL PROCEDURE / PART V: PROCEDURE / CHAPTER 121: JURIES; TRIAL BY JURY (June 26, 2024)
... , until after the **master** jury wheel has been emptied and refilled pursuant to ... section 1863(b)(4) of this title and all persons selected to serve as jurors before the **master** ...

28 USC 1868
Maintenance and inspection of records.

TITLE 28: JUDICIARY AND JUDICIAL PROCEDURE / PART V: PROCEDURE / CHAPTER 121: JURIES; TRIAL BY JURY (June 26, 2024)
... After the **master** jury wheel is emptied and refilled pursuant to ... master wheel was emptied have completed such service, all records and papers compiled and maintained by ... the jury commission or clerk before the **master** wheel was emptied shall be preserved in the custody of ... the hands of the commission or clerk before the **master** wheel was emptied for provisions covering the ...

28 USC 2284
Three-judge court; when required; composition; procedure.
TITLE 28: JUDICIARY AND JUDICIAL PROCEDURE / PART VI: PARTICULAR PROCEEDINGS / CHAPTER 155: INJUNCTIONS; THREE-JUDGE COURTS (June 26, 2024)
... preliminary injunction. A single judge shall not appoint a **master**, or order a reference, or hear and determine ...

TAB 12

12. Rule 7.1 Subcommittee

The Rule 7.1 Subcommittee, chaired by Justice Jane Bland, has made significant progress since the last advisory committee meeting. As a reminder, the effort to amend the corporate-disclosure requirement of Rule 7.1 attempts to close the gap between what corporate parties must disclose and the information necessary for a judge to determine whether she must recuse because she has a 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). The statute defines "financial interest" as "ownership of a legal or equitable interest, however small," with some exceptions for mutual funds and other investment vehicles. *Id.* § (d)(4). A workable rule will never eliminate this gap entirely, but an expanded disclosure requirement may reveal enough additional information to adequately inform judges of unknown financial ties to a party in most cases.

Currently, Rule 7.1(a)(1) requires a statement identifying "any parent corporation and any publicly held corporation owning 10% or more of its stock." Our primary focus, from the start of this endeavor, has been to consider ways to ensure disclosure of corporate "grandparents" of a party in which a judge might hold a financial interest. In other words, a judge may hold an interest in an entity that owns a subsidiary that, in turn, owns a party. With few exceptions, the current rule has not been interpreted to require disclosure of such a corporate "grandparent."

The subcommittee's consideration of the rule has coincided with efforts by the Judicial Conference Codes of Conduct Committee to provide additional guidance to judges in fulfilling their duty to recuse when required. In February 2024, shortly before our most recent Advisory Committee meeting, the Codes of Conduct Committee published a new Advisory Opinion No. 57 on "Disqualification Based on a Parent-Subsidiary Relationship." Since its issuance, the subcommittee has looked closely at this guidance and has tried to craft new rule language that will assist judges in complying with it. Therefore, close examination of the Advisory Opinion is warranted here.

The prior version of Advisory Opinion No. 57, issued in December 2017, was far less detailed than the new version, but its basic premise is carried forward. The prior opinion stated: "The Committee concludes that under the Code the owner of stock in a parent corporation has a financial interest in a *controlled* subsidiary. Therefore, when a judge knows that a party is *controlled* by a corporation in which the judge owns stock, the judge should recuse." (Emphasis added.) The thrust of the guidance, then and now, is that whether a judge has a financial interest requiring her to recuse turns on whether the entity in which she owns an interest "controls" a party.

Neither the old nor the new version of the guidance defines "control," but control is assumed if the parent owns all or a majority of the stock in a party subsidiary. But when a parent owns *less* than a majority, the prior guidance advised that "the judge should determine whether the parent has control of the subsidiary. The Committee advises that the 10% disclosure requirement in Fed. R. App. P. 26.1 is a *benchmark measure* of parental control for recusal purposes." (Emphasis added.) In other words, the old guidance borrowed from the 10% figure in our current Rule 7.1 (as well as the appellate and other federal rules) as a proxy for control.

These same concepts, albeit further elaborated, also drive the new February 2024 guidance, which provides: "When a judge concludes that a party is *controlled* by a corporation in which the judge owns stock, the judge must recuse." (Emphasis added.) This version of the guidance also does not define control, but it now explicitly cites the Black's Law Dictionary definition of a "parent corporation" as "[a] corporation that has a controlling interest in another corporation."

As before, the guidance also states that "when a corporation does not own all or a majority of stock in a party, the judge should determine whether the corporation has control of a party." The guidance then cites "the 10% disclosure requirement in the Federal Rules" as "a threshold rebuttable presumption of control for recusal purposes."

The Advisory Opinion now adds that "[r]egardless of control, a judge must recuse if the company in which the judge owns stock could be substantially affected by the outcome of a proceeding." That is, if "the value of the party's stock is likely to be affected by the outcome of the proceeding, and the value of the company in which the judge owns stock would in turn be affected substantially by the change in the party's stock price." This sort of prediction – whether the outcome of a case will affect the stock price of another corporation in which the judge owns stock – seems rather difficult to facilitate in a disclosure rule. Perhaps recognizing this, the guidance again refers to "the 10% disclosure requirement of the Federal Rules" as "raising a threshold presumption that a company could be substantially affected by litigation," but cautions that "in the case of large holding companies invested in a wide range of corporations, a share greater than 10% may not represent a significant portion of its portfolio."

In sum, then, the new guidance says:

- Recusal is required if a judge owns stock in a corporation that owns a majority of stock in a party.
- Recusal is required if a judge owns stock in a corporation that controls a party.
    - A judge must recuse if she owns stock in a company that controls a party.
    - A judge must recuse (or investigate further) if she owns stock in a corporation that owns 10% or more of the stock in a party. Ownership of 10% or more of the stock in a party creates a rebuttable presumption of control.
- Recusal is required if the judge owns stock in a corporation whose value would be substantially affected by the outcome of a proceeding. If the corporation in which the judge owns stock owns 10% or more of the stock in a party, there is a rebuttable presumption in favor of recusal, but ownership of 10% of stock in a party may not sufficiently affect the stock price of that owner in the context of other holdings.

One could read this new guidance as an endorsement of our current rule. Our rule requires disclosure of "any parent corporation," which, if one adopts the definition of parent cited in the advisory opinion as a "corporation that has a controlling interest," might be read to cover both grandparents and corporations that own less than 10% of stock in a party but nevertheless control the party. Moreover, since the advisory opinion views 10% ownership of a party as creating rebuttable presumptions of "control" and a substantial effect on the stock a judge might own in another corporation, there may be value in leaving the rule as it is. That is, the current rule seems to track the guidance, and may be the best that can be done, without imposing a mandate whose

burden may typically outweigh the benefit. As the current committee note states, no rule will ensure disclosure of all possible financial interests in a case, and:

> Framing a rule that calls for more detailed disclosure will be difficult. Unnecessary disclosure requirements place a burden on the parties and on courts. Unnecessary disclosure of volumes of information may create a risk that a judge will overlook the one bit of information that might require disqualification, and also may create a risk that unnecessary disqualifications will be made rather than attempt to unravel a potentially difficult question. It has not been feasible to dictate more detailed disclosure requirements in Rule 7.1(a).

On the other hand, the importance of this issue is great, and any costs of informing judges at the outset of potential conflicts may be worth a pound of cure later in the litigation, should such a conflict come to light. Moreover, the subcommittee's efforts have all along been motivated by the concern that the current rule, as typically interpreted, does not cover "grandparents," and therefore does not sufficiently inform judges that they may own stock in a company that in fact owns a controlling interest in a party, albeit via another subsidiary. Such a concern may arise regularly, particularly if judges hold shares of large holding companies, like Berkshire Hathaway. That said, as the new guidance notes, even if Berkshire Hathaway wholly owns a subsidiary that owns a party (e.g., the example of Berkshire wholly owning Dairy Queen, which wholly owns Orange Julius), the results of the litigation may not have any material impact on Berkshire's stock price.

The subcommittee's work toward developing an amendment has focused on canvassing local rules for promising approaches, and indeed there is much experimentation at the local level, as described in earlier agenda books. As a result of our research, aided significantly by then-Rules Law Clerk Christopher Pryby, the subcommittee has reached several conclusions. First, any disclosure rule that attempts to list a party's every possible corporate affiliation will inevitably be over or underinclusive – overinclusive because it may demand disclosure of affiliations that are irrelevant or obsolete, and underinclusive because of the endless and changing variety of business relationships. Second, a rule that attempts to use a broad catch-all term to require disclosure of all corporate "affiliations" will be either onerous to comply with for parties and leave judges swamped with a potentially enormous amount of information, or will go uncompiled with.

Therefore, the subcommittee has trained its attention on a rule that seeks to capture the essence of the Advisory Opinion as closely as possible by requiring disclosure of ownership of 10% of a party or control of that party. A draft note could make clear that control of a party need not be achieved through direct ownership but could be created by ownership of an entity that owns 10% or more of the stock in a party. The challenge of introducing the concept of "control" in the rule is defining control, likely in the note. It is possible that such a definition could be uncontroversial, especially if the note is crafted to clarify that the "grandfather" problem is the primary target. Additionally, perhaps an uncontroversial definition of control could be adapted

from a source like the ALI Restatement (Third) of Agency, or a generally accepted analogue.[1] The note might also list various arrangements that indicate control.[2]

One possibility for such rule language might be:

Rule 7.1. Disclosure Statement

(a) Who Must File; Contents.

(1) ***Nongovernmental Corporations [Business Organizations]***[3]. A nongovernmental corporate party or nongovernmental corporation [business organization] that is a party or seeks to intervene must file a statement that:

(A) identifies any parent corporation [business organization] ~~and~~, any publicly held corporation [business organization] owning 10% or more of its stock, and any publicly held business organization that [directly or indirectly] controls a party; or

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

At this stage of our efforts, we are also eager to engage in outreach to those who might be able to provide useful feedback on such an amendment, particularly those who might find themselves most regularly affected by an expanded disclosure requirement. We are especially interested in suggestions from advisory committee members of potentially fruitful sources of such reactions.

[1] Restatement (Third) Agency § 1.01 (2006) ("Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act").

[2] *See* 31 C.F.R. § 1010.380(d)(1) (defining "substantial control" to include serving as a senior officer, having authority over the appointment or removal of any senior officer, or a majority of the board of directors, directing, determining, or having substantial influence over important decisions made by the reporting company, or "any other form of substantial control").

[3] Changing references to "corporations" to "business organizations" may have the effect of clarifying that a party need not be formally defined as a "corporation" to be covered by the rule.

TAB 12A

Committee on Codes of Conduct Advisory Opinion
No. 57: Disqualification Based on a Parent-Subsidiary Relationship

This opinion considers recusal issues arising out of parent-subsidiary relationships between corporations.

Canon 3C(1) of the Code of Conduct for United States Judges provides that:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:
>
> * * *
>
> (c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a 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.

Canon 3C(3)(c) defines a "financial interest" as "ownership of a legal or equitable interest, however small." The provision enumerates exceptions to the definition, including ownership in a mutual or common investment fund; the proprietary interest of a policy-holder in a mutual insurance company, or a similar proprietary interest, where the outcome of the proceeding could not substantially affect the value of the interest; and ownership of government securities, where the outcome of the proceeding could not substantially affect the value of the securities. None of these exceptions are applicable to parent-subsidiary relationships, which present materially different issues.

If a parent corporation owns all or a majority of stock in a subsidiary that is a party, the Committee advises that a judge who owns stock in the parent then has a financial interest in the subsidiary, requiring recusal.

The issue is less clear where the parent holds less than a majority interest. The Committee concludes that under the Code the owner of stock in a parent corporation has a financial interest in a subsidiary that the parent controls. Therefore, when a corporation does not own all or a majority of stock in a party, the judge should determine whether the corporation has control of the party. *See* Black's Law Dictionary (11th ed. 2019) (defining "parent corporation" as "[a] corporation that has a controlling interest in another corporation"). The Committee 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. Whether that presumption may be rebutted or not depends on other indicia of control, such as board representation or wide dispersion of the remainder of the stock, which are relevant to the influence

wielded by a 10% interest. To determine if one entity controls another, a judge may exercise his or her discretion to seek information from the parties or their attorneys; a judge also may review publicly available sources, such as Securities and Exchange Commission filings. When a judge concludes that a party is controlled by a corporation in which the judge owns stock, the judge must recuse.

Whether recusal is necessary when a party discloses that a mutual fund company or holding company owns 10% or more of its stock warrants additional elaboration. Ordinarily, because a judge who invests in a mutual fund does not have a financial interest in the mutual fund management company, or the securities held in the fund, unless the judge participates in the fund's management, the judge does not have a financial interest in a subsidiary and there is no need for the judge to determine whether the mutual fund company exercises control. *See* Canon 3C(3)(c)(i); Advisory Opinion No. 106 ("Mutual or Common Investment Funds"); *see also* Black's Law Dictionary (11th ed. 2019) (defining "mutual fund" as "[a]n investment company that invests its shareholders' money in a usu[ally] diversified selection of securities"). In the case of holding companies, the necessary inquiry is once again the percentage of ownership interest, with 10% the relevant threshold. But, as explained above, this threshold creates a rebuttable presumption and is not an absolute line, because in practical terms the specific percentage of ownership may fluctuate over time based simply on market conditions without affecting whether the holding company has control over the party. *See* Black's Law Dictionary (11th ed. 2019) (holding company is a "company formed to control other companies, usu[ally] confining its role to owning stock and supervising management").

Regardless of control, a judge must recuse if the company in which the judge owns stock could be substantially affected by the outcome of the proceeding. For example, recusal would be required if the value of the party's stock is likely to be affected by the outcome of the proceeding, and the value of the company in which the judge owns stock would in turn be affected substantially by the change in the party's stock price. The Committee notes that the 10% disclosure requirement in the Federal Rules "assumes that if a judge owns stock in a publicly held corporation which in turn owns 10% or more of the stock in the party, the judge may have sufficient interest in the litigation to require recusal." Fed. R. App. P. 26.1, 1998 Advisory Committee Note. But although a 10% ownership interest in a party may raise a threshold presumption that a company could be substantially affected by litigation, in the case of large holding companies invested in a wide range of corporations, a share greater than 10% in a single enterprise may not represent a significant portion of its overall portfolio.

Even in the case of mutual funds, a judge may, in rare circumstances, be required to recuse based on ownership of a mutual fund that owns 10% or more of a party's stock if the judge's interest in the mutual fund could be affected substantially by the outcome of the proceeding. While a judge is not required to monitor the underlying investments in a mutual fund, Canon 3C(1)(c) requires a judge to recuse if the judge knows that his or her interest in a mutual fund could be substantially affected by the

outcome of a case. *See* Advisory Opinion No. 106. A judge who invests in a "sector" or "industry" fund, for example, must recuse from a case involving that particular sector or industry if the outcome of the proceeding could substantially affect the value of the judge's interest in the fund. *Id.*

If a judge owns stock in the subsidiary rather than the parent corporation, and the parent corporation appears as a party in a proceeding, the judge must recuse if the value of the judge's interest in the subsidiary could be substantially affected by the proceeding. As the Committee has explained in other contexts, it is not the size of the judge's interest that matters, but rather whether the interest could be substantially affected.

In closing, the Committee notes that recusal decisions are also governed by the recusal statutes, 28 U.S.C. §§ 455 and 144, and the case law interpreting them. Although the Committee is not authorized to render advisory opinions interpreting §§ 455 and 144, Canon 3C of the Code closely tracks the language of § 455, and the Committee is authorized to provide advice regarding the application of the Code.

February 2024

TAB 13

13. Cross-Border Discovery Subcommittee

This Subcommittee (Judge Shah, Chair, Judge Boal, Judge McEwen, Prof. Clopton, and Josh Gardner of DOJ) was formed at the end of the Advisory Committee's October 2023 meeting. As reported during the Committee's April meeting, the Subcommittee decided initially to focus on discovery sought from parties to U.S. federal-court litigation and addressed in 28 U.S.C. § 1781.

Since that meeting, representatives of the Subcommittee have attended the annual meetings of the Lawyers for Civil Justice (in Washington, D.C.) and of the American Association for Justice (in Nashville). There has also been an online session with members of the Sedona Conference about cross-border discovery issues.

In March 2025, at the Sedona annual meeting in Los Angeles, it is hoped that Subcommittee representatives will be present for an in-depth discussion of issues raised.

So this is an interim report. The Subcommittee reached out to the Federal Magistrate Judges Association and the Department of Justice for initial reactions on whether rule changes are needed to deal effectively with cross-border discovery issues. There also have been efforts to obtain feedback from bankruptcy practitioners and judges, and from the ABA International Litigation Section. These efforts are ongoing.

The initial unofficial report from the members of the FMJA Rules Committee did not indicate that there were serious problems that a rule change could fix. Instead, the members thought that Rules 26(f) and 16 as currently drafted allow for sufficient flexibility to address cross-border discovery issues. There was no support for adding cross-border discovery to the list already in Rule 26(f). The biggest concern was the loss of control of the case's schedule and potential need to rely on the actions of a foreign government, which could stymie the American court's schedule for proceeding with the case. Although privacy and confidentiality issues have arisen, these problems can be solved by such means as production with redactions.

The initial DOJ report was that cross-border discovery can be challenging when blocking statutes adopted in other countries come into play. And the fact that some judges have less experience with cross-border discovery can sometimes require efforts to educate the court. In addition, DOJ has found that Rule 34 document requests are more often the source of difficulties than depositions. But the Department has not found that application of the factors adopted in *Aerospatiale v. U.S. District Court*, 482 U.S. 522 (1987), has produced difficulties. Similarly, though obtaining discovery from non-U.S. subsidiaries can come up – particularly as to third-party discovery – it is not apparent that these challenges could be addressed effectively by amending the rules.

As a reminder to the full Committee, the initial stimulus for creation of this Subcommittee was a proposal from Judge Baylson, who appeared personally at the October 2023 meeting. The proposal was largely based on Baylson & Gensler, Should the Federal Rules of Civil Procedure be Amended to address Cross-Border Discovery?, 107 Judicature 18 (2023).

This article urged that it would be valuable to initiate a study of possible rule amendments to "establish a procedural framework for lawyers and judges to follow" when confronting cross-border discovery issues. "An easy starting point might be to integrate *Aerospatiale* and the [Hague

Convention] process into the discovery-management and case-management rules." Such a rule might prod the parties to set forth their views in the discovery plan that emerges from the Rule 26(f) conference.

Beyond that, the article suggests that the rules "might explicitly address what parties can do to obtain documents located outside the U.S.." That orientation might present challenges in determining where digital material is "located," particularly if the material is "in the cloud."

At the LCJ annual meeting in Washington, D.C., in May 2024, (attended by Judge Shah and Prof. Bradt, as well as Judge Baylson) the LCJ community was not enthusiastic about a rules change. Some participants expressed how difficult navigating cross-border issues has become and thought more emphasis on proportionality could alleviate some burden. But others said they have been able to manage (and worried about unintended consequences from a rules change when they have been able to work out issues without unwanted attention from both U.S. judges and other countries' enforcement authorities).

At the AAJ session in Nashville in July, the participants came well prepared and seemed almost to speak with a single voice. And they uniformly opposed adding specific reference to cross-border discovery to the list presently in Rule 26(f). A published illustration of this plaintiff-side view is Relkin & Breslin, Hidden Across the Atlantic, Trial Magazine, June 2012 at 14. This article asserts that – at least in drug and medical device litigation – defendants "may attempt to hide behind the narrower foreign laws that protect an associated entity to prevent important discovery."

More generally, the AAJ participants stressed their view that often invocation of the Hague Convention and data confidentiality rules like the EU General Data Protection Regulation (GDPR) together both impede what they view as needed discovery and also delay it. Though there may be cases in which American courts have found using the Convention effective, the AAJ participants regarded those examples as exceptional.

On August 2, the Sedona Conference hosted an online discussion involving several of its members with extensive experience in cross-border discovery. Before that, Sedona had in June issued its draft Commentary on Proportionality in Cross-Border Discovery. The draft called for comments to be submitted by Aug. 28, 2024, so it may be revised after the comment period. But it seems worth noting the draft includes a 20-page prescriptive recommended approach which seems to be a multi-step process in its Part VI:

A. Rule 26(b)(1) Scope Analysis, Including Proportionality, is a Threshold Inquiry.

1. Relevancy

2. Proportionality factors in 2015 Rule 26(b)(1) amendment

B. If material is discoverable under Rule 26(b)(1) but subject to an ongoing transfer restriction, the parties should explore transfer under the Hague Convention before the court considers a comity analysis

C. If the parties do not agree to use the Hague Convention, courts should then move to the *Aerospatiale* inquiry

It seems that one goal is that the court should resolve the issues involved in each step before proceeding to the next one. Some might argue that this could build delays into cross-border discovery.

During the Aug. 2 online session, particular emphasis was placed on the Hobson's dilemma broad American discovery can impose on parties also subject to data privacy rules imposed by other countries, particularly the GDPR. One participant called attention to Sant, Court-Ordered Law Breaking, 81 Fordham L. Rev. 181 (2015), which opens with the following sentence: "Perhaps the strangest legal phenomenon of the past decade is the extraordinary surge of U.S. courts ordering individuals and companies to violate foreign law."

The Sedona participants focused primarily on the difficulties parties subject to the GDPR confront in responding to Rule 34 requests. Some said that U.S. courts do a "cut and paste" analysis of the *Aerospatiale* factors or use a "tautological" method of applying the Supreme Court's decision.

One theme was that – at least for cross-border discovery – it is important to determine promptly whether material sought through discovery would be admissible at trial, and perhaps to condition discovery on such a showing.

Another desirable approach suggested would be to turn first to production of material located in the U.S. and resort to production from abroad only where necessary. Whether this would depend on Rule 34's "possession, custody, or control" criteria could depend in part on foreign law. For example, in Germany the employer does not possess the employees' devices, and some employees may complain that the company is violating their privacy rights by producing the information it does possess.

A particular problem is sometimes the American preservation duty, which arguably conflicts with data protection statutes' prohibition of "processing" of personal data.

One question was whether the existing Rule 26(f) conference requirement affords a sufficient opportunity for counsel to raise these issues. It seemed to be agreed that "educating the judges is the lawyers' task," on this as on other subjects.

* * * * *

So progress has been made in focusing the Subcommittee on ways to consider rule changes to improve the cross-border discovery process. At the same time, it also seems that (as has happened on other discovery-related issues) that there is chasm between the attitudes of the "requesting" and the "producing" parties.

The Subcommittee will continue its exploration of these issues and invites reactions from the full Committee about whether or how rule changes might improve practice. It also invites suggestions on how and where to get additional information. For example, the Dean of the

University of Pennsylvania Law School has seemed receptive to organizing a conference to address these issues if that would assist the Subcommittee.

TAB 14

14. Discovery Subcommittee – Filing under seal

The Discovery Subcommittee's report on Rule 45(b)(1) and problems with its directions on service of subpoenas is included elsewhere in this agenda book. This report relates to an ongoing project to which the Subcommittee expects to turn as the Rule 45(b)(1) issues are completed. In part, this report repeats what has been in previous agenda books. That may be useful as a reminder, and particularly useful to new members of the Committee.

Focus on sealed filings began with 20-CV-T, a submission from Prof. Eugene Volokh, the Reporters' Committee for Freedom of the Press, and the Electronic Frontier Foundation, urging the adoption of a new Rule 5.3 with very detailed requirements for motions to seal materials filed in court, and strict limits on the handling of such motions. Various other submissions have followed, including 21-CV-G, from the Lawyers for Civil Justice, opposing Prof. Volokh's proposals, 21-CV-T, from the Knight First Amendment Institute at Columbia University supporting rulemaking (attaching a 95-page compendium of the local rules of district courts), and 22-CV-A, The Sedona Conference Commentary on the Need for Guidance and Uniformity and filing ESI and Records Under Seal, including a seven-page model rule. Links to these submissions are provided at the end of this report.

Going forward, it is expected that the Subcommittee will receive guidance from the Clerk Liaison and it is also hoped that the Federal Magistrate Judges Association will continue to provide advice and guidance.

The standard for sealing

The Advisory Committee has received a number of submissions urging that the rules explicitly recognize that issuance of a protective order under Rule 26(c) invokes a "good cause" standard quite distinct from the more demanding standards that the common law and First Amendment require for sealing court files. There seems to be little dispute about the reality that the standards are different, though different circuits have articulated and implemented the standards for filing under seal in somewhat distinct ways. Indeed, it might be said that there is relative uniformity among the circuits that filings under seal must meet a higher standard than protective order motions. As the Subcommittee has previously reported, that should not be difficult to accomplish. See, e.g., *June Medical Services, L.L.C. v. Phillips*, 22 F.4th 512, 521 (5th Cir. 2022) ("Difference legal standards govern protective orders and sealing orders.").

The Subcommittee's current orientation is not to try to displace any of the circuit standards, or to try to determine how much they differ. Instead, when the issues were first raised, the Discovery Subcommittee focused on making explicit in the rules the differences between issuance of a protective order regarding materials exchanged through discovery and filing under seal. Two years ago, therefore, it presented the full Committee with sketches of rule provisions to accomplish this goal:

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(c) Protective Orders.

* * * * *

(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

(d) Filing.

* * * * *

(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.[1]

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

[1] 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.

the materials, but also says the receiving party may "promptly present the information to court under seal for a determination of the [privilege] claim." As noted below, 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:

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 is surely 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.

For the present, however, the Subcommittee does not have a pressing need for guidance from the Committee about the standard for sealing.

Uniform procedures for filing under seal and unsealing

This is the topic on which considerable additional work needs to be done and Advisory Committee reactions would be helpful to the Subcommittee.

Many of the submissions to the Committee have gone well beyond urging that the rules recognize the diverging standards for protective orders and filing under seal. Indeed, since most recognize that the courts are already aware of this difference in standards, one might say that the main objective of the current proposals is to promote nationally uniform procedures for deciding whether to authorize filing under seal. At least some judges seem receptive to efforts to standardize the handling of decisions whether to permit filing under seal.

These proposals contain a variety of procedures for handling sealed filings. One submission (22-CV-A, from the Sedona Conference) contains a model rule that is about seven pages long. Another (21-CV-T, from the Knight First Amendment Institute at Columbia University) attaches a 95-page compilation of local rules regarding sealing from all or almost all district courts. Some of the local rules are quite elaborate, and other districts give little or no attention to sealed court filings in their local rules.

Thus, there does presently seem to be considerable variety in local rules and practices on filing under seal. Adopting a set of nationally uniform procedures could introduce more consistency in the treatment of such issues, but also would likely conflict with the local rules of at least some courts.

The Subcommittee is uncertain how far to venture into prescribing uniform procedures. Although the various proposals received so far have urged the adoption of a new Rule 5.3 on filing under seal, the Subcommittee's inclination is instead to treat these procedural issues within the framework of existing Rule 5(d). Though there are rules addressed to only one kind of motion (e.g., Rule 37 on motions to compel; Rule 50 on motions for judgment as a matter of law; Rule 56 on motions for summary judgment; and Rule 59 on motions for a new trial), motions to seal do not seem of similar moment, so that a whole rule devoted to them does not seem warranted.

At the same time, the Rule 5(d) approach sketched above could be adapted to include various features suggested by submissions received by the Committee. The following offers a variety of alternative provisions on which the Subcommittee hopes to receive reactions from the full Committee, building on the sketch presented above.

The Subcommittee is hoping to receive some feedback from the Federal Magistrate Judges Association and also – with the assistance of our Clerk Liaison – from court clerks. It cannot be gainsaid that at least some proposed measures identified below could create logistical difficulties. As with the service of subpoena matter, the Subcommittee invites the full Committee to identify any concerns it should be addressing going forward.

Rule 5. Serving and Filing Pleadings and Other Papers

(d) Filing.

* * * * *

(5) ***Filing Under Seal.*** Unless filing under seal is directed 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. The following procedures apply to a motion to seal:

(A) [Unless the court orders otherwise,] The motion must not be filed under seal;

Many urge that motions to seal themselves be included in the public docket and open to public inspection. But there may be circumstances in which even that openness could produce unfortunate results. The bracketed phrase would take account of those situations while retaining the presumption that motions to seal should not themselves be under seal. One example is provided by Rule 5.2(d), which calls for a court order to authorize sealing to protect personal privacy.

The rule could specify something more about what the motion should include, but that seems unnecessary given the rule's invocation of common law and First Amendment limitations in filing in court under seal. A number of submissions provide that sealing orders be "narrowly tailored." But that seems implicit in the invocation of the existing limitations on filing under seal.

In the same vein, the proposal by some that there be "findings" to support an order to seal seems an unnecessary addition. Except for court trials governed by Rule 52, there are few findings requirements in the rules. (Rule 26(b)(3) does seem to have such a requirement because it the court may certify a class only if it finds that the predominance and superiority prongs of the rule are satisfied.) Again, once the common law and First Amendment standards are specified as criteria for deciding a motion to seal, adding a findings requirement seems unnecessary. Perhaps it would be useful were frequent appellate review anticipated, but appellate review of discovery-related rulings is rare, and there are no similar findings requirements for such rulings.

A potential problem here is that the party that wants to file the materials may not itself be in a position to make the showing required to justify sealing. For example, if the party that wants to file the materials obtained them through discovery from somebody else, the entity capable of making the required showing is not the one that wants to file these items. (This may often be true.)

One possibility might be to direct that the parties confer about the motion to seal before presenting it to the court, as is presently required for a motion to compel under Rule 37(a)(1). But the motion to seal situation may be quite different from the motion to compel situation. Party agreement is not sufficient to support sealing if the common law or First Amendment requirements are not met, while party agreement is almost always sufficient to resolve discovery disputes. Indeed, party agreement was a motivating factor behind the certification requirements of Rule 37(a)(1).

In a sense, there may often be two antagonistic parties wanting different things. Often the party that wants to make the filing is indifferent to whether it is under seal, perhaps even favoring public filing. It's another party (or perhaps a nonparty that responded to a subpoena) that wants the court to seal the confidential materials. Conferring might simplify the court's task in such circumstances, but it does not promise to relieve the court of the ultimate duty to make a decision on the motion to seal.

(B) Upon filing a motion to seal, the moving party may file the materials under [temporary] {provisional} seal[, providing that it also files a redacted version of the materials];

Some of the proposals forbid a court ruling on a motion to seal for a set period (say 7 days) after the motion is filed and docketed. But it appears that the reality is that many such filings are in relation to motions or other proceedings that make such a "waiting period" impractical. For example, a seven-day waiting period would seem to dilute the authority Rule 5.2(d) provides for a court order authorizing filing personal identifying information under seal. The filing of a redacted version of the materials sought to be sealed may sometimes provide some measure of public access, however.

(C) The moving party must give notice to any person who may claim a confidentiality interest in the materials to be filed;

This provision is designed to permit nonparties to be heard on whether the confidential materials should be sealed. Perhaps it should be a requirement of (i) above, and it might also include some sort of meet-and-confer requirement.

Alternative 1

(D) If the motion to seal is not granted, the moving party may withdraw the materials, but may rely on only the redacted version of the materials;

Alternative 2

(D) If the motion to seal is not granted, the [temporarily] {provisionally} sealed materials must be unsealed;

The question of what should be done if the motion to seal is denied is tricky. One answer (Alternative 2) is that the temporary seal comes off and the materials are opened to the public. Unless that happens, it would seem that the court could not rely on the sealed portions in deciding the motion or other matter before the court. On the other hand, it seems implicit that if the motion is granted the court can consider the sealed portions in making its rulings. Whether that might somehow change the public access calculus might be debated.

Things get trickier if the motion is denied and the party claiming confidentiality is not the one that wanted to file the materials. To permit that party (or nonparty) claiming confidentiality to snatch back the materials would deprive the party that filed them of the opportunity to pursue the result it sought in filing the materials in the first place.

(E) The motion to seal must indicate a date when the sealed material may be unsealed. Unless the court orders otherwise, the materials must be unsealed on that date.

This is a recurrent proposal. It cannot reasonably be adopted along with the alternative (below) that the materials must be returned to party that filed them, or to the one claiming confidentiality, at the termination of the litigation.

(F) Any [party] {interested person} [member of the public] may move to unseal materials filed under seal.

Various proposals have been submitted along these lines. One caution at the outset is that such a provision seems to overlap with Rule 24's intervention criteria. Rule 24 has been employed to permit intervention by nonparties to seek to unseal sealed materials in the court's files. See 8A Fed. Prac. & Pro. § 2044.1.

Such intervention attempts may sometimes raise standing issues. A recent example is *U.S. ex rel. Hernandez v. Team Finance, L.L.C.*, 80 F.4th 571 (5th Cir. 2023), a False Claims Act case in which the district court denied a motion to intervene by a "health care economist." The intervenor sought to unseal information about health care pricing in an action alleging that defendant routinely billed governments for doctor examinations and care services that did not actually occur. The court of appeals concluded that "violations of the public right to access judicial records and proceedings and to gather news are cognizable injuries-in-fact sufficient to establish standing." But the court also remanded for a determination whether the application to intervene was untimely under Rule 24(b).

Indeed, it is interesting to note that Prof. Volokh (the source of the original submission to the Committee) seems himself to be a rather active intervenor. See, e.g., *Mastriano v. Gregory*, 2024 WL 40003343 (W.D. Okla., Aug. 26, 2024) (Volokh granted leave to intervene to move to unseal two exhibits that were filed under seal, and motion to unseal granted); *Sealed Appellant v. Sealed Appellee*, 2024 WL 980494 (5th Cir., March 7, 2024) (Prof. Volokh intervened to challenge the sealing of the file after "this case came to his attention after one of the district court's orders turned up in a scheduled daily Westlaw search for cases mentioning sealing and the First Amendment"); *Doe v. Town of Lisbon*, 78 F.4th 38 (1st Cir. 2023) (Prof. Volokh granted intervention to seek identity of police officer who sued seeking to have his name removed from list of officers found guilty of misconduct, but motion to unseal denied).

Because there is an existing body of precedent on intervention for these purposes, providing some parallel right by rule looks dubious. On the one hand, the proposal that every "member of the public" can intervene may be too broad. Rule 24(b)(1), which is ordinarily relied upon for such intervention to unseal, also has other requirements that might not be included in a new rule.

The role of nonparty confidentiality claimants (mentioned above) seems distinguishable. Particularly if their confidential information was obtained under the auspices of the court (e.g., by subpoena), it would seem to follow that they should have some avenue to protect those interests

when a party sought to file those materials in court. (It might be mentioned that most of the submissions seem to take no notice of the possibility that nonparties might favor filing under seal.)

> **(G)** Upon final termination of the action, any party that filed sealed materials may retrieve them from the clerk.

A proposal made in at least one submission is that all sealed materials be unsealed within 60 days after "final termination" of the action. If that "final termination" is on appeal, it may be difficult for the district court clerk's office to know when to unseal. Imposing such a duty on the clerk's office, rather than empowering the party that filed the material to request its return based on a showing that final termination of the action has occurred seems more reasonable.

The question what is a "final termination of the action" might create uncertainty. At least in the district court, that might be said to be the entry of judgment. But not all judgments end the litigation in the district court. For one thing, Rule 54(a) says that "'[j]udgment' as used in these rules means any order from which an appeal lies." So a partial final judgment under Rule 54(b) would seem to be included. And under 28 U.S.C. § 1292 a variety of interlocutory decisions are reviewable immediately. In addition, Rule 23(f) permits a party displeased with a ruling on class certification to seek immediate discretionary review of that decision in the court of appeals. Presumably the filed materials may not be retrieved until the appeal is resolved in one is filed.

Alternatively, as reflected in at least one local rule, the clerk could be directed to destroy the sealed materials after final termination of the action. That would also present the monitoring problem mentioned just above.

As noted above, these proposals have also prompted at least one submission opposing adoption of any such rule amendments. See 21-CV-G from the Lawyers for Civil Justice, arguing that such amendments would unduly limit judges' discretion regarding confidential information, conflict with statutory privacy standards, and stoke unprecedented satellite litigation.

Discussions during the Advisory Committee's October 2023 meeting stressed the reality that many litigations involve highly confidential technical and competitive information; making filing under seal more difficult could prove very troublesome.

But attorney members of the committee stressed the extreme variety of practices in different districts, sometimes making the lawyers' work much more difficult. Some districts have very elaborate local provisions on filing under seal, and others have few or almost no provisions dealing with the topic. But it was also noted that this divergence might in some instances reflect the sorts of cases that are customary in different districts. There was discussion of the tension between recognizing the need for local latitude in dealing with handling these problems and also recognizing that concerns about perceptions of excessive sealing of court records have continued.

* * * * *

This report hopefully introduces the issues, and identifies some of the challenges. Advisory Committee guidance on experience with problems resulting from sealed filings, and recommendations about how and where to seek additional information would be welcome.

TAB 15

MEMORANDUM

To: Advisory Committee Chairs

From: Reporters' Privacy Rules Working Group
H. Thomas Byron III, Rules Committee Chief Counsel

Re: Potential issues related to the privacy rules

Date: August 21, 2024

The Rules Committees have received several suggestions that address particular issues related to the privacy rules (Appellate Rule 25, Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1): (1) a suggestion to reconsider whether to require complete redaction of social-security numbers (SSNs) in federal-court filings (22-AP-E, 22-BK-I, 22-CV-S, 22-CR-B); (2) suggestions to streamline the caption on many bankruptcy notices by limiting or eliminating detailed information about a debtor, including the debtor's SSN, from subsequent notices after the meeting of creditors notice (23-BK-D, 23-BK-J); and (3) a suggestion to amend Criminal Rule 49.1(a)(3) and corresponding provisions of the other privacy rules, which currently require including in a filing only the initials of a known minor, to require instead the use of a pseudonym in order to better protect the privacy interests of minors who are victims or witnesses (suggestions 24-CR-A, 24-AP-B, 24-BK-D, 24-CV-C). The appropriate Advisory Committees will continue to consider those pending suggestions. This memo addresses whether those deliberations should expand to encompass other privacy-related issues, and recommends against such an expansion.

I. Background and Overview

At the spring 2024 meetings, the Advisory Committees discussed a suggestion from Senator Wyden (22-AP-E, 22-BK-I, 22-CV-S, 22-CR-B) that would require complete redaction of social-security numbers. The agenda books included a sketch of a draft rule amendment but did not recommend that the amendment be considered at that time. (Our March 19, 2024, memorandum is attached for reference.) Based on the recommendation of the reporters' working group, the committees decided to defer consideration of a draft rule amendment until after discussion of pending suggestions and possibly other potential issues concerning the privacy rules.

In addition to the pending suggestions that are under consideration by the Bankruptcy and Criminal Rules Committees, we have identified several potential

issues common to all three rule sets (Bankruptcy, Civil, and Criminal).[1] This memorandum explains the tentative conclusion of the working group that those issues, outlined below, do not warrant further study by the advisory committees. We seek input from each committee about that recommendation and about whether any other issues related to the privacy rules deserve consideration at this time.

Each of the issues described below represents an area where some clarifying changes could be made to the privacy rules or where they could be expanded to cover additional information. But our consensus view is that there is no demonstrated need for the Rules Committees to take up any of these issues. Put simply, there is no real-world problem that we need to solve right now. That initial question—whether there is an actual problem in the application of the rules that could be solved by an amendment—has long driven the focus of the rules committees, and it properly reflects the limited time and other resources available to the committees, as well as the presumption that rule amendments should be limited to avoid disruption of settled practices.

That view could change if we receive a specific suggestion for a rule amendment that identifies a practical problem in the privacy rules or if case law or other information reflects real uncertainty or divergence in how the rules are being interpreted or applied. In that event, we will ask the committees to consider how to address the particular concern. Similarly, if another Judicial Conference committee, such as CACM or IT, were to identify a privacy-related concern that could be addressed by a rule amendment, the rules committees could consider the issues raised in that context.

In the meantime, the Bankruptcy and Criminal Rules Committees will continue to consider the pending proposals for amendments to the privacy rules. The suggestion for an amendment requiring complete redaction of social-security numbers can be considered along with any proposed amendments that result from that ongoing work on pending suggestions.

The following summaries describe the issues considered by the working group:

II. Potential Privacy-Rule Issues

A. Ambiguity and overlap in the exemptions

The exemptions from the redaction requirements, set forth in subdivision (b) of each of the privacy rules, include language that appears ambiguous or possibly

[1] Appellate Rule 25(a)(5) generally provides that that the appropriate privacy rule in the Bankruptcy, Civil, or Criminal Rules will govern in particular categories of cases in the appellate courts. Unless otherwise noted, privacy rule citations in this memo are to the common provisions of the Bankruptcy, Civil, and Criminal Rules.

overbroad, although we are not aware of any particular problems or concerns related to the application of these provisions. Here are two examples:

Subdivision (b)(3) refers to the "official record from a state-court proceeding"; rules committee records indicate that this exemption was originally intended to refer to the records of state cases removed to federal court. But that focus is not apparent in the text of the rules. And state-court records can be included in filings in other types of cases as well.

Subdivision (b)(4), which exempts "the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed," was initially aimed at pre-2007 federal court records, although the rule text appears to apply much more broadly to the record of any court or tribunal. It appears to overlap, and perhaps make redundant, some more specific exemptions for: (1) the record of administrative or agency proceedings, in subdivision (b)(2); (2) the official record of a state-court proceeding, in subdivision (b)(3); and (3) state-court records in a pro se action brought under 28 U.S.C. § 2254, in subdivision (b)(6) of Civil Rule 5.2 and Criminal Rule 49.1.

B. Scope of the waiver

The waiver provision in subdivision (h) of Civil Rule 5.2 and Criminal Rule 49.1, and subdivision (g) of Bankruptcy Rule 9037, can be read narrowly to provide only that an individual does not violate the rule by failing to comply with the redaction requirements with respect to the person's own personally identifiable information (PII). That is, inclusion of a person's own unredacted PII waives the redaction requirement for that party with respect to that specific PII in that particular filing only. However, the records of the rules committees' original consideration of the privacy rules support a broader reading of the waiver provision: Under that view, once a person waives the protection of subdivision (a)'s redaction requirements in a filing as to the person's own information, other filers no longer need to redact the disclosed PII in subsequent filings in the case (or perhaps even in other cases).

The broader view is not apparent from the rule text or committee note. But the ambiguity inherent in the term "waives," as well as the rules committees' public records on the subject, leaves open the possibility that the waiver provision could be read by some litigants to permit inclusion of unredacted PII in a broad range of court filings. Here too, however, we have not received any indication of a problem in practice related to the waiver provision.

C. Expansion of protected information subject to redaction

Since their adoption in 2007, the privacy rules have required redaction of "an individual's social-security number, taxpayer-identification number, or birth date," as well as "the name of an individual known to be a minor" and "a financial-account

number." Civil Rule 5.2(a). Other categories or identifiers might equally warrant protection in court filings as PII. For example, an individual's passport or driver's license number could potentially cause harm if disclosed, and there seems little or no reason why an unsealed filing would need to disclose those kinds of details. Similarly, online login information such as account identifiers and passwords could cause harm if disclosed.

Other information, such as an individual's birthplace, could—in conjunction with other data—facilitate identity theft or similar malicious activity. Telephone numbers and physical or email addresses could pose different considerations, as they are generally required for attorneys and pro se filers to ensure that courts and parties can reach litigants. But there might be little reason to allow routine disclosure of third parties' information.

At this point, we have not received any indication that disclosure of these categories of information in court filings is widespread or has led to specific problems. And the absence of such a suggestion seems sufficient reason not to devote resources to these questions now.

D. Protection of other sensitive information

Beyond redaction of specific PII, there might also be additional categories of information that warrant protection from public disclosure. For example, medical records and related information about an individual's health conditions are protected from disclosure in certain circumstances, although the privacy rules do not address that type of information. And geolocation information (such as from cellphone records, smartwatches, GPS devices, or Bluetooth trackers) can also include sensitive personal information that might be considered private in some circumstances. The privacy rules specifically mention filings made under seal in subdivision (d), and these categories of information raise the question whether the rules should protect specific categories of privacy-related information that might need to be known to parties in litigation but should not be subject to wider public disclosure.

A 2023 submission from Lawyers for Civil Justice (23-CV-W) questions whether the rules as a whole do enough to ensure the protection of sensitive personal information from disclosure. The Civil Rules Committee has not yet discussed that suggestion, and its consideration of the issues could provide additional relevant guidance to the other Advisory Committees. At this time, however, there is no indication that the privacy rules need to be amended to address these broader concerns.

MEMORANDUM

To: Advisory Committee Chairs

From: Reporters' Privacy Rules Working Group
H. Thomas Byron III, Chief Counsel, Rules Committee Staff
Zachary Hawari, Rules Law Clerk

Re: Update on Review of Privacy Rules

Date: March 19, 2024

I. Background and Overview

In 2022, Senator Ron Wyden suggested that the Rules Committees reconsider whether to require complete redaction of social-security numbers (SSNs) in federal-court filings (suggestions 22-AP-E, 22-BK-I, 22-CV-S, 22-CR-B). The redaction requirements—including the requirement that filers redact all but the last 4 digits of SSNs—are generally consistent across the privacy rules (Appellate Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2(a), and Criminal Rule 49.1(a)). See E-Government Act of 2002, Pub. L. No. 107-347, § 205(c)(3)(A)(ii), 116 Stat. 2914 ("Such rules shall provide to the extent practicable for uniform treatment of privacy and security issues throughout the Federal courts.").

The partial SSN redaction requirement in the privacy rules was adopted and retained in large part due to concerns that participants in bankruptcy cases needed the last 4 digits of a debtor's SSN. In light of that history, the Advisory Committees concluded in 2022 that the Bankruptcy Rules Committee should first determine the extent to which that need remains paramount before the Appellate, Civil, and Criminal Rules Committees consider whether any different approach would be warranted in non-bankruptcy cases. The Bankruptcy Rules Committee has tentatively determined that it would not be feasible to require complete redaction of SSNs in all bankruptcy filings, but that committee is considering a range of options that could include eliminating SSNs from some filings. Those issues remain under review and are unlikely to result in a recommendation to publish any proposed amendments to the Bankruptcy Rules before 2025.

The reporters and Rules Committee Staff have been discussing Senator Wyden's suggestion and related issues concerning the privacy rules. We have tentatively concluded that any amendments to the Civil and Criminal Rules concerning the redaction of SSNs should not be considered in isolation but should be part of a more considered review of the privacy rules. The following sections outline possible areas of inquiry that the Rules Committees might consider.

II. Sketch of Rules Amendments Requiring Complete Redaction of SSNs

The Rules Committees could consider amendments that would require complete SSN redaction by amending Civil Rule 5.2(a) and Criminal Rule 49.1(a) along these lines:

> (a) REDACTED FILINGS. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing must [fully] redact the social-security number or taxpayer-identification number and may include only:
>
> (1) ~~the last four digits of the social-security number and taxpayer-identification number;~~
>
> ~~(2)~~ the year of the individual's birth;
>
> (~~3~~2) the minor's initials; and
>
> (4~~3~~) the last four digits of the financial-account number.

The Bankruptcy Rules Committee is considering this suggestion, among other possible approaches to amending the rules governing SSNs in bankruptcy filings.[1]

Several considerations warrant a broader review of the privacy rules before moving forward to consider this or a similar proposal in isolation. First, the Federal Judicial Center is conducting a study of unredacted privacy information—including SSNs—in court filings. That study could help inform the Rules Committees' understanding of whether the privacy rules warrant further review and possible amendment. Second, the Rules Committees have received additional suggestions concerning possible amendments to the privacy rules. While the proposal outlined above could move forward while the committees consider other suggestions, the Rules Committees generally seek to avoid multiple proposed amendments to any individual rule, preferring instead to present a single set of consolidated changes after comprehensive consideration. This approach helps educate courts, litigants, and the public about rules changes, avoiding confusion and the risk of amendment fatigue.

Because the committees will be considering other privacy rule suggestions, as well as the conclusions of the ongoing FJC study, it seems prudent to consider any proposed amendment requiring full redaction of social-security numbers along with any other proposed amendments to the privacy rules that the committees conclude may be warranted after careful review of the issues.

[1] There would likely be no need for an amendment of Appellate Rule 25(a)(5), which specifies that the other privacy rules apply to appellate filings in particular categories of cases.

III. Other Privacy Rule Issues

A. The Bankruptcy Rules Committee is considering suggestions to streamline the caption on many notices by limiting or eliminating detailed information about a debtor, including the debtor's SSN, from subsequent notices after the meeting of creditors notice (23-BK-D, 23-BK-J). That committee is considering the suggestions in conjunction with its ongoing consideration of the continuing need and utility of including the last 4 digits of an individual's SSN in bankruptcy filings.

B. The Department of Justice has recently submitted a suggestion to amend Criminal Rule 49.1(a)(3), which currently requires including in a filing only the initials of a known minor, to require instead the use of a pseudonym in order to better protect the privacy interests of minors who are victims or witnesses (suggestion 24-CR-A). Because similar requirements appear in the Bankruptcy and Civil Rules, and are incorporated in the Appellate Rules, the suggestion has been forwarded to those advisory committees as well (suggestions 24-AP-B, 24-BK-D, 24-CV-C).

C. Nearly 20 years have passed since the Rules Committees initially considered the privacy rules, and this could present a timely opportunity to review the rules and consider whether any amendments might be warranted in light of the passage of time, or whether practice under the rules has identified other areas of concern. For example, the committees could consider whether any other personal information, not included in the redaction requirements, might warrant protection today.

Some issues could concern provisions that are common to the privacy rules. For example, the exemptions from the redaction requirements in subdivision (b) of each of the privacy rules include language that could be ambiguous or overlapping; additional inquiry could identify whether any of these provisions pose a practical problem to litigants or courts. And the waiver provision in subdivision (h) might warrant clarification. Those inquiries should proceed on a coordinated basis, either by continuing the work of the reporters' working group, by designating one advisory committee to take the lead, or by asking the Standing Committee Chair to appoint a joint subcommittee.

Moreover, an Advisory Committee might seek to consider issues solely related to filings in appellate, bankruptcy, civil, or criminal proceedings. For example, the Bankruptcy Rules Committee is already considering such questions. And the Criminal Rules Committee might review several provisions in Criminal Rule 49.1 that address unique concerns, such as arrest or search warrants and charging documents (Rule 49.1(b)(8)-(9)).

* * * *

The Rules Committee Staff will continue to work with the relevant Advisory Committee Chairs and reporters to identify any areas of common concern and to

assist in any necessary coordination. We anticipate that the reporters' advisory group will continue its discussions over the next several months. Each Advisory Committee can also consider whether it wishes to appoint a subcommittee to consider these issues or instead to await further information.

TAB 16

MEMORANDUM

DATE: August 21, 2024

TO: Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules

FROM: Catherine T. Struve

RE: Sketch of potential rule amendments concerning self-represented litigants' filing and service

As you know, a working group has recently been discussing possible rule amendments on the topic of self-represented litigants' filing and service. The working group has focused on two broad topics: (1) increases to electronic access to court by self-represented litigants (whether via the court's electronic-filing system[1] or alternative means) and (2) service (of papers subsequent to the complaint) by self-represented litigants on litigants who will receive an electronic notice of filing (Notice of Filing)[2] through the court's electronic-filing system or through a court-based

1 In prior memos, this project had referred specifically to CM/ECF. This memo refers generically to the "court's electronic-filing system" in order to take account of other terms that courts may use for their electronic-filing system (such as the Appellate Case Management System, or "ACMS," that is in use in the Second and Ninth Circuits).

2 This memo uses "Notice of Filing" to denote an electronic notice provided to case participants by the court's electronic-filing system to inform them of a filing or other activity on the docket. The term "Notice of Filing" encompasses the current terms "Notice of Docket Activity" and "Notice of Electronic Filing" or "NEF."

One Clerk representative questions the choice of "Notice of Filing" as the defined term, and suggests "Notice of Entry" or "Notice of Docket Activity" as possible alternatives: "Because electronic notices are sent whenever anything happens on the docket, we tend to think the term 'NDA' is more appropriate. There are many instances where nothing was 'Filed' and only a docket entry has been entered. Many courts issue docket text-only orders. It's not implausible to consider attorneys eventually doing this too. If so, would 'entry' be more accurate than 'document?'"

This is a good question. If one were thinking only of items that might be served by a party, then "Notice of Filing" seems like a logical choice, because the items that a party might typically need to serve under Rule 5 – usually, post-complaint pleadings, motions, and other papers – would also be filed. But Civil Rule 77(d)(1) incorporates Rule 5(b) when discussing the

electronic-noticing program.

The working group has collaborated on a very tentative sketch of a possible amendment to Civil Rule 5. This memo sets out the current version of that sketch for discussion at the fall Advisory Committee meetings. After providing a brief introduction (in Part I of this memo), I set out the sketch in Part II.

I. Overview of the project

General policy choices. The sketch in Part II implements two policy choices – one regarding service, and the other regarding filing.

As to service, the sketch eliminates the requirement of separate (paper) service (of documents after the complaint) on a litigant who receives a Notice of Filing through the court's electronic-filing system or a court-based electronic-noticing program. (See Part I of my September 2023 memo[3] for discussion of some courts that have already implemented such an exemption.)

The sketch also permits service by email to the address that the court uses to email Notices of Filing, so long as the sender has designated in advance the email address from which such service will be made.[4] This provision could be useful beyond the context of self-

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clerk's service of notice of the entry of an order or judgment: "Immediately after entering an order or judgment, the clerk must serve notice of the entry, as provided in Rule 5(b), on each party who is not in default for failing to appear. The clerk must record the service on the docket. A party also may serve notice of the entry as provided in Rule 5(b)." So it's worthwhile to consider whether the choice of term should reflect the reality that many of the court-provided notices served electronically under Rule 77(d)(1) and Rule 5(b) concern docket entries that don't involve a separately *filed* court order. (See also Rule 79(a)(2), including among the things the clerk must enter in the docket "papers filed with the clerk" and "orders, verdicts, and judgments.")

On the other hand, I think that terminological issue is also baked into the current Rule as well, given that existing Rule 5(b)(2)'s description of service through CM/ECF reads in relevant part "A paper is served under this rule by: … (E) sending it to a registered user by filing it with the court's electronic-filing system." If that provision is sufficiently clear as it applies currently to Rule 5(b) as incorporated by Rule 77(d)(1), then perhaps "Notice of Filing" would be sufficiently clear in the amended rule as applied to the same thing.

3 That memo is available starting at page 184 of the agenda book that is available here: https://www.uscourts.gov/sites/default/files/2024-01_agenda_book_for_standing_committee_meeting_final_0.pdf

4 The proviso about designating the email address from which the service will be made is designed to address the possibility that this sort of email service otherwise might end up in the

represented litigants; for example, discovery material that is served but not filed could also be served this way.

As to filing, the sketch makes two changes compared with current practice: (1) it presumptively permits self-represented litigants to file electronically (unless a court order or local rule bars them from doing so) and (2) it provides that a local rule or general court order that bars self-represented litigants from using the court's electronic-filing system must include reasonable exceptions or must permit the use of another electronic method for filing documents and receiving electronic notice of activity in the case.

A court could comply with this amended filing rule by doing either of the following:

- Allowing reasonable access for self-represented litigants to the court's electronic-filing system. That access could (and I expect typically would) be limited to non-incarcerated litigants and could be restricted to those persons who satisfactorily complete required training. (See Part II of my September 2023 memo for discussion of some courts that already provide such access.)

- Not allowing self-represented litigants to access CM/ECF, but providing them with an alternative electronic means for filing (such as by email or upload) and an alternative electronic means for receiving notice of court filings and orders (such as an electronic noticing program). (See Part III of my September 2023 memo for discussion of some courts that already have such alternative programs.)

Note that, under the amended filing rule, a court would need to adopt a local rule or court order *dis*allowing CM/ECF access for self-represented litigants if it wanted to foreclose such access; the default would be access. Note also that the rule would always permit a court to enter an order barring a particular litigant from using CM/ECF.

These policy choices, at present, are the product of discussions in the working group.

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recipient's "junk mail" folder. This concern might arise with respect to service by a party in a way that it wouldn't arise with respect to notices from the court, because it's reasonable to expect those participating in the court's electronic-filing or electronic-noticing systems to take steps to ensure that emails from the court's email address won't be snared in a junk folder. In order for the participant to take similar steps with respect to service by another litigant, it may be necessary to require that a litigant making service by email has designated their email address in advance before using it to make email service.

It should be noted, though, that there is not full consensus on the inclusion of this proviso. One of the Clerk representatives argues that this proviso is unnecessary and "serves only to complicate the rule. A recipient's junk filters aren't really of concern to the courts. This potentially exists in the paper world too. (We mailed it, but it never arrived for any myriad of reasons.)"

After roughing out a sketch of the proposed rule changes based on those policy choices, we circulated the sketch to the Clerk representatives on the Appellate, Bankruptcy, Civil, and Criminal Rules Committees for their comments. Their input has produced significant improvements in the draft shown here.

In addition, the Clerk liaisons' feedback made clear that – as the committees have already heard – the proposed changes regarding filing by self-represented litigants will be controversial at the level of the trial courts (though likely not at the level of the courts of appeals). Although the proposed rule and Note would make clear that e-filing need not be provided to incarcerated filers and that litigants who abuse the system can be barred from it, concerns persist that technological limitations or cybersecurity fears may nonetheless make it difficult for some trial courts to comply with either of the dual options noted above (providing self-represented litigants with either CM/ECF access or some alternative means of electronic filing and noticing).

In the event that the advisory committees decide to publish these proposed amendments for comment, we would expect to receive robust public input on the filing aspects of the proposal. A question for the Advisory Committees is whether to proceed with publication and comment of the filing portion of the project despite the concerns that have been expressed about it. On one hand, these concerns may ultimately lead the Advisory Committees to hold back from approving the filing aspects of the proposal sketched below (at least in the rule sets that apply to the trial courts). But on the other hand, publication and comment may usefully serve to generate new knowledge and awareness about practices in federal courts around the country, which may be salutary even if the changes concerning filing are not adopted in this rulemaking cycle.

In any event, whether or not the Advisory Committees decide to publish for public comment the aspects of the proposed rule concerning filing, the working group supports the publication (and adoption, assuming no unanticipated grounds for hesitation emerge from the comment period) of the proposed rule changes concerning service. The service-related changes sketched below have not generated substantive concerns to date (though, as noted in this memo, consensus is still emerging on the best language choices for the service provisions).

Implementation across the rule sets. As noted, we are using Civil Rule 5 for illustrative purposes. Once we arrive at a working draft of Civil Rule 5, we would then turn to working on parallel sketches for amendments to the other sets of rules.[5]

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5 Here is my working list of the rules that would require consideration: Appellate Rule 25 (filing and service); Bankruptcy Rules 5005 (filing), 7005 (applying Civil Rule 5 in adversary proceedings), 8011 (filing & service in appeals to a district court or BAP), and 9036(c) (electronic service); and Criminal Rule 49.

In those other rules, there might be additional particularities to consider as drafting proceeds. For example, as noted in the text, our goal here is to address filing and service issues of documents subsequent to the initial complaint – hence the focus on Civil Rule 5 rather than

Application in the criminal, habeas, and Section 2255 contexts. We are contemplating possible amendments that would be generally parallel across the Appellate, Bankruptcy, Civil, and Criminal rule sets. It is also necessary to consider how the amendments would work in the context of state-prisoner habeas (i.e., Section 2254) and Section 2255 proceedings.

Criminal Rule 49's treatment of issues regarding self-represented litigants may at first appear beside the point, given that nearly all criminal defendants are represented. But Criminal Rule 49's potential applicability to Section 2255 proceedings means that there is a significant population of self-represented litigants that could be affected by the proposed changes to Criminal Rule 49. Admittedly, nearly all those self-represented litigants will be incarcerated, and the proposed amendments would not require courts to provide CM/ECF access for self-represented litigants who are incarcerated. So the on-the-ground effect of the proposed filing-related changes to Criminal Rule 49 would be minimal. However, the proposed service-related changes to Criminal Rule 49 (and Civil Rule 5) would be important for incarcerated self-represented litigants (in Section 2254 and Section 2255 proceedings), because those changes would relieve such litigants of a service requirement that is likely to be onerous for incarcerated litigants (who may have greater difficulty than non-incarcerated litigants in paying for postage).

There is a further reason to amend Criminal Rule 49 in tandem with Civil Rule 5. As you know, Rule 12 of the Rules Governing § 2254 Cases provides that "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." Meanwhile, Rule 12 of the Rules Governing § 2255 Proceedings provides that "[t]he Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." To the extent that Civil Rule 5 and Criminal Rule 49 are amended so as to take the same approach to the service and filing questions discussed here, that would allow courts to avoid choosing which rule governs.

As drafting proceeds, the Appellate and Criminal Rules Committees might also wish to give attention to whether the proposed changes would require adjustment to the 'prison mailbox' provisions in Appellate Rules 4(c) and 25(a)(2)(A)(iii) and in Rules 3 of the habeas and Section

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Civil Rule 4. In the bankruptcy context, the petition that initiates the bankruptcy may not be the only case-initiating document, because complaints in adversary proceedings might also be filed in the context of an ongoing bankruptcy. Thus, the Bankruptcy Rules Committee might wish to consider adjusting the language of the sketch's Committee Note, when transposing it into the context of Bankruptcy Rule 5005, to make clear that the amended rule does not displace any local requirement that a complaint initiating an adversary proceeding be filed in paper. The adjustment might be accomplished by this tweak to the Committee Note: "Also, a court could adopt a local provision stating that certain types of filings – for example, **complaints in adversary proceedings, and/or** notices of appeal – cannot be made by means of the court's electronic-filing system."

2255 rules.[6]

II. The tentative rule sketch

Below is the current sketch. A particular focus, in drafting, has been on terminology. We are trying to use language that maps onto the way in which court technology programs currently work and are likely to work in the future.

Currently, the court electronic-filing programs that we are aware of are the Case Management / Electronic Case Filing (CM/ECF) system and the Appellate Case Management (ACMS) system; both of those are encompassed in the term "the court's electronic-filing system." We are also aware of alternative electronic-filing options that some courts provide to self-represented litigants (such as the Electronic Document Submission System (EDSS)) and court-based electronic-noticing programs. Notice from a court-based electronic-noticing system is encompassed in proposed Rule 5(b)(2)'s reference to persons "registered to receive [a Notice of Filing] from the court's electronic-filing system" and in proposed Rule 5(d)(3)(B)(ii)'s reference to "another electronic method for … receiving electronic notice of activity in the case." Alternative electronic-filing options (such as EDSS) are encompassed in proposed Rule 5(d)(3)(B)(ii)'s reference to "another electronic method for filing documents … in the case."

Rule 5. Serving and Filing Pleadings and Other Papers

(a) Service: When Required.

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

(A) an order stating that service is required;

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6 I highlighted this question in a prior sketch of this project that was circulated to the Clerk representatives on the Advisory Committees and to selected additional court personnel. The feedback that we received included this suggestion: "This would be a good opportunity to amend [Appellate Rule] 4(c) to make explicit that the electronic service programs qualify as 'a system designed for legal mail' and to define 'deposited in the institution's mail system' for purposes of filing - what kind of document, statement, or evidence does the inmate need to provide when filing electronically, to get the benefit of the mailbox rule?"

The possibility of revising the prisoner-mailbox provisions to take account of prison e-filing programs may have been briefly considered the last time that the Appellate Rules' prison-mailbox rules were amended (effective 2016). At that time, no attempt was made to address institutional e-filing programs. But it may well be that the prevalence of prison e-filing programs has expanded in the 8+ years since the 2016 amendments were under consideration, so perhaps the time may be ripe for re-considering this question. In any event, that question seems potentially separable from the proposed rule changes addressed in the text of this memo.

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

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

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

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

* * *

(b) Service: How Made.

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

(2) Service by Means of the Court's Electronic-Filing System. The [court's sending of the][7] Notice of Filing [is] [constitutes][8] service under this rule [of the filed paper][9] on the Notice's[10] date on any person registered to receive the Notice from the court's electronic-filing system. The court may provide by local rule that [filings] [papers filed] under seal are not served under this Rule 5(b)(2).

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

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7 Some participants have suggested eliminating the phrase "court's sending of the" and saying, simply, "The Notice of Filing is" service. That shorter formulation may also work, but one benefit of the slightly longer formulation is that it might be clearer to users (such as self-represented litigants) who aren't generally familiar with the system.

8 Which of these verbs is better? Cf. Civil Rule 5(d)(3)(C) ("A filing made through a person's electronic-filing account . . . constitutes the person's signature.").

9 Is this bracketed language helpful or unnecessary? A participant suggested "of the filed document," but I would lean toward "of the filed paper" if we are adding this phrase, because Civil Rule 5 uses "paper" instead of "document."

10 Should we capitalize "Notice"? I believe that the CM/ECF authorities use capitals in the phrase "Notice of Electronic Filing," see, e.g., https://www.uscourts.gov/court-records/electronic-filing-cmecf/faqs-case-management-electronic-case-files-cmecf. Presumably whether to capitalize the short form ("Notice") is a question for the style consultants.

(A) handing it to the person;

(B) leaving it:

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

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

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

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

(E) ~~sending it to a registered user by filing it with the court's electronic filing system or~~ sending it by email to the address that the court uses to email Notices of Filing – so long as the sender has designated in advance the email address from which such service will be made – or by other electronic means that the person consented to in writing—in either of which events service is complete upon ~~filing or~~ sending, but is not effective if the ~~filer or~~ sender learns that it did not reach the person to be served; or

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

~~**(3) Using Court Facilities.** [Abrogated (Apr. 26, 2018, eff. Dec. 1, 2018.]~~
(4) Papers not filed. Rule 5(b)(3) governs service of a paper that is not filed.

(5) Definition of "Notice of Filing." The term "Notice of Filing" in this rule includes a Notice of Docket Activity, a Notice of Electronic Filing, and any other similar electronic notice provided to case participants by the court's electronic-filing system to inform them of a filing or other activity on the docket.

* * *

(d) Filing.

(1) Required Filings; Certificate of Service.

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

(B) Certificate of Service. No certificate of service is required when a paper is served under Rule 5(b)(2)~~by filing it with the court's electronic filing system~~. When a paper that is required to be served is served by other means:

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

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

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

(A) to the clerk; or

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

(3) Electronic Filing and Signing.

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

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

(i) A person not represented by an attorney~~: (i)~~ may file electronically ~~only if allowed by~~ unless a court order or ~~by~~ local rule bars the person from doing so; ~~and~~but ~~(ii)~~ may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(ii) A local rule or general court order that bars persons not represented by an attorney 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.

(iii) A court may set reasonable conditions and restrictions on access to the court's electronic-filing system for persons not represented by an attorney.

(iv) A court may deny a particular person access to the court's electronic-filing system, and may revoke a person's prior access to the court's electronic-filing system for noncompliance with the conditions stated in (iii).

* * *

Committee Note

Rule 5 is amended to address two topics concerning self-represented litigants. Rule 5(b) is amended to address service of documents (subsequent to the complaint) filed by a self-represented litigant in paper form. Because all such paper filings are uploaded by court staff into the court's electronic-filing system, there is no need to require separate paper service by the filer on case participants who receive an electronic notice of the filing from the court's electronic-filing system. Rule 5(b)'s treatment of service is also reorganized to reflect the primacy of service by means of the electronic notice. Rule 5(d) is amended to expand the availability of electronic modes by which self-represented litigants can file documents with the court and receive notice of filings that others make in the case.

Subdivision (b). Rule 5(b) is restructured so that the primary means of service – that is, service by means of the court's electronic-filing system – is addressed first, in subdivision 5(b)(2). Existing Rule 5(b)(2) becomes new Rule 5(b)(3), which continues to address alternative means of service. New Rule 5(b)(4) addresses service of papers not filed with the court, and new Rule 5(b)(5) defines the term "Notice of Filing" as any electronic notice provided to case participants by the court's electronic-filing system to inform them of a filing or other activity on the docket.

Subdivision (b)(2). Amended Rule 5(b)(2) eliminates the requirement of separate (paper) service (of documents after the complaint) on a litigant who is registered to receive a Notice of Filing from the court's electronic-filing system. Litigants who are registered to receive a Notice of Filing include those litigants who are participating in the court's electronic-filing system with respect to the case in question and also include those litigants who receive the

Notice because they have registered for a court-based electronic-noticing program.[11] (Current Rule 5(b)(2)(E)'s provision for service by "sending [a paper] to a registered user by filing it with the court's electronic-filing system" had already eliminated the requirement of paper service on registered users of the court's electronic-filing system by other registered users of the system; the amendment extends this exemption from paper service to those who file by a means other than through the court's electronic-filing system.)

The last sentence of amended Rule 5(b)(2) states that the court may provide by local rule that papers filed under seal are not served under Rule 5(b)(2). This sentence is designed to account for districts in which parties in the case cannot access other participants' sealed filings via the court's electronic-filing system.

Subdivision (b)(3). Subdivision (b)(3) carries forward the contents of current Rule 5(b)(2), with two changes.

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

Subdivision (b)(3)(E). Subdivision (b)(3)(E) is amended in two ways. First, the prior reference to "sending [a paper] to a registered user by filing it with the court's electronic-filing system" is deleted, because this is now covered by new Rule 5(b)(2). Second, a new option is added: "sending [the paper] by email to the address that the court uses to email Notices of Filing – so long as the sender has designated in advance the email address from which such service will be made." This provision enables a litigant to serve another case participant by email to the email address that the court uses to email Notices of Filing, but only if the sending litigant has already designated in advance the email address from which such service will be made. The latter proviso addresses the possible concern that otherwise an email from another litigant in the case might end up in the recipient's junk email folder.

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11 N.B.: An initial sketch of Rule 5(b) included a proposed Rule 5(b)(3) that separately treated "service by means of the court's electronic-noticing system," but we have removed that provision because it appears that such service appears to be already covered in proposed Rule 5(b)(2). The reason is that – as far as we are aware – the way that electronic-noticing programs work, in the courts that have them, is that email addresses for those self-represented litigants who opt in to electronic noticing are simply added to the list of email recipients that will receive Notices of Filing from the court's electronic-filing system. (There seems to be no reason that any court would use a different method for their e-noticing program. However, if we are incorrect about this, public comment should bring that fact to light.)

Subdivision (b)(4). New Rule 5(b)(4) addresses service of papers not filed with the court. It makes explicit what is arguably implicit in new Rule 5(b)(2): If a paper is not filed with the court, then the court's electronic system will never generate a Notice of Filing, so the sender cannot use Rule 5(b)(2) for service and thus must use Rule 5(b)(3).

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

Subdivision (d)(3)(B). Under new Rule 5(d)(3)(B)(i), the presumption is the opposite of the presumption set by the prior Rule 5(d)(3)(B). That is, under new Rule 5(d)(3)(B)(i), self-represented litigants are presumptively authorized to use the court's electronic-filing system to file documents in their case subsequent to the case's commencement. If a district wishes to restrict self-represented litigants' access to the court's electronic-filing system, it must adopt an order or local rule to impose that restriction.

Under Rule 5(d)(3)(B)(ii), a local rule or general court order that bars persons not represented by an attorney from using the court's electronic-filing system must include reasonable exceptions, unless that court permits the use of another electronic method for filing documents and receiving electronic notice of activity in the case. But Rule 5(d)(3)(B)(iii) makes clear that the court may set reasonable conditions on access to the court's electronic-filing system.

A court can comply with Rules 5(d)(3)(B)(ii) and (iii) by doing either of the following: (1) Allowing reasonable access for self-represented litigants to the court's electronic-filing system, or (2) providing self-represented litigants with an alternative electronic means for filing (such as by email or by upload through an electronic document submission system) and an alternative electronic means for receiving notice of court filings and orders (such as an electronic noticing program).

For a court that adopts the option of allowing reasonable access to the court's electronic-filing system, the concept of "reasonable access" encompasses the idea of reasonable conditions and restrictions. Thus, for example, access to electronic filing could be restricted to non-incarcerated litigants and could be restricted to those persons who satisfactorily complete required training and/or certifications and comply with reasonable conditions on access. Also, a court could adopt a local provision stating that certain types of filings – for example, notices of appeal – cannot be filed by means of the court's electronic-filing system. Rule 5(d)(3)(B)(ii) uses the term "general court order" to make clear that Rule 5(d)(3)(B)(ii) does not restrict a court from entering an order barring a specific self-represented litigant from accessing the court's electronic-filing system.

Rule 5(d)(3)(B)(iv) provides that the court may deny a specific self-represented litigant access to the court's electronic-filing system, and that the court may revoke a self-represented litigant's access to the court's electronic-filing system.

* * *

A conforming amendment to Civil Rule 6(d) would be needed to adjust for the change in numbering of current Civil Rule 5(b)(2):

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

* * *

(d) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after being served and service is made under Rule 5(b)(~~2~~3)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

Committee Note

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

TAB 17

MEMORANDUM

DATE: August 21, 2024

TO: Advisory Committees on the Bankruptcy, Civil, and Criminal Rules

FROM: Judge J. Paul Oetken
Andrew Bradt
Catherine T. Struve

RE: Joint Subcommittee on Attorney Admission Report

We write on behalf of the Joint Subcommittee on Attorney Admission to report on the Subcommittee's ongoing deliberations. As you know, the Subcommittee includes members of the Criminal, Civil, and Bankruptcy Rules Committees[1] and has been tasked with considering the proposal by Alan Morrison and others for adoption of national rules concerning admission to the bars of the federal district courts.[2]

We are grateful for the feedback provided by the Advisory Committees at their spring 2024 meetings. This memo summarizes our inquiries since then. Part I of this memo provides a brief summary of the project to date, including the 2024 discussions in the Standing Committee and Advisory Committee meetings. Part II turns briefly to the question of statutory authority for rulemaking on the topic of attorney admission. Part III considers the admission of attorneys to practice in the federal appellate courts. Part IV discusses local-counsel requirements and how those might affect the efficacy of any national rule that might be adopted concerning attorney admission. Part V summarizes what we have learned to date concerning attorney admission fees. Part VI explores the question of how a rule concerning admission to practice in federal district courts might intersect with state law concerning the unauthorized practice of law. And Part VII

1 The Subcommittee members are: Judge J. Paul Oetken (Chair; member, Bankruptcy Rules Committee), Judge André Birotte Jr. (member, Criminal Rules Committee), Thomas G. Bruton (Clerk of Court representative on the Civil Rules Committee), David J. Burman, Esq. (member, Civil Rules Committee); Judge Michelle M. Harner (member, Bankruptcy Rules Committee), Judge M. Hannah Lauck (member, Civil Rules Committee), and Catherine M. Recker, Esq. (member, Criminal Rules Committee).

2 See Suggestions 23-BK-G, 23-CR-A, and 23-CV-E, available at https://www.uscourts.gov/rules-policies/archives/suggestions/alan-morrison-23-bk-g .

notes that concerns about challenges facing attorneys who are military spouses may be partially addressed through other mechanisms.

I. The project to date

In this Part, we briefly sketch some of the major developments since the project's inception.

A. October 2023 Subcommittee discussion

The Subcommittee held its initial discussion in October 2023, and considered the three possible options sketched by Dean Morrison: (1) creating a national "Bar of the District Court for the United States," (2) adopting a rule providing that admission to any federal district court entitles a lawyer to practice before any federal district court, or (3) adopting a rule barring the district courts from requiring (as a condition of admission to the district court's bar) that the applicant reside in, or be a member of the bar of, the state in which the district court is located.

Subcommittee members expressed no interest in Dean Morrison's Option (1), and a number of members questioned its feasibility and/or predicted that it would generate much opposition. Some participants did express interest in considering Option (3). Participants also discussed the possibility of modeling a national rule for the district courts on Appellate Rule 46.

The Subcommittee members considered various policy concerns regarding any change from the current system. It was noted that requiring in-state bar admission is particularly burdensome in states that require applicants to take the bar examination. But participants also noted the need to allow districts to pursue their goal of protecting the quality of practice within the district – a goal that implicates both a lawyer's experience level and also the capacity of the admitting court to know of discipline imposed on the lawyer in other jurisdictions. The Subcommittee recognized that changing the rules on attorney admission might pose a revenue concern and observed that fee revenues currently fund a range of important court functions.

We also noted that any proposal would need to address questions of whether the rulemakers have statutory authority to address the topic of attorney admission.

The Subcommittee summarized its progress in a December 2023 report that was published in the agenda book for the Standing Committee's January 2024 meeting.[3]

3 That report starts on page 101 of the agenda book that is available here: https://www.uscourts.gov/sites/default/files/2024-01_agenda_book_for_standing_committee_meeting_final_0.pdf .

B. Morrison / Alvord December 2023 comment

On December 21, 2023, after publication of the Subcommittee's December 2023 report to the Standing Committee, Dean Morrison and Thomas Alvord responded to the report:

> … Our primary goal in making this proposal was to eliminate the many barriers that prevented lawyers who are admitted to practice in one district court from practicing in other districts. It was our view that centralizing admission in the Administrative Office of the U.S. Courts would be the easiest way to accomplish that goal, but we are by no means wedded to that alternative.
>
> In particular, we have no interest in removing the authority from individual districts to discipline attorneys, and our suggestion to centralize discipline was based on our view about centralizing admission.
>
> As for the issues of costs of implementation and loss of revenue, we also recognize that the AO has much better access to the data than we do. In that connection, we note that different districts have different rules on how often attorneys must renew their licenses and how much the court charges for renewal. The lack of uniformity might be another issue the Subcommittee might consider if it is not inclined to support a centralized system of admission….

C. January 2024 Standing Committee discussion

At the Standing Committee's January 2024 meeting, the Subcommittee Chair and reporters summarized the Subcommittee's initial discussion (as well as the new Morrison / Alvord comments) and sought the Standing Committee's reactions.[4]

Multiple members of the Standing Committee expressed support for pursuing the project. A number of members expressed support for dropping Option (1), and no one expressed interest in pursuing that option. A couple of members expressed support for considering Option (3). It was noted that in-state bar admission is not a close proxy for quality of lawyering and that fees to local counsel can be costly for litigants. A committee member encouraged us to consider whether and how to assist military spouses who must practice law while moving multiple times.

Participants did express some reservations, as well. One member wondered whether lawyers admitted only to federal court would forum-shop into federal court; and other participants expressed concern that permitting out-of-state lawyers to handle state-law claims in diversity or supplemental jurisdiction could offend federalism values. It was noted that

4 The relevant portion of the draft minutes of the meeting is available starting on page 22 of the agenda book available here: https://www.uscourts.gov/sites/default/files/2024-06_agenda_book_for_standing_committee_meeting_final_6-21-24.pdf .

admission to practice in the courts of appeal is not a close model for admission to practice in the trial court, where more can go wrong (e.g., with discovery).

Ethics and client-protection concerns were also highlighted. There was concern about national practitioners soliciting clients whom they can only represent in federal court. The importance of collaboration between district courts and state disciplinary authorities was noted. A member asked whether broadening admission standards for lawyers who are not members of the encompassing state's bar could raise questions of unauthorized practice of law.

The question of fees was also discussed, with one member asking how fees and revenues vary across districts.

D. February 2024 Subcommittee discussion

The Subcommittee held its second meeting on February 12, 2024. We first reported on the Standing Committee's January discussion.

The issue of local-counsel requirements emerged as a key theme during our February discussion. It was noted that some judges would oppose a rule amendment that would prevent the court from requiring the involvement of local counsel in every case. That requirement, for instance, could be viewed as important in a district that maintains a practice of moving cases quickly. Would broadening attorney admission requirements do much to increase access if the broadening rule change were offset by a broadened local-counsel requirement? Members suggested that it would be helpful to learn more about why the courts that require local counsel do so.

Attorney discipline also emerged as a matter of concern. While courts each have their own disciplinary systems, and can also coordinate with the disciplinary authorities of other jurisdictions, we questioned how any particular district court could stay abreast of disciplinary activity in far-flung jurisdictions. One idea was to require the admitted attorney to update the court concerning subsequent disciplinary actions in other jurisdictions.

Tim Reagan had already been researching the various district courts' attorney-admission fees, and he undertook to prepare an additional report on local-counsel requirements. (His findings on these topics are discussed in Parts IV and V, below.)

E. Spring Advisory Committee discussions

We provided a report to each of the relevant Advisory Committees (Bankruptcy, Civil, and Criminal) during their spring 2024 meetings. The most extensive discussion took place at the

Civil Rules Committee meeting.[5]

At the Civil Rules Committee's April 9, 2024 meeting, two judge members voiced strong opposition to the project, and a third judge member's comments were also somewhat skeptical. The first judge questioned why this is a rules issue; to him, this is a matter for state bars. He can see why a court would want lawyers practicing before it to be part of the state bar, as that increases the chances of repeat players and a sense of community. He also questioned the analogy to practice in the courts of appeals; coming in to argue an appeal differs from establishing a law practice in the state. The second judge agreed, noting that districts have distinct cultures and important traditions. This judge felt that admission pro hac vice suffices to accommodate the legitimate needs of out-of-state lawyers. The third judge noted that a district's bar-admission practices reflect the culture of the local bar as well as that of the local bench. During the Civil Rules discussion, Dan Coquillette also underscored the need to look at the unauthorized-practice issue.

Our report on the project did not generate feedback during the Bankruptcy Rules Committee's April 11, 2024 meeting, but a member shared a suggestion for a potential contact with state bar authorities. At the Criminal Rules Committee's April 18, 2024 meeting,[6] Jonathan Wroblewski (the DOJ representative) noted that the U.S. Supreme Court has very permissive practices about admitting attorneys to its bar, and he asked how the Court handles situations in which an attorney it has admitted is disbarred in another jurisdiction.

F. Summer 2024 Subcommittee discussion

The Subcommittee met virtually in July 2024. It reviewed Tim Reagan's research (detailed in Parts IV and V below) concerning local-counsel requirements and admission fees. Participants continued discussing the potential significance of local-counsel requirements, which might offset the effects of any new rule requiring the district courts to loosen their attorney-admission practices. The Subcommittee also discussed issues relating to the unauthorized practice of law (noted in Part VI of this memo). Participants noted that it would be useful to make inquiries among state bar authorities to learn whether they would have concerns about a national rule loosening district-court admission requirements for out-of-state lawyers. It was also noted that learning more about circuits' practices under Appellate Rule 46 (see Part III.A below) would be useful.

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5 The Civil Rules discussion is also described in the Civil Rules Committee's draft minutes starting at page 566 of the agenda book available here: https://www.uscourts.gov/sites/default/files/2024-06_agenda_book_for_standing_committee_meeting_final_6-21-24.pdf .

6 The Criminal Rules discussion is also described in the Criminal Rules Committee's draft minutes starting at page 600 of the agenda book available here: https://www.uscourts.gov/sites/default/files/2024-06_agenda_book_for_standing_committee_meeting_final_6-21-24.pdf .

II. Questions of rulemaking authority

One threshold question, as always, is whether the Rules Enabling Act provides rulemaking authority on this issue. In the language of the statute, would rulemaking regarding district court bar membership fit the category of "general rules of practice and procedure . . . for cases in the United States district courts" and not "not abridge, enlarge or modify any substantive right." The Reporters are continuing research on this question, though the existence of Appellate Rule 46, detailed further below, for a half century provides strong precedent on the general issue.

Questions were also raised about the relevance of 28 U.S.C. § 1654. We enclose a helpful memo from the then-Rules Law Clerk, Zachary Hawari, on that topic.

III. Federal appellate courts as a model?

As the Subcommittee has already discussed, the federal appellate courts might provide a model for attorney admission at the district-court level. Part III.A summarizes what we know of the courts of appeals' approaches under Appellate Rule 46, and Part III.B discusses the approach taken by the U.S. Supreme Court under its rules. Part III.C notes reasons why the appellate court experience may not generalize to the district court.

A. The federal courts of appeals

This subpart recapitulates Rule 46's features and summarizes what we have learned about admission fees and attorney discipline in the courts of appeals.

Appellate Rule 46 reads:

(a) Admission to the Bar.

> (1) Eligibility. An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands).
>
> (2) Application. An applicant must file an application for admission, on a form approved by the court that contains the applicant's personal statement showing eligibility for membership. The applicant must subscribe to the following oath or affirmation:
> "I, _____, do solemnly swear [or affirm] that I will

conduct myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States."

(3) Admission Procedures. On written or oral motion of a member of the court's bar, the court will act on the application. An applicant may be admitted by oral motion in open court. But, unless the court orders otherwise, an applicant need not appear before the court to be admitted. Upon admission, an applicant must pay the clerk the fee prescribed by local rule or court order.

(b) Suspension or Disbarment.

(1) Standard. A member of the court's bar is subject to suspension or disbarment by the court if the member:

(A) has been suspended or disbarred from practice in any other court; or

(B) is guilty of conduct unbecoming a member of the court's bar.

(2) Procedure. The member must be given an opportunity to show good cause, within the time prescribed by the court, why the member should not be suspended or disbarred.

(3) Order. The court must enter an appropriate order after the member responds and a hearing is held, if requested, or after the time prescribed for a response expires, if no response is made.

(c) Discipline. A court of appeals may discipline an attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with any court rule. First, however, the court must afford the attorney reasonable notice, an opportunity to show cause to the contrary, and, if requested, a hearing.

A few features of Rule 46 are worth noting. Rule 46(a)(1) mandates that an attorney is eligible for admission to the bar of a court of appeals if the attorney is "of good moral and professional character" and admitted to the bar of the U.S. Supreme Court, a state high court, another federal court of appeals, or a federal district court. Rules 46(a)(2) and (3) accord the court of appeals the authority to set the form of the application and to prescribe the fee. Rule 46(b) recognizes the court of appeals' authority to suspend or disbar the attorney, subject to a loose substantive test (suspension or disbarment by another court, or "conduct unbecoming") and some basic procedural protections. And Rule 46(c) recognizes a court of appeals' authority to

impose discipline short of suspension or disbarment upon lawyers practicing before the court, so long as it provides notice and an opportunity to be heard.

Thanks to helpful research by Tim Reagan, we know that the fee for admission to the bar of a court of appeals varies across the circuits.[7] It is "$199 plus any additional fee that the local court charges."[8] "The median [total] bar admission fee is $239, and the range is from $214 to $300."[9] Tim notes that because Appellate Rule 46 requires that the attorney seeking admission be admitted to another bar, the attorney will also have to pay for a certificate of good standing from that other bar.[10] Three circuits charge a renewal fee (of from $20 to $50) every five years.[11] Some circuits exempt stated categories of lawyers from paying the admission fee (or, in some instances, permit the lawyer to appear pro hac vice without paying a fee). The most common exemptions are those for federal government lawyers and lawyers representing IFP litigants.

As noted, Rule 46(b)(1)(A) provides for discipline based upon suspension or disbarment in another jurisdiction. In the Subcommittee's discussions, the question has arisen how a court of appeals would become aware of discipline imposed by another jurisdiction. Anecdotally, a court of appeals is more likely to be contacted about attorney discipline by authorities from states within the circuit than by authorities from states outside the circuit. But on at least some occasions, a court of appeals may become aware of discipline imposed by an out-of-circuit state. In at least one circuit, a local rule appears to require that members of the court's bar update the court if they are suspended or disbarred in another jurisdiction.[12] Self-reporting is of course an imperfect system; one can find examples where lawyers who should have self-reported failed to do so.

There is reason to think that not all attorney-discipline opinions can be found on electronic case-reporting systems such as WestlawNext or Lexis. It is thus perhaps unsurprising that an initial very rough search found not many opinions available on WestlawNext concerning reciprocal discipline.

The Subcommittee is currently making inquiries with the Circuit Clerks to ascertain how

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7 See Tim Reagan, Fees for Admission to Federal Court Bars 2 (FJC 2024) ("Reagan Fee Report"). Tim's report was distributed to the Subcommittee previously; you can also download it at https://www.fjc.gov/content/385023/fees-admission-federal-court-bars (last visited August 12, 2024).

8 Id. at 1.

9 Id. at 2.

10 Id. at 1 (noting that the fee for a certificate of good standing "in the states and territories range from no fee to $50").

11 Id. at 2.

12 Ninth Circuit Rule 46-2(c) provides in part: "An attorney who practices before this Court shall provide the Clerk of this Court with a copy of any order or other official notification that the attorney has been subjected to suspension or disbarment in another jurisdiction."

Rule 46 is functioning and whether the Rule's relatively open approach to attorney admission causes any problems with attorney conduct in the circuits.

B. The U.S. Supreme Court

Like the federal courts of appeals, the U.S. Supreme Court has a relatively permissive admission standard. Supreme Court Rule 5.1 provides:

> To qualify for admission to the Bar of this Court, an applicant must have been admitted to practice in the highest court of a State, Commonwealth, Territory or Possession, or the District of Columbia for a period of at least three years immediately before the date of application; must not have been the subject of any adverse disciplinary action pronounced or in effect during that 3-year period; and must appear to the Court to be of good moral and professional character.

Supreme Court Rule 8 governs disbarment and disciplinary action. It provides:

> 1. Whenever a member of the Bar of this Court has been disbarred or suspended from practice in any court of record, or has engaged in conduct unbecoming a member of the Bar of this Court, the Court will enter an order suspending that member from practice before this Court and affording the member an opportunity to show cause, within 40 days, why a disbarment order should not be entered. Upon response, or if no response is timely fled, the Court will enter an appropriate order.
>
> 2. After reasonable notice and an opportunity to show cause why disciplinary action should not be taken, and after a hearing if material facts are in dispute, the Court may take any appropriate disciplinary action against any attorney who is admitted to practice before it for conduct unbecoming a member of the Bar or for failure to comply with these Rules or any Rule or order of the Court.

The Supreme Court Practice treatise offers this description of the Supreme Court's approach:

> The issuance of an order to show cause is usually premised, as Rule 8 indicates, on a report by federal or state bar authorities that some form of serious discipline has been imposed upon the attorney in question…. The Supreme Court also learns of disbarment or disciplinary actions affecting members of its Bar from the periodic reports of the American Bar Association Center for Professional Responsibility, which maintains a computerized information system referred to as the National Discipline Data Bank. That data bank records disciplinary actions of all state, federal, and appellate courts and bar authorities. The Supreme Court

> Clerk's Office carefully reviews the reports of the Center for Professional Responsibility to determine whether any members of the Supreme Court Bar have been subjected to disbarment or other discipline, and it provides the Center with information concerning disbarment or discipline imposed by the Court….
>
> If reports of state disciplinary actions are made and it appears that any member of the Supreme Court Bar has been the subject of such discipline, the Clerk then makes an evaluation of the disciplinary sanction. A mere reprimand or other minor sanction is not likely to result in the issuance of a show cause order by the Court, although the fact that the state imposed such a sanction is duly noted. But if the state has imposed some significant disciplinary sanction falling short of permanent disbarment, a show cause order may well issue from the Court. In such situations, the Court has been known to impose a more severe sanction than that imposed by the state authorities, the sanction of permanent disbarment.[13]

The National Lawyer Regulatory Data Bank (as it is now called) warrants a bit of explanation. The ABA's website states:

> The ABA National Lawyer Regulatory Data Bank is the only national repository of information concerning public regulatory actions relating to lawyers throughout the United States. It was established in 1968 and is operated under the aegis of the ABA Standing Committee on Professional Discipline. ... The Data Bank is particularly useful for disciplinary authorities and bar admissions agencies in providing a central repository of information to facilitate reciprocal discipline and to help prevent the admission of lawyers who have been disbarred or suspended elsewhere. All states and the District of Columbia, as well as many federal courts and some agencies, provide regulatory information to the Data Bank.[14]

An important limitation of the Data Bank is that submission of data is voluntary, and thus may not be complete.[15] Moreover, one commentator stated in 2012 that disciplinary authorities "are not informed automatically when lawyers they license are reported to the Data Bank."[16] And

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13 Stephen M. Shapiro et al., Supreme Court Practice ch. 20, § 20.8 (11th ed. 2019) (ebook).
14 American Bar Association, National Lawyer Regulatory Data Bank, available at https://www.americanbar.org/groups/professional_responsibility/services/databank/ (last visited August 12, 2024).
15 See Jennifer Carpenter & Thomas Cluderay, Implications of Online Disciplinary Records: Balancing the Public's Interest in Openness with Attorneys' Concerns for Maintaining Flexible Self-Regulation, 22 Geo. J. Legal Ethics 733, 746 (2009).
16 Arthur F. Greenbaum, The Automatic Reporting of Lawyer Misconduct to Disciplinary Authorities: Filling the Reporting Gap, 73 Ohio St. L.J. 437, 506 n.277 (2012).

even when the authorities are told about the imposition of discipline in another jurisdiction, there may be mix-ups concerning who was disciplined: "because [the Data Bank] does not employ a universal identification number system, it is sometimes hard to identify whether a given lawyer, particularly one with a common name, has been reported."[17] Note, as well, that the "Data Bank only includes those who have actually been disciplined, thus, excluding lawyers who have been sanctioned by courts, but not disciplined."[18]

C. Whether the appellate experience generalizes to the district court

Initial anecdotal data suggest that, at least in one circuit, the current system has not led to problems with the quality of practice before the court of appeals. This is so even though it is possible that the court does not learn about disciplinary problems encountered by all the lawyers that practice before it. Similarly, the U.S. Supreme Court maintains a very large bar and a very permissive admission standard.

However, a number of participants in discussions of this project have questioned whether the experience of the federal courts of appeals with attorney admission can generalize to the context of admission to practice at the trial level. They note that the typical appellate proceeding involves a very confined set of activities and comparatively few deadlines (briefing and perhaps argument), whereas at the trial level – where the record is made and where the participants conduct discovery, hearings, and trials – much more can go awry if an unskilled or unscrupulous practitioner is involved.

IV. Local-counsel requirements

Many districts currently require that an attorney admitted pro hac vice associate local counsel. Dean Morrison and his fellow rule-change proponents appear to assume that admission to a district court's bar would exempt an out-of-state lawyer from the requirement of associating local counsel in a case.[19] But in the Subcommittee's most recent discussions, participants asked whether expanding access to district court bars would be a Pyrrhic victory for the rule change's

17 Greenbaum, supra note 16, at 506 n. 277.

18 Lonnie T. Brown, Jr., Ending Illegitimate Advocacy: Reinvigorating Rule 11 Through Enhancement of the Ethical Duty to Report, 62 Ohio St. L.J. 1555, 1607–08 (2001).

19 Dean Morrison's proposal for a national rules change does not discuss local-counsel requirements. But the appended materials (which he and others previously submitted to the Northern District of California in support of a proposal for a local rule amendment) explain that not being admitted to practice in the district subjects litigants to onerous local-counsel requirements. See Petition of Public Citizen Litigation Group & 12 Others Pursuant to Local Rule 83-2 To Amend Local Rule 11-1(b) (Feb. 6, 2018), at 11 ("[U]nder the current Rule, if a client prefers to have as lead counsel a lawyer who is not eligible to become a member of the Bar of this Court, that will generally require retaining and paying for local counsel, not just to sign papers, but, for at least some judges, to appear in court.").

proponents if districts responded by also expanding their local-counsel requirement so that it encompasses attorneys who are admitted in the district but not in the encompassing state.

Currently, more than half of federal districts require participation by local counsel in litigation conducted by an attorney who is admitted pro hac vice. Tim found that "[f]ifty-six districts (60%) require local-counsel participation for pro hac vice appearances. In addition to being a member of the district court's bar, local counsel may be required to live or work in the district or be a member of the local state's bar."[20]

Some districts even require local counsel for some cases litigated by members of the district court's bar;[21] these districts do so in (variously) three types of circumstances: (1) if the attorney is not an in-state bar member, (2) if the attorney neither resides nor has an office in the district, and (3) if the attorney either doesn't reside in the district or lacks a full-time office there.

Courts vary in the degree of involvement that they require of local counsel. Many courts require that local counsel make the motion for non-local counsel's admission pro hac vice; it's possible that this might be one way that a district assures itself that someone has checked that the non-local counsel is in good standing with their home-state bar. The court may also require that local counsel:

- sign the first pleading,[22]
- review and sign all filings,[23]
- be available for service of litigation papers,[24]
- be prepared to try the case,[25]

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20 Tim Reagan, Local-Counsel Requirements for Practice in Federal District Courts (FJC 2024), at 10. Tim's report and its appendices are available here: https://www.fjc.gov/content/385779/local-counsel-requirements-practice-federal-district-courts (last visited August 12, 2024).

21 See Reagan, Local-Counsel Report, at 6 ("Thirteen districts (14%) require association with local counsel even for some members of the district court's bar."). In six of those districts, though, as Tim notes, the rules don't themselves require local counsel in this situation, but accord the judge discretion to require it.

22 See, e.g., E.D. Okla. Local Civil Rule 83.3(b) ("The local attorney shall sign the first pleading filed and shall continue in the case unless other local counsel is substituted.").

23 See W.D. Wash. Local Civil Rule 83.1(d)(2) ("Unless waived by the court … , local counsel must review and sign all motions and other filings [and] ensure that all filings comply with all local rules of this court ….").

24 See, e.g., E.D. Okla. Local Civil Rule 83.3(b) ("Any notice, pleading or other paper may be served upon the local counsel with the same effect as if personally served on the non-resident attorney.").

25 M.D. Tenn. Local Rule 83.01(e)(4) ("Entry of an appearance or otherwise participating as

- be prepared to step in for the lead counsel whenever necessary,[26]
- attend all court appearances,[27] and/or
- be "equally responsible with *pro hac vice* counsel for all aspects of the case."[28]

We might try to infer from the nature of these requirements the reasons why courts require local counsel. To take an obvious example, the requirements that local counsel be available to accept service seem addressed to a simple logistical point – and one that may be largely obsolete now that service of papers subsequent to the commencement of the case is ordinarily accomplished via CM/ECF. A requirement that local counsel review and sign all filings suggests that the court wishes to have a local (and thus more accountable?) lawyer review the filings' compliance with Civil Rule 11. Requirements that local counsel be available to step in at any time suggest that the court is concerned that out-of-district lawyers not cause delay. (A related example might be the Eastern District of Virginia, where local counsel are viewed as important to fulfilling the demands of the court's "rocket docket.") An additional possibility is that, by requiring local counsel, some courts are trying to address behavior by lawyers that doesn't rise to the level of a discipline issue but that implicates questions of quality of lawyering, civility, and professionalism.

Another theme that has emerged is the potential significance of the court's discretion to excuse compliance with the local-counsel requirement. Some local rules explicitly provide for such discretion. Additionally, some local rules expressly exempt some categories of attorney from the local co-counsel requirement.[29]

Dean Morrison and the other rule-change proponents are not taking direct aim at the local counsel requirements themselves (perhaps because they are not focusing on the relatively small number of districts that require local counsel even for some admitted attorneys). Rather, they appear to assume that admission would release an out-of-district lawyer from any obligation to associate local counsel. To test the plausibility of that assumption, it may make sense to focus on districts that currently require in-state bar membership for admission and ask whether those

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counsel of record is a representation that the attorney will be prepared to conduct the trial of the case, from which the attorney may only be relieved by approval of the Court.").

26 See W.D. Wash. Local Civil Rule 83.1(d)(2) ("By agreeing to serve as local counsel and by signing the pro hac vice application, local counsel attests that he or she is authorized and will be prepared to handle the matter in the event the applicant is unable to be present on any date scheduled by the court.").

27 See E.D. Mich. Local Rule 83.20(f)(2) ("Local counsel must attend each scheduled appearance on the case unless the Court, on its own motion or on motion or request of a party, dispenses with the requirement.").

28 M.D. Tenn. Local Rule 83.01(d)(6).

29 See, e.g., N.D. Okla. Loc. Gen. Rule 4-3(c) (exempting lawyers for the federal government, federal defenders, and CJA lawyers); M.D. Tenn. Local Rule 83.01(d)(2) (exempting lawyers for the federal government and federal defenders).

districts also impose a local-counsel requirement for attorneys who are only admitted pro hac vice.

We have not yet compiled that full list, but as a starting point, one can look at the nine districts in California, Delaware, Florida, and Hawaii that currently require in-state bar membership for admission (it is in those districts, of course, that in-state bar membership is the most onerous barrier because it requires taking the state bar exam). Here is a chart of those districts:

District	Local counsel required where lead attorney is admitted pro hac vice?
Central District of California	Yes. See C.D. Cal. Local Civil Rule 83-2.1.3.4.
Eastern District of California	Not exactly? E.D. Cal. Local Rule 180(b)(2)(ii) requires that an attorney admitted pro hac vice "shall … designate … a member of the Bar of this Court with whom the Court and opposing counsel may readily communicate regarding that attorney's conduct of the action and upon whom service shall be made."
Northern District of California	Yes. See N.D. Cal. Local Civil Rule 11-3(a)(3) (requiring "[t]hat an attorney, identified by name and office address, who is a member of the bar of this Court in good standing and who maintains an office within the State of California, is designated as co-counsel").
Southern District of California	Not exactly? S.D. Cal. Civil Rule 83.3(c)(4) requires that an attorney admitted pro hac vice must "designate … a member of the bar of this court with whom the Court and opposing counsel may readily communicate regarding the conduct of the case and upon whom papers will be served."
District of Delaware	Yes. See D. Del. Local Rule 83.5(d): "Unless otherwise ordered, an attorney not admitted to practice by the Supreme Court of the State of Delaware may not be admitted pro hac vice in this Court unless associated with an attorney who is a member of the Bar of this Court and who maintains an office in the District of Delaware for the regular transaction of business ("Delaware counsel"). … Delaware counsel shall be the registered users of CM/ECF and shall be required to file all papers. Unless otherwise ordered, Delaware counsel shall attend proceedings before the Court."
Middle District of Florida	Apparently not. (N.B.: This district's version of pro hac vice admission is called "special admission," see M.D. Fla. Local Rule 2.01(c).).
Northern District of Florida	Apparently not.
Southern District of Florida	Yes. See Rules 1(b)(1) (local counsel to move admission pro hac vice) and 1(b)(3) (requiring designation of "at least one member of the bar of this Court who is authorized to file through the Court's electronic filing system, with whom the Court and opposing counsel may readily communicate regarding the conduct of the case, upon whom filings shall be served, and who shall be

	required to electronically file and serve all documents and things that may be filed and served electronically, and who shall be responsible for filing and serving documents in compliance with the CM/ECF Administrative Procedures").
District of Hawaii	Yes. See D. Haw. Local Rule 83.1(c)(2)(B)(vi) (requiring "designation of a current member in good standing of the bar of this court who maintains an office within the district to serve as associate counsel" and also "the associated attorney's commitment to at all times meaningfully participate in the preparation and trial of the case with the authority and responsibility to act as attorney of record for all purposes; to participate in all court proceedings (not including depositions and other discovery) unless otherwise ordered by the court; and to accept service of any document").

We can see that more than half of these districts (five of nine) require attorneys admitted pro hac vice to associate local counsel. It's not implausible to surmise that at least some of these districts – if required by national rule to admit to their bar attorneys not admitted to the bar of the encompassing state – might consider whether to extend the local-counsel requirement to such attorneys.

These reflections prompt the following questions:

- Is this sampling of districts representative of the districts that currently take a restrictive approach to bar admissions?

- In districts with rules that require local counsel, how often are those requirements waived in practice?

- Would a national rule change on bar admission simply prompt widespread enlargement of local-counsel requirements?

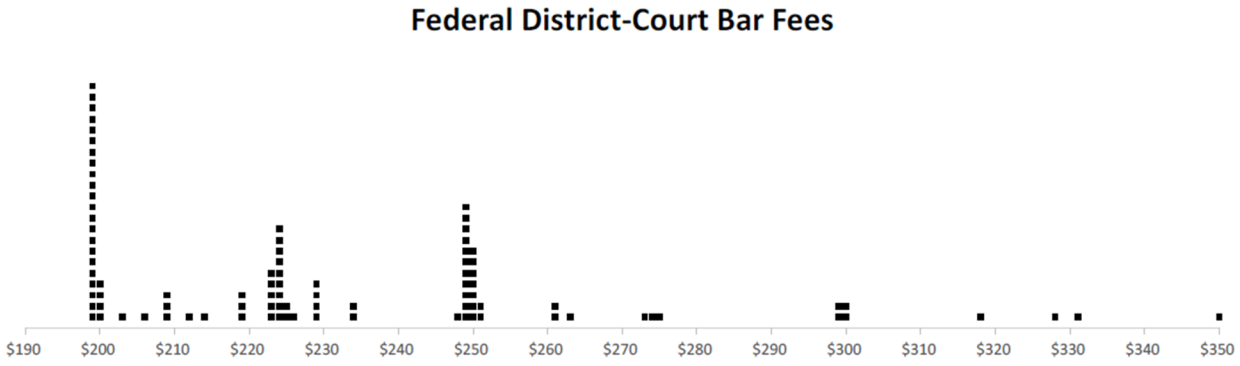
If the answer to the last of these questions is yes, then unless the rulemakers are willing to enlarge this project to encompass districts' ability to require local counsel, one might question the prospects for effectively addressing the access and expense concerns that underpin the proposals we are currently considering.

V. Attorney admission fees

Our discussions have also focused on the fiscal implications of potential changes to the district courts' attorney-admission framework. This Part briefly summarizes what we have learned about the revenue coming in and the uses to which it is put.

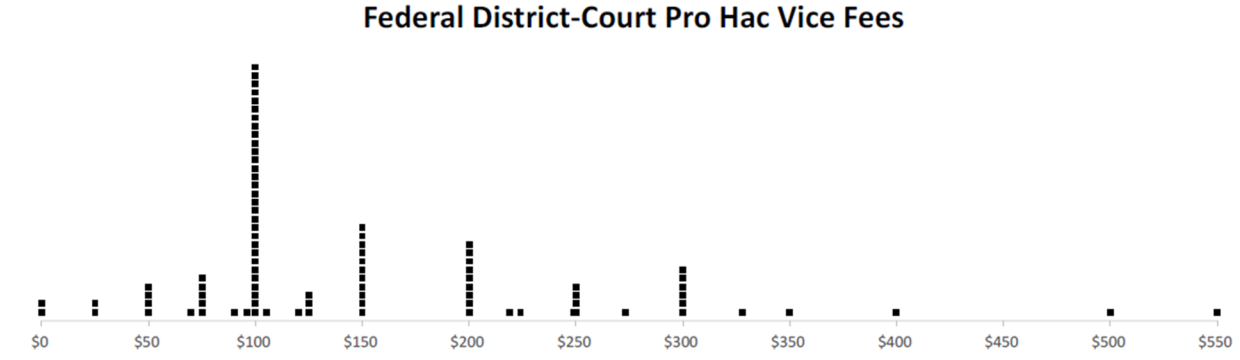
A. Revenue coming in

Tim Reagan has provided us with an overview of the fees charged by districts around the country. He reports that "admission fees range from the national minimum of $199 to $350."[30] His helpful graph[31] suggests that most districts set the fee in the $199 - $250 range:



In addition, roughly a quarter of districts charge periodic dues or renewal fees. "Twenty-five districts (27%) charge dues, often referred to as renewal fees. Renewal periods range from one to six years, and annualized dues range from $3 to $75."[32] From the detailed discussion in the accompanying footnote, it looks as though five districts have annualized 'dues' of more than $25.[33]

Separate from admission fees are the fees charged for pro hac vice admission. Tim reports that "[p]ro hac vice fees range from no fee to $550."[34] His accompanying graph[35] suggests that most districts charge $150 or less, with additional clusters at $200, $250, and $300:



30 Reagan Fee Report, supra note 7, at 3.
31 See id.
32 Id.
33 See id. at 3 n.6.
34 See id. at 3.
35 See id. at 4.

B. Uses to which revenue is put

The district courts do not keep the "national" portion of the admission fee, which is $199;[36] they remit that portion to the Administrative Office of the U.S. Courts. By contrast, there is no "national" portion of any fee for renewing a bar admission or for admission pro hac vice, and so the districts keep the entirety of those fees.

As we have previously noted, districts put their portion of the fees to various uses, including funding a clinic for self-represented litigants; guardians ad litem for defendants who are minors; bench/bar activities; reimbursement of pro bono expenses; and support for a court historical society.

VI. Unauthorized practice of law

During our discussions, a number of participants have stressed the importance of examining the relevance of state law concerning the unauthorized practice of law. An initial look at this field confirms that this topic is well worth the Subcommittee's consideration.

To some, the idea of federal-court attorney-admission barriers intersecting with unauthorized-practice-of-law issues might seem somewhat counterintuitive. After all, if a federal district court *authorizes* someone to practice as a member of the court's bar, how could practice in that court be *unauthorized*? An answer to this question becomes easier to discern if one distinguishes between different types of situations in which the question might be posed.

Some might intuitively imagine a scenario that a big-firm lawyer usually encounters: Big Corp. gets sued in federal court in State A, looks around for a high-powered lawyer, finds Lawyer B in State C, and hires B to handle the federal-court lawsuit in State A. It seems (and likely is) straightforward that B can handle the suit, without being admitted to practice in State A, so long as B is admitted to practice, or gets permission to appear pro hac vice, in the relevant federal district court in State A.

But a look at the caselaw indicates that unauthorized-practice issues usually come up in quite a different type of scenario. Lawyer D, say, is admitted to practice in State E but not in State F. Lawyer D moves to State F and doesn't get admitted in State F, but gets admitted in the federal district court for the District of F. Lawyer D hangs out a shingle in State F, sees clients, triages them, and only takes cases Lawyer D can bring in federal court. In at least some states, it seems, there is a potential risk that the state bar authorities would consider D to be engaging in the unauthorized practice of law in State F by so doing. The strictest caselaw on this topic is in some instances decades old, and there has been some movement toward making the rules on

36 See District Court Miscellaneous Fee Schedule (setting fee "[f]or original admission of attorneys to practice" at $199), available at https://www.uscourts.gov/services-forms/fees/district-court-miscellaneous-fee-schedule (last visited June 28, 2024).

unauthorized practice of law more forgiving, but nonetheless it appears from an initial look at the caselaw that Lawyer D could run a substantial risk in a number of states by behaving as described.

We will not review here the details of the caselaw that we have gathered thus far. By definition, a field of law (like professional responsibility) that is governed state-by-state is challenging to summarize comprehensively. Moreover, some of the notable caselaw is relatively dated. Instead, we note a few key lines of authority and sketch some relevant concepts. A better sense of the scope and nature of likely problems might emerge from an inquiry with state bar authorities as the project moves forward.

It's useful to start with two sources of authority that might be influential to those shaping state law on unauthorized practice: the Model Rules of Professional Conduct and the Restatement of the Law Governing Lawyers.

Model Rule of Professional Conduct 5.5[37] currently provides in relevant part:

Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) **A lawyer who is not admitted to practice in this jurisdiction shall not:**

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) **A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that**:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

37 See American Bar Association, Model Rules of Professional Conduct Rule 5.5, available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_5_unauthorized_practice_of_law_multijurisdictional_practice_of_law/ (last visited August 12, 2024).

(2) **are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized**;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) **A lawyer admitted in another United States jurisdiction** or in a foreign jurisdiction, **and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof**, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, **may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:**

(1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) **are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction…**.

Model Rule 5.5 (emphases added).

Much of the contents of the current version of Model Rule 5.5 – including most of the bolded language above – was contained in the version of Model Rule 5.5 adopted by the ABA House of Delegates in August 2002.[38] Of particular interest in the current context is Rule

38 See American Bar Ass'n Center for Professional Responsibility, Client Representation in the

5.5(d)(2), which authorizes the provision, by a lawyer not admitted in the state, "through an office or other systematic and continuous presence in this jurisdiction," of "services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction."

A key question is what the drafters meant by "authorized by federal … law or rule." Neither the Commentary nor the 2002 Report of the Commission on Multijurisdictional Practice addresses whether a federal court's admission of a lawyer to practice would count as authorization for this purpose, or what the scope of that authorization would be.[39]

The Restatement of the Law Governing Lawyers also provides relevant, but somewhat equivocal, authority on this point. Section 3 of the Restatement provides:

> § 3 Jurisdictional Scope of the Practice of Law by a Lawyer
>
> A lawyer currently admitted to practice in a jurisdiction may provide legal services to a client:
>
> (1) at any place within the admitting jurisdiction;
>
> (2) before a tribunal or administrative agency of another jurisdiction or the federal government in compliance with requirements for temporary or regular admission to practice before that tribunal or agency; and
>
> (3) at a place within a jurisdiction in which the lawyer is not admitted to the extent that the lawyer's activities arise out of or are otherwise reasonably related to the lawyer's practice under Subsection (1) or (2).

Comment g to Section 3 states in part:

21st Century: Report of the Commission on Multijurisdictional Practice title page & 19-20 (2002) ("MJP Commission Report"). An ABA commission is currently considering possible changes to Model Rule 5.5, including a proposal to authorize practice in all states based on admission in any single state. See Memorandum dated January 16, 2024 from David Machrzak, Chair, Center for Professional Responsibility Working Group on ABA Model Rule of Professional Conduct 5.5 to ABA Entities, Courts, Bar Associations (state, local, specialty, and international), Individuals, and Entities, available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/issues-paper-for-comment-mr5-5.pdf (last visited August 19, 2024) ("ABA Issues Paper"). That proposal, if adopted, would significantly change the assumptions on which restrictive federal-court admission rules are based. The ABA project does not address more specifically the federal-court-practice issues of interest here.

39 MJP Commission Report, supra note 38, at 34.

> g. Authorized practice in a federal agency or court. A lawyer properly admitted to practice before a federal agency or in a federal court (see § 2, Comment b) may practice federal law for a client either at the physical location of the agency or court or in an office in any state, so long as the lawyer's practice arises out of or is reasonably related to the agency's or court's business. Such a basis for authorized practice is recognized in Subsection (2). Thus, a lawyer registered with the United States Patent and Trademark Office could counsel a client from an office anywhere about filing a patent or about assigning the ensuing patent right, matters reasonably related to the lawyer's admission to the agency. (The permissible scope of practice of a nonlawyer patent agent may be less, since admission to the agency does not suggest competence to deal with matters, such as the assignment of patents, beyond the jurisdiction of the agency.)
>
> A lawyer admitted in one state who is admitted to practice in a United States district court located in another state, but who is not otherwise admitted in the second state, can practice law in the state so long as the practice is limited to cases filed in that federal court. Local rules in some few federal district courts additionally require admission to the bar of the sitting state as a condition of admission to the federal court. The requirement is inconsistent with the federal nature of the court's business….

Reading this commentary, one might be tempted to impute to the Restatement a broad view about the preemptive force of federal-court rules governing attorney admission to practice in federal court. Before reaching that conclusion, though, it is useful also to consider this observation in the Reporter's Note to comment e: "There are few decisions dealing with the question of permissible out-of-state practice. Several involve clear instances of impermissible practice, through setting up an office in a state in which the lawyer is not admitted." Admittedly, the Reporter's Note expresses only the views of the Reporter, and not necessarily those of the ALI. But together, the commentary and the Reporter's Note suggest a view that admission to practice in a federal district protects the lawyer from unauthorized-practice accusations so long as the lawyer limits that practice to the cases actually filed in federal court – but that the lawyer courts trouble by actually opening an office in a state in which the lawyer isn't admitted.

It's also useful to consider the U.S. Supreme Court's decision in *Sperry v. State of Florida*, 373 U.S. 379 (1963). *Sperry* provides some support for the idea that a lawyer who only maintains an in-state office for purposes of a solely federal-tribunal practice does not violate state unauthorized-practice prohibitions. However, *Sperry* can be read narrowly to apply only to the context in which it arose – federal patent office practice – in which the topic area is well-defined and the jurisdiction is exclusively federal.

Sperry was "a practitioner registered to practice before the United States Patent Office"

who had "not been admitted to practice law before the Florida or any other bar."[40] He had an office in Tampa and held "himself out to the public as a Patent Attorney."[41] The Florida Supreme Court found that he was engaging in unauthorized practice and enjoined him from, inter alia, from calling himself a patent attorney, giving legal opinions (even on patentability), preparing legal documents (including patent applications), "holding himself out, in [Florida], as qualified to prepare … patent applications," or otherwise practicing law.[42] The U.S. Supreme Court vacated and remanded, holding that 35 U.S.C. § 31[43] and regulations promulgated thereunder authorized the admission of persons, including nonlawyers, to practice before the Patent Office.[44] The Court did not define exactly what the state was foreclosed from prohibiting, but offered this guidance:

> Because of the breadth of the injunction issued in this case, we are not called upon to determine what functions are reasonably within the scope of the practice authorized by the Patent Office. The Commissioner has issued no regulations touching upon this point. We note, however, that a practitioner authorized to prepare patent applications must of course render opinions as to the patentability of the inventions brought to him, and that it is entirely reasonable for a practitioner to hold himself out as qualified to perform his specialized work, so long as he does not misrepresent the scope of his license.[45]

One might read *Sperry* to stand for the proposition that any valid federal-law provision authorizing a person to practice before a federal tribunal preempts the application of state unauthorized-practice provisions to a lawyer's work in connection with such authorized practice before a federal tribunal. Note, however, that federal patent applications differ from ordinary federal-court litigation because the subject-matter is discrete and exclusively federal, and might well be ordinarily separable from matters that might be covered by state law.

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40 Sperry, 373 U.S. at 381.
41 Id.
42 Id. at 382.
43 At the time, 35 U.S.C. § 31 provided:
> § 31. Regulations for agents and attorneys
> The Commissioner, subject to the approval of the Secretary of Commerce, may prescribe regulations governing the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Patent Office, and may require them, before being recognized as representatives of applicants or other persons, to show that they are of good moral character and reputation and are possessed of the necessary qualifications to render to applicants or other persons valuable service, advice, and assistance in the presentation or prosecution of their applications or other business before the Office.

44 Id. at 384-85.
45 Id. at 402 n.47.

As noted previously, it is challenging to offer confident appraisals of state unauthorized-practice law as it might apply to practice by lawyers admitted in federal court but not to the bar of the encompassing state. Much of the relevant caselaw is somewhat dated – raising the possibility that subsequent changes in applicable state statutes or rules might have undermined earlier and more restrictive approaches. Also, the Rules of Professional Conduct may provide incomplete guidance in some states, because unauthorized-practice principles are also contained in statutes that might not have been updated at the same time as the state's Rules of Professional Conduct.

Initial research has uncovered some authority in a couple of states that suggests that admission to practice in an in-state federal court may not always immunize a lawyer (who is not admitted to the state bar) from charges of unauthorized practice. The picture emerging is that the clearest case for protection from unauthorized-practice allegations is where the client relationship arose in a state where the lawyer is admitted to practice and the client then decides to sue (or is sued) in a federal court (in a different state) where the lawyer is admitted. The clearest case of danger of unauthorized practice would be where the lawyer opens a permanent office only in the encompassing state without being admitted there, and brings in new clients by interviewing them in that in-state office. Even if the lawyer appears only in federal court, the lawyer might be regarded (at least by authorities in some states) as engaging in unauthorized practice.

Due to this complexity, it may be difficult to draft a national rule without giving attention to the unauthorized-practice question in some way. While the picture of unauthorized-practice-of-law doctrine is still emerging, this topic merits attention as the Subcommittee seeks the views of state bar authorities concerning the issues raised by this project.

VII. Addressing concerns about attorneys who are military spouses

In the discussions to date, participants have sometimes mentioned that particular types of attorneys face particular hardship from restrictive bar admission rules. Lawyers who are military spouses are an example, as their spouse's work might require the family to relocate multiple times.

That particular concern might be partly addressed at the state bar level. An effort is underway to persuade state bar authorities to adopt special provisions to accommodate military spouses. The Military Spouse J.D. Network Foundation provides this description of its ongoing efforts:

> In February 2012, with the support of the ABA Commission on Women in the Profession, the ABA House of Delegates adopted a ABA Resolution 108 (2012) supporting changes in state licensing rules for military spouses with law degrees.

> In April 2012, Idaho became the first state to approve a military spouse licensing accommodation.
>
> Then in July 2012, the Conference of Chief Justices voted to support a resolution for admission of military spouse attorneys without examination. ….
>
> December 2012 saw the second state, Arizona, adopt a licensing rule specifically addressed the challenges faced by military spouse attorneys. Since then, other states have joined in the efforts to reduce barriers to employment for military spouses in the legal profession.
>
> In the years since, MSJDN has seen more than 40 states and the U.S. Virgin Islands pass common sense license reciprocity rules for military spouse attorneys. Our efforts continue as we work to reach all 50 states. MSJDN has also begun to petition the nine states which passed license reciprocity for military spouses but included harmful supervision requirements which have rendered the rules unduly burdensome and ineffective in practice.[46]

VIII. Conclusion

This report provides a snapshot of the Subcommittee's efforts as of summer and fall 2024. The Subcommittee will provide further updates as it continues its inquiries, and welcomes any additional Advisory Committee feedback in the meantime.

Encl.

46 See Military Spouse J.D. Network Foundation, State Licensing Efforts, available at https://msjdn.org/rule-change/ (last visited August 12, 2024).

MEMORANDUM

To: Catherine T. Struve
Andrew Bradt

From: Zachary Hawari, Rules Law Clerk

Re: History of 28 U.S.C. § 1654

Date: December 28, 2023

History

Why and when was this statute first adopted, and what was its subsequent history?

The statutory right to plead and conduct one's own case personally or by counsel goes back at least to the founding of the United States courts, and its language remains largely unchanged. Section 35 of the Judiciary Act of 1789 provided "[t]hat in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct their cases therein." 1 Stat. 73, 92 (1789).

The Judiciary Act of 1789 was introduced as Senate Bill No. 1 in the first legislative session of the first Congress, and its authorship is often credited to Oliver Ellsworth and the other two members of the drafting committee–William Paterson and Caleb Strong.[1] Section 35 contains the provision that became 28 U.S.C. § 1654, but it also included a more controversial provision providing for the appointment of United States Attorneys and the Attorney General.[2] I have not had much success in identifying the purpose or history of the relevant part of Section 35.

Some courts and commentators have since observed that the Sixth Amendment's right to counsel was being debated at the same time as the Judiciary Act.[3] The history of the common law right to self-representation, the Founders'

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[1] *See* New Light on the History of the Federal Judiciary Act of 1789 (jstor.org); The Judiciary Act of 1789: Charter for U.S. Marshals and Deputies (usmarshals.gov); First Federal Congress: Creation of the Judiciary (gwu.edu)

[2] New Light on the History of the Federal Judiciary Act of 1789 (jstor.org).

[3] Historical Background on Right to Counsel | Constitution Annotated | Congress.gov | Library of Congress

skepticism toward lawyers, the Sixth Amendment's right to counsel, and the Judiciary Act was discussed extensively by the Supreme Court in *Faretta v. California*, 422 U.S. 806, 812-32 (1975). More research would be required to understand how views during the 17th and 18th century led to Section 35, especially considering that views on the right to counsel in civil and criminal cases appears to have essentially reversed.[4]

In any event, Section 35 was codified in Section 747 of the Revised Statutes in the 1870s. The Judicial Code of 1911 then included a slightly modified version. 36 Stat. 1087, 1164 (1911). Section 272 of Chapter 11, which provided for provisions common to more than one court, stated: "In all courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein" (changes emphasized). When Title 28 was reorganized, that provision was moved from 28 U.S.C. § 394 to § 1654.

In 1948, § 1654 was briefly shortened to: "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel." 62 Stat. 869, 944 (1948). According to the reviser's notes for the 1948 amendment, the phrase "as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein" was "omitted as surplusage," and "[c]hanges were made in phraseology."[5] For example, "by the assistance of such counsel or attorneys at law" was apparently shortened to "by counsel."[6]

But in 1949, Congress "restore[d]" the "language of the original law." 63 Stat. 89, 103 (1949). Oddly, this restoration only included the "as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein" phrase.

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[4] Several colonies in the 17th century prohibited pleading for hire. *Faretta*, 422 U.S. at 827. Interestingly, the Massachusetts Body of Liberties included a proto-attorney-admission element or, at least, a provision giving the court power to reject a representative:

Every man that findeth himselfe unfit to plead his owne cause in any Court shall have Libertie to imploy any man *against whom the Court doth not except*, to helpe him, provided he give him noe fee or reward for his paines….

Id. at n.32 (quoting Art. 26 (1641)) (emphasis added).

[5] United States Code: General Provisions, 28 U.S.C. §§ 1651-1656 (1952) (loc.gov).

[6] It is not entirely clear whether shortening to "by counsel" was done in the 1948 amendment. The advisory committee notes to the 1944 amendment of Criminal Rule 44 quotes § 1654 with the assistance-of-counsel-or-attorney-at-law language. So, either there was another amendment between 1944 and 1948 or the 1949 amendment did not fully restore § 1654 to the 1911 version. Unfortunately, year-by-year versions of this statute have proven difficult to track down.

The change to "by counsel" survived the 1949 rollback. The allusion to the last phrase being "surplusage" in 1948 and its subsequent restoration in 1949 is intriguing, but I have not been able to find much legislative history on these changes. For example, the reviser's notes and several cases refer to 80th Congress House Report No. 308, but I cannot find it online.

The current § 1654 has not changed since 1949. To summarize, these are the differences between 1789 and today:

> "[I]n all ~~the~~ courts of the United States~~,~~ the parties may plead and ~~manage~~ conduct their own ~~causes~~ cases personally or by ~~the assistance of such~~ counsel ~~or attorneys at law~~ as, by the rules of ~~the said~~ such courts, respectively, ~~shall be~~ are permitted to manage and conduct ~~their cases~~ causes therein.

Rule-Making Authority and Appellate Rule 46

Does the statute's reference to counsel who are "permitted to … conduct causes" in the federal courts "by the rules of such courts" indicate that this statute accords the local courts authority over attorney admissions?

Courts were regulating attorney admissions and conduct prior to the REA, but it is not clear under what authority they did so—possibly inherent authority, some natural law theory, or statutory authorization like Section 35. *See generally Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867) (discussing attorney admission and discipline in the context of a Civil War era statute requiring attorneys to swear oaths).

More recently, the Supreme Court has "recogniz[ed] that a district court has discretion to adopt local rules that are necessary to carry out the conduct of its business. See 28 U.S.C. §§ 1654, 2071; Fed. Rule Civ. Proc. 83." *Frazier v. Heebe*, 482 U.S. 641, 645 (1987). "This authority includes the regulation of admissions to its own bar." *Id.* This is a point on which the dissent agreed. *Id.* at 652 (Rehnquist, J., dissenting) ("It is clear from 28 U.S.C. § 1654 that the authority provided in § 2071 includes the authority of a district court to regulate the membership of its bar.").[7]

Nor was *Frazier* the first time the Supreme Court mentioned these provisions together as a basis for authority. The Court had previously noted that two district

[7] The Court held that the district court "was not empowered to adopt its local Rules to require members of the Louisiana Bar who apply for admission to its bar to live in, or maintain an office in, Louisiana where that court sits." *Frazier*, 482 U.S. at 645. The dissent, however, believed that the Supreme Court lacked authority to set aside a rule promulgated by a district court governing admission to its own bar merely because it found the rules "unnecessary and irrational." *Id.* at 652-55.

courts were "[a]cting under 28 U.S.C. §§ 1654, 2071, and Rule 83" when they promulgated local rules governing practice in their courts." *United States v. Hvass*, 355 U.S. 570, 571 (1958).[8]

Circuit courts have made similar statements. The Seventh Circuit stated that "[t]he authority to adopt rules relating to admission to practice before the federal courts was delegated by Congress to the federal courts in Section 35 of the Judiciary Act of 1789, … *now codified as* 28 U.S.C. § 1654." *Brown v. McGarr*, 774 F.2d 777, 781 (7th Cir. 1985); *see also Pappas v. Philip Morris, Inc.*, 915 F.3d 889, 895 (2d Cir. 2019) (quoting *Brown*). The Seventh Circuit also relied on § 2071 and inherent power to support the district court's authority to regulate attorney conduct.

It appears that courts have the necessary authority to regulate admission to the bar of that court under § 1654 and the REA, but it is not entirely clear whether § 1654, alone, would provide sufficient authority.[9]

If so, was this statute analyzed during prior rulemaking discussion on attorney admissions, for example in the lead-up to the adoption of Appellate Rule 46?

I have not found a direct reference to § 1654 in the discussion leading up to the addition of Appellate Rule 46 in the 1960s—at least not in the materials on the uscourts.gov website, namely the Committee Reports and Meeting Minutes. There is another archive of historical records that I have not yet searched, so there might still be something to be found.

Interestingly, however, in the minutes for the Appellate Rules Committee's August 1963 meeting, Dean O'Meara felt that attorney admission issues should be left for each appellate court to deal with by local rule while other members felt that this was an area where uniformity would be particularly helpful to the bar.[10]

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[8] The issue in *Hvass* was not, however, about the validity of a local rule, but rather whether a willfully false statement made by an attorney under oath during the district court's examination, under its local rule, into his fitness to practice before it, constitutes perjury.

[9] The reviser's note to the 1940s amendments to § 1654 also mentions these sections together, stating that "the revised section [1654] and section 2071 of this title effect no change in the procedure of the Tax Court before which certain accountants may be admitted as counsel for litigants under Rule 2 of the Tax Court." That said, the reviser's note was getting at separate discussion about who can appear before the Tax Court and whether it should be limited to attorneys.

[10] Circuit courts as they existed in the 18th century looked very different from modern courts of appeal, which were created in the Evarts Act in 1891. Another potential avenue for follow-up research is determining when courts of appeals created local rules governing attorney admission (presumably in the late 19th and early 20th centuries but possibly earlier) and seeing what authority they cited.

TAB 18

18. Random Case Assignment

Whether the Advisory Committee should pursue a Federal Rule of Civil Procedure covering case assignment in the district courts remains on the agenda. Attention to case-assignment in the district courts has grown in recent years, particularly in cases seeking nationwide injunctions against executive action, but also in areas including bankruptcy and patents. In various settings, plaintiffs can effectively select the judge based on where they file; that is, if by filing in a particular location, such as a division with only one judge, a plaintiff can know who will hear the case. Although choosing one's preferred judge does not dictate the outcome of the case, it does raise questions of fairness and legitimacy. As a result, the Advisory Committee has received several prompts, including a July 10, 2023 letter from Senator Schumer signed by 18 other senators, to consider a rule requiring random assignment of some cases among all the judges in a district.

Shortly before the Advisory Committee's April 2024 meeting, the Judicial Conference of the United States issued guidance to all districts recommending district-wide random assignment of any civil action seeking to bar or mandate state- or nationwide enforcement of state or federal law. After releasing this guidance, Judge Robert J. Conrad, Jr., Secretary of the Conference, stated "The random case-assignment policy deters judge-shopping and the assignment of cases based on the perceived merits or abilities of a particular judge. It promotes the impartiality of proceedings and bolsters public confidence in the federal Judiciary." This guidance, however, was exhortatory, not mandatory.

At the April Advisory Committee meeting, the Committee discussed this issue and confirmed its importance. In light of the Judicial Conference guidance, however, the Committee concluded that it would be best to defer immediate action to see to what extent districts adopted the suggested procedures. In the six months since the guidance was issued, it does appear that some districts with one or two-judge divisions have shifted to more random assignment in the kinds of cases described in the guidance. For instance, the Western District of Virginia has six one or two-judge divisions and adopted the guidance on June 14, 2024.[1] Other districts that have adopted the guidance include: the Southern District of Florida,[2] the Northern District of Indiana,[3] the Southern District of Indiana,[4] the Western District of Kentucky,[5] the Western District of Pennsylvania.[6] Many districts with single-judge divisions have not changed their formal assignment procedures. In the coming months, the Reporters will continue to follow whether districts have altered their case-assignment policies consistent with the guidance.

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[1] *See* Western District of Virginia Standing Order 2024-6, June 14, 2024 https://www.vawd.uscourts.gov/sites/Public/assets/File/StandingOrders/Court/Random-Assignment-of-Civil-Cases.pdf.

[2] Southern District of Florida Administrative Order 2024-34 (May 6, 2024) https://www.flsd.uscourts.gov/sites/flsd/files/adminorders/2024-34.pdf.

[3] Northern District of Indiana, General Order NO. 2024-28 (Aug. 30, 2024).

[4] Southern District of Indiana General Order/Administrative Policy 2024-11, (April 15, 2024).

[5] Western District of Kentucky, General Order No. 24-05 (May 2, 2024).

[6] Western District of Pennsylvania, Administrative Order 2024-09 (July 17, 2024).

Districts of course vary significantly in many ways, in terms of geographic size, caseload, number of judges, and how they are organized (for instance, some districts have multiple divisions to which judges are assigned, while others have several duty stations to which one or more judges may be assigned for certain periods of time). Moreover, there are calls to consider random assignment beyond cases seeking injunctive relief against state or federal action, such as patent and bankruptcy. Any rulemaking regarding case assignment that would mandate a uniform, nationwide rule is thus a significant undertaking.

There is also a strong argument that assignment of cases among the judges in a district is within the Congress's jurisdiction. Since the Judiciary Act of 1911, Congress has statutorily provided for case assignment to be left to the districts in the first instance, and this remains the case today. 28 U.S.C. § 137(a) provides that, "[t]he business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court."

In the wake of the Judicial Conference guidance, Senators McConnell, Cornyn, and Tills stated their views in a letter to the Chief Judge for the Eastern District of Kentucky:

> It is Congress that decides how cases should be assigned in the inferior courts and Congress has already spoken on this issue in an enacted statute: Congress gave that power to the individual district courts. Whatever the Judicial Conference thinks you ought to do, what you actually choose to do is left to your court's discretion under the law.[7]

A Federal Rule of Civil Procedure could potentially supersede this statute if it complies with the strictures of the Rules Enabling Act and is approved by Congress. It would require consideration of whether a rule regarding case assignment is within the Enabling Act's delegation of authority to "prescribe general rules of practice and procedure," 28 U.S.C. § 2072(a). One could assert that a rule governing the assignment of cases is one of practice and procedure, as it does not implicate the merits of any claim. Such a judgment must be considered in the context of the history of the Congressional delegation of power to divide judicial business to the districts themselves.

This issue will remain on the Advisory Committee's agenda as the districts continue to react to the Judicial Conference guidance. The Reporters will continue to monitor the situation as it develops.

[7] Letter from Sen. Mitch McConnell to Chief Judge Danny Reeves, March 14, 2024.

TAB 19

19. Third Party Litigation Funding Disclosure

This matter was originally brought to the Committee's agenda in 2014. It is included on this agenda because there is ongoing concern about the possible impact of litigation funding on civil litigation in the federal courts. In large measure, this report builds on earlier agenda book reports on the subject, particularly the report for the October 2021 Committee meeting, excerpted below. More recently, TPLF has been the subject of recent communications from members of Congress:

Letter dated July 12, 2024, from Rep. Comer, Chair of the House Oversight Committee to the Chief Justice

24-CV-M, dated July 11, 2024, from Senators Cornyn and Tillis

Each of these items is included in the agenda book.

The agenda book report for the October 2021 meeting (excerpted below) detailed the developments that began with a 2014 submission urging that Rule 26(a) be amended to require that TPLF be included as another initial disclosure item. After discussion during the Fall 2014 Committee meeting, the conclusion was that immediate action was not appropriate. In 2017, TPLF was among the topics assigned to the newly-formed MDL Subcommittee. After extensive consideration (including review of reports by MDL transferee judges to the Judicial Panel), the MDL Subcommittee concluded that TPLF was not a distinctive feature of MDL proceedings. It was removed from the list of issues before the MDL Subcommittee.

At the same time, it was recognized that TPLF was, more generally, a significant ongoing (and evolving) concern. So it was retained on the Committee's agenda, with the expectation that the Reporter would monitor and, with the assistance of the Rules Law Clerk, maintain a collection of materials on the subject for potential use by the Committee. Among the items included in the agenda book for the October 2021 meeting, therefore, was the then-current collection maintained by the Rules Law Clerk. This collection has been augmented since that meeting, and this agenda book contains the items added since then.

At the October 2021 Committee meeting, the conclusion was that TPLF is a big topic, but that the time had not come to try to start drafting any rule responses. As discussed at the October Committee meeting, it seemed clear that judges have authority to require disclosure of TPLF when warranted, but it was suggested that some judges may not be alerted to this possibility, so that a prompt in Rule 16 or Rule 26(f) might be useful, or perhaps that it would be useful to encourage judges to discuss funding issues with the parties. There was also some interest in details about the impact of disclosure requirements in places where they exist, either under state law for state courts or by local rule or general order in some district courts.

Other comments at that Committee meeting included consulting with the Conference of Chief Justices and National Center for State Courts to gauge the experience of state courts, where the great majority of civil cases are filed.

Additional observations included that the definition problem is real – does a traditional bank line of credit possibly fall within the range of TPLF sought to be disclosed under these various

rule proposals and bills in Congress? Should disclosure include financing obtained by plaintiffs for their living expenses, or only financing obtained by lawyers or law firms?

A recurrent reaction in October 2021 was that taking on TPLF involves taking on a large topic. "This is a huge research burden." Moreover, to the extent a major concern is consumer protection for plaintiffs against predatory lending, "there is a whole state regulatory mechanism." An excerpt from the minutes of the Oct. 5, 2021, Committee meeting is included in this agenda book.

In the three years since the October 2021 Committee meeting, there have been further developments. In 2022, at the request of Senator Grassley and Rep. Barr, the Government Accounting Office issued a 47-page report entitled Third-Party Litigation Financing: Market Characteristics, Data and Trends. In August 2022, the Securities and Exchange Commission began to gather data on hedge fund investments in litigation finance. Andrew Ramonas, Hedge Fund Lawsuit Financing Poised for SEC Enforcement Scrutiny, Bloomberg Law News, Aug. 15, 2022. On Dec. 18, 2022, TPLF was featured in a segment of the CBS News program 60 Minutes.

There have also been intimations of foreign powers using litigation funding for malignant purposes. In December 2022, the attorneys general of 14 states wrote to U.S. Attorney General Merrick Garland to warn of "potential threats posed by third-party litigation funding in civil matters by foreign entities hostile to the United States." See Letter dated Dec. 22, 20222, on letterhead of Attorney General of Virginia to Merrick Garland, Matthew Olsen (Ass't Attorney General for the National Security Division) and Lisa Monaco (Deputy Attorney General). A Wall Street Journal piece warned that litigation funding "could give foreign adversaries a way to disrupt the U.S. economy and political system." Donald Kochan, Keep Foreign Cash Out of U.S. Courts, Wall St. J., Nov. 24, 2022.

At the same time, the litigation funding "industry" has continued to evolve. In late 2023, for example, it was reported that insurance companies were eyeing the potential profits of providing insurance products that would compete with "traditional" litigation funding. Emily Siegel, Insurers Invade Litigation Finance, Boosting Law Firm Options, Bloomberg Law News, Dec. 19, 2023 ("The $13.5 billion litigation finance industry is getting new competition from the insurance sector.").

In short, it is not clear that the contours of this funding activity have become settled. Assuming disclosure should be required, it could be a challenge to describe in a rule when the disclosure requirement applies. Given the broad agreement that judges can require disclosure in cases in which that seems warranted, requiring that it be provided in every case might well be regarded as too broad, particularly given the possible uncertainty about what is or is not the sort of litigation funding that must be disclosed.

And it is not clear what judges are to do with the information if it is disclosed. One argument is that such disclosure might reveal grounds for recusal. The Rule 7.1 Subcommittee is dealing with somewhat related issues. But it is not clear that judges have interests in funders that are comparable, or that disclosures (when ordered in individual cases) were sought or used to shed light on possible grounds for recusal.

The question presently is whether it has come time for the Committee to embark on what is likely to be a challenging TPLF project. Much education will be needed to gain a reliable familiarity with the issues involved. There surely have been notable developments since the Committee first encountered the proposal to amend Rule 26(a) in 2014. But it is not clear that those developments show that the way is now clear for work to begin on a possible rule amendment.

At the same time, it is important to note that there have been bills introduced in Congress from time to time over this decade to require disclosure of funding in all or at least in some cases.

TAB 19A

24. THIRD-PARTY LITIGATION FUNDING (TPLF)

This matter is on the agenda for the Fall 2021 meeting because it seemed timely to report back to the Committee, in part due to an inquiry in May 2021 from Senator Grassley and Representative Issa.

This report identifies a variety of challenges that any rulemaking effort on this front might present, and also includes a catalog (prepared by successive Rules Law Clerks) that collects materials on the subject.

This memorandum does not recommend any immediate action, but provides an opportunity for Committee members to address these issues. The agenda book therefore contains a rather expansive treatment of this topic to acquaint Advisory Committee members with the issues, should the Committee be interested in proceeding at this time. If not, it is expected that the Committee will continue to monitor developments. It is likely that further information, including that provided by the GAO outreach to the FJC, can be brought to bear. If the decision at present is to continue monitoring TPLF developments, there is no present need (despite the number of pages that follow) to delve deeply into these issues. But moving forward likely will present them.

The appendix to this report includes the following:

- Excerpt from the agenda book for the Advisory Committee's November 7, 2017 meeting (Excerpt)
- Suggestion 21-CV-L
- Catalog of materials collected by successive Rules Law Clerks on TPLF issues since 2019 (TPLF Catalog)

Rulemaking Background

Because it has been some time since the Committee discussed TPLF issues, it seems useful to provide some detail about the background of the current situation.

Proposals to add disclosure regarding third-party litigation funding first appeared on the Committee's agenda in Fall 2014. The U.S. Chamber of Commerce Institute for Legal Reform recommended then that a requirement to disclose TPLF be added to Rule 26(a)(1)(A), and apply to all civil actions. At that time, the Committee concluded that the field was changing rapidly and that not enough was known about it to support adding a disclosure requirement, and also that there were other questions about the wisdom of doing so.

Essentially the same proposal was raised again in 2017, submitted by the Chamber Institute for Legal Reform and more than two dozen other entities (Suggestion 17-CV-O). That proposal drew responses from two of the largest entities in the litigation funding business and also from two law professors who are prominent in the legal ethics field and familiar with the operation of TPLF entities. The agenda book for the November 2017 meeting of the Committee included more than 120 pages devoted to TPLF disclosure issues. The agenda memo presented at that meeting is included in this agenda book.

During the November 2017 meeting, the Committee discussed a variety of issues related to the role of TPLF in contemporary litigation. On the day after that meeting, the Humphreys Complex Litigation Institute of George Washington University National Law Center organized an all-day conference about TPLF that was attended by several members of the Committee.

Thereafter, the TPLF issues were among many studied by the MDL Subcommittee. Information from the Judicial Panel on Multidistrict Litigation and other sources indicated that such arrangements were not commonplace in MDL proceedings and, at the Committee's October 2019 meeting the subcommittee reported that TPLF did not seem particularly prominent in MDL proceedings. The conclusion reached was that further work on a possible rule would be suspended, but the evolution of TPLF would be monitored going forward, not with a primary focus on MDL proceedings but with regard to all civil litigation, the focus on the original 2014 proposal. This changed treatment was reported to the Standing Committee at its January 2020 meeting.

That monitoring has continued, and successive Rules Law Clerks have assisted in preserving a collection of materials on the subject, as well as preparing a summary of what's in the collection. As noted above, the current version of this catalog is in this agenda book.

The purpose of this memo, then, is to introduce the current status of these issues. One starting point might be drawn from the Institute for Legal Reform's 2017 submission in support of its proposal in 2017 (Suggestion 17-CV-O at 9), which urges that disclosure should be required because TPLF arrangements "often distort the traditional adversarial system of civil justice." Somewhat the same point appears in the minutes of the Advisory Committee's minutes of the November 2017 meeting (at p. 17, lines 744-48):

> "Warring camps" are involved. The proponents of disclosure have strategic interests. They would like to outlaw third-party financing because it enables litigation that would not otherwise occur. There is no question that funding enables lawsuits. Many of them are meritorious, though perhaps not all.

Perhaps further evidence of that dispute is that a new organization — the International Legal Finance Association, founded in September 2020 — submitted a comment to the Committee on April 7, 2021 (Suggestion 21-CV-H), pushing back against points made in the most recent submission by the U.S. Chamber Institute for Legal Reform (Suggestion 20-CV-II), citing the "countless hearings, receipt of testimony" and "extensive factfinding" by this Committee in deciding not to proceed with the disclosure proposal before it, and noting that district courts have often rejected discovery requests directed to litigation funding.

It is clear that there are strong views on both sides of the disclosure issues. It is not clear that either set of views is correct in all instances, or most of the time. TPLF organizations (and others) emphasize that such funding enables people with valid claims to sustain litigation. TPLF funders urge that they carefully scrutinize the validity of claims before funding litigation because, given the usual non-recourse nature of their financing, they can only make money if the litigation produces positive financial results. For example, a law firm blog mentioned in the TPLF Catalog noted on April 2, 2019 that litigation funding can be used by insurance policyholders to counteract an insurer's incentives to drag out litigation and delay paying claims.

Disclosure proponents point to reported instances of TPLF financing used to support outreach of "claims aggregators" who collect claims and funnel them to lawyers. It is not clear that any across-the-board judgment on whether TPLF is desirable or not desirable will be possible.

Meanwhile, in some states there have been legislative initiatives to address allegedly overreaching tactics by some litigation funders. In general, this legislative activity has had a "consumer protection" cast, and it has focused on the "consumer" part of the TPLF market. The "commercial" version of TPLF usually involves much larger sums of money and sophisticated actors. One feature of such consumer protection initiatives has to do with usury protections. Disclosure of terms to the borrower, not disclosure to the litigation adversary, is sometimes included.

In addition, as noted below, in late June 2021, the District of New Jersey adopted a local rule addressing TPLF, and in early 2017, the Northern District of California adopted a local rule calling for disclosure of TPLF arrangements in connection with class actions.

Inquiry from Senator Grassley and Representative Issa (Suggestion 21-CV-L)

In May 2021, Senator Grassley, Ranking Member of the Senate Judiciary Committee, and Representative Issa, Ranking Member of the House Judiciary Committee, wrote to the Committee inquiring about its ongoing consideration of TPLF issues. In part this submission says:

> The practice of TPLF cannot be allowed to proceed in its current form. Under present law, virtually all TPLF activity occurs in secrecy because there is no procedural or evidentiary rule requiring disclosure of the use and terms of such funding. Moreover, to the extent defendants seek this information through ordinary discovery, plaintiffs generally object to providing it, and courts often do not compel production of the requested information.
>
> Transparency brings accountability. It is true of Congress, the Executive, and our courts. A healthy dose of transparency is necessary to ensure that profiteers are not distorting our civil justice system for their own benefit.

Both Senator Grassley and Representative Issa have introduced legislation addressing TPLF that closely resembles bills introduced in prior Congresses. Senate Bill 840 would add a new § 1716 to Title 28, providing in part that:

> (a) IN GENERAL. — In any class action, class counsel shall —
>
> (1) disclose in writing to the court and all other named parties to the class action the identity of any commercial enterprise other than a class member or class counsel of record, that has a right to receive payment that is contingent on the receipt of monetary relief in the class action by settlement, judgment, or otherwise; and

(2) produce for inspection and copying, except as otherwise stipulated or ordered by the court, any agreement creating the contingent right.

The bill would also add a new subsection (g) to § 1407 of Title 28, saying in part:

(g)(1) In any coordinated or consolidated pretrial proceedings conducted pursuant to this section, counsel for a party asserting a claim whose civil action is assigned to or directly filed in the proceedings shall —

(A) disclose in writing to the court and all other parties the identity of any commercial enterprise, other than the named parties or counsel, that has a right to receive payment that is contingent on the receipt of monetary relief in the civil action by settlement, judgment, or otherwise; and

(B) produce for inspection and copying, except as otherwise stipulated or ordered by the court, any agreement creating the contingent right.

If enacted, this bill might produce some questions of implementation. For one thing, it is not clear what consequences follow from failure to comply with the disclosure requirements. Should that lead to dismissal with prejudice? Perhaps that would give the funder a strong incentive to ensure disclosure.

But complying might prove difficult for class counsel in class actions. For one thing, it is not clear whether the bill would apply from the moment the proposed class action is filed or only after class certification. Rule 23(g)(3) permits the court to appoint interim class counsel before certification. Would the disclosure apply to this lawyer as well? Would that mean that class counsel must collect and report the contingency fee agreements class members have reached with retained counsel? Perhaps the limitation to a "commercial enterprise" would exclude retained counsel, though one might say that lawyers are engaged, at least in part, in a commercial enterprise.

A different set of complications could ensue if putative class counsel (whether or not appointed as interim class counsel) negotiate a pre-certification settlement that includes class certification as well as the substantive relief available via the settlement. Rule 23(e) requires notice to the class of the proposed settlement and, in Rule 23(b)(3) class actions, Rule 23(c)(2)(B) requires individual notice to class members who can be identified through reasonable effort. They can opt out if they choose. Are class counsel obliged to determine and disclose whether any class members have made TPLF arrangements, perhaps of a "consumer" sort? Should the Rule 23(c) notice advise class members that such disclosure is required if they do not opt out?

In the MDL setting, related but somewhat different issues might be presented. The disclosure responsibility seems to rest on retained counsel there rather than leadership counsel. In MDL proceedings in which there is a PFS or Census practice, perhaps disclosure of TPLF arrangements would be appended to that.

Earlier bills regarding TPLF before Congress did not all focus only on class actions and MDL proceedings.

"Consumer" Funding Issues

As already introduced, another set of potential issues relates to the funding not obtained by lawyers but by clients themselves. We have been told repeatedly that there are at least two disparate worlds of litigation funding — "commercial" litigation funding (often involving funding commitments in the millions) and "consumer" litigation funding, often involving much smaller amounts of money that plaintiffs use to support themselves while their cases are pending. At least in some instances lawyers may not be aware of all such funding. At least the "commercial enterprise" provision would seem to exclude disclosure regarding financing from friends and relatives who provide support to the plaintiff during the litigation in expectation that they would be paid back after a successful conclusion of the case. But it would seem to call for disclosure of funding from an entity in the business of providing "consumer" TPLF.

The 2017 and 2014 proposals to this Committee sought to add a new subsection (v) to Rule 26(a)1)(A) as follows:

> (v) for inspection and copying as under Rule 34, any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from any proceeds of the civil action, by settlement, judgment or otherwise.

This proposal would apply to all civil litigation. It is not limited to "commercial enterprises," and could reach relatives of the plaintiff who provided support for the plaintiff's living expenses while the suit was pending, expecting to be repaid after the suit's successful conclusion.

All these proposals could be criticized as being one-sided. That is, they are directed only at those asserting claims, and not at those defending against them. Yet (as mentioned in some of the recent literature) there are indications that in at least some instances TPLF arrangements exist to support defendants litigating against claims. It seems that at least some of those are arranged by "commercial enterprises." One might ask whether the existence of such arrangements might also distort the traditional adversary system of U.S. civil justice.

Growing Importance of TPLF

Another starting point is to recognize that TPLF is, according to some, an increasingly big deal: "Litigation finance is our civil justice system's killer app. Unheard of yesterday, it is a mainstay today." Suneal Bedi & William Marra, *The Shadows of Litigation Finance*, 74 Vand. L. Rev. 563, 565 (2021). There is even a publication called the Third Party Litigation Funding Law Review, published by Law Business Research Ltd. of London. Its 2019 third edition had chapters on TPLF arrangements in 23 countries, including Indonesia, Nigeria, Ukraine, and the United Arab Emirates.

Chapter 23 of this TPLF Law Review is about the U.S. It distinguishes between two "main categories" of funding activity — commercial claims often in excess of $10 million, and consumer claims, typically of a mass tort or personal injury nature. It also identifies a number of sorts of funders. *Id.* at 217-18.

1. Large, publicly-traded entities

2. US-based private funds

3. privately held foreign funders

4. funders focused on smaller opportunities

5. lesser known, smaller entities, some of which are backed by single investors or raise capital on an investment by investment basis

It also reports that "a growing secondary market exists, in which hedge funds and other investment managers increasingly participate." In addition, "major funders have increasingly shifted toward portfolio funding," involving "a collateral pool of multiple cases. * * * Some funders also provide loans to law firms against legal receivables." *Id.* at 218-19. At some point, those may come to resemble bank financing of law firms secured by receivables.

Looking beyond the U.S., TPLF appears to be prominent internationally. For example, Professor Victoria Sahini of Arizona State University College of Law published a book entitled Third Party Funding in International Arbitration (Walters-Kluwer 2017, co-authored with Lisa Bench Nieuwveld). According to her online law school biography, Prof. Sahini has also published at least four articles in U.S. law reviews on TPLF, and also has contributed chapters on TPLF to three forthcoming books to be published in Europe.

As noted in the catalog of materials gathered during the monitoring of TPLF issues, there are less orthodox arrangements that may be viewed as funding. One example is *Lawson v. Spirit AeroSystems, Inc.*, 2020 WL 3288058 (D. Kan., June 18, 2020), a dispute between the former CEO of one company and a company with which he signed on as a consultant. The CEO was owed periodic payments from his former company that it threatened to terminate on the ground that he was forbidden from serving as a consultant to the new company. The new company then promised to pay the CEO the amounts that he was to receive from his old company in return for being subrogated to claims (asserted in this lawsuit) against his former company for separation payments. As the court put it, "Elliot [the new company] is now funding this lawsuit to recover the amounts Spirit [the old company] owes Lawson pursuant to his Retirement Agreement." This certainly looks like a one-off arrangement, but it also suggests the variety of litigation funding arrangements that may come into existence.

Other recent cases point up other sorts of arrangements that may occur and be regarded as TPLF. For example, *Ruckh v. Salus Rehabilitation, LLC*, 963 F.3d 1089 (11th Cir. 2020), was a False Claims Act case in which the relator got funding when defendant filed a motion for judgment as a matter of law. At that point (well into the case), the relator sold 4% of her interest in the recovery (estimated to be many millions of dollars) to a funder. The court addressed the question whether this arrangement deprived the relator of Article III standing. The court rejected

the argument. Though it is an odd example, it may suggest a whole area of litigation funding that has existed for some time — funding after a successful result in the trial court to support appellate efforts to protect the resulting judgment. Some items listed in the TPLF Catalog thus focus on litigation funding for judgment enforcement efforts. It is not clear whether the various proposals before this Committee seek to require disclosure of funding sought to enforce or protect judgments entered by district courts; the focus seems to be more at funding obtained near the outset, not after judgment in the trial court.

Still other recent developments point up possible additional considerations. In some Bankruptcy Court proceedings, for example, litigation on behalf of the estate may be financed by litigation funders. Indeed, court approval may be necessary before such funding arrangements can be consummated. One example is provided by *In re Bronson Masonry, LLC*, Case No. 15-34713-sgj7 (N.D. Tex.) — a transcript of an evidentiary hearing on April 13, 2016 concerning approval by the court for such an arrangement. It is not clear how frequent such arrangements might be, but it is understandable that they may sometimes be considered. Bankruptcy Rule 7026 says that "Fed. R. Civ. P. 26 applies in adversary proceedings." It may be that the possible impact of an amendment to Rule 26(a)(1)(A) in bankruptcy court proceedings should be considered. It does not appear that the pending bill in Congress would affect those proceedings.

Issue Presently Before the Committee

The question at present is whether to launch a serious study of TPLF activity to support possible rulemaking. Though there certainly have been developments since 2019, it seems that many or most of the questions that existed when the Committee last considered these issues continue to be challenging. For the present, it seems useful to draw from the reports cataloged in Appendix D a partial list of issues suggested by those materials that would affect any such rulemaking effort. The effort would require a considerable amount of work. As information about the multitude of issues increases, it may be that one response is to conclude that this collection of issues is too diverse to be handled by a civil rule amendment. Another is to conclude that regulation of TPLF is best left to other entities, such as state legislatures, rather than individual federal judges.

The following provides information bearing on the Committee's role.

<u>Local Rules and State Legislation Addressing Disclosure</u>

There has been some consideration in the past of local rules addressing disclosure of TPLF. In 2018, Rules Law Clerk Patrick Tighe prepared a memorandum on local rules in the courts of appeals and the district courts that was included in the agenda book for the Committee's April 2018 meeting. *See* Agenda Book for April 2018 Meeting at 209-18. Tighe found disclosure requirements in some two dozen district courts, seemingly designed to alert the court to possible grounds for recusal. (About half the courts of appeals had similar rules.) It does not seem that these disclosure rules are focused on the main issues the current proposal before this Committee addresses.

On June 21, 2021, the District of New Jersey adopted its Local Rule 7.7.1 that seems to be focused more closely on issues like those raised by the current submission before this Committee. It applies to all cases, and calls for compliance in pending cases within 45 days (i.e., by early August 2021). It provides, in pertinent part:

> (a) Within 30 days of filing an initial pleading or transfer of the matter to this district, including the removal of a state action, or promptly after learning of the information to be disclosed, all parties, including intervening parties, shall file a statement (separate from any pleading) containing the following information regarding any person or entity that is not a party and is providing funding for some or all of the attorneys' fees and expenses for the litigation on non-recourse basis in exchange for (1) a contingent financial interest based upon the results of the litigation or (2) a non-monetary result that is not in the nature of a personal or bank loan or insurance:
>
> 1. The identity of the funder(s), including the name, address, and if a legal entity, its place of formation;
>
> 2. Whether the funder's approval is necessary for litigation decisions or settlement decisions in the action and if the answer is in the affirmative, the nature of the terms and conditions relating to that approval; and
>
> 3. A brief description of the nature of the financial interest.
>
> (b) The parties may seek additional discovery of the terms of any such agreement upon a showing of good cause that the non-party has authority to make material litigation decisions or settlement decisions, the interests of the parties or the class (if applicable) are not being promoted or protected, or conflicts of interest exist, or such other disclosure is necessary to any issue in the case.

A Bloomberg Law News story on May 24, 2021, while the local rule was under consideration, reported that a practitioner involved in drafting this rule proposal invoked Patrick Tighe's 2018 study of other district court local rules. But it does not seem that the local rules Tighe found, focused on recusal issues, resemble the proposals on which this memorandum is focused. And there appears to have been some controversy about the D.N.J. local rule proposal. Thus, the May 24 Bloomberg Law News story about it is entitled "New Jersey Sees New Battle Over Litigation Finance Disclosure."

The D.N.J. local rule does not automatically require the party that obtained funding to turn over the funding agreement. Instead, it focuses on issues of funder control of litigation and contemplates further discovery based on the showings outlined in section (b) of the proposed rule.

In 2018, the Wisconsin Legislature adopted a provision for the Wisconsin state courts that required disclosures of the sort called for by the proposal before this Committee. That

provision was part of a larger bill known as Wisconsin Act 235, which also included other provisions like one revising the scope of discovery in Wisconsin state courts to correspond to the revised scope definition in Rule 26(b)(1). Two days after Wisconsin Governor Scott Walker signed the Wisconsin act, the president of the U.S. Chamber Institute for Legal Reform said other states would follow Wisconsin's lead. *See* U.S. Chamber Institute for Legal Reform release, April 5, 2018 (citing Lisa Rickard's statement in an interview with the National Law Journal).

Informal research does not indicate that this Wisconsin legislation has had a major impact in the Wisconsin state courts. It is not clear whether any other states have adopted similar legislation.

In January 2017, the N.D. Cal. added the following to the paragraph of its Standing Order on the Contents of Joint Case Management Statement that relates to a certification of interested persons: "In any proposed class, collective, or representative action, the required disclosure includes any person or entity that is funding the prosecution of any claim or counterclaim." In its submission in support of the rule proposal before this Committee, the Institute for Legal Reform quoted a newspaper article saying that this court's action was "a harbinger and a signal that courts * * * need to consider the presence of third-party financiers." Suggestion 17-CV-O at 10. Though no search has been made, it is not clear that other federal courts have followed the California lead.

It bears noting, however, that this provision is (like the pending legislation in Congress) not applicable to all civil litigation but instead only to class, collective, or representative actions. In addition, it requires only the identification of the person that is funding the litigation. To date, there has evidently been only one occasion of disclosure pursuant to the N.D. Cal. order. That disclosure was of a grant from a public entity (not a litigation funder per se) to help with the costs of a prisoner civil rights litigation.

Problems of scope: As already noted, the pending proposal before this Committee and the bill in Congress have different scopes in terms of what they apply to. As was noted in 2017, there would be problems of scope if this Committee pursues rulemaking. *See infra* Excerpt. The information obtained since 2017 suggests that many would need to be confronted:

All civil litigation or only class, MDL, and "representative" litigation: One of the most active litigation areas for litigation funding is reportedly patent litigation, but that would not seemingly be affected by the bill in Congress. On the other hand, including all personal injury auto accident cases in federal court might be seen as excessive, in part depending on what is considered "litigation funding." When a relative helps the victim with living expenses, should that be covered? Should "consumer" litigation funding be included?

"Commercial" v. "consumer" funding: There seem to be at least two major branches of litigation funding. The "commercial" branch appears to involve large funding amounts (millions of dollars) that sometimes go directly to the lawyers to pay for the litigation. The consumer form of funding tends to involve payments to the plaintiffs to cover rent, groceries, etc. Limiting a rule to "commercial" funding could prove difficult. Would that dividing line look to the dollar

amount of the funding commitment, the nature of the litigant (natural person or legal entity), or the nature of the claim (e.g., personal injury or patent infringement)?

Sources of funding covered: It does not seem that the primary concern of those advancing disclosure proposals is to have them apply to relatives who help with living expenses. Thus, the bill in Congress speaks of "commercial enterprises." We have been informed that there are companies that are in the business of making relatively small loans to auto accident claimants. It is not clear that requiring disclosure of these "living expenses" arrangements addresses the concerns of the proponents of disclosure. Perhaps one can assume that most such cases will not be in federal court, but one might also consider that we are told defendants often prefer federal court and will remove if that is possible.

"Public interest" or "social interest" litigation funders: In the TPLF Catalog there is a reference to *Hyland v. Navient Corp.*, No. 18-cv-9031 (S.D.N.Y., Oct. 9, 2020) in which the American Federation of Teachers paid plaintiffs' counsel fees in a class action, but this arrangement was not disclosed to the court. The court therefore directed that what would otherwise be paid as an attorney's fees award instead be paid into a cy pres fund. Other discussions of TPLF have raised the possibility that "social justice" organizations might support litigation, and that requiring disclosure of those arrangements could be disruptive without seeming to address the concerns raised by the proponents of disclosure.

In a related vein, one might think of the action brought by Hulk Hogan against Gawker, in which his litigation costs were reportedly underwritten by the Silicon Valley billionaire Peter Thiel, who had an unrelated grudge against Gawker. Perhaps Thiel regarded bankrupting Gawker as "social justice," but that seems different from the efforts of the American Federation of Teachers.

Farther afield yet is a March 7, 2021 article (included in the catalog of materials in this agenda book) entitled "Who's Funding That Lawsuit? Implications for Lawfare." This article warns that an American company vying for a contract to build infrastructure in an African country might find itself facing a class action in U.S. courts funded by a foreign bidder for the same project. The foreign company or government might fund the American litigation; "the rise of phenomena like third-party litigation funding [could allow] foreign actors to weaponize the [American] legal system for their own influence objectives." This scenario may be far-fetched, but it is worth noting that the current proposals would not reach it because they focus on funders who seek a payout from the litigation; in the hypothetical situation the goal is only to hobble the American company. Indeed, the article posits that the hypothetical lawsuit would eventually be dismissed, but that dismissal would happen too late to enable the American company to compete for the business in Africa. This is surely not "public interest" litigation.

What must be disclosed: A different problem of scope is the scope of required disclosure. The proposal before this Committee requires that the parties' full agreement must be disclosed, and the bill in Congress says the same in instances in which it would apply. There are other gradations. Disclosure could be limited to the fact of funding. Disclosure could also require that the funder's identity be included. (This could address recusal issues.) Disclosure could call for a general description of the funding agreement. Disclosure could also include specific reference to any control the funder has over the conduct of the litigation. Disclosure cold also go beyond the

current proposals and include all communications between the funder and the attorney or party that received the funding. (This would raise serious work product issues, mentioned below.)

To whom must disclosure be made: The proposals before Congress and this Committee call for disclosure to all other parties, including (perhaps particularly) adverse parties. That is not the only option. In the Opioid MDL in the N.D. Ohio, Judge Polster directed that funding arrangements be disclosed to the court, with the possibility of in camera examination of funding materials if the court found that useful. As noted already, the MDL Subcommittee concluded that there is little indication of attorneys in MDL proceedings using litigation funding. In the Zantac MDL, Judge Rosenberg inquired about such finding but did not find any.

Follow-on discovery: As the D.N.J. local rule proposal shows, a rule could explicitly address follow-on discovery by specifying the showing that need be made. With regard to the other required disclosures under Rule 26(a)(1)(A), follow up discovery is normal, even the purpose of the initial disclosures. As noted below, district courts have been quite cautious about allowing substantial discovery regarding funding even where its existence is disclosed. One scope issue then might be whether to address this possibility in a rule. Another potential concern is that such discovery could be viewed as distracting from the merits of the case. And it might be that the fuller the disclosure the greater the potential for discovery designed to "follow up on" what was disclosed.

Portfolio funding: As the sources in the catalog of materials show, "portfolio" funding may be attractive to funders to expand the collateral available. A Bloomberg Law News story ("Firm Lawyers Wary of Portfolio Litigation Financing, March 5, 2019) says that lawyers strongly prefer single-case funding. From the rulemaking perspective, the possibility of portfolio funding could raise issues of scope. Is disclosure required in every case in the portfolio? Assuming the portfolio includes cases on file when the funding is advanced, what is the timing of disclosure for those pending cases? If the portfolio funding agreement provides that all obligations to the funder are satisfied once $X is paid (and that then the funding obligation no longer exists to pending cases), does that mean that the disclosure can somehow be withdrawn?

Cases on appeal: Funders emphasize that they pick the cases they will fund very carefully. (They stress this point in part to rebut claims that funding encourages the filing of groundless litigation.) At least with regard to cases in which a substantial verdict or judgment has been obtained, it would seem that the funder would be much more willing to provide funding to defend that judgment on appeal. Indeed, that seems to be a significant sub-category of litigation funding. Should that be included? Should it be included in the Appellate Rules? Can it really be said that funding for successful litigants facing appeals challenging their trial court success raises the concerns advanced as justifying the proposed disclosure requirement?

PPP loans included?: Solely to illustrate arguments that might be made, consider a June 12, 2020, post from California Attorney Lending (listed in the catalog of TPLF materials included in this agenda book). It suggests that PPP loans to law firms might be included even though they are not tied to specific litigation. Though they may be non-recourse (repayment not required if the recipient law firm retains its employees during the lockdown), it does not seem that anyone would seriously argue that they are subject to disclosure as TPLF. Certainly the PPP program will be behind us before any rule change goes into effect, but the possibility that such

arguments might be made illustrates the difficulties of proceeding without a great deal more knowledge.

Disclosure forbidden?: One final note on scope. There have certainly been instances in which parties that have funding want their adversaries to know about it, and perhaps to know the extent of the promised funding. That could be a club to use to encourage settlement. Conceivably, a rule might prohibit such disclosure. Nobody has suggested such a rule.

Work Product Concerns

The funders that have submitted comments to the Committee have emphasized their need to evaluate cases carefully before providing funding, explaining that intense scrutiny on the ground that non-recourse loans are high risk. A Feb. 14, 2020, article in Bloomberg Law News entitled "Litigation Finance — How to Get to 'Yes' After Hearing 'No'" (included in catalog of materials in this agenda book) cites an officer of a leading funder as saying that to obtain funding a prospective client should offer: "(1) a substantive memo on the claims, including a comprehensive explanation of how the law firm counsel plans to tackle any legal hurdles that may arise; (2) a thoughtful and supported early-stage estimate of damages; and (3) a detailed budget for counsel's fees and costs, keyed to stages in the litigation." It is not clear that all funders are this demanding; high-volume "consumer" funders of car crash claimants probably are not.

This kind of material is likely to be core opinion work product. For a litigation adversary to gain access to it would provide many strategic benefits. But ordinarily one would regard the funder and the litigating party as having a common interest sufficient to prevent waiver arguments. To require disclosure of such material would threaten to undermine that protection.

Current District Court Handling of Discovery Regarding Funding

As the letter from Senator Grassley and Representative Issa says, when defendants seek discovery of funding details "courts often do not compel production of the requested information." It seems that a significant objective of the current proposals is to overturn these district court decisions.

As Senator Grassley and Representative Issa say, the general view is that courts are reluctant to permit discovery regarding litigation funding. An illustration is *Continental Circuits LLC v. Intel. Corp.*, 435 F.Supp.3d 1014 (D. Az. 2020), decided by Judge David Campbell, a former Chair of a prior Discovery Subcommittee, of this Committee, and of the Standing Committee.

In this patent infringement action, plaintiff was a non-practicing entity, one that does not manufacture products but is primarily involved in seeking licensing fees for its patents. Plaintiff asserted that Intel had infringed several of its patents. Intel sought discovery of what it contended were "three narrowly-tailored categories of documents and information" about plaintiff's funding:

1. any final agreement between plaintiff and any funder; and

2. the identities of all persons or entities with a fiscal interest in the outcome of the litigation; and

3. the identities of any potential funders who declined to provide funding after being approached by plaintiff.

These discovery requests may offer a hint of the sort of discovery adopting a disclosure rule might invite.

Judge Campbell found that the first two requests satisfied the "relatively low bar" of relevancy, but that the third did not. Plaintiff objected to production with regard to items (1) and (2) on work product grounds. (Plaintiff did not raise attorney-client privilege grounds.) Intel argued that the funding materials were not generated "for use in" litigation, but Judge Campbell rejected that argument using the Ninth Circuit "because of" standard: "Litigation funding agreements are created 'because of' the litigation they will fund." Intel also argued that any work product protection had been waived. Judge Campbell had reviewed some funding agreements in camera and found that they included confidentiality provisions consistent with the common interest exception to waiver. Given that, Intel failed to show a substantial need to justify production of these materials. On this basis, Judge Campbell ordered plaintiff to identify its funders, but denied further discovery.

As this case demonstrates, the handling of discovery requests in given cases depends considerably on the specifics of those cases. It does seem that district judges have inquired into funding and provided discovery about it when justified in a given case. At the same time, it is apparent that tricky work product issues may arise with some frequency, particularly if funders seek and obtain opinion work product as part of their scrutiny of requests for funding.

It also seems likely that fairly aggressive discovery efforts will occur in some cases. There is a considerable argument that Rule 26 is calibrated to guide district judges in making discovery decisions in individual cases. To the extent that disclosure rules might alter the outcomes (which Senator Grassley and Representative Issa seem to say is a goal of their proposed legislation), that could deprive district judges of the discretion they currently wield in making these decisions. Doing the same thing by amending Rule 26(a)(1)(A) might similarly limit district court discretion. Presently, district judges may make case-by-case decisions, but a rule would likely change that.

Enforcement

As noted above, it is not clear how the pending bill in Congress would be enforced. Regarding the proposal to amend Rule 26(a)(1)(A) before this Committee, enforcement might prove a challenge.

For most of the other initial disclosure provisions, Rule 37(c)(1) is the enforcement device, and it says that material not disclosed may not be used by the party that failed to disclose it. That exclusion remedy has generated a great deal of case law. *See* 8B Fed. Prac. & Pro. § 2289.1.

Enforcing the disclosure of insurance coverage, required by Rule 26(a)(1)(A)(iv), is less easy. That coverage cannot usually be admitted in evidence under the Evidence Rules. And the insured (usually a defendant) ordinarily would not want to use that evidence. Perhaps this new proposed disclosure provision is similar. It hardly seems that the claim should be dismissed due to failure to disclose funding. Research on methods of responding to failures to comply with Rule 26(a)(1)(A)(iv) might yield analogies, but absent that the likely outcome will be further challenges for district judges who find that required disclosure has not been provided.

Funding for Defendants?

There is at least some suggestion that on occasion funding arrangements have been made to support litigation by the defendant rather than the plaintiff. To the extent that funding might facilitate unwarranted claims, it would seem possible that funding might also facilitate assertion of unwarranted defenses. All the proposals have focused only on claimants, and that will likely be the bulk of litigation funding activity. But if serious study of these issues is to occur, at least some thought might be given to funding of defendants. This might be regarded as another scope issue.

Lest it be thought that defense-side funding could not occur, one could refer to a case that is a law school staple regarding constitutional limits on personal jurisdiction — *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). That case arose out of a rear-end collision in Oklahoma leading to a fire that seriously injured several members of a family from New York who were moving to Arizona. They claimed that their Audi was defectively designed, leading to the fire. The county in which the crash occurred was regarded as a sort of "plaintiffs' paradise." Because the family had not gotten to Arizona (thereby acquiring Arizona domicile) they were still New Yorkers for diversity purposes.

Plaintiffs sued in state court, naming not only Audi, the German manufacturer of the car, and VW of America, the nationwide distributor, but also the New York retailer from whom they bought their car, and World-Wide, the distributor for New York, New Jersey, and Connecticut. These defendants moved to dismiss for lack of personal jurisdiction, but those objections were unsuccessful in the state courts. These "small fry" defendants were not willing to pay the cost of seeking Supreme Court review, but their lawyer persuaded Audi and VW of America that the big defendants should fund the appeal to the Court in an effort to make the case removable. *See* Charles Adams, *World-Wide Volkswagen v. Woodson — The Rest of the Story*, 72 Neb. L. Rev. 1112, 1135 (1993) (reporting that Audi agreed to pay for the Supreme Court petition, have its lawyers prepare briefing in the Court, and have a name partner in its New York law firm argue the case). This funding would not be covered by any of these disclosure provisions. Audi is clearly a "commercial enterprise," but it sought no payout sourced from the ultimate victory in the Court by the funded parties. It did get to remove after the Court's decision. Yet if the goal of disclosure is to reveal who is "really on the other side of the litigation," that principle might extend to funding for defendants.

Courts as Enforcers of Professional Responsibility Rules

Several of the arguments of the proponents of rule amendment are premised on various rules of professional responsibility. Ordinarily those rules are the province of state bar

authorities. Not all states may come out the same way. For example, the TPLF Catalog includes an October 26, 2020 Bloomberg Law News article entitled "California State Bar Opinion on Litigation Funding Could Have Sway." This article reports on Formal Opinion No. 2020-204 of the state bar "strongly support[ing] legal finance and confirm[ing] that its use presents no significant hurdles to the ethical practice of law."

On the other hand, a February 28, 2020 New York City Bar Report of its Working Group on Litigation Funding raised cautions about such arrangements, particularly with regard to fee sharing. A March 2, 2020 Bloomberg Law News article commented on the potential impact of this report. *See infra* TPLF Catalog.

In general, the federal courts have not regarded themselves as responsible to enforce state professional responsibility rules. It is certainly possible that litigation funding could put stress on a lawyer's duty of loyalty to the client. But that is not the only potential source of such stress. Consider the ordinary personal injury contingency fee agreement. That also might place the lawyer's self interest in prompt payment (via settlement) in tension with the client's desire to go to trial. But there is no general disclosure requirement regarding the existence or details of contingency fee agreements so that judges can police them.

Particularly in light of the seemingly divergent attitudes in various states about litigation funding, the Committee may consider it a dubious enterprise to adopt disclosure requirements designed to immerse federal judges in these issues, or in enforcing state professional responsibility rules.

And in MDL proceedings, that might become even more difficult, as it could present far trickier choice of law issues. Is the transferee judge to apply the professional responsibility rules of the state in which she sits, or refer to the rules that prevail in the jurisdictions from which transferred cases came? And how should cases "directly filed" in the transferee court (by stipulation of the defendants) be handled?

Federal Courts as Enforcers of Champerty and Maintenance Rules

The proponents of disclosure urge that one objective should be to unearth violations of rules against champerty and maintenance. Interesting debates can focus on whether these common law doctrines continue to serve a useful purpose. For purposes of this Committee, however, if it attempts to fashion rules to govern the entire federal court system, what may matter most is that the handling of these matters is hardly uniform across the nation.

To the contrary, some reports we have received from ethics experts suggest that both these doctrines are in decline. For example, the Institute for Legal Reform proposal in 2017 cited a Minnesota Court of Appeals decision emphasizing "Minnesota's local interest against champerty." Suggestion 17-CV-O, p. 12, citing *Maslowski v. Prospect Funding Partners LLC*, 2017 Minn. App. LEXIS 26, at *22 (Minn. Ct. App., Feb. 13, 2017). Yet as disclosed in the catalog of materials included in this agenda book, the Bloomberg Law News article "The Fall of Champerty and the Future of Litigation Funding" (June 16, 2020) reports that in *Maslowski v. Prospect Funding Partners, LLC*, 44 N.W.2d 235 (Minn. S. Ct. 2020), the state supreme court

held the challenged litigation funding contract in that case was enforceable under Minnesota law over objections based on champerty.

Careful investigation of the current importance and evolving viability of the doctrines of champerty and maintenance has not been done, but the auguries may make it seem odd to establish a procedure by national rule that is designed to further legal doctrines that no longer apply in significant parts of the nation.

* * * * *

This catalog of issues is hardly exhaustive, but suggests the challenges that may lie ahead for rulemaking on this subject. As should be apparent, a very large amount of fact-gathering would be necessary to fashion a disclosure rule addressing TPLF.

The following excerpt from the November 2017 agenda book provides more, but somewhat dated, information. This additional background may illuminate the issues presented by possible disclosure rules for TPLF arrangements. The variety of materials in the catalog of TPLF publications maintained by the Rules Law Clerks provides additional detail about the wide variety of issues that may arise. Moving forward likely involves addressing many of these issues.

Suggestion 21-CV-L raises a number of intriguing issues in relation to a just-emerging phenomenon. Should the Committee wish to proceed, it might well be important initially to try to get a better grasp of the TPLF phenomenon itself, for devising a rule that suitably deals with it seems to depend on some confidence about how it works. Although the phenomenon may have stirred controversy in some quarters, it is not clear how much a rule change would improve the handling of those controversies.

TAB 19B

Judge Bates noted that there may be a risk that each of the advisory committees may hang back from this topic, waiting to see whether some other committee will take the lead. The Appellate Rules Committee, for example, has tabled the question pending consideration by the Civil Rules Committee. Deferring consideration by all committees may be the right course. Perhaps the reporters should take the question up among themselves, to make sure that it does not fall through the cracks. Professor Struve agreed that the reporters will confer.

Judge Dow noted that in addition to coordination among the advisory committees, it will be important to coordinate with the Court Administration and Case Management Committee to integrate with the next generation CM/ECF project. He also noted that some courts are experimenting with e-filing by supporting facilities in prisons.

Judge McEwen noted that there has been little progress on this subject in the Bankruptcy Rules Committee. "We're heading into the next generation CM/ECF. We need to find out how it works." In bankruptcy there often are hundreds of docket events in a single case, in a system that cannot work for untrained persons. Claims can be filed electronically, and frequent filers must do so. But any system for e-filing by unrepresented debtors or other parties would need "a lot of safeguards."

Another comment suggested that a distinction might be drawn between the events that initiate a case and later filings. Electronic filing of initiating papers could be troublesome. This concern was seconded by another participant who suggested that clerks' offices may well resist electronic filing of case-initiating filings by pro se litigants.

A practical note was sounded by asking how electronic filing would relate to getting permission to file without paying fees under 28 U.S.C. § 1915. This question was expanded by an observation that § 1915 provides a screen for dismissing frivolous filings without service of process. But if a fee is paid, not all judges do the initial screening.

This question will be retained. The next step may be collaboration of the reporters.

Third Party Litigation Funding

Professor Marcus introduced the report on Third Party Litigation Funding as a timely reminder that this growing and changing phenomenon continues to hold a place on the agenda. The report is further made timely by an inquiry last May from Senator Grassley and Representative Issa.

This topic first came to the agenda in 2014 with a proposal to add a rule requiring initial disclosures about TPLF arrangements. That proposal was studied carefully and put aside to await further developments and better knowledge of TPLF practices. It came back in 2019, and was then confided to the Multidistrict Litigation Subcommittee. The Subcommittee concluded that TPLF is not distinctively allied to MDL proceedings, and remitted the subject to the Committee's general agenda.

TPLF presents an important set of issues. The Committee will continue to monitor them. The Rules Law Clerks continue to gather a catalogue of relevant materials that has grown to impressive length.

Legislation has been introduced in Congress, S. 840, that would adopt disclosure requirements for TPLF in class actions and MDL proceedings.

TPLF continues to present many "uncertainties, unknowns, and difficulties."

Last week the Committee received a proposal that TPLF disclosure be tested by a pilot project. There are some local rules that might be seen as informal pilot projects. A Northern District of California local order providing for disclosure in class actions has been invoked once in four years. The District of New Jersey has recently adopted a local rule; there is no information yet on how it works. Wisconsin has adopted a disclosure requirement for TPLF arrangements in civil cases in its state courts, but informal inquiries have failed to garner much information about how it is working.

The agenda materials describe several of the many problems that must be confronted by any attempt to create a rule for TPLF arrangements. What should be its scope -- what sorts of financing, and perhaps what sorts of litigation should be included? What about work-product protections? Many of the concerns, such as professional responsibility and usury, "are not the normal stuff of the Civil Rules."

Judge Dow said that the topic has been presented to take stock. What experiences have Committee members had? Some judges do ask about TPLF. A party can ask the judge to inquire.

A judge reported requiring disclosure of any TPLF arrangements by those applying for leadership positions in an MDL. The disclosures were to be made to the judge ex parte. No arrangements were reported.

This MDL experience was consistent with findings by the Judicial Panel on Multidistrict Litigation, which found that TPLF

seems not to be used in big MDLs, likely because lawyers self-finance. Another judge, however, reported being aware of massive TPLF positions in some MDLs. The court has to keep in touch with this. Possibilities could include adding the subject to Rule 16(b) and Rule 26, or encouraging courts to discuss TPLF with the parties. The court might decide that there is nothing to do about the arrangements. And there is no need to make the arrangements public. He did have one case in which he admonished the lender that it could not affect settlement decisions.

A judge agreed that courts have authority to require disclosure. "A Rule 16 prompt could be useful." Not all judges are aware of the authority they have.

A judge who reported no personal experience with TPLF suggested that it would be good to learn more about the California, New Jersey, and Wisconsin arrangements. We heard years ago that TPLF is common in patent litigation, but the California order does not seem to touch that. A related issue is before the Appellate Rules Committee, concerning disclosure of who is actually funding an amicus brief. These are big issues. Holding them open may be the right course to pursue.

Another judge agreed that it would be useful to learn more about such local rules and practices as may be identified. And the reports about patent litigation indicated that TPLF is used by defendants as well as plaintiffs. It would be good to learn more about defendant financing practices.

A magistrate judge noted that magistrate judges frequently engage in mediations. They have discussed among themselves the effect that ex parte disclosures of TPLF might have in mediating a resolution.

Another participant noted that "there is a whole state regulatory mechanism." "This is a huge research burden," perhaps too heavy to impose on the rules law clerks. A judge agreed that state courts confront TPLF practices, and volunteered to approach the Conference of Chief Justices and the National Center for State courts if that seems likely to be helpful.

A lawyer member provided a reminder that it is critical to be clear about defining terms in approaching TPLF. It can mean many different things. What of a traditional bank line of credit? All agree that's not "TPLF." TPLF goes on around the world, though it is more common in some places than others.

This observation included a reminder that it is important to encourage diversity, equity, and inclusion in the ranks of class action lawyers and MDL leadership. There are lawyers who need to borrow to represent clients they are perfectly able to represent.

They should not be left at a disadvantage.

Another participant observed that lawyers frequently have financing in bankruptcy proceedings. In state courts, financing may provide living expenses for plaintiffs. "There are lots of things we're not talking about." Champerty is one of the things others are talking about.

Two participants agreed there is a distinction between "consumer" and "commercial" TPLF. There are so many permutations that it would be difficult to define what sorts of arrangements should be brought into a "TPLF" rule. "This is a challenge. There is much to be learned. But filling in the blanks will not make the rules choices go away."

The Committee agreed that TPLF is a big topic. It cannot be allowed to get away. Continued study will be important. But the time has not come to start drafting. The game for now is to stay the course.

Mandatory Initial Discovery Pilot Projects

Dr. Lee provided an interim report on the mandatory initial discovery projects in the District of Arizona and the Northern District of Illinois. The projects ran for three years in each court, beginning and concluding a month apart. All judges participated in the Arizona project. Most judges participated in the Northern District of Illinois.

The "pilot order" was docketed in more than 5,000 cases in Arizona. Discovery was filed in about half of them. Ninety-three percent of these cases have closed. In both Arizona and Illinois there is a backlog of cases awaiting trial because of the pandemic. Jury trials are on the lists. The pilot order was entered in more than 12,000 cases in Illinois. Ninety percent of these cases have closed, leaving some 1,200 open.

There are positive things to report about the study. The pandemic affected both districts, so it remains possible to compare their experiences. Case events have been loaded into the study program with the cooperation of the clerks' offices. The FJC has interviewed judges and court staff. In-depth docket data is being collected.

Surveys are sent to the lawyers in closed cases at six-month intervals. More than 10,000 surveys have been sent. There are more than 3,000 responses. That is a great response rate.

The FJC has been working on the study for five years. "It's become part of my mental furniture." It will yield "lots and lots of information."

TAB 19C

JAMES COMER, KENTUCKY
CHAIRMAN

ONE HUNDRED EIGHTEENTH CONGRESS

JAMIE RASKIN, MARYLAND
RANKING MINORITY MEMBER

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND ACCOUNTABILITY
2157 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6143
MAJORITY (202) 225–5074
MINORITY (202) 225–5051
https://oversight.house.gov

July 12, 2024

The Honorable John Roberts
Chief Justice of the United States
Presiding Officer, Judicial Conference
1 First Street, NE
Washington, D.C. 20543

Dear Chief Justice Roberts:

The Committee on Oversight and Accountability (Committee) has been investigating the practice of unaffiliated third parties "investing" in lawsuits in exchange for a percentage of any settlement or judgement, known as "third party litigation funding ("TPLF")."[1] The Committee has received evidence indicating that these investments often hurt, rather than help, litigants, and are sometimes being made by foreign actors. I write to urge the Judicial Conference to examine these unaffiliated funders of litigation and to consider enacting rules requiring disclosures of third-party litigation funding to protect litigants and ensure a fair adjudication of claims.

Third-party litigation funding has been used as a tool for ensuring access to justice, for parties who lack the financial resources to pursue meritorious claims.[2] This mechanism, when used responsibly, has helped to provide necessary financial support to litigants who might otherwise have been unable to afford the costs associated with legal proceedings.[3] However, it is now being abused by domestic and foreign actors. Recently it became public that Fortress Investment Group (Fortress), a private investment firm owned by Abu Dhabi's Mubadala Investment Company, had funded $6.8 billion in litigation financing.[4] In one case, it has been alleged that the firm Beasley Allen's litigation financing agreement with Fortress may have delayed settlement talks and detrimentally impacted claimants.[5]

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[1] *What You Need to Know About Third Party Litigation Funding*, U.S. CHAMBER OF COMMERCE INSTITUTE FOR LEGAL REFORM (June 7, 2024).
[2] *Id.*
[3] *Id.*
[4] *See* Sunjeet Indap, *Johnson & Johnson settlement shows the new stakes in litigation finance*, FINANCIAL TIMES (May 20, 2024).
[5] Amanda Bronstad, *Johnson & Johnson, Citing 'Eye-Opening Emails, Moves to Subpoena Beasley Allen*, LAW.COM (May 17, 2024); *see also* Sunjeet Indap, *Johnson & Johnson settlement shows the new stakes in litigation finance*, FINANCIAL TIMES (May 20, 2024).

Fortress is not the only investment group engaging in questionable practices regarding litigation funding. PG&E Corp. a California utility company, was sued for the role the company played in in the 2017 North Bay Fires and the 2018 Camp Fire and soon thereafter filed for bankruptcy.[6] PG&E later settled the cases for $13.5 billion.[7] However, it was later discovered that the claimant's attorney had received a "'huge' line of credit" from Apollo Global Management (Apollo) and Centerbridge Partners (Centerbridge).[8] While on its own this may seem innocuous, closer examination underscores a troubling divergence of interests and the possibility of manipulation. Appollo held more than $600 million in debt and insurance claims against PG&E and Centerbridge was a shareholder that held nearly $496 million in debt and insurance claims against PG&E.[9] The claimant's attorney had not disclosed these creditors, nor their financial interests in PG&E, to the claimants. This raises serious questions as to whether the attorney was acting in the interest of the claimants, or his benefactors, when negotiating the settlement.

The lack of oversight and transparency of these arrangements, even by judges, has significant impacts on legal proceedings. Transparency in TPLF is essential to maintain ethical standards and preserve the fairness and credibility of our legal system.[10] Without transparency measures in place, there is a strong risk of profit-driven investment funds, both foreign and domestic, directly influencing litigation proceedings with aims that may not be fully aligned with the interests of claimants.[11]

Many states have enacted laws addressing the transparency gap.[12] These laws restrain many forms of TPLF arrangements, ensuring that they operate in the interest of the parties litigating the case.[13] In West Virginia and Wisconsin funding contracts must be disclosed to both parties.[14] In Maine and Vermont litigation funders must register with the state and are limited in how much they can charge in interest.[15] The Northern District of California and the District of New Jersey have issued standing orders to restrict TPLF in specific cases, and recommendations have been presented to the Advisory Committee

[6] *PG&E Bankruptcy and Wildfire Claims*, PGE LAWSUIT GUIDE, (July 1, 2024).
[7] J.D. Morris, *PG&E victim's lawyer scrutinized over Wall Street connections*, SAN FRANCISCO CHRONICLE, (May 2, 2020).
[8] *Id*.
[9] *Id*.
[10] U.S. Gov't Accountability Off., GAO-23-105210, *Third-Party Litigation Financing: Market Characteristics, Data, and Trends* (2022).
[11] *See* Sunjeet Indap*, Johnson & Johnson settlement shows the new stakes in litigation finance*, FINANCIAL TIMES (May 20, 2024).
[12] *Id.*
[13] *Id.*
[14] Consumer Litigation Financing, W. VA. CODE. §46A-6N-6 (2023); *see also*, 2017 Wisconsin Act 235, § 12 WIS. STAT. § 804.01(2)(bg).
[15] Consumer Litigation Funding Companies, VT. STAT. ANN. tit. 8, ch. 74 (2023); *see also* Maine Consumer Credit Code Legal Funding Practices, ME. REV. STAT. ANN. tit. 9-A, § 12 (2007).

on Rules of Civil Procedure for mandatory disclosure requirements.[16] However, these efforts have not yet resulted in consistent enforcement of transparency standards at the federal level.[17]

There is currently no nationwide requirement which would uniformly mandate disclosure of TPLF agreements.[18] Clear, and comprehensive disclosure of TPLF arrangements is essential. Understanding the funding terms, sources, financial details, and potential conflicts of interest are vital to ensuring informed decision-making and guarding against perceptions of undue influence. Such transparency is pivotal in maintaining public trust in the legal profession, demonstrating a commitment to fairness and integrity in litigation decisions.

Therefore, we request that the Judicial Conference review the role TPLF plays in litigation and work towards enforcing transparency nationwide.

The Committee on Oversight and Accountability is the principal oversight committee of the U.S. House of Representatives and has broad authority to investigate "any matter" at "any time" under House Rule X. Thank you in advance for your cooperation with this inquiry.

Sincerely,

James Comer
Chairman
Committee on Oversight and Accountability

cc: The Honorable Jamie Raskin, Ranking Member
Committee on Oversight and Accountability

[16] *Supra* note 10.
[17] *Id.*
[18] *Id.*

TAB 19D

United States Senate
WASHINGTON, DC 20510

July 11, 2024

H. Thomas Byron III, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, DC 20544

Dear Mr. Byron,

We write to urge the Advisory Committee on Civil Rules to promulgate a rule governing commercial third-party litigation funding. A proposal to amend Fed. R. Civ. P. 26(a)(1)(A) to require disclosure of this kind of funding has been before the Committee for more than six years.[1] This rule is needed and should be advanced.

Third party litigation funding has rapidly expanded over the last several years and is now distorting the American civil justice system. Private equity, hedge funds, foreign sovereign wealth funds and other institutions are using civil litigation as an investment opportunity, creating ethical issues and a heightened risk of foreign interference.

These investments are usually secret. Third party litigation funding is rarely disclosed to the court. Indeed, a recent GAO report identified 47 active commercial enterprises engaging in litigation funding.[2] These entities had $12.4 billion in assets and committed at least $2.8 billion to litigation financing in 2021. Plaintiffs are often times unaware that their lawyers are relying on third parties to fund their suits, and these funders may have a priority right to any award a court grants a plaintiff. This undercuts both lawyers' obligations to their clients and plaintiffs' rights. We believe serious ethical considerations are implicated in this situation and a rule addressing it is appropriate.

Mass tort suits are a particular target for litigation funders, who generally invest directly with law firms in a portfolio of cases without engaging with or knowing specific plaintiffs. In 2022, 70% of litigation funding commitments were to mass tort portfolios.[3] This money goes to both the actual costs of litigation and the efforts to advertise, recruit and generate claims, regardless of underlying merit. These funders have a large financial stake in the outcome of these cases, and they orient the outcome of the case around their investment goals, not the benefit of the plaintiffs. As a result, attorneys are incentivized to take cases with large potential payouts even when the claim is not meritorious. This can lead to the inefficient administration of justice,

[1] Proposal to Amend Fed. R. Civ. P. 26(a)(1)(A), No. 17-CV-O (June 1, 2017), supplemented by No. 17-CV-GGGGGG (Nov. 3, 2017), and No. 20-CV-II (Dec. 21, 2020) and No. 23-CV-M (May 8, 2023).
[2] U.S. Government Accountability Office, *Third-Party Litigation Financing: Market Characteristics, Data, and Trends*, GAO-23-105210, at 11 (Dec. 2022)
[3] Westfleet Insider, 2022 Litigation Finance Market Report, at 6.

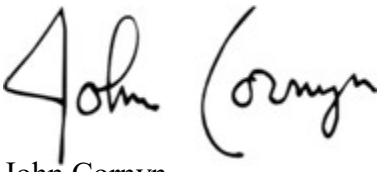
the inability of the court to have the full picture of the case, and the subsuming of the interests of the plaintiff to external concerns.

Litigation funding is an available weapon for foreign investors to attack domestic businesses. There have been reports in the news of a Chinese firm financing intellectual property lawsuits in federal courts in order to undercut its competitor.[4] Other reports indicate that a group of Russian oligarchs who have been sanctioned by the United States have funded litigation in New York.[5] Foreign adversaries could use litigation funding mechanisms to weaken critical industries or obtain confidential materials. These tactics by our foreign adversaries not only harm American businesses, but undermine our national security.

Because of the ethical harms to plaintiffs and the risk of foreign interference, we urge the Committee to formulate a rule of civil procedure that would address these concerns. Third party litigation funding agreements need to be disclosed to the court. Discovery into the agreement and the circumstances surrounding it should also be allowed, to confirm the proper extent of disclosure. Courts should also have the discretion to allocate litigation fees and expenses to the financed party where appropriate, in order to address the risk of meritless suits. Finally, the rule should address the potential ethical pitfalls of such a funding arrangement by placing a fiduciary duty on a funder to the plaintiff in a funded case. A plaintiff must be in control of his or her case.

Another reason a rule like this is needed is to create clarity and consistency. Individual federal judges are moving forward with creating rules for their individual courts. For example, the U.S. District Court for the District of New Jersey adopted a local rule requiring each party to file a certification 30 days after docketing identifying any funder, whether the funder's approval is needed for litigation and settlement decisions, and the nature of the financial interest.[6] The rule also allows additional discovery on the funding agreement upon a showing of good cause. Other courts, including in federal districts in California and Maryland, have established approaches to the issue, whether by creating a standing order or asking for disclosures in specific cases. Consistency would benefit the plaintiffs, the defense bar, and the court.

For these reasons, we urge the Committee to convene and initiate the process of promulgating a federal rule on commercial Third Party Litigation Funding that addresses our concerns.



John Cornyn
United States Senator

Thom Tillis
United States Senator

[4] Emily R. Siegel, *China Firm Funds US Suits Amid Push to Disclose Foreign Ties*, Bloomberg L., Nov. 6, 2023.
[5] *Tackling Foreign Manipulation: The Urgent Need for Regorm in Third Party Litigation Funding*, INST. FOR LEGAL REFORM (Apr. 1, 2024), https://instituteforlegalreform.com/blog/tackling-foreign-manipulation-the-urgent-need-for-reform-in-third-party-litigation-funding/.
[6] *See* D.N.J. L. Civ. R. 7.1.1(a).

TAB 19E

Third-Party Litigation Finance
Articles, Reports, Posts & Select Cases

J&J Talc Suit Law Firms Clash Over $6.5 Billion Settlement (September 11, 2024)
Author(s): Emily R. Siegel
Source: *Bloomberg Law News*
Summary: Law firms leading the suit against Johnson & Johnson over cancer-causing talc products are now fighting each other. The law firm Beasley Allen sued Smith Law Firm and Porter Malouf, alleging that the two firms owe it more than $1 million in litigation expenses and that Smith Law and its founder Robert Allen Smith pushed clients to vote in favor of a controversial settlement deal in the case because of pressure to pay off a large debt—"perhaps as high as $240 million"—to its outside litigation funder. Beasley Allen says it advised clients to vote against the settlement deal, but Smith Law continued negotiations with Johnson & Johnson.

Big Law Grows Litigation Finance to Cut Risk, Please Clients (September 4, 2024)
Author(s): Emily R. Siegel
Source: *Bloomberg Law News*
Summary: The biggest U.S. law firms have grown comfortable with using investments from third parties to pay the cost of lawsuits. Big Law has helped build litigation finance into a $15.2 billion industry, up from $9.5 billion five years ago. The large law firms' comfort has stemmed from a better understanding of the industry and a desire to take on more contingency cases without assuming the risk. Patent litigation accounted for 19% of new capital commitments last year. Firms said antitrust and international arbitration were also popular areas.

Mass Tort Marketer Hires Ex-LexShares CEO to Lead Funding Program (August 20, 2024)
Author(s): Emily R. Siegel
Source: *Bloomberg Law News*
Summary: Consumer Attorney Marketing Group ("CAMG") has hired Max Doyle, former CEO of LexShares, as chief strategy officer. Traditionally, law firms hire marketers to find potential plaintiffs by advertising. However, CAMG works directly with litigation funders and pairs them with lawyers to identify new plaintiffs. The arrangement involves an intermediary firm serving as middleman, helping with clerical, accounting, and management tasks. Once a case is acquired, the intermediary then co-counsels with a separate law firm that does the litigation. In 2020, Arizona became one of only a handful of states that allows nonlawyers to own law firms and split attorney's fees. Private equity firms have moved to Arizona to take advantage of the state's looser rules on law firm ownership.

Third-Party Funding for Litigation Faces States' Scrutiny (August 5, 2024)
Author(s): Brenna Goth
Source: *Bloomberg Law News*
Summary: As evidenced by statements at the recent National Conference of State Legislatures summit, some states are moving to increase transparency in litigation funding through disclosure

requirements. Indiana, West Virginia, and Louisiana have enacted some disclosure requirements this year. Third-party litigation funding is growing. The U.S. Chamber of Commerce Institute for Legal Reform, which opposes the practice, estimates it to be a $15.2 billion industry. States are also concerned about the potential impact of foreign entities on litigation funding. The Louisiana law, for example, requires disclosure of funding from "countries of concern." A federal bill introduced in 2023 would have banned such funding from foreign governments.

NY Courts Weigh Limited Litigation Finance Disclosure Rules (July 25, 2024)

Author(s): Beth Wang

Source: *Bloomberg Law News*

Summary: The New York State courts are considering a proposal to mandate the disclosure of litigation financing agreements in personal injury and wrongful death settlements. The proposal is supported by organizations like Uber and the U.S. Chamber of Commerce. It would require plaintiffs to disclose such agreements upon petitioning for settlement approval, addressing concerns over high-interest rates that could diminish plaintiffs' recoveries, especially for minors. Critics say the requirements are vague and may unfairly advantage defendants, while the New York State Trial Lawyers Association opposes certain aspects like disclosures in wrongful death cases. The committee plans to consider potential revisions to the proposal at its next meeting in September.

House IP Subcommittee Concerns of Foreign Interference in Patent Litigation Are Sensationalized (July 22, 2024)

Author(s): Gautham Bodepudi

Source: *IP Watchdog*

Summary: The author argues that during the recent hearing of the House Subcommittee on Courts, Intellectual Property, and the Internet, members' concerns about foreign interference in U.S. patent litigation are misdirected. At the hearing, witnesses "failed to articulate how unauthorized disclosure of confidential [business] information could occur" in patent litigation. The author asks the question: "If a protective order limits disclosure of confidential information to a specified group . . . then how would the existence of a litigation funder or an agreement with a patent holder enable unauthorized disclosure of material protected under the protective order?" The author asserts that it would not. The article goes on to discuss other concerns, such as the risk that the lack of TPLF disclosure requirements has on national security interests.

Comer Urges Chief Justice Roberts to Examine Litigation Funding (July 12, 2024)

Author(s): Emily R. Siegel

Source: *Bloomberg Law News*

Summary: Representative James Comer (R-Ky.) sent Chief Justice John Roberts a letter on July 12, 2024, urging the Judicial Conference to examine litigation funding in federal courts and to consider promulgating rules to require disclosure of third-party litigation funding. Rep. Comer is Chair of the House Committee on Oversight and Accountability. The article also highlights Judge

Robert M. Dow's previous statements on litigation funding. Judge Dow is the former Chair of the Civil Rules Committee, and currently serves as Counselor to the Chief Justice.

Rep. Issa Says He Will Draft Litigation Finance Disclosure Bill (June 12, 2024)
Author(s): Emily R. Siegel
Source: *Bloomberg Law News*
Summary: At the end of the congressional hearing on litigation finance in the intellectual property arena, Representative Darrell Issa (R-Ca.) indicated he would be drafting legislation to require disclosure of third-party litigation financing arrangements in civil suits. Rep. Issa is Chair of the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet. (Note: Rep. Issa announced on July 11, 2024, that he introduced the Litigation Transparency Act of 2024.)

The U.S. Intellectual Property System and the Impact of Litigation Financed by Third-Party Investors and Foreign Entities (June 12, 2024)
Author(s): House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet
Source: *House Judiciary Committee's website*
Summary: The House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet will hold a hearing on Wednesday, June 12, 2024, at 2:00 p.m. ET. The hearing, "The U.S. Intellectual Property System and the Impact of Litigation Financed by Third-Party Investors and Foreign Entities," will examine recent developments with respect to intellectual property (IP) litigation financed by third party investors and foreign entities, including the impact of those developments on the U.S. IP system and our national security.

WITNESSES:

- Hon. Bob Goodlatte, former U.S. Representative (VA-6); former Chairman, House Judiciary Committee
- Paul Taylor, Visiting Fellow, National Security Institute, George Mason University
- Donald Kochan, Professor of Law and Executive Director of the Law and Economics Center, Antonin Scalia Law School, George Mason University

Litigation Funders Set to Prosper in Proposed NY Rule Change (April 10, 2024)
Author(s): Emily R. Siegel
Source: *Bloomberg Law News*
Summary: This article reports on the New York City Bar Association's proposed amendments to Rule 5.4. (See entry from April 5, 2024) Rule 5.4(a) bans lawyers and law firms from sharing fees with nonlawyers.

Proposed Amendments to New York Rule Of Professional Conduct 5.4 As Concerns Non-Party Litigation Funding (April 5, 2024)
Author(s): New York City Bar Association Working Group on Litigation Funding
Source: *New York City Bar*

Summary: This a report from the New York City Bar Association's (City Bar) Committee on Professional Responsibility. In 2020, the City Bar's Working Group on Litigation Funding presented a report suggesting two possible revisions to New York Rule of Professional Conduct 5.4 in light of its findings concerning non-party litigation funding. The Working Group's proposals would permit funding for a particular case or a law firm's practice more generally while attempting to ensure lawyer independence. The Committee recommended that Rule 5.4 be amended in ways that somewhat deviated from the Working Group's proposals. The Committee agreed with the Working Group's conclusion that non-recourse litigation funding tied to the results of specific cases ought to be permitted. But it also understood that the Ethics Committee had concluded that Rule 5.4, in its current form, prohibits such financing arrangements. The Committee did not believe it prudent to enshrine in a Rule what provisions any such financial arrangements must or must not contain, leaving the details to attorneys. The Committee also concluded that clients whose cases are subject to such financial arrangements should be notified and given an opportunity to inquire, but informed consent from clients is not required. Finally, the Committee would add financers to the list of those who a lawyer may not permit to interfere with his or her professional independence or to cause him or her to disclose a client's confidential information or to incur a conflict of interest.

Litigation Finance Industry Shrinks After Years of Growth (March 27, 2024)

Author(s): Emily R. Siegel

Source: *Bloomberg Law News*

Summary: This article describes Westfleet Advisors' 2023 report. Westfleet Advisors' data includes commercial funders investing in cases and law firms in the United States. The firm said it changed its methodology for calculating assets under management by more accurately accounting for undrawn capital commitments for certain industry participants. In its 2022 report, Westfleet said there were $13.5 billion assets under management. In the new report, it revised last year's figure to $15.1 billion. The article also explains that, as lawsuit investments tailed off, some litigation funders were forced to lay off workers and other firms sold off portions of assets. Portfolio structures, in which funders finance bundles of cases to hedge risk, made up 66% of the types of deals. The largest category of funded matters continued to be patent litigation, accounting for 19% of commitments, Westfleet found. The year was also marked by a wave of employees leaving established funders to open their own firms or to work in adjacent sectors such as insurance.

BigLaw Is Greater Part of Litigation Funding Industry 'In Flux' (March 27, 2024)

Author(s): Ryan Boysen

Source: *Law360*

Summary: This article describes Westfleet Advisors' fifth annual Litigation Finance Market Report for 2023. The litigation funding industry is entering an era of "consolidation" and "shakeout" after years of rapid growth. Even as the total value of new deals dropped to $2.7 billion from $3.2 billion in 2022, the amount of new deal money allocated to BigLaw firms rose to $960 million last year, a jump of $70 million from $890 in 2022. That means BigLaw firms accounted for 35% of all new litigation funding outlays in 2023, up from 28% in 2022. Westfleet CEO Charles Agee told Law360 Pulse that the drop in new deal value came as somewhat of a surprise, rising interest rates have made legal finance relatively less attractive. There has also been a rise in "contingent risk insurance," which can be used in ways similar

to litigation funding, but the Westfleet thinks fears of insurance displacing litigation financing are overblown. Westfleet is also closely monitoring the increased use of litigation funding proceeds toward claim monetization, as well as increased allocation toward corporate portfolios. Claim monetization is when a party borrows money using a legal claim as collateral but uses the money received for something other than funding the lawsuit or lawsuits tied to that claim.

Rocade Capital Backs New UK Litigation Funder With $100 Million (Feb. 27, 2024)
Author(s): Emily R. Siegel
Source: *Bloomberg Law News*
Summary: As an industry, 44 funders managed $13.5 billion in U.S. commercial litigation investments in 2022, up 9% from the previous year, according to Westfleet Advisors. This article reports that Virginia-based Rocade Capital, a litigation funder spun off from EJF Capital LLC in 2023, is investing $126.7 million in a new London-based firm, Winward Ltd. Since its predecessor was founded in 2014, Rocade has funded approximately $1.1 billion of investments. Winward plans to invest in 18 cases over the next three years in common law jurisdictions in Europe, Australia, and Canada and will focus antitrust, arbitration, contract, group action, insolvency, and tort. The UK litigation funding market is in flux after the UK Supreme Court found litigation funding agreements seeking a percentage of damages are unenforceable. Jeremy Marshall, Winward's chief investment officer and managing director, suggested loans to law firms may be a way around the PACCAR decision. Marshall previously worked for Bentham Europe and Omni Bridgeway. For now, Marshall will be Winward's sole employee and will select cases subject to review by an advisory committee of professionals in the funding and legal markets. According to the author, there has been a push particularly in the UK for investing in class actions with opt-out claims, but Marshall said that opt-outs are not the only type of case Winward plans to fund. Winward will receive insurance coverage for adverse costs from Arcadian Risk Capital and Litica Ltd.

Judge's Order Deals Blow to Sysco, Burford Capital in Pork Suits (February 14, 2024)
Author(s): Emily R. Siegel & Katie Arcieri
Source: *Bloomberg Law News*
Summary: A magistrate judge in the U.S. District Court for the District of Minnesota denied a motion to substitute a Burford Capital affiliate as plaintiff in two lawsuits Burford funded for food distributor Sysco Corp. Burford provided Sysco with $140 million to pursue the lawsuits, but they disagreed over Sysco's attempt to settle with some defendants. The magistrate judge found substitution would be against public policy as it would have a litigation funder step in mid-way through litigation to prevent settlement of litigation. Tom Baker, a law professor at the University of Pennsylvania, said that he expects litigation funders will view the assignment of a claim as riskier and it could chill some transactions. But the article reports that people in the industry see the cases as more of an anomaly. At a Florida senate hearing to discuss a pending disclosure bill, state Senator Jay Collins brought up the clash between Sysco and Burford as one reason he introduced the legislation.

Elon Musk Is Funding Ex-'Mandalorian' Actress's Suit Against Disney (February 6, 2024)
Author(s): Brooks Barnes
Source: *New York Times*

Summary: This article reports that Elon Musk agreed to fund a wrongful-termination lawsuit against the Walt Disney Company filed by the "Mandalorian" actress Gina Carano. Musk posted on X: "Please let us know if you would like to join the lawsuit against Disney." X's head of business operations, Joe Benarroch, said in a statement that Musk's company was "proud to provide financial support for Gina Carano's lawsuit, empowering her to seek vindication of her free speech rights on X and the ability to work without bullying, harassment or discrimination." Last year, Musk said he would fund legal action for X users who said they had been discriminated against at work because of their posts on the platform. At the time, he said he would "go after the boards of directors of the companies too." According to the article, "Disney dropped Ms. Carano, a former mixed-martial artist, from 'The Mandalorian' in 2021 after she espoused baseless conspiracy theories and right-wing positions, some of which were seen as homophobic and antisemitic, in a series of social media posts."

Capital Flows into Litigation Funds with Social Justice Impact (February 2, 2024)

Author(s): Emily R. Siegel & Justin Wise

Source: *Bloomberg Law News*

Summary: This article reports on litigation funding firms—Vallecito Capital, TRGP Capital, Flashlight Capital, and Aristata Capital—being launched to effect social change. While investing in capital markets to achieve policy or socially conscious goals gained influential champions years ago, the trend of litigation funders seeking social change and profits through the court system developed just in the past nine months, according to this article. "Conservative, liberal, whatever it might be, you're seeing more capital moving into this space," said Rob Ryan, chief executive officer at Aristata Capital.

Third-Party Litigation Finance: Law, Policy, and Practice, First Edition (February 1, 2024)

Author(s): Anthony J. Sebok

Source: *Aspen Publishing*

Summary: From the casebook blurb: Litigation finance sits at the intersection of many well-known subjects within the law school curriculum: contracts, torts, civil procedure, evidence, professional responsibility, insurance, and capital markets. There are no professionally produced materials for a professor who wants to teach an entire semester-long course on litigation finance. This casebook is an attempt to fill that gap. Its ten chapters provide a foundation for a two- or three-credit class, although many of the chapters could also be used individually as supplemental material for a free-standing unit on litigation finance in another course, such as torts, civil procedure, or the law of lawyering. Notwithstanding the fact that the law of litigation finance is rapidly developing as investment in litigation and legal services grows, the cases and other materials contained in this book will remain relevant and useful to anyone trying to teach students about this important new body of law.

Trump Can't Inquire About Carroll's Litigation Funding at Trial (January 9, 2024)

Author(s): Dorothy Atkins

Source: *Law360*

Summary: District Judge Lewis A. Kaplan mostly sided with E. Jean Carroll on multiple evidentiary issues in her defamation suit against former President Donald Trump, among other things, barring Trump from asking about her litigation funding. Trump sought to examine Carroll about her counsel and the litigation funding after she acknowledged in a deposition that her

attorneys obtained additional funding from a nonprofit to offset certain expenses and legal fees. Trump claimed the nonprofit was supported by a rival Democratic presidential candidate. Although the judge allowed limited discovery into the issue of who was funding Carroll's lawsuits, he ultimately ruled in the prior trial that any probative value of the evidence would be outweighed by the prejudicial impact of it.

By the Numbers: Five Big Things in Litigation Finance in 2023 (December 26, 2023)

Author(s): Emily R. Siegel

Source: *Bloomberg Law News*

Summary: This article reports on the five biggest developments in litigation finance in 2023. (1) Sysco Corp. sued Burford Capital, accusing Burford of meddling in Sysco's efforts to settle several antitrust lawsuits, and Sysco eventually assigned its claims to an affiliate of Burford, Carina Ventures LLC. (2) Burford's victory in the YPF case. (3) The mixed results of legislative efforts in Montana, Louisiana, and Congress. (4) In a class action involving truck manufacturer PACCAR, the UK Supreme Court found that litigation funding agreements in which the funder's recovery is a percentage of the damages are unenforceable. Legislative action may partially reverse the PACCAR decision. (5) Judge Connolly, D. De., in one of the most popular venues for patent litigation has a standing order that requires disclosure of litigation funding and found IP Edge LLC attorneys violated professional conduct rules.

Insurers Invade Litigation Finance, Boosting Law Firm Options (December 19, 2023)

Author(s): Emily R. Siegel

Source: *Bloomberg Law News*

Summary: This article reports that insurance brokers such as Aon, CAC Specialty and Willis Towers Watson Plc are invading the space of litigation finance companies as the asset class has grown in popularity since its infancy a decade ago. In litigation finance, investors pay the cost of a lawsuit—or for a portfolio of lawsuits—in return for a portion of the award in successful cases. Insurance-backed legal finance involves covering all of a law firm's out-of-pocket costs, and a percentage of the legal fees, on a case or portfolio of cases. The law firm or client could then approach a capital provider and offer the underlying litigation and the insurance policy as collateral. Litigation funders are typically more willing to fund early-stage cases than insurance companies.

Judge's Litigation Funding Probe Reveals IP Edge's Human Toll (December 4, 2023)

Author(s): Michael Shapiro & Emily R. Siegel

Source: *Bloomberg Law News*

Summary: This article reports on Chief Judge Colm Connolly's investigation into the attorneys for—and owners of—limited liability companies created by IP Edge, one of the highest volume filers of patent lawsuits in the United States. On paper, the LLCs and patents were owned by non-practicing entities, who do not make or sell the products themselves. Rather, the three patent owners in this article were a surgeon's assistant, a food truck operator, and a software salesman. The judge found that IP Edge structured the LLCs so that IP Edge and its affiliates received the lion's share of the litigation benefits while the on-paper owners "assume all the risk" from the lawsuits, including attorneys' fees awards or court-imposed sanctions. The judge emphasized the sophistication mismatch between the lawyers at IP Edge, and the people they recruited for the litigation campaign, who would only get 5-10% of the profits from these

suits. According to a Baker Botts partner who specializes in patent litigation defense, the ruling revealed IP Edge's "unbelievable disregard" for people recruited as owners of the LLCs that filed suits. Although the judge did not impose sanctions in the 105-page memorandum opinion, he referred IP Edge attorneys to the Supreme Court of Texas Unauthorized Practice of Law Committee and flagged the cases for the U.S. Department of Justice's Criminal Division and to the U.S. Patent and Trademark Office.

Litigation Finance Group Shrugs Off Forced Disclosure Push (November 15, 2023)

Author(s): Emily R. Siegel

Source: *Bloomberg Law News*

Summary: The International Legal Finance Association argues that concerns that foreign entities are exerting influence on U.S litigation via third-party financing are entirely overblown. ILFA represents 21 litigation funders, a large portion of the total 40 or 50 commercial financers. ILFA is the face of the commercial litigation finance industry's fight against disclosure and has spent $150,000 on lobbying this year. It accuses the U.S. Chamber of Commerce, which has spent $49 million on lobbying this year, of scaremongering. This article also reports that Montana enacted a bill requiring disclosure of litigation funding agreements in civil cases, but Louisiana's governor vetoed a disclosure bill that had passed their legislature. Federally, the focus is on the presence of foreign actors in litigation finance. Burford Capital has an $872 million funding arrangement with a sovereign wealth fund, which it extended in October 2023. Fortress Investment Group, which is raising its second fund to invest in legal assets, is in the process of having 90% of its equity acquired by Mubadala Investment Company, a sovereign investor based in Abu Dhabi. However, the industry has seen some tightening, including layoffs at Validity, the investment team leaving Augusta for Omni Bridgeway, and Woodsford trying to sell off its passive U.S. assets.

China Firm Funds U.S. Suits Amid Push to Disclose Foreign Ties (November 6, 2023)

Author(s): Emily R. Siegel

Source: *Bloomberg Law News*

Summary: According to this article, a Chinese firm, Purplevine IP, is funding the patent litigation of a Florida-based tech firm, Staton Techiya, against Samsung and Harman, which are Korean companies. *Staton Techiya v. Harman International Industries*, D. Del., 23-cv-00802-CFC. Purplevine's CEO is also VP/group general counsel for TCL, a Chinese consumer tech company. Purplevine's role was revealed because Judge Colm F. Connolly issued a standing order in April 2022 insisting that litigation finance be disclosed for cases in his courtroom. The article also reports that House Speaker Mike Johnson (R-La.) and two other lawmakers in September introduced legislation (H.R. 5488, S. 2805) that would require disclosure of foreign entities funding lawsuits in U.S. courts. The proposal would ban sovereign wealth funds and foreign governments from engaging in the practice. "Leaving our courts unprotected from foreign influence—such as from China—poses a major risk to U.S. national security," said Sen. John Kennedy (R-La.). Gary Barnett, executive director of the International Legal Finance Association, said national security concerns around litigation finance are "pure speculation."

Rubio, Scott Push for Transparency for Foreign Third Party Litigation Funding in U.S. Courts (November 3, 2023)

Author(s): Marco Rubio and Rick Scott

Source: *Senator Rubio's website*

Summary: U.S. Senators Marco Rubio (R-FL) and Rick Scott (R-FL) sent a letter to the chief judges of Florida's three federal districts, requesting they consider disclosure requirements for foreign TPLF in their respective jurisdictions. "The potential impacts of allowing unfettered and undisclosed foreign TPLF throughout the judiciary could be severe, unless properly addressed. Most alarmingly, these foreign funders have the potential to provide hostile foreign actors with sufficient sway to exert undisclosed influence on litigation moving through the federal judiciary, including litigation related to critical infrastructure. Foreign actors attempting to capitalize on such influence may seek to, among other things, advance frivolous lawsuits, needlessly and excessively prolong litigation disputes, exacerbate domestic discord, or seize control of the litigation from the case's original parties."

Coalition of Large Companies Write to House Oversight and Accountability re TPLF (October 31, 2023)

Author(s): 25 Companies

Source: *Institute for Legal Reform (U.S. Chamber of Commerce) Press Release*

Summary: A cross-industry group of 25 large companies with a combined market capitalization in the trillions of dollars sent a letter to the House Committee on Oversight and Accountability following a September 13 hearing on TPLF. They raised concerns about "[h]idden TPLF players" who "operate from the shadows and often manipulate civil litigation for their own purposes." They highlight MDL mass tort litigation and consumer class actions as places filled with dubious claims to force defendants to settle where upon the standard 33-40% contingency fee arrangements will divert settlement proceeds the lawyers and their backers. They also note patent litigation as an area of concern "with TPLF now involved in approximately 30% of all patent litigation cases." They invite "further oversight and crafting corrective legislation or rules." Signatory companies include AT&T, Verizon, Comcast, Bayer US, J&J, Lyft, Uber, Exxon, Shell USA, Intel, Merek & Co., The Home Depot, Liberty Mutual Ins., and Travelers.

Bogus Claims Threaten to Taint Lejeune Toxic Water Payout (October 30, 2023)

Author(s): Kaustuv Basu and Emily R. Siegel

Source: *Bloomberg Law News*

Summary: The government has agreed to pay billions of dollars to victims of toxic water at Camp Lejeune where more than 1 million people may have been exposed to contamination. This article reports on the fraudulent claims being filed and explains that a surge in available litigation funding means extra resources for law firms to find and register as many potential plaintiffs as they can before the window to file claims ends next August. According to the article, "[a] surge in available litigation funding" by "call centers without oversight" has produced the problem. A Navy spokesman said it had received about 117,000 claims by mid-October and "is working diligently to identify potential fraud during the claims review process." A consultant told Bloomberg Law that "lenders by mid-year had committed nearly

$2 billion to firms filing Camp Lejeune lawsuits." "More than $145 million had been spent last year on legal advertising related to the Camp Lejeune litigation."

NFL Concussion Settlement Claims Process Not Available to Lender (October 27, 2023)
Author(s): Peter Hayes
Source: *Bloomberg Law News*
Summary: Thrivest Specialty Funding, LLC, loaned money to NFL players who were waiting to receive their awards in exchange for a partial assignment of settlement proceeds. The claims administrator later established the funder rules that "(1) whenever there is a third-party funding agreement, settlement awards will be paid directly to class members—not to the class members' lawyers; (2) the payment of an award 'has no bearing whatsoever' on the class member's potential obligations to a third party; and (3) any dispute between a class member and a third-party funder with respect to the disposition of settlement proceeds 'must be litigated or arbitrated in an appropriate forum outside of the claims administration context.'" Thrivest moved in the district court to revise the funder rules to eliminate the direct payment provision, but the district court denied the motion. In an unpublished 2-1 opinion, the Third Circuit dismissed the appeal for lack of jurisdiction, holding that the "'purely administrative' order to 'distribute funds in a particular way' presented 'little for an appellate court to review." According to the majority, the post-settlement order was neither final nor sufficiently important to warrant review under the collateral order doctrine. The dissent would have found there was jurisdiction under the collateral order doctrine but affirm on the merits.

Ex-Supreme Court Clerks Find Big Money Opportunities in Litigation Finance (October 23, 2023)
Author(s): Jimmy Hoover
Source: *Law.com*
Summary: This article reports on former Supreme Court clerks' involvement in litigation funding. For example, a few years after finishing their clerkships, three clerks founded their own litigation fund called Gerchen Keller Capital, soon becoming one of the biggest players in the emerging industry with more than $1 billion in managed assets. In 2016, Burford acquired the fund for $160 million. Another clerk has commented that, as opposed to perhaps other areas of finance, litigation funding relies on lawyers to assess the legal risk in a case before making an investment. Working as a judicial law clerk is particularly good preparation. "[T]here is a lot of symmetry actually between the funding funnel and the Supreme Court cert funnel."

Unlikely Colorado Court Vexes $8 Million Litigation Finance Win (October 19, 2023)
Author(s): Roy Strom
Source: *Bloomberg Law News*
Summary: This article describes the procedural history of case where a litigation funding agreement was set aside by a Denver Probate Court judge based on a usury argument. Horn and Noble Prestige entered into a litigation funding agreement in 2011 in which the funder gave Horn $500,000 in exchange for $5 million or 5% of his award, whichever was greater. Additionally, Horn was not allowed to accept a settlement worth less than 90% of the estimated $100 million value of the case. According to the article, funders usually say they exert no control over settlements. Horn settled for $57 million, and Noble Prestige alleged Horn breached the contract. In 2017, the probate judge found Horn had a mental health condition rendering him

incapable of making decisions regarding his lawsuit, so the judge placed the settlement proceeds in a conservatorship. An arbitration panel in Hong Kong awarded $5 million to Noble Prestige (now $8 million with interest). But the conservator ruled that Horn's estate could not pay a $5 million award to Nobel Prestige because the terms of the agreement were usurious, calling the deal a loan facility agreement "disguised" interest. After Noble Prestige attempted to enforce the arbitration agreement in Florida district court, the Eleventh Circuit vacated a preliminary injunction that held up $10 million from estate, holding that the Denver probate court held exclusive jurisdiction over the estate *res*. (The district court retains *in personam* jurisdiction to the extent Noble Prestige seeks to enforce arbitral awards against Horn.) This article makes clear it is rare for a usury argument to prevail.

Plaintiff Bias Is Weak Basis to Reveal Litigation Funding Deals (September 9, 2023)

Author(s): Casey Grabenstein & Andrew Schwerin

Source: *Bloomberg Law News*

Summary: This article reports on two different approaches taken by magistrate judges on whether plaintiff bias justifies discovery about litigation funding. A magistrate in Delaware granted a motion to compel and ordered individual members of a plaintiff LLC to testify about their precise financial stake in the litigation. Another magistrate judge in California denied Netflix's motion compel the production of litigation funding documents, rejecting its argument that the documents were relevant to bias without "a specific, articulated reason to suspect bias or conflicts of interest." The authors agree with the California magistrate's approach, arguing that litigation funding and the size of the plaintiff's stake in the case does not change their motivation to win and that permitting cross-examination of witness based on litigation funding could confuse juries and potentially prejudice plaintiffs who cannot afford to litigate on their own.

Litigation Funder Woodsford Seeks Portfolio Sale in Market Shift (September 15, 2023)

Author(s): Emily R. Siegel

Source: *Bloomberg Law News*

Summary: This article reports that Woodsford Group Ltd., a UK litigation funder, is looking to sell its portfolio of passive U.S. investments so it can focus on large-scale lawsuits that allege corporate wrongdoing. The company wants to shift from investing in cases that law firms generate and instead wants to identify and organize suits on its own. It will organize shareholders in seeking compensation on a non-litigious basis and, failing that, provide litigation funding. The company decided to shift after identifying a gap in the market due to a 2010 U.S. Supreme Court case holding that security cases with significant foreign elements cannot be tried in the United States. Woodford wants to find security suits previously under U.S. purview and orchestrate them abroad even though many of the claimants would still be in the United States.

Unsuitable Litigation: Oversight of Third-Party Litigation Funding - United States House Committee on Oversight and Accountability (September 13, 2023)

Author(s): House Committee on Oversight and Accountability

Source: *(witnesses) Maya Steinitz, Erik Milito, Erik Milito, Erik Milito, Erik Milito*

Burford Eyes 37,000% Return in $16 Billion Argentina Award (September 9, 2023)

Author(s): Bob Van Voris and Emily R. Siegel

Source: *Bloomberg Law News*

Summary: This article reports on a district judge awarding $16 billion against Argentina over its 2012 seizure of oil company YPF, S.A. Argentina has vowed to appeal the award. If the award stands, Burford Capital will receive around $6.2 billion, which would give the litigation funder more than a 137-fold return on its initial investment. Burford has paid around $50 million in attorneys' fees to date for the YPF case and previously sold more than a third of its interest to other investors, mainly large hedge funds, for $236 million.

Booming Litigation Funders Dealt Blow by UK Top Court Ruling (July 26, 2023)

Author(s): Upmanyu Trivedi

Source: *Bloomberg Law News*

Summary: The UK Supreme Court held that litigation funders may not provide funds for antitrust class actions in return for a share of the judgment. UK rules prevent "claim management services" from making damages-based financing deals with lawyers in antitrust cases. Funders were disappointed with the ruling, calling it detrimental to plaintiffs' lawyers and funders, but they are expected to restructure their deals to make them compliant. One lawyer said that the decision "levels the playing field between funders and law firms."

Burford-Backed Investors Seeking $16 Billion in Gas Deal Payout (July 26, 2023)

Author(s): Emily R. Siegel

Source: *Bloomberg Law News*

Summary: The article discusses the upcoming trial to determine how much Argentina would pay investors in the energy company YPF SA after Argentina nationalized it in 2012. Summary judgment had previously been granted to the investors, who are backed by litigation financer Burford Capital. Burford invested $16.6 million in suits against Argentina in 2012. After the investors won summary judgment, Burford's shares jumped over 30% on the market. Burford stands to receive most of the damages awarded.

Litigation Funders Bet Billions on Veterans' Toxic Water Claims (July 20, 2023)

Author(s): Emily R. Siegel & Kaustuv Basu

Source: *Bloomberg Law News*

Summary: This article reports on litigation funding in the Camp Lejeune mass-tort case. Lenders have committed almost $2 billion so far to firms filing claims in the case. At least one-third of the claims are estimated to ultimately be backed by litigation financers. One law firm sought a loan of over $50 million. This is in part because the litigation is seen as close to a "sure thing" as one can have, and the payout would be backed by the federal government. Over 75,000 claims have been filed so far with the Navy, and tens of thousands of those claims are anticipated to become lawsuits in E.D.N.C. More than $145 million was spent on advertising in 2022 to recruit potential victims. Without disclosures, UCC filings are the only way to identify potential funding arrangements, but that the amount or reason for the loan are not disclosed. The article then discusses several law firms and lenders involved in the litigation, including South Carolina-based Bell Legal Group, which lobbied Congress not to limit attorney's fees from Camp Lejeune litigation. (The article also notes that West Virginia has begun "attempting to force disclosure" of litigation-funding agreements.)

Judge Threatens Litigation Funders in Apple Case with Sanctions (July 19, 2023)
Author(s): Michael Shapiro
Source: *Bloomberg Law News*
Summary: A magistrate judge in S.D. Cal. issued show-cause orders to two plaintiffs in a patent-infringement suit against Apple. The order relates representations the plaintiffs made about their relationship with litigation funder Burford Capital (the representations were redacted) in seeking to quash subpoenas from Apple.

Private Equity Critic Sounds Alarm on Mass Tort Suit Investors (June 22, 2023)
Author(s): Roy Strom
Source: *Bloomberg Law News*
Summary: This article reports on a draft article by Professor Samir D. Parikh (Lewis & Clark Law School). Prof. Parikh argues that the rapid increase in outside funding in mass-tort cases gives the investors the ability to control the outcomes of those cases, to the detriment of the people actually harmed by faulty products. He admits not having "hard evidence" that it is actually happening but that it is "only a matter of time." He says that he has interviewed lawyers in both the plaintiff and defense bars as well as counsel at major companies. Although funders say that plaintiffs retain control of major litigation decisions, including settlement discussions, Prof. Parikh "doesn't buy it." His essay cites the dispute between Sysco and litigation funder Burford Capital. The article appears critical of Prof. Parikh's argument—it highlights Prof. Parikh's assertion that Sysco was "oblivious" to the fact that it had given up control over settlement decisions (which seems ridiculous if taken at face value), and it opines that Prof. Parikh's conclusions are "colored by his previous research critical of private equity firms" for using "aggressive terms in debt negotiations to exert leverage over creditors." The article concludes by outlining Prof. Parikh's prediction of a three-step process called the "Alchemist's Inversion." First, litigation funders will be incentivized to create big mass-tort cases without checking closely whether the claimants actually have suffered the alleged harm; second, the funders will try to make those claims more valuable (e.g., unnecessary surgeries paid for by backers in pelvic-mesh litigation); and then the funders will control settlement decisions. Prof. Parikh anticipates writing a sequel article to make recommendations for how to deal with the increase in mass-tort litigation funding.

Opaque Capital and Mass Tort Financing (June 13, 2023)
Author(s): Samir D. Parikh
Source: *133 Yale L.J.F. (forthcoming 2023)*

Litigation Finance Revealed in Rare Move by 'Open' Company (June 13, 2023)
Author(s): Emily R. Siegel
Source: *Bloomberg Law News*
Summary: SilcoTek Corp. voluntarily revealed that it is using litigation finance to pay for a patent-infringement suit. It cites its ethos of being "extremely open" both internally and externally. It declined to reveal how much funding it took, citing an NDA with its funder, Omni Bridgeway. This is extremely unusual in the industry; plaintiffs and litigation funders usually fight disclosure requirements. (The article mentions that four states now have laws requiring disclosure of litigation-finance agreements: New Jersey, Wisconsin, California, and Montana.) Omni warned SilcoTek about the risks of disclosing its funding agreement,

cautioning that defendants may try to subpoena more information about the arrangement or "start a discovery sideshow that could end up costing more money." Although critics like the Chamber of Commerce argue that funders will exert influence over the litigation, SilcoTek says that Omni Bridgeway is not in control—they let SilcoTek make all the decisions, including which lawyers to hire.

Litigation Funders Say Capital Becomes Scarce as Recession Looms (June 2, 2023)
Author(s): Emily R. Siegel
Source: *Bloomberg Law News*
Summary: This article reports on additional economic difficulties for litigation funders. It notes Validity Capital's woes (see below) and that UK funder Lionfish is up for sale after losing 4 million euro from two cases it invested in. Litigation is being seen more as a risky asset class. Despite high demand for litigation financing because of inflation and tighter credit, those same factors are discouraging potential investors. Some firms are speculated to be in "harvest mode," managing only old investments. Some funders are also trying to sell off old investments to obtain liquidity.

Litigation Funder Cuts Staff as Backer Slashes Future Commitment (June 2, 2023)
Author(s): Roy Strom
Source: *Bloomberg Law News*
Summary: This article reports that Validity Capital is laying off half of its staff of 20. It plans to maintain a slimmer business going forward, investing only in patent cases. Its private equity backer, TowerBrook Capital, plans to harvest returns from the roughly 60 cases it is already committed to fund after concluding that Validity was not "creating enterprise value apart from case returns" and "could not be sold." TowerBrook expects the cases to generate good returns and will not sell its rights in them. Validity will focus on patent cases alone going forward because they outperformed (with the group winning eight out of eight cases). There haven't been many sales of litigation-financing companies. Since mid-2018, when Validity launched, Burford shares had fallen by about one-third, and Omni Bridgeway's shares have remained flat. But there is a growing secondary market for litigation-finance deals.

DoorDash Denied Bid to Examine Chicago Deal with Outside Counsel (May 26, 2023)
Author(s): Ufonobong Umanah
Source: *Bloomberg Law News*
Summary: After the City of Chicago sued food-delivery service DoorDash for misleading consumers about the cost of their orders, DoorDash raised an affirmative defense that the city's contingent-fee arrangement with its law firm gave the firm a financial stake in the suit. That stake, according to DoorDash, was "contrary to the city's obligation to act [in] the public interest" and "violate[d] DoorDash's due process rights." DoorDash moved to compel discovery of all nonprivileged documents relating to the city's retention of the firm, not limited to the case against DoorDash. The court denied DoorDash's motion in part, writing that such contingency-fee arrangements are acceptable. Other aspects of DoorDash's motion were too broad or were "supported mostly by speculation and conjecture."

Connolly 'Easily' Tosses Latest Bid to End Lawsuit Funding Probe (May 23, 2023)
Author(s): Christopher Yasiejko

Source: *Bloomberg Law News*

Summary: Chief Judge Connolly denied a plaintiff's request to set aside his order to produce documents and communications regarding litigation financing. The plaintiff contended that the district court lacked jurisdiction to issue and enforce the order because the plaintiff voluntarily moved to dismiss its claims and because the defendants did not present the concerns leading to the order. The judge found that a party cannot deprive a court of its inherent power to investigate fraud on the court merely by filing a notice of dismissal.

Litigation Finance Disclosure Requirement Advancing in Louisiana (May 23, 2023)

Author(s): Emily R. Siegel

Source: *Bloomberg Law News*

Summary: The article describes a bill in Louisiana to require disclosure of litigation-financing arrangements; the bill had been voted out of committee (8–5). It would invalidate a litigation-financing contract if it was not disclosed within 60 days. The bill's sponsor, Senator Barrow Peacock, cited national-security concerns as a motivation. A litigation funder who testified before the committee called those concerns speculative, and he also pointed to a Louisiana rule already discouraging litigation finance. The U.S. Chamber of Commerce supported the bill. The article notes that Wisconsin and New Jersey already require disclosure. (Update: The bill was vetoed by Louisiana's Democratic governor in June 2023. *Litigation Finance Disclosure Legislation Vetoed in Louisiana*.)

Agenda for American Law Institute Annual Meeting (May 21, 2023)

Summary: Lists a two-hour CLE ethics program called "The Issues and Ethics of Litigation Financing." Speakers include Jiamie Chen (D.E. Shaw & Co.), Victoria Shannon Sahani (Boston University School of Law), Virginia A. Seitz (Sidley Austin), and Hon. Sarah S. Vance (U.S. District Court for the Eastern District of Louisiana). Moderated by Tom Baker (University of Pennsylvania Carey Law School).

Clients Embrace Litigation Finance to Cut Costs in Tough Economy (May 18, 2023)

Author(s): Emily R. Siegel

Source: *Bloomberg Law News*

Summary: This article reports that litigation finance is seen as a way for clients to reduce risk and avoid borrowing money as interest rates are rising. Omni Bridgeway saw 30% growth in funding requests this fiscal year over last year, and Validity Finance had the highest number of leads ever in the first quarter of 2023. In the year ending in June 2022, U.S. litigation funders made more than $3.2 billion in new commitments to lawsuits, an increase of 16% over the previous 12-month period. Burford Capital has also seen an increase in funding requests from firms that don't usually work on contingency.

Litigation Funders Fight over Loans to Houston Injury Law Firm (Apr. 19, 2023)

Author(s): Emily R. Siegel

Source: *Bloomberg Law News*

Summary: The article discusses legal battles among two litigation funders and a personal-injury law firm that has been accused of fraud. The battles highlight the growing trend in which litigation funders provide general loans to lawyers and firms, and those loans are often used to pay off

existing debts. This is because mass torts have become more popular, so financers are becoming more flexible in how they are distributing loans.

Trump Protests Democratic Donor Backing Rape-Accuser's Suit (Apr. 13, 2023)
Author(s): Erik Larson & Zoe Tillman
Source: *Bloomberg News*
Summary: E. Jean Carroll, who sued Donald Trump for rape and defamation, received funding for her lawsuit from Reid Hoffman, the cofounder of LinkedIn who is also a major Democratic donor. Carroll had denied receiving outside funding during a deposition, but she did receive funding from a nonprofit organization that Hoffman had donated to (though Hoffman denies knowing ahead of time that his donation would fund Carroll's suit). Trump's lawyer claims that the funding is part of a partisan effort to take down the former president. Carroll said that she was not aware of the funding during her deposition, and it was an inappropriate question in any case. The trial judge denied Trump's request to continue the trial but gave his lawyer another chance to question Carroll about her knowledge of the financing arrangements and ordered Carroll's team to disclose documents related to the financing.

Some Third-Party Litigation Funders Pose a Threat to U.S. Security (Apr. 7, 2023)
Author(s): Howard "Buck" McKeon
Source: *Bloomberg Law News*
Summary: This article outlines potential threats to national security posed by third-party litigation financing. Specifically, it examines the threat that adversaries could "damage the reputation of and drain resources from U.S. competitors, while getting access to sensitive information during legal proceedings." It also notes that some politicians are starting to raise concerns to DOJ and the Chief Justice and asserts that China is "ramping" up its "focus on intellectual property." Lastly, it suggests action either by Congress or by amending the Federal Rules of Civil Procedure.

New Bill Targets California Litigation Financing (Apr. 5, 2023)
Author(s): Cheryl Miller
Source: *The Recorder*
Summary: Discusses key provisions of California S.B. 581 (see below). No official sponsor for the bill, but Consumers for Fair Legal Funding (whose members include the American Property Casualty Insurance Association, the National Federation of Independent Businesses, and local chambers of commerce) backs it. Plaintiff's attorneys agree with much of the bill but say that being forced to tell opposing counsel about their funding arrangements would be a "tactical disadvantage" for clients who cannot afford to self-finance litigation. The article notes other recent challenges to the litigation-financing industry, including overcharging 9/11 victims and the disagreement between Buford Capital and Sysco.

California Senate Bill No. 581 (introduced Feb. 15, 2023)
Summary: Introduced by Senator Anna Caballero. Would require registering with California Secretary of State and posting surety bond to engage in litigation-financing transactions in California. Would regulate litigation-financing transactions by prohibiting certain practices (e.g., paying for referrals to the financer, making false or misleading statements, charging more annual fee greater than 36% of original funding), requiring a written contract and consumer disclosures,

and requiring annual reporting by financers. Would make financer jointly liable for costs. Would make litigation financing a valid subject of discovery in all civil actions. Limits fees to 42 months.

Delaware Judge Orders Patent Funding Disclosure of Backertop (Mar. 31, 2023)
Author(s): Isaiah Poritz
Source: *Bloomberg Law News*
Summary: Chief Judge Connolly (D. Del.) ordered Backertop Licensing LLC, involved in patent litigation, to disclose information about its relationship with "nonpracticing entities" (a/k/a patent trolls) and its litigation financing, including communications with the entities and monthly bank statements. The judge expressed concern that the entities are not the real parties of interest in the case. The order continues the judge's practice of cracking down on a glut of infringement lawsuits in the district court by plaintiffs whose owners are not clear.

Litigation Finance Spurs Innovation by Moving Past Single Cases (Mar. 16, 2023)
Author(s): Maurice MacSweeny (Director of Legal Finance and Sales Planning at Harbour Litigation Funding)
Source: *Bloomberg Law News*
Summary: This article discusses how litigation financers are starting to provide legal financing for more than just a single case, which generally requires a large claim amount to be economical to finance. Financers can provide funding for a portfolio of cases of different sizes, including both claims and defenses, diversifying claims in a portfolio can hedge against risk. Financers can buy a share of future recoveries for an immediate lump sum—allowing for monetization of ongoing litigation before final judgment. Financers have also started evolving into funders of legal businesses in general.

Sysco Accuses Burford Capital of Meddling in Antitrust Deals (Mar. 9, 2023)
Author(s): Mike Leonard & Justin Wise
Source: *Bloomberg Law News*
Summary: Sysco, which had previously received litigation funding from Burford to aid Sysco's antitrust litigation against chicken, meat, and dairy producers, is now suing Burford. Sysco alleges that Burford has obtained an arbitral order blocking Sysco from executing settlement agreements with the chicken producers. Burford says that the settlements are too low based on the value of the claims. Sysco is seeking vacatur of the arbitral order. Although "Burford and other litigation finance firms have pledged not to meddle directly in the cases they pay for, and there are ethical rules restricting their ability to do so," Sysco claims that Burford has crossed that line. Burford claims that Sysco breached the funding agreement when it assigned "antitrust claims to customers who asserted a contractual right to pursue them"; the assignment "weakened [Sysco]'s incentives to maximize the potential outcomes in the cases." Jan Jacobowitz (who teaches legal ethics at U. Miami) commented that the case "highlights the tension between ethical rules and contractual agreements" that give funders say in funded litigation.

Guest Post: Third-Party Litigation Funding: Disclosure to Courts, Congress, and the Executive (Feb. 22, 2023)
Author(s): Jonathan Stroud

Source: *Patently-O*

Summary: Author is general counsel of Unified Patents, often adverse to litigation-funded entities. Article begins by describing the explosion in TPLF in patent litigation, then it describes how TPLF deals are generally structured. Patent TLPF funds generally promise about 20% year-over-year returns. Article then discusses the lack of transparency behind TLPF—current disclosures rely on a "patchwork of state law, court rules, self-reporting, FOIA requests, leaks to journalists, and funding pitches." In some cases, no government body knows "who is funding [them], who is influencing or controlling them, or what promises they are making investors." Article posits that disclosure "remains sparse at least in part because the very wealthy private investors who fund litigation claims," which include sovereign nation funds, "have fought hard to keep those agreements secret, even from judges asking for disclosure." Article discusses Judge Connolly in D. Del., notes that the FRCP "have been moving toward greater transparency for years" and that "similar requirements in Federal District courts across the nation have been in place for years," albeit largely not in patent-heavy districts, and observes that "many states already require disclosure or much more draconian regulation of litigation funders," as well as the U.S. International Trade Commission. Article posits that the cases involving Judge Connolly are particularly important because of Delaware's status as hub for patent litigation. Some litigants have walked away from years-long cases rather than disclose their investors: VLSI Technology LLC and IP Edge, for examples. "[I]f there is nothing to hide, why fight so hard to keep it hidden?" Article concludes that, because TPLF is "a prominent feature of our litigation landscape," "fulsome disclosure is a fair bargain for such profitable investments into otherwise public court proceedings. One that is coming, and that right soon." Article also notes that executive agencies have been faster at seeking disclosure than Congress and the courts.

Big Law Balks at Litigation Finance Deals Seen as Too Pricey (Feb. 16, 2023)

Author(s): Roy Strom

Source: *Bloomberg Tax News*

Summary: Despite the growth of TPLF after the COVID-19 pandemic, the biggest law firms have been shying away from it. Westfleet CEO Charles Agee says this is because "portfolio deals" are backed by multiple cases that are "cross-collateralized." If one case generates a return, the firm must pay back all invested money, often 2-3 times the money received up front. The pricing levels don't make sense for that limited offloading of risk. Big Law's absence has allowed competitors to occupy the space, such as hedge funds and alternative-asset managers. The deals are structured like typical loans, with interest rates in the high teens or low twenties—still often "significantly" less expense than portfolio pricing. Agee also commented on the GAO report, which found significant "data gaps" in the TLPF market—"There's lots of data gaps in many industries, but if you don't have a good reason to believe they're creating a significant policy problem, what's the government interest in closing those data gaps?" Agee also believes TLPF's effect on the overall litigation system in the U.S. is "clearly little to none."

2022 Litigation Finance (Undated)

Author(s): Westfleet Advisors

Summary: This is a summary of data gathered and compiled by Westfleet Advisors on the state of the TLPF market from July 1, 2021, to June 30, 2022. It focused only on commercial-litigation

finance, not consumer-litigation finance, full-recourse law-firm finance, etc. Overall, it found that the demand for litigation financing continues to increase with no signs of slowing down soon. The industry grew despite the pandemic, which not only affected the economy but also bottlenecked the civil-justice system. Only a few hundred commercial litigation and arbitration matters are funded annually in the U.S., with about $3.2 billion in capital committed—"a rounding error" compared to the hundreds of billions spent litigating civil cases annually. Westfleet does not expect that proportion to change much. A noticeable development in recent months is the use of insurance—lenders are insuring against aggregate loss of capital, litigants, and law firms are protecting their interest in large judgments and have a guaranteed minimum recovery in prejudgment matters. The number of funders in the market has been stable for the last 5 years, and the market remains opaque, even to funders themselves. After the overview, the document reviews some figures for various aspects of the market, such as industry size and recent growth, types of litigation funders, and a breakdown of the capital developed.

Camp Lejeune Ads Surge Amid "Wild West" of Legal Finance, Tech (Jan. 30, 2023)

Author(s): Roy Strom

Source: *Bloomberg Law News*

Summary: More than $145 million has been spent on web and TV ads for Camp Lejeune litigation. This could double because up to 500,000 veterans or relatives could be eligible for payment out of congressionally authorized $6 billion fund. Large investors see mass torts as an increasingly lucrative asset class and are likely to diversify their holdings. Funders provide capital for advertisements in exchange for a portion of damages or settlement. A new wave of lawsuits is expected in March and the claim-filing window closes in Aug. 2024. Advertising is main method of finding claimants. Lawyer-specific advertisement agencies (called lead generators) find clients and obtain medical records then sell the clients to law firms. Before statute passed, average claim could be purchased for about $1,000; now am average claim can be purchased for $5,000 or more. Social media targeting allows mass tort cases to be larger. Lacuna Ventures is biggest spender on social-media and web-based advertisements.

Pennsylvania Privacy Rights Keep City Legal Fund Donors Secret (Jan. 3, 2023)

Author(s): Alex Ebert

Source: *Bloomberg Law News*

Summary: Donors gave money to the City of Harrisburg, Pa., to hire lawyers to defend its gun ordinance. A Pennsylvania court ruled that the privacy rights of the donors outweighed the public interest in knowing the donors' identities. The ruling protects their names, addresses, and bank-account information; the donors are concerned about future harassment. In 2019, the Pa. Supreme Ct. had ruled that the state's Right to Know Law applied to donations to city legal-defense funds. But the court on remand held that donors before the 2019 ruling had a right to expect privacy in their donations, and that right had to be weighed against the public interest in knowing who funds policies. The court found that the donations did not call into question the fairness of the city's decisionmaking process regarding the enactment of the gun ordinances because the ordinances had already been enacted when the donations were made. A lawyer for one of the donors said that, although the ruling was a relief to his client, there is still a chilling effect on donations to the government.

Third-Party Litigation Funding: Market Characteristics, Data, and Trends (December 2022)

Author(s): Government Accountability Office

Summary: This report found a difference in clients and uses of funding for commercial TPLF (legal expenses) and consumer TPLF (living expenses), with the commercial market having grown in recent years as businesses become more familiar with it. The report described gaps in data that, if filled, would help researchers answer important questions about the TPLF industry; options to address those gaps were identified. Next, the report presented the advantages and disadvantages of TPLF from multiple stakeholders' viewpoints. TPLF can help its users access the legal system and manage risks, but it is expensive and may deter settlement. Investors can obtain high returns uncorrelated with the markets, but at high risk. And the report found that TPLF regulation is limited in the United States, with no nationwide regulation or disclosure requirement. The report also surveyed regulations in Australia, England, and Canada.

Lawyer Is Convicted in Staged Slip-and-Fall Scheme That Involved Unnecessary Surgeries (December 20, 2022)

Author(s): Debra Cassens Weiss

Source: *ABA Journal*

Summary: George Constantine was a New York lawyer who earned more than $5 million in settlement fees from lawsuits filed based on staged accidents. After a staged accident, fake victims were brought to Constantine's office, who then sent them to medical appointments. The patients would have unnecessary surgery and then be paid $1000. Litigation-funding companies paid for the surgeries and other medical procedures, charging interest rates so high that most of the recoveries went to the companies, Constantine, and other conspirators. Constantine and an orthopedic surgeon were convicted of conspiracy, mail fraud, and wire fraud. Several others have been convicted in the scheme or have pleaded guilty.

Why Consumer Legal Funding Poses No Risk to National Security (December 19, 2022)

Author(s): Jeremy Kidd

Source: *Bloomberg Law News*

Summary: Distinguishes "consumer legal funding," whose "sole purpose is to help individuals and families alleviate cash-flow problems after an accident, while seeking compensation for injuries through lawsuits," from "commercial legal funding, which provides funding for large-scale litigation, encompassing any industry and area of law you can imagine." Argues that Chamber of Commerce concern about national-security risks of TPLF is misplaced, at least when it comes to consumer legal funding: consumer legal funding is insignificant ($2 to $3 thousand) and low-profile compared to commercial litigation funding.

Order, In re Nimitz Technologies LLC, No. 2023-103 (December 8, 2022)

Author(s): Per curiam, United States Court of Appeals for the Federal Circuit

Summary: This order denies Nimitz's petition for a writ of mandamus to vacate D. Del. Chief Judge Connolly's 11/10/2022 disclosure order. Held that Nimitz has not shown mandamus is its only recourse to protect its purportedly privileged materials nor that it has a clear right to preclude an in-camera inspection of those materials. Held further that district court's identification of four concerns "related to potential legal issues in the case . . . or to aspects of proper practice

before the court, over which district courts have a range of authority preserved by" Civil Rule 83(b).

Judge Should Bow Out of Litigation-Funding Probe, Lawyer Says (December 8, 2022)
Author(s): Christopher Yasiejko
Source: *Bloomberg Law News*
Summary: This article is reporting on statements by Nimitz's counsel in his motion for Chief Judge Connelly to withdraw the memorandum opinion. The lawyer, George Pazuniak, says that the judge has prejudged Pazuniak and Nimitz guilty of unethical conduct. Pazuniak also complained that Judge Connelly's interpretation of the rules of professional conduct would open the floodgates to new types of discovery and would mean that it is evidence of fraud to form an LLC or other corporate entity.

How Litigation Finance Turns Law into an Asset Class: QuickTake (Aug. 29, 2022; revised December 2. 2022)
Author(s): Katharine Gemmell
Source: *Bloomberg Law News*
Summary: This article explains the basics on litigation finance in an FAQ format. It mentions the most common criticisms and potential future regulation of litigation finance.

Memorandum, Nimitz Technologies LLC v. CNet Media, Inc., Civ. No. 21-1247-CFC (November 30, 2022)
Author(s): Chief Judge Colm Connolly, United States District Court for the District of Delaware
Summary: This order is in response to a petition for a writ of mandamus filed in the Federal Circuit about Judge Connolly's disclosure directive. It explains the lengthy investigation and factfinding underlying the order, identifying instances of possible fraud upon the court by counsel and sham transactions. Judge Connolly concludes that the court's inherent power to investigate ethics violations and punish fraud upon the court justify his order.

Keep Foreign Cash Out of U.S. Courts (November 24, 2022)
Author(s): Donald J. Kochan
Source: *Wall Street Journal*
Summary: Author is a law professor at George Mason. He reiterates his concerns about the lack of disclosures and transparency in TPLF cases; he cites Chamber of Commerce/Institute for Legal Reform's national-security argument.

Litigation Funders Seek Transparency in Disclosure Debate (November 23, 2022)
Author(s): Dai Wai Chin Feman & Will Weisman
Source: *Law360*
Summary: Argues that entities, such as Institute for Legal Reform, have ulterior motives (referring to 2017 Civil Advisory Committee meeting) and would like to outlaw TPLF because funding enables litigation that otherwise would not occur. Many aspects of funding arrangements could be prejudicial to plaintiffs—might open litigation strategy, analysis of case merits and likely outcomes, etc. Argues that funders are not trying to hide, rather, they are trying to guard sensitive information. Characterizes proponents of disclosure as "peddl[ing] a fear campaign based on unsubstantiated speculation that funders 'benefit from secrecy' through clandestinely

controlled litigation." D.N.J., despite disclosure requirements akin to Judge Connolly's order and a high volume of civil litigation, commercial litigants are funded in fewer than 10 cases; no judicial recusals have resulted; and there are no instances of funders having veto authority over litigation decisions or settlement decisions. Argues that funders must respect bounds of SEC, attorney ethics rules, contract law, deceptive trade practice laws, and champerty & maintenance laws. Agrees with limited disclosure to eliminate "distraction" of funding as issue in litigation and perhaps encourage more settlements if defendants realize their plaintiffs can litigate to conclusion.

This Judge Is Scrutinizing Litigation Funding. Some Say He's Overstepping His Authority (November 23, 2022)

Author(s): Scott Graham

Source: *Law.com*

Summary: The Federal Circuit has intervened in Judge Connolly's inquiry into patent-assertion-entity litigation funding. Judge Connolly has demanded attorney-retention letters and correspondence between LLC owners, lawyers, and the LLC related to the settlement of patent suits. Judge Connolly has been putting everything on public record. CAFC stayed the order in one of Judge Connolly's cases and the judge stayed similar orders in light of the Federal Circuit's stay. Only disclosure order stayed; no stays on other proceedings or upcoming hearings involving different patent owners. One issue at the Federal Circuit is who will defend Judge Connolly's order below; both parties have already settled, so they won't want to brief it. No amici briefs filed.

Analysis: Are Boom Times Ahead for Litigation Finance? (November 13, 2022)

Author(s): Annie Pavia

Source: *Bloomberg Law News*

Summary: This article argues that litigation funding has a small but growing role in the legal industry. More lawyers are interested in using it than there were. It is not correlated to the market and can substitute for decreased cash flow during downturns. Although only a few courts require disclosure, there is a push for more transparency, including through rules amendments.

ILR Briefly: A New Threat: The National Security Risk of Third Party Litigation Funding (November 2022)

Author(s): U.S. Chamber of Commerce, Institute for Legal Reform

Summary: Argues that large amount of foreign-sourced money pouring into U.S. civil litigation against U.S. companies and industries (including those in defense and other highly sensitive sectors) through TPLF raises significant national and economic security risks. E.g., a foreign sovereign-wealth fund could fund a suit against a defense contractor and obtain confidential proprietary information about sensitive technologies or seek to advance adversary's home industries at expense of U.S. companies by encouraging and exploiting commercial disputes. Author advocates requiring disclosure of TPLF, especially foreign funding, and requiring U.S. persons acting as agents of foreign parties in TPLF to register with government. Discusses pending proposal to amend Civil Rule 26 "to require disclosure of TPLF agreements in all civil cases" and amend Civil Rule 16(c)(2) to include TLPF as one of the pretrial conference topics.

Multi-Party Litigation and Third-Party Funding of Litigation as a Response to Globalisation (October 27, 2022)

Author(s): Michael James Boland

Source: *Galway Law Review*

Summary: Author is PhD Researcher and Assistant Lecturer at University College Cork, Ireland. TPLF is largely barred in Ireland, but courts have started giving it tentative approval as a potential tool to provide access to justice. Article first discusses the characteristics of British and Irish multiparty litigation, comparing and contrasting with American class actions. Article next discusses differences among different nations' schemes to allow litigants to fund "David v. Goliath" actions. Ireland does not extend civil legal aid to group litigation and mass-harm claims, and the UK follows the "loser pays" principle. Ireland continues to have common-law rules against maintenance and champerty, but it is not often (if ever) prosecuted. Courts have begun a "cautious reappraisal" of these rules, taking an "increasingly experimental approach" to TPLF, often distinguishing certain forms of funding (such as "after the event" insurance for legal costs, funding given with "charitable intent," or indemnifying minority shareholders against legal expenses incurred on a company's behalf) from "champertous connivance." Irish and UK courts sometime permit TPLF if the litigation funder has even an "indirect interest" in the litigation. Article suggests legislation will be necessary in Ireland to define the precise kinds of "sufficient connection" or "legitimate interest" sufficient to allow funding. UK courts accepted TPLF because it was a tool for "making justice readily available to persons of modest means." One UK court distinguished between fee arrangements where lawyers and funders "share in the spoils of litigation" (like a contingency fee)—which "tend[s] to corrupt the administration of justice"—and those where the lawyer or funder receives only their "ordinary fees." Another UK court reasoned that even the "normal fee" arrangement nevertheless tempts a lawyer to misbehave; likewise, the greater the share of spoils a funder received, "the greater the temptation to stray from the path of rectitude." But later legislation expressly permitted contingency fees for lawyers; not expressly permitted for funders, but Code of Conduct is "unequivocal that the funder 'receives a share of the proceeds if the claim is successful.'" Unlike U.S. TLPF, though, where a funder can receive 3-4x the funded amount, the Code of Conduct "measures the funder's reward against the amount of their financial contribution." Article then discusses status of TLPF in various U.S. states, also noting the SCOTUS case NAACP v. Button, which struck down Virginia's laws against maintenance and champerty as unconstitutional. Article discusses other 1st Amendment jurisprudence (such as Citizens United), comparing anti-maintenance and anti-champerty laws to censorship or denial of corporate access to the courts.

Litigation Finance Gains Traction in Patent Infringement Cases (October 20, 2022)

Author(s): Kelcee Griffis

Source: *Bloomberg Law News*

Summary: Chief Judge Connolly (see Apr. 2022 standing order) will hold hearing in case involving VLSI and Intel to probe whether VLSI made proper disclosures of third-party funding in patent dispute. Patent cases are expensive, so small inventors suing large corporations team up with investment firms to back their case and sometimes get large verdicts (e.g., VLSI's $2.18 billion verdict against Intel in Texas case, Michael Kaufman's $10 million award against Microsoft); must also defend expensive inter partes reviews at PTAB. Nearly one-third of 2021 litigation capital commitments ($812 million out of $2.8 billion) are in patent cases.

Patent owners are starting to secure financing earlier in litigation process. Intel unsuccessfully challenged funding set-up to defeat verdict in Texas. Judge Conolly appears concerned about potential for conflict of interest if court doesn't know who VLSI's "true owners" are and asks whether to dismiss case as sanction for failing to fully disclose who has interest in litigation. Concerns are that incentives are changed by TPLF so that plaintiff and funder are more interested in extracting a large amount of money from defendant than simply righting wrong via licensing deal or settlement; might also aggravate patent-troll problem. Sen. Grassley (R-IA), GAO studying litigation finance industry. N.D. Cal., D. Del., and D.N.J. have started requiring parties to disclose arrangements. Those disclosures can change the narrative of "David vs. Goliath" lawsuit in patent litigation.

Lawsuit Funders Look to Take Advantage of Currency Value Plunge (September 29, 2022)
Author(s): Roy Strom
Source: *Bloomberg Tax News*
Summary: Increase in USD's strength against GBP and EUR gives rise to potential arbitrage opportunity for British and European funders if the foreign currencies rebound before end of litigation. By contrast, U.S. law firms lack flexibility to change long-term strategies based on currency fluctuations.

Litigation Fund Fight Shows Trap Lurking in Win-Win Deals (September 8, 2022)
Author(s): Roy Strom
Source: *Bloomberg Tax News*
Summary: Litigation funder Woodsford Group, Ltd., (founded in England) seeks to collect $1.8 million arbitration award against San Francisco patent-law firm Hosie Rice. Core contract issue in the litigation-funding agreement is whether Woodsford can collect on the hourly fees collected by Hosie Rice in case funded by Woodsford (where Hosie Rice's client refused to pay expected contingency fee after settlement). An arbitration panel found Woodsford entitled to $1.8 million judgment, but Hosie Rice contends that Woodsford is seeking payment of money outside the agreement. ("Woodsford transformed a high-risk but high-return contingency financing into a high-return but no risk fully secured loan.") Hosie Rice is currently trying to vacate the arbitration award in Delaware federal district court on grounds that arbitration panel improperly ruled in Woodsford's favor without allowing discovery into the disputed contract issue. The article notes that "[f]ederal judges rarely overturn arbitration awards, making Hosie Rice's bid unlikely to prevail." Case is *Frome Wye Ltd. v. Hosie Rice LLP*, No. 22-mc-00249 (D. Del. filed June 1, 2022), Chief Judge Colm F. Connolly presiding.

Litigation Lenders Bankrolled Tom Girardi Despite His Apparent "Proclivities" for Stealing from Clients, Suit Says (September 6, 2022)
Author(s): Debra Cassens Weiss
Source: *ABA Journal*
Summary: Bankruptcy trustee for Girardi Keese law firm sued two litigation-funding lenders and one of their owners for funding Thomas Girardi's firm despite allegedly knowing of Girardi's thefts of at least $14 million in settlement funds from clients and his "looting" of $23 million from firm's IOLTA account. Litigation funders allegedly referred clients and funded cases in exchange for half of contingency fees collected. Lawsuit alleges that the fee-sharing arrangement violated lawyer ethical rules and California state law and alleges that the

litigation funders were implied partners-in-fact with Girardi and owed a fiduciary duty to the law firm's clients. Lawsuit seeks declaration that the fee-sharing agreements are void and that funds paid to the lenders must be repaid. The lawsuit also seeks to disallow or subordinate litigation funders' secured claims against bankruptcy estate and to return $1.7 million paid to one of the lenders from a case stemming from the loss of Indonesia's Lion Air Flight 610.

How Hedge Funds Are Speculating on Justice: QuickTake (bloomberglaw.com) (August 29, 2022)
Author(s): Katharine Gemmell
Source: *Bloomberg Law News*
Summary: This article explains the basics on litigation finance in a FAQ format. It mentions the most common criticisms and potential future regulation of litigation finance.

Hedge Fund Lawsuit Financing Poised for SEC Enforcement Scrutiny (August 15, 2022)
Author(s): Andrew Ramonas
Source: *Bloomberg Law News*
Summary: This news article notes that the Securities and Exchange Commission will begin confidentially (i.e., it will not be made public) collecting data from litigation funders regarding their investments. The purpose of this data collection is to try to better protect investors in hedge funds, particularly regarding false or misleading disclosures. Specifically, funds would need to disclose what percentage of their funds go toward litigation financing.

Litigation Funders Are Betting on a Rise in UK Class Actions (August 9, 2022)
Author(s): Katherine Gemmel
Source: *Bloomberg Law News*
Summary: The article notes an increase in opt-out class actions in the UK, which have been funded by third-party litigation funders. The total amount of funding has nearly doubled in the past three years and now exceeds £2 billion/year.

Is It All That Fishy? A Critical Review of the Concerns Surrounding Third Party Litigation Funding in Europe (July 14, 2022)
Author(s): Adrian Cordina
Source: *Erasmus Law Review (Forthcoming)*
Summary: This article identifies commonly raised objections to third-party litigation funding within the European Union, specifically the commodification of justice, conflicts of interest, and funder capital inadequacy. The author analyzes third-party litigation funding from a law and economics perspective, arguing that its availability is beneficial because it increases access to justice by decreasing the risks on individual litigants and therefore increasing the cost of wrongdoing by tortfeasors. He rebuts many of the objections to third-party litigation funding, although he acknowledges a risk in consumer funding that claimants could be taken advantage of by funders in their funding contracts. However, there is no evidence that third-party litigation funding has led to an increase in unmeritorious claims, as funders are unlikely to fund such claims, and even if they did, procedures exist that allow courts to throw out such cases very early in the proceedings. The article concludes by recognizing that some regulation of the third-party litigation funding industry may be justified, but it is a still-emerging and understudied industry. Such regulation, however, should "minimise the social cost which

could arise from [third-party litigation funding] in a way that does not disincentivise funders from funding meritorious and socially desirable cases" that otherwise would not be pursued.

Litigation Funding in Ireland (July 14, 2022)
Author(s): David Capper
Source: *Erasmus Law Review (Forthcoming)*
Summary: This article explores the ongoing prohibition in Ireland of champerty and maintenance and how it impacts access to justice in the country. As a result of their prohibition, third-party litigation funding remains unavailable in Ireland. The article notes that the judiciary has invited the legislature to enact legislation to change the law, but it has not yet done so. The article laments the access to justice issues caused, especially when coupled with the possibility of an adverse costs order should an individual with limited means lose his case. The article also posits that if Ireland were to permit third-party litigation funding, it could financially benefit as European Union-based companies may seek to use its courts due to its common law framework (as opposed to the civil law framework in all other EU countries excluding Cyprus).

Delaware State Senate Concurrent Resolution No. 127: Encouraging the Delaware Judiciary to Study Transparency in Third-Party Litigation Funding (June 28, 2022)
Summary: This resolution from the Delaware State Senate notes the nationwide developments requiring disclosure of third-party litigation funding agreements and expresses the view that allowing third-party funders to participate anonymously in litigation "runs counter" to the principle that "transparency and ethical standard are critical elements of a fair judicial system and essential in promoting public trust." It then resolves to "encourage" the judiciary to study and potentially revise the rules of procedure or statutes "to implement a disclosure requirement for third-party litigation funding."

Litigation Finance Pioneers Return to Hunt Rare Secondary Deals (June 2, 2022)
Author(s): Roy Strom
Source: *Bloomberg Law News*
Summary: This article discusses the return of Adam Gerchan and Ashley Keller to third-party litigation funding through their new outlet, which would buy up pieces of lawsuits from other firms as a secondary player in the industry. The firm, Gerchan Capital Partners, has already raised $750m. This secondary investment is common in private equity, but it is somewhat novel in third-party litigation funding. The article notes a handful of examples but also expresses that many in the industry are pessimistic in the potential for a large secondary market because "[f]unders will only give up claims they don't expect to pay out." However, Gerchan Capital believes they will have similar returns to primary investors, as they would only be investing in cases that have progressed past potential negative outcomes. They also believe that returns will be quicker. On the sale side, one player who sold to Gerchan Capital said that the secondary market would allow them to offload risk that no longer meets their initial investment strategies.

Third-Party Funding of Patent Litigation: Problems and Solutions (June 1, 2022)
Author(s): Korok Ray

Summary: The article tracks the growth in third-party litigation funding in patent cases in the United States. It notes that since November 2002, the percentage of patent cases that can be identified as having third-party funding has increased to 24% from 0%, which averages to a 1.56-percentage-point net increase per year. The author notes that the Eastern and Western Districts of Texas have a disproportionately high percentage of cases that are third-party funded, as well as a disproportionately high percentage that are brought by nonpracticing entities. The article discusses various scenarios where third-party funding may exist, arguing that some promote the purpose of patent law, while others—and in particular funding to nonpracticing entities who buy up patents for the purpose of litigation—distort it. The combination of nonpracticing entities using third-party funding to engage in lawsuits is "the real problem," and the best solution is to increase transparency in the funding process. Specifically, the article calls for mandatory disclosure of information such as the amount of funding, any interest rate charged or equity granted to the funder, and the names of those providing the capital. The article argues that in the long run, disclosure would "choke off the supply of capital to patent trolls" by making juries less likely to find in their favor. It would likewise protect innovators enforcing their own patents, as they will be more likely to attain funders with good reputations, at least so long as their claims are meritorious.

The Complete Litigation Finance Guide for Plaintiff's Attorneys (Undated)

Author(s): Greg Hong & Dylan Ruga

Source: *Steno*

Summary: This litigation finance guide aims to provide plaintiff's attorneys with information on the third-party litigation funding process, including regarding regulations, benefits, and types of funding available. The guide notes some best practices to protect attorney-client privilege, while also noting that work product immunity should cover investors because they share a common interest in the litigation. The guide discusses disclosure requirements, noting that the majority rule is that funding documents are irrelevant and therefore do not need to be disclosed. However, adverse parties have been pushing for mandatory disclosure. The guide then discusses the difference between commercial and consumer litigation funding, as well as single-case and portfolio financing models, before turning to a "new" type of funding that Steno (the authors of the guide) are offering, which they call DelayPay. This would be non-recourse and would involve Steno partnering with a debt facility to borrow against the total value of services provided. Next, the guide delineates some benefits of third-party litigation finance and notes the substantial growth in the industry even in just the last few years. The guide concludes with some more best practices for people considering obtaining third-party litigation funding, as well as rebuts some "misconceptions" of it that are advanced by opponents of the industry.

The Economics of Litigation Finance (May 14, 2022)

Author(s): Sandro Claudio Lera, Robert Mahari, & Moris Simon Strub

Summary: This article provides an economic analysis of litigation funding with a specific focus on cases that proceed to trial. The research found that the optimal funding situation would be where a third-party funder covers all costs. In such a situation, generally larger amounts get spent on the litigation with higher winning probabilities. Furthermore, because litigation with lower win probabilities but higher potential judgment payoffs are more likely to attract litigation funding, litigation funding will expand access to justice and allow more plaintiffs to be able

to bring their cases to court with adequate resources expended on them. The article noted differing views on whether third-party funding agreements should be disclosed, as well as how disclosure (or lack thereof) may have economic impacts.

Federal Court in Delaware Requiring Disclosure of Litigation Funding Agreements (April 21, 2022)

Source: *Claims Journal*

Summary: This article discusses the positive reaction of various insurance associations to a new standing order by the Chief Judge in the District of Delaware [for details on the standing order, see the next entry in this document]. The Chief Legal Officer for the American Property Casualty Insurance Association (APCIA) stated that TPLF "promotes speculative litigation and increases costs for everyone," and "[a]t its worst" this leads to "incentives to prolong litigation." The article notes that the industry has grown and now takes in over $11b a year. Insurance groups and the U.S. Chamber of Commerce support further regulation "to prevent abuses of the legal system and to protect consumers who often pay exorbitant interest rates." APCIA is quoted as supporting more "common sense reforms" like those in the Chief Judge's standing order since transparency "can help end lawsuit abuse and bring balance to the civil justice system."

Del. Judge Requires 3rd Party Litigation Funding Disclosures (April 19, 2022)

Author(s): Dorothy Atkins

Source: *Law360*

Summary: This article discusses the new standing order from the Chief Judge of the District of Delaware that requires litigants to disclose whether their cases are being funded in exchange for a financial stake in the litigation or some other non-monetary result (excluding loans or insurance), as well as a "brief statement" regarding that interest and whether the funder requires any terms or conditions for settlement. The order further provides for further discovery if certain conditions are met, including that the funder has "authority to make material litigation decisions or settlement decisions." According to an attorney who runs a blog regarding IP litigation in Delaware, the impetus for the standing order was a "few" cases in front of the Chief Judge where "parties successfully challenged a litigant's standing based on the entities funding the lawsuit." The standing order applies to both plaintiffs and defendants, and it is not limited to IP cases.

Standing Order Regarding Third-Party Litigation Funding Arrangements (Apr. 18, 2022)

Author(s): Chief Judge Colm Connolly, United States District Court for the District of Delaware

Summary: Requires disclosure of any TPLF, including funder's identity, whether funder's approval is necessary for litigation/settlement decisions, terms and conditions of that approval, and nature of funder's financial interest. Permits discovery of litigant's arrangement with funder upon showing of one of several conditions or good cause.

New Group Litigation Association Launched (Apr. 8, 2022)

Source: *Litigation Finance Insider*

Summary: This article details CORLA, a new association of six UK law firms to establish a collective redress association for claimant practitioners in the group litigation sector. The association in

particular plans to tackle access to justice issues, particularly regarding how collective redress can help.

The Rise and Regulation of Litigation Funding in Australian Class Actions (Apr. 4, 2022)
Author(s): Michael Legg
Source: *Erasmus Law Review*
Summary: This article discusses the history of litigation funding in Australia, both as developed through judicial decisions and statutory law, in the specific context of class action proceedings. It notes recent studies concerning the practice and that claimants in class actions receive on average only 51% of the settlement when they have funders compared to 85% when they do not. This runs counter to the purpose of class actions "to deliver reasonable, proportionate, and fair access to justice." Concurrently, however, the judiciary has started to provide some oversight to litigation funding agreements. The article addresses in significant depth the various means that the judiciary has developed to oversee third-party litigation funding, including (i) requiring disclosure of the agreement (with sensitive information redacted); (ii) requiring that funders ensure there is no conflict of interest; (iii) and reviewing the agreement, and sometimes revising the agreement or refusing to approve a settlement because of the agreement. It also addresses recent legislative regulation, including requiring all funders to obtain a license that subjects them to numerous regulatory requirements. The article notes that as a result of these increased regulations, there has been a quite significant short-term decline in the number of class actions filed. Further potential legislative activity intends to set limits on permissible funding schemes, with a rebuttable presumption that it should not be above 30 percent.

Big Law Warms Up to Litigation Finance as Deals Pot Hits $2.8B (Mar. 25, 2022)
Author(s): Roy Strom
Source: *Bloomberg Law News*
Summary: This article overviews trends in the litigation-funding marketplace. It discusses how the boom the industry expected from the pandemic-related recession did not happen, although the industry continued to grow, due largely to a 46% increase in commitments from the country's 200 largest law firms. Some firms have signed "portfolio" deals of up to $100 million, providing access to a pool of money they can use to fund multiple lawsuits. Overall, litigation funders managed over $12 billion in assets in 2021, a 32% increase over 2019. However, the size of an average deal declined 20% year-on-year, as new funds have emerged that specialize in smaller deal sizes that are not economical for the largest funders.

Missouri HB 2771 (February 23, 2022)
Summary: This state house bill targets TPLF in "consumer" litigation, although it defines consumer broadly to encompass any natural person residing or litigating in Missouri. The bill would require plaintiffs to disclose any funding agreement to all parties, even in the absence of a discovery request. It also makes third party funding agreements discoverable in personal injury cases. In putative class actions in which the proposed class attorney has a financial relationship with a litigation funder, the court and the purported class members would have to be advised of that fact.

3rd Eye Surveillance, LLC v. Elbit Systems of America, LLC, No. 15-501C (February 18, 2022)

Author(s): Judge Lettow, U.S. Court of Federal Claims, 158 Fed. Cl. 216

Summary: The Court of Federal Claims resolved a discovery dispute in a patent infringement case concerning the discoverability of certain litigation funding agreements and related communications with litigation funders. Plaintiffs offered to submit the litigation funding agreement to the court for in camera review "to enable the necessary determinations" as to whether they "remain in 'complete control over the litigation.'" Under CFC precedent such funding agreements are only discoverable to determine "whether the party is the real party in interest," or if the claims have been assigned. The court agreed with plaintiffs and ordered an in-camera review. Regarding communications with litigation funders, the court ordered plaintiffs to identify which documents provided to litigation funders have already been produced and which it is withholding and on what grounds. The court refused at this juncture to determine whether any privilege or protection might apply. The court also held that litigation funding agreements from prior litigations were "irrelevant and beyond the scope of this litigation."

Kansas Senate Bill 152 (February 2021) & **Kansas Senate Judiciary Committee Hearing** (February 14, 2022)

Source: *Speakers at hearing: Eric Stafford (Kansas Chamber); Mark Behrens (U.S. Chamber); Gary Barnett (ILFA); Andrew Cohen (Burford Capital)*

Summary: This bill, which was introduced in the Kansas state senate in February 2021, would make discoverable "without awaiting a discovery request" the "agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action." At the Kansas Senate Judiciary Committee hearing on the bill, four individuals spoke, two in favor of the bill and two against. Those speaking in favor of the bill stated that TPLF can hinder settlement due to funders often having a say in when and whether to settle. Those speaking against the bill noted that in third-party-funded commercial litigation, funders do not have a say in settlement decisions, and thus opposed the bill reaching commercial litigation funders.

A Litigation Finance Stock Market? This Law Firm Plans to Launch One (Feb. 14, 2022)

Author(s): Lyle Moran

Source: *ABA Journal*

Summary: This article notes a law firm, Roche Freedman, soliciting individual investors for as little as $100 to finance litigation against the U.S. government for destruction of over $1 billion worth of a client's hemp crop in California. Investors receive Avalanche blockchain tokens, with an anticipated value of 200 to 350 percent above investment amount if the litigation is successful. A founding partner at the firm said the firm was "testing out a new approach to raising capital." Due to success with the initiative and favorable responses within the litigation finance industry, they are planning to "move forward with plans to help develop a forum to host multiple initial litigation offerings. The platform, named Ryval, is expected to launch later this year and serve as a 'stock market of litigation financing.'" The platform would make litigation financing more transparent, as well as opening access to new individuals to participate. The article discusses some potential issues, including that many investors might not have the knowledge to properly evaluate litigation investments.

Use and Abuse (Winter 2022)
Author(s): Robert E. Shapiro
Source: *ABA Litigation*
Summary: This article, written by one of the editors of ABA Litigation magazine, describes litigation funding arrangements as "kind of a contingency fee arrangement on steroids, where not just the lawyer involved but a third-party fund provides the financial muscle to bring and maintain litigation and stands to gain from a from a favorable outcome." Although published long after a D.N.J. local rule on disclosure of such arrangements went into effect, the article appears to have been written while the rule was still under consideration, as it says of the then-proposed rule that "[i]n the end, the rule seems ill-suited to the problem of distinguishing between proper and improper uses" of TPLF.

How Litigation Funding Shifted in the Pandemic (December 22, 2021)
Author(s): Matthew Oxman and Cayse Llorens
Source: *Bloomberg Law; Bloomberg Tax News*
Summary: This article, written by two people involved in TPLF on the financier side, discusses how TPLF has emerged from the pandemic and what issues it faces in the post-pandemic world. The article notes the ongoing dispute on the discoverability of TPLF agreements, but that "even after New Jersey Local Rule 7.1.1. took effect" there have been "few public divulgences" of TPLF agreements and "attempts to establish uniform federal rules have stalled as recently as October." The article also notes the $50m agreement between Willkie Farr and Longford Capital, which would "give[] Willkie a ready source of capital for plaintiff-side clients who desire or require outside funding." Furthermore, it discusses revisions to Arizona's ethics rules, which allow non-lawyers, such as financiers, to own shares in legal practices in the state, providing another means for litigation finance. Finally, the authors note that diverse entities are beginning to fund litigation, including pension funds and university endowments, which are part of an eight-fold increase since 2008 in the number of funding firms in the United States.

Litigation Finance: New Possibilities for a Maturing Sector (December 9, 2021)
Author(s): Jason N. Goldman
Source: *Bloomberg Law*
Summary: This article provides an update on TPLF and argues that it is "going mainstream," which may permit corporate legal departments to operate as "profit centers" by "bringing legal claims that generate revenue and support corporate strategy." The author argues that when "[d]eployed correctly, litigation finance should result in a win-win-win" because it would provide funding to plaintiffs who otherwise would not have the resources to bring suit, ensuring that law firms are paid regardless of the result of the litigation, and "providing equity-like returns to financiers." TPLF will democratize litigation and expand access to justice" and therefore "level[] playing fields for claimants against well-funded defendants." The article also argues that as TPLF grows, there will be increased competition amongst financiers, benefiting litigants. The article notes issues that courts and bar associations will need to "increasingly grapple" with, including discoverability of and privilege between communications with financiers and potential ethical issues from fee splitting and conflicts between the lawyer's ethical duties to the client and its financial interests and obligations with the financier.

H.R. 6151: Highway Accident Fairness Act of 2021 (introduced December 7, 2021)
Press Release: Bipartisan Bill Improves Trucking Safety to Ensure Supply Chain Continuity (December 9, 2021)
Author(s): Sponsored by Hon. Henry Cuellar (D-Tex.); **co-sponsored by** Hon. Garret Graves (R-La.)
Press Release Author(s): Dana Youngentob
Summary: This bill would require disclosure of third-party funding agreements in any suit alleging bodily harm or loss of life involving one or more commercial motor vehicles operating on a public road in interstate commerce. In such a case, plaintiffs would have to "disclose in writing to the court and all other named parties to the action the identity of any commercial enterprise . . . that has a right to receive payment that is contingent on the receipt of monetary relief in the action." Unless otherwise ordered by the court, plaintiffs would have to produce the agreement for inspection and copying. These disclosure requirements would apply in both state and federal court. In the press release announcing the introduction of the bill, available on Congressman Cuellar's website, the American Trucking Association President and CEO states that TPLF, among other things, is "perverting civil justice into a profit center, jeopardizing highway safety and adding more costs and strain to our nation's supply chain. This legislation would restore balance and fairness to the system and help ensure justice drives accident litigation—not profiteering and windfalls."

Litigation Funding May Soon Be Addressed by New York Legislature (November 20, 2021)
Author(s): Wilson Elser
Source: *National Law Review*
Summary: This article provides a high-level overview of what litigation funding is that "comes [in] all sorts of relationships and dynamics" but brings "many problems . . . to our litigation system." Speaking from the defense point-of-view, TPLF can "mak[e] settlement of your case much more difficult" and "expensive" because "plaintiff has cut a deal with the Litigation Funding company, which is charging very high interest rates and [is] expecting a high return on its investment." The article cites an editorial in the New York Post, which details specific oversight provisions that a bill before the New York Senate would bring to TPLF in consumer litigation. It concludes that "the need for some reasonable regulation probably exists" and that New York's bill may represent reasonable regulation.

ANALYSIS: Lawyers Who Know Are Warming Up to Litigation Finance (November 12, 2021)
Author(s): Annie Pavia
Source: *Bloomberg Law*
Summary: This article summarizes the results of Bloomberg Law's 2021 Litigation Finance Survey, which asked lawyers various questions about their perceptions of litigation funding. Among respondents, 78 percent of lawyers said they disagreed with the assertion that "litigation finance enables more frivolous lawsuits," up from 57 percent in the previous year's survey. Likewise, 88 percent of lawyers agreed that "litigation finance enables better access to justice," a jump from 70 percent last year. Finally, 72 percent of lawyers agreed with or were neutral to the statement that "the litigation finance industry has a positive ethical reputation," which was up from 57 percent last year.

More Reason to Crack Down on the Lawsuit-Lending Industry (September 1, 2021)
Author(s): Post Editorial Board

Source: *New York Post*

Summary: This editorial discusses perceived "evil[s]" of the lawsuit-lending industry, which it says, "preys on the vulnerable, cashing in on their distress" while "enabl[ing] outrageous nuisance suits that should never see the courthouse door, blackmailing victims (including city government) into settling rather than bear the expense of trial." The editorial supports regulation of the industry. It discusses a bill in committee in the New York Senate that would provide some oversight and limitations, such as prohibiting usurious interest rates, but laments that the bill cannot get out of committee.

TAB 20

20. Privacy & Cyber Security – 23-CV-W

Lawyers for Civil Justice has submitted 23-CV-W, which is included in this agenda book. It urges amendments to a number of rules "to protect privacy rights and avoid attendant cyber security risks." Also in this agenda book (behind Tab 15) is a report regarding ongoing inter-committee work on privacy issues, including Social Security Numbers.

Submission 23-CV-W goes beyond the ongoing work addressed elsewhere in the agenda book. It emphasizes "the massive expansion in the amount and ubiquity of personal information" in contemporary society and says "courts, litigants, and non-parties face a recurring quagmire in balancing their obligation to protect the privacy rights enshrined in the Constitution and defined by many statutes and regulations with the needs of particular cases." It argues that rule amendments are needed to require "proactive" consideration of privacy and cyber security issues throughout the litigation process. In particular, "privacy interests cannot be honored when cyber security risks are left unaddressed."

There is no doubt that cyber security and privacy are important concerns. Dealing comprehensively with these concerns presents challenges for this Committee that may call for extended study and education. By way of comparison, after problems with electronic discovery were first called to the Committee's attention in January 1997, it embarked on an effort to understand and respond to rapidly evolving technological changes that included multiple mini-conferences and other outreach, plus expert assistance from the Federal Judicial Center. Because that was a challenging effort involving so much educational outreach, it was not until almost a decade later – on Dec. 1, 2006 – that the E-Discovery amendments to the discovery rules went into effect.

This submission underscores the complexity and challenges presented in the current environment. It is comprehensive and cites much supporting material. Though it largely focuses on discovery rules, it is not limited to those rules, and calls as well for amendments to Rules 1, Rule 5.2, 23, 44.1, and 45. A list of the 13 rules that would be affected appears on pp. 7-8, and the proposed changes are collected in a 13-page Appendix to the submission.

In this agenda book, this is an information item. If Committee members have views on how the rules might productively deal with these matters, it would be helpful for them to share those views.

TAB 20A

RULES SUGGESTION
to the
ADVISORY COMMITTEE ON CIVIL RULES

FRCP AMENDMENTS ARE NEEDED TO GUIDE COURTS AND LITIGANTS IN PROACTIVELY MANAGING THEIR SHARED OBLIGATIONS TO PROTECT PRIVACY RIGHTS AND AVOID ATTENDANT CYBER SECURITY RISKS

September 19, 2023

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Rules Suggestion to the Advisory Committee on Civil Rules ("Advisory Committee").

BACKGROUND

As a result of the massive expansion in the amount and ubiquity of personal information[2] stored across smart phones, cloud services, corporate databases, social media, and the internet-enabled devices, courts, litigants, and non-parties face a recurring quagmire in balancing their obligation to protect the privacy rights enshrined in the Constitution[3] and defined by many statutes and

[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 35 years, LCJ has been closely engaged in reforming federal procedural rules to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] As used herein, the term "personal information," includes any information considered "personally identifiable information," "personal data," or "protected health information," as well as any other information over which a person may have a reasonable expectation of privacy. The term "confidential information" describes any confidential or proprietary information such as trade secrets, sensitive commercial information, or other information subject to a confidentiality agreement whether or not it contains personal information.

[3] *See* Allyson Haynes Stuart, *A Right to Privacy for Modern Discovery*, 29 GEO. MASON L. REV. 675, 718-19 (2022) ("Stuart") ("[P]rivacy rights in discovery are protected by the Constitution when requests touch on personal, intimate matters, or implicate rights to association like donor or membership lists, and are protected by public policy when they implicate state or federal statutory confidentiality provisions."); *see also*, *Whalen v. Roe*, 429 U.S. 589, 599 (1977) (a privacy interest exists in "avoiding disclosure of personal matters"); *Seattle Times Co. v. Rhinehart*,

regulations[4] with the needs of particular cases.[5] As one commentary explains: "The pressures to balance our commitment to broad discovery with escalating privacy risks are already intense and continue to build."[6]

Unfortunately, the Federal Rules of Civil Procedure ("FRCP") fail to provide the needed structure and guidance[7] for proactively considering, avoiding, and managing the complications that arise in most civil law suits related to privacy rights and reasonable expectations, including as to the unique and pervasive personal information that is generated and stored in today's

467 U.S. 20, 34-35 (1984) ("It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties." (footnote omitted)); *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958) (Discovery order compelling "disclosure of membership in an organization engaged in advocacy of particular beliefs" violates Due Process); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 457 (1977) (acknowledging privacy interest in "'avoiding disclosure of personal matters'"); and *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) ("the First Amendment has a penumbra where privacy is protected from governmental intrusion.").

[4] For applicable state privacy laws, *see* Int'l Ass'n of Priv. Pros., *U.S. State Privacy Legislation Tracker*, https://iapp.org/media/pdf/resource_center/State_Comp_Privacy_Law_Chart.pdf (last updated July 28, 2023). For state blocking statutes, *see Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522, 544 n.28 (1987) *and* David Yerich et al., *Data Privacy Laws and Blocking Statutes: Five Practical Strategies for Counsel*, JD SUPRA (Jan. 30, 2023), https://www.jdsupra.com/legalnews/data-privacy-laws-and-blocking-statutes-7485715/. For state biometric information laws, *see* Bryan Cave Leighton Paisner, *U.S. Biometric Laws & Pending Legislation Tracker*, BCLP: INSIGHTS (June 2, 2023), https://www.bclplaw.com/en-US/events-insights-news/us-biometric-laws-and-pending-legislation-tracker.html#:~:text=Biometric%20privacy%20laws%20and%20regulations,biometric%20information%20or%20biometric%20identifiers. For the General Data Protection Regulation (GDPR), *see* Eur. Union, *The History of the General Data Protection Regulation*, EUROPEAN DATA PROTECTION SUPERVISOR, https://edps.europa.eu/data-protection/data-protection/legislation/history-general-data-protection-regulation_en (last visited Sept. 11, 2023). For SEC regulations requiring reporting of cybersecurity risks effective as of September 5, 2023, *see* Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure, 88 Fed. Reg. 51,896 (Aug. 4, 2023) (to be codified at 17 C.F.R. pts. 229, 232, 239, 240 and 249).

[5] *See, e.g.*, *Riley v. California*, 573 U.S. 373, 385-86, 393-97 & 403 (2014), for an extensive discussion and analysis by Chief Justice Roberts writing for the Court regarding the profound nature of changes in just the past few years affecting the amount of sensitive, private information that is now routinely stored and carried around by the average member of the public and the importance of considering the reality of these changes in daily life when courts adjudicate legal controversies. *See also*, *Carpenter v. United States*, 138 S. Ct. 2206, 2219 (2018) (chastising the government's legal position for failing to account for "the seismic shifts in digital technology" storing personal information that has occurred over the past few years.).

[6] Steven S. Gensler & Lee H. Rosenthal, *The Privacy-Protection Hook in the Federal Rules*, 105 JUDICATURE 77, 78 (2021) ("Gensler & Rosenthal").

[7] Stuart, *supra* note 3, at 677 ("The Rules do not provide for explicit protection against discovery based on privacy, with the exception of redaction of personal information under Rule 5.2." (footnote omitted)).

technology such as in cell phones[8] (including BYOD devices),[9] social media,[10] GPS,[11] personal fitness trackers,[12] AirTags,[13] and the internet of things.[14] The word "privacy" appears only once in the FRCP—in the heading of Rule 5.2, which was written before the iPhone was introduced, and is a narrow provision limited to a discrete and outdated list of items such as social security numbers and bank account information to be redacted in paper records filed with the court.[15]

By default rather than design, the lone FRCP provision for handling privacy issues in civil litigation is Rule 26(c), which authorizes courts to issue protective orders but does not mention

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[8] The Supreme Court in *Riley*, 573 U.S. at 394-95 explained:

> The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several months, as would routinely be kept on a phone.

[9] *See* Agnieszka A. McPeak, *Social Media, Smartphones, and Proportional Privacy in Civil Discovery*, 64 U. KAN. L. REV. 235, 285 (2015) ("McPeak"):

> As more employers adopt BYOD policies, business disputes will involve broad attempts at discovery of smartphone or other personal device contents. While these devices are not shielded from discovery, the scope of discovery must account for the unique privacy implications that arise because of the comingling of personal and professional data. Further, smartphones and personal devices will continue to expand in functionality and will archive even more highly personal details over time, making broad attempts at civil discovery even more intrusive. Courts will have to weigh privacy concerns when defining discovery's parameters.

[10] *See Id.* at 273 ("Needless to say, social media's popularity, functionality, and ubiquity has grown in unprecedented ways since 2006, and it is safe to assume that the ESI discovery amendments did not specifically consider social media and its unique ability to compile detailed personal information."); Stuart, *supra* note 3, at 707 ("Broad requests for social media content implicate privacy concerns because people often share 'the most intimate of personal details on a host of matters, many of which may be entirely unrelated to issues in specific litigation.'").

[11] *See United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring) ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about … familial, political, professional, religious, and sexual associations") *and* Stuart, *supra* note 3, at 725 ("Clearly, Supreme Court case law provides strong support for privacy rights in cell phones, GPS data, and cell site location information[.]").

[12] Stuart, *supra* note 3, at 710 ("Information from [personal activity] devices is now a regular part of form interrogatories and document requests.").

[13] *See* Kaitlin Balasaygun, *The Biggest Risks of Using Bluetooth Trackers Like Apple AirTag, Tile*, CNBC.com (Jan. 14, 2023), https://www.cnbc.com/2023/01/14/the-biggest-security-pros-and-cons-of-using-bluetooth-gps-trackers.html#:~:text=Apple%27s%20work%20with%20law%20enforcement,may%20have%20limited%20value%2C%20though.

[14] Stuart, *supra* note 3, at 713 ("It is only a matter of time before the explosion in IoT devices leads to regular civil discovery into smart speakers, smart home alarm systems, and smart home health monitors. Civil defense lawyers already tout the importance of discovery into virtual assistants like Alexa and Siri[.]").

[15] FED. R. CIV. P. 5.2 (rule limited to social security numbers, tax ID numbers, birth dates, financial account numbers, and identifying information of minors).

privacy or provide any tools for early, proactive management of privacy issues.[16] Although "[p]rotective orders are an important mechanism for protecting privacy,"[17] and the Supreme Court has acknowledged Rule 26(c)'s role in protecting privacy,[18] the rule is now ill-equipped to meet this critical need because protective orders are by nature reactive;[19] they do not furnish a structure for considering, avoiding, minimizing, or navigating around the complications of privacy interests and attendant cyber security risks.[20] Also, protective orders are resource-intensive for both courts and parties—they require a showing of "good cause" that can be inappropriate for information that is protected by law[21] (although some courts require discovery of private information be "clearly" relevant or that it go to the "heart of the case"[22]). Protective orders also are limited in effectiveness (particularly as to cyber security risks[23]) and rarely address the standards that should govern how information is stored, accessed, and protected by receiving entities. Further, protective orders are not reasonably accessible to non-parties who are often unaware of the potential risk of prejudice to their privacy rights and, therefore, not in a position to seek the court's protection.[24]

Civil litigation, and discovery in particular, *always* involves privacy considerations and accompanying data security risks.[25] The information that litigants reveal in pleadings, request in discovery, rely on for motions, and relate in court includes not only data that a party may regard as proprietary, but may also include information that is protected by law or that parties and non-

[16] The 1970 Committee Note to Rule 26(c) uses the word privacy only in relation to "trade secrets and other confidential commercial information."

[17] McPeak, *supra* note 9, at 272 n.268 (citing *Seattle Times Co.*, 467 U.S. at 31).

[18] *Seattle Times Co.*, 467 U.S. at 35 n.21 ("Although the Rule [26(c)] contains no specific reference to privacy or to other rights or interests that may be implicated, such matters are implicit in the broad purpose and language of the Rule.").

[19] Babette Boliek, *Prioritizing Privacy in the Courts and Beyond*, 103 CORNELL L. REV. 1101, 1128 (2018)

("Boliek") ("Although courts have always had the authority, in practice, courts rarely limit discovery on privacy grounds on their own motion.").

[20] *Id.* at 1132 ("These orders are not foolproof, however, and cannot replace the initial gatekeeper role of the judge in granting discovery in the first instance.").

[21] *See* McPeak, *supra* note 9, at 256 ("The good cause standard requires particular facts demonstrating potential harm, and not on conclusory allegations. The party seeking the protective order must show a particular need for protection, rather than broad allegations of harm. Further, the harm must be significant." (footnotes omitted); Robert D. Keeling & Ray Mangum, *The Burden of Privacy in Discovery*, 105 JUDICATURE 67, 68 (2021), https://judicature.duke.edu/articles/the-burden-of-privacy-in-discovery/ ("Keeling & Mangum") ("Showing good cause was (and is) often difficult in contested matters.").

[22] *See* Stuart, *supra* note 3, at 699 nn. 171, 172.

[23] Boliek, *supra* note 19, at 1132, 1145 ("protective orders are effective only when the signatories comply with their parameters, and even then information can be misplaced or disclosed inadvertently" and "hackers are hitting well-known law firms—a reminder that a protective order does not protect data from outside threats" (footnote omitted)).

[24] *Id.* at 1137-38 ("third-party interests are difficult to defend in a court of law because of the cost of intervening in a court case").

[25] *Id.* at 1104 ("the undervaluation of the privacy interest (unnecessarily) increases cybersecurity risks").

parties consider private or confidential.[26] While most people understand that their bank, insurance company, health care provider, employer, favorite search engine, email provider, mobile App, or fitness tracker has information about them, few comprehend that a court or litigant could be required to provide their information to numerous entities or people involved in a lawsuit without the data subject's knowledge or consent. Nor do many people know that the content of their emails, text messages, financial information, or search queries can be requested and ordered to be shared with unknown entities involved in a civil lawsuit of which they are not aware—even if their information is putatively protected by privacy laws. In fact, it is now routine for parties to seek and produce significant amounts of data about non-party individuals—including customers, employees, suppliers, contractors, and members of the general public—without any notice to those individuals that their personal information or other material they consider private is being disclosed and used.[27]

Non-party information raises particularly difficult questions because the holders of such data likely have different interests than the people who are the subject of that data.[28] Moreover, privacy interests cannot be honored when cyber security risks are left unaddressed. Notwithstanding substantial investments by universities, corporations, and individuals of resources in state-of-the-art security to safeguard information technology systems (often required by federal and state regulations[29]), discovery frequently requires those entities to create copies of vast amounts (gigabytes and terabytes, even in small cases) of sensitive information and deliver that information into higher-risk environments that are non-compliant with even rudimentary cybersecurity practices, making it vulnerable to both negligent and purposeful exposure.[30] Increasingly sophisticated hackers, including foreign state actors, purposely target participants in

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[26] *See* Gensler & Rosenthal, *supra* note 6, at 79 ("Parties often seek discovery of information that is intermingled with private information, including private information of or about nonparties to a lawsuit."); Stuart, *supra* note 3, at 705-06 ("[M]odern discovery goes far beyond what we consider typical documents and communications. Litigants increasingly focus on sources of discovery that have the capacity to reveal a great deal of information, much of it highly personal.").

[27] "Courts should apply higher limits still when private information is sought from or implicates the rights of third parties." Stuart, *supra* note 3, at 719.

[28] Boliek, *supra* note 19, at 1107:

> There are certainly times when sensitive information is *not* essential to a case, and a defendant … may simply agree to release information because it is easier or cheaper to hand over the data than to litigate the issue or redact the data. This is particularly true when the information at issue is about a third party, not about the information recipient (holder) itself. In economic terms, this is an example of misaligned interests. In other words, the defendant (the recipient of the information) may bear little cost by disclosing information to the plaintiff—costs of disclosure will be largely borne by the third party (the information provider). But, in contrast, the defendant may bear high costs if he or she fights against such disclosure. Unless the defendant internalizes the consequences the disclosure has on the information provider (e.g. public embarrassment, identity theft, loss of employment due to the exposure of the personal information, etc.) a private discovery agreement between the plaintiff and that defendant will never protect the third-party privacy interests.
>
> Add to this scenario the risk of cybersecurity breaches in the transfer, storage, and disposal of sensitive data, and the risks associated with an ill-conceived judicial order explode.

[29] *See, e.g.*, Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure, 88 Fed. Reg. 51,896 (Aug. 4, 2023) (to be codified at 17 C.F.R. pts. 229, 232, 239, 240 and 249).

[30] Boliek, *supra* note 19, at 1133-34.

the U.S. civil justice system because litigation forces the assemblage and concentration of confidential information onto less secure platforms, which explains why frequent cyber-attacks are aimed at law firms,[31] ediscovery vendors, expert witnesses and U.S. courts. Indeed, some information is at risk only because of court decisions requiring discovery.[32]

As the Sedona Principles reflect, parties have a responsibility to "take reasonable steps" to protect personal and confidential information confidential.[33] Conforming the FRCP to this accepted standard means moving beyond protective orders as the sole implement and incorporating tools throughout the FRCP, as Professor Babette Boliek observes:

> To shore up the protective order for modern day realities, courts must first acknowledge that they cannot rely solely on the protective order of old to limit the inadvertent disclosure of sensitive information. A means to assure protection is to consider and weigh the affected parties' privacy interest at every step of the discovery process.[34]

The suggestions below and attached in the appendix propose a comprehensive examination of the FRCP to identify provisions that should be amended to establish a much-needed framework for courts and parties to navigate and protect privacy rights and prevent cyber security problems in civil litigation. Such issues arise throughout the litigation process, from case filing through to trial and beyond; the FRCP's prompts and instructions should be integrated throughout the rules.[35]

PROPOSALS

These proposals reflect that, while discovery is appropriately focused on truth-seeking, the current rules are no longer adequate for helping ensure that courts and parties balance their dual responsibilities to the case and to protecting parties and non-parties from the intrinsic risk that

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[31] *See* Graham Cluley, *Oreo Maker Mondelez Staff Hit by Data Breach at Third-Party Law Firm*, BITDEFENDER (June 21, 2023), https://www.bitdefender.com/blog/hotforsecurity/oreo-maker-mondelez-staff-hit-by-data-breach-at-third-party-law-firm/?clickid=wIY3Us2AjxyPWqWXyWTPvxroUkFU5LSPUXUYTU0&irgwc=1&MPid=4328530&cid=aff%7Cc%7CIR%2F%2F; The hacking of two of New York's most prestigious law firms in 2016 shocked the profession and highlighted the vulnerability of data entrusted to other parties during discovery, even when "protected" by confidentiality orders and possessed by the nation's most admired law firms. Nicole Hong & Robin Sidel, *Hackers Breach Law Firms, Including Cravath and Weil Gotshal*, WALL ST. J. (Mar. 29, 2016), https://www.wsj.com/articles/hackers-breach-cravath-swaine-other-big-law-firms-1459293504?reflink=desktopwebshare_permalink; Jeff John Roberts, *China Stole Data From Major U.S. Law Firms,* FORTUNE (Dec. 7, 2016), https://fortune.com/2016/12/07/china-law-firms/.

[32] Boliek, *supra* note 19, at 1138 ("in some circumstances, third-party information is at risk only because of the unique prerogative of the judiciary to compel discovery").

[33] THE SEDONA PRINCIPLES, THIRD EDITION: BEST PRACTICES, RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION, 19 SEDONA CONF. J. 1, 147, princ. 10 (2018) ("Parties should take reasonable steps to safeguard electronically stored information, the disclosure or dissemination of which is subject to privileges, work product protections, privacy obligations, or other legally enforceable restrictions.").

[34] Boliek, *supra* note 19, at 1134.

[35] Stuart, *supra* note 3.

access, use, and disclosure of personal and confidential information can cause significant and irreversible harm.

- Rule 1: Because all stakeholders share the obligation, the starting point should be an acknowledgment in Rule 1 that courts and parties have a responsibility to protect reasonable expectations of privacy, particularly with respect to information about non-parties who have no notice of the proceedings.
- Rules 26(f) and 16(b)(3)(B): The rules should prompt early consideration of privacy and cyber security issues.
- Rule 26(a)(1) and 26(e): The rules about initial disclosures and supplementation should clarify that parties need not include information protected by federal, state, or foreign privacy laws.
- Rule 26(c): Because protective orders are frequently used to protect privacy rights, Rule 26(c) should expressly acknowledge that such orders can bar unnecessary disclosure of personal and confidential information and require reasonable steps to ensure that no personal or confidential information is placed at risk of unauthorized disclosure.
- Rule 5.2: Clear guidance is needed about the sealing of documents. Rule 5.2 is woefully outdated.
- Rule 34: As the focal point of requests for documents and ESI, Rule 34 should empower courts and parties to ensure reasonable steps are taken to protect against unauthorized access of personal or confidential information.
- Rule 26(b)(1): To ensure that courts and parties consider whether discovery requests are proportional to the needs of the case, Rule 26(b)(1) should specifically reference the legal complexities, burdens on time, risks of exposure, potential infringement on privacy rights, and financial costs of producing and/or redacting personal information when determining whether the "burden or expense of the proposed discovery outweighs its likely benefit."[36]
- Rule 26(g): Lawyers who request or respond to discovery should be reminded by Rule 26(g) certifications that reasonable steps are required to avoid unnecessary use of personal information.
- Rule 37: The FRCP should provide remedies for the failure to "take reasonable steps"[37] to protect personal and confidential information.
- Rule 26(b)(4)(A): Because experts often rely on personal and confidential information when informing and explaining their opinions, Rule 26(b)(4)(A) should provide guidance for protecting against disclosure of such information in expert reports and depositions.
- Rule 44.1: Lawyers should not seek, and courts should not order, disclosure of information the production of which puts the holder in a Catch-22 situation because disclosure is barred by federal, state, or foreign law or infringes on the privacy rights of the data subjects.

[36] FED. R. CIV. P. 26(b)(1).

[37] *See* THE SEDONA PRINCIPLES, *supra* note 35, at 147, princ. 10 ("Parties should take reasonable steps to safeguard electronically stored information, the disclosure or dissemination of which is subject to privileges, work product protections, privacy obligations, or other legally enforceable restrictions.").

- Rule 23: Due to the duties that judges have in class action proceedings, Rule 23 should include express protections for the privacy interests of absent class members.
- Rule 45: Finally, it is very important that Rule 45 be amended to protect non-parties[38] by ensuring that subpoenas do not result in unnecessary use or disclosure of personal or confidential information, including information that is subject to federal, state, or foreign data protection laws; that the issuer must take reasonable steps to protect personal and confidential information from unauthorized disclosure; and that these duties are enforceable with appropriate sanctions.

Together, these proposals will ensure that privacy and cyber security considerations are interwoven into the fabric of the FRCP so courts and parties have coherent guidance on how to anticipate, mitigate, and manage their shared responsibilities for these issues.

I. RULE 1 SHOULD AFFIRM THAT THE FRCP SHOULD BE CONSTRUED, ADMINISTERED, AND EMPLOYED TO PROTECT THE PRIVACY RIGHTS OF PARTIES AND NON-PARTIES

The responsibility for ensuring protection of parties' and non-parties' personal and confidential information during the litigation process is shared by courts[39] and parties[40] alike. Stating this in Rule 1 would not be an invention; it would be an affirmation of the present reality. "Privacy is a core concept that underlies the civil discovery rules…."[41] and "[m]any courts refer to 'expectations of privacy' in the context of civil discovery."[42] In fact, "for decades courts have routinely limited discovery based on the private nature of the information sought" and "[c]ourts have long utilized [the "good cause"] balancing test to protect privacy rights in the context of civil discovery."[43] Just as Rule 1 proclaims that courts and parties should construe, administer, and employ the FRCP to "secure the just, speedy, and inexpensive determination of every action and proceeding,"[44] so should Rule 1 acknowledge that courts and parties have responsibilities to

[38] Boliek, *supra* note 19, at 1139 ("[T]he need to protect the privacy interest is particularly acute when third parties cannot self-protect (opt out of the transaction) and cannot pursue tort remedies in the event of disclosure. As a threshold analysis, therefore, a judge should intervene to protect privacy interests in discovery when certain elements exist because they indicate circumstances when such rights are least likely to be otherwise protected.").

[39] Federal courts are obligated to protect private information by the E Government Act of 2002, 44 U.S.C. § 3601 *et seq*.; *See also* Boliek, *supra* note 19, at 1105 ("Only the judiciary plays the solemn role of gatekeeper to discovery requests and is therefore the ultimate guardian of this country's corporate, governmental, and individual private information.").

[40] THE SEDONA PRINCIPLES, *supra* note 35, at 147, princ. 10 ("Parties should take reasonable steps to safeguard electronically stored information, the disclosure or dissemination of which is subject to privileges, work product protections, privacy obligations, or other legally enforceable restrictions.").

[41] McPeak, *supra* note 9, at 235.

[42] Stuart, *supra* note 3, at 714.

[43] Hon. James C. Francis IV (Ret.), *Good Intentions Gone Awry: Privacy as Proportionality Under Rule 26(b)(1)*, 59 SAN DIEGO L. REV. 397, 401, 404 (2022) ("Francis"); *See also* Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 2 (1983) ("courts have regularly entered protective orders not only to protect trade secrets, but also to avoid other undesirable consequences such as the invasion of litigants' privacy" (footnotes omitted)).

[44] Fed. R. Civ. P. 1.

protect privacy rights and should use the FRCP to help manage those duties. It is particularly important for Rule 1 to acknowledge non-party privacy interests because today's practice of seeking and producing vast quantities of data about non-party individuals without notice to such individuals or a realistic opportunity to intervene reflects a sea change in discovery that is insufficiently contemplated by the FRCP. Because Rule 1 sets the aspirations for practice under the rules, it should be amended to reflect the responsibility of courts and parties to protect reasonable expectations of privacy and confidentiality as follows:

Rule 1 – Scope and Purpose

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding, and to protect the reasonable expectations of privacy and confidentiality of parties and non-parties.

II. PRIVACY AND CYBER SECURITY CONSIDERATIONS SHOULD BE DISCUSSED IN RULE 26(f) PRETRIAL CONFERENCES AND INCORPORATED IN SCHEDULING ORDERS ISSUED UNDER RULE 16(b)

Amending Rules 16(b)(3)(B) and 26(f) to encourage parties to discuss privacy and cybersecurity issues early in the case is as important today as it was, in the 2015 rules amendments, to encourage parties to consider preservation and FRE 502 issues.[45] The Advisory Committee recognizes that early discussions are key to managing and solving discovery issues, particularly those that involve an information gap between the parties. The Committee Note to the 2015 amendment to Rule 26(b)(1) states:

> A party requesting discovery, for example, may have little information about the burden or expense of responding. A party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party. Many of these uncertainties should be addressed and reduced in the parties' Rule 26(f) conference and in scheduling and pretrial conferences with the court.[46]

Privacy and cyber security considerations should be part of this process. In fact, it would be equally accurate if the note also stated:

> A party requesting discovery also may have little information about the burden or expense of identifying personal or confidential information, whether it is protected by federal, state, or foreign data privacy laws, the feasibility of redacting such information and the associated burden, and what reasonable steps might be necessary to ensure that

[45] *See* FED. R. CIV. P. 16(b)(3)(B) advisory committee's note to 2015 amendment.

[46] FED. R. CIV. P. 26(b)(1) advisory committee's note to 2015 amendment.

> such information is handled in a manner that does not place it at increased risk of unauthorized access, use, or disclosure.

Today, some of the most complex problems in litigation require balancing privacy interests of both parties and non-parties with the needs of the case. Such problems can arise very early in the case – for example, during preservation decisions – and can grow more thorny as the case progresses if not anticipated. Privacy considerations are not often top of mind early in a case when lawyers are focused on their clients' issues and interests, which do not always include protecting the privacy interests of non-parties.[47] But as the Sedona Principles observe, "the widespread adoption of state and federal privacy laws (as well as the application of foreign data protection laws) demands protective orders and procedures that provide adequate personal privacy safeguards and meet applicable statutory and common law legal standards."[48] Too often, these matters are left out of the early planning conferences, only to show up later in the form of a motion for protective order – or, even worse, only after someone's sensitive information has already been exposed. "[C]ourts should recognize that a valid privacy concern exists when a party seeks access to a digital data compilation."[49] Rather than ignore the problem until an exigency erupts, Rule 26(f) should require parties to share proposals on how to incorporate into their discovery plans how they will minimize the use of personal and confidential information, protect such information from unauthorized access or disclosure, and comply with the privacy rights of parties and non-parties as defined by applicable laws. A Sedona comment explains:

> Redactions or other actions necessary to protect private, personal information to meet required safeguards can be costly and time-consuming. The parties should address and attempt to resolve such issues at the Rule 26(f) conference. For example, parties may agree to exclude from production categories of private, personal information that are only marginally relevant to the claims and defenses or are cumulative of other produced information.[50]

Similarly, Rule 16 should prompt judges to discuss handling these issues proactively and to include provisions in their scheduling orders that provide protection for personal and confidential information, establish appropriate cybersecurity measures for information produced during the proceeding, and direct an appropriate process for returning or destroying sensitive information after the conclusion of the case.

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[47] While the term non-parties is used throughout this proposal, we wish to emphasize that we are not primarily focused on non-parties who receive a Rule 45 subpoena. Instead, we primarily use this term – except where otherwise noted – to describe non-party individuals whose information may be used in conjunction with a proceeding even though they have no meaningful notice of the proceeding and no way to respond. For example, the employees, customers, or suppliers of a party whose information is collected, copied, and transferred as part of the discovery process, or the friends and family members of a custodian whose chat messages and photos are collected when that custodian's personal devices are forensically imaged. No rule currently addresses the concerns or rights of such true non-parties, even though their information constitutes much of the information exchanged in discovery.

[48] THE SEDONA PRINCIPLES, *supra* note 35, at 152, cmt. 10.e.

[49] McPeak, *supra* note 9, at 288.

[50] THE SEDONA PRINCIPLES, *supra* note 35, at 163, cmt. 10.j.

A Rule 26(f) amendment could look like this:

Rule 26 – Duty to Disclose; General Provisions Governing Discovery

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(f) CONFERENCE OF THE PARTIES; PLANNING FOR DISCOVERY.

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(3) *Discovery Plan.* A discovery plan must state the parties' views and proposals on:

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(F) how the use of personal and confidential information will be minimized, including through the use of data anonymization, pseudonymization, encryption and redactions;
(G) how data disclosed or used in the proceeding will be protected from unauthorized access, use, or disclosure, and how the privacy rights of parties and non-parties covered by federal, state, and foreign data privacy laws will be protected; and
(HF) any other orders that the court should issue under Rule 5.2, Rule 26(c) or under Rule 16(b) and (c).

***

A Rule 16 amendment could address the problem as follows:

Rule 16 – Pretrial Conferences; Scheduling; Management

***

(b) SCHEDULING.

***

(3) *Contents of the Order.*

***

(B) *Permitted Contents.* The scheduling order may:

***

(vii) provide measures for protecting personal and confidential information related to both parties and non-parties, including any personal information

subject to federal, state, or foreign data privacy laws, from unnecessary use, disclosure or unauthorized access during the proceeding;
(viii) provide for reasonable and appropriate cybersecurity measures to prevent unauthorized access, use or disclosure of any information produced or disclosed by a party or a non-party during the proceeding;
(ix) direct that, at the conclusion of the proceeding, information disclosed during the proceeding be returned or securely destroyed; and
(x~~vii~~) include other appropriate matters.

***

(c) ATTENDANCE AND MATTERS FOR CONSIDERATION AT A PRETRIAL CONFERENCE.

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(2) *Matters for Consideration.* At any pretrial conference, the court may consider and take appropriate action on the following matters:

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(P) determining reasonable procedures for protecting personal and confidential information from unnecessary use, disclosure, or unauthorized access, including any personal information subject to federal, state, or foreign data protection laws; and
(Q) facilitating in other ways the just, speedy, and inexpensive disposition of the action.

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III. PRIVACY PROTECTIONS AND CYBER SECURITY CONSIDERATIONS SHOULD BE EXPRESSLY ACKNOWLEDGED AS LIMITS TO INITIAL AND SUPPLEMENTAL DISCLOSURES

The requirements of Rule 26(a)(1) and Rule 26(e) should reflect that parties are not obligated to make initial disclosures of information that is protected by law, and are not required to turn over personal and confidential information unless the recipients have taken reasonable steps to protect such information from unauthorized access, use, or disclosure. An amendment to Rule 26(a)(1) could look like this:

Rule 26 – Duty to Disclose; General Provisions Governing Discovery
(a) REQUIRED DISCLOSURES.
(1) *Initial Disclosure*.

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(F) *Limits on Initial Disclosure for Privacy and Information Security*. A party's initial disclosures need not include information protected by federal, state, or foreign privacy laws, including confidential information or personal information if the recipient has not taken reasonable and appropriate steps to ensure that such information is not subject to unauthorized access, use or disclosure. A party relying on this provision must expressly so state in their initial disclosures. These limits also apply to Rule 26(e) supplementation of initial disclosures.

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(3) *Pretrial Disclosures*.

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

(i) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises, subject to the considerations outlined in Rule 5.2(i);

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IV. RULE 26(c) SHOULD ACKNOWLEDGE AND ENCOURAGE PROTECTIVE ORDERS ADDRESSING PRIVACY AND CYBER SECURITY ISSUES

Rule 26(c) protective orders are frequently used to address privacy interests and cyber security risks in discovery, and the Rule should be amended to reflect this important role and to emphasize that reasonable and appropriate steps are needed to prevent the negligent or purposeful unauthorized access, use, or disclosure of information. An appropriate amendment would not only conform the rule to common practice, but also could prompt orders that protect the interests of non-parties, including employees, customers, patients, and contractors who might not even be aware that their personal information is being sought and disclosed. An amendment could add a provision as follows:

Rule 26 – Duty to Disclose; General Provisions Governing Discovery

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(c) PROTECTIVE ORDERS.

(1) In General. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

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(I) requiring that personal and confidential information not be revealed or be revealed only in a specified manner and that reasonable and appropriate steps be taken to avoid placing it at risk of unauthorized access, use or disclosure.

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V. RULE 5.2 SHOULD BE UPDATED TO PROVIDE CLEAR GUIDANCE FOR BALANCING LITIGATION NEEDS WITH THE NECESSITY OF PROTECTING PERSONAL AND CONFIDENTIAL INFORMATION

The sealing of information filed with the court or used in court proceedings is critical to courts' and parties' ability to balance the needs of litigation with the courts' and parties' obligation to protect personal and confidential information. As the Advisory Committee is now considering whether and how to fashion a uniform federal rule governing sealing procedures,[51] the Advisory Committee's attention should focus on helping courts and parties navigate the legal requirements and complexities of privacy interests held by parties and non-parties. The Advisory Committee recognized that a court's decision whether to allow sealing is consequential because the default practice is to make court records open to the public. The Committee Notes to Rule 5.2 warn:

> Parties must remember that any personal information not otherwise protected by sealing or redaction will be made available over the internet.[52]

Although this is an appropriate caution, it is wholly insufficient as rules guidance. Acknowledging that information belonging to parties (and non-parties, although not mentioned in Rule 5.2), even if protected by law, will be publicly available unless sealed or redacted does not provide a framework for navigating the knotty questions. Trial courts recognize that sealing of documents and portions of court proceedings is necessary to protect the privacy and proprietary interests of parties and non-parties.[53] But Rule 5.2 is outdated; it does not expressly

[51] Advisory Committee on Civil Rules, *Agenda Book* 133-34 (Mar. 28, 2023), https://www.uscourts.gov/sites/default/files/2023-03_civil_rules_committee_agenda_book_final_0.pdf.

[52] FED. R. CIV. P. 5.2 advisory committee's note.

[53] *See, e.g.*, Gina Kim, *Masimo Execs Testify Behind Closed Doors In $3B Apple Trial*, LAW360 (Apr. 6, 2023), https://www.law360.com/articles/1594526/masimo-execs-testify-behind-closed-doors-in-3b-apple-trial, ("U.S.

allow redactions of information that is now protected by privacy laws, or personal information that does not fall within the four narrow categories listed in the rule (social security number, birthdate, a minor's name, and financial account numbers).[54] Nor does the rule prompt consideration of the most basic necessary factors including the privacy and confidentiality rights of parties and non-parties, the burdens of identifying and redacting sensitive information, and whether the court and parties have taken reasonable steps to protect against negligent disclosure of, or unauthorized access to, other people's information. Alarmingly, Rule 5.2 expressly allows a person making a redacted filing to file an additional unredacted copy under seal, which could completely vitiate any protection the rule might otherwise offer. That provision shows an important defect in the rule: sealing cannot be considered a cure all. As the recent SolarWinds data breach of federal court information systems demonstrates, a sealing order is not a guarantee against disclosure, and courts' considerations should include whether their own systems are appropriately secure and whether certain information is so sensitive that it should not be filed under seal.

To address these important shortcomings, the Advisory Committee should amend Rule 5.2 to provide express guidance for considering sealing requests. The rule should make clear that a decision to seal court records is a balancing between the needs of the litigation, transparency, and the duty to protect the privacy and property interests. The rule should also recognize the responsibility of the court and parties to address the rights and interests of non-parties who might not be aware that their personal information could be disclosed through a court filing or testimony.

It is important to note that the Advisory Committee is being urged to draft an all-new rule 5.3 to curtail a perceived excess in sealing orders.[55] But an entirely new rule is not needed given that Rule 5.2 is intended to encompass the details of sealing and that the caselaw shows courts already give ample consideration to avoiding unnecessary restrictions on public access to judicial *proceedings*. To the contrary, the real problems occur when courts adopt an overly prescriptive approach to sealing *documents* containing personal or confidential information, resulting in either excessive and burdensome redactions of information that did not really need to be protected or, alternatively, grossly inadequate protections for information that should have been sealed, particularly personal information related to non-parties whose names and other personal information appear in exhibits and evidence. Our proposed amendment to Rule 5.2 solves these problems by setting explicit criteria for consideration in sealing decisions paired with sufficient flexibility to enable courts and parties to craft case-specific approaches that balance the interests of privacy and transparency.

District Judge James V. Selna ordered the courtroom sealed for portions of testimony on both direct and cross-examination from Kiani regarding the plaintiffs' purported trade secrets.").

[54] FED. R. CIV. P. 5.2(a).

[55] Letter from Eugene Volokh, Gary T. Schwartz Professor of Law, UCLA School of Law, to Members of the Advisory Committee (Aug. 7, 2020), https://www.uscourts.gov/sites/default/files/20-cv-t_suggestion_from_eugene_volokh_reporters_committee_for_freedom_of_the_press_and_the_electronic_frontier_foundation_-_rule_5_0.pdf.

An appropriate amendment could look like this:

Rule 5.2. – Privacy Protection For Filings Made with the Court

(a) Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing with the court, a party:

(1) may redact personal information protected by federal, state, or foreign privacy laws; and

(2) shall redact sensitive personal information consisting of an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number; a party or nonparty making such filing may include only:

(~~1~~a) the last four digits of the social-security number and taxpayer-identification number;
(~~2~~b) the year of the individual's birth;
(~~3~~c) the minor's initials; and
(~~4~~d) the last four digits of the financial-account number.

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(e) Protective Orders. For good cause, the court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's ~~remote electronic~~ access to a document filed with the court.

(f) Option for Additional Unredacted Filing Under Seal. For good cause, the court may by order in a case allow a~~A~~ person making a redacted filing ~~may also~~to file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

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(i) Considerations. When the court is considering the sealing or unsealing of documents filed with the court, or whether to order discovery or disclosure under Rule 26, including the issuance of a protective order, the court shall consider: (a) whether the court or requesting party can provide reasonable and appropriate protection against unauthorized access or disclosure; (b) the rights and interests of parties and non-parties in maintaining the privacy and confidentiality of information pertaining to them; (c) the burdens on parties and non-parties, including whether those burdens are proportional to the needs of the case; (d) whether the information to be redacted is protected by federal, state, or foreign privacy laws; and (e) whether the information to be redacted is subject to a contractual confidentiality obligation or non-disclosure agreement.

VI. RULE 34 SHOULD EMPOWER COURTS AND PARTIES TO ENSURE REASONABLE STEPS ARE TAKEN TO PROTECT AGAINST UNAUTHORIZED ACCESS OF PERSONAL OR CONFIDENTIAL INFORMATION

Rule 34 defines the procedure for requesting—and objecting to requests for—documents, ESI, and tangible things, but it does not provide parties with adequate assurance of appropriate handling of such information to deal with privacy and cybersecurity concerns. The Advisory Committee has acknowledged the problem, albeit in a very limited way; the 2006 Committee Note observes that testing and sampling of ESI or information systems "may raise issues of confidentiality or privacy" and suggests that "[c]ourts should guard against undue intrusiveness" resulting from inspecting or testing information systems.[56] The rule's restraint belies the seriousness of the problems that regularly occur under the rule. As the Sedona Conference describes, Rule 34 inspections trigger significant privacy and cyber security risks:

> Direct access to an opposing party's computer systems under a Rule 34 inspection also presents possible concerns such as:
>
> a) revealing trade secrets;
> b) revealing other highly confidential or personal information, such as personnel evaluations and payroll information, properly private to individual employees;
> c) revealing confidential attorney-client or work-product communications;
> d) unreasonably disrupting the ongoing business;
> e) endangering the stability of operating systems, software applications, and electronic files if certain procedures or software are used inappropriately; and
> f) placing a responding party's computing systems at risk of a data security breach.[57]

The information explosion is posing severe challenges to courts and parties making, responding to, and ruling on discovery requests and objections. Rule 34 is the epicenter; it is the means by which parties request data from employees' BYOD devices and people's cell phones, fitness trackers, smart watches, computers, and GPS units—locations where information is almost always intermingled with sensitive, personal, and private data related to both parties and non-parties alike. Even if discoverable, such information must be protected from unnecessary disclosure or use. Rule 34 generates this type of situation frequently enough that rule guidance would be much more efficient than *ad hoc* protective orders, and the best way for Rule 34 to help is to set forth the common-sense responsibility of requesting parties to provide assurances that reasonable measures are in place to protect such information from unauthorized access, use, or disclosure. An appropriate amendment could look like this:

Rule 34 – Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

[56] FED. R. CIV. P. 34(a)(1) advisory committee's note to 2006 amendment.

[57] THE SEDONA PRINCIPLES, *supra* note 35, at 128-29.

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(b) Procedure.

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(2) *Responses and Objections*.

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(E) Producing the Documents or Electronically Stored Information. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

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(iv) A party may produce personal or confidential ESI by providing the requesting party with access to a secure data escrow service or other secure digital environment in which the ESI can be securely reviewed, provided such service permits the export of exhibits for use during depositions and in court filings;

(v) A party may object based on plausible concerns about the adequacy of the methods anticipated to be used by the requesting party or other recipients to prevent unauthorized access to, or use of, personal information or other confidential and proprietary information; and

(vi) A party need not produce documents or electronically stored information without having received adequate assurances that any personal information or other confidential and property information will be reasonably and adequately protected from unauthorized access or disclosure upon such transfer.

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VII. THE SCOPE OF DISCOVERY AS DEFINED IN RULE 26(b) SHOULD REFLECT THE COMPLEXITIES AND BURDENS IMPOSED BY PRIVACY ISSUES AND CYBER SECURITY RISKS

Rule 26(b)(1) proportionality factors are highly germane to courts' and parties' consideration of discovery requests that include personal or confidential information. Those factors include whether "the burden or expense of the proposed discovery outweighs its likely benefit" and weighing "the importance of the discovery in resolving the issues."[58] The proportionality

[58] *See* THE SEDONA CONFERENCE PRIMER ON SOCIAL MEDIA, SECOND EDITION, 20 SEDONA CONF. J. 1, 27-28 (2019) ("The proportionality limitation on the scope of discovery includes two factors that implicate privacy concerns, *i.e.,* 'the importance of the discovery in resolving the issues, and whether the burden … of the proposed discovery outweighs its likely benefit'") (citing *Henson v. Turn, Inc*., No. 15-cv-01497-JSW (LB), 2018 WL 5281629 (N.D. Cal. Oct. 22, 2018)).

analysis is especially important when, as often happens today, the discovery sought includes materials that are intertwined with personal, protected information of parties and non-parties such as data generated and stored by cell phones and other BYOD devices,[59] social media, activity trackers, and the internet of things.

"[C]ourts should take privacy burdens into account when determining the proportionality of discovery,"[60] and should consider the impact of privacy concerns on proportionality at all stages of the discovery process.[61] "Achieving proportional privacy means that the privacy invasion in some cases may outweigh the likely benefits of the discovery."[62] For example, before financial information regarding millions of people is extracted from a bank app and duplicated across multiple parties, non-parties, their consultants, experts and the courts, the court and parties should think through whether sharing so much sensitive information about other people and putting it at a higher risk for unauthorized use is proportional to the needs of the case and whether doing so on the scale proposed is fair to the non-party individuals whose information will be duplicated and disseminated.

Often, when managed early and thoughtfully, alternative approaches can provide the key information with much less risk to individuals and lower burdens on parties. Proportionality is flexible; it can be used to determine the smallest amount of data access that is proportional to the needs of the case. For example, "[h]igh costs for redaction may lead a court to order that less data be released, no data be released, or another privacy protection option be employed."[63] In contrast, ignoring proportionality analysis can lead to inefficient, inappropriate, and unfair decisions that impose complicated, time-consuming, and expensive legal work, often encumbering a single stakeholder – typically, the producing party – with sorting out the disparate legal standards and undertaking all of the redactions and other remedies required by various laws and regulations without first asking whether those burdens are proportional to the value of the information in adjudicating the claims and defenses.

"[A]n emerging consensus of courts and commentators has concluded that privacy interests may—and indeed, should—be considered as part of the proportionality analysis required under Rule 26(b)(1)."[64] Unfortunately, however, neither Rule 26(b)(1), Rule 26(b)(2)(C), nor the accompanying Committee Notes mention privacy and cyber security considerations expressly. "[I]t is difficult to shoehorn privacy interests into any of the factors identified in Rule 26(b)(1)"[65] in part because, "[d]espite the courts' preexisting authority to limit discovery based on privacy

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[59] "[D]iscovery of content on these devices may encompass irrelevant, highly personal information of both litigants and employees who are not parties to the litigation." McPeak, *supra* note 9, at 283.

[60] *Id.* at 289.

[61] *See* Keeling & Mangum, *supra* note 21, at 71 (noting that proportionality applies to "all aspects of the discovery and production of ESI" and that privacy concerns are, therefore, "relevant from the outset" of the case) (quoting THE SEDONA PRINCIPLES, *supra* note 35, at 67) (internal quotations omitted).

[62] McPeak, *supra* note 9, at 291.

[63] Boliek, *supra* note 19, at 1143.

[64] Keeling & Mangum, *supra* note 21, at 67.

[65] Francis, *supra* note 45, at 421.

concerns, the word 'privacy' was curiously absent from this new list of factors."[66] Not only is this oversight depriving courts and parties of a useful framework for managing and avoiding complicated and important issues, but it has also led to considerable uncertainty about the meaning of the rule itself – namely, whether proportionality and mandatory protective order standards apply to discovery involving privacy issues and cyber security considerations. Some courts and lawyers are using the Rule 26(b)(1) proportionality requirement in navigating privacy issues,[67] but others say the text and history of the rule provide no basis for applying proportionality analysis to such questions.[68] Although scholars and commentators disagree about the extent to which the Rule 26(b)(1) "proportionality" requirement already provides a tool to help courts and parties balance privacy interests with the needs of discovery, even the critics of proportionality as a means of balancing privacy interests concede that proportionality is relevant. Judge Francis observes:

> Certainly, to the extent that a party is obligated to expend resources to safeguard the privacy interests of itself or of a non-party whose information it holds, those expenditures are properly considered in a traditional proportionality calculation. Thus, the costs of disaggregating data to isolate that which is private, of redacting personal information, or of anonymizing data in order to shield the identity of non-parties are all burdens appropriately included in the proportionality analysis.[69]

Any fear that amending the proportionality factors to include privacy interests would give judges too much discretion at the expense of clarity and consistency[70] would be prevented by amending other FRCP provisions as suggested herein rather than relying on Rule 26(b)(1) to do the heavy lifting.

As Judge Rosenthal and Professor Gensler urge, the correct path is "to take the subject head on" as "[i]t may well be time to rethink some of the rule choices we made in the past."[71] The Advisory Committee should end the uncertainty about whether the scope of discovery is

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[66] Boliek, *supra* note 19, at 1129.

[67] *See* Keeling & Mangum, *supra* note 21, at 69 ("[T]he fact that specific, nonpecuniary burdens, such as privacy, were not explicitly discussed at length in the pre-2015 history of the amendments does not foreclose it as a proper factor in conducting a proportionality analysis. To the contrary, the Rule's text is plain, and it clearly evinces the drafters' intent that both monetary costs and additional nonpecuniary 'burdens' must be weighed") *and* McPeak, *supra* note 9, at 286 ("Courts already have the discretion to limit the scope of discovery based on the needs of the case and should utilize the proportionality test in Rule 26 to balance the privacy burden of overly invasive discovery against the needs of the case").

[68] Francis, *supra* note 45, at 420 ("To the extent that courts intend to treat privacy as a true proportionality factor, they are hard-pressed to find a theoretical basis for doing so").

[69] *Id*. at 435.

[70] *Id.* at 425-26, 429 ("Treating privacy as a proportionality factor also expands judicial discretion while, at the same time, reducing the clarity and consistency of court decisions" and "treating privacy as a proportionality factor can tempt judicial decision makers to cut analytic corners" and "including privacy within the proportionality analysis provides overburdened jurists a further excuse for dismissing a discovery request out of hand without doing the hard work of disaggregation first").

[71] Gensler & Rosenthal, *supra* note 6, at 81.

impacted by privacy rights—it is, has been for decades, and should be.[72] Just as the 2015 amendment to Rule 26(b)(1) reaffirms that proportionality is *always* a consideration in discovery, so should the rule reflect that privacy and cyber security concerns, which are *always* present, raise—often, even more dramatically—the very question of whether the value of requested information outweighs the complexities, burdens, and risks inherent in identifying, redacting, sharing, and protecting it.

Requiring courts and parties to consider privacy rights and cyber security risks as part of the proportionality analysis would be helpful to courts and parties who share the responsibility to protect personal information, reduce the risks created by discovery, and enhance public trust in the judicial process. Accordingly, Rule 26(b)(1) and Rule 26(b)(2)(C) should be amended to require that privacy interests and cyber security risks be considered when determining if the discovery sought is proportional to the needs of the case. Here's how such amendments might look:

Rule 26 – Duty to Disclose; General Provisions Governing Discovery

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(b) Discovery Scope and Limits.

(1) *Scope in General*. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, the privacy rights held by parties and non-parties, the risk of unauthorized access to, or use of, personal or confidential information, the harm such unauthorized access or use would cause, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) *Limitations on Frequency and Extent.*

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(C) *When Required*. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

[72] Boliek, *supra* note 19, at 1127 ("It is time … for the courts to fully employ the discretion afforded them in Rule 26 and to adopt greater protections for the privacy interest than the traditional protective order.").

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; ~~or~~

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1);

(iv) the discovery sought would require the disclosure of personal information related to parties or non-parties beyond what is strictly necessary to facilitate the action, would violate any federal, state or foreign data privacy law, or otherwise infringes on reasonable privacy expectations held by parties or non-parties; or,

(v) the discovery sought poses an unreasonable risk of unauthorized access, use or disclosure of personal or other confidential information.

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VIII. THE FRCP SHOULD REQUIRE CERTIFICATION THAT REASONABLE STEPS ARE TAKEN REGARDING PRIVACY RIGHTS AND CYBER SECURITY RISKS

As the Advisory Committee knows, compliance with the FRCP's principles and purposes does not flow automatically from rule amendments. The rules, for that reason, provide incentives for observance of particularly important provisions including via the certifications stated in Rule 26(g). Rule 26(g) makes lawyers responsible for the process by which their clients gather the information and documents that form the basis for their discovery responses as well as the mandatory initial disclosures.[73] Encouraging parties and their lawyers to make responsible decisions to balance discovery needs with privacy interests and cyber security risks is worthy of this treatment. Rule 26(g) should say that the signature on discovery requests, responses, and objections certifies that the lawyer has made reasonable efforts to avoid unnecessary requests for or use of personal or confidential information, and that any discovery request or response will not result in unnecessary risks of unauthorized access to, or disclosure of, such information. It should also function as a certification that the lawyer is taking reasonable steps to provide cybersecurity protections, including having a data breach response plan.

An appropriate amendment to Rule 26(g) might read as follows:

Rule 26 – Duty to Disclose; General Provisions Governing Discovery

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(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

[73] Steven S. Gensler, *Some Thoughts on the Lawyer's E-volving Duties in Discovery*, 36 N. KY. L. REV. 521, 558-559 (2009) (discussing the lawyer's duty to certify).

(1) Signature Required; Effect of Signature. Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, email address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made~~;~~ and that reasonable efforts have been made to avoid unnecessary use of personal or confidential information, including any personal information subject to federal, state, or foreign data privacy laws; and

(B) with respect to a discovery request, response, or objection~~, it is~~:

(i) is consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) will not be interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; ~~and~~

(iii) will not result in unnecessary access to, use, or disclosure of, personal or other confidential information, including any personal information subject to federal, state, or foreign data privacy laws;

(~~iii~~iv) is neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action; and,

(v) will not require the production of personal or other confidential information until the requesting party and its attorneys have each implemented reasonable and appropriate cybersecurity protections for such information, including having in place a written data breach response plan.

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IX. THE FRCP SHOULD PROVIDE MEASURES FOR THE FAILURE TO TAKE REASONABLE STEPS TO COMPLY WITH PRIVACY AND CYBER SECURITY REQUIREMENTS

Existing statutes, regulations and tort remedies often require, or at a minimum strongly incentivize, producing parties to take reasonable and appropriate steps to protect personal and confidential information that is within their possession, custody or control prior to its production in civil litigation. However, while the existing FRCP often require parties to produce large quantities of sensitive information, the current rules fail to correspondingly ensure that parties *receiving* such information take adequate steps to protect it. Accordingly, Rule 37 should be amended to incentivize appropriate handling of privacy and attendant cyber security risks by providing a remedy for losses of information due to a receiving party's or lawyer's failure to take reasonable steps to avoid such losses. This provision will act as a deterrent to the negligent or

purposeful failure to protect the privacy rights of parties and non-parties, and will compensate those who suffer from privacy-related harm. An appropriate amendment would be to add a Rule 37(g) with the elements incorporated here:

> Rule 37 – Failure to Make Disclosures or to Cooperate in Discovery; Sanctions
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> ***
>
> (g) Failure to Provide Adequate Protection for Personal and Confidential Information. If unauthorized access to, or disclosure of, personal or confidential information during litigation is caused by the receiving party's failure to take reasonable and appropriate steps to comply with the obligations imposed by these rules, the court may require that party, the attorney advising that party, or both, to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

X. BECAUSE EXPERTS OFTEN BASE OPINIONS ON PERSONAL AND CONFIDENTIAL INFORMATION, THE FRCP SHOULD PROVIDE EXPRESS GUIDANCE FOR PROTECTING THAT INFORMATION FROM DISCLOSURE IN EXPERT REPORTS AND DEPOSITIONS

The FRCP contemplate unabridged disclosure of information upon which an expert relies for the basis of an opinion—and rightly so in most cases. The Advisory Committee explains:

> [T]he intention is that "facts or data" be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients. The disclosure obligation extends to any facts or data "considered" by the expert in forming the opinions to be expressed, not only those relied upon by the expert.[74]

The FRCP do not, however, require or provide guidance about protecting against disclosure of the personal and confidential information the expert considers. Although it is commonplace for courts to enter stipulated protective orders that bind experts to confidentiality and non-disclosure of confidential discovery, such protective orders rarely address the critical need for parties and their counsel to ensure that experts take reasonable steps to secure that information, including measures to make information systems appropriately secure and not vulnerable to unauthorized access. Accordingly, Rule 26(b)(4)(A) should clarify the obligation with respect to experts. An amendment might look like this:

> Rule 26 – Duty to Disclose; General Provisions Governing Discovery
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> ***

[74] FED. R. CIV. P. 26(a)(2)(B) advisory committee's note to 2010 amendment.

(b) Discovery Scope and Limits.

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(4) Trial Preparation: Experts.

(A) Deposition of an Expert Who May Testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided. A party deposing an expert should take reasonable and appropriate measures to protect against disclosure of personal or confidential information relating to parties or non-parties.

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XI. RULE 23 SHOULD UPHOLD THE COURT'S ROLE IN PROTECTING ABSENT CLASS MEMBERS BY PROVIDING GUIDANCE FOR AVOIDING UNNECESSARY USE AND MISUSE OF PERSONAL INFORMATION

Rule 23 establishes a unique role for courts in protecting the interests of absent class members. Today, safeguarding personal information against unnecessary disclosure and misuse during class action litigation is just as important as – and a necessary element of – ensuring adequacy of counsel and fairness of settlements. Accordingly, Rule 23 should clarify that: (1) as a prerequisite, a class action should not unreasonably infringe on the privacy rights of putative class members; (2) certification decisions take account of the need to protect the privacy interests of putative class members, defendants, and non-parties alike; (3) notice avoids disclosing information related to individual class members; (4) in conducting the action, courts will establish appropriate procedures to protect personal and confidential information; (5) settlement agreements will provide for the return or secure destruction of all confidential information; and (6) class counsel has the ability to protect class members' and other litigants' personal and confidential information from negligent or purposeful disclosure.

Amendments to Rule 23 could include the following:

Rule 23 – Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
(1) the class is so numerous that joinder of all members is impracticable;
(2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
(4) the representative parties will fairly and adequately protect the interests of the class, and (5) the action can be brought in a manner that does not unreasonably infringe the privacy rights of putative class members, unnamed class members and non-parties to the action,

including the right of each class member or putative class member to prevent the disclosure of any personal identifying information to class counsel without explicit written consent in advance to such disclosure.

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(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.
(1) *Certification Order*.

(A) *Time to Issue*. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class*; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Confirming Protection of Privacy and Information Security*. An order that certifies a class action must detail the specific measures that will be taken by the parties to:

(i) ensure personal information related to parties and non-parties, including unnamed class members, is accessed, used and disclosed no more than is strictly necessary to facilitate the just resolution of claims and defenses in the action;

(ii) ensure any personal information protected by federal, state, or foreign data protection laws is used or disclosed only in a manner consistent with such laws; and,

(ii) ensure reasonable and appropriate protection from unauthorized access, use or disclosure of personal or otherwise confidential information during the action and upon its conclusion.

(~~C~~D) *Altering or Amending the Order*. An order that grants or denies class certification may be altered or amended before final judgment.

(2) *Notice*.

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) the types of information related to individual class members that will be used or disclosed in the action, including during discovery, and to whom such information will be disclosed;
(~~i~~v) that a class member may enter an appearance through an attorney if the member so desires;
(vi) that the court will exclude from the class any member who requests exclusion;
(vii) the time and manner for requesting exclusion; and
(viii) the binding effect of a class judgment on members under Rule 23(c)(3).

***

(d) Conducting the Action.

***

(3) *Privacy and Information Security*. The court shall at all times safeguard the privacy rights of parties and non-parties, including the rights of unnamed class members. At a minimum, this will require the court to establish reasonable and appropriate procedures for protecting personal or other confidential information from unnecessary use, disclosure, and unauthorized access or disclosure, including any personal information subject to federal, state, or foreign data privacy laws. In making determinations related to this provision, the court must never presume that unnamed class members or non-parties would want information about them used or disclosed to facilitate the action or during its pendency.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval.

The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) *Notice to the Class*.

***

(2) *Approval of the Proposal*. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;
(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:
(i) the costs, risks, and delay of trial and appeal;
(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
(iii) the terms of any proposed award of attorney's fees, including timing of payment; and
(iv) any agreement required to be identified under Rule 23(e)(3);
(D) the proposal treats class members equitably relative to each other; and
(E) the proposal contains sufficient provisions for the return or secure destruction of all personal and confidential information, including personal information relating to unnamed class members and confidential information belonging to the parties, exchanged during the litigation.

***

(g) Class Counsel.

(1) Appointing Class Counsel. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;
(ii) counsel's experience in handling class actions,
other complex litigation, and the types of claims asserted in the action;
(iii) counsel's knowledge of the applicable law;
(iv) the resources that counsel will commit to representing the class;
(v) counsel's ability to protect the privacy interests of putative and unnamed class members, including personal information and all parties' confidential information; and,
(vi) counsel's ability to provide reasonable and appropriate cyber security protections for all systems used in the litigation for accessing, viewing, sharing, communicating, or storing such information.

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;
(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;
(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and
(E) may make further orders in connection with the appointment.

(2) *Standard for Appointing Class Counsel*. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.
(3) Interim Counsel. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.
(4) Duty of Class Counsel. Class counsel must fairly and adequately represent the interests of the class, including protecting personal information related to each class member.

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XII. RULE 44.1 SHOULD HELP COURTS AND PARTIES RESOLVE CONFLICTS BETWEEN DISCOVERY OBLIGATIONS AND FOREIGN LAWS DEFINING PRIVACY RIGHTS

The main purpose of Rule 44.1 is "[t]o avoid unfair surprise" when a party intends to raise an issue of foreign law.[75] Today, it is commonplace for parties to grapple with foreign privacy laws as they relate to discovery obligations, especially the General Data Protection Regulation (GDPR).[76] The "unfair surprise" is not that such foreign laws are raised, but rather that producing parties are often asked and even ordered to take actions that, absent disproportional effort, would violate laws that bar disclosure of information related to employees, consumers, patients, counterparties, and members of the public. Discovery now frequently forces producing parties to make an impossible choice between obeying a court order or complying with governing privacy laws that do not allow compliance with that order. The recurring problem is that foreign legal standards are not compatible with U.S. caselaw interpreting the FRCP-imposed discovery obligations.[77] Indeed, the original rubric established for addressing such conflicts in

[75] FED. R. CIV. P. 44.1 advisory committee's note to 1966 rule.

[76] Eur. Union, *The History of the General Data Protection Regulation*, EUROPEAN DATA PROTECTION SUPERVISOR, https://edps.europa.eu/data-protection/data-protection/legislation/history-general-data-protection-regulation_en (last visited Sept. 11, 2023).

[77] *See, e.g.*, *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 544 n.29 (1987) (noting that "[i]t is well settled that [foreign blocking] statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute."); *Royal Park Invs. SA/NV v. HSBC Bank USA, N.A.*, No. 14 CIV. 8175 (LGS), 2018 WL 745994, at *2 (S.D.N.Y. Feb. 6, 2018) (overruling Royal Park's objections to producing unredacted documents based on the Belgian Data Privacy Act, finding "that the comity analysis weighs in favor" of compelling production); *Knight Cap. Partners Corp. v. Henkel Ag & Co., KGaA*, 290 F. Supp. 3d 681, 687 (E.D. Mich. 2017) ("the German Federal Data Protection Act does not bar the defendant from disclosing email communications and other business records included in the plaintiff's discovery requests, principally because the Act contains an express exception to the broad prohibitions on personal data disclosure."); *Gucci Am., Inc. v. Curveal Fashion*, No. 09 CIV. 8458 RJS/THK, 2010 WL 808639, at *2 (S.D.N.Y. Mar. 8, 2010) ("courts in the Second Circuit may also consider the hardship of compliance on the party or witness from whom discovery is sought [and] the good faith of the party resisting discovery") (internal citations omitted); *Laydon v. Mizuho Bank, Ltd.*, 183 F. Supp. 3d 409, 413 (S.D.N.Y. 2016) (same); *AccessData Corp. v. ALSTE Techs. GmbH*, No. 2:08CV569, 2010 WL 318477, at *2 (D. Utah Jan. 21, 2010) (the court found that the party resisting discovery failed to demonstrate how the legal claims or consent exceptions did not apply, and ordered the production of documents).

discovery was created nearly 40 years ago in a case that did not consider the issue of privacy at all, *Société Nationale,*[78] and at a vastly different time when the internet, smart phones, and social media did not exist and few companies were truly global. Today, the world is more interconnected than ever and it is now common for even seemly small cases or small business to involve discovery of personal information stored abroad or pertaining to employees, customers, and other individuals residing aboard. Struggling to make sense of the challenges, the Sedona Conference has produced more than 10 different guides addressing the complexities created by the intersection of privacy and cross-border discovery in the past six years.[79] These issues will continue to grow even more labyrinthian as more jurisdictions create laws, more people become interconnected, and more cases involve data related to consumers, employees, and others who are located abroad.

The solution is not to put the onus of Catch-22 obligations exclusively on the shoulders of a producing party or non-party, but rather to clarify the shared responsibility that courts and parties have to navigate applicable laws. It is also critically important to the credibility and fairness of the U.S. judicial system to recognize that these foreign privacy laws often exist to protect important rights held by individual non-parties living and working in their home countries, who have demanded through the democratic process of those countries that their rights be protected. It does not reflect well on the U.S. judiciary when individual rights that are highly valued and often hard fought are cast aside by U.S. courts and parties who give them short shrift. The once-little-used provisions of Rule 44.1 are now front and center, and the rule can and should be amended to help resolve these constant conflicts. An amendment along these lines is needed:

Rule 44.1 – Determining Foreign Law

(a) A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

(b) When evidence is sought from a foreign country and the laws of that country create a right to privacy held by individuals residing therein that conflicts with US law, or the law of that country places restrictions on the transfer of data outside the country, the court must

[78] *Société Nationale*, 482 U.S. 522.

[79] *See, e.g.*, THE SEDONA CONFERENCE PRACTICAL IN-HOUSE APPROACHES FOR CROSS-BORDER DISCOVERY AND DATA PROTECTION, 17 SEDONA CONF. J. 397 (2016); THE SEDONA CONFERENCE INTERNATIONAL LITIGATION PRINCIPLES ON DISCOVERY, DISCLOSURE & DATA PROTECTION IN CIVIL LITIGATION (TRANSITIONAL EDITION) (The Sedona Conference Working Group Series, 2017); THE SEDONA CONFERENCE INTERNATIONAL PRINCIPLES FOR ADDRESSING DATA PROTECTION IN CROSS-BORDER GOVERNMENT & INTERNAL INVESTIGATIONS: PRINCIPLES, COMMENTARY & BEST PRACTICES, 19 SEDONA CONF. J. 557 (2018); THE SEDONA CONFERENCE COMMENTARY AND PRINCIPLES ON JURISDICTIONAL CONFLICTS OVER TRANSFERS OF PERSONAL DATA ACROSS BORDERS, 21 SEDONA CONF. J. 393 (2020); THE SEDONA CONFERENCE COMMENTARY ON THE ENFORCEABILITY IN U.S. COURTS OF ORDERS AND JUDGMENTS ENTERED UNDER GDPR, 22 SEDONA CONF. J. 277 (2021); THE SEDONA CONFERENCE COMMENTARY ON MANAGING INTERNATIONAL LEGAL HOLDS, 24 SEDONA CONF. J. 429 (2023).

ensure such privacy rights are respected and accorded substantial deference, particularly if the evidence sought relates to non-party individuals residing abroad.

XIII. RULE 45 SHOULD PROVIDE EXPLICIT REQUIREMENTS FOR PROTECTING PERSONAL AND CONFIDENTIAL INFORMATION FROM DISCLOSURE AND SET OBJECTIVE STANDARDS FOR QUASHING SUBPOENAS THAT FAIL TO MEET THOSE STANDARDS

Although Rule 45 acknowledges an important need to protect "a person subject to the subpoena,"[80] it makes no mention of privacy rights, which today are considerations that are at least if not even more pressing than the considerations enumerated in the rule. "[C]ourts should be careful to protect against discovery that implicates privacy of third parties."[81] It is insufficient in today's digitized world to put the burden on subpoena recipients, particularly those who are innocent bystanders to the litigation, to bring affirmative motions to quash whenever a subpoena requests information that is personal, confidential, and/or subject to legal protections. It is also important to note that "private litigants may have little incentive to incur security costs to protect third-party information."[82] Additionally, it is unthinkable to require the production of such information, even when necessary for the case, to a party that fails to take reasonable steps to protect that information from unauthorized access, use, or disclosure. The issuers of subpoenas, not solely the recipients, have responsibilities to exercise due care in the scope of information requests and in the handling of personal and confidential data produced due to their requests. Accordingly, Rule 45 should be amended to clarify that protecting "a person subject to the subpoena" begins with the issuer's duties to minimize and protect personal information and includes enumerating specific privacy factors for quashing an overreaching subpoena. An amendment should include the following elements:

Rule 45 – Subpoena

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(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions.

(A) A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. At a minimum, this requires the issuing party or attorney to:

[80] FED. R. CIV. P. 45(d).

[81] Stuart, *supra* note 3, at 724.

[82] Boliek, *supra* note 19, at 1108.

(i) ensure the subpoena will not result in the unnecessary use or disclosure of personal or other confidential information, including any personal information that is subject to federal, state, or foreign data protection laws; and,

(ii) undertake reasonable and appropriate steps to protect personal and confidential information, including personal information relating to parties and non-parties, from unauthorized access, use or disclosure after production of such information to the requesting party or attorney.

(B) The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings, ~~and~~ reasonable attorney's fees, costs, and reimbursement of reasonable expenses incurred by the responding party or any individual person harmed as a result of noncompliance—on a party or attorney who fails to comply.

***

CONCLUSION

Any notion that the FRCP do not protect privacy[83] is untenable in the digital age – and in fact, has never been true.[84] The FRCP have a critical role in guiding courts, parties, and non-parties to fulfill their obligations to protect privacy rights while balancing those duties with the needs of particular cases. Unfortunately, the FRCP are failing to provide sufficient guidance to courts and parties on the privacy and cyber security issues that are now intrinsic and recurring in litigation. The two FRCP rules that have any relevance to the problems – rules 5.2 and 26(c) – are not only outdated but also inherently lack the dimension necessary to give courts and parties adequate structure for proactively considering, minimizing, and handling the complexities of personal and confidential information in litigation.

The suggested amendments discussed above and attached in the appendix are needed because they address critical and frequent privacy issues. At the same time, they are modest because they reflect best practices that have already developed among forward-thinking judges and practitioners. While discovery is appropriately focused on obtaining and disclosing information relevant to the claims and defenses in the case, FRCP guidance is needed to ensure that courts and parties balance that purpose with the legal, commercial, personal, and reputational peril that

[83] *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 30 (1984) ("Under the Rules, the only express limitations are that the information sought is not privileged, and is relevant to the subject matter of the pending action").

[84] *Id*. at 35 n.21 ("[a]lthough the Rule [26(c)] contains no specific reference to privacy or to other rights or interests that may be implicated, such matters are implicit in the broad purpose and language of the Rule"). *See also*, Boliek, *supra* note 19, at 1127 ("Indeed, for more than eighty years, courts have recognized the burden imposed on private parties when their personal, private information is disclosed as part of a discovery request" (footnote omitted) *and* Francis, *supra* note 45, at 401 ("for decades courts have routinely limited discovery based on the private nature of the information sought, sometimes even characterizing the right of privacy as 'constitutionally-based.' Courts have traditionally relied upon Rule 26(c) to protect privacy." (footnotes omitted)).

inherently exists when an increasingly large amount of information is requested, produced, duplicated, stored, shared, and used in litigation.

Appendix

Rule 1. Scope and Purpose

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding, and to protect the reasonable expectations of privacy and confidentiality of parties and non-parties.

Rule 5.2. Privacy Protection For Filings Made with the Court

(a) Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing with the court, a party:

(1) may redact personal information protected by federal, state, or foreign privacy laws; and

(2) shall redact sensitive personal information consisting of an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number; a party or nonparty making such filing may include only:

(~~1~~a) the last four digits of the social-security number and taxpayer-identification number;
(~~2~~b) the year of the individual's birth;
(~~3~~c) the minor's initials; and
(~~4~~d) the last four digits of the financial-account number.

***

(e) Protective Orders. For good cause, the court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's ~~remote electronic~~ access to a document filed with the court.

(f) Option for Additional Unredacted Filing Under Seal. For good cause, the court may by order in a case allow a~~A~~ person making a redacted filing ~~may also~~ to file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

***

(i) Considerations. When the court is considering the sealing or unsealing of documents filed with the court, or whether to order discovery or disclosure under Rule 26, including the issuance of a protective order, the court shall consider: (a) whether the court or requesting party can provide reasonable and appropriate protection against unauthorized access or disclosure; (b) the

rights and interests of parties and non-parties in maintaining the privacy and confidentiality of information pertaining to them; (c) the burdens on parties and non-parties, including whether those burdens are proportional to the needs of the case; (d) whether the information to be redacted is protected by federal, state, or foreign privacy laws; and (e) whether the information to be redacted is subject to a contractual confidentiality obligation or non-disclosure agreement.

Rule 16. Pretrial Conferences; Scheduling; Management

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(b) Scheduling.

***

(3) *Contents of the Order.*

(A) *Required Contents.* The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) *Permitted Contents.* The scheduling order may:

(i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);
(ii) modify the extent of discovery;
(iii) provide for disclosure, discovery, or preservation of electronically stored information;
(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502;
(v) direct that before moving for an order relating to discovery, the movant must request a conference with the court;
(vi) set dates for pretrial conferences and for trial; ~~and~~
(vii) provide measures for protecting personal and confidential information related to both parties and non-parties, including any personal information subject to federal, state, or foreign data privacy laws, from unnecessary use, disclosure or unauthorized access during the proceeding;
(viii) provide for reasonable and appropriate cybersecurity measures to prevent unauthorized access, use or disclosure of any information produced or disclosed by a party or a non-party during the proceeding;
(ix) direct that, at the conclusion of the proceeding, information disclosed during the proceeding be returned or securely destroyed; and
(~~vii~~x) include other appropriate matters.

***

(c) Attendance and Matters for Consideration at a Pretrial Conference.

***

(2) *Matters for Consideration.* At any pretrial conference, the court may consider and take appropriate action on the following matters:

(A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;
(B) amending the pleadings if necessary or desirable;
(C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;
(D) avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under Federal Rule of Evidence 702;
(E) determining the appropriateness and timing of summary adjudication under Rule 56;
(F) controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;
(G) identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial;
(H) referring matters to a magistrate judge or a master;
(I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;
(J) determining the form and content of the pretrial order;
(K) disposing of pending motions;
(L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;
(M) ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue;
(N) ordering the presentation of evidence early in the trial on a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);
(O) establishing a reasonable limit on the time allowed to present evidence; ~~and~~
(P) determining reasonable procedures for protecting personal and confidential information from unnecessary use, disclosure, or unauthorized access, including any personal information subject to federal, state, or foreign data protection laws; and
(~~P~~Q) facilitating in other ways the just, speedy, and inexpensive disposition of the action.

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Rule 23. Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
(1) the class is so numerous that joinder of all members is impracticable;
(2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

(4) the representative parties will fairly and adequately protect the interests of the class, and
(5) the action can be brought in a manner that does not unreasonably infringe the privacy rights of putative class members, unnamed class members and non-parties to the action, including the right of each class member or putative class member to prevent the disclosure of any personal identifying information to class counsel without explicit written consent in advance to such disclosure.

***

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.
(1) *Certification Order*.
(A) *Time to Issue*. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.
(B) *Defining the Class*; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).
(C) *Confirming Protection of Privacy and Information Security*. An order that certifies a class action must detail the specific measures that will be taken by the parties to:
(i) ensure personal information related to parties and non-parties, including unnamed class members, is accessed, used and disclosed no more than is strictly necessary to facilitate the just resolution of claims and defenses in the action;
(ii) ensure any personal information protected by federal, state, or foreign data protection laws is used or disclosed only in a manner consistent with such laws; and,
(ii) ensure reasonable and appropriate protection from unauthorized access, use or disclosure of personal or otherwise confidential information during the action and upon its conclusion.
(~~C~~D) *Altering or Amending the Order*. An order that grants or denies class certification may be altered or amended before final judgment.
(2) *Notice*.
(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.
(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:
(i) the nature of the action;
(ii) the definition of the class certified;
(iii) the class claims, issues, or defenses;
(iv) the types of information related to individual class members that will be used or disclosed in the action, including during discovery, and to whom such information will be disclosed;

(~~i~~v) that a class member may enter an appearance through an attorney if the member so desires;
(v*i*) that the court will exclude from the class any member who requests exclusion;
(vi*i*) the time and manner for requesting exclusion; and
(viii) the binding effect of a class judgment on members under Rule 23(c)(3).

***

(d) Conducting the Action.

***

(3) *Privacy and Information Security*. The court shall at all times safeguard the privacy rights of parties and non-parties, including the rights of unnamed class members. At a minimum, this will require the court to establish reasonable and appropriate procedures for protecting personal or other confidential information from unnecessary use, disclosure, and unauthorized access or disclosure, including any personal information subject to federal, state, or foreign data privacy laws. In making determinations related to this provision, the court must never presume that unnamed class members or non-parties would want information about them used or disclosed to facilitate the action or during its pendency.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval.

The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) *Notice to the Class*.

***

(2) *Approval of the Proposal*. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:
(A) the class representatives and class counsel have adequately represented the class;
(B) the proposal was negotiated at arm's length;
(C) the relief provided for the class is adequate, taking into account:
(i) the costs, risks, and delay of trial and appeal;
(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
(iii) the terms of any proposed award of attorney's fees, including timing of payment; and
(iv) any agreement required to be identified under Rule 23(e)(3);

(D) the proposal treats class members equitably relative to each other; and
(E) the proposal contains sufficient provisions for the return or secure destruction of all personal and confidential information, including personal information relating to unnamed class members and confidential information belonging to the parties, exchanged during the litigation.

***

(g) Class Counsel.

(1) Appointing Class Counsel. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;
(ii) counsel's experience in handling class actions,
other complex litigation, and the types of claims asserted in the action;
(iii) counsel's knowledge of the applicable law;
(iv) the resources that counsel will commit to representing the class;
(v) counsel's ability to protect the privacy interests of putative and unnamed class members, including personal information and all parties' confidential information; and,
(vi) counsel's ability to provide reasonable and appropriate cyber security protections for all systems used in the litigation for accessing, viewing, sharing, communicating, or storing such information.

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;
(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;
(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and
(E) may make further orders in connection with the appointment.

(2) *Standard for Appointing Class Counsel*. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.
(3) Interim Counsel. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.
(4) Duty of Class Counsel. Class counsel must fairly and adequately represent the interests of the class, including protecting personal information related to each class member.

***

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

(1) Initial Disclosure.

***

(F) *Limits on Initial Disclosure for Privacy and Information Security*. A party's initial disclosures need not include information protected by federal, state, or foreign privacy laws, including confidential information or personal information if the recipient has not taken reasonable and appropriate steps to ensure that such information is not subject to unauthorized access, use or disclosure. A party relying on this provision must expressly so state in their initial disclosures. These limits also apply to Rule 26(e) supplementation of initial disclosures.

***

(3) Pretrial Disclosures.

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

(i) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises, subject to the considerations outlined in Rule 5.2(i);

(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

(iii) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

***

(b) Discovery Scope And Limits.

(1) *Scope in General*. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, the privacy rights held by parties and non-parties, the risk of unauthorized access to, or use of, personal or confidential information, the harm such unauthorized access or use would cause, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) *Limitations on Frequency and Extent.*

***

(C) *When Required*. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; ~~or~~

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1);

(iv) the discovery sought would require the disclosure of personal information related to parties or non-parties beyond what is strictly necessary to facilitate the action, would violate any federal, state or foreign data privacy law, or otherwise infringes on reasonable privacy expectations held by parties or non-parties; or,

(v) the discovery sought poses an unreasonable risk of unauthorized access, use or disclosure of personal or other confidential information.

***

(4) Trial Preparation: Experts.

(A) Deposition of an Expert Who May Testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided. A party deposing an expert should take reasonable and appropriate measures to protect against disclosure of personal or confidential information relating to parties or non-parties.

***

(c) Protective Orders.

(1) In General. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; ~~and~~

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs; and

(I) requiring that personal and confidential information not be revealed or be revealed only in a specified manner and that reasonable and appropriate steps be taken to avoid placing it at risk of unauthorized access, use or disclosure.

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(f) Conference of the Parties; Planning for Discovery.

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(3) *Discovery Plan.* A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;
(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;
(C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;
(D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;
(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; ~~and~~

(F) how the use of personal and confidential information will be minimized, including through the use of data anonymization, pseudonymization, encryption and redactions;
(G) how data disclosed or used in the proceeding will be protected from unauthorized access, use, or disclosure, and how the privacy rights of parties and non-parties covered by federal, state, and foreign data privacy laws will be protected; and
(HF) any other orders that the court should issue under Rule 5.2, Rule 26(c) or under Rule 16(b) and (c).

* * *

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) Signature Required; Effect of Signature. Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, email address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and that reasonable efforts have been made to avoid unnecessary use of personal or confidential information, including any personal information subject to federal, state, or foreign data privacy laws; and
(B) with respect to a discovery request, response, or objection, it is:
(i) is consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;
(ii) will not be interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and
(iii) will not result in unnecessary access to, use, or disclosure of, personal or other confidential information, including any personal information subject to federal, state, or foreign data privacy laws;
(iiiiv) is neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action; and,
(v) will not require the production of personal or other confidential information until the requesting party and its attorneys have each implemented reasonable and appropriate cybersecurity protections for such information, including having in place a written data breach response plan.

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Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

***

(b) Procedure.

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(2) *Responses and Objections*.

***

(E) Producing the Documents or Electronically Stored Information. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; ~~and~~

(iii) A party need not produce the same electronically stored information in more than one form~~.~~; and

(iv) A party may produce personal or confidential ESI by providing the requesting party with access to a secure data escrow service or other secure digital environment in which the ESI can be securely reviewed, provided such service permits the export of exhibits for use during depositions and in court filings;

(v) A party may object based on plausible concerns about the adequacy of the methods anticipated to be used by the requesting party or other recipients to prevent unauthorized access to, or use of, personal information or other confidential and proprietary information; and

(vi) A party need not produce documents or electronically stored information without having received adequate assurances that any personal information or other confidential and property information will be reasonably and adequately protected from unauthorized access or disclosure upon such transfer.

***

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

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(g) Failure to Provide Adequate Protection for Personal and Confidential Information. If unauthorized access to, or disclosure of, personal or confidential information during litigation is caused by the receiving party's failure to take reasonable and appropriate steps to comply with the obligations imposed by these rules, the court may require that party, the attorney advising that party, or both, to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

Rule 44.1 Determining Foreign Law

(a) A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

(b) When evidence is sought from a foreign country and the laws of that country create a right to privacy held by individuals residing therein that conflicts with US law, or the law of that country places restrictions on the transfer of data outside the country, the court must ensure such privacy rights are respected and accorded substantial deference, particularly if the evidence sought relates to non-party individuals residing abroad.

Rule 45. Subpoena

***

(d) Protecting A Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions.

(A) A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. At a minimum, this requires the issuing party or attorney to:

(i) ensure the subpoena will not result in the unnecessary use or disclosure of personal or other confidential information, including any personal information that is subject to federal, state, or foreign data protection laws; and,

(ii) undertake reasonable and appropriate steps to protect personal and confidential information, including personal information relating to parties and

non-parties, from unauthorized access, use or disclosure after production of such information to the requesting party or attorney.

(B) The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings, ~~and~~ reasonable attorney's fees, costs, and reimbursement of reasonable expenses incurred by the responding party or any individual person harmed as a result of noncompliance—on a party or attorney who fails to comply.

***

TAB 21

21. 24-CV-K – Rule 16(b)(4)

Magistrate Judge Jeremiah McCarthy proposes that there be a clarification of the term "good cause," as used in Rule 16(b)(4), which says that a Rule 16(b) scheduling order "may be modified only for good cause and with the judge's consent." He supports this proposal with his article "Rule 16(b)(4): Is 'Good Cause' a Good Thing? Why I Hate Scheduling Orders," 16 Fed. Cts. L. Rev. 1 (2024), which can be accessed here: https://www.uscourts.gov/rules-policies/archives/suggestions/hon-jeremiah-mccarthy-24-cv-k.

This article represents exceptionally thorough research and, drawing on the judge's service for more than 17 years, makes the point that courts applying Rule 16(b)(4) have adopted "vastly different approaches" that highlight the "potentially drastic consequences" of denial of relief from the court's schedule. Yet "one will search in vain for a uniform definition or application of Rule 16(b)(4)'s 'good cause' requirement." Id. at 1-2.

He illustrates with two Second Circuit cases that seem out of step with one another about whether the diligence of the party seeking relief from the schedule is the only thing the court should consider, if the other side would suffer no prejudice by granting relief. See id. at 3-4. Confronted with a request for relief from an attorney who reported that the opposing counsel did not object to relief, he says that "I must apply the Second Circuit's definition of good cause" because courts have "no authority to subvert the plain meaning of the federal rules despite harsh results." Id. at 8.

But taking up this proposal could lead to something of a slippery slope for the Committee. A quick check indicates that the term "good cause" appears around 30 times in the Civil Rules. In an era of managerial judging, it might be viewed as a sort of rulemaking universal solvent. Here's what is probably a partial list of other rules that use "good cause" as a guide for judicial decisions on a wide variety of matters:

4(d)(2)	31(a)(5)	55(c)
4(m)	32(c)	65(b)(2)
5(d)(3)	33(b)(4)	71.1(h)(2)(C)
5(e)	35(a)(2)	73(b)(3)
6(b)(1)	43(a) – along with "compelling circumstances," for remote trial testimony, a topic before the Rule 43/45 Subcommittee.	77(c)(2)
7(c)(1)(C)		E(6)
26(a)(3)(B)		G(3)(c)(ii)
26(b)(2)(B)		G(5)(a)(ii)
26(c)(1)	44(a)(2)(C)	G(7b)(i)(D)
	45(e)(1)(C)	
	47(c)	

Indeed, one need look no further than Rule 16(b)(2) to find "good cause" used in another part of Rule 16(b) (emphasis added):

> The judge must issue the scheduling order as soon as practicable, but unless the judge finds *good cause* for delay, the judge must issue it within either of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared.

The Committee Note to Rule 16(b) (quoted in part by Judge McCarthy at pp. 2-3) says:

> [T]he court may modify the schedule on a showing of good cause if it cannot reasonably be met despite the diligence of the party seeking the extension. Since the scheduling order is entered early in the litigation, this standard seems more appropriate than a "manifest injustice" or "substantial hardship" test.

Perhaps that articulation works also for Rule 16(b)(2), though the command of that rule (adopted when judicial management was not commonplace throughout the federal judicial system) was probably meant to have more teeth.

This comparison of the use of the "good cause" standard in two parts of Rule 16(b) suggests the difficulty of being more specific about what constitutes good cause in all the other places the term appears in the Civil Rules. Probably considerations of diligence and prejudice recur, but trying to calibrate for each of those instances seems exceedingly daunting.

And in some places, it might be counterproductive. For example, consider Rule 4(d)(2), dealing with failure of the defendant to waive service of process. It says that the court must impose on the defendant the cost of service by traditional means if the defendant fails "without good cause" to sign and return the waiver. Contrast Rule 4(m), calling for prompt service of the summons and complaint: "if the plaintiff shows good cause for the failure [to serve], the court must extend the time for service for an appropriate period."

It is likely to a review of the many other places where "good cause" is the standard to guide the court would reveal that a more specific distillation of the general standard would be the same for each of the dozens of situations in which the term appears in the rules. But attempting to add specifics on what constitutes "good cause" to Rule 16(b)(4) and leaving the term unadorned in each of the other places where it appears (including Rule 16(b)(2)) invites the conclusion that "good cause" in Rule 16(b)(4) means something different from what it means in all the places where the term appears in the Civil Rules, including another part of Rule 16(b)(2).

Further work could be done, either to try to fashion a rule change for Rule 16(b)(4), or to develop tailored definitions of "good cause" in each rule where the term appears. That probably would be a major undertaking, and invite much contention.

On the other hand, adding a definition of "good cause" to Rule 16(b)(4) and leaving the phrase unadorned in all the other places it appears would invite difficulty unless it could be made clear that, as used in Rule 16(b)(4), "good cause" has a unique meaning unrelated to the meaning it has in the other rules where it appears.

It is recommended that this submission be dropped from the agenda.

TAB 21A

From: Jeremiah McCarthy
To: RulesCommittee Secretary
Subject: Rule 16(b)(4)"s "good cause" requirement for modifying scheduling orders
Date: Tuesday, April 30, 2024 3:19:11 PM

To whom it may concern:

Attached is my Federal Courts Law Review article discussing Rule 16(b)(4)'s "good cause" requirement for modifying scheduling orders. For the reasons discussed in the article, I believe that the Rule should be amended to clarify what is meant by “good cause”, and to allow consideration of factors other than diligence, such as the absence of prejudice caused by the modification. I thank you for your consideration, and please let me know if I can be of further assistance in this regard.

Jeremiah J. McCarthy
United States Magistrate Judge
Robert H. Jackson United States Courthouse
2 Niagara Square
Buffalo, NY 14202

TAB 22

22. 24-CV-L – Rules 50 and 52

Professor Evan Zoldan has submitted 24-CV-L, proposing an amendment to Rules 50(a) and 52(c), supported by his article on this subject, Zoldan, Issues, 65 Will. & Mary L. Rev. 1005 (2024). Though Prof. Zoldan has identified tensions in the use of the word "issues" at various points in the Civil Rules, it does not seem that he has identified any actual problem with the current terminology calling for a rule amendment. A copy of Prof. Zoldan's letter is included in this agenda book. His full submission, including the law review article, can be accessed here: https://www.uscourts.gov/rules-policies/archives/suggestions/evan-zoldan-24-cv-l-0

Prof. Zoldan's proposed amendment to Rule 50(a) is as follows:

(a) Judgment as a Matter of Law.

(1) ***In General.*** If a party has been fully heard on a~~n~~ factual dispute ~~issue~~ during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that factual dispute ~~issue~~, the court may:

(A) resolve the factual dispute ~~issue~~ against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that factual dispute ~~issue~~.

His proposed companion amendment to Rule 52(c) is as follows:

(c) Judgment on Partial Findings. If a party has been fully heard on a~~n~~ factual dispute ~~an issue~~ during a nonjury trial and the court finds against the party on that factual dispute ~~issue~~, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that factual dispute ~~issue~~. * * * * *

The article also includes proposed Committee Notes for these amendments to Rules 50 and 52.

Prof. Zoldan's article shows that he is a careful and thorough researcher. It draws in detail from Advisory Committee records and also displays an impressive familiarity with canons of interpretation (including citation to his article "Canon Spotting" in ftn. 18).

As the article points out, rule amendments over the years have not always focused carefully on the use of the word "issue" in Rules 50 and 52(a) and in the analogous context of Rule 56(a). Thus, in 1991, Rule 50 was amended to adopt the use of the word "issue" to correspond to the use of that word in Rule 56(a), as then written, but in 2010, as part of a comprehensive revision of Rule 56, Rule 56(a) was amended to provide for grant of summary judgment when "there is no genuine dispute as to any *material fact*." Rules 50(a) and 52(c) were not changed at that time.

Those are hardly the only places where the word "issue" has appeared in the rules, however. To the contrary, Prof. Zoldan says that the word appears 148 times in the rules. See 65 Will. &

Mary L. Rev. at 1008. Nonetheless, he urges, due to "the rise of textualism as a method of interpreting the Rules, the term 'issue' in Rules 50 and 52, which once was clear, has been rendered ambiguous." Id. at 1009.

But the article does not identify any real problem associated with the "ambiguity" that Prof. Zoldan identifies. To the contrary, he acknowledges that "Rules 50 and 52(c) are normally applied without much difficulty." Id. at 1014. The closest he comes to identifying any case in which there was an actual problem is *Summers v. Delta Air Lines, Inc.*, 508 F.3d 923 (9th Cir. 2007). It is true that the court there said that "Rule 50(a) thus allows a court to remove 'issue[s]' – claims, defenses, or entire cases – from the jury when there is no 'legally sufficient evidentiary basis' to support a particular outcome." Id. at 926.

That dictum seems to have nothing to do with the actual holding in the case, however, which was that the district court improperly granted a Rule 50(a) motion on a ground not raised in defendant's motion, and that on the facts of that case plaintiff had not been "fully heard" at the time the district court granted defendant's motion under Rule 50(a).

In these circumstances, it does not seem there is a need to consider a rule amendment. Moreover, Prof. Zoldan himself recognizes that there may be a downside to adopting the amendments he proposes: "[A]lthough these proposed amendments should not change the operation of Rule 50, they might be read to make a subtle change in the potential scope of Rule 50." Id. at 1036. Put differently, even though there is no current problem, making this change could create a future problem.

Moreover, Prof. Zoldan does not think the Advisory Committee should stop with Rules 50(a) and 52(c). He adds (id. at 1039) that more work should also be done:

> Rules 50 and 52 are far from the only Rules that would benefit from disambiguation. The Rules are full of issues – that is, uses of the term "issue." Although sometimes the meaning is clear, like the many uses of "issue" to mean "send out," other times it is ambiguous. For example, Rule 26's use of the term, on its face, could be read to mean either a problem or legal argument. [citing Rule 26(f)(2)] Rule 9's use of the term could be read to mean either an allegation of fact or a legal defense. In short, the problem identified with the term "issue" in Rules 50 and 52 is, in some ways, just the tip of the iceberg. In order to ensure that the text of all the Rules reflects their meaning, all of the rules that use the term "issue" should be revisited to consider whether they are ambiguous.

In the fullness of time, such an effort might be worth pursuing – perhaps taking on the whole iceberg. But at present the Committee has before it a variety of other matters that either are or are asserted to present important present problems that might be solved by a rule change.

It is recommended that 24-CV-L be dropped from the Committee's agenda.

TAB 22A

Evan C. Zoldan
Professor of Law
College of Law
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419-530-2864

June 6, 2024

H. Thomas Byron III, Esq., Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, DC 20544

Re: Proposed Amendments to Federal Rules of Civil Procedure 50 and 52

Dear Mr. Byron:

I am writing to propose amendments to clarify the language of Federal Rules of Civil Procedure 50 and 52. This letter will briefly explain the reasons for the proposal, propose amendment language, and propose committee note language to include with these amendments. By way of further explanation, I am attaching a recent article in which I set out the reasons for these proposals more completely.

Reason for Proposed Changes

The term "issue" in Rules 50 and 52, which is central to their operation, is ambiguous. In other words, it is susceptible of more than one meaning, with the most salient possibilities being "factual dispute" and "legal argument." The ambiguity of the term "issue" is exacerbated by the fact that the same term is used in multiple different ways throughout the Rules and in other legal contexts. Indeed, the Advisory Committee itself recognized that the term "issue" in the Rules is ambiguous, leading to the elimination of the term from Rule 56 in 2010.

The ambiguity in Rules 50 and 52 has led to some confusion and imprecision among lower courts. For example, the Court of Appeals for the Ninth Circuit has defined the term "issue" in Rule 50 rather amorphously as a "claim, defense, or entire case."

The Proposed Amendments

In order to fix the current ambiguity that exists and avoid future interpretive problems, Rules 50 and 52 should be amended to eliminate the term "issue" and replace it with the term "factual dispute," as shown below:

Rule 50

(a) JUDGMENT AS A MATTER OF LAW. (1) *In General.* If a party has been fully heard on a~~n issue~~ factual dispute during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that ~~issue~~ factual dispute, the court may:

(A) resolve the ~~issue~~ factual dispute against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that ~~issue~~ factual dispute.

Rule 52

(c) JUDGMENT ON PARTIAL FINDINGS. If a party has been fully heard on a~~n issue~~ factual dispute during a nonjury trial and the court finds against the party on that ~~issue~~ factual dispute, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that ~~issue~~ factual dispute.

Explanation of Amendments

The amendments described above will eliminate the ambiguity that currently exists in Rules 50 and 52 and prevent future interpretive problems. First, these changes will align the text of Rules 50 and 52 with the Supreme Court's consistent interpretation of the term.

Second, these changes will align the text of Rules 50 and 52 with the history and longstanding purposes of these Rules. Ever since their adoption, Rules 50 and 52 have been used to test evidentiary sufficiency. The proposed changes confirm that the current Rules embody this same purpose today. Also, these proposed amendments better reflect the distinction that has developed between judge and jury, ensuring that it is the judge who decides questions of law and that it is the jury that resolves genuine factual disputes.

Third, these proposed changes align Rules 52 and 50 with the logic of other procedural devices that test the sufficiency of the evidence, found in conceptually related rules 12(b)(6), 12(c), and 56. In particular, it eliminates the unintended misalignment of the operative language of Rule 56—which explicitly describes a "dispute of fact"—and the language of Rule 50.

Proposed Committee Note Language

The following draft proposed committee notes briefly explain the effect of the proposed amendments:

Proposed Advisory Committee Note to Rule 50

> *Amendment Subdivision (a).* The term "issue" is deleted to eliminate any ambiguity in its meaning and replaced with the term "factual dispute." This amendment aligns the text of Rule 50 with the Supreme Court's consistent interpretation of its language. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 151 (2000). *See also* 10A Charles Alan Wright et al., *Federal Practice and Procedure* § 2713.1 (2016). This amendment also aligns the text of Rule 50 with the history of its development and its purpose. In particular, this amendment clarifies the proper division of authority between the trial judge and the jury: it is the judge who decides, as a matter of law, whether the evidence supporting the nonmoving party's version of a dispute of fact is sufficient to warrant submission to a jury. *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935); *see also* 9B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2521 (3d ed. 2008). This amendment also conforms the language of Rule 50 to the operation of conceptually related Rules 12(b)(6), 12(c), and 56. Most saliently, it reconnects the language of Rule 50 with the language of Rule 56, confirming that both rules continue to concern disputes of fact, just as they did before 2010 when both rules used the term "issue." *See* Fed. R. Civ. P. 56 advisory committee's note to 2010 amendment.

Proposed Advisory Committee Note to Rule 52

> *Amendment Subdivision (c).* The term "issue" is deleted to eliminate any ambiguity in its meaning and replaced with the term "factual dispute." Like the parallel change made to Rule 50, this change conforms the Rule's text to the way that courts consistently interpret it—that is, to provide for the resolution of disputes of fact. 9C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2573.1 (3d ed. 2008). *See, e.g.*, *Ritchie v. United States*, 451 F.3d 1019, 1023 (9th Cir. 2006). This amended language also reflects the history and purpose of Rule 52(c), which was added in 1991 to serve as a bench-trial analog to Rule 50. Fed. R. Civ. P. 52 advisory committee's note to 1991 amendment. Finally, the amended language makes clear the connection between Rule 52(c) and, not only Rule 50, but also conceptually related Rules 12(b)(6), 12(c), and 56.

For these reasons, and for all of the reasons given more completely in the attached article, I encourage the committee to consider adopting the changes outlined above. If I can be of any assistance, please let me know. I would be very happy to discuss any of this further.

Kind regards,

Evan C. Zoldan
Professor of Law
University of Toledo College of Law

TAB 23

23. 23-CV-V – Rule 12(a)(4)(B)

This submission from five Cornell Law School students (evidently stimulated by their first-year civil procedure course) focuses on the absence of an extension of time to file an answer when the court grants a motion to strike under Rule 12(f), even though there is an extension when the court denies the defendant's motion. The submission focuses on Rule 12(a)(4):

> **(4)** ***Effect of a Motion.*** Unless the court sets a different time, serving a motion under this rule alters these periods as follows:
>
> **(A)** if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or
>
> **(B)** if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

The submission notes that the extension of time under Rule 12(a)(4) does apply when a party files an unsuccessful motion to strike under Rule 12(f) [that is a "motion under this rule"] but not when the party files a successful motion under the rule. The proposed solution is to amend (B) as follows:

> **(B)** if the court grants a motion for a more definite statement [or a motion to strike], the responsive pleading must be served within 14 days after the more definite statement is served or the insufficient defense or redundant, immaterial, impertinent, or scandalous matter is stricken from the pleading.

An earlier edition of the Federal Practice & Procedure treatise described this as "an unintended omission on the part of the Advisory Committee, an omission that should have been corrected." 5B C. Wright & A. Miller, Fed. Prac. & Pro. § 1346 (3d ed. 2004).

But the current edition of the same work, now authored by Dean Spencer (recently a member of this Committee) finds the different treatment reasonable:

> [T]he omission of the motion to strike from Rule 12(a)(4)(B) makes some sense in light of the fact that in most cases the motion is being asserted by a defendant who is attacking portions of the complaint as "redundant, immaterial, impertinent, or scandalous" – rather than seeking to strike defenses as "insufficient" – because complaints do not raise defenses. In such a situation, interposing a motion to strike should not delay the time for the defendant to respond to the complaint, which is consistent with how Rule 12(a) was originally drafted. If the plaintiff uses to motion to strike to eliminate "an insufficient defense," she would typically be doing so in response to an answer to which no response is due, making the 21-day deadline irrelevant.

5B C. Wright, A. Miller & A. Spencer, Fed. Prac. & Pro. § 1346 at 41-42 (2024).

The submission posits that the moving party faces a dilemma because – if the motion is granted – there is no time to prepare and serve an answer to the remaining unstricken allegations. Rule 12(e) and 12(f) motions should be treated equally, the submission urges. Practical problems might result from the current rule, including unnecessary legal fees, potential malpractice actions against lawyers who assume there is an extension, a burden on pro se litigants and "illogical rules lowering the apparent authoritativeness of the FRCP."

The submission offers no example of an actual problem, however. One can imagine that having to admit or deny allegations that are stricken as "immaterial, impertinent, or scandalous" could improperly burden the defendant if it would have to *admit* such allegations even though they do not belong in the complaint. But no example of such a contretemps has been offered.

And this would only matter in a case in which the defendant filed only a Rule 12(f) motion to strike and neither a Rule 12(b) motion to dismiss nor a Rule 12(e) motion for a more definite statement. In short, it seems to matter only when the defendant's sole Rule 12 objection to the complaint is that it includes "redundant, immaterial, impertinent, or scandalous" allegations.

It is not clear that the rules should provide incentives for such motions by defendants. Rule 12(f) is indeed valuable for a plaintiff that wants the court to strike insufficient defenses. Plaintiff lawyers have sometimes objected to the presence in answers of numerous affirmative defenses that eventually drop out because they have no actual application to the current case. Some even contend that defense counsel should not, under Rule 11, assert such defenses. Whether or not Rule 12(f) motions often are a useful way to dispose of those defenses, encouraging motions to strike not tethered to a Rule 12(b) motion or at least a motion for a more definite statement does not seem a wise course.

At the same time, as noted by Dean Benjamin, making the proposed amendment might encourage such motions as methods to delay the proceedings. Perhaps, then, it would be better to amend Rule 12(a)(4) to eliminate the extension afforded a defendant that files a Rule 12(f) motion:

> **(4)** ***Effect of a Motion.*** Unless the court sets a different time, serving a motion under Rule 12(b) or Rule 12(e) ~~this rule~~ alters these periods as follows:

That would mean that there is no extension whether or not the motion under Rule 12(f) is granted; it is odd that by filing motion to strike that the court denies the defendant wins an additional 14 days to answer, but there is no such grace period if the motion is granted. One can argue that there should not be a grace period either way.

This is not a proposal to make the possible amendment to Rule 12(a) identified just above. It should be noted, however, that it's not clear that unless the court's granting a motion to strike effects the striking of the offending allegations, instead some later action means those allegations are stricken. The proposed amendment seems to contemplate such a later development.

For purposes of this proposal, however, the main point is that there is no indication that this "inconsistency" has caused actual problems. Unwarranted affirmative defenses may indeed cause problems, so retaining the motion to strike as a way to challenge them seems useful. Encouraging motions to strike allegations of the complaint does not seem desirable. Though it can

be said that the submission points up an "inconsistency" in the rules, there is no current reason to believe that this "inconsistency" has caused real problems.

It is recommended that this proposal be dropped from the agenda.

TAB 23A

To: Rules Advisory Committee
From: Committee on Rule Amendment at Cornell Law School
Date: September 15, 2023
Re: Proposed Rule Amendment to FRCP 12(a)(4)(B)

Dear Members of the Committee:

I. Statement of Purpose

We write to bring the Committee's attention to a deficiency in Rule 12(a)(4)(B) of the Federal Rules of Civil Procedure ("FRCP"). As it stands, the text of Rule 12(a)(4) provides a fourteen-day extension upon which an answer to a complaint is due in three circumstances: (1) when the court denies a motion for a more definite statement under Rule 12(e); (2) when the court denies a motion to strike under Rule 12(f); and (3) when the court grants a motion for a more definite statement under Rule 12(e). The extension of time provision, however, does not apply when the court *grants* a motion to strike under 12(f).[1] We identified this issue in our first-year civil procedure course with Professor Kevin Clermont and have since been determined to bring the inconsistency to the Committee's attention. The purpose of this rule amendment proposal is to increase efficiency for parties and judges alike, avoid unduly dismissed complaints for technical error, to allow otherwise meritorious lawsuits to proceed, and to prevent accrual of costly legal fees to parties who miss the deadline to answer as a result of the inconsistency in Rule 12(a)(4). This proposed amendment will bring the rules closer to their intended purpose: "to secure the just, speedy, and inexpensive determination of every action and proceeding."[2]

II. Statement of the Problem

Because the extension of time provision in Rule 12(a)(4) does not apply to the granting of a 12(f) motion, the movant is faced with a dilemma: either respond before the resolution of her 12(f) motion or wait until the motion is determined by the court.[3] If she responds before the resolution, she runs the risk that she will have been forced to admit or deny potentially scandalous—or at minimum irrelevant—matter. This is because if the motion is granted, she will have responded to the stricken matter. Alternatively, if the motion is denied and she has not responded to the matter that has been unsuccessfully stricken, she runs the risk that her pleading will be partially deficient. Finally, if she waits to respond, she may face default because the twenty-one day response time will typically expire before the court has adjudicated the motion.[4]

This problem is mentioned in an earlier version of *Federal Practice and Procedure* by Charles Alan Wright and Arthur R. Miller, describing the inconsistency in Rule 12(a)(4) as "an unintended omission on the part of the Advisory Committee, an omission that should have been corrected."[5]

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[1] While Rule 12(a)(4)(A) provides the extension when the court denies a motion more generally, including motions under both 12(f) and 12(e), Rule 12(a)(4)(B) only provides the extension when "the court grants a motion for a more definite statement." FED. R. CIV. P. 12(a)(4). An extension for when the court grants a motion to strike is missing from the rule.
[2] *See* FED. R. CIV. P. 1.
[3] 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1346 (3d ed. 2004).
[4] *Id.*
[5] *See id.*

A later update of the treatise ("the Update") changes its tune, arguing the omission should remain.[6] According to the Update, an amendment such as the one proposed here would turn the motion to strike into a "tool for imposing unnecessary delay."[7] However, this argument fails to recognize that a fourteen-day extension is already available to defendants raising a motion for a more definite statement regardless of whether it is granted or denied. Therefore, a defendant aiming to cause unnecessary delay may do so already by raising a frivolous motion for a more definite statement, and we have found no evidence of defendants doing so. If defendants are not using 12(e) motions to cause unnecessary delay—a tool already available to them—why would they suddenly start doing so with an extension under 12(f)? Further, even if defendants did attempt such delay, courts are well equipped to respond with sanctions under Rule 11.[8]

The Update also asserts that the omission "makes sense in light of the fact that in most cases, the motion is being asserted by a defendant who is attacking portions of the complaint as 'redundant, immaterial, impertinent, or scandalous'—rather than seeking to strike defenses as 'insufficient'—because complaints to not raise defenses."[9] However, the movant's dilemma persists regardless of whether or not the movant is attacking portions of the complaint as redundant, immaterial, impertinent, or scandalous as opposed to seeking to strike defenses as insufficient. Defendants still must choose between responding to potentially scandalous or irrelevant matter or filing a partially deficient pleading. Those who wait to respond may risk default if the twenty-one day response time has run up. Of course, defendants may avoid this risk by requesting an extension of time under the court's authority to "specif[y] a different time" under Rule 12(a)(1)(C).[10] However, with the proposed amendment, defendants would not have to spend precious time and money contemplating this dilemma or requesting an extension and judges would not have to spend time ruling on their request—leading to a more efficient and simplified resolution of the complaint.

Finally, the Update argues that the twenty-one day deadline for plaintiffs is irrelevant in most cases, with one exception: if the plaintiff wishes to challenge an answer containing affirmative defenses with a motion to strike and either party has sought an order for the plaintiff to file a reply.[11] In this case, the Update suggests that plaintiffs request an extension of time. Once again, this is not the most efficient system. With the proposed amendment, plaintiffs would not have to spend time and money requesting an extension and judges would not have to spend time deciding on them. Additionally, the rule as written—providing the fourteen-day extension in all circumstances except the granting of a motion to strike—would cause most lawyers to assume that the extension applies to 12(e) and 12(f) motions equally. Meaning, many lawyers may not even realize the risk of default for waiting to respond.

Ultimately, to maximize efficiency, we ask the Committee to resolve the inconsistency in Rule 12(a)(4). We believe the current rule comes with a number of significant costs, in addition to those laid out above, including, but not limited to: (1) legal fees associated with avoiding the dilemma or remedying missed deadline to answer; (2) potential malpractice actions due to assuming the extension applies to 12(e) and 12(f) motions equally; (3) plaintiff's meritorious lawsuits being unduly dismissed; (4) complexity of the current rule and the burden on pro se litigants; and (5) illogical rules lowering the

[6] *See* 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1346 (3d ed. 2023).
[7] *See id.*
[8] *See* FED. R. CIV. P. 11.
[9] *See* WRIGHT & MILLER, *supra* note 6.
[10] *See* FED. R. CIV. P. 12(a)(1)(C).
[11] *See* WRIGHT & MILLER, *supra* note 6.

apparent authoritativeness of the FRCP. All of these costs could be remedied if Rule 12(a)(4) were to apply the extension of time to 12(e) and 12(f) motions equally.

III. Proposed Solution

Should the Committee determine it appropriate to recommend altering Rule 12(a)(4)(B), a solution is relatively straightforward: apply the extension of time provision to a motion to strike under Rule 12(f), so that it would read:

> If the court grants a motion for a more definite statement *or a motion to strike,* the responsive pleading must be served within 14 days after the more definite statement is served *or the insufficient defense or redundant, immaterial, impertinent, or scandalous matter is stricken from the pleading.*

(emphasis added to show changes).

Thank you for considering our thoughts on this topic.

Sincerely,

Tyler Andrews
Julia Doyle
Haylee Privitera
Caleb Gentile
Katilyn Greening
J.D. Candidates, Cornell Law School

TAB 24

Federal Judicial Center

Date: August 12, 2024

To: Advisory Committees on Rules of Practice and Procedure

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

Re: Federal Judicial Center Research and Education

This memorandum summarizes 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

Local-Counsel Requirements for Practice in Federal District Courts

Prepared for the Standing Rules Committee's subcommittee on admissions to the district courts' bars, this report summarizes when and where federal district courts require local counsel to participate in litigation and attorney admissions (www.fjc.gov/content/385779/local-counsel-requirements-practice-federal-district-courts).

Fees for Admission to Federal Court Bars

Prepared for the Standing Rules Committee's subcommittee on admissions to the district courts' bars, this report summarizes fees charged for admission to federal court bars, including admission fees, pro hac vice fees, and fees charged by state and territory bars for certificates of good standing (www.fjc.gov/content/385023/fees-admission-federal-court-bars).

Current Research for Rules Committees

Broadcasting Criminal Proceedings

The Center is providing the Criminal Rules Committee with research support as it studies whether the proscription on remote public access to criminal proceedings should be amended.

Remote Participation in Bankruptcy Contested Matters

The Center is providing the Bankruptcy Rules Committee with research support as it studies remote participation in contested matters.

Prior Convictions as Impeachment Evidence for Criminal Defendants

At the request of the Evidence Rules Committee, the Center is conducting research on prior felony convictions as impeachment evidence against testifying criminal defendants.

Intervention on Appeal

At the request of the Appellate Rules Committee, the Center is conducting research on interventions on appeal.

The Need for Redacted Social Security Numbers in Bankruptcy Cases

In light of proposals to fully redact Social Security numbers in public filings, rather than all but the last four digits, the Bankruptcy Rules Committee asked the Center to survey bankruptcy trustees and others on the need for partial Social Security numbers in public filings.

Bankruptcy Judges' Use of "Special Masters"

At the request of the Bankruptcy Rules Committee, the Center will be gathering information from bankruptcy judges on how and whether they would use "special masters" if they had the authority to do that. It is acknowledged that there are concurrent proposals to discontinue use of the word "master" because of the word's historical association with involuntary servitude.

Default and Default-Judgment Practices in the District Courts

At the request of the Civil Rules Committee, the Center studied district-court practices with respect to the entry of defaults and default judgments under Civil Rule 55. Of particular interest was under what circumstances they are entered by clerks rather than judges. A completed report will be presented to the committee at its October 2024 meeting.

Complex Criminal Litigation Website

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

Unredacted Social Security Numbers in Federal Court PACER Documents

At the request of the Committee on Court Administration and Case Management, as part of the Center's ongoing privacy study, the Center identified unredacted Social Security numbers in public filings apparently out of compliance with Federal Rules of Practice and Procedure: Appellate

Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1. The Center found 22,391 unredacted Social Security numbers in a sample of 4.7 million filed documents (www.fjc.gov/content/387587/unredacted-social-security-numbers-federal-court-pacer-documents). Of those, 22% were exempt from the redaction requirement, and 6% belonged to pro se filers who waived the rules' privacy protection by disclosing their own Social Security numbers.

Current Research for Other Judicial Conference Committees

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, an update to research prepared for the Committee on Rules of Practice and Procedure in 2010 and 2015 (Unredacted Social Security Numbers in Federal Court PACER Documents, www.fjc.gov/content/313365/unredacted-social-security-numbers-federal-court-pacer-documents).

Remote Public Access to Court Proceedings

At the request of the Committee on Court Administration and Case Management, the Center conducted focus groups with district judges, magistrate judges, and bankruptcy judges to learn about their experiences providing remote public access to proceedings with witness testimony during the pandemic.

Case Weights for Bankruptcy Courts

The Center is collecting data for updated research on 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

Enhancing Efforts to Coordinate Best Workplace Practices Across the Federal Judiciary

This report, and the study of federal-judiciary workplace practices on which it is based, were undertaken by the Center and the National Academy of Public Administration pursuant to a House Committee recommendation under the Consolidated Appropriations Act of 2023 (www.fjc.gov/content/388247/enhancing-efforts-coordinate-best-workplace-practices-across-federal-judiciary).

JUDICIAL GUIDES

Completed

Mutual Legal Assistance Treaties and Letters Rogatory: Obtaining Evidence and Assistance from Foreign Jurisdictions

This guide, now in its second edition, provides an overview of the statutory schemes and procedural matters that distinguish mutual legal assistance treaties and letters rogatory (www.fjc.gov/content/386124/mutual-legal-assistance-treaties-letters-rogatory). It also discusses legal issues that arise when the prosecution, the defense, or a civil litigant seek to obtain evidence from abroad as part of a criminal or civil proceeding.

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

Summer Institute for Teachers

In June 2024, the Center collaborated with the ABA to present a week-long professional-development conference for teachers focusing on three famous historical trials: The *Amistad* trial, *United States v. Guiteau*, and *United States v. Rosenberg*. The Center presents information about these and other famous federal trials on its website (www.fjc.gov/history/cases/famous-federal-trials).

Spotlight on Judicial History

Since 2020, the Center has posted twenty-two short essays about judicial history on a variety of topics (www.fjc.gov/history/spotlight-judicial-history).

Recent posts include "*Chy Lung v. Freeman*: Anti-Chinese Sentiment and the Supremacy of Federal Immigration Law" (www.fjc.gov/history/spotlight-judicial-history/chinese-immigration-restriction), "Eighth Amendment Prison Litigation" (www.fjc.gov/history/spotlight-judicial-history/eighth-amendment-prison-litigation), "The Certificate of Division" (www.fjc.gov/history/spotlight-judicial-history/certificate-division), and "NFL Television Broadcasting" (www.fjc.gov/history/spotlight-judicial-history/nfl-television-broadcasting).

A User Guide to the History of the Federal Judiciary Website

The Center recently added to its History website a user guide that provides brief descriptions of resources of interest to specific audiences, including the general public, judges and court staff, educators, students, and researchers (www.fjc.gov/history/user-guide).

Snapshots of Federal Judicial History, 1790–1990

The Center recently added to its History website extensive exhibits presenting data about the federal judiciary at various points in its evolution (www.fjc.gov/history/exhibits/snapshots-federal-judicial-history-1790-1990).

EDUCATION

Specialized Workshops

FJC–Center for Law, Brain & Behavior Workshop on Science-Informed Decision-Making

Participants at this three-day, in-person workshop on the incorporation of behavioral science into decisions made in criminal cases were judges and probation and pretrial services officers.

Judicial Seminar on Emerging Issues in Neuroscience

A two-day, in-person judicial seminar explored developments in neuroscience and the role that neuroscience can play in legal determinations, such as decisions about criminal culpability and the admissibility of evidence. The seminar was cosponsored by the American Association for the Advancement of Science and funded by a grant from the Dana Foundation.

Electronic Discovery Seminar

A two-day, in-person judicial workshop explored technologies, rules, and legal requirements related to the retrieval of electronically stored information. It was cosponsored by the Electronic Discovery Institute.

Employment Law Workshop

A two-day, in-person judicial workshop explored issues arising in employment-law litigation, including the use of experts, electronic discovery, case management, retaliation, implicit bias, big data, and the role of the whistleblower. The New York University School of Law's Institute of Judicial

Administration and Center for Labor and Employment Law cosponsored the program.

Ronald M. Whyte Intellectual Property Seminar

A four-day, in-person judicial workshop addressed the basics of patent, copyright, and trademark law; patent case management; and emerging issues in intellectual property law. It was cosponsored by the Berkeley Center for Law and Technology.

Antitrust Judicial Law and Economics Institute for Federal Judges

A three-day, in-person judicial workshop focused on antitrust law and economics fundamentals in the context of various procedural issues, including pleading an antitrust case after the Supreme Court's decision in *Bell Atlantic Corporation v. Twombly*; antitrust injury; class certification; and the use of experts at class certification, during damages analysis, and throughout trial. The program was a collaboration of the Center, the American Bar Association's Antitrust Section, the University of Chicago, and the University of California at Berkeley.

Distance Education

Court Web

A monthly webcast included as recent episodes "Generative AI and the Future of Legal Practice" (featuring Middle District of Florida Magistrate Judge Anthony Porcelli and Southern District of California Magistrate Judge Allison Goddard), "Election Litigation Update" (featuring Professors Richard Hasen and Derek Muller), "Hot Topics in Federal Sentencing" (featuring Northern District of Ohio Judge Benita Pearson and Alan Dorhoffer, director of the U.S. Sentencing Commission's Office of Education and Sentencing Practice), "Finding the Ripcords: Top Ten 'Safe Landing' Federal Practice Cases" (featuring attorney Jim Wagstaffe and discussing recent appellate cases addressing jurisdictional issues), "Best Practices for Serving Unrepresented Litigants in the Federal Courts" (featuring Northern District of California Judge Jacqueline Scott Corley and Western District of Missouri Judge Willie Epps), and "Below the Radar: Vital Civil Procedure Developments You Might Not Know" (featuring attorney Jim Wagstaffe and highlighting the most recent developments in federal jurisdiction and civil procedure).

Term Talk

The Center has presented periodic webcasts with the nation's top legal scholars discussing what federal judges need to know about the U.S. Supreme Court's most impactful decisions. Recent episodes include "*Turkiye Halk Bankasi v. United States*; *Pugin v. Garland*" (discussing subject-matter jurisdiction over criminal prosecutions against foreign sovereigns) and "*Biden v. Nebraska*; *United States v. Texas*" (discussing state standing to sue

for losses suffered by a third party and standing to seek vacation of immigration guidelines).

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).

Interactive Orientation for Federal Judicial Law Clerks

The Center provides term law clerks with online interactive training resources.

Customer Service in the Courts

Launched in 2023, this e-learning course discusses working with self-represented litigants, among other topics. The course objectives are to provide information and address concerns without crossing into legal advice.

General Workshops

National Leadership Conference for Chief Judges of United States District and Bankruptcy Courts

This is an annual conference. In addition to updates from various Judicial Conference committees, the 2024 workshop included a session on the evaluation of the interim recommendations of the Cardone Report.

National Workshop for U.S. District Court Judges

These three-day workshops are held in even-numbered years. Among the topics examined at the 2024 workshop were scientific evidence, artificial intelligence, employment-discrimination litigation, deferred sentencing, restorative justice, and managing mass litigation.

National Workshop for U.S. Magistrate Judges

These three-day workshops are held annually. Among the topics examined at the 2024 workshop were the impact of ChatGPT on court filings, including those by self-represented litigants, and the impact of "deepfakes" on evidence and procedure.

National Workshop for U.S. Bankruptcy Judges

These three-day workshops are held annually. Among the topics discussed in 2024 were sealing court records and healthcare bankruptcies.

Circuit Workshops for U.S. Appellate and District Judges

In 2023, the Center put on two- or three-day workshops for Article III judges in the Second, Ninth, and Eleventh Circuits.

National Conference for Appellate Staff Attorneys

The Center puts on biennial three-day educational conferences for appellate staff attorneys, now in odd-numbered years.

Wm. Matthew Byrne, Jr., Judicial Clerkship Institute for Career Law Clerks

Held in collaboration with Pepperdine University Caruso School of Law, this annual two-day program offers sessions on managing pro se litigation, bankruptcy appeals, and jurisdictional issues.

Federal Defender Capital Habeas Unit National Conference

This annual three-day conference is designed for attorneys, paralegals, investigators, and mitigation specialists.

National Seminar for Federal Defenders

This annual three-day seminar is designed for assistant federal defenders who have been practicing criminal law for a minimum of three years.

Orientation Programs

Orientation Programs for Judges

The Center invites newly appointed judges to attend two one-week conferences focusing on skills unique to judging. The first phase includes sessions on trial practice, case management, judicial ethics, and opinion writing. 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, case management, security, self-represented litigants, relations with the media, and ethics. Recent orientation programs for district judges have included updates on the Cardone Committee's recommendations and evaluation. Orientation programs for circuit judges include a program at New York University School of Law for both state and federal appellate judges.

Orientation Seminar for Assistant Federal Defenders

This week-long seminar is held every year.