ADVISORY COMMITTEE
ON
CRIMINAL RULES

October 27, 2022

AGENDA
Meeting of the Advisory Committee on Criminal Rules
October 27, 2022 | Phoenix, Arizona

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- Chair's Remarks and Administrative Announcements (Oral Report)

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- Report of the Rules Committee Staff

  - Report on the June 2022 Meeting of the Committee on Rules of Practice and Procedure
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Meeting of the Advisory Committee on Criminal Rules
October 27, 2022 | Phoenix, Arizona

4. Pretrial Subpoena Authority (Rule 17)

5. Next Meeting: April 20, 2023, Washington, DC

RULES COMMITTEES — CHAIRS AND REPORTERS

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(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
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Advisory Committee on Appellate Rules

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Advisory Committee on Bankruptcy Rules

Chair	Reporter
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Associate Reporter

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

Advisory Committee on Civil Rules

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	Associate Reporter
	Professor Richard L. Marcus University of California Hastings College of the Law San Francisco, CA

Advisory Committee on Criminal Rules

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	Associate Reporter
	Professor Nancy J. King Vanderbilt University Law School Nashville, TN

Advisory Committee on Evidence Rules

Chair	Reporter
Honorable Patrick J. Schiltz United States District Court Minneapolis, MN	Professor Daniel J. Capra Fordham University School of Law New York, NY

ADVISORY COMMITTEE ON CRIMINAL RULES

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

Members

Honorable Andre Birotte, Jr. United States District Court Los Angeles, CA	Honorable Jane Boyle United States District Court Dallas, TX
Honorable Timothy Burgess United States District Court Anchorage, AK	Honorable Robert J. Conrad, Jr. United States District Court Charlotte, NC
Dean Roger A. Fairfax, Jr. American University Washington College of Law Washington, DC	Honorable Michael J. Garcia New York State Court of Appeals Albany, NY
Lisa Hay, Esq. Federal Public Defender Portland, OR	Honorable Bruce J. McGiverin United States District Court San Juan, PR
Honorable Jacqueline H. Nguyen United States Court of Appeals Pasadena, CA	Hon. Kenneth A. Polite, Jr.* Assistant Attorney General (ex officio) United States Department of Justice Washington, DC
Catherine M. Recker, Esq. Welsh & Recker PC Philadelphia, PA	Susan M. Robinson, Esq. Thomas Combs & Spann PLLC Charleston, WV

Liaisons

Honorable Gary Feinerman
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Chicago, IL

Clerk of Court Representative

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Advisory Committee on Criminal Rules

Members	Position	District/Circuit	Start Date	End Date
James C. Dever III Chair	D	North Carolina (Eastern)	Member: 2014 Chair: 2022	2020 2025
Andre Birotte, Jr.	D	California (Central)	2021	2024
Jane Boyle	D	Texas (Northern)	2021	2024
Timothy Burgess	D	Alaska	2021	2023
Robert J. Conrad, Jr.	D	North Carolina (Western)	2021	2024
Roger A. Fairfax, Jr.	ACAD	Washington, DC	2019	2025
Michael J. Garcia	JUST	New York	2018	2024
Lisa Hay	FPD	Oregon	2020	2025
Bruce J. McGiverin	M	Puerto Rico	2017	2023
Jacqueline H. Nguyen	C	Ninth Circuit	2019	2025
Kenneth A. Polite, Jr. (ex-officio)	DOJ	Washington, DC	----	Open
Catherine M. Recker	ESQ	Pennsylvania	2018	2024
Susan M. Robinson	ESQ	West Virginia	2018	2024
Sara Sun Beale Reporter	ACAD	North Carolina	2005	Open
Nancy J. King Associate Reporter	ACAD	Tennessee	2007	Open

ADVISORY COMMITTEE ON CRIMINAL RULES
SUBCOMMITTEES
(October 1, 2022—September 30, 2023)

Emergency Rules Subcommittee Judge Robert Conrad, Chair Judge André Birotte Ms. Lisa Hay Judge Bruce McGiverin Ms. Angela Noble Mr. Jonathan Wroblewski (DOJ) Judge James Dever Cc: Criminal Rules Reporters, Professor Daniel Capra, Allison Bruff	**Rule 49.1 Subcommittee** Judge André Birotte, Chair Judge Jane Boyle Ms. Lisa Hay Judge Bruce McGiverin Ms. Susan Robinson Judge James Dever Cc: Criminal Rules Reporters, Allison Bruff
Pro Se Filing Subcommittee Judge Timothy Burgess, Chair Ms. Lisa Hay Judge Bruce McGiverin Ms. Angela Noble Ms. Susan Robinson Judge James Dever Cc: Criminal Rules Reporters, Allison Bruff	**Rule 17 Subpoenas Subcommittee** Judge Jacqueline Nguyen, Chair Judge Jane Boyle Ms. Lisa Hay Ms. Catherine Recker Mr. Jonathan Wroblewski (DOJ) Judge James Dever Cc: Criminal Rules Reporters, Allison Bruff

Updated October 1, 2022

RULES COMMITTEE LIAISON MEMBERS

Liaisons for the Advisory Committee on Appellate Rules	Andrew J. Pincus, Esq. *(Standing)* Hon. Bernice B. Donald *(Bankruptcy)*
Liaison for the Advisory Committee on Bankruptcy Rules	Hon. William J. Kayatta, Jr. *(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. Gary Feinerman (*Standing*)
Liaisons for the Advisory Committee on Evidence Rules	Hon. Robert J. Conrad, Jr. (*Criminal*) Hon. Carolyn B. Kuhl *(Standing)* Hon. M. Hannah Lauck *(Civil)*

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Dr. Emery G. Lee
Senior Research Associate
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Research Associate
(Evidence)

Tim Reagan, Esq.
Senior Research Associate
(Standing)

TAB 1

This item will be an oral report.

ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
April 28, 2022
Washington, D.C.

Attendance and Preliminary Matters

The Advisory Committee on Criminal Rules ("the Committee") met on April 28, 2022, in Washington, D.C. The following members, liaisons, and reporters were in attendance:

Judge Raymond M. Kethledge, Chair
Judge André Birotte Jr. (via Microsoft Teams)
Judge Jane J. Boyle
Judge Robert J. Conrad
Dean Roger A. Fairfax, Jr. (via telephone)
Judge Michael J. Garcia
Lisa Hay, Esq.
Judge Bruce J. McGiverin
Angela E. Noble, Esq., Clerk of Court Representative
Judge Jacqueline H. Nguyen
Catherine M. Recker, Esq.
Susan M. Robinson, Esq.
Jonathan Wroblewski, Esq.[1]
Judge John D. Bates, Chair, Standing Committee
Judge Jesse M. Furman, Standing Committee Liaison
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Professor Catherine Struve, Reporter, Standing Committee (via Microsoft Teams)
Professor Daniel R. Coquillette, Standing Committee Consultant (via Microsoft Teams)
Professor Daniel Capra, Reporter, Evidence Committee (via Microsoft Teams)

The following persons participated to support the Committee:

Allison A. Bruff, Esq., Counsel, Rules Committee Staff
Brittany Bunting, Administrative Analyst, Rules Committee Staff
Burton DeWitt, Esq., Law Clerk, Standing Committee
Bridget M. Healy, Esq., Counsel, Rules Committee Staff
Laural L. Hooper, Esq., Senior Research Associate, Federal Judicial Center
S. Scott Myers, Esq., Counsel, Rules Committee Staff

[1] Mr. Wroblewski represented the Department of Justice.

The following persons attended as observers on Microsoft Teams or by telephone:

Pedro E. Briones	DC Courts
Patrick Egan	American College of Trial Lawyers
Peter Goldberger	National Association of Criminal Defense Lawyers
John Hawkinson	Freelance Journalist
Nate Raymond	Legal Affairs Correspondent – Reuters
Crystal Williams	Public

Opening Business

Judge Kethledge opened the meeting with administrative announcements. He thanked the staff at the Administrative Office for making all of the arrangements, and he expressed pleasure that the meeting was taking place in person for the first time in almost three years, though a few participants were attending virtually.[2]

Judge Kethledge stated this was his last meeting, and he expressed gratitude for the experience of serving on the Committee for nine years. He characterized the Committee's work as interesting, important, and fulfilling. He called the Committee an exemplary body whose members trust one another and work collectively to identify the best solutions for administration of criminal justice. The Committee, he observed, is an example of the respect and civility that this country should move towards.

Judge Kethledge thanked the Administrative Office again for everything that they had done over many years, as well as the many members with whom he had worked. He expressed special thanks to Judges David Campbell and John Bates for their work as chairs of the Standing Committee, and to prior Criminal Rules Committee chairs whose examples he sought to follow. Finally, Judge Kethledge thanked the reporters, calling their work truly extraordinary and expressing appreciation for their friendship and kindness. He said he would miss the constant interaction he had had with them.

Overall, Judge Kethledge concluded, his overall feeling was one of gratitude for being able to serve here.

Professor King opened her comments on Judge Kethledge's contributions with a photo of him holding a very large fish. Noting that Judge Kethledge is an accomplished fisherman, she described the traits that made him successful as both a fisherman and committee chair: being goal oriented, decisive, and patient. She characterized Judge Kethledge as laser focused on what was most important and willing to go slowly through multiple revisions, forging and maintaining a consensus. She noted that as fisherman and chair Judge Kethledge had to have a sense of humor and the resilience to persist when things go wrong, like the line breaking, the bait falling

[2] Judge Andre Birotte, Dean Roger Fairfax, and Professors Cathie Struve, Dan Capra, and Dan Coquillette participated virtually.

off, or the Standing Committee sending back a draft rule. She concluded that Judge Kethledge had been an outstanding chair, and the Committee was grateful to have "caught" him.

Professor Beale said that although she had no photograph, everyone on the Committee had observed the three things she wished to speak about: Judge Kethledge's service, leadership, and his traits as a person. Describing his strong sense of duty and service, she noted that in nearly a decade he never missed a meeting of the Committee or its many subcommittees, and he was always available to the reporters by telephone or email. He placed the Committee's work high on a busy agenda that included not only his judicial work, but also teaching at the University of Michigan, his own writing, and his family.

Professor Beale said that Judge Kethledge's handling of the Rule 16 project was an example of his leadership. The Committee received a lengthy and complex proposal from a New York bar group. As he wrote in his book about leadership, Judge Kethledge—and the Committee—took a step back to determine what was most important. We held a miniconference with a wide range of participants to help identify and understand the most important problems. It led to a breakthrough, and with Judge Kethledge's constant encouragement the participants forged a consensus that all agreed was a significant improvement—though not necessarily everything that each member might want. In this process, Judge Kethledge brought the best in each person. If there is no objection in Congress, the resulting amendment will go into effect December 1, 2022.

Professor Beale also praised Judge Kethledge's work on the emergency rules. It was an enormous project, which the Committee accomplished because Judge Kethledge created a subcommittee and then divided it into working groups. There were countless telephone meetings, and Professor Beale wished she had a nickel for each call.

Finally, Professor Beale praised Judge Kethledge's friendship, kindness, and patience. She noted that he always asked the most from each member and reporter, but also recognized their other responsibilities, including to their families. She concluded that she would really miss him.

Judge Bates said that both he and the Committee would greatly miss Judge Kethledge. They had worked together not only on the rules, but also with Judge David Campbell and others on the CARES Act. Judge Bates called that a great exercise that turned out very well. He said Judge Kethledge's leadership had been crucial for this Committee. The judiciary is the better for it, and we appreciate it.

Mr. Wroblewski said he had had the honor of representing the Department of Justice on this Committee for several decades, and he called Judge Kethledge an extraordinary steward of the Committee and the Federal Rules of Criminal Procedure. He praised Judge Kethledge for recognizing that we have inherited a really fine text in the existing Rules of Criminal Procedure, which he compared favorably to two foundational criminal justice documents—the federal criminal code and the Sentencing Guidelines. But Judge Kethledge had also recognized that the world was changing in ways that required changes in the rules to deal with networks of robots

committing crimes and pandemics, and he guided the Committee to the needed reforms while maintaining the core virtues of the text, the rules that have stood the test of time. Mr. Wroblewski concluded with his mother's advice: when you take on something like this, you always want to leave it better than you found it. He said Judge Kethledge had done just that. Calling Judge Kethledge a man of solitude, grace, humility, principle, confidence, intellect, and common sense, he said it had been a privilege to get to know him over the past decade.

Judge Kethledge responded warmly, thanking Mr. Wroblewski and expressing his respect for him as a professional and person who brought the Department's perspective and represented it well, but always put the nation's interest first. That made the Committee's accomplishments on Rule 16, Rule 62, and all of the other projects possible.

Noting that he would go over everyone's comments later, Judge Kethledge moved to the next items on the agenda. He thanked the members of the public who were observing, noting the Committee appreciated their interest as well as the comments and suggestions they provide. Ms. Bunting provided a quick review of meeting etiquette for those in person and those online.

Minutes and Rules Committee staff report

Judge Kethledge noted the minutes of the last meeting were lengthy, and he thanked the reporters for their work. Hearing no comments or concerns, he called for a motion to approve the minutes. The motion was made and seconded, and the minutes were approved.

The next item was the Rules Committee Staff report. Ms. Healy provided the first portion, drawing the Committee's attention to the fact that Rule 16 would go into effect on December 1, 2022, unless Congress prevented it. Mr. DeWitt discussed the legislation that might affect the Criminal Rules, noting the overarching theme was Congress's interest in virtual proceedings, which is reflected in multiple bills. The Courtroom Video Conferencing Act of 2022, page 98, would make certain provisions of the CARES Act permanent, allowing the chief judge of a district to authorize teleconferencing for a variety of proceedings. This would not require an emergency, and would effectively negate some of the provisions in draft Rule 62. Mr. DeWitt also drew attention to the Protecting Our Democracy Act, pp. 96-97, which passed the House in December 2021. It would prohibit any interpretation of Rule 6(e) dealing with grand jury secrecy that would prohibit disclosure to Congress of grand jury materials related to individuals that the president has pardoned or commuted their sentences. Professor Beale commented that it was somewhat surprising that the bill did not purport to amend Rule 6(e), but rather to prohibit any interpretation that would preclude disclosure to Congress. Professor Beale noted that this was related to a degree to some of the issues considered by the Committee at its last meeting, when it declined to move ahead with amendments to Rule 6(e). Mr. DeWitt stated that the bill passed the House on almost a party line vote in December, and was now before the Senate Judiciary Committee and perhaps some other committees. Finally, Mr. DeWitt noted the Government Surveillance Transparency Act of 2022, p. 98, which would explicitly amend Rule 41(f)(1)(B) regarding what the government must disclose in the required inventory. Mr. DeWitt confirmed that the Administrative Office was closely tracking all of the legislation affecting the rules.

Rule 62

Judge Kethledge began the discussion of draft Rule 62 with a brief description of the process that followed the legislative directive in the CARES Act to prepare amendments that would apply in future emergencies. Judge Dever chaired the Emergency Rules Subcommittee, which broke into working groups. The working groups and the subcommittee had innumerable telephone calls and Zoom meetings, and then the subcommittee held a day long miniconference to get input from all kinds of affected parties, asking how they were faring in the emergency and the particular challenges they were facing with regards to the Criminal Rules. The process for developing the draft rule and repeatedly refining it was lengthy and involved. Eventually the draft rule was approved for publication in August 2021. Despite the breadth of the rule, there were only a modest number of public comments, including the thoughtful comments and suggestions the Committee would be discussing.

Judge Kethledge thanked the reporters for their memorandum and the subcommittee for its thoughtful consideration, but he emphasized that the Committee's review was plenary. He asked Judge Conrad, the subcommittee chair, to begin the discussion.

Judge Conrad stated that after careful review of the public comments the subcommittee was recommending no change in the text of the rule as published but a few changes in the committee note. The Committee would go through each of the issues in the memo, with the reporters describing the comments and the subcommittee's response.

With regard to the process, Judge Kethledge and the reporters stated that motions to make changes in the rule or text could be made during the discussion, which would conclude with a final vote to approve the rule and note for transmittal to the Standing Committee.

Rule 62(d)(1)

Professor Beale began the discussion of the one change the subcommittee recommended, discussed in the memorandum on page 101 of the agenda book. The public comments stated conflicting views regarding the treatment of victims in the committee note for (d)(1), which concerns public access. The Department of Justice expressed concern that the note did not mention the Crime Victims' Rights Act (CVRA) and grouped victims with other members of the public, which might lead courts to take actions that would not be in compliance with the CVRA. Accordingly, the Department proposed adding an explicit reference to the need to comply with the CVRA to make sure it was scrupulously followed.

The National Association of Criminal Defense Lawyers (NACDL) strongly disagreed, stating that the committee note as published was absolutely correct and opposing the Department's proposal.

Finally, Professor Miller and her federal criminal justice clinic students (the FCJC) thought that the text and committee note short-changed the members of the defendant's family and friends, whose support is critical and who should not be placed on a lower priority than victims.

The subcommittee came up with what we think is a very good compromise, quoted on page 104. It draws attention to both sets of interests that courts should consider: both the First and Sixth Amendments (which include the defendant's friends and family) and the Crime Victims' Rights Act (CVRA). It does not try to spell out either the constitutional requirements or those of the CVRA. And it doesn't assume the CVRA is the only possible statutory provision. Although we did not identify other possibilities, the "including" language leaves open room for other statutory directives. After drawing attention to these constitutional and statutory directives, it leaves it to the courts to define what reasonable alternative access would be in particular circumstances. With this new reference to the CVRA, the subcommittee proposed deleting the parenthetical reference to victims in the note as published. Drawing attention to, but not attempting to fully define, the constitutional and statutory provisions that should be considered is consistent with the approach the Committee has historically taken in other committee notes.

Noting that this was one of the more difficult issues raised by the public comment, Professor Beale asked for discussion of the issues and the subcommittee's proposed approach.

Judge Bates asked whether there is a common law right of access in addition to the First and Sixth Amendment constitutional guarantees and the CVRA. If so, he wondered if the failure to reference it might mislead some judges.

Professor King commented that common law rights govern unless modified by statute, so it was something we could consider adding because the proposed note language does list three things and might suggest it is comprehensive.

Judge Kethledge asked what common law would mean in this context. Would common law be the basis for judicial judgment as opposed to informing constitutional analysis?

Professor King responded that the common law analysis came up in connection with the Committee's study of issues raised by efforts to protect cooperators, but could not recall what difference there was between the common law and First Amendment rights of access.

Professor Beale also had some recollection of that research connected to the cooperator proposals, and thought that some courts went to the common law right of access first, before turning to the constitutional analysis. She thought that to the extent there was a body of law recognizing a common right of access it was a helpful suggestion to add a reference in the note listing things courts should be attentive to.

Judge Furman agreed it would be a good idea to mention the common law and suggested that it might be sufficient to refer to "the constitutional and/or common law guarantees of public access." The references to the First and Sixth Amendments could be deleted on the theory that there's no need to specify which provisions of the constitution are applicable. Judge Kethledge responded it might be sufficient to make sure courts do not overlook the constitutional guarantees without being specific.

Professor Beale asked whether there was agreement to add the common law right of access; if so, then it would be necessary to think about the precise wording. Judge Kethledge

responded that if a reference to the common law were added, it would be appropriate to be "agnostic" rather than instructing judges to find such a right.

Professor King reminded the Committee that the FCJC's concerns centered on the Sixth and First Amendments and the need to follow the constitutional requirements whenever there is some sort of courtroom closure. This proposed mention of the First and Sixth Amendments in the addition to the committee note was as far as the subcommittee went in responding to the FCJC's comments, which requested many references to the Sixth Amendment test throughout the note. Eliminating the references to the First and Sixth Amendments would be something the FCJC would strongly oppose. They were very focused on bringing judicial attention to the Sixth Amendment.

Professor Coquillette asked whether it would be sufficient to say any applicable statutory provision, rather than mentioning the CVRA. That would avoid any problems down the line if the CVRA were repealed, and he noted it was more likely a statute like the CVRA might be repealed than the constitution be repealed. He suggested that the same arguments made in favor of deleting the references to the First and Sixth Amendments would also favor deleting the reference to the CVRA.

Mr. Wroblewski responded by first putting the discussion in context, noting that no one was suggesting any change in the rule. The only issue under discussion concerned the note language intending to identify the considerations that judges should look at in implementing the emergency procedures. As published, the note referred to both "victims" and the First and Sixth Amendments. In light of the fact that the CVRA is very relevant to who has access to the courtroom and how they have access, the Department thought it was important to refer to the CVRA in the note as one of those considerations. The Department was not trying to determine the priority of access between friends and families, but only to make clear the CVRA should be a consideration. This particular statute is different from all others and should be mentioned within the note. The way the reporters and subcommittee have drafted the note makes it clear that the Committee is not trying to identify relative priorities, but only trying to say to judges these are things you need to consider: the constitution, the common law, statutory provisions and this one in particular—the CVRA—because it specifies access to courts in the statute.

Responding to Professor Coquillette's concern about citing a statute in the note, Professor Beale commented that other notes specify statutes, such as the Speedy Trial Act. That Act could be repealed, but that is not likely. And it is not likely that the CVRA will be repealed. Because the CVRA directly addresses the victim's right to address the court and otherwise participate in proceedings, she favored retaining the reference to it in the note (and adding the common law as well as referencing the First and Sixth Amendments). She agreed with Professor King's comment about the very strong concerns expressed by the FCJC in the public comments that the Sixth Amendment right to public access may be overlooked or not given enough attention in an emergency. The note is listing things for courts to think about, not trying to say one is more important than another. But in saying these things must be considered, the rule does not spell out exactly what kind of access must be provided. So it's pretty spare, and the question what courts

must consider has been deferred to the note. It was appropriate to identify some of the things they should consider.

Professor Coquillette said he understood that consideration, and he commented that in general the note was very well crafted and struck a good balance.

A member said she liked the language of the proposed note with the addition of any common law. Given the purpose of the note, the specificity of the First and Sixth Amendments gives helpful guidance for courts. She also liked the proposed treatment of victims and deleting the earlier general reference. The proposed language did not seem clunky or awkward.

Another member agreed that we should retain the reference to the Sixth Amendment to provide some guidance to the courts. When we talk about public access, we often think of the First Amendment, and it is useful to have a reminder to consider the Sixth Amendment. If we want to be neutral about the common law, the note could say "the constitutional guarantees of public access in the First and Sixth Amendments, the common law, and any applicable statutory provision …." That way we would not be saying there is a common law right of access.

Judge Conrad observed that the subcommittee did not identify any other constitutional or statutory provision. Since the language of the proposed note is "any applicable statutory provision, including the Crime Victims' Rights Act," he wondered whether the word "including" should be added before the reference to the First and Sixth Amendments. That would make the provisions parallel.

Professor King said she was struggling to identify other constitutional provisions that might provide a right of access. Perhaps the Eighth Amendment. Or the Due Process Clause.

Professor Beale observed that the question whether there were other plausible constitutional provisions was closely related to the question whether parallel language was appropriate. If there are no other plausible constitutional provisions, then she would not favor the parallel phrasing "including." She too was uncertain whether there were other constitutional provisions and a need to draw attention to them.

Judge Kethledge commented that if something would be a relatively novel argument, it will arise only if someone makes the argument. In that situation, there would be no concern a court would overlook the issue.

Judge Furman noted that there is an argument that the Sixth Amendment is a trial right that would not apply to various pretrial proceedings governed by Rule 62 (which makes no provision for virtual trials). Without knowing the substantive law, he thought that arguments in that context might rely on the Due Process Clause rather than the Sixth Amendment. That would be a reason to be deliberately indefinite about the constitutional guarantees rather than specifying particular provisions, and to trust judges to understand that generally means the First and/or Sixth Amendments.

Professor King summed up the proposals that had been made:

- Refer to the constitutional guarantees of public access, including those in the First and Sixth Amendments
- Omit the reference to the First and Sixth Amendments
- Retain the reference to the First and Sixth Amendments and add a reference to the common law.

She suggested turning first to the question of references to the constitution, and then to whether to add a reference to the common law.

Judge Kethledge asked for discussion on whether to omit the references to the First and Sixth Amendments. A member who had previously spoken in favor of including them acknowledged the point that the Due Process Clause might be helpful in proceedings not covered by the Sixth Amendment. And if due process protects public access, we don't want to imply we are not protecting that here.

Professor Beale commented that making the reference to constitutional provisions parallel to the phrasing regarding statutes would leave open the possibility that people would litigate and over time a body of law would develop under the Sixth Amendment, the Fifth Amendment, or otherwise.

Another member who had also spoken in favor of including the First and Sixth Amendments in the text said she too had been unaware that there are other rights of public access. She asked whether the subcommittee had researched the due process issue.

Judge Kethledge and the reporters responded that the subcommittee had not done so, though Professor Beale said that due process rights had been discussed a bit in the Rule 49.1 subcommittee. A member of that subcommittee responded that in the context of Rule 49.1 the defense did turn to a due process argument, though not on the question of public access. She agreed that whenever there is a threat to the rights of the defendant you often turn first to due process, so that might be true here as well.

Professor Beale thought there was no need to be too restrictive in what the note suggests courts think about if there was a concern that about misdirection if the note is read as saying these are the only constitutional provisions. That argument had been successful when the subcommittee knew it wanted to cite the CVRA but did not want to signal that there could be no other statute.

Judge Kethledge observed that if we have "including" referring to the statutory but not the constitutional provisions that might suggest that we are certain about identifying the constitutional provisions. So one way to go forward would be "including" referencing the First and Sixth Amendments, adding the common law, and retaining the CVRA reference. But we heard some comments about eliminating the reference. He asked if anyone wished to do so.

Mr. Wroblewski sought clarification of the earlier reference to the First and Sixth Amendments (on the first line of page 140). Professor Beale responded that reference would not be affected by any change being discussed. This portion of the note explains how the Committee

defined the term "public proceeding" in Rule 62, which are the proceedings where there must be access under the First and Sixth Amendments. Judge Kethledge agreed that we were referring to an extant body of case law, which is a little different. Professor King agreed, noting that the first reference at the top of page 140 is to what is meant by public proceedings, and the new paragraph focuses on what judges should think about when they are determining whether alternative access is reasonable. She thought, for example, one might raise an equal protection challenge to alternative access. But that would not affect what is characterized as a public proceeding. Mr. Wroblewski thanked Judge Kethledge and the reporters for that explanation.

Judge Bates suggested that the Committee look ahead to the presentation of the rule to the Standing Committee, and he suggested that it would be helpful to have done research on these issues. If there is any case law on other constitutional bases for access other than the First or Sixth Amendments, that would raise the question whether the note should limit the reference only to those amendments. But it might be unwieldy to start adding other constitutional provisions, which might be a reason to refer only to constitutional guarantees in general.

Judge Kethledge responded that in light of the language at the top of page 140, which Mr. Wroblewski had just asked about, a judge who is reading the note to (d)(1) will just have read the reference to the First and Sixth Amendments. Perhaps the judge does not need to be reminded of them again specifically three paragraphs later in the same note.

Professor King expressed reservations about deleting the references to the First and Sixth Amendments as things the judge should consider in determining reasonable alternative access. Several of the suggestions in the public comments wanted more detail and emphasis on the access guaranteed by these amendments, and the subcommittee declined to add those references in part because of the language proposed here. Judge Kethledge responded that the other reference to the First and Sixth Amendments was in a note to the same paragraph on public access, (d)(1). He returned to a point made earlier: because the law can change over time, our phrasing regarding statutory provisions allowed for others that might be added. He noted members had suggested the defense would turn to due process if they did not have other options. So a parallel treatment of the constitutional and statutory provisions might be appropriate if we were drawing attention to the constitutional provisions we knew should be considered, but trying to signal that we were not saying nothing else mattered.

Professor Beale stated she was not opposed to more research, but she was not sure more research was needed to defend an open-textured way of drawing attention to the provision we are 100% sure courts should be thinking about, but trying to signal that the door is not closed to other kinds of arguments. In response to a question from Judge Bates, she agreed this was an argument in favor of referring to constitutional guarantees of public access, including the First and Sixth Amendments. Judge Kethledge commented that the text might read better using parentheticals.

After clarifying that the reference to the First and Sixth Amendments at the top of page 140 would remain, a member said she was coming around to the position that the references to the First and Sixth Amendments might be confusing. Doing some quick research during the

meeting she had found multiple references that grouped together First Amendment, Due Process, and common law rights of access, all thrown together in one phrase. So it might be desirable to refer to "the constitutional right to public access, the common law, and any statutory provision" (acknowledging that the Justice Department wanted to specifically refer to the CVRA). She was not sure we would lose anything by deleting the reference to the First and Sixth Amendments since they were already in the earlier paragraph in the same note.

Judge Kethledge noted that the Committee seemed to be moving towards consensus. The question was whether to delete the references to the First and Sixth Amendments. He asked if there was a motion to do so. He suggested taking a voice vote on this issue—with those participating on Teams using the raised hand feature—and deferring the question whether to add a reference to the common law. This would be a vote on the concept.

A member asked for clarification, noting that it appeared there was a serious question whether due process might be applicable. Assuming that there might be other constitutional provisions that could provide a right of public access, she thought this would be a way to accommodate them. If we do not know whether or how many constitutional rights there might be, it would be safest not to list only two amendments since that might mislead judges.

The member and the reporters agreed there were two ways to do this: (1) delete the reference to specific amendments and refer only to constitutional guarantees or (2) refer to constitutional guarantees of public access "including the First and Sixth Amendments."

In favor of the second option, Professor Beale noted that most people have litigated public access under the First and Sixth Amendments, and there is a great deal of case law discussed in the FCJC's public comment memo. The FCJC urged that these amendments have great significance for the alternative access courts must provide. And if representatives of the press were present, she thought they would like the note to draw attention to the First Amendment. So the note could draw attention to these two amendments and recognize the potential for litigation on other issues (though they had not seen much of that). Or the note could be "short and sweet," referring simply to any constitutional guarantee of public access.

Noting that there had not been much discussion of the word "any constitutional guarantees," a member commented that it would be preferable to say "the constitutional guarantees," since there clearly are constitutional guarantees of public access.

Judge Kethledge suggested that the Committee try to reach agreement on specific language which someone then might move to adopt. In response to a member's question, he confirmed that the Committee was only considering the new paragraph proposed on page 104, not the reference in the first paragraph on that page.

Professor King stated the following option:

> When providing reasonable alternative access, courts must be mindful of the constitutional guarantees of public access….

Someone asked whether this should be "the constitutional and common law guarantees" (emphasis added). Judge Kethledge asked what that would mean, noting that he was not aware of a specific case. How sure, he asked, are we about common law guarantees? Professor Beale responded that the reporters had included the common law in their research memos when the Committee was considering protections for cooperators.

Professor King restated option 1:

> When providing reasonable alternative access, courts must be mindful of the constitutional and common law guarantees of public access, and any applicable statutory provision, including the Crime Victims' Rights Act.

She then stated option 2:

> When providing reasonable alternative access, courts must be mindful of the constitutional guarantees, including the First and Sixth Amendments, the common law right of public access, and any applicable statutory provision, including the Crime Victims' Rights Act.

Judge Bates commented that rather than voting on both options, it might be simpler to vote initially on the first option, which he characterized as making just two simple changes: after "constitutional" deleting the words "First and Sixth Amendments," and adding the word "common law."

A motion to adopt option 1 was made, seconded, and passed by a vote of seven to three. Judge Kethledge observed this issue was likely to get attention at the Standing Committee meeting, and Professor Beale added that in writing it up the reporters would determine whether any additional research was needed.

A member raised a stylistic question about the note to (d)(1), which was generally in the present tense but included one verb in the past tense: "The term public proceeding was intended to capture…." Should this be the present tense, defining what the term is intended to capture? Judge Kethledge agreed that would be a good change, and asked whether a motion was necessary. Professor Beale thought not: if no one objected, it could be covered in the final vote to approve the rule and note. That would cover, as well, the strikeout of the words "including victims" on the top of page 140, which was part of the proposal to add the new paragraph the Committee just voted to adopt.

Other comments on Rule 62: No changes recommended

Professor Beale then turned to the discussion of the other comments received, which the subcommittee had considered and declined to make the changes that were proposed. She noted that these were all decisions to be made by the Committee as a whole.

Rule 62(a) – the role of the Judicial Conference

Two comments, described on page 105, addressed the decision to give the Judicial Conference the exclusive authority to declare rules emergencies. Lodging this authority in the

Judicial Conference, she noted, was an important common feature shared by the other emergency rules. The Federal Magistrate Judges Association expressed concern that the Conference would not be able to act quickly enough in different kinds of emergencies. On the other hand, the Federal Bar Association strongly supported this feature.

The subcommittee recommended no change. It understood that this issue had received serious consideration throughout the process. Professor Beale noted that the Committee had strongly favored the Judicial Conference as a single gatekeeper that would have a uniform and fairly strict approach to relaxing the ordinary and important requirements in the Federal Rules of Criminal Procedure for emergency situations. It had been persuaded that the Judicial Conference can act quickly, including through its executive committee as necessary. The Conference has the ability to gain the necessary information and respond quickly. And there is a value in placing this responsibility in the judiciary and in the Judicial Conference exclusively. So the subcommittee was comfortable with this portion of the rule as published, and it also understood that this was a common feature of all the rules going forward.

Professor Coquillette stated his agreement with Professor Beale's comments. Having served as the Standing Committee reporter for many years, he had been able to see the Judicial Conference and executive committee act quickly in in emergency situations. They're quite capable of doing it under the leadership of the Chief Justice.

Neither Judge Conrad nor any other member of the Committee wished to add anything more on this issue.

Rule 62(d)(1) – deleting or revising existing references to contemporaneous and audio access

Professor Beale turned next to two comments, both of which expressed concern about the requirement that the reasonable alternative access be "contemporaneous if feasible." The Federal Magistrate Judges Association expressed concern that saying "contemporaneous if feasible" was too weak. It might signal that contemporaneous access was not important or not necessary, and that language might actually lead to more frequent denial of the right of public access during emergencies. The group from Chicago (abbreviated as the FCJC in the memorandum) wanted to expressly provide that any limitations on public access during rules emergencies must satisfy the *Waller* test, a constitutional decision that spells out multiple criteria.

So the question for the subcommittee—and now the Committee as a whole—was whether the rule struck the right balance. The subcommittee was not persuaded that it would be appropriate for the rule or the note itself to try to spell out the constitutional analysis that courts should apply. That gets into substantive constitutional decision making, and the subcommittee felt that that was not appropriate for the rule or note. The proposal signals to courts that they need to attend to the constitutional principles applicable to public access, but does not try to spell out those provisions. As to the language "contemporaneous if feasible" and whether it might actually undercut and cause courts to provide less rather than more access, the subcommittee

recognized that we don't know what kinds of emergencies courts might be dealing with. Or what would be possible in these unknown future emergencies.

The language "contemporaneous if feasible" was intended to strike a balance, to nudge courts towards understanding that contemporary access should be afforded, though it may not be feasible or possible under all circumstances. There was some debate within the subcommittee about whether "possible" would be better than "feasible." Is it correct to signal that contemporaneous is the goal, though it may not always be possible?

The subcommittee decided to recommend no change. The word "feasible" is used elsewhere in in the notes. The questions for discussion were whether to substitute the word "possible," or—as the Federal Magistrate Judges Association suggested—better to strike it entirely. The subcommittee thought we probably got the balance right.

Professor Beale noted there were two discrete questions here. One is about whether "contemporaneous if feasible" is helpful or harmful, and the other is whether we ought to include an express reference to a particular Supreme Court case as something that the judges should be mindful of.

Judge Conrad stated the approach here was consistent with the earlier discussion. The Committee tries to avoid substantive constitutional analysis in the notes. The subcommittee did try to think of words other than feasible, but it did not come up with anything that expressed it better. That was why, at the end of the day, it recommended retaining those words.

Judge Kethledge responded that reasonable people could differ on "feasible" or "possible," and the subcommittee had talked about that.

A subcommittee member recounted her recollection of the discussion at various stages. She thought when we first discussed alternative access we came up with the idea of requiring contemporaneous alternative access from the courtroom. She thought contemporaneous access is pretty critical when we talk about a public hearing. We want victims to be able to participate in the hearing. We want family members to participate. We want the press to hear as the proceeding is occurring, not to receive a transcript, maybe weeks later. So, she recalled, we discussed contemporaneous alternative access. And then in the subcommittee we wondered if contemporaneous was always possible, and we discussed if it is possible, then is it feasible? Which would be the right modifier? She now agreed with the magistrate judges. By putting a limiter on contemporaneous, we may be signaling that that would be acceptable to provide access that is not contemporaneous. Perhaps we should strike the phrase "contemporaneous if feasible" altogether so that our rule just requires alternative access. That would leave it up to the judges to decide how to interpret what's actually feasible. If we say "contemporaneous if feasible," that would be suggest the Committee thought that it would comply with the constitution and the common law right of public access, because the rule should not allow something that's unconstitutional. We'd want that to develop in the case law. So she proposed that our rule require reasonable alternative access, and we strike "contemporaneous if feasible."

We would not be watering down that important idea, though not requiring it either if the emergency is so great that it couldn't happen.

Professor Beale responded that she thought the history was slightly different. We did not have "contemporaneous" in initially. It was added because there was a strong sense that we should be signaling the importance of access being contemporaneous. (Not, for example, like the Supreme Court recordings and transcripts that are released later.) But we recognized that we couldn't possibly guarantee it would always be possible in future emergencies. So if we were going to reference it, it might be critical to have some recognition of that possibility. But the goal was to at least state the norm while recognizing it couldn't always be met. That's the debate, she said. Is it important to state the norm, even with that limitation?

Judge Kethledge wanted to retrace some of the committee's thinking. He observed that everyone prefers contemporaneous access, and no one thinks later access is better. He thought the emphasis or preference for contemporary access did seem like something that some judges could overlook and not be mindful of during an emergency. So we thought a reference to contemporaneous access was helpful, so that judges don't lose sight of it when they are making these arrangements. If we are going to have a reference to contemporaneous, then the question was would this be "if possible" or "if feasible." "Possible" is somewhat more demanding. If you construe it literally, a lot of things are possible. We could be mandating herculean efforts to have contemporaneous access, and the Committee backed away from that idea, preferring feasible or practicable: do this, if it's feasible. But if it was going to be unreasonable, then the Committee backed away. With that recap, he called for other comments on whether to retain the word "feasible" or have this phrase at all.

Mr. Wroblewski had a question for the member who had expressed support for deleting the phrase "contemporaneous if feasible." He asked if she wanted to keep the paragraph in the note that states alternative access must be contemporaneous when feasible, but take it out of the rule. Or did she want to take it out of both? He wondered where she stood on giving this nudge to the judges that it should be contemporaneous. He agreed there was universal agreement that that is the preference. He understood there may be a negative implication that could be drawn from including the words. So did she want to give the nudge in the note but not the rule, or take it out of both?

The member responded that was a good question. If we took it out of the rule, the rule would no longer suggest it considers non contemporaneous to be appropriate. But if the note still referenced contemporaneous access if feasible, she remained concerned because even suggesting that it doesn't have to be contemporaneous waters down that right. She definitely thought the rule should not include that phrase. And she noted the reporters would probably say if it's not in the rule, it's considered less binding. Judge Kethledge commented that it would be less binding.

Professor Beale stated that reasonable alternative access is a very broad idea. It just tells the judge to figure out what's reasonable. It doesn't say anything about whether it has to be contemporaneous. Judge Kethledge agreed and commented that there was a danger that a judge might think contemporaneous access is going to be a lot of trouble, and I think what I am doing

is reasonable. Professor Beale recalled a prior member who was strongly against including contemporaneous because he was afraid it wouldn't always be possible. The pushback to his argument was that it was not sufficient just to say "reasonable." On its face "reasonable" doesn't give any signal about the importance of it being contemporaneous—none. It suggests to the judge whatever you think is reasonable, so that's the issue. And the member was correct that if you demote it only to the to the committee note it will have less significance. Judges may not see it. The notes are not in the little yellow pamphlets that they print and provide to the courts.

Judge Kethledge suggested it might be inappropriate to remove the phrase from the rule, but retain a mandate for contemporaneous access in the note.

Professor Coquillette, who called himself a real believer opposed to putting anything in a note that changes the way they understand the rules, said if it's going to be important, put it in the rule. A lot of people don't see the notes, and he thought this was also much better rulemaking.

Judge Kethledge commented that as a judge he found the notes are harder to access than the text. The notes are not in the hard copies distributed to judges. He found accessing the notes tricky, and usually has his clerks do it.

Professor King commented that leaving "contemporaneous if feasible" in the rule on line 39, page 129, elevates this aspect of reasonable alternative access above other aspects of reasonable alternative access. The rule does not say visual if feasible, or anything else about reasonable alternative access except that it must be contemporaneous. It's a choice to take that aspect of what the Constitution requires and say something about it in the rule if you're concerned about singling that out, and not talking about other things as the FCJC advocated. It may also be a problem if you are concerned (as the magistrate judges were) about suggesting the possibility that it would not need to be contemporaneous. Otherwise, it is the subcommittee's recommendation that this particular aspect of reasonable alternative access should be front and center in the rule.

Judge Kethledge responded that sometimes the decision to highlight something or to call it out is not about elevating that thing above other values. Rather, it's based on a fear that judges might forget or overlook it. He thought that was driving the Committee on this issue.

But now, Professor Beale noted, adding "contemporaneous if feasible" was causing concern about negative implications. To the extent the concern is negative implications, the Committee might consider the stronger wording "contemporaneous if possible."

A member who had expressed concern about the negative implications asked whether others thought "contemporaneous if feasible" signaled that access does not have to be contemporaneous. She suggested the alternative of requiring "reasonable contemporaneous alternative access." Perhaps the rule should say that even in an emergency public access must be contemporaneous. Do we think, she asked, that in an emergency a court should be able to have hearings in which there is no contemporary public access? If that would not be feasible, perhaps the court hearing should not proceed. She found herself coming back to that position. If we can't

even have a phone line to allow people to listen in, then maybe they should not have the court hearing even if it's an emergency. Like the magistrates, she was concerned that "contemporaneous if feasible" weakens the requirement of alternative public access significantly. So she preferred either omitting that phrase or substituting "reasonable contemporaneous alternative access."

Professor Beale said that the Committee talked about different kinds of public emergencies. One possibility might involve the grid and a loss of electronic communications, but in that scenario, some members of the public could come into the courthouse and be physically present. She recalled a former member from Judge Furman's court had described that court's experience and the impossibility of providing any kind of alternative at some points: people could not come in physically because of the COVID, and there were so many technology problems that he thought that it might be just impossible. So the question for the Committee is whether there are proceedings that should go ahead when it is not possible to give any kind of alternative public access contemporaneously? Is that a real possibility based on what we know? If so, we have a hard choice. Should the rule say that the court cannot go ahead with that procedure?

Judge Furman agreed this was consistent with his recollection of the prior discussion and his own experience. He would adamantly oppose a change from "feasible" to "possible" because the latter is too restrictive. In his experience, particularly in the early days of the pandemic, they were scrambling to keep the system going and encountering all sorts of practical problems, obstacles, and technological issues. Having some degree of flexibility—mindful of the important principles at stake—was definitely necessary. There were circumstances and proceedings where it was very critical that they go forward. But situations arose where people could only listen in and not be on the video—just more practical limitations than one might think. So based on his experience he definitely supported the "if feasible" language as an important recognition of the needed flexibility.

The clerk of court liaison noted she had spoken to this issue at the last meeting when we were talking about a September 11th situation where phone lines don't work, and Internet service is not available. There will be circumstances where it is important to have a hearing if you can physically do so. For example, if someone's due to be released on bond, you don't want to delay those proceedings if you don't have to just because you don't have a phone line or the Internet so that people can listen in. The rights of the defendant are important, and we need to have the proceedings. She thought it was important to say it should be contemporaneous, but at the same time there may be limitations. So the rules should allow flexibility for judges, but not to say "I don't have to do it," but rather "I can't do it." We should provide contemporaneous public access. We need to do it. But if for some reason circumstances don't allow it, we have to have something in the rule that says it's OK for us to continue. She said 9/11 is a good example. In the Southern District of New York, you could not get to the courthouse because of its proximity to Ground Zero.

Judge Conrad commented that the emphasis on flexibility was very important to the Committee. If we are going to prioritize contemporaneous access, we should also modify it by the flexibility required during an emergency which nobody can predict.

Judge Kethledge asked if there was a motion, and a member moved to strike "contemporaneous if feasible" and instead insert the word "contemporaneous" earlier, so that (d)(1) would require the court to provide "contemporaneous reasonable alternative access." There was no second, so the motion did not go forward.

Rule 62(d)(1) – adding references to constitutional standards

After a ten minute break, Professor Beale returned to the public comments discussed on pages 109 and 110. These suggestions requested quite a lot of additional detail in the rule and/or the note: the requirement that public access allow participants to see observers, that there be no advance registration, and that there be a requirement of announcement of public access limitations unless *Waller* was satisfied. The subcommittee's response to all of these was that this level of detail is not appropriate for a rule of this nature, and there are other ways of providing it, such as CACM advisories, the Benchbook, and so forth. Maybe courts require more advice on these matters, but the subcommittee did not think that the rule was the place for it.

Judge Kethledge commented that there is a difference between a rule and an application, and these proposals started to get into applying it to particulars.

Professor Beale drew attention to one additional suggestion at the bottom of 110, barring courthouse-only access. She thought it was interesting that the supporters of contemporaneous access also wanted the right not to be required to come into the courthouse. That was based on a pandemic-type situation where coming in might risk their health. But as noted in the reporters' memo, that suggestion raised other issues. Rule 53 generally bans broadcasting, and the norm is in-person attendance. That is what these commenters wanted in other contexts: alternative access should be like the ability to walk into a courthouse. The subcommittee did not agree that type of restriction was appropriate for the rule. And it did not agree that the rule should limit how courts could navigate around the prohibition between broadcasting, or that allowing a kind of alternative in-person access would be insufficient. The subcommittee did not think that was something that would be appropriate to put in the rule.

Judge Kethledge commented that as an institutional matter the approach of the rules has been to lay out a principle or a standard. Then the rule leaves it to the District Judge to apply that rule to particular circumstances, and we expect that that District Judge will be reasonable and prudent and wise in doing so. An alternative approach, foreign to the Anglo-American tradition, is to try to codify all the particulars that a judge might face and say you shall do this, or shall not do this or that as to many particulars. The rule-based approach, as opposed to the codification approach, leaves such matters to the judge's discretion and judgment based on that judge's greater information about the situation in front of him or her. He thought these suggestions implicate that different approach.

Judge Kethledge asked if there were any comments about these particular suggestions. Hearing none, the reporters moved on.

Rule 62(d)(2) – signing on behalf of the defendant

Professor King began the discussion of comments concerning the provisions on signing or consenting on behalf of the defendant. She drew the Committee's attention to the comments on (d)(2), discussed on page 111. She read the text of the rule as it went out for public comment (page 129 of the agenda book):

> (2) Signing or Consenting for a Defendant. If any rule, including this rule, requires a defendant's signature, written consent, or written waiver—and emergency conditions limit a defendant's ability to sign—defense counsel may sign for the defendant if the defendant consents on the record. Otherwise, defense counsel must file an affidavit attesting to the defendant's consent. If the defendant is pro se, the court may sign for the defendant if the defendant consents on the record.

The committee note explained that the proposed rule recognizes emergency conditions may disrupt compliance with the rule that requires a defendant's signature, written consent, or written waiver. If emergency situations limit the defendant's ability sign, (d)(2) provides an alternative, allowing defense counsel to sign if the defendant consents to ensure there's a record of the defendant's consent to this procedure. The amendment provides two options. Defense counsel may sign for the defendant if the defendant consents on the record. Without the defendant's consent on the record, defense counsel must file an affidavit attesting to the defendant's consent. The defendant's oral agreement on the record alone will not substitute for the defendant's signature. Both alternatives require defense counsel to do something, to sign and file the consent, or to file an affidavit attesting to the defendant's consent. It is not something the court can do with one exception. The last sentence of the rule says that if the defendant is pro se, the court may sign for the defendant.

Professor King said that's what the rule requires. Defense counsel has to file something, and that requirement generated the comments that we received. Judge Cote recommended that the line 45 of the text of the rule, on page 129, be amended to read "defense counsel or the court" may sign for the defendant if the defendant consents on the record. Her concern, articulated on page 111, was that there is an adequate record if the defendant consents on the record, and defense counsel often asked the judge to add the defendant's signature to the form or expressed relief when the judge volunteered to do so. What is essential, Judge Cote argued, is that the consultation occurred, that was knowing and voluntary, and that there is an adequate contemporaneous record of the consultation and assent. The Federal Magistrate Judges Association agreed and argued that magistrate judges often had to obtain oral consent on the record, especially at first appearances initial presentments. The FMJA urged the committee to consider more flexibility.

One thing to keep in mind when we discuss this, Professor King said, are the various points in the rules that require a defendant to consent in writing or file something that he's

signed. So we're talking about not just the new rule that requires a written request for video conferencing of pleas and sentencing. We are also talking about existing rules that require the defendant's signature or written waiver: Rule 23 waiver of a jury, Rule 10(b)(2) waiver of appearance at arraignment, Rule 43(b)(2) consent to trial of a misdemeanor by video or in absentia, and Rule 20(a)(1) transfer of case to another district, as well as the written request for video conferencing for pleas and sentences. Those are the situations where the rules now, and the new provisions in Rule 62, would require this to happen.

The subcommittee considered the concerns raised by the commenters and it recommended no change to the published rule, in light of the benefits of having defense counsel sign instead of the judge. Those benefits were articulated by Judge Dever, who then chaired the subcommittee, and were considered at the Fall 2020 meeting. First, the written document creates a record that the defendant consented, a record beyond the transcript of whatever video proceeding is taking place. If the consent is later challenged, there is that written consent signed by defense counsel. Second, insisting on a writing from defense counsel reduces the chance that courts will pressure the defendant into consenting, or that the defendant will perceive such pressure. It ensures that the judge is not in the position of asking a defendant directly for consent but must go through defense counsel.

The subcommittee concluded that these advantages—avoiding later claims that the judge's signature did not reflect consent, ensuring that the judge was not in the position of asking defendant directly for consent but rather must go through counsel, preserving the duty of counsel to determine whether the defendant consented, and avoiding departure from existing rules unless necessary—were more important than the concerns about delay or inefficiency raised by the judges.

The subcommittee also recognized that only judges and not defense counsel seemed concerned about potential difficulties defense counsel would have or have had in providing a written consent or waiver to the court. Defense counsel suggested this rule requiring that counsel sign at the 2020 miniconference, where the practitioners said this is how we are doing this and that it was working well. No one objected then to having the counsel sign. The subcommittee considered that as well when recommending no change in this provision.

Judge Kethledge invited discussion.

One member said she had served on the original subcommittee and was part of the extensive deliberation about this provision. She said she had called a number of magistrate judges in her district and to her surprise two of them were quite open about their frustration and anger about not being able to force a defendant to go forward virtually. It was a very small sample size, but it settled the question for her. (She added later in the discussion that the judges were reacting to what she gathered they thought was an incredibly irrational decision.)

The member also noted that a signature adds a dimension of formality to the conversation that is necessary and prompts a defendant to ask questions. The consent is informed and is of a different quality. Having a client affix a signature on a piece of paper yields a different

conversation. In her view, it is the best way to achieve informed consent. If an emergency creates reasons why that can't happen, the next best thing would be for the lawyer to affix a signature to an affidavit.

The member said she agreed with NACDL's recommendation that informed consent must take place in an unhurried manner, and before a virtual proceeding. Without advocating that the Committee adopt that language, she thought the concept was extremely important. The alternative is a conversation between lawyer and client that takes place while everybody else is waiting, and then they put the consent on the record. She did not think that was appropriate at all.

The member noted, however, that she had also spoken with judges whose districts have a much larger geographic scope than hers. One judge from a very large district said that some of the detention facilities that she works with are over 200 miles away from the court, and that appointed counsel often cut corners and don't go visit. Those state and county facilities are less likely to have any form of acceptable technological access. What then tends to happen is that the informed consent takes place virtually, when the judge and others are waiting and the lawyer scrambles to have the conversation with the client. So that's an infrastructure failing, something the rules do not address. The judge was not optimistic that the infrastructure problems would be solved anytime soon, which is tragic. But in the member's view the rule should not be watered down to accommodate what is a really painful and horrific failing in many places in the country as far as providing defendants and counsel any kind of reasonable access to one another and to the justice system.

Judge Furman spoke in favor of Judge Cote's recommended change, or a variation of that recommendation. He said he shared her experience and definitely found that having the flexibility that she describes was very helpful, if not necessary, particularly in the early days of the pandemic. If it's on the record, he said, it seems far-fetched to imagine a judge overcoming a defendant's lack of consent, because the record would reveal it. Also, this rule would not prevent a judge from finding the defendant consented and directing counsel to sign for the defendant, so it is not a failsafe. As an alternative that would provide additional safeguards, he suggested allowing the court to sign if both the defendant and defense counsel consent on the record. Early in the pandemic, Judge Furman said, there were times when defense counsel was not in a position to sign something or provide it to the court immediately, so having the ability to sign things on behalf of the defendant when that was confirmed on the record and then having it filed was definitely helpful.

Judge Kethledge asked for more explanation of the logistical difficulty, assuming defense counsel is able to consult with the defendant—as mandated in another provision—and there is going to be some remote proceeding in which the defendant is participating, so the defendant can consent on the record to counsel signing. Is the concern about the additional step that counsel then has to submit electronically the document with that signature? That counsel is not going to be able to submit? There is no particular time deadline. If there isn't a time deadline, then what really is the insuperable obstacle to this additional step of counsel electronically submitting something?

Judge Furman explained that there are circumstances in which the court should have the document at the time of the proceeding and be able to say on the record, "I've now fixed the defendant's signature and we'll file it as part of the record," as opposed to expecting defense counsel to follow up days or weeks later. But given the flexibility in the rule, he said, he didn't feel as strongly about this as he did about another comment Judge Cote made that would be coming up later in the meeting.

Mr. Wroblewski stated that one of the reasons that the Department of Justice had not weighed in strongly on this issue was because in their experience the most important thing is actually the colloquy. It's not the actual piece of paper. The paper without the colloquy is vulnerable to attack. The case law suggests this is pretty ministerial. The most important part is the part that the Department asked for in the note where it mentions the colloquy.

Judge Bates made what he called a broader observation. A big place where this consent is needed is video conferencing. In his district in most cases going to a plea there is a provision in the plea agreement, signed by the defendant, consenting to video conferencing. This will not be something that comes up at the moment of the entry of the plea. It's something that will occur in the context of entering the plea agreement and will be signed by the defendant. And that's what we'll see for the most part. The plea agreement basically says, "I consent to plea and sentencing occurring by video conference."

Judge Furman said that was not the procedure in his district. Rather, they use a separate waiver form that that the defendant executes.

Judge Bates asked if the signed consent was in the plea agreement, wouldn't that satisfy the rule? It is a writing signed by the defendant.

Judge Kethledge responded that the defendant would have to consent on the record in a colloquy that he's OK with the signature.

Professor King noted that the topic of consent for videoconferencing is also addressed later in the reporters' memo, in connection with the written request for waiver of presence and consent to video conferencing for pleas and sentencing. Section (d)(2) is more general—it is not just for video conferencing. She thought a signed plea agreement would satisfy (d)(2) for some of the other waivers. But the defendant has to request video conferencing for pleas and sentencing. So maybe not if the defendant has to request it. The plea agreement may not satisfy it.

Judge Bates responded that "maybe not" raised concerns if the Department of Justice is going to be applying this rule every day in determining what to enter into a plea agreement. They could word it to say that defendant has requested. Professor King agreed.

Judge Kethledge suggested shifting back to a focus on this (d)(2) requirement that counsel for defendant do the signing rather than the court, noting the conversation about video pleas would be coming up later in the discussion.

Judge Bates suggested you're never going to reach the question of whether defense counsel or the court signs, because in all those cases there will be a signature by the defendant already in the plea agreement. Judge Kethledge said that sounded right. But the question is not whether that satisfies the signature requirement. It's whether it satisfies the request requirement, a different question coming up later. He asked for more comments on (d)(2), and comments about allowing the judge to sign for the defendant rather than counsel.

A member said she was having a very difficult time understanding under what circumstance a judge could have fixed a signature to a document and a defense attorney could not. When would it ever arise, unless maybe there are initial proceedings or initial appearances where some courts don't require defense attorneys to appear?

Mr. Wroblewski commented that his memory of the early part of the pandemic was that the defense attorney is part of the proceeding, but not physically present, and the defendant is part of the preceding but not physically present. The judge may be sitting in her courtroom watching all of this, and everybody consents on video. But there needs to be a piece of paper and Judge Cote wants to pull out the piece of paper, sign on behalf of the defendant, file it, and it's all done, as opposed to the defense attorney finding the piece of paper, signing it, scanning it, emailing it, or filing it.

The member then asked whether to get to the proceeding in the first instance, doesn't the defendant have to request to proceed remotely?

Judge Kethledge responded that the request requirement applies only to pleas and sentencing. But (d)(2) applies more broadly to instances where a defendant must sign.

Another member added that there are many, many times where the defendant can just consent on the record with no writing, and there are only a few instances where there's a writing. She thought that in a lot of those cases there wouldn't be a court hearing necessarily on the spur of the moment. The waiver of a jury trial seems like something defense attorneys should be able to discuss with their client in advance of appearing for the bench trial and actually sign that. There aren't many that would be spur of the moment. A lot of these documents are available online as PDFs from the Administrative Office or from the Department of Justice. Lawyers had all gotten used to putting our electronic signatures on the form. The defense attorneys are as able to do so as the judges working from their homes. We can download the form, put our signature on it, and file it right then with the court through ECF, so it's not as cumbersome as it used to be where you might have to scan something and copy it.

Keeping the protection that the defense attorney signs is an important protection, she continued. It does avoid some of the problems that were discussed earlier about the appearance that the judge might be somehow interfering with the attorney-client relationship. There aren't that many instances where a form would need to be signed in the courtroom—a Rule 20 transfer or a Rule 5 where the defendant's being prosecuted in a different district and they're agreeing that they want to be kept in this district. But that's an important moment, and the attorney should have talked to the client about that in advance. They're going to plead guilty if they stay in this

district and there's a form they have to sign. She thought the attorney would want to have that form in front of them when they talked to the client even if it's just by phone in the court right beforehand. Again, it is a matter of expediency that maybe isn't worth the possible infringement on rights if we have the judge get involved. The defense attorney should be doing the advising. She agreed with the earlier comments that we shouldn't adopt this change.

Another member offered an example of a scenario she had seen where a lawyer couldn't sign for the defendant. The lawyer didn't have power or electricity to be able to file but could pick up the phone and attend the phone conference and appear in court.

A different member responded that even in that scenario, the judge could grant 10 or 14 days to file the piece of paper. He said he agreed 100% that these protections are important, and he didn't see any gains in efficiency that would countervail them.

Judge Kethledge asked if anyone cared to make a motion as to this suggestion to change (d)(2). Hearing none, he moved on to the next issue—consultation with counsel.

Rule 62(e)(1)

Professor King introduced this issue on page 114 of the reporters' memo and the three comments received. First, the Federal Magistrate Judges Association commented that by adding the requirement to provide an opportunity for confidential consultation for proceedings that already permit videoconferencing under Rules 5, 10, 40, and 43, draft Rule 62 implies that the obligation to provide an opportunity to consult does not exist in non-emergency times. Second, Judge Cote has suggested that the requirement for consultation between counsel and client be changed so that it doesn't require confidential consultation before and during but only requires consultation either before or during, but not both. The concern Judge Cote raised was that during the pandemic it has been difficult for the defendant and defense counsel to arrange for that consultation, and when an adequate opportunity for consultation is provided either before *or* during that should be sufficient. Finally, NACDL supported retaining the dual consultation requirement before and during a proceeding, but specified that the adequate opportunity should be defined to include an unhurried and confidential meeting between the accused and counsel that occurs well before and whenever feasible not on the same day as the preceding itself.

Professor King noted that the subcommittee agreed from the beginning that providing consultation before and during the proceeding was important, this Committee agreed, and the Standing Committee had accepted it. The subcommittee discussed Judge Cote's request to change it and recognized that one consultation would be potentially more efficient, as requiring an opportunity to consult both before and during might mean delay. But the subcommittee didn't think that any difficulty in providing these opportunities justified the change given the important interest at stake. The subcommittee also rejected NACDL's request for more detail about consultation. Although there was sympathy on the subcommittee for this idea, the subcommittee believed judges should have the flexibility to adapt consultation opportunities to varying circumstances.

Professor King asked if anyone shared the concern by the Federal Magistrate Judges Association that adding the consultation requirement for Rules 5, 10, 40, and 43(b) when emergency conditions impair that consultation, implies that it doesn't exist in non-emergency times. There was no response.

Judge Kethledge asked for comments as to whether we ought to require only consultation before or during as opposed to before and during. At the mini-conference we heard an awful lot about problems counsel were having consulting with their clients, and the Committee felt very strongly that that was one of the ways in which the emergency had eroded an important safeguard.

Judge Furman said he was not sure he agreed with his colleague Judge Cote, stating he believed this was important, and wasn't sure that as a practical matter it is a serious obstacle. The experience throughout the pandemic and especially in the beginning is that communication between counsel and defendants who were detained in particular was very difficult and oftentimes impossible to arrange before a proceeding. What they did in those circumstances was not start the proceeding until the lawyer had an opportunity to talk with the client before the proceeding began. That would satisfy the before requirement, assuming that that was adequate to whatever the proceeding was. So in that sense it is not a serious problem, and given the importance of it he thought we should leave the rule as it is.

Judge Kethledge asked if anyone had concerns about the current text of the rule on this point. Hearing none, Judge Kethledge moved to the next suggestion.

Rule 62(e)(3)(B) – requiring a written request from the defendant for video pleas or sentencing proceedings

Professor King introduced the next issue, concerning the written request from the defendant in 62(e)(3)(B), mentioned during the earlier discussion of (d)(2). Judge Cote and Judge Hornak requested changes in this aspect of the rule.

Judge Cote recommended the written request requirement be omitted and urged that if the court finds during the proceeding that the defendant, following consultation with counsel, has requested that the proceeding be conducted by video conferencing then that should be enough. She argued there was no need for a written request before the proceeding, and that the rule should allow the court to sign for the defendant. Professor King noted that the Committee had discussed allowing counsel but not the court sign for the defendant earlier in connection with (d)(2). Judge Cote said even if the rule envisions that defense counsel may sign the written request on behalf of the defendant (which it does), defense counsel may in many emergencies find it difficult to create the writing and transmit it. These issues, Professor King said, we already covered.

Judge Hornak also argued that this was a problem. On page 117, the next to last full paragraph at the end, he concluded that allowing counsel to sign the required writing would not

solve the problem that he identified because the existence of the emergency would almost always impede counsel's access.

Both of these judges raised concerns about the written request requirement, not just on the basis that counsel would not have access to the client, but also that counsel might find it difficult to get that written request filed with the court.

The subcommittee considered the other situations in which counsel signing for the defendant was required and decided that this situation—plea and sentencing by video conferencing—was just as significant as those, and saw no reason to come up with a different solution here than for the other waivers (trial jury and others) that we reviewed earlier. So the subcommittee rejected these requests to scale back on the requirement that the request by the defendant be written and signed.

Judge Kethledge stated that this suggestion raises a concern about the writing requirement here and the ability of counsel to sign and then transmit a writing in which this request would be made. We just covered that same logistical concern. He suggested the Committee set that to one side for the moment, and focus on the new concern as to this provision in particular, which is that the defendant request that the plea or sentencing proceeding be remote.

He emphasized that conducting pleas and sentencing remotely was the biggest concern that the Committee had about these remote proceedings. It was the consensus of the Committee that it is truly a last resort to sentence a man to prison for 20 years through an iPad. The Committee's concern was that the defendant not feel at all pressured to proceed with these exceptionally important proceedings by video, unless the defendant wants to do that, and that there not be a dialogue with the judge, where the person who is going to sentence the defendant proposes that the proceeding be conducted in a certain manner. Our concern was that the judge could be really nice about it and not say anything objectionable when you read the record, but a criminal defendant might feel pressured to agree to do these proceedings remotely, when that defendant otherwise would not agree. The issue here was whether the Committee thought it was important that the defendant must initiate, must make the request or whether that's something that could be initiated by the judge. That was the issue on the table. We received two very thoughtful comments. He asked for additional comments.

Judge Bates began by noting that it is not always going to be a question whether it's the defendant initiating or the court initiating. It's most likely going to be initiated either by the prosecutor or the defense counsel, not by the defendant. Is the contemplation really that it has to be an original idea to the defendant? He thought that was never going to occur. Does request in writing mean something different than consents?

The reporters responded that it is different. As the note states, "the substitution of request for consent was deliberate as an additional protection against undue pressure to waive physical presence."

Judge Bates asked if it has to be the defendant who initiated thinking of it. Can it come initially from the prosecutor, saying to the defense counsel, "Let's do this by video" and counsel says to the defendant, "I'm gonna suggest that we do this by video, is that alright with you?"

Judge Kethledge thought it was different, because it has to come from the defendant. Request is different than consent.

Judge Bates asked then what is the judge looking for? Is the judge going to say, "Miss Jones, is this your idea? Are you requesting it?"

Judge Kethledge responded that it has to be a document submitted to the court, saying, "I want my proceeding to be remote." "I request," or "I want" this, rather than just "I agree." Consent can be just going along with something, as opposed to wanting it. That is the distinction here. The defendant has to say, "I want this," not the court, saying "Do you have a problem with this?"

A member stated that he conceived of this requirement as trying to build into the system that the default does not become video hearings. Two years into the CARES Act it would be fair to say that video change of pleas has become the default. He is seeing that a defendant will file a motion saying that I've reached an agreement and want to change a plea. The next thing is an order from the court setting a video conference change of plea and making the usual CARES Act finding, and then asking the defendant to say later informed consent. This rule would require the defendant at the beginning to say "I'm the one who wants to have this by video." This whole mechanism would not start until that happens. If you believe that the default should be in person, then this serves a useful function.

Mr. Wroblewski asked if the reporters had the same understanding, that it needs to be at the beginning? Judge Hornak also says that in his comment. He says the requirement of an advanced writing signed by the defendant. Mr. Wroblewski did not read the rule that way. He read the rule to allow, as Judge Bates said, if the two lawyers get together and they have an agreement, the defense lawyer goes and talks her client and the client says, "Yeah, that's what I want to do." Then they set the proceeding for video. They all meet by video proceeding and the defendant's lawyer gets up and says this is the way we want to proceed. There is a writing that reflects that and does not have to be filed in advance.

A different member commented she agreed with the earlier member who spoke in favor of the requirement. With the really vast improvements in technology, we're all experiencing during the pandemic some slippage into Zoom court appearances and Zoom arguments. This language signals this last line, that when it comes to plea discussions and sentencings, that should be done in person unless the defendant affirmatively requests it. It's important in reading this to pull back and read the very beginning of that section under subsection 3, where it says for a felony proceeding under Rule 11 or 32, a court may use video conferencing only if, in addition to the requirements of (2)(B), and then it sets out three things. The first is the chief judge's finding that this is emergency. Second, the defendant, after consulting with counsel, requests in writing signed by the defendant that the proceeding be conducted by video conferencing. And

third, the court finds that further delay in the particular case would cause serious harm to the interests of justice. Those three subdivisions have to be read together, and they signal the importance of the presumption these proceedings be done in person unless all of the findings are met.

The member added that she did not read the rule as requiring that the defendant has to be the initiator of the idea. If the defendant is not going to serve a whole lot more time and the logistical difficulties are such that everybody's motivated to get the plea agreement on the record as soon as possible, the prosecutor could go to defense counsel and say, "Hey, is he interested in doing it by video? Maybe we need to talk about that? Can you go talk to your client about that?" It doesn't matter who initiated the discussion so long as the request is initiated by the defendant as far as the court is concerned. There has to be a formal request rather than having it come up impromptu during the middle of discussion. In that sense, this requirement, in context, is very different than just consent. This is something that after careful consideration and discussion with counsel, the defendant asks that the court go forward with the video conferencing.

Judge Kethledge said that the defendant has to come to the court with a written request to do this remotely. There's no waiting period. It's not that the request has to come in a certain period of time beforehand. But you can't start a sentencing hearing and then say "OK, do you agree with this? You'll file something afterward." That probably doesn't work.

The member continued that in practice, unless the court has that consent or that request in writing, the court doesn't even schedule the change of plea hearing.

Judge Furman said that comment gets to the heart of his concern, and he felt more strongly about this issue. It's a question of timing and involves the difficulties of arranging for times for counsel to confer with the client in advance of a proceeding. It was often easier to schedule a court proceeding, and then provide time at the outset of the proceeding for counsel to confer with the defendant. He said he was not a big fan of request versus consent. We allow defendants to waive all sorts of rights as long as it is knowing and voluntary. We allow them to waive fundamental rights. The heart of the matter is the timing. He urged the Committee to allow for scheduling the plea proceeding without a written request in advance. At the outset of the proceeding, the writing can be satisfied whether it's called consent or request. That's just a function of what the form says.

Judge Furman proposed that the note be amended to state that as long as the defendant has had an opportunity to consult with counsel, the writing requirement can be satisfied at the outset of a proceeding. It should be at the very beginning, making it clear that the proceeding would not go forward without a request. There were scenarios in the pandemic where it was very difficult to make these arrangements in advance of scheduling. He didn't read the rule to speak to the timing question and thought what he proposed was consistent with the language of the rule itself. He proposed making it clearer in the note that the written request may be signed at the outset of the proceeding itself.

Judge Kethledge said that if a court scheduled something called a plea hearing or a sentencing hearing and the guy hasn't asked for it yet, that would seem to violate what this currently says.

Judge Furman said that as a practical matter the way this often works is counsel speak to one another. They say, "We're prepared to plead," "We're ready to plead," or "We need to plead now." There are circumstances where it's time sensitive and needs to happen quickly. The defendant is prepared to do it remotely, but there is not an ability for defense counsel to confer with the defendant in advance to get the writing signed and filed. Why should a court be prohibited from proceeding if at the outset of the proceeding defense counsel has an adequate opportunity to confer with the defendant and after that opportunity either the defendant or counsel signs a thing that says, "I'm requesting to proceed with this proceeding remotely"? It seemed to him that there are enough circumstances that could arise that we should give that level of flexibility. He stated that before the pandemic the Second Circuit had held that a defendant can actually consent to remote sentencing, and it doesn't need to be in writing, as long as the consent is knowing and voluntary and on the record. It is *United States v. Salim*, where there was a consent through counsel.

Judge Kethledge said Judge Furman's hypothetical involved a discussion between prosecution and defense counsel. What the Committee was concerned about when it came up with this language is the discussion consultation between the *judge* and defense counsel. Something's underway and the judge says "Well, you know why don't we just proceed with the sentencing right now remotely? So why don't you talk to your client for a moment?" Now the client has just heard the judge say this. The judge has put this on the table. The Committee's concern has been that defendant will feel pressured to do what the judge just proposed in a hearing that began about something else. That's the concern.

Professor King asked Judge Furman about the scenario that concerned him. Is it when counsel have met and decided this would be a good idea, then defense counsel discusses it with the client, and the defendant says "Yeah, I want to request this?"

Judge Furman said that was not the scenario. His suggestion was to make clear that the written request can be executed at the outset of the proceeding. What happened very often is defense counsel had no opportunity to speak to his client in advance of the plea proceeding itself. These are detained defendants with practical limitations on communication. They couldn't speak before the proceeding itself. But the court was able to schedule a proceeding. So what would happen in those circumstances is counsel would confer, and say "We're ready to plead, our client is prepared to plead, but I haven't had an opportunity to speak to him about whether he's willing to proceed remotely. I'm quite sure he'll consent but I haven't had an opportunity to confer with him." The only way to confer is to do that at the outset of the proceeding before the proceeding begins. They speak, the defendant says, "Yes, I do want to proceed remotely" with the plea or with the sentencing or whatever.

Professor King said it seemed to her that the rule already allows the written request to be executed after the breakout room and defense counsel could file it then to comply with (d)(2), so no change is needed.

Judge Furman responded he is proposing adding to the note to make clear that the rule does permit that. A judge could read the rule to say it needs to be a written request and that we can't schedule the proceeding unless we have the written request in hand. We should have the flexibility to schedule the proceeding because it's often the proceeding that enables counsel to confer with the defendant to make that request.

A member asked Judge Furman what triggered the court setting a guilty plea hearing.

Judge Furman responded there were many scenarios where the only way of going forward was to do it remotely and the defense lawyer and client had spoken about one thing, but hadn't had an opportunity to speak about the other. There were plenty of scenarios in which the conversation about proceeding remotely happened as part of the proceeding itself.

Judge Kethledge asked in those instances, what was the proceeding on the calendar? What's it called? What brings everyone together?

Judge Furman responded that when he schedules something in a criminal case, he doesn't necessarily call it anything—just says parties shall appear at X date and that's it. What happens in the course of the proceeding is the defendant says "I'm prepared to plead," or "Let's proceed directly to sentencing."

Judge Kethledge asked, so a defendant goes to a hearing that doesn't have a particular agenda and counsel can confer and decide if they want to do something, but defense counsel can't consult with the defendant?

Judge Furman responded he was not advocating getting rid of consultation between client and counsel. But we should allow flexibility so that the consultation, the request, and the proceeding, are all done essentially as part of one scheduled appearance, because in his experience the consultation between counsel and the defendant was *enabled* by the court proceeding.

Another member offered his experience. We'll have a status conference, he explained. For the status conference the lawyer may not have had a chance to speak to this client about whether they agree to proceeding by video. But the lawyers have communicated with the courtroom clerk, saying "We want to talk about a possible disposition." So, it is set for a status conference and before the judge joins, defense counsel will have time with his client alone, to discuss the matter. Then he will come out, and the lawyer will say, "I'm here with so and so who has agreed to appear via video," and then he will confirm that fact. Later on, at least in this member's court, typically the public defender and her AUSA will reach out to the courtroom deputy, and say "We believe we've reached the resolution. We'd like to set this for a change of plea." And again, lawyer and client have time alone beforehand, because in the situation where the defendant is two hours away, and they haven't signed the waiver of video, they will talk

beforehand and confirm that it's OK to do it via video. Then the court will confirm it at the change of plea, and ask defense counsel if counsel can get it signed and put it on the docket at some point thereafter. Those are the scenarios. That's why this member agreed with Judge Furman that there needs to be that flexibility to do it at the time of the hearing because at least during the height of the pandemic, most defense counsel did not necessarily have the time to discuss with their client that specific issue beforehand.

Judge Kethledge said his sense of the current language was that you cannot have a remote sentencing or plea until the court has the request in writing. You can't actually take that step of saying, "Here's your sentence," unless the court has that. It can't be something after the fact.

After a break for lunch, Judge Kethledge continued the discussion on whether (e)(3)(B) or the note needs to be modified, specifically whether a court may schedule a remote plea or sentencing proceeding before the court has in hand a writing in which defendant requests the remote plea or sentencing. As this is currently written, Judge Kethledge stated, the court may use video conferencing only if, among other things, the defendant after consulting with counsel requests in a writing signed by the defendant that the preceding be conducted by video conferencing. He said that he would read that to mean that you cannot start something that is understood to be a plea or sentencing proceeding until the court has in hand that written request after consultation with counsel. As a practical matter, that will probably prevent a court from on the fly in a status conference saying, "Hey, why don't we just go ahead and enter a plea?" Logistically it may well be hard to do that. And that's by design.

If a judge broaches the question of a remote plea or sentencing, with the defendant observing, during for example a status conference, Judge Kethledge said the concern was that the defendant will feel pressured to go ahead and do that. Frankly, he said, there are many judges who want to do a lot of remote pleas and sentencings. Before the pandemic, the Committee got requests almost every year from judges who wanted to do this for reasons of their own. So that's the concern: if the defendant hears it from the judge first—and then that same day, or after a break, consents, with the document to be filed later—the defendant will have been pressured to plead guilty or to proceed with a sentencing, which are really the two most important things that happen in a United States District Court. He requested comments from the defense lawyers on the Committee, who had not yet spoken on this issue.

A defense member strongly supported the idea that the defendants should be in court for a plea and sentencing. It is an incredibly important moment and the rules require the defendant be present in the courtroom. During the pandemic, we've gotten used to maybe cutting some corners, but that doesn't mean that's the right thing to do. A new rule should try to get back to the formality and the dignity of what happens during a plea and a sentencing. This rule reaches the right balance. It does allow video conferencing, but the court has to make three different findings. Only one is related to the defendant's request and it's really protecting an important constitutional right of the defendant to be represented by counsel and to have counsel advise them of the plea.

If there are districts where the defendant and the defense attorney cannot talk before the plea, the member continued, so the defense attorney is not able to ask, "Do you consent and can I file, can I sign this request in writing and file it with the court?", then the member was concerned that they're also not talking about the plea language itself. That is a crisis, and the solution shouldn't be that we go forward and have the plea anyway after giving the defense counsel some time on video to talk to their client. The solution should be that we can't have a plea or sentencing in that kind of situation, and we need the court's help to make sure that defense attorneys can talk to their clients where they're in custody.

If a client is detained in a place that doesn't have phone access, the member said, we need the system to jump in and say, "This is not adequate, we can't have adequate representation, and the court proceedings cannot go forward when the defense counsel can't talk to their clients." This is a really important protection. We know from the pandemic that there have been all these structural barriers and there have been problems. But we don't want to write into a rule a belief that those barriers can exist, or that it's constitutional or appropriate to hold court proceedings when those barriers exist. We want the rule to protect the fundamental rights that we all want to see protected for the defendant and for the process. It's an important rule that we've written.

The member read the "request in writing" to mean in advance, so that the writing has to be on the docket before the court can set the plea hearing. It's a protection, so that if a defendant really wants to be in person, and the judges don't want to have in person hearings, there's a stalemate where we just say, "We don't want to have this by video so we're requesting an in person plea," and it's docketed and noted and maybe has to be appealed if that's where we are, but it's important.

She responded to the earlier question about how the plea gets set. She said that in her district if the defense wants to enter a change of plea, the defense will email the courtroom deputy, copying the prosecutor and the pretrial service officer, and say "we're ready in this case to set a change of plea." And the court will set a change of plea. So this rule would be a change for us, where we would have to say, "and I'm filing the written request to have this be by video" or the presumption would be this is a change of plea that's happening in person. That is a presumption for her district now, as we move out of the pandemic that if we set a change of plea, it's in person.

Another defense member said she agreed with everything that the other member just said. As Judge Kethledge mentioned earlier, the Committee has received requests from judges to amend the rules to allow routine video proceedings for the court's convenience, and she has always spoken against that. That process of taking a plea or sentencing, with a defendant being in the courtroom, being present, we've all known of situations where defendants have changed their minds, where circumstances occur, and the defendant is once again reminded of his protections from the court. And all of that being in person. You just cannot capture that on video. She was concerned that the default is moving toward video and we will lose a great deal of that protection for our process, not just for the defendant, who has a right to have counsel representing him or her, but also for the public. It is very important, particularly for those two proceedings, that this

has to be brought up by the defendant. The defendant has to understand he has a right to be there in person, what that means, and that he's giving that up to proceed.

The member explained that the situation early on in the pandemic was more difficult. She said she comes from a rural area where defendants are housed in different states with different rules as to where and how counsel can visit them. It eventually got worked out, after a lot of communication between the courts, between the Marshals Service, even relocating defendants to other prison locations, so that they could have better communications with their attorneys. Functionally how it worked was if one of her clients or a client of another attorney in her district wanted to go forward, because they were facing 6 months, 8 months or whatever and needed to that proceeding to go forward, they entered into a plea agreement through discussions with the government, and they signed that plea agreement. Unless it's signed there's not a plea hearing set. At the moment that the government would file a motion to schedule a guilty plea based on a written plea agreement with the defendant's signature on that plea agreement, defense counsel would file a motion for that plea hearing to be held by video. So that's how the request has worked in her district, and it had not seemed to be a significant impediment.

She concluded by saying that when this first began she was CJA representative for the district, and there was considerable concern among CJA panel members about being pressured by the courts to get their clients in the system, to get them pled, and out of whatever jail system they were in. The attorneys themselves felt that pressure. So having that barrier between the client and the court is a very important protection. She supported not making any changes to the rule as it is currently written.

A third defense member said she echoed what the others have said but wanted to pick up on the concept of pressure. She spoke of the pressure that a defendant feels when he is consulting with counsel in the moments that have been carved out for him or her, knowing that everybody's waiting. To be able to focus on what your lawyer is explaining to you as far as what you're giving up in a plea, that is just not adequate. That pressure, knowing that everybody wants to move this forward is eliminating a really meaningful relationship between the attorney and the client. She said she felt very strongly that establishing some distance between the request in writing and the plea hearing was really important to give the attorney the opportunity to explain to the client what it is the client is about to give up. Because those rights are substantial.

In her district (she said she was basing her comments on what her friends had told her because she had not had anybody who was incarcerated and agreed to this), the government files a change of plea motion, so there's a motion on the docket with a signed plea agreement in hand. So she didn't see a reason, if the defense counsel can provide the government with a signed plea agreement, why there wouldn't easily be an opportunity to request in writing that the process take place virtually.

A judge member added that the committee note emphasizes the seriousness of this and its last resort status. The proposed note says that the Committee's intent was to carve out emergency authority to substitute virtual presence for physical presence at a felony plea or sentence only as a last resort in cases where the defendant would likely be harmed by further delay. Accordingly,

the three prerequisites for using video conference are the chief judge's declaration, the written request, and the finding. Then the note goes on to say that "The defendant must request in writing that the proceeding be conducted by video conferencing after consultation with counsel. The substitution of request for consent was deliberate as an additional protection against undue pressure to waive physical presence." The member said those aren't adding to the words of the text other than explaining both its uniqueness, its intended rare use, and the prerequisites that must be done before any hearing gets started. It all supports no change to the language.

Judge Furman said he agreed with most of what the defense counsel said about the importance of physical presence for pleas and sentencings and that this should be a last resort. He said he was not advocating for change of the rule language itself. He wouldn't read the current proposal to preclude what he is suggesting it allows. Namely, at the outset of that proceeding, as long as there was an opportunity for the defendant and counsel to go in a breakout room, speak to one another, then come back into the proceeding, then defense counsel, with the defendant's consent on the record, could say "I'm now signing a written request to proceed with this proceeding remotely." He thought the rule permits that.

Judge Kethledge asked if Judge Furman was envisioning that a request in writing would be filed.

Judge Furman responded that plea agreements are not filed in his district on the docket, they're retained by the government. He did envision that it would be filed, but that goes back to the timing issues discussed before. The rule doesn't require that it be filed in advance of the proceeding. It doesn't say anything about the timing. In his scenario, defense counsel would sign it, and then at some point within 10 days, 14 days, who knows, they would file that on the docket, so the record would be complete. In other words, the writing is done at the time. He wouldn't read the current rule to preclude that. To suggest that the rule shouldn't be changed to allow that, he thought, was reading into the rule things that are not there. The rule ought to be clear.

Judge Kethledge said that if the rule says defendant requests in writing, isn't the implication that the court must have the writing? Request is a transitive verb, you're making a request to an entity.

Judge Furman asked if the judge should not be permitted to proceed if, in the video proceeding, counsel confers with the client and then comes back to the public part of the video and says, "I'm now signing the written request, representing on the record that I've signed the written request." Then the judge says, "OK, file that within the next 3 days." The requirements of the rule have been satisfied. The rule doesn't talk about filing. It doesn't talk about in "advance" or "before" the thing is scheduled that it be signed.

Judge Kethledge said it was an interesting question worth talking about because it affects our respective understandings of whether any change is needed. He said he didn't think one makes a request of a court in writing unless one submits the writing to the court. It's not enough to say, "Judge, I'm writing this down and let's just go ahead." For a felony proceeding to

proceed by video conference, the defendant must request it in writing. He said if he got a case raising this issue, his interpretation would be that you request something in writing, not by writing it at home, not by calling the judge and saying, "Judge, I'm writing a request here." The whole point of a written request is the court must get the request and have the request in writing rather than somebody telling the judge verbally, "I'm writing a request."

Judge Furman responded that counsel says, "I'm writing the request. Here's the written request. I'm showing it to you on the screen." It's not in the judge's hands. It's not filed on the docket. Yet is that a written request to the court? It is.

Judge Bates asked whether the scenario is one in which they are going into a breakout room to consult beforehand. If so, that means they are probably not in the same location. So there is actually not going to be the signature on a written request at the time because the defendant isn't with the defense counsel.

Judge Furman responded it would have to be a (d)(2) signature by counsel. He said he agreed about the importance of it not being at the pressure of the court. But what about the following hypothetical: Counsel says, "My client is prepared to plead, but I haven't had an opportunity to discuss proceeding remotely." I say, "OK, why don't you go into a breakout room and discuss that, and under the rule if you make a request then I have authority to proceed." Is that then impermissible because as the judge I have suggested the idea?

Judge Kethledge responded it was impermissible.

Judge Furman asked is it impermissible forever thereafter, because I raised it?

Judge Kethledge responded that he wouldn't say that. That scenario is not the one Committee has been worried about. It's not where counsel comes to the court and says, "Hey, I've talked to my guy separately and we want to go ahead and just do a plea." The concern is where the judge says, "Well, why don't we just go ahead with the plea now?" He noted that his knowledge was limited because he did not conduct these proceedings himself. But he thought if the rule allows for post hoc filing of the writing, it seems we're opening the door to the judge bringing this up and saying, "Why don't you do this, OK? Why don't we do this, go off and talk." And then, "OK your honor, I'll submit it afterwards." It opens the door to that, whereas if the court cannot commence a plea or sentencing hearing without the writing already, the theory is that it creates a space for that consultation to happen in a more meaningful fashion, likely without the court having in the last 15 minutes told or implied—or at least the defendant perceiving that the court has signaled—that the court wants this to happen. It's likely to be a less pressured and more meaningful consultation. It's a kind of prophylactic device in that respect.

Judge Furman agreed that should be the preference and said he had suggested some note language that would make that clear. Let's say in general that this should occur before the proceeding is even scheduled. The rule right now does not state a preference that it happens in advance unless you read "request" in the way Judge Kethledge was suggesting, which doesn't necessarily require that reading. We should (1) make clear that it can happen as part of the same proceeding, and (2) make clear the preference that it happen in advance.

Judge Furman said he was not that troubled if defense counsel says, "My guy is ready to plead but we haven't had an opportunity to discuss proceeding remotely," and I say, "OK, Why don't you go in a breakout room. If he's prepared to make the request, I'm prepared to proceed." This is where the colloquy is the more important thing. I would say "You understand you have a right to do this in person. You understand that you know you've had an opportunity to consult your lawyer. You've consulted with your lawyer. After doing that is it your desire to proceed?" We let people waive the right to a jury trial and plead guilty on the record without doing that in writing. We let them waive all sorts of rights.

Judge Kethledge responded that they waive those rights in person.

Judge Furman said not always. In the case of jury waivers, they are not in person.

Judge Kethledge said this is a departure from current practice.

Judge Bates asked if the rules currently prohibit a judge from going forward after a colloquy in which the defendant waives the right to jury trial with the signed waiver of the jury trial being filed by the end of the day or the next day. He thought that happens. And why is this of so much greater concern in terms of getting that filed before the proceeding is over?

Judge Kethledge said that once a person enters a guilty plea, he's guilty. But if he waives the jury trial, he has a trial in front of Judge Bates. The stakes are just higher if you plead guilty. We've all seen the pleader's remorse cases where they're trying to get out of that. And if all of this happens within an hour of lunch and then the next morning, the defendant thinks "I made a big mistake." It started as a status conference and he walked out guilty. That's the concern. Particularly if the judge was suggesting, "Hey? Why don't you plead guilty? Why don't you make yourself guilty before you leave here today?"

The Committee, Judge Kethledge continued, has not been worried about judges like Jesse Furman and John Bates. Institutionally we come with a different perspective. He remembered from his early days on the Committee where we would get these requests, it seemed once a year. He recalled one from a judge in another district who had a lake house in Maine, and he wanted to sentence people when he was in Maine. The Committee has received these requests every year for remote pleas and sentencing. Institutionally it has a sense that there are many judges who want to do this more often than they should.

And, Judge Kethledge commented, the defense bar never came to us with this. The defense bar never came saying, "We're having a problem. My guy wants to make it a plea and he can't." We have never heard a peep along those lines from the defense bar. The Department of Justice hasn't come to us. It has always been judges who wanted this, and we're a little paranoid about that. This is the most important thing that happens in a courtroom. It is much more important than what happens in our appellate courtrooms. That, he said, was the concern.

Another member posed a question for Judge Furman. She said she was having difficulty envisioning how often these impromptu change of plea proceedings would come up. Is it in instances where the defendant pleads to the sheet, where there's no written plea agreement?

Judge Furman said he didn't want to suggest that the scenario where everybody shows up and no one realizes until that moment that it's a plea happens with frequency. The more common scenario is where there's been advanced discussion, some opportunity for defense counsel to speak to the defendant, and they're able to say "I'm prepared to plead guilty." The scenario he was describing, which happened with some regularity, is when counsel comes to a conference and says, "I've had an opportunity to speak to my client. My client is prepared to plead guilty, but I didn't have an opportunity to talk about whether to proceed remotely." He didn't know whether this occurred because counsel neglected to raise the question of proceeding remotely, or because it was in the beginning of the pandemic, or because the opportunity to confer wasn't there, or because the conversation between the defendant and counsel was, "If the government will agree to this then I'm prepared to plead guilty," and they never got to the practicalities of what the proceeding would look like. He was not privy to the reasons why it occurred, but that scenario arose with some regularity.

You might say it shouldn't go forward, Judge Furman continued, that we should wait. But there are many circumstances where there's some time sensitivity to getting a plea done, and we are more often talking about pleas than sentencings. And at least in his district because of the scarcity of resources of court conference time on video and video conferencing or even telephone conferencing between counsel and defendant, if it doesn't happen when you're on the calendar, you have an opportunity to bring everybody together, you have an opportunity to have the defendant speak with counsel before it, if you don't do it all at that one moment, it's going to be another three weeks before you can reassemble and be prepared to go.

A member said she'd never heard of a status conference that turned into a guilty plea.

Judge Furman repeated that was not the scenario. He said he was surprised that defense counsel isn't more supportive of this and would guess if he called their federal defender's office that they would support what he was saying precisely for the reasons that he had articulated—namely that they were many scenarios in which the opportunity to have a meaningful conversation was facilitated by the court scheduling the proceeding itself. Perhaps they had unusually limited resources in New York.

Professor King asked Judge Furman if he thought he could still do what he has been doing under the existing rule language.

Judge Furman said he thought so, but Judge Kethledge didn't agree, so he might be reversed.

Judge Kethledge commented that he thought there is an assumption baked into the idea of making a request in writing to the court that the court receives the request. That's the difference from a verbal request accompanied with a promise to file something later about something that was done three days earlier.

Professor King asked about the situation where that the defendant and counsel are consulting at the beginning of the proceeding, they decide they want it by video conference, and they send the signed request to the court; they don't show it to the court on the video.

Judge Kethledge said that's OK.

Another member agreed that you could always do the proceeding at the beginning. You could call a conference, and you could have a breakout room before the judge even gets on the phone, they can consult, come back, and say it's coming. Is the problem the form? If the defendant is sitting in MCC or whatever and they can't get you the physical form beforehand?

Professors Beale and King said that no, the lawyer can sign it under (d)(2). The defendant does not have to sign. Judge Kethledge agreed.

The member continued saying then he reads the rule to allow what Judge Furman is asking, that there can be a conference at the beginning. Then you just file it. You have to file it.

Judge Furman said it doesn't say filed.

Judge Kethledge said that's where he and Judge Furman disagreed about what written request is.

The member said that if it's unclear and you have an appellate judge thinking it's no good, maybe we want to clarify it.

Judge Kethledge asked for further comments.

Professor Beale confirmed that Judge Furman thought the rule permits what he wants to do but would like to see clarification in the note.

Judge Furman agreed. We should clarify first that what he was describing can occur, but given the concerns that we heard from defense counsel here, we should also articulate that that should not be the preference. Right now, the rule does not state a preference between the two. The better practice is to do it in advance. He wanted to be clear about that. The advantage of writing something into the rule makes that preference clear, but also makes clear that in certain scenarios, in circumstances where it's impractical or otherwise, then the rule does permit what he is describing.

Professor Beale noted that the only public comments we received read it as requiring that the request had to be signed and sent in.

Professor King said she thought that the sending it in isn't the issue. It's the timing of that.

Judge Kethledge said you can't go forward with one of these things unless the court has it in hand. The defendant has filed a writing that requests this. It's got to be on ECF, on the docket.

Judge Furman said in some emergencies ECF may be down. What if the defense signs it and then holds it up on the screen and says, "Look judge. I've now signed the written request." Should he not be permitted to go forward in that scenario? That has complied with the written rule. And when it's filed is not dictated by the rule. The judge would tell defense counsel, "OK, when you can, file that on ECF." But he shouldn't be precluded from proceeding.

Professor Beale repeated that Judge Furman believes the text allows what he wants, but he wants something in the in the note that says that, and that also makes the point that all the defense lawyers have been saying, which is that it normally should be done the other way. She was not sure there is a problem.

A member said that she thought the notes already say that the preference is for in person appearances. She said if we want to be clear that we think it's going to be a filed request we could amend the rule to say the defendant after consulting with counsel files a request in writing. That is consistent with how others have interpreted the rule. Maybe that would require republication, but she did not think so because it has been discussed. With that change, it would be clear that the request must be filed and we won't have to talk about the timing. If in New York they let you file it after you've shown it on the video, we can address that problem when a defendant challenges the constitutionality of it. We could say the defendant after consulting with counsel files a request in writing.

Judge Kethledge offered "files a written request signed by the defendant that the proceeding be conducted," and so forth.

Judge Furman said he would not support that, because it would be even more restrictive.

Judge Kethledge said it would be removing ambiguity.

Judge Bates said he didn't think the rule could be interpreted as requiring a filing without added language, because right now there's nothing that says it has to be filed in advance. And there is something that does have to be filed in advance, and that's if the defense counsel is filing an affidavit with respect to the signature. That has to be filed in accordance with the language of the rule. A fair interpretation would be that filing is not a requirement of this "request." And he agreed with Judge Furman that would be a complication for some cases.

To some extent, Judge Bates said, it is a scheduling issue—having proceedings occur timely and on schedule and not having to reschedule. That's part of the concern here for district judges. Do we have to stop because even though the defense counsel is holding up the form, saying it's all signed and ready to go, but they can't get it physically filed until later in the day or tomorrow morning? If the judge would have to continue the proceeding, as Judge Furman says, in some jurisdictions that might be a several-week continuance.

Judge Kethledge added that the Committee has heard the stories about the difficulty of getting a slot for video and so on. On the interpretive point, (d)(2) does not have the word "request," and "request" is where he saw the idea that it has to be submitted to their court before it's a written request to the court.

Judge Kethledge said it boiled down to a concern about whether a district court can convert a non-plea or -sentencing proceeding more or less on the fly into a plea or sentencing proceeding. There are instances where it seems like everybody wants that conversion. And if the thing needs to be filed in advance, it is going to be inconvenient because you're going to have a second call or video conference to do the plea hearing. It's going to be hard to meet these

requirements and have that continuation of a hearing that then does the plea, if the writing must be submitted to the court before the court can proceed. Yes, we might have to have a second hearing in some instances, where everybody wants to go forward and no one has been pressured.

The concern that has animated this requirement is that there will actually be some forced conversions, pressured conversions that would not otherwise happen, if the defendant had to submit in writing a request before the hearing starts. You would have the space in between, where counsel can talk and the person can think, and it's not 15 minutes. That's the fear. There's an efficiency loss with the inability to convert stuff where everyone wants to convert it. But there's a danger of pressured conversions. That's where it comes out.

Judge Kethledge said our Committee has to make a decision and then the Standing Committee will decide whatever it decides. We are an advisory committee, and he said it was time to give our advice on this point. After asking for further comment and hearing none, Judge Kethledge asked if anyone wanted to make a motion to change the rule or the note with respect to (e)(3)(B).

A member made a motion that language be changed to read that "the defendant after consulting with counsel, files a request in writing signed by the defendant, that the proceeding be conducted by video."

Professor Beale clarified this would be on page 133.

Judge Kethledge suggested "files a written request." If our Committee is going to be clear about what we're recommending, then this would remove the strategic ambiguity that we currently have and clarify what we are really recommending. It's not meant to be provocative towards the folks who have a concern about this position.

The motion was seconded.

Judge Bates raised the question whether this change to the rule would require it to go back out for public comment.

Professor Beale said that to the extent that the comments received from Judge Cote and Judge Hornak essentially read it this way, and thought it was a problem for that reason, it would not require republication. But filing wasn't included.

Judge Bates commented that was the issue: that filing wasn't express in the rule, so is that something that the bar and the public might have a view on? And they have not yet had a chance to voice that view.

Professor Beale added that she thought the timing of when it has to be received is what they were responding to, not filing per se, but receipt in advance. And normally the way a court receives something in advance is it's filed.

Judge Bates said that was not true. Not everything a court receives is filed. The question is how far in advance. Back to that issue of the plea agreement containing the consent, that isn't filed until after the proceeding in his district and none of the plea papers that wind up on the

docket on the record get filed until after the plea is completed. They don't actually get filed in advance. They may be received by him in advance, and he's looking at them and inquiring of the defendant with respect to them and in a remote proceeding maybe holding it up, but they're not actually filed in advance.

The member who made the motion said the intent was to make explicit what he believed was implicit in the rule.

Judge Kethledge noted now we had a distinction between filed and received by the judge. Perhaps, he said, we ought to leave it as it is.

A member said the rule says counsel requests in writing, not files.

Professor Beale wondered if Professor Struve wanted to say something about republication, because that might affect members' view if it would take this out of the queue with the other emergency rules. Judge Kethledge agreed that would be a big consequence.

Professor Struve said that Judge Bates raised a good question because to the extent that commenters were weighing in, they did engage with the practicalities of how things are going to work. So to the extent that the explicit requirement of filing would be added, there was enough of a question about that that she thought it was well worth considering. It struck her as towards the borderline but she didn't have a strong sense of whether it would need to go back. She noted there was hydraulic pressure towards avoiding anything that would need to.

Professor Beale asked Professor Struve if she thought it was at least questionable whether it would require republication.

Professor Struve responded that with differing views on what the published rule text requires, on one hand, you don't want uncertainty persisting that could lead to reversals on appeal. On the other hand, if the concern is there was ambiguity as published and we need to fix it, then that suggests it's a change from the published version. So it's tough.

Professor Coquillette added he completely agreed this is a really close question and will have to be discussed at the Standing Committee. It could go either way.

The member who seconded the motion asked to withdraw the second because she believed the Committee should not separate Rule 62 from the other emergency rules.

Judge Kethledge concluded that the discussion on the subject appeared to be complete. He said it is a hard question, and the Committee had made a lot of progress in understanding it from both the policy and interpretative standpoints. It will be before the Standing Committee, and they can do what they think best.

Judge Kethledge asked the reporters to introduce the next agenda item.

Rule 62(d) – the contents of counsel's consultation

Professor King noted the next issue on page 118 of the agenda book concerns what the defense counsel must explain to the defendant about waiving in-person presence and going remote. She indicated the subcommittee had no interest in dictating what defense counsel should say to their clients, so passed on that recommendation from NACDL to spell that out. Professor Beale added that was consistent with other occasions, where the Committee has declined to try to provide anything in the rules about the content of advice provided by defense counsel. Judge Kethledge asked if there was any interest in discussing that, and hearing none, moved to the next item.

Rule 62(d)(4) – extending the time under Rule 35

Professor Beale said that regarding the provision in (d)(4), which allows extending time under Rule 35, the Department of Justice had expressed concern that there might be essentially frivolous requests to extend time from defendants whose time had run out for example, before the emergency began. The subcommittee thought the rule was clear enough and that possible attempts to misuse the extension language did not warrant express resolution in the committee note.

Mr. Wroblewski said they were satisfied with those deliberations, and he did not intend to renew the request.

A new subdivision to allow the extension of grand jury terms

Professor Beale continued to the last issue concerning Rule 62, the Department's new request to allow grand juries to be extended in emergency situations. Because that would require republication, the subcommittee decided it was not something it could do now. It appears later as a new suggestion in the agenda book. She noted that putting that aside for later consideration put the Committee in a position to make a final motion on Rule 62.

Approval of Rule 62

Judge Kethledge asked Professor Beale to state what the motion would be. Professor Beale stated the motion would be to approve transmittal of Rule 62, as revised, to the Standing Committee, with the recommendation that it move forward.

A member asked about the language added to the note. Professor Beale responded that was the tracked language and there had been a vote on that, so it would be reaffirming that earlier decision, otherwise approving of the rest of the rule as published, and agreeing to transmit it to the Standing Committee.

Professor Struve confirmed, the motion is to approve as published, but with the change to the note. Judge Kethledge agreed and called for a vote.

The motion passed, with one vote against, by a member who then explained her vote. She said that it had been a terrific process, and there are many protections in the rule. But she thought that emergency measures have a tendency to evolve into permanent norms, and we should not

put an emergency rule into our rules. Nonetheless she appreciated the whole process and was objecting only on the basis that she did not want to include any emergency provision.

Judge Kethledge thanked the Committee for its work on Rule 62 and moved to the remaining agenda items.

Rule 49.1

Judge Kethledge provided a status report on Rule 49. Judge Furman suggested an amendment adding an introductory clause "subject to any right of public access" a court may rule that a filing be made under seal without redaction. The committee note currently says "the following documents in a criminal case shall not be included in the public case file and should not be made available to the public at the courthouse," and then the list that follows includes financial affidavits filed seeking representation pursuant to the CJA. Institutionally, Judge Kethledge said, this Committee should not and does not take positions on substantive questions of law. The suggestion reflects the belief that this current note language does take such a position categorically as to financial affidavits and says that they may be sealed categorically. Judge Furman had a case where he ordered that affidavit be available to the public.

Judge Furman said his suggestion is based on the point that the current note does take a position on a substantive legal issue, and it shouldn't. More to the point, the note is inconsistent with pretty much all the existing case law, which is not uniform but all of which takes a more nuanced approach than the note on the question whether and when these things have to be public. Apropos of our earlier discussion about the constitutional right to public access to proceedings, Judge Furman said, we should avoid a scenario where the rule or the note is a trap for the unwary. As noted in his opinion, there was at least one case where one of his colleagues did go astray because of the note language. The problem is the note. But because we cannot amend the note without amending the rule, he had suggested a slight modification of the rule that would at a minimum just flag that there are concerns and issues that courts need to be sensitive to.

Judge Kethledge said that the subcommittee held one meeting by Zoom a few weeks ago with a decision to work on different options for note language that would try to embody this principle of neutrality, i.e., that the rule ought not to be taking a substantive position about whether this type of document is subject to public access or not. The reporters are going to work on some proposed language, and then the subcommittee will reconvene.

Judge Birotte, chair of the Rule 49.1 Subcommittee, added there had been some discussion about coordinating with the Committee on Court Administration and Case Management (CACM). Judge Kethledge had reached out to Judge Fleissig and fortunately it looks like there isn't any issue with us considering this change. Judge Kethledge agreed, saying that he and Judge Fleissig had a nice exchange, and she appreciated the heads up. CACM was independently looking at that guidance, and it had no objection to us proceeding and considering a change to a criminal rule.

Pro se e-filing

Professor Beale said the next item on page 155 of the agenda book was a brief status report on electronic pro se filing. It lets the Committee know that a working group led by Professor Struve, and involving excellent assistance from the Federal Judicial Center, is compiling data about what's actually occurring with pro se filing. The sense was that with the tremendous development technologically and changes during the pandemic, it was time to look at this rule. Professor Beale reported that the working group was nowhere near any kind of proposal and was still learning about different districts. The most interesting thing to the reporters so far was the practice in many districts of accepting filings from pro se litigants, including prisoners, in forms of electronic submission that are not CM/ECF—email, PDF upload, and so on. It appears that that the limiting factor on these being more generally adopted has been problems in getting the kind of infrastructure needed. So that may be something that we will develop over time, especially if this coordinated look nationwide reveals that these are helpful and working well. Some of the concerns about what might happen have proven to be unfounded in the districts. So there would be more to come on that.

Grand jury extension during rules emergencies

Professor Beale continued to the next agenda item on page 158. At the very end of the memo on Rule 62 the reporters had referenced the Department's request for an additional provision allowing the extension on grand jury terms. It could not be considered as part of the current draft of Rule 62 and would have to be an amendment that would come along later if there were interest in making this change. There is a timing issue. The advice that we have received is that it would be undesirable to muddy the waters to introduce an amendment to a rule that hadn't yet been adopted. That would potentially create some confusion on the part of courts, Congress, and the general public. We should wait on this until Rule 62 moves essentially through the process. That is the advice we received from Professor Struve and from Professor Dan Capra, the reporter responsible for coordinating all of the emergency provisions.

Judge Bates agreed that captured it.

Judge Kethledge agreed that it would go onto the study agenda rather than being taken up by a subcommittee now.

Rule 17

Judge Kethledge described the next item as a serious substantial suggestion by the White Collar Committee of the New York City Bar to overhaul Rule 17. They had obviously put a lot of work into it. Professor Beale noted it was only on the agenda today for determination whether a subcommittee would be appointed. She thought it is such a serious proposal that there will be a subcommittee.

Judge Kethledge asked for comments from the Department of Justice.

Mr. Wroblewski said he wanted everyone to know that a number of the authors of the proposal are former DOJ lawyers, many of whom he had worked with before. Early on several of them contacted the Criminal Division, shared some of the ideas, and actually solicited some of

the Department's views. When that happened, he called the reporters and let them know that that was happening. We had a very candid conversation about the proposal, and we expressed our preliminary view (and it is a preliminary view) that the proposal is no mere clarification. The Department views it as a very dramatic change to federal criminal practice. The proposal deals with the compulsory court process. It would change two things. It would first dramatically change the scope of what could be gathered under the court's compulsory process. There's very clear Supreme Court case law, he said, which is discussed in the letter about Rule 17 and the scope of what can be subpoenaed. It would dramatically change that. Second, and maybe more importantly, it would also take the court out of that process. It would say that that these materials could be subpoenaed without the court being involved at all. And so the Department thinks it's a very, very significant issue and it looks forward to the discussions.

Judge Kethledge commented that this proposal looked like it would be a lot of fun, just like Rule 16 did when it started (though that was not to say it's going to end that way). The first question is whether there is a problem. Is there a problem that needs to be handled? Second, if there is, what's the right way to address it? A lot of times the Committee ends up doing something nobody anticipated at the beginning. He agreed a subcommittee was needed, and said he would like to ask Judge Nguyen if she would chair that subcommittee.

Judge Nguyen said it would be her pleasure. Given the scope of the issues we're discussing here, she expected that it will be a lengthy and interesting time. Judge Kethledge agreed it is a meaty intellectual project and he looked forward to watching from the outside.

Rule 5

Professor Beale said there was just one more item on page 187. Magistrate Judge Bruce Reinhart suggested a change in Rule 5 to respond to the Due Process Protection Act, which now requires a reminder of prosecutorial obligations. The legislation requires the reminder to be given at the first scheduled court date where both the prosecutor and the defense are present. Judge Reinhart suggested this is confusing and it would be better to provide the reminder at the arraignment. As the reporters stated in their meeting memo, that might have been a better idea than what Congress enacted. But Congress did independently amend Rule 5. This suggestion would require us to delete the Congressional amendment to Rule 5 and put something in Rule 10. Even if it might have been a better idea, the reporters asked whether it would be appropriate at this time to try to revise something that Congress had recently enacted. That seemed unwise.

Judge Kethledge added that there's also no indication of any confusion or operational problem with the current language.

A member commented that he did think there has been confusion, but it is not preventing magistrate judges from giving those instructions at some point. He surveyed the other magistrate judges in his district, and if anything, because of the confusion, they are giving it more than once. Professor Beale said Congress would probably be pleased with that.

Professor Kethledge announced the next meeting would be on October 27, 2022, in Phoenix, Arizona.

The meeting ended with a rousing round of applause for the outgoing Chair, Judge Kethledge.

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
June 7, 2022

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) met in a hybrid in-person/virtual meeting in Washington, DC on June 7, 2022, with the public and certain members attending by videoconference. The following members were in attendance:

Judge John D. Bates, Chair
Elizabeth J. Cabraser, Esq.
Judge Jesse M. Furman
Robert J. Giuffra, Jr., Esq.
Judge Frank Mays Hull
Judge William J. Kayatta, Jr.
Peter D. Keisler, Esq.
Judge Carolyn B. Kuhl
Professor Troy A. McKenzie
Judge Patricia A. Millett
Hon. Lisa O. Monaco, Esq.*
Judge Gene E.K. Pratter
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipps

Professor Catherine T. Struve attended as reporter to the Standing Committee.

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 Dennis R. Dow, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura B. Bartell,
Associate Reporter

Advisory Committee on Civil Rules –
Judge Robert M. Dow, Jr., Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus,
Associate Reporter

Advisory Committee on Criminal Rules –
Judge Raymond M. Kethledge, 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 providing support to the Standing Committee included: Professors Daniel R. Coquillette, Bryan A. Garner, and Joseph Kimble, consultants to the Standing Committee; H. Thomas Byron III, Rules Committee Chief Counsel-Designate; Bridget Healy, Rules Committee Staff Acting Chief Counsel; Scott Myers and Allison Bruff, Rules Committee Staff Counsel; Brittany Bunting and Shelly Cox, Rules Committee Staff; Burton S. DeWitt, Law Clerk to the

* 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. Andrew Goldsmith was also present on behalf of the DOJ for a portion of the meeting.

Standing Committee; Dr. Emery G. Lee, Senior Research Associate at the FJC; and Dr. Tim Reagan, Senior Research Associate at the FJC.

OPENING BUSINESS

Judge Bates called the meeting to order and welcomed everyone. He noted that Deputy Attorney General Lisa O. Monaco would not be able to attend, but he welcomed Elizabeth Shapiro and thanked her for attending on behalf of the Department of Justice (DOJ). He thanked several members whose terms were expiring following this meeting, including Standing Committee members Judge Frank Hull, Peter Keisler, and Judge Jesse Furman. Judge Bates also thanked Judge Raymond Kethledge and Judge Dennis Dow for their service as chairs of the Criminal Rules and Bankruptcy Rules Advisory Committees respectively. He welcomed Tom Byron, who would be joining the Rules Office as Chief Counsel in July, and Allison Bruff, who had joined as counsel. Judge Bates congratulated Professor Troy McKenzie on his appointment as Dean of New York University Law School. In addition, Judge Bates thanked the members of the public who were in attendance by videoconference for their interest in the rulemaking process.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the minutes of the January 4, 2022 meeting.**

JOINT COMMITTEE BUSINESS

Emergency Rules

Judge Bates introduced this agenda item, which concerned final approval of proposed new and amended rules addressing future emergencies. Specifically, the Appellate, Bankruptcy, Civil, and Criminal Advisory Committees were requesting approval of amendments to Appellate Rules 2 and 4, as well as promulgation of new Bankruptcy Rule 9038, new Civil Rule 87, and new Criminal Rule 62.

Professor Struve thanked all the chairs and reporters of the Advisory Committees for their extraordinary work on this project, and especially Professor Capra for leading the project. This project was in response to Congress's mandate to consider rules for emergency situations. In regard to the uniform aspects of these rules (*i.e.*, who declares an emergency, the basic definition of a rules emergency, the duration of an emergency, provisions for additional declarations, and when to terminate an emergency), most of the public comments focused on the role of the Judicial Conference in declaring a rules emergency. One commentator supported the decision to centralize emergency-declaration authority in the Judicial Conference; others criticized the decision in various ways. The Advisory Committees carefully considered this both before and after public comment. The uniform aspects remain unchanged post-public comment.

Professor Capra noted two minor disuniformities that remained within the emergency rules. Proposed Appellate Rule 2(b)(4), concerning additional declarations, was styled differently than the similar provisions in the proposed Bankruptcy, Civil, and Criminal emergency rules. And proposed Civil Rule 87(b)(1), concerning the scope of the emergency declaration, was worded differently than the similar provisions in the proposed Bankruptcy and Criminal emergency rules.

Proposed Civil Rule 87(b)(1), as published, stated that the declaration of emergency must "adopt all of the emergency rules in Rule 87(c) unless it excepts one or more of them." The proposed Bankruptcy and Criminal rules provide that a declaration of emergency must "state any restrictions on the authority granted in" the relevant subpart(s) of the emergency rule in question.

Appellate Rules 2 and 4. Turning to the point raised by Professor Capra, Professor Hartnett noted that proposed amended Rule 2(b)(4), as set out on lines 27 to 29 of page 89 of the agenda book, used the passive voice ("[a]dditional declarations may be made") instead of the active voice used by the other emergency rules ("[t]he Judicial Conference … may issue additional declarations"). He stated that the Appellate Rules Advisory Committee agreed to change the language to bring it into conformity with the other emergency rules.

A judge member focused the group's attention on proposed Appellate Rule 2(b)(5)(A) (page 90, line 36). In the event of a declared emergency, this provision would authorize the court of appeals to suspend Appellate Rules provisions "other than time limits imposed by statute and described in Rule 26(b)(1)-(2)." The member asked whether the "and" should be an "or." The rule, as drafted, could be read as foreclosing suspension of only those time limits that are both imposed by statute and described in Rule 26(b)(1) or (2). Professor Hartnett stated that the use of "and" was intentional. Current Appellate Rule 2 permits suspension (in a particular case) of Appellate Rules provisions "except as otherwise provided in Rule 26(b)," and Appellate Rules 26(b)(1) and (2) currently bar extensions of the time for filing notices of appeal, petitions for permission to appeal, and requests for review of administrative orders. The proposed Appellate emergency rule, by contrast, is intended to permit extensions of those deadlines, so long as they are set only by rule and not also by statute. Changing "and" to "or" would eliminate that feature of the proposed rule. Professor Struve noted that she is unaware of any deadline set by both statute and an Appellate Rule other than those referenced in Rule 26(b).

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendments to Appellate Rules 2 and 4, with the revision to proposed Appellate Rule 2(b)(4) (lines 27-29) as discussed above.**

New Bankruptcy Rule 9038. Judge Dennis Dow introduced proposed new Bankruptcy Rule 9038. The proposed new rule would authorize extensions of time in emergency situations where extensions would not otherwise be authorized. The Bankruptcy Rules Advisory Committee received only one relevant public comment, which was positive and not specific to the Bankruptcy rule. He requested the Standing Committee give its final approval to proposed new Rule 9038 as published.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved proposed new Bankruptcy Rule 9038.**

New Civil Rule 87. Judge Robert Dow introduced proposed new Civil Rule 87. The Civil Rules Advisory Committee received a handful of comments. The CARES Act Subcommittee considered these comments and determined that no changes were necessary, and the Advisory Committee agreed. The Advisory Committee made some small changes concerning bracketed

language in the committee note, but otherwise the rule looks similar to the language that came before the Standing Committee prior to publication for public comment.

Professor Cooper noted a pair of changes to the portion of the committee note shown on page 124 of the agenda book. Emergency Rule 6(b)(2)(A) authorizes a court under a declared rules emergency to "apply Rule 6(b)(1)(A) to extend" the deadlines for post-judgment motions. (Ordinarily, Civil Rule 6(b)(2) forbids a court from extending those deadlines.) Rule 6(b)(1)(A) authorizes a court, "for good cause, [to] extend the time … with or without motion or notice if the court acts, or if a request is made, before the original time *or its extension* expires." (emphasis added.) Prior to the Standing Committee meeting, a judge member had pointed out that, as published, the text of the rule, by referring to Rule 6(b)(1)(A), authorizes sequential extensions (that is, a court could grant an extension under Rule 6(b)(1)(A) and, before time expired under that extension, grant a second extension). But, the member observed, the committee note did not reflect this possibility. Professor Cooper agreed with this assessment of the committee note. The Advisory Committee therefore agreed to add language (in the first and fifth sentences of the relevant committee note paragraph) clarifying that such further extensions were possible. Separately, the Advisory Committee had decided to delete the first sentence of the next paragraph of the committee note, and to combine the remainder of that paragraph with the following paragraph to form one paragraph.

Discussion then turned to the wording of proposed Civil Rule 87(b)(1). A practitioner member noted that as he read the proposed Criminal and Bankruptcy emergency rules, if the Judicial Conference failed to specify which emergency provisions it was invoking or exempting, the default was that all the emergency provisions would go into effect. However, proposed new Civil Rule 87(b)(1)(B) by its terms worked differently: "The declaration must … adopt all the emergency rules … unless it excepts one or more of them." Under this wording, the member suggested, if the declaration did not specify which provisions it was adopting, it would be an invalid declaration. Professor Cooper stated that, originally, the relevant portion of Rule 87(b)(1) had said simply that "[t]he declaration *adopts* all the emergency rules unless it excepts one or more of them," thus setting the same default principle as the proposed Bankruptcy and Criminal rules. But in the quest for uniformity in wording across the three proposed emergency rules, the word "must" had been moved up into the initial language in Rule 87(b), which had the effect of inserting "must" into proposed Rule 87(b)(1)(B). Professor Cooper explained that (for the reasons set forth on page 111 of the agenda book) it was not possible for Civil Rule 87(b)(1)(B) to use identical wording to that in the proposed Bankruptcy and Criminal emergency rules. The Bankruptcy and Criminal provisions directed that the emergency declaration "must … state any restrictions on" the emergency authority otherwise granted by the relevant emergency rule—a formulation that would not be appropriate in the Civil rule given the indivisible nature of each particular Civil emergency rule. Professor Cooper expressed the hope that the Judicial Conference would remember to specify which courts were affected and which rules it was adopting by its emergency order. Judge Bates added that if the rule would require the Judicial Conference to make a specific declaration for Civil that need not be made for the other emergency rules, members should consider whether it would cause any problems.

Professor Struve suggested that there were actually two uniformity questions at issue—stylistic uniformity, and a deeper uniformity as to the substance. Uniformity on the substance, she

offered, could be achieved through revisions to Civil Rule 87(b)(1) (on pages 116-17)—namely, deleting the word "must" from line 10 and instead inserting it at the beginning of lines 11 and 15, and changing "adopt" at the beginning of line 12 to "adopts." Under that revised wording, if the declaration failed to specify any exceptions, it would adopt all the emergency rules in Rule 87(c)—thus achieving the same default rule as the Bankruptcy and Criminal provisions.

Professor Capra, however, stated that this proposed revision would deepen rather than alleviate the uniformity problem. He predicted that the good sense of the Judicial Conference would surmount any problem with the language of the rule as published. Professor Coquillette agreed that the Judicial Conference would know what it needed to do to declare a Civil Rules emergency. Judge Bates added that he believed the Rules Office would inform the Judicial Conference of the procedures it needed to follow to declare a Civil Rules emergency. Professor Struve expressed her confidence in the meticulousness of the Rules Office, but she questioned why the rulemakers would want to impose an additional task on the Rules Office in the event of an emergency. Making it as simple as possible for all actors to act in an emergency situation seemed desirable.

Judge Bates highlighted two goals: First, the desire for uniformity. Second, the desire to not have to ask the Judicial Conference to do something unique with respect to the Civil Rules. Judge Bates thought that Professor Struve's suggestion would accomplish the second goal, although it would offend uniformity. And, he suggested, the proposed rule as published already offended uniformity. Therefore, the question under debate was not about *creating* disuniformity but rather fixing one issue while continuing the lack of uniformity.

A practitioner member stated that she agreed with the proposed change. The change would make the rule read more clearly while also safeguarding against something being overlooked in an emergency. Professor Marcus said that the goal of the Advisory Committee was to make it as easy as possible for the Judicial Conference to declare a rules emergency, with all the emergency rules going into effect unless the Judicial Conference explicitly excluded a rule. To the extent the rule as written did not do so, it would be good to make changes to get there. A judge member agreed that the rule should not create more work for people to do in order to declare a rules emergency.

Judge Robert Dow stated that he believed Professor Struve's proposed change was friendly and therefore acceptable to the Advisory Committee. While it would add a disuniformity to the proposed new Rule 87, that disuniformity occurred in a place where the rule already was not uniform in relation to the other emergency rules. He asked the Standing Committee to grant final approval to proposed new Civil Rule 87, with the noted changes both to the committee note and to lines 10 through 15 of the rule text.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved proposed new Civil Rule 87.**

New Criminal Rule 62. Judge Kethledge introduced proposed new Criminal Rule 62. The Criminal Rules Advisory Committee received ten or so public comments, some of which were overlapping. He highlighted one change to the committee note plus two of the public comments.

First, the change to the committee note concerned a passage addressing proposed Rule 62(d)(1)'s requirement that courts provide "reasonable alternative access" to the public when conducting remote proceedings. The note as published stated that "[t]he rule creates a duty to provide the public, including victims, with 'reasonable alternative access.'" DOJ requested that the note be revised to mention the Crime Victims' Rights Act (CVRA). A pair of comments opposed this suggestion, and one of those comments requested deletion of the phrase "including victims." The latter phrase had been included to ensure that district courts did not overlook the requirements of the CVRA when holding remote proceedings, not to suggest an order of priority among observers of remote proceedings. Accordingly, the Advisory Committee revised the note as shown on page 161 of the agenda book by deleting the phrase "including victims" and by adding a sentence directing courts to "be mindful of the constitutional guarantees of public access and any applicable statutory provision, including the Crime Victims' Rights Act." This language reminds courts to consider both the First and Sixth Amendments' guarantees of public access, in addition to any statutory rights, such as the CVRA. Later in the meeting, an attorney member suggested changing "be mindful of" to "comply with," and Judge Kethledge (on behalf of the Advisory Committee) acquiesced in that change.

Second, one of the public comments concerned proposed new Rule 62(d)(2), which provides that, if "emergency conditions limit a defendant's ability to sign[,] defense counsel may sign for the defendant if the defendant consents on the record." A district judge suggested that this language be revised to allow the court to sign for the defendant as well. The Advisory Committee did not support this suggestion. There was no demonstrated need to have the court sign for the defendant when counsel would be perfectly able to do so. The Advisory Committee was particularly concerned that this would infringe upon the attorney-client relationship. And the Advisory Committee was concerned that this would allow the court to sign a request to hold felony plea or sentencing hearings remotely under proposed new Rule 62(e)(3)(B).

Third, the Advisory Committee received public comments regarding proposed new Rule 62(e)(3)(B), which addresses holding felony plea or sentencing hearings remotely. This is by far the most sensitive subject that Rule 62 addresses. A defendant's decision to plead guilty and the court's decision to send a person to prison are the most important proceedings that happen in a federal court. The Advisory Committee has an institutional perspective that remote proceedings for pleas and sentencing truly should be a last resort; holding such a proceeding remotely is always regrettable, even if it is sometimes necessary. A court does not have as much information when proceeding remotely as it would have in a face-to-face proceeding. The Advisory Committee has a strong concern that there are judges who would want to hold remote sentencing proceedings even when not necessary. These concerns underpinned Rule 62(e)(3)(B), which set as a requirement for a remote felony plea or sentencing that "the defendant, after consulting with counsel, requests in a writing signed by the defendant that the proceeding be conducted by videoconferencing." The goal of this language was to make sure the decision was unpressured and therefore truly the decision of the defendant. Comments from some judges argued, on logistical grounds, that this provision should be revised to allow the court to sign for the defendant. However, the Advisory Committee rejected those suggestions, noting that counsel for the defendant could sign the request on the defendant's behalf.

At the Advisory Committee meeting, the liaison from the Standing Committee had suggested that the committee note be revised to make clear that the requisite writing could be provided at the outset of the plea or sentencing proceeding itself. Judge Kethledge invited this member of the Standing Committee to discuss his suggestion. The member observed that Rule 62(e)(3)(B) required a "request" from the defendant, but he did not think that the rule required the request be made at any specific time. However, he suggested, it was possible to read the rule as requiring that the request be made *before* the hearing, and the note should be revised to resolve this ambiguity. He suggested (based on the challenges of arranging opportunities for counsel to confer with their clients during the pandemic) that the note say that, while it was preferable to provide the request in advance of the hearing, it could be provided at the hearing if the defendant had an opportunity to confer with counsel.

Judge Bates questioned the use of "requests" in Rule 62(e)(3)(B). If that language required that the idea of proceeding remotely must originate with the defendant, he suggested that could cause practical problems in cases where the remote option is first mentioned by the judge or the prosecutor.

A judge member stated that requiring the request in advance of the hearing could create logistical problems: a need to monitor the docket to check for the required request, and potential last-minute cancellations for lack of the required request. Also, this member suggested, the focus should be on whether the defendant freely consented to the remote proceeding, not on whether it was the defendant who had requested the remote proceeding. Later, Professor Beale stated that the Advisory Committee members recognized that requiring the request in advance of the hearing might not be efficient and could slow things down, but members felt strongly that it was important to protect the ability of the defendant to consult freely with counsel before making the decision to proceed remotely. As to the challenges presented by districts that cover large areas, Professor Beale recalled that the Advisory Committee was persuaded by a member's argument that the rules should not relax standards to accommodate infrastructure failures.

Judge Kethledge noted that the Advisory Committee was not unanimous regarding whether the request in writing must precede the proceeding, although most members of the Advisory Committee (including Judge Kethledge) thought that the request to hold the proceeding remotely must precede the plea or sentencing proceeding. The rule requires that the request be effectuated by a writing—which can only be true if the court has received the writing. Furthermore, another prerequisite for remote proceedings (including felony pleas and sentencings) is Rule 62(e)(2)(B)'s requirement that the defendant have an "opportunity to consult confidentially with counsel both before and during the proceeding." If Rule 62(e)(3)(B) permitted a request to be made midstream in a proceeding (rather than only beforehand), in such midstream instances there would have been no opportunity for consulting prior to the proceeding. Additionally, the contrast between Rules 62(e)(1) and 62(e)(2)(B) (which both require an opportunity for the defendant to consult with counsel "confidentially") and Rule 62(e)(3)(B) (which makes no mention of confidentiality) suggests that the consultation and request under Rule 62(e)(3)(B) must come before the proceeding.

The practical concern, Judge Kethledge explained, was that allowing mid-proceeding requests would open the door to exactly the type of judicial pressure that the request-in-writing

requirement was meant to prevent. During a remote proceeding, the judge could solicit from the defendant a request for the plea or sentencing to proceed remotely. A resulting request from the defendant would not be the unpressured, deliberate decision that the Advisory Committee insisted upon before the defendant gives up the very important right to an in-person proceeding. Permitting the request to occur during rather than before the hearing could greatly undermine the purpose of the writing requirement—namely, to ensure that the emergency rule permits only a narrow exception to the normal in-person requirement. The Advisory Committee was therefore opposed to such a change, which had not been requested by the DOJ and which was opposed by the defense bar.

Professor King reported that defense counsel members of the Advisory Committee had recounted pressure during the pandemic to get their clients to consent to proceed remotely. One noted that two judges in her district had expressed frustration regarding defendants who refused to proceed remotely. Another member reported that CJA members in her district themselves felt pressure to proceed remotely, and having a barrier between the court and the client was important. Another stressed the need for distance between the request in writing and the plea hearing, to give the attorney time to explain the choice to the defendant. It would not be fair to the defendant to be sent to a breakout room with everyone waiting in the main room for the defendant to come back with a "yes," after being asked to proceed remotely by the person with sentencing authority. Not a single member of the Advisory Committee was interested in advancing the proposal to revise the committee note (*i.e.*, to state that the requisite writing could be provided at the outset of the plea or sentencing).

Professor Beale added that to hold a felony plea or sentencing proceeding remotely under Rule 62(e)(3)(C), the court would need to find that "further delay … would cause serious harm to the interests of justice." This would happen only rarely, such as where the defendant faced only a very short sentence.

Judge Bates reiterated his concern that the meaning of "requests" was not entirely clear. Did it require the court to make a finding that the idea of proceeding remotely originated from the defendant and not, for example, some comment the court may have made at a prior proceeding?

Noting that the Standing Committee's membership did not include any criminal defense lawyers, a practitioner member stated that he found compelling the real-world concerns of the defense bar that were credited by the Advisory Committee and expressed by Judge Kethledge, Professor King, and Professor Beale. So he favored requiring that the request come from the defendant before the proceeding begins. But he did not think the rule as drafted was clear on this point, and he stressed the need for clarity so as to avoid future litigation.

Another attorney member agreed as to the timing question, and advocated adding the words "in advance" to reflect that. But, he argued, in the real world the idea will usually not come from the defendant, so he advocated saying "consents" instead of "requests." A judge member predicted that the term "requests" would generate litigation due to the dearth of caselaw on point; by contrast, he said, much caselaw addressed the meaning of "consent." He also suggested that promulgating a form would help to forestall litigation over what was required.

The judge member who had suggested that the committee note be revised to state that the writing could be provided at the outset of the proceeding acknowledged that judges had in the past advocated the use of remote proceedings for what the Advisory Committee had found to be insufficient reasons. He noted, however, that Rule 62 would be in effect only during an emergency—which diminished his concern over the possible misuse of remote proceedings under it. As a data point, this judge member stated he was more often rejecting requests from defendants to proceed remotely than approving them. The member clarified that his concern was not with scenarios in which the idea of holding the plea proceeding comes up midstream during another remote proceeding. Rather, the member's concern was with another possible scenario that was based on his own experiences early in the pandemic: A plea allocution is scheduled to take place remotely, but just prior to the hearing, counsel asks to go into a breakout room to speak with the defendant in order to get the not-yet-provided signature on the request to proceed remotely. The judge does not join the main hearing room until after defendant and counsel return from the breakout room. The member argued that the rule appears to permit the proceeding to go forward in this circumstance, and that this avoids the significant delay that could be entailed in scheduling a new proceeding.

Another judge member noted that defense counsel, not solely judges, may sometimes pressure a defendant to consent to a remote plea or sentencing hearing. Judges, this member suggested, should be alert to this risk. The member noted the difficulty of drafting rules to address emergencies, which may present strange circumstances.

A practitioner member said that the Standing Committee should not make changes that would not have made it through the Advisory Committee. If the Standing Committee wished to make such a change, it should consider remanding the proposal to the Advisory Committee—but that would prevent Rule 62 from proceeding in tandem with the other proposed emergency rules. Both for that procedural reason and on the substance, this member supported the position taken by the Advisory Committee. As to adding language to require that the request in writing occur "in advance," the practitioner member suggested that no such language could foreclose a judge from attempting to streamline the process. For example, a requirement of a request "in advance" could be met by making the request during a status conference in the morning, and reconvening later that day for the plea or sentencing.

A judge member emphasized that judges vary in their ability; in her circuit, there were sometimes even defects in plea colloquies. Given the critical nature of plea and sentencing proceedings, this member thought that the request needs to be in advance of the proceeding. If the request need not be made in advance, it will become routine. The rule should say "in advance," and possibly even state *how far* in advance, such as seven days. She acknowledged, however, that answering the how far question would likely require sending the rule back to the Advisory Committee, so she was not making that suggestion.

A practitioner member agreed with the proposal to insert "in advance." It is inherently important to the integrity of the criminal justice system that plea changes and sentencing hearings be done in-person. As a civil practitioner, this member periodically witnesses criminal sentencing proceedings that occur before the civil matters. The very best judges are those who take the most

care with sentencing proceedings. It gives dignity to the individuals involved in the process, including their families. This does not translate well to videoconferencing.

A judge member who had earlier stated that requiring the request in advance of the hearing could create logistical problems suggested that the rule should be clear about what it requires and that, in her view, it should permit bringing the document to the hearing itself. This member pointed out that efficiency is also important for defendants; a more cumbersome process (requiring a request in advance) may delay closure (and release) for defendants who will receive time-served sentences.

Judge Bates stated that he counted four proposed changes. First, to change "requests" to "consents." Second, to specify that the requisite writing must be signed by the defendant "in advance." Third, and contrary to the second suggestion, to revise the committee note to say that the writing could, if necessary, be provided at the outset of the proceeding. Fourth was the suggestion that the rule be clarified—a suggestion that might be addressed by the decision on the other proposed changes. Judge Bates suggested that it would be helpful to learn the sense of the committee on these proposals. He was not inclined to suggest remanding the proposal to the Advisory Committee unless the latter thought a remand was a good idea—and even then, he surmised, the Advisory Committee would want to know what the Standing Committee thought on each of these issues. Judge Kethledge said he believed the Advisory Committee would be fine with the second suggestion (inserting "in advance"). As to the first suggestion, the Advisory Committee's choice of "requests" would not foreclose situations where the idea itself came from someone other than the defendant, it simply required that the defendant come forward to trigger the remote proceeding—that is, the rule was meant to protect against situations where the decision to proceed remotely came after a discussion with the *judge*.

Professor Capra suggested that a compromise might be to insert "in advance" but also change "requests" to "consents." He urged the Standing Committee not to remand the entire proposal over this issue, and he suggested that his proposed compromise would not require republication. Professor Coquillette agreed with Professor Capra concerning the lack of need for republication.

A judge member noted that during the colloquy at the start of the hearing, the judge will make sure the defendant consents to proceeding remotely. Therefore, she recommended keeping the word "requests." The request would come in advance, and the consent would be confirmed via the colloquy at the hearing. Citing a recent example of a case in which the defendant challenged the voluntariness of his consent to proceed remotely, Judge Kethledge reiterated the importance of foreclosing the option of deciding midstream in a remote proceeding to convert the proceeding into a remote plea or sentencing proceeding.

Upon motion by a member, seconded by another: **The Standing Committee voted 10-3 to insert "before the proceeding and" in proposed new Criminal Rule 62(e)(3)(B)** on line 109 (page 154 in the agenda book). ("Before" and "proceeding" were substituted for "in advance of" and "hearing" for reasons of style and internal consistency.)

Upon motion by a member, seconded by another: **The Standing Committee voted 7-6 to change "requests" to "consents" in proposed new Criminal Rule 62(e)(3)(B) (p. 154, line 110), with conforming changes to be made to the committee note (p. 168).**

Judge Bates then invited the Standing Committee to vote on whether to give final approval to proposed new Criminal Rule 62, with the changes to Rule 62(e)(3)(B) that the Committee had just voted to make, conforming changes to the committee note (p.168), and the substitution of "comply with" for "be mindful of" in the Advisory Committee's revised note language concerning Rule 62(d)(1) (p.161).

Upon motion by a member, seconded by another: **The Standing Committee unanimously approved proposed new Criminal Rule 62.**

Judge Bates thanked the Standing Committee and the Advisory Committees, including the chairs and reporters, and specifically thanked Professor Capra and Professor Struve, for their work on all the emergency rules. He noted that the rules have now reached the Judicial Conference, and have done so particularly quickly.

Due to scheduling constraints, the Criminal Rules Advisory Committee provided its report (described infra p. 13) prior to the lunch break. After the lunch break, the Standing Committee resumed its discussion of joint committee business.

Juneteenth National Independence Day

Judge Bates introduced this agenda item, which concerned the proposal to add Juneteenth National Independence Day to the lists of specified legal holidays in Appellate Rules 26(a)(6)(A) and 45(a)(2), Bankruptcy Rule 9006(a)(6)(A), Civil Rule 6(a)(6)(A), and Criminal Rules 45(a)(6)(A) and 56(c).

A practitioner member suggested that the semi-colon in the proposed amendment to Bankruptcy Rule 9006 was a typo, and the Bankruptcy Rules Advisory Committee agreed to substitute a comma.

Professor Capra noted that the committee notes were not uniform between the rule sets. He suggested that the reporters confer after the meeting to achieve uniformity.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously gave final approval (as technical amendments) to the proposed amendments to Appellate Rules 26 and 45, Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rules 45 and 56, subject to the committee notes being made uniform.**

Pro Se Electronic Filing Project

Professor Struve introduced this item. She thanked the Federal Judicial Center (FJC) for its superb research work and its report ("Federal Courts' Electronic Filing By Pro Se Litigants") which was available online. Judge Bates had asked Professor Struve to convene the reporters for

the Appellate, Bankruptcy, Civil, and Criminal Rules Advisory Committees, along with members from the FJC, to discuss suggestions relating to electronic filing by self-represented litigants, and this working group had met in December 2021 and March 2022. One issue is whether self-represented litigants have access to the court's case management / electronic case filing ("CM/ECF") system. Among the findings by the FJC is that such access varies by type of court, with the courts of appeals most willing to grant such access to self-represented litigants, the district courts less so, and the bankruptcy courts least of all. On the other hand, a number of bankruptcy courts are using an "electronic self-representation" system. This raises the question of whether the four Advisory Committees may select different approaches for differing levels of courts.

Another question is that of service on persons who receive notice through CM/ECF. When a non-CM/ECF user files a document, the clerk's office will subsequently enter it into CM/ECF; the system then sends a notice of electronic filing to parties that are CM/ECF users. Yet many courts continue to require the non-CM/ECF filer to nonetheless serve the filing on other parties, whether or not those parties are CM/ECF users.

Professor Struve noted that the working group was planning a further discussion sometime in the summer with the hope of teeing up topics for discussion by the four Advisory Committees at their fall meetings.

Dr. Reagan noted that in the civil context there are two different groups of self-represented people who file—prisoners and non-prisoners—and these groups represent significantly different concerns and challenges. Additionally, the concept of electronic filing does not necessarily mean using CM/ECF; other methods include email or electronic upload, but these methods can pose cybersecurity issues. CM/ECF is difficult even for attorneys to use, and at least one district requires attorneys to initiate cases via paper filings rather than via CM/ECF.

Electronic Filing Deadline Study

Judge Bates provided a brief introduction to this information item concerning electronic filing times in federal courts. He noted that an excerpt from the FJC's recently-completed report on this topic appeared in the agenda book starting at page 185. The report had not yet been reviewed by the subcommittee that had been formed to consider whether the time-computation rules' presumptive electronic-filing deadline of midnight should be altered.

Dr. Reagan noted that the FJC studied the frequency of filings at different times of day. While results varied from court to court, the FJC found that most filing occurred during business hours, but that a significant amount did occur outside of business hours. He noted that in the bankruptcy courts, there were a significant number of notices filed robotically overnight.

The FJC began a pilot survey of judges and attorneys, but it gathered limited data because it closed the survey due to the pandemic. Continuing the survey under current conditions would be unproductive because opinions and experiences during the pandemic would not be representative of future non-emergency practice. But the limited pilot-study data did show a distinction between the views of sole practitioners and those of big-firm lawyers. The latter were more likely to favor moving the presumptive deadline to a point earlier than midnight.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Kethledge provided the report of the Advisory Committee on Criminal Rules, which met in Washington, DC on April 28, 2022. For the sake of brevity, Judge Kethledge highlighted only the Juneteenth-related amendments to Criminal Rules 45 and 56 (pp. 11–12, supra) and one other technical amendment. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 810.

Action Item

Final Approval

Rule 16(b)(1)(C)(v). Judge Kethledge introduced the only action item, which was a proposed technical amendment (p. 814) to fix a typographical error in a cross-reference in Rule 16(b)(1)(C)(v), addressing defense disclosures. The version of the rule with the typo is set to take effect on December 1, 2022, absent contrary action by Congress.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously gave final approval to the proposed amendment to Rule 16(b)(1)(C)(v) as a technical amendment.**

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Schiltz and Professor Capra provided the report of the Advisory Committee on Evidence Rules, which met in Washington, DC on May 6, 2022. The Advisory Committee presented nine action items: three rule amendments for which it was requesting final approval and six rule amendments for which it was requesting publication for public comment. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 866.

Action Items

Final Approval

Rule 106. Judge Schiltz introduced the proposed amendment to Rule 106 shown on page 879 of the agenda book. Rule 106 is the rule of completeness. When a party introduces part of a statement at trial, and that partial statement may be misleading, another party can introduce other parts of the statement that in fairness ought to be considered. The proposed amendment would fix two problems with the existing rule.

First, suppose a prosecutor introduces part of a hearsay statement and the completing portion does not fall within a hearsay exception. There is a circuit split as to whether the completing portion can be excluded under the hearsay rules. This amendment would resolve the split by making explicit that the party that introduced the misleading statement could not object to

completion on grounds of hearsay. But the completing statement could still be excluded on other grounds.

Second, current Rule 106 only applies to "writings" and "recorded statements," not oral statements. This means that for an oral statement, the court needs to turn to the common law. Unlike other evidentiary questions, here the common law has only been partially superseded by the Federal Rules of Evidence. This is particularly problematic because completeness issues will generally arise during trial when there is no opportunity for research and briefing.

The Advisory Committee received a handful of comments, all but one of which were positive. One public comment spurred a change to the rule text. The proposal as published would have provided for the completion of "written or oral" statements, a phrase that the Advisory Committee had thought would cover the field. But as a public comment pointed out, that phrase failed to encompass statements made through conduct or through sign language. As a result, the Advisory Committee decided to delete the current rule's phrase "writing or recorded" so that the rule will refer simply to a "statement."

A judge member asked whether there would be Confrontation Clause issues if a criminal defendant introduced part of a statement and the government was allowed to introduce the completing portion over a hearsay objection. Professor Capra stated that for a Confrontation Clause issue to arise the completing portion would have to be *testimonial* hearsay, which would be quite rare. If the issue did arise, the Supreme Court in *Hemphill v. New York*, 142 S. Ct. 681, 693 (2022), left open the possibility a forfeiture might apply. The idea would be that the rule of completeness might be applicable as a common law rule incorporated into the Confrontation Clause's forfeiture doctrine. Judge Schiltz added that the proposed amendment did not purport to close off a potential Confrontation Clause objection.

Another judge member stated that the proposed amendment was helpful because a judge at trial should not have to look to the common law to resolve issues of completion.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 106.**

Rule 615. Judge Schiltz introduced the proposed amendment to Rule 615. Rule 615 requires that upon motion, the judge must exclude from the courtroom witnesses who have yet to testify, unless they are excepted from exclusion by current subdivisions (a) through (d). Rule 615 is designed to prevent witnesses who have not yet been called from listening to others' testimony and tailoring their own testimony accordingly. The current rule does not speak to instances where a witness learns of others' testimony from counsel, a party, or the witness's own inquiries. Thus, in some circuits, if the court enters a Rule 615 order without spelling out any additional limits, the sole effect is to physically exclude the witness from the courtroom. But other circuits have held that a Rule 615 order automatically forbids recounting others' testimony to the witness, even when the order is silent on this point. In those circuits, a person could be held in contempt for behavior not explicitly prohibited by either rule or court order. The proposed amendment would add a new subdivision (b) stating that the court's order can cover disclosure of or access to testimony, but it must do so explicitly (thus providing fair notice).

The proposed amendment also makes explicit that when a non-natural person is a party, that entity can have only one representative at a time excepted from Rule 615 exclusion under the provision that is now Rule 615(b) and would become Rule 615(a)(2). This would put natural and non-natural persons on an even footing. Under the current rule, some courts have allowed entity parties to have two or more witnesses excepted from exclusion under Rule 615(b). The amended rule would not prevent the court from finding these additional witnesses to be essential (see current Rule 615(c)), or statutorily authorized to be present (see current Rule 615(d)).

The Advisory Committee received only a handful of public comments on the proposal, all of which were positive.

Focusing on proposed Rule 615(b)(1)'s statement that "the court may … by order … prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom," a judge member asked whether there was any consideration of specifying whom the prohibition runs against? Judge Schiltz answered that trial testimony might be disclosed by a range of people, such as an attorney, a paralegal, or even the witness's spouse. It would be tricky to delineate in the rule. Professor Capra added that it would be a case-by-case issue, and the judge would specify in the Rule 615 order who was subject to any Rule 615(b)(1) prohibition.

A practitioner member noted that in longer trials, there may be situations where a corporate party needs to change who its designated representative is. Professor Capra responded that the committee note recognizes the court's discretion to allow an entity party to swap one representative for another during the trial.

The same practitioner member echoed the judge member's previous suggestion that Rule 615(b)(1) should explicitly state who is prohibited from disclosing information to the witness. Professor Capra stated that the rule does not need to say that; rather, that is an issue that the court should address in its order. Judge Schiltz added that the judge in a particular case is in the best position to determine in that case who must not disclose trial testimony to a witness.

The practitioner member turned to a different concern, focusing on the portion of the committee note (the last paragraph on page 888) that dealt with orders "prohibiting counsel from disclosing trial testimony to a sequestered witness." The committee note acknowledged that "an order governing counsel's disclosure of trial testimony to prepare a witness raises difficult questions" of professional responsibility, assistance of counsel, and the right to confrontation in criminal cases. The member expressed concern that the proposed rule would permit such orders without setting standards or limits to govern them. The member acknowledged that this vagueness was a conscious choice, but argued that it gave the judge too much discretion. Judge Schiltz responded that such discretion already exists today under the current rule. And specifying standards for such orders in the rule would be nightmarishly complicated. Judge Bates added that all the proposed rule would do is tell judges that if they want to do anything more than exclude a witness from the courtroom, the order needs to explicitly spell that out.

Another practitioner member stated he supports the proposed rule change. The proposal gives clarity, while leaving discretion to the judge to tailor an order on a case-by-case basis.

However, he questioned whether the language in the committee note was too strong in stating that an order governing disclosure of trial testimony "raises" the listed issues. Based on suggestions from this member and the other practitioner member who had raised concerns about the passage, Professor Capra agreed to redraft the paragraph's second sentence to read: "To the extent that an order governing counsel's disclosure of trial testimony to prepare a witness raises questions of professional responsibility and effective assistance of counsel, as well as the right to confrontation in criminal cases, the court should address those questions on a case-by-case basis."

Ms. Shapiro turned the Committee's attention to the committee note's discussion (page 889) of proposed Rule 615(a)(3). She suggested that the words "to try" be removed from the note's statement that an entity party seeking to have more than one witness excepted from exclusion at one time is "free to try to show" that a witness is essential under Rule 615(a)(3). "Free to try" suggests that the showing is a difficult one, when really it is routine for courts to allow the United States to except from exclusion additional necessary witnesses such as case agents. A judge member questioned whether "is free to show" is the correct phrase. Should the note say "must show" or "may show" instead? Discussion ensued concerning the relative merits of "must," "may," "should," and "needs to." Professor Capra and Judge Schiltz agreed to revise the note to say "needs to show."

Professor Bartell suggested that a committee note reference to "parties subject to the order" (page 888) be revised to say "those" instead of "parties" (since a Rule 615(b) order can also govern nonparties). Professor Capra agreed and thanked Professor Bartell.

The Advisory Committee renewed its request for final approval of Rule 615, with the three amendments to the committee note documented above.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 615.**

Rule 702. Judge Schiltz introduced this action item. Rule 702 deals with expert testimony and the proposed amendment would address two problems. The first relates to the standard the judge should apply when deciding whether to admit expert testimony. Current Rule 702 sets requirements that must be met before a witness may give expert testimony. It is clear under the caselaw and the current Rule 702 that the judge should not admit expert testimony until the judge—not the jury—finds by a preponderance of the evidence that the requirements of Rule 702 are met. However, there are a lot of decisions from numerous circuits that fail to follow that requirement, and the most common mistake is that the judge instead asks whether *a jury* could find by a preponderance of the evidence that the requirements of Rule 702 are met. As a result, very often jurors are hearing expert testimony that they should not be permitted to hear. Under a correct interpretation of current Rule 702, the proposed amendment does not change the law; it merely makes clear what the rule already says.

Second, the proposed amendment addresses the issue of overstatement, *i.e.*, where a qualified expert expresses conclusions that go beyond what a reliable application of the methods to the facts would allow. Overstatement issues typically arise with respect to forensic testimony in criminal cases. For example, the expert may say the fingerprint on the gun *was* the defendant's, or

the bullet *came from* the defendant's gun, when that level of certainty is not supported by the underlying science. For some time, the Advisory Committee has been debating and considering whether to address this issue via a rule amendment. Some members thought current Rule 702 gives attorneys all the tools they need to attack issues of overstatement, but that they were not using them. Other members thought that amending the rule would serve an educational goal and draw attention to this problem. After considerable debate, the Advisory Committee decided to amend Rule 702(d). Currently, the subdivision requires that "the expert has reliably applied the principles and methods to the facts of the case." The proposed amendment would require that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." The hope is that this change in rule language, alongside the guidance in the committee note, will shift the emphasis and encourage judges and parties to focus on the issue of overstatement, particularly concerning forensic evidence in criminal cases.

The Advisory Committee received over 500 public comments regarding the proposed amendments to Rule 702. Additionally, about two dozen witnesses spoke on the proposal at the Advisory Committee's hearing.

Professor Capra summarized the public comments. Viewed quantitatively, they were mostly negative. There was a perceptible difference of opinion between plaintiffs' and defendants' lawyers. Many comments used identical idiosyncratic language. If commenters were copying and pasting language from others' comments, that could explain some of the volume. A number of comments evinced a misunderstanding of current law. For example, many comments said the proposed amendment would shift the burden from the opponent to the proponent—an assertion premised on the incorrect idea that the burden is now on the opponent to show that proposed expert testimony is unreliable. Such misunderstandings support the need for the proposed amendment.

Additionally, many comments criticized the published proposal's use of the "preponderance of the evidence" standard. Particularly, parties were concerned that the standard meant that judges could only rely on *admissible* evidence. However, Rule 104(a) explicitly states that the court can consider inadmissible evidence. The Advisory Committee therefore did not think that these critiques had merit. Nonetheless, because the published language had proven to be a lightning rod, the Advisory Committee chose to change the language, but not the meaning, of the proposed rule text, which (as presented to the Standing Committee) requires that the "proponent demonstrates to the court that it is more likely than not" that the Rule's requirements are met.

The phrase "to the court" in that new language responded to another set of concerns voiced in the comments—namely, *who* needed to find that the preponderance of the evidence standard was met. The proposed Rule 702 as published for public comment did not specify who—whether the judge or the jury—was tasked with making this finding. Implicitly, the judge must make the finding, as all decisions of admissibility under the Federal Rules of Evidence are made by the judge. However, because of all the uncertainty in practice as to who has to make this finding, there was significant sentiment on the Advisory Committee to specify in the rule text that it is the court that must so find. The Advisory Committee explored various ways to phrase this before landing on "if the proponent demonstrates to the court that it is more likely than not" that the checklist in Rule 702 is met.

Judge Schiltz noted a change the Advisory Committee would like to make to the committee note (page 893). At the Advisory Committee meeting, a member expressed concern that the rule could be read as requiring that the judge make detailed findings on the record that each of the requirements of Rule 702 is met, even if no party objects to the expert's testimony. To alleviate that concern, the Advisory Committee added a statement in the note that "the rule [does not] require that the court make a finding of reliability in the absence of objection." Prior to the Standing Committee meeting, a judge member had expressed concern that this statement in the note was problematic. Judge Schiltz shared this concern. On the one hand, judges typically do not rule on admissibility questions unless a party objects. But on the other hand, judges are responsible for making sure that plain error does not occur. So it was not exactly right to say that "the rule" did not require a finding. Judge Schiltz accordingly proposed to change "rule" to "amendment" so that the note would say, "Nor does the amendment require that the court make a finding." Thus revised, the note would observe that the amendment was not intended to change current practice on this issue but would avoid taking a position on what Rule 702 already does or does not require. Professor Capra agreed that it was better to skirt the topic; if one were to state in Rule 702 that "there must be an objection, but even if not, there's always plain error review," then one might also need to add that caveat to all the other rules.

A judge member stated her appreciation for the changes: although they are somewhat minor, they help clarify perennial issues.

Judge Bates noted that the language regarding the preponderance of the evidence standard ("more likely than not") comes from the Supreme Court in *Bourjaily v. United States*, 483 U.S. 171 (1987). It therefore is already the law.

A practitioner member asked why the statement "if the proponent demonstrates to the court that it is more likely than not" was written in the passive tense, as opposed to active tense language, such as "if the court finds that it is more likely than not." Judge Schiltz stated that some members of the Advisory Committee were concerned that if the rule used the word "finding," that could be read as requiring the judge to make findings on the record even in the absence of an objection. The language may be awkward, but the Advisory Committee arrived at it as consensus language after years of debate.

A judge member raised a question from a case-management perspective: whether there is any difficulty combining a Rule 702 analysis with a Daubert hearing, and in what sequence these issues would arise. Professor Capra responded that the overall hearing should be thought of as a Rule 702 hearing. Rule 702 is broader than *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), which only concerned methodology. Methodology falls under current Rule 702(c). The judge member thanked Professor Capra for his answer and emphasized the importance of educating the bar and bench about that fact. Citing *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008), *as amended* (Jan. 16, 2009), Professor Marcus observed that Rule 702 issues can come up at junctures prior to trial, such as in connection with class certification.

A judge member applauded the Advisory Committee for drafting a very helpful amendment that does exactly what the Advisory Committee said it was trying to do: not change anything, but rather make clear what the law is.

Professor Capra thanked Judge Kuhl for formulating the language in proposed amended Rule 702(d). The Advisory Committee then renewed its request for final approval of Rule 702, with the one change to the committee note documented above.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 702.**

Judge Bates thanked—and members of the Standing Committee applauded – Professor Capra, Judge Schiltz, and the Advisory Committee for all their work on the proposed amendments to Rules 106, 615, and 702.

Publication for Public Comment

Judge Schiltz stated that the Advisory Committee had six proposed amendments that it was requesting approval to publish for public comment. Every few years, usually coinciding with the appointment of a new Advisory Committee chair, the Advisory Committee reviews circuit splits regarding the Federal Rules of Evidence. The Advisory Committee lets most of those splits lie, but it found that these six proposed amendments—which came as a result of that study—were worth pursuing.

Rule 611(d)—Illustrative Aids. Judge Schiltz introduced this action item. Illustrative aids are used in almost every jury trial. Nonetheless, there is a lot of confusion regarding their use, especially as to the difference between demonstrative evidence and illustrative aids; the latter are not evidence but are used to assist the jury in understanding the evidence. There also are significant procedural differences in how judges allow illustrative aids to be used, including (i) whether a party must give notice, (ii) whether the illustrative aid may go to the jury, and (iii) whether illustrative aids are part of the record. This proposed new rule, which would be Rule 611(d), was designed to clarify the distinction between illustrative aids and demonstrative evidence. The Advisory Committee is hoping that the public comments will assist it in refining the proposal. It is likely impossible to get a perfect dictionary definition of the distinction, but the Advisory Committee hoped to end up at a framework that would assist judges and lawyers in making the distinction.

The proposed new rule sets various procedural requirements for the use of illustrative aids. It would require a party to give notice prior to using an illustrative aid, which would allow the court to resolve any objections prior to the jury seeing the illustrative aid. It would prohibit jurors from using illustrative aids in their deliberations, unless the court explicitly permits it and properly instructs the jury regarding the jury's use of the illustrative aid. Finally, it would require that to the extent practicable, illustrative aids must be made part of the record. This would assist the resolution of any issues raised on appeal regarding use of an illustrative aid.

Professor Capra noted a few changes to the rule and committee note. First, Professor Kimble had pointed out that by definition notice is in advance. Therefore, the word "advance" was deleted from line 13 of the rule text (p. 1010). Second, Rule 611(d)(1)(A) sets out the balancing test the court is to use in determining whether to permit use of an illustrative aid. The provision is

intended to track Rule 403 but is tailored to the particularities of illustrative aids. In advance of the Standing Committee meeting, a judge member asked why the proposed rule in line 9 said "substantially outweighed," as opposed to just "outweighed." "Substantially outweighed" is the language in Rule 403, but the member questioned why there should be such a heavy presumption in favor of permitting use of illustrative aids. The Advisory Committee welcomes public comment on this question, and thus proposes to include the word "substantially" in brackets. Third, the same judge member had pointed out prior to the Standing Committee meeting that the committee note was incorrect in saying that illustrative aids "ordinarily are not to go to the jury room unless all parties agree" (p. 1014). Rather, he suggested "unless all parties agree" be changed to "over a party's objection." The Advisory Committee agreed to this change. Finally, Professor Capra stated that the "[s]ee" signal at the end of the carryover paragraph on page 1013 of the agenda book should be a "[c]f." signal. Rule 105 deals with evidence admitted for a limited purpose, and therefore is not directly applicable since illustrative aids are not evidence. A further change was made to the sentence immediately preceding the citation to Rule 105. Because Rule 105 does not apply, the statement that an "adverse party has a right to have the jury instructed about the limited purpose for which the illustrative aid may be used" is not correct. Rather, the adverse party "may ask to have the jury" so instructed. Professor Capra expressed agreement with this change. Later in the discussion, an academic member asked why a judge would refuse a request for such an instruction. Judge Schiltz suggested, for example, that if the judge has already given the jury many instructions on illustrative aids, she may feel that a further instruction is unnecessary. But he agreed that almost always the judge will give a limiting instruction.

Judge Bates asked about a comment in the Advisory Committee's report that it was "important to note" that the proposed rule "was not intended to regulate" PowerPoint slide presentations or other aids that counsel may use to help guide the jury in opening or closing arguments. This topic, Judge Bates noted, was a particular focus in the Advisory Committee's discussions, and he asked why it was not mentioned in the committee note. Judge Schiltz stated that the Advisory Committee was aware that likely more language would need to be added to the note, but that it wanted to receive public comments first. The debate at the Advisory Committee meeting centered around whether opening or closing slides even are illustrative aids. Participants asserted that such PowerPoints are just a summary of argument. But the rejoinder was, what if a party builds an illustrative aid into its slide presentation? Professor Capra added that the problem with adding a sentence that says that the rule does not regulate materials used during closing argument is that where an illustrative aid is built into the slide presentation, this would not be an accurate statement.

A judge member suggested that Rule 611(d)(2) should set a default rule as to whether the illustrative aid should go to the jury. As currently worded, that provision only addressed what would happen in the event of an objection. Judge Schiltz suggested setting as the default rule that it does not go to the jury. Based on this suggestion, Rule 611(d)(2) was revised to provide that "[a]n illustrative aid must not be provided to the jury during deliberations unless: (A) all parties consent; or (B) the court, for good cause, orders otherwise." Professor Capra undertook to make conforming changes to the relevant portion of the committee note.

A practitioner member stated that this proposal could turn out to be one of the most important rule changes during his time on the Standing Committee. Trials nowadays are as much

a PowerPoint show as anything else. If you are going to address the jury in opening or closing, you should be forced to share the PowerPoints in advance. Most judges require this because, otherwise, an inappropriate statement in a slide presentation could cause a serious problem. But also, slide presentations are being used in direct and cross-examination of witnesses, and with expert witnesses sometimes the entirety of the examination is guided by the slide presentation. In listing categories covered by the proposed rule, the note refers to blackboard drawings. Blackboard drawings are often created on the fly based on the answers the witness gives. There is no way to give the other party the opportunity to review such a drawing in advance. Taken literally, the member suggested, the proposed rule would basically require the judge to preview the trial testimony in advance of trial because the whole trial is being done with PowerPoints. Summing up, the member stressed the real-world importance of the proposed rule. He advised giving attention to the distinction between experts and fact witnesses. A requirement for notice would play out differently as applied to openings and closings, versus direct examination, versus cross-examination. If a lawyer must give opposing counsel the direct-examination PowerPoints in advance, opposing counsel can use those slides in preparing the cross-examination. The rulemakers should think about how that would change trials. The member advocated seeking comment from thoughtful practitioners such as members of the American College of Trial Lawyers.

Professor Capra agreed that these are important questions, and he hoped that practitioner input at the upcoming Advisory Committee meeting and hearings will provide guidance. He stated that the goal of the rule is not to touch on every issue that may come up but rather to create a framework for handling illustrative aids. How far to go into the details is still an open question. Judge Schiltz acknowledged that the proposal presents challenging issues, and observed that the Advisory Committee's upcoming fall symposium would provide helpful input. He noted that the notice requirement can be met by disclosing the illustrative aid minutes prior to presenting it to the jury. This allows the court to resolve any objections before the jury sees the aid. The same practitioner member reiterated that although opening and closing slides should be disclosed before use, he does not think that will work with illustrative aids used with witnesses. Judge Schiltz said the views of practitioner members of the Advisory Committee were the exact opposite: opening and closing slides are sacrosanct, but items to be shown to a witness can be disclosed prior to use.

Another practitioner member agreed with the description of current trial practice provided by the first practitioner member. He stated that the broader the scope of the rule, the more the word "substantially" needs to be retained. Additionally, when you use a slide presentation with a witness, you are trying to synthesize what you think the witness will say. When you use a slide presentation for opening or closing, it is in essence your argument. Disclosing that feels strategically harmful. Once the Advisory Committee receives the public comments, it will be critical to explain when the rule applies and when it does not. For example, the rule refers to using illustrative aids to help the factfinder "understand admitted evidence." Judges who think that PowerPoints are illustrative aids might bar their use in opening arguments because no evidence has yet been admitted.

The Advisory Committee requested approval to publish for public comment proposed new Rule 611(d), with the changes as noted above to both the rule and committee note.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 611.**

Rule 1006. Judge Schiltz introduced this action item as a companion item to the Rule 611(d) proposal. Rule 1006 provides that a summary of voluminous records can itself be admitted as evidence if the underlying records are admissible and too voluminous to be examined in court. Many courts fail to distinguish between summaries of evidence that are themselves evidence, which are covered by Rule 1006, and summaries of evidence that are merely illustrative aids. Judges often mis-instruct juries that Rule 1006 summaries are not evidence when they are in fact evidence. And some courts have refused to allow Rule 1006 summaries when any of the underlying records have been admitted as evidence, while other courts have refused to allow Rule 1006 summaries *unless* the underlying records are also admitted into evidence, neither of which is a correct application of the rule. Rather, Rule 1006 allows parties to use these summaries in lieu of the underlying records regardless of whether any of the underlying records have been admitted in their own right.

A practitioner member stated he thought this was a good rule. He queried whether the rule should mention "electronic" summaries, but he concluded that it was probably unnecessary because that would be covered by the general term "summary." Professor Capra noted that under Rule 101(b)(6), the Rule's reference to "writings" includes electronically stored information.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 1006.**

Rule 611(e)—Juror Questions. Judge Schiltz introduced this action item. This proposed new rule subdivision does not take a position on whether judges should permit jurors to ask questions. Instead, the rule sets a floor of protection that a judge must follow if the judge determines that juror questions are permissible in a given case. These protections were pulled together from a review of the caselaw regarding juror questions.

A practitioner member stated that he cannot recall ever having a jury trial where a judge permitted juror questioning. He asked whether there is a sense as to how prevalent the practice is. He noted that once this is in the rulebook, it has the potential to come in in every case, and that could transform the practice in the country. Judges who do not allow the practice may feel compelled to permit it. Judge Schiltz stated that he does not permit juror questions but another judge in his district does so in civil cases. Another district judge reported that some judges in the Northern District of Illinois permit the practice, though he does not, and it is controversial. Judge Bates reported similar variation in the District of Columbia, although he does not permit juror questions. Judge Schiltz acknowledged that having a rule in the rulebook would appear to give an imprimatur to the practice. But the practice is fairly widespread and is not going away.

A judge member stated that the practice is prevalent in her district, in part because many of the judges previously were state-court judges and Arizona allows juror questions. She did not take a position on whether to adopt the rule, but she offered some suggestions on its drafting. She

thought proposed Rule 611(e)(1) did an excellent job of covering instructions to the jurors. However, Rule 611(e)(1)(F)'s requirement of an instruction that "jurors are neutral factfinders, not advocates," gave her pause. Jurors may be confused as to how to incorporate that instruction into what they may or may not ask. She suggested that this might be explained in the committee note. Additionally, she suggested considering whether the rule should address soliciting the parties' consent to jurors asking questions. Finally, she noted that Rule 611(e)(3) uses two different verbs: the judge must *read* the question, or allow a party to *ask* the question. Professor Capra responded that "ask" is meant to reflect that one of the counsel may want to ask the question, that is, make it their own question. A judge would do nothing more than read it. Another judge member stated that though he did not permit juror questions himself, the practice was sufficiently prevalent that it made sense to have a rule on point. He pointed out a discrepancy between the rule text and note (the note said that the judge should not disclose which juror asked the question, but the rule itself did not so provide). He also questioned the read / ask distinction in Rule 611(e)(3). Responding to a suggestion by Judge Schiltz, this member agreed that this concern could be addressed by revising the provision to state, "the court must ask the question or permit one of the parties to do so." A bit later, discussion returned to the read / ask distinction, and it was suggested that "read" was a better choice than "ask" because the judge might wish to emphasize to jurors that questions should not be asked extemporaneously. Another judge member then used the term "pose," and Professor Capra agreed that "pose" was a better choice than "read" or "ask."

Professor Bartell noted that subsection (3) only mentions questions that are "asked," while other subsections distinguish "asked, rephrased, or not asked." While it seems subsection (3) is meant to apply both to questions that are asked and those that are first rephrased, it is ambiguous, and subsection (3) could be read as not applying to questions that are rephrased.

A practitioner member asked whether this rule was modeled after a particular judge's standing order, and whether such resources could be cited in the committee note to illustrate that the practice already exists. Professor Capra stated that he reviewed the caselaw and included all the requirements found in the caselaw that were appropriate to include in a rule. But he agreed that it would be useful to cite other resources, such as the Third Circuit's model civil jury instruction, in the committee note.

Another practitioner member reiterated his concern that by putting this out for public comment, the Standing Committee is in essence putting its imprimatur on this practice. This is a controversial practice, and there are a number of judges who do not allow it. This member suggested revising Rule 611(e)(1) to state that the court has discretion to refuse to allow jurors to ask questions. Professor Capra stated that this suggestion gave him pause. There may be requirements in some jurisdictions that courts must permit the practice, or there may be such requirements in the future. The Advisory Committee did not want to take a stand either way.

Judge Bates asked whether Judge Schiltz and Professor Capra would consider taking the Rule 611(e) proposal back to the Advisory Committee to consider the comments of the Standing Committee. Professor Capra stressed the value of sending proposals out for comment in one large package rather than seriatim. Judge Bates noted, however, that the Rule 611(d) and 611(e) amendments are both new subdivisions that deal with entirely different matters.

A judge member stated that although she herself is "allergic" to the practice of jurors asking questions, the practice exists and the rules should account for it. But this member expressed agreement with Judge Bates's suggestion that the Advisory Committee consider these issues further before putting the rule out for public comment.

An academic member stated that his instinct was not to delay publication. By contrast to the Bankruptcy Rules, which are frequently amended, the tradition with the Evidence Rules has always been to try to avoid constant changes and—instead—to make amendments only periodically, in a package. The comments from the Standing Committee were important, and it was possible the Advisory Committee would decide not to go forward with the proposal after public comment; but this member favored sending the proposal forward for public comment.

Another judge member stated she agreed with Judge Bates. She could not recall there ever being an appellate issue regarding juror questions, and she favored waiting for the issue to percolate before adopting a rule on the issue. Additionally, judges who do allow juror questioning are very careful already. The judge member also questioned whether the rule should distinguish between the practice in civil and criminal cases. Had the Advisory Committee received any feedback from the criminal defense bar? What about from the government? This member agreed with the prediction that if the rule were to go forward without a caveat up front, it would be a signal to judges that they should be permitting the practice. Professor Capra stated that there has been a case in every circuit so far. He added that the public defender on the Advisory Committee voted in favor of the rule.

A judge member stated that if and when the rule did go out for public comment, the Advisory Committee should ask for comment on whether the practice should be allowed, not allowed, or left to the judge's discretion. Judge Bates added that even if the Advisory Committee did not specifically ask for it, the public comments would likely state whether that commentator thought the practice should be permitted.

Another judge member suggested that the rulemakers should be open to regional variations. The practice arose in Arizona state court and was adopted in the California state courts, and then as the state judges have moved on to the federal bench, they have taken the practice with them. The practice, this member suggested, is not as rare as it might seem to those on the East coast. Another judge member pointed out that the Ninth Circuit's model jury instruction addressing juror questions is presented in a way that makes clear that the judge has the option to allow or not allow juror questions. This has the benefit of clarifying that it is discretionary while still providing guidance.

As a result of the comments and suggestions received from the Standing Committee, the Advisory Committee withdrew the request for publication for public comment.

Rule 613(b). Judge Schiltz introduced this action item as an item that would conform Rule 613(b) to the prevailing practice. At common law, prior to introduction of extrinsic evidence of a prior inconsistent statement for impeachment purposes, the witness must be given an opportunity to explain or deny the statement. By contrast, current Rule 613(b) allows this opportunity to be given at any time, whether prior or subsequent to introduction of extrinsic evidence of the

statement. However, judges tend to follow the old common law practice, and the Advisory Committee agrees with that practice as a policy matter. Most of the time, the witness will admit to making the statement, obviating the need to introduce the extrinsic evidence in the first place. The proposed amendment would still give the judge discretion in appropriate cases to allow the witness an opportunity to explain or deny the statement after introduction of extrinsic evidence, such as when the inconsistent statement is only discovered after the witness finishes testifying and has been excused.

Professor Capra noted one style change to the rule, which moves the phrase "unless the court orders otherwise" to the beginning of the rule.

A practitioner member stated that he thought this was an excellent proposal.

Professor Kimble suggested changing "may not" to "must not." The style consultants tend to prefer "must not" in most situations. Professor Capra thought this suggestion would substantively change the rule. A party may not introduce the evidence unless the court orders otherwise, but the judge could allow it. It is not a command to the judge to not admit the evidence. Judge Schiltz stated he did not feel strongly one way or another, but based on Professor Capra's objection would keep the language as "may not."

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 613(b).**

Rule 801(d)(2). Judge Schiltz introduced this action item, which concerns an amendment to the hearsay exemption for statements by a party-opponent. There is a split of authority on how the rule applies to a successor in interest of a declarant. Suppose, for example, that the declarant dies after making the statement; is the statement admissible against the declarant's estate? The Advisory Committee was unanimous in thinking the answer should be yes.

A judge member highlighted the statement in the committee note that the exemption only applies to a successor in interest if the statement was made prior to the transfer of interest in the claim. The member observed that this was obvious as a matter of principle, but it was not obvious from the text of the rule itself. He suggested that this is a sufficiently important limitation that it ought to be in the rule itself. Professor Capra undertook to consider this suggestion further during the public comment period; he suggested that writing the limit explicitly into the rule text might be challenging and also that the idea might already be implicit in the rule text.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 801(d)(2).**

Rule 804(b)(3). Judge Schiltz introduced the proposed amendment to Rule 804(b)(3)(B) set out on page 1029 of the agenda book. Rule 804(b)(3) provides a hearsay exception for declarations against interest. Rule 804(b)(3)(B) deals with the situation in a criminal case when a statement exposes the declarant to criminal liability. This tends to come up when a criminal

defendant wants to introduce someone else's out-of-court statement admitting to committing the crime. Rule 804(b)(3)(B) requires that defendant to provide "corroborating circumstances that clearly indicate [the] trustworthiness" of the statement. The circuits are split concerning the meaning of "corroborating circumstances." Some circuits have said the court may only consider the guarantees of trustworthiness inherent in the statement itself. Other circuits allow the judge to additionally consider other evidence of trustworthiness, even if extrinsic to the statement. The proposed amendment would direct judges to consider all the evidence, both that inherent in the statement itself and any evidence independent of the statement.

A judge member noted that the rule only talks about corroborating evidence, not conflicting evidence, while the note speaks both to corroborating and conflicting evidence. Judge Schiltz stated that he made this point at the Advisory Committee meeting, but the response was that mentioning conflicting evidence in the text of Rule 804(b)(3) would necessitate a similar amendment to the corresponding language in Rule 807(a)(1). Professor Capra stated that courts applying Rule 807 do consider conflicting evidence, even though the rule text only says "corroborating." It is better to keep the two rules consistent than to have people wondering why Rule 804(b)(3) mentions conflicting evidence while Rule 807 does not. The judge member observed that one way to resolve the problem would be to make a similar amendment to Rule 807. Judge Bates noted that this could be considered during the public comment period.

A practitioner member asked why, in line 25, it says "the totality of the circumstances," but in the next line it does not say *the* "evidence." Should the word "the" be added on line 26? Professor Capra undertook to review this with the style consultants during the public comment period.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 804(b)(3).**

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Bybee and Professor Hartnett provided the report of the Advisory Committee on Appellate Rules, which met in San Diego on March 30, 2022. The Advisory Committee presented an action item and briefly discussed one information item. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 199.

Action Item

Publication for Public Comment

Amendments to Appendix of Length Limits. Judge Bybee introduced this action item. The Standing Committee had already approved for publication for public comment proposed amendments to Rules 35 and 40 regarding petitions for panel rehearing and hearing and rehearing en banc, as well as conforming amendments to Rule 32 and the Appendix of Length Limits (Appendix). Subsequent to that approval, the Advisory Committee noticed an additional change that needed to be made in the Appendix. Namely, the third bullet point in the introductory portion

of the Appendix refers to Rule 35, but the proposed amendments to Rules 35 and 40 would transfer the contents of Rule 35 to Rule 40. As the amendment to the Appendix has not yet been published for public comment, the Advisory Committee would like to delete this reference to Rule 35 in the Appendix and to include that change along with the other changes approved in January for publication for public comment.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to the Appendix of Length Limits.**

Information Items

Amicus Curiae Disclosures. Professor Hartnett introduced the information item concerning potential amendments to Rule 29's amicus curiae disclosure requirements. The Advisory Committee was seeking feedback from the Standing Committee regarding four questions. Due to time constraints, Professor Hartnett chose to ask just two of the questions at the meeting. The first question asked concerned the relationship between a party and an amicus. The Advisory Committee was trying to get a sense of whether disclosure of non-earmarked contributions by a party to an amicus should be disclosed, and, if so, at what percentage. The competing views ranged from those who say these should not be disclosed at all because a contributor does not control what an amicus says, to those who say significant contributors (*i.e.*, at least 25 or 30 percent of the amicus's revenue) have such a significant influence over an amicus that the court and the public should know about it. Second, regarding the relationship between an amicus and a non-party, the Advisory Committee sought feedback on whether an amended rule should retain the exception to disclosure for contributions by members of the amicus that are earmarked for a particular amicus brief. A point in support of retaining the exception was that an amicus speaks for its members, and therefore these contributions need not be disclosed. Points against retaining the exception were that there is a big difference between being a general contributor to an amicus and giving money for the purpose of preparing a specific brief, and it is easy to evade disclosure requirements by first becoming a member of the amicus and then giving money to fund a particular brief.

Judge Bates stated these are important questions and ones that the Standing Committee should focus on. He encouraged members to share any comments with Professor Hartnett and Judge Bybee after the meeting.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Dennis Dow, Professor Gibson, and Professor Bartell provided the report of the Advisory Committee on Bankruptcy Rules, which last met via videoconference on March 31, 2022. The Advisory Committee presented eleven action items: seven for final approval, and four for publication for public comment. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 250.

Action Items

Final Approval

Restyled Rules for the 3000-6000 Series. Judge Dow introduced this action item, which presented for final approval the restyled Rules in the 3000 to 6000 series. The Standing Committee already gave final approval for the 1000 and 2000 series. The Advisory Committee received extensive public comments from the National Bankruptcy Conference on these rules, in addition to a few other public comments. Some of these comments led to changes. Professor Bartell noted that the Advisory Committee was not asking to send these rules to the Judicial Conference quite yet; rather, like the 1000 and 2000 series, they should be held until the remainder of the restyling project is completed.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed restyled Rules for the 3000-6000 series.**

Rule 3011. Judge Dow introduced this action item, which would add a subsection to Rule 3011 to require clerks to provide searchable access on each bankruptcy court's website to information about funds deposited under Section 347 of the Bankruptcy Code. This is part of a nationwide effort to reduce the amount of unclaimed funds. He noted that the Advisory Committee received one public comment, which led it to substitute the phrase "information about funds in a specific case" for the phrase "information in the data base for a specific case."

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 3011.**

Rule 8003. Judge Dow introduced this action item to conform the rule to recent amendments to Appellate Rule 3. No public comments were received on this proposed rule amendment.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 8003.**

Official Form 101. Judge Dow introduced this action item. Questions 2 and 4 of the individual debtor petition form, which concern other names used by the debtor over the past 8 years, would be amended to clarify that the only business names that should be reported are those the debtor actually used in conducting business, not the names of separate legal entities in which the debtor merely had an interest. This change would avoid confusion and make this form consistent with other petition forms. The Advisory Committee received one public comment; it made no changes based on this comment.

Judge Bates clarified for the Standing Committee that in contrast to some other forms, Official Bankruptcy forms must be approved by the Judicial Conference through the Rules Enabling Act process.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Form 101.**

Official Forms 309E1 and 309E2. Judge Dow introduced this action item regarding forms that are used to give notice to creditors after a bankruptcy filing. The Advisory Committee improved the formatting and edited the language of these forms in order to clarify the applicability of relevant deadlines. The Advisory Committee did not receive any comments, and its only post-publication change was to insert a couple of commas.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendments to Forms 309E1 and 309E2.**

Official Form 417A. Judge Dow introduced this action item. This form amendment is to conform the form to the amendments to Rule 8003. There were no public comments on this proposed form amendment.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Form 417A.**

Publication for Public Comment

Restyled Rules for the 7000-9000 Series. Judge Dow introduced this action item, which sought approval to publish for public comment the next portion of the proposed restyled rules. The Advisory Committee applied the same approach to these rules as it did when restyling the first six series.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed restyled Rules for the 7000 to 9000 series.**

Rule 1007(b)(7). Judge Dow introduced this action item. Under the current rule, debtors are required to complete an approved debtor education course and file a "statement" on an official form evidencing completion of that course before they can get a discharge in bankruptcy. As revised, the rule would instead require filing the certificate of completion from the course provider, as that is the best evidence of compliance. The amendment would also remove the requirement that those who are exempt must file a form noting their exemption. This requirement is redundant, as in order to get an exemption, the debtor would have to file a motion, and the docket will therefore already contain an order approving the exemption.

The Advisory Committee also sought approval to publish conforming amendments changing "statement" to "certificate" in another subsection of Rule 1007 and in Rules 4004, 5009, and 9006.

A judge member noted, and the Advisory Committee agreed to remedy, a typo on page 666, line 14 of the agenda book ("if" should be "is").

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 1007(b)(7) and conforming amendments to Rules 1007(c)(4), 4004, 5009, and 9006.**

New Rule 8023.1. Judge Dow introduced this action item, which concerned a proposed new rule dealing with substitution of parties. While Civil Rule 25 (Substitution of Parties) applies to adversary proceedings, the Part VIII rules (which govern appeals in bankruptcy cases) do not currently mention substitution. Proposed new Rule 8023.1 is based on, and is virtually identical in language to, Appellate Rule 43.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed new Rule 8023.1.**

Official Form 410A. Judge Dow introduced this action item to amend the attachment to the proof-of-claim form that a creditor with a mortgage claim must file. The amendment revises Part 3 of the attachment (regarding the calculation of the amount of arrearage at the time the bankruptcy proceeding is filed) to break out principal and interest separately.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Official Form 410A.**

Information Items

Judge Dow briefly noted that the Bankruptcy Threshold Adjustment and Technical Correction Act had not yet been enacted by Congress, but if and when it were to be enacted, the Advisory Committee would seek final approval of technical amendments to a couple of forms and would ask the Administrative Office to repost an interim version of Rule 1020 for adoption by bankruptcy courts as a local rule. He also mentioned, but did not discuss at length, three other information items in the agenda book.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Robert Dow, Professor Cooper, and Professor Marcus provided the report of the Advisory Committee on Civil Rules, which last met in San Diego on March 29, 2022. The Advisory Committee presented two action items and five information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 722.

Action Items

Final Approval

Rule 15(a)(1). Judge Dow introduced this action item, a proposed amendment to Rule 15(a)(1) for which the Advisory Committee was requesting final approval. The proposed amendment would replace the word "within" with the phrase "no later than." This change clarifies that where a pleading is one to which a responsive pleading is required, the time to amend the pleading as of right continues to run until 21 days after the earlier of the events delineated in Rule 15(a)(1)(B). The Advisory Committee received a few comments, but it made no changes based on these comments. In the committee note, it deleted one sentence that had been published in brackets and that appeared unnecessary.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 15(a)(1).**

Rule 72(b)(1). Judge Dow introduced this action item, which presented for final approval a proposed amendment to Rule 72(b)(1) (concerning a recommended disposition by a magistrate judge). The proposed amendment would bring the rule into conformity with the prevailing practice of district clerks with respect to service of the recommended disposition. Most parties have CM/ECF access, so the current rule's requirement of mailing the magistrate judge's recommendations is unnecessary. The amendment permits service of the recommended disposition by any means provided in Rule 5(b). The Advisory Committee received very few public comments. In the committee note, it deleted as unnecessary one sentence that had been published in brackets.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 72(b)(1).**

Information Items

Rule 12(a)(4). Judge Dow introduced this information item, which concerned a proposed amendment to Rule 12(a)(4) that was initially suggested by the DOJ and had been published for comment in August 2020. The Advisory Committee received only a handful of public comments, but two major comments were negative. Rule 12(a)(4) sets a presumptive 14-day time limit for filing a responsive pleading after denial of a motion to dismiss. This means that the DOJ only has 14 days after denial of a motion to dismiss on immunity grounds in which to decide whether to appeal the immunity issue; but courts frequently grant it an extension. The proposed amendment would have flipped the presumption, giving the DOJ 60 days as opposed to 14 unless the court shortened the time. The Advisory Committee considered a number of options, including a compromise time between 14 and 60 days, as well as providing the longer 60-day period only for cases involving an immunity defense.

The DOJ was unable to collect quantitative data as to how often it sought and received extensions. As a result, and based on the comments received and the views of both the Standing

and Advisory Committees members, the Advisory Committee voted not to proceed further with the proposed amendment to Rule 12(a)(4).

Judge Bates clarified that because the proposed amendment had not emerged from the Advisory Committee, this was not an action item, and therefore no vote of the Standing Committee was required.

Rule 9(b). Judge Dow introduced this information item, which concerned a proposal to amend the second sentence of Rule 9(b) in light of the Supreme Court's interpretation of that provision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The Advisory Committee had appointed a subcommittee to study the proposal. However, the subcommittee found that there were not many cases coming up that indicated a problem. Moreover, a number of Advisory Committee members thought *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Iqbal* were working pretty well in their cases. Therefore, the Advisory Committee chose not to proceed further.

Rule 41. Judge Dow noted this project, which was prompted by a suggestion from Judge Furman to study Rule 41(a)(1)(A). The initial question is whether that provision authorizes voluntary dismissal only of an entire action, or whether it also authorizes voluntary dismissal as to fewer than all parties or claims. The Advisory Committee appointed a subcommittee, which will study this issue and probably also Rule 41 more generally.

Discovery Subcommittee. Judge Dow provided an update on the Discovery Subcommittee, which is focused primarily on privilege log issues. The subcommittee met with bar groups and attended a two-day conference. There seems to be some common ground between the plaintiff and defense bar for procedures for privilege logs. There may be some forthcoming proposals to amend Rules 16 and 26 to deal with these procedural issues, particularly to encourage parties to hash out privilege-log issues early on.

The Discovery Subcommittee has paused its research into sealing issues pending an Administrative Office study of filing under seal.

MDL Subcommittee. Judge Dow introduced this information item. About fifty percent of federal civil cases are part of an MDL. The subcommittee's thinking continues to evolve as it receives input from the bench, the bar, and academics. About a year ago, the subcommittee was looking at the possibility of proposing a new Rule 23.3 (addressing judicial appointment and oversight of leadership counsel). The subcommittee then shifted and thought about revising Rules 16 and 26 to set prompts concerning issues that MDL judges ought to think about. Now, the subcommittee has begun to consider a sketch of a proposed Rule 16.1, which would contain a list of topics on which parties in an MDL could be directed to confer. Flexibility is critical, and any rule will just offer the judge tools to use in appropriate instances.

At a March 2022 conference at Emory Law School, the subcommittee heard from experienced transferee judges that lawyers can do a great service to the transferee judge by explaining their views of the case early on. The judge could then decide which of the prompts in the proposed rule fits the case. The rule would list issues on which the judge could require the lawyers to give their input.

The subcommittee has been focusing closely on the importance of an initial census. The initial census is key because it can tell the judge and parties who has the cases and what kinds of cases there are, and can help the judge make decisions on leadership counsel.

The subcommittee will work over the summer on the sketch of Rule 16.1 so as to tee up the question of whether or not to advance it. Judge Dow expressed a hope that the subcommittee would complete its work in the coming year.

Jury Trials. Judge Bates highlighted the portion of the Advisory Committee's report (pages 751–72) concerning the procedures for demanding a jury trial. Though the Advisory Committee has deferred consideration of this issue for the moment, Judge Bates suggested that it may be important to deal with it at some point. Judge Dow and Professor Cooper explained that Congress enacted legislation directing the FJC to study what factors contribute to a higher incidence of jury trials in jurisdictions that have more of them. Dr. Lee has launched that study, and predicts that he will have a short report on the topic ready for the Advisory Committee's fall agenda book.

OTHER COMMITTEE BUSINESS

Adequacy of the Privacy Rules Prescribed Under the E-Government Act of 2002. Professor Struve presented this item, which concerned a report required under the E-Government Act of 2002. She thanked all the Advisory Committee chairs and reporters, Judge Bates, and the Rules Office staff for their work on this report. The privacy rules, which impose certain redaction requirements, took effect in 2007. The idea of the report is to evaluate the adequacy of these rules to protect privacy and security. The report does so in three ways: it discusses amendments (relevant to the privacy rules) that have been adopted since 2011 (the date of the last report); it notes privacy-adjacent items that are pending on the rules committees' dockets; and it discusses other privacy-related concerns discussed since 2011 that did not give rise to rule amendments because the rules committees determined that rule amendments were not the way to address those concerns. A new report to Congress will be prepared every two years going forward.

Professor Struve noted that the Standing Committee was asked to approve the proposed Report on the Adequacy of the Privacy Rules Prescribed Under the E-Government Act of 2002, and to recommend that the Judicial Conference forward the report to Congress.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously voted to approve the proposed Report on the Adequacy of the Privacy Rules Prescribed Under the E-Government Act of 2002 and to recommend that the Judicial Conference forward the report to Congress.**

Legislative Report. The Rules Law Clerk delivered a legislative report. The chart in the agenda book at page 1051 summarized legislation currently pending before Congress, as well as the Juneteenth National Independence Day Act, which passed and was signed into law by President Biden in 2021.

Judiciary Strategic Planning. Judge Bates addressed the Judiciary Strategic Planning item, which appeared in the agenda book at page 1061. The Judicial Conference requires the Standing Committee to submit a report on its strategic initiatives. He asked the Standing Committee for approval to submit the report.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the Judiciary Strategic Planning report for submission to the Judicial Conference.**

CONCLUDING REMARKS

Before adjourning the meeting, Judge Bates thanked the Standing Committee members and other attendees for their attention and insights. The Standing Committee will next meet on January 4, 2023. The location of the meeting had not yet been confirmed. Judge Bates expressed the hope that the meeting would take place somewhere warm.

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 2, 4, 26, and 45, 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. 4-6

2. a. Approve the proposed amendments to Bankruptcy Rules 3011, 8003, and 9006, and proposed new Bankruptcy Rule 9038, 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; and

   b. Approve, effective December 1, 2022, the proposed amendments to Bankruptcy Official Forms 101, 309E1, and 309E2, and effective December 1, 2023, the proposed amendment to Bankruptcy Official Form 417A, 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. 7-10

3. Approve the proposed amendments to Civil Rules 6, 15, and 72, and proposed new Civil Rule 87, 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. 14-17

4. Approve the proposed amendments to Criminal Rules 16, 45, and 56, and proposed new Criminal Rule 62, as set forth in Appendix D, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 18-21

5. Approve the proposed amendments to Evidence Rules 106, 615, and 702, as set forth in Appendix E, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 22-24

6. Approve the proposed 2022 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 F, and ask the Administrative Office Director to transmit it to Congress in accordance with the law ..... pp. 28-29

The remainder of the report is submitted for the record and includes the following 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 7, 2022. All members participated.

Representing the advisory committees were Judge Jay S. Bybee, Chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Dennis Dow, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robert M. Dow, Jr., Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, Advisory Committee on Civil Rules; Judge Raymond M. Kethledge, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and 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; Allison Bruff, Bridget Healy, and Scott Myers, Rules Committee Staff Counsel; Burton S. DeWitt, Law Clerk to the Standing Committee; Dr. Tim Reagan and Dr. Emery Lee, Senior Research Associates, Federal Judicial Center (FJC); and Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, and Andrew Goldsmith, National Coordinator of Criminal Discovery Initiatives,

representing the Department of Justice (DOJ) on behalf of Deputy Attorney General Lisa O. Monaco.

In addition to its general business, including a review of the status of pending rule amendments in different stages of the Rules Enabling Act process and pending legislation affecting the rules, the Standing Committee received and responded to reports from the five advisory committees. Among other things, the advisory committee reports discussed two items that affect multiple rule sets: (1) recommendations from the Appellate, Bankruptcy, Civil, and Criminal Rules Committees for final approval of rules addressing future emergencies; and (2) recommended technical amendments to those four rule sets addressing Juneteenth National Independence Day.

The Committee also received an update on two items of coordinated work among the Appellate, Bankruptcy, Civil, and Criminal Rules Committees: (1) consideration of suggestions to allow electronic filing by pro se litigants; and (2) consideration of suggestions to change the presumptive deadline for electronic filing. Finally, the Committee approved the proposed 2022 Report on the Adequacy of the Privacy Rules Prescribed Under the E-Government Act of 2002, was briefed on the judiciary's ongoing response to the COVID-19 pandemic, and approved a draft report regarding judiciary strategic planning.

PROPOSED EMERGENCY RULES

The proposals recommended for the Judicial Conference's approval include a package of rules for use in emergency situations that substantially impair the courts' ability to function in compliance with the existing rules of procedure. These rules were developed in response to Congress's directive in the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") that rules be considered, under the Rules Enabling Act, to address future emergencies. The set of proposed amendments and new rules developed in response to this charge includes an

amendment to Appellate Rule 2 (and a related amendment to Appellate Rule 4); new Bankruptcy Rule 9038; new Civil Rule 87; and new Criminal Rule 62. The proposed amendments and new rules were published for public comment in August 2021.

Although there are some differences in the four proposed emergency rules – the Appellate rule is much more flexible, and the Bankruptcy, Civil, and Criminal rules provide for different types of rule deviations in a declared emergency – they share some overarching, uniform features. Each rule places the authority to declare a rules emergency solely in the hands of the Judicial Conference. Each rule uses the same basic definition of a "rules emergency" – namely, when "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules." The Bankruptcy, Civil, and Criminal rules take a roughly similar approach to the content of the emergency declaration, setting ground rules to make clear the scope of the declaration. Each emergency rule limits the duration of the declaration; provides for additional declarations; and accords the Judicial Conference discretion to terminate an emergency declaration before the declaration's stated termination date. The Bankruptcy, Civil, and Criminal rules each address what will happen when a proceeding that has been conducted under an emergency rule continues after the emergency has terminated, though each rule does so with provision(s) tailored to take account of the different contexts and subject matters addressed by the respective emergency provisions.

To the extent that public comments touched on uniform aspects of the emergency rules, those comments focused on the role of the Judicial Conference. Some commentators criticized the decision to place in the hands of the Judicial Conference the authority to declare or terminate a rules emergency, though another commentator specifically supported the decision to centralize authority in the Judicial Conference. One commentator argued that there should be a backup

plan in case the emergency prevents the Judicial Conference from acting. The Advisory Committees reviewed these comments and uniformly concluded that the Judicial Conference was fully capable of responding to rules emergencies, and that the uniform approach of the Judicial Conference was preferable to other approaches involving more decisionmakers. Accordingly, the Advisory Committees voted to retain, as published, the substance of all of the uniform features of the set of proposed emergency rules. A few post-publication changes to the Appellate Rule's text, the Civil Rule's text and note, and the Criminal Rule's text and note are discussed below in connection with the recommendations of the respective Advisory Committees.

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 2, 4, 26, and 45.

Rule 2 (Suspension of Rules)

The proposed amendment to Appellate Rule 2 is part of the set of proposed rules, mentioned above, that resulted from the CARES Act directive that rules be considered to address future emergencies. The proposal adds a new subdivision (b) to Appellate Rule 2. Existing Rule 2, which would become Rule 2(a), empowers the courts of appeals to suspend the provisions in the Appellate Rules "in a particular case," except "as otherwise provided in Rule 26(b)." (Rule 26(b) provides that "the court may not extend the time to file: (1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or (2) a notice of appeal from or a [petition to review an order of a federal administrative body], unless specifically authorized by law.") New Rule 2(b) would come into operation when the Judicial Conference declares an Appellate Rules emergency and would empower the court of appeals to "suspend in

all or part of that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2)."

In the event of a Judicial Conference declaration of an Appellate Rules emergency, a court of appeals' authority under Rule 2(b) would be broader in two ways than a court of appeals' everyday authority under Rule 2(a). First, the suspension power under Rule 2(b) reaches beyond a particular case. Second, the Rule 2(b) suspension power reaches time limits to appeal or petition for review, so long as those time limits are established only by rule. (Rule 2(b) does not purport to empower the court to suspend time limits to appeal or petition for review set by statute.)

Rule 4 (Appeal as of Right—When Taken)

The proposed amendment to Appellate Rule 4 is designed to make Appellate Rule 4 operate smoothly with Emergency Civil Rule 6(b)(2) (discussed below) if that Emergency Civil Rule is ever in effect, while not making any change to the operation of Appellate Rule 4 at any other time.

It does this by replacing the phrase "no later than 28 days after the judgment is entered" in Rule 4(a)(4)(A)(vi) with the phrase "within the time allowed for filing a motion under Rule 59." When Emergency Civil Rule 6(b)(2) is not in effect, this amendment makes no change at all. But if Emergency Civil Rule 6(b)(2) is ever in effect, a district court might extend the time to file a motion under Rule 59. If that happens, the amendment to Appellate Rule 4(a)(4)(A)(vi) would allow Appellate Rule 4 to properly take that extension into account.

Rule 26 (Computing and Extending Time) and Rule 45 (Clerk's Duties)

In response to the enactment of the Juneteenth National Independence Day Act (Juneteenth Act), Pub. L. No. 117-17 (2021), the Advisory Committee made technical amendments to Rules 26(a)(6)(A) and 45(a)(2) to insert "Juneteenth National Independence

Day" immediately following "Memorial Day" in the Rules' lists of legal holidays. Because of the technical and conforming nature of the amendments, the Advisory Committee recommended final approval without publication.

The Standing Committee unanimously approved the Advisory Committee's recommendations, after making a stylistic change to Appellate Rule 2(b)(4) to conform that Rule's language to the language used in the other Emergency Rules.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 2, 4, 26, and 45, 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 Approved for Publication and Comment

The Advisory Committee on Appellate Rules submitted proposed amendments to the Appendix of Length Limits Stated in the Federal Rules of Appellate Procedure with a recommendation that they be published for public comment in August 2022. The proposed amendments to the Appendix would conform with proposed amendments to Rules 35 and 40, which were approved for publication for public comment. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Information Items

The Advisory Committee met on March 30, 2022. In addition to the matters noted above, the Advisory Committee discussed whether to propose an amendment to Rule 39 clarifying the process for challenging the allocation of costs on appeal and whether to propose amending Form 4 to simplify the disclosures required in connection with a request for in forma pauperis status. It referred to a subcommittee a new suggestion that Rule 29 be amended to require identification of any amicus or counsel whose involvement triggered the striking of an amicus brief. The Advisory Committee also continued its discussion of whether to propose amendments to Rule 29

with respect to disclosures concerning the relationship between an amicus and either parties or nonparties.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Forms Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules recommended for final approval the following proposals: Restyled Bankruptcy Rules for the 3000-6000 series; amendments to Bankruptcy Rules 3011, 8003, and 9006; new Bankruptcy Rule 9038; and amendments to Official Forms 101, 309E1, 309E2, and 417A. The Advisory Committee also recommended all of the foregoing for transmission to the Judicial Conference other than the restyled rules; the latter will be held for later transmission once all the bankruptcy rules have been restyled.

Restyled Rules Parts III, IV, V, and VI (the 3000-6000 series of Bankruptcy Rules)

The National Bankruptcy Conference submitted extensive comments on the restyled rules, and several others submitted comments as well. After discussion with the style consultants and consideration by the Restyling Subcommittee, the Advisory Committee incorporated some of those suggested changes into the revised rules and rejected others. (Some of the rejected suggestions were previously considered in connection with the 1000-2000 series of restyled rules, and the Advisory Committee adhered to its prior conclusions about those suggestions as noted at pages 10-11 in the Standing Committee's September 2021 report to the Judicial Conference.)

The Advisory Committee recommended final approval for this second set of restyled rules, but, as with the first set, suggested that the Standing Committee not submit the rules to the Judicial Conference until all remaining parts of the Bankruptcy Rules have been restyled, published, and given final approval, so that all restyled rules can go into effect at the same time.

Rule 3011 (Unclaimed Funds in Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, and Chapter 13 Individual's Debt Adjustment Cases)

The proposed amendment, which was suggested by the Committee on the Administration of the Bankruptcy System, redesignates the existing text of Rule 3011 as subdivision (a) and adds a new subdivision (b) requiring the clerk of court to provide searchable access on the court's website to information about funds deposited pursuant to § 347 of the Bankruptcy Code (Unclaimed Property). There was one comment on the proposed amendment, and the language of subdivision (b) was restyled and modified to reflect the comment. The Advisory Committee recommended final approval as amended.

Rule 8003 (Appeal as of Right – How Taken; Docketing the Appeal)

The proposed amendments to Rule 8003 conform to amendments recently made to Federal Rule of Appellate Procedure 3, which stress the simplicity of the Rule's requirements for the contents of the notice of appeal and which disapprove some courts' "expressio unius est exclusio alterius" approach to interpreting a notice of appeal. No comments were submitted, and the Advisory Committee gave its final approval to the rule as published.

Rule 9006 (Computing and Extending Time; Time for Motion Papers)

In response to the enactment of the Juneteenth Act, the Advisory Committee proposed a technical amendment to Rule 9006(a)(6)(A) to include Juneteenth National Independence Day in the list of legal public holidays in the rule. The Advisory Committee recommended final approval without publication because this is a technical and conforming amendment.

Rule 9038 (Bankruptcy Rules Emergency)

New Rule 9038 is part of the package of proposed emergency rules drafted in response to the CARES Act directive. Subdivisions (a) and (b) of the rule are similar to the Appellate, Civil, and Criminal Emergency Rules in the way they define a rules emergency, provide authority to

the Judicial Conference to declare such an emergency, and prescribe the content and duration of a declaration.

Rule 9038(c) expands existing Bankruptcy Rule 9006(b), which authorizes an individual bankruptcy judge to enlarge time periods for cause. Although many courts relied on Rule 9006(b) to grant extensions of time during the COVID-19 pandemic, the rule does not fully meet the needs of an emergency situation. First, it has some exceptions—time limits that cannot be expanded. Also, it arguably does not authorize an extension order applicable to all cases in a district. Rule 9038 is intended to fill in these gaps for situations in which the Judicial Conference declares a rules emergency. The chief bankruptcy judge can grant a district-wide extension for any time periods specified in the rules, and individual judges can do the same in specific cases. There were no negative comments addressing Rule 9038, and the Advisory Committee recommended final approval as published.

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

The amendments to Questions 2 and 4 in Part 1 of Form 101 clarify how and where to report business names used by the debtor. These changes clarify that the only names to be listed are names that were used by the debtor personally in conducting business, not names used by other legal entities. The changes also bring Form 101 into conformity with the approach taken in Forms 105, 201, and 205 in involuntary bankruptcy cases and in non-individual cases. A suggestion unrelated to the proposed change was rejected, and the Advisory Committee recommended final approval as published.[1]

[1] The version of Official Form 101 in Appendix B includes an unrelated technical conforming change to line 13 which went into effect on June 21, 2022, after the Standing Committee's meeting. The change was approved by the Advisory Committee on Bankruptcy Rules pursuant to its authority to make such changes subject to subsequent approval by the Standing Committee and notice to the Judicial Conference. It conforms the form to the Bankruptcy Threshold Adjustment and Technical Corrections Act (the "BTATC" Act), Pub. L. No. 117-151, which went into effect on the same date. The Standing Committee will review the BTATC Act changes to Official Form 101 and another form at its January 2023 meeting, and will update the Judicial Conference on the changes in its report of that meeting.

Official Forms 309E1 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors)) and 309E2 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors under Subchapter V))

The amendments clarify the deadline for objecting to a debtor's discharge and distinguish it from the deadline to object to discharging a particular debt. There were no comments, and the Advisory Committee recommended final approval as published with minor changes to punctuation.

Official Form 417A (Notice of Appeal and Statement of Election)

The amendments conform the form to proposed changes to Rule 8003. No comments were submitted, and the Advisory Committee recommended final approval with a proposed effective date of December 1, 2023, to coincide with the Rule 8003 amendment.

The Standing Committee unanimously approved the Advisory Committee's recommendations.

Recommendation: That the Judicial Conference:

a. Approve the proposed amendments to Bankruptcy Rules 3011, 8003, and 9006, and proposed new Bankruptcy Rule 9038, 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; and

b. Approve, effective December 1, 2022, the proposed amendments to Bankruptcy Official Forms 101, 309E1, and 309E2, and effective December 1, 2023, the proposed amendment to Bankruptcy Official Form 417A, 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 and Forms Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted the proposed restyled Bankruptcy Rules for the 7000-9000 Series; proposed amendments to Rules 1007, 4004, 5009, and 9006; proposed new Rule 8023.1; and a proposed amendment to Official Form 410A with a

recommendation that they be published for public comment in August 2022. The Standing Committee unanimously approved the Advisory Committee's recommendations.

Restyled Rules Parts VII, VIII, and IX

The Advisory Committee sought approval for publication of Restyled Rules Parts VII, VIII, and IX (the 7000-9000 series Bankruptcy Rules). This is the third and final set of restyled rules recommended for publication.

Rule 1007(b)(7) (Lists, Schedules, Statements, and Other Documents; Time Limits) and conforming amendments to Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3), and 9006(c)(2)

The amendments to Rule 1007(b)(7) would eliminate the requirement that the debtor file a "statement" on Official Form 423 upon completion of an approved debtor education course, and instead require filing the certificate of completion provided by the approved course provider. The six other rules would be amended to replace references to a "statement" required by Rule 1007(b)(7) with references to a "certificate."

Rule 8023.1 (Substitution of Parties)

Proposed new Rule 8023.1, addressing the substitution of parties, is modeled on Appellate Rule 43, and would be applicable to parties in bankruptcy appeals to the district court or bankruptcy appellate panel.

Official Form 410A (Mortgage Proof of Claim Attachment)

Amendments are made to Part 3 (Arrearage as of Date of the Petition) of the form, replacing the first line (which currently asks for "Principal & Interest") with two lines, one for "Principal" and one for "Interest." Because under 11 U.S.C. § 1322(e) the amount necessary to cure a default is "determined in accordance with the underlying agreement and applicable nonbankruptcy law," it may be necessary for a debtor who is curing arrearages to know which portion of the total arrearages is principal and which is interest.

Information Items

The Advisory Committee met on March 31, 2022. In addition to the recommendations discussed above, the Advisory Committee considered (among other matters) a proposed amendment to Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence) and five related forms that were published for comment. It also considered a suggestion from the Court Administration and Case Management (CACM) Committee concerning electronic signatures.

Rule 3002.1

The proposed amendments to Rule 3002.1 were designed to encourage a greater degree of compliance with the rule and to provide a new midcase assessment of the mortgage claim's status in order to give a chapter 13 debtor an opportunity to cure any postpetition defaults that may have occurred.

Twenty-seven comments were submitted on the proposed amendments. Some of the comments were lengthy and detailed; others briefly stated an opinion in support of or opposition to the amendments. The comments generally fell into three categories: (1) comments opposing the amendments, or at least the midcase review, submitted by some chapter 13 trustees; (2) comments favoring the amendments, submitted by some consumer debtor attorneys; and (3) comments favoring the amendments but giving suggestions for improvement, submitted by trustees, debtors, judges, and an association of mortgage lenders.

The Consumer Subcommittee concluded that there is a need for amendments to Rule 3002.1, and that there is authority to promulgate them. The Advisory Committee agreed. The Consumer Subcommittee was sympathetic, however, with the desire expressed in several comments for simplification, and it has begun to sketch out revisions. It hopes to present a revised draft to the Advisory Committee at the fall meeting. The Forms Subcommittee will

await decisions about Rule 3002.1 before considering any changes to the proposed implementing forms.

Electronic Signatures

The Advisory Committee has been considering a suggestion by the CACM Committee regarding the use of electronic signatures in bankruptcy cases by individuals who do not have a CM/ECF account. At the fall 2021 meeting, the Technology Subcommittee presented for discussion a draft amendment to Rule 5005(a)(2)(C) that would have permitted a person other than the electronic filer of a document to authorize the person's signature on an electronically filed document. The discussion raised several questions and concerns. Among the issues raised were how the proposed rule would apply to documents, such as stipulations, that are filed by one attorney but bear the signature of other attorneys; how it would apply if a CM/ECF account includes several subaccounts; and whether there is really a perception among attorneys that the retention of wet signatures presents a problem that needs solving.

After the fall 2021 meeting, the Advisory Committee's Reporter followed up with the bankruptcy judge who had raised the issue of electronic signatures with the CACM Committee, and learned that this judge is working on a possible local rule for his district modeled on a state-court rule that allows for electronic signatures rather than requiring the retention of wet signatures. In its suggestion, the CACM Committee had questioned whether the lack of a provision in Rule 5005 addressing electronic signatures of individuals without CM/ECF accounts may make courts "hesitant to make such a change without clarification in the rules that use of electronic signature products is sufficient for evidentiary purposes." The Technology Subcommittee concluded that current Rule 5005 does not address the issue of the use of electronic signatures by individuals who are not registered users of CM/ECF and that it therefore does not preclude local rulemaking on the subject. The Bankruptcy Court for the District of

Nebraska already has such a rule (L.B.R. 9011-1). The Technology Subcommittee concluded that a period of experience under local rules allowing the use of e-signature products would help inform any later decision to promulgate a national rule. Electronic signature technology will also likely develop and improve in the interim. The Advisory Committee agreed with the Technology Subcommittee's recommendation and voted not to take further action on the suggestion.

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 6, 15, and 72, and new Civil Rule 87.

Rule 6 (Computing and Extending Time; Time for Motion Papers)

In response to the enactment of the Juneteenth Act, the Advisory Committee made a technical amendment to Rule 6(a)(6)(A) to include the Juneteenth National Independence Day in the list of legal public holidays in the rule. The Advisory Committee recommended final approval without publication because this is a technical and conforming amendment.

Rule 15 (Amended and Supplemental Pleadings)

The amendment to Rule 15(a)(1) would substitute "no later than" for "within" to measure the time allowed to amend a pleading once as a matter of course. Paragraph (a)(1) currently provides, in part, that "[a] party may amend its pleading once as a matter of course *within* (A) 21 days after serving it or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier" (emphasis added).

A literal reading of the existing rule could suggest that the Rule 15(a)(1)(B) period does not commence until the service of the responsive pleading or pre-answer motion, creating an

unintended gap period (prior to service of the responsive pleading or pre-answer motion) during which amendment as of right is not permitted. The proposed amendment is intended to remove that possibility by replacing "within" with "no later than."

After public comment, the Advisory Committee made no changes to the proposed amendment to Rule 15(a)(1) as published. The Advisory Committee made one change to the committee note after publication, deleting an unnecessary sentence that was published in brackets. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 72 (Magistrate Judges: Pretrial Order)

Rule 72(b)(1) directs that the clerk "mail" a copy of a magistrate judge's recommended disposition. This requirement is out of step with recent amendments to the rules that recognize service by electronic means. The proposed amendment to Rule 72(b)(1) would replace the requirement that the magistrate judge's findings and recommendations be mailed to the parties with a requirement that a copy be served on the parties as provided in Rule 5(b).

After public comment, the Advisory Committee made no changes to the proposed amendment to Rule 72(b)(1) as published. The Advisory Committee made one change to the committee note, deleting an unnecessary sentence that was published in brackets. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 87 (Civil Rules Emergency)

Proposed Civil Rule 87 is part of the package of proposed emergency rules drafted in response to the CARES Act directive. Subdivisions (a) and (b) of Rule 87 contain uniform provisions shared by the Appellate, Bankruptcy, and Criminal Emergency Rules. The uniform provisions address (1) who declares an emergency; (2) the definition of a rules emergency; (3) limitations in the declaration; and (4) early termination of declarations.

In form, Civil Rule 87(b)(1) diverges from the Bankruptcy and Criminal Rules with regard to the Judicial Conference declaration of a rules emergency; but in function, Rule 87(b)(1) takes a similar approach to those other rules. While the Bankruptcy and Criminal Rules provide that the declaration must "state any restrictions on the authority granted in" their emergency provisions, Rule 87(b)(1)(B) provides that the declaration "adopts all the emergency rules in Rule 87(c) unless it excepts one or more of them." The character of the different emergency rules provisions accounts for the difference. Rule 87 authorizes Emergency Rules 4(e), (h)(1), (i), (j)(2), and for serving a minor or incompetent person (referred to as "Emergency Rules 4"), each of which allows the court to order service of process by a means reasonably calculated to give notice. Rule 87 also authorizes Emergency Rule 6(b)(2), which displaces the prohibition on the extension of the deadlines for making post-judgment motions and instead permits extension of such deadlines. The Advisory Committee determined that, while it makes sense for the Judicial Conference to have the flexibility to decide not to adopt a particular Civil Emergency Rule when declaring a rules emergency, it would not make sense to invite other, undefined, "restrictions" on the Civil Emergency Rules. Accordingly, the Advisory Committee's proposed language in Civil Rule 87(b)(1)(B) stated that the Judicial Conference's emergency declaration "must … adopt all the emergency rules in Rule 87(c) unless it excepts one or more of them." (The inclusion of the word "must" was the result of a stylistic decision concerning the location of "must" within Rule 87(b)(1).)

At the Standing Committee's June 2022 meeting, a member suggested that it would be preferable to create a clear default rule that would provide for the adoption of all the Civil Emergency Rules in the event that a Judicial Conference declaration failed to specify whether it was adopting all or some of those rules. Accordingly, the Standing Committee voted to relocate the word "must" to Civil Rules 87(b)(1)(A) and (C), so that Civil Rule 87(b)(1)(B) provides

simply that the declaration "adopts all the emergency rules in Rule 87(c) unless it excepts one or more of them." The resulting Rule will operate roughly the same way as the Bankruptcy and Criminal Emergency Rules – that is, a Judicial Conference declaration of a rules emergency will put into effect all of the authorities granted in the relevant emergency provisions, unless the Judicial Conference specifies otherwise.

After public comment, the Advisory Committee deleted from the committee note two unnecessary sentences that had been published in brackets, and augmented the committee note's discussion of considerations that pertain to service by an alternative means under Emergency Rules 4(e), (h)(1), (i), and (j)(2). Based on suggestions by a member of the Standing Committee, the committee note was further revised at the Standing Committee meeting to reflect the possibility of multiple extensions under Emergency Rule 6(b)(2) and to delete one sentence that had suggested that the court ensure that the parties understand the effect of a Rule 6(b)(2) extension on the time to appeal.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Civil Rules 6, 15, and 72, and proposed new Civil Rule 87, 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 met on March 29, 2022. In addition to the matters discussed above, the Advisory Committee considered various information items, including a possible rule on multidistrict litigation (MDL). The Advisory Committee's MDL Subcommittee is considering amendments to Rules 16(b) or Rule 26(f), or a new Rule 16.1, to address the court's role in managing the MDL pretrial process. The drafts developed for initial discussion would simply focus the court and parties' attention on relevant issues without greater direction or detail.

The MDL Subcommittee has collected extensive comments from interested bar groups on some possible approaches.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules recommended for final approval proposed amendments to Criminal Rules 16, 45, and 56, and new Criminal Rule 62.

Rule 16 (Discovery and Inspection)

The proposed amendment to Rule 16, the principal rule that governs discovery in criminal cases, would correct a typographical error in the Rule 16 amendments that are currently pending before Congress. Those amendments, expected to take effect on December 1, 2022, revise both the provisions governing expert witness disclosures by the government – contained in Rule 16(a)(1)(G) – and the provisions governing expert witness disclosures by the defense – contained in Rule 16(b)(1)(C). Subject to exceptions, both Rule 16(a)(1)(G)(v) and Rule 16(b)(1)(C)(v) require the disclosure to be signed by the expert witness. One exception applies if, under another subdivision of the rule (concerning reports of examinations and tests), the disclosing party has previously provided the required information in a report signed by the witness. This exception cross-references the subdivision concerning reports of examinations and tests.

In Rule 16(a)(1), the relevant subdivision is Rule 16(a)(1)(F), and Rule 16(a)(1)(G)(v) duly cross-references that subdivision (applying the exception if the government "has previously provided under (F) a report, signed by the witness, that contains" the required information). In Rule 16(b)(1), the relevant subdivision is Rule 16(b)(1)(B); however, Rule 16(b)(1)(C)(v) as reported to Congress cross-references not "(B)" (as it should) but "(F)" (applying the exception if the defendant "has previously provided under (F) a report, signed by the witness, that contains"

the required information). The proposed amendment would correct Rule 16(b)(1)(C)(v)'s cross-reference from (F) to (B). The Advisory Committee recommended this proposal for approval without publication because it is a technical amendment. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 45 (Computing and Extending Time) and Rule 56 (When Court is Open)

In response to the enactment of the Juneteenth Act, the Advisory Committee made technical amendments to Rules 45 and 56 to include Juneteenth National Independence Day in the list of legal public holidays in those rules. The Advisory Committee recommended final approval without publication because these are technical and conforming amendments. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 62 (Criminal Rules Emergency)

New Rule 62 is part of the package of proposed emergency rules drafted in response to Congress's directive in the CARES Act. Subdivisions (a) and (b) of Rule 62 contain uniform provisions shared by the Appellate, Bankruptcy, and Civil Emergency Rules. The uniform provisions address (1) who declares an emergency; (2) the definition of a rules emergency; (3) limitations in the declaration; and (4) early termination of declarations. Under the uniform provisions, the Judicial Conference has the sole authority to declare a rules emergency, which is defined as when "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with" the relevant set of rules.

Rule 62 includes an additional requirement not present in the Appellate, Bankruptcy, or Civil Emergency Rules. That provision is (a)(2), which – for Criminal Rules emergencies – requires a determination that "no feasible alternative measures would sufficiently address the impairment within a reasonable time." This provision ensures that the emergency provisions in

subdivisions (d) and (e) of Rule 62 would be invoked only as a last resort, and reflects the importance of the rights protected by the Criminal Rules that would be affected in a rules emergency.

Subdivision (c) of Rule 62 addresses the effect of the termination of a rules emergency declaration. For proceedings that have been conducted under a declaration of emergency but that are not yet completed when the declaration terminates, the rule permits completion of the proceeding as if the declaration had not terminated if (1) resuming compliance with the ordinary rules would not be feasible or would work an injustice and (2) the defendant consents. This provision recognizes the need for some flexibility during the transition period at the end of an emergency declaration, while also recognizing the importance of returning promptly to compliance with the non-emergency rules.

Subdivisions (d) and (e) of Rule 62 address the court's authority to depart from the Criminal Rules once a Criminal Rules emergency is declared. These subdivisions would allow specified departures from the existing rules with respect to public access, a defendant's signature or consent, the number of alternate jurors, the time for acting under Rule 35, and the use of videoconferencing or teleconferencing in certain proceedings.

Paragraph (d)(1) specifically addresses the court's obligation to provide reasonable alternative access to public proceedings during a rules emergency if the emergency substantially impairs the public's in-person attendance. Following the public comment period, the Advisory Committee considered several submissions commenting on the reference to "victims" in the committee note discussing (d)(1). The Advisory Committee revised the committee note to direct courts' attention to the constitutional guarantees of public access and any applicable statutory provision, including the Crime Victims' Rights Act, 18 U.S.C. § 3771. The Standing Committee

made a minor wording change to this portion of the committee note (directing courts to "comply with" rather than merely "be mindful of" the applicable constitutional and statutory provisions).

As published, subparagraph (e)(3)(B) provided that a court may use videoconferencing for a felony plea or sentencing proceeding if, among other requirements, "the defendant, after consulting with counsel, requests in a writing signed by the defendant that the proceeding be conducted by videoconferencing." Public comments raised practical concerns about the requirement of an advance writing by the defendant requesting the use of videoconferencing. The Advisory Committee considered these comments as they pertained to the "request" language and the timing of the request, and ultimately elected to retain the language as published.

The Standing Committee made three changes relating to Rule 62(e)(3)(B). First, the Standing Committee voted (10 to 3) to insert "before the proceeding and" in subparagraph (e)(3)(B) to clarify the temporal requirement. Second, the Standing Committee voted (7 to 6) to substitute "consent" for "request" in subparagraph (e)(3)(B). The net result of these two changes is to require that the defendant, "before the proceeding and after consulting with counsel, consents in a writing signed by the defendant that the proceeding be conducted by videoconferencing." Third, the Standing Committee authorized the Advisory Committee Chair and Reporters to draft conforming changes to the committee note. After these deliberations, the Standing Committee voted unanimously to recommend final approval of new Criminal Rule 62.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Criminal Rules 16, 45, and 56, and proposed new Criminal Rule 62, as set forth in Appendix D, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Information Items

The Advisory Committee on Criminal Rules met on April 28, 2022. In addition to the matters discussed above, the Advisory Committee considered several information items,

including proposals to amend Rule 49.1 to address a concern about the committee note's language regarding public access to certain financial affidavits and to amend Rule 17 to address the scope of and procedure for subpoenas.

FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules recommended for final approval proposed amendments to Evidence Rules 106, 615, and 702.

Rule 106 (Remainder of or Related Writings or Recorded Statements)

The proposed amendment to Rule 106 – the rule of completeness – would allow any completing statement to be admitted over a hearsay objection and would cover all statements, whether or not recorded. The overriding goal of the amendment is to treat all questions of completeness in a single rule. That is particularly important because completeness questions often arise at trial, and so it is important for the parties and the court to be able to refer to a single rule to govern admissibility. The amendment is intended to displace the common law, just as the common law has been displaced by all of the other Federal Rules of Evidence.

The Advisory Committee received only a few public comments on the proposed changes to Rule 106. As published, the amendment would have inserted the words "written or oral" before "statement" so as to address the rule's applicability to unrecorded oral statements. After public comment, the Advisory Committee deleted the phrase "written or oral" to make clear that Rule 106 applies to all statements, including statements – such as those made through conduct or through sign language – that are neither written nor oral.

Rule 615 (Excluding Witnesses)

The proposed amendments to Rule 615 would limit an exclusion order under the existing rule (which would be re-numbered Rule 615(a)) to exclusion of witnesses from the courtroom,

and would add a new subdivision (b) that would provide that the court has discretion to issue further orders to "(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) prohibit excluded witnesses from accessing trial testimony." Under the proposed amendments, if a court wants to do more than exclude witnesses from the courtroom, the court must so order. In addition, the proposed amendments would clarify that the existing provision that allows an entity-party to designate "an officer or employee" to be exempt from exclusion is limited to one officer or employee. The rationale is that the exemption is intended to put entities on par with individual parties, who cannot be excluded under Rule 615. Allowing the entity more than one exemption is inconsistent with that rationale. In response to public comments, the Advisory Committee made two minor changes to the committee note (replacing the word "agent" with the word "representative" and deleting a case citation). The Standing Committee, in turn, revised three sentences in the committee note (including the sentence addressing orders governing counsel's disclosure of testimony for witness preparation).

Rule 702 (Testimony by Expert Witnesses)

The proposed amendments to Rule 702's first paragraph and to Rule 702(d) are the product of Advisory Committee work dating back to 2016. As amended, Rule 702(d) would require the proponent to demonstrate to the court that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." This language would more clearly empower the court to pass judgment on the conclusion that the expert has drawn from the methodology. In addition, the proposed amendments as published would have required that "the proponent has demonstrated by a preponderance of the evidence" that the requirements in Rule 702(a) – (d) have been met. This language was designed to reject the view of some courts that the reliability requirements set forth in Rule 702(b) and (d) – that the expert has relied on sufficient facts or data and has reliably applied a reliable methodology to the facts – are

questions of weight and not admissibility, and more broadly that expert testimony is presumed to be admissible. With this language, the Advisory Committee sought to explicitly weave the Rule 104(a) standard into the text of Rule 702.

More than 500 comments were received on the proposed amendments to Rule 702. In addition, a number of comments were received at a public hearing. Many of the comments opposed the amendment, and the opposition was especially directed toward the phrase "preponderance of the evidence." Another suggestion in the public comment was that the rule should clarify that it is the court and not the jury that must decide whether it is more likely than not that the reliability requirements of the rule have been met. The Advisory Committee carefully considered the public comments and determined to replace "the proponent has demonstrated by a preponderance of the evidence" with "the proponent demonstrates to the court that it is more likely than not" that the reliability requirements are met. The Advisory Committee also made a number of changes to the committee note, and the Standing Committee, in its turn, made one minor edit to the committee note.

After making the changes, noted above, to the committee notes for Rules 615 and 702, the Standing Committee unanimously approved the proposed amendments to Rules 106, 615, and 702.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Evidence Rules 106, 615, and 702, as set forth in Appendix E, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The Advisory Committee on Evidence Rules submitted proposed amendments to Rules 611, 613, 801, 804, and 1006 with a recommendation that they be published for public comment in August 2022. The Standing Committee unanimously approved for publication for

public comment the proposed new Rule 611(d) and the proposed amendments to Rules 613, 801, 804, and 1006, but did not approve for publication proposed new Rule 611(e). The Advisory Committee will further consider the proposed new Rule 611(e) in the light of the Standing Committee's discussion.

Rule 611(d) (Illustrative Aids)

The proposed amendment would amend Rule 611 ("Mode and Order of Examining Witnesses and Presenting Evidence") by adding a new Rule 611(d) to regulate the use of illustrative aids at trial. The distinction between "demonstrative evidence" (admitted into evidence and used substantively to prove disputed issues at trial) and "illustrative aids" (not admitted into evidence but used solely to assist the jury in understanding the evidence) is sometimes a difficult one to draw and is a point of confusion in the courts. The proposed amendment would set forth uniform standards to regulate the use of illustrative aids, and in doing so, would clarify the distinction between illustrative aids and demonstrative evidence. In addition, because illustrative aids are not evidence and adverse parties do not receive pretrial discovery of such aids, the proposed amendment would require notice and an opportunity to object before an illustrative aid is used, unless the court for good cause orders otherwise.

Rule 611(e) (Juror Questions for Witnesses)

Proposed new Rule 611(e) was not approved for publication. That proposed rule would set forth a single set of safeguards that should be applied if the trial court decides to allow jurors to submit questions for witnesses. The proposed new Rule 611(e) requires the court to instruct jurors, among other things, that if they wish to ask a question, they must submit it in writing; that they are not to draw inferences if their question is rephrased or does not get asked; and that they must maintain their neutrality. The proposed rule also provides that the court must consult with counsel when jurors submit questions, and that counsel must be allowed to object to such

questions outside the jury's hearing. The committee note to proposed Rule 611(e) emphasizes that the rule is agnostic about whether a court decides to permit jurors to submit questions. During the Standing Committee meeting, members expressed differing views concerning this proposal, and the Advisory Committee has been asked to develop the proposal further in the light of that discussion.

Rule 613 (Witness's Prior Statement)

Current Rule 613(b) rejects the "prior presentation" requirement from the common law that before a witness could be impeached with extrinsic evidence of a prior inconsistent statement, the adverse party was required to give the witness an opportunity to explain or deny the statement. The current rule provides that extrinsic evidence of the inconsistent statement is admissible so long as the witness is given an opportunity to explain or deny the statement at some point in the trial. The proposed amendment to Rule 613(b) would require a prior opportunity to explain or deny the statement, with the court having discretion to allow a later opportunity. This would bring the rule into alignment with what the Advisory Committee believes to be the practice of most trial judges.

Rule 801(d)(2) (An Opposing Party's Statement)

Current Rule 801(d)(2) provides a hearsay exemption for statements of a party opponent. Courts are split about the applicability of this exemption in the following situation: a declarant makes a statement that would have been admissible against him as a party-opponent, but he is not the party-opponent because his claim or potential liability has been transferred to another (either by agreement or by operation of law), and it is the transferee that is the party-opponent.

The proposed amendment to Rule 801(d)(2) would provide that such a statement is admissible against the successor-in-interest. The Advisory Committee reasoned that

admissibility is fair when the successor-in-interest is standing in the shoes of the declarant because the declarant is in substance the party-opponent.

Rule 804 (Hearsay Exceptions; Declarant Unavailable)

Current Rule 804(b)(3) provides a hearsay exception for declarations against interest. In a criminal case in which a declaration against penal interest is offered, the rule requires that the proponent provide "corroborating circumstances that clearly indicate [the] trustworthiness" of the statement. There is a dispute in the courts about the meaning of the "corroborating circumstances" requirement. The proposed amendment to Rule 804(b)(3) would parallel the language in Rule 807 and require the court to consider the presence or absence of corroborating evidence in determining whether "corroborating circumstances" exist.

Rule 1006 (Summaries to Prove Content)

The proposed amendment to Rule 1006 would provide greater guidance to the courts on the admissibility and proper use of summary evidence under Rule 1006. The proposed amendment to Rule 1006 fits together with proposed new Rule 611(d) on illustrative aids. Rule 1006 provides that a summary can be admitted as evidence if the underlying records are admissible and too voluminous to be conveniently examined in court. Courts are in dispute about a number of issues regarding admissibility of summaries of evidence under Rule 1006, and some courts do not properly distinguish between summaries of evidence under Rule 1006 (which are themselves admitted into evidence) and summaries that are illustrative aids (which are not evidence at all). The proposed amendment to Rule 1006 would clarify that a summary is admissible whether or not the underlying evidence has been admitted, and would provide a cross-reference to Rule 611(d) on illustrative aids.

Information Items

The Advisory Committee on Evidence Rules met on May 6, 2022. The Advisory Committee discussed the matters listed above.

PROPOSED 2022 REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADEQUACY OF PRIVACY RULES PRESCRIBED UNDER THE E-GOVERNMENT ACT OF 2002

The E-Government Act of 2002 directed that rules be promulgated, 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." Pursuant to that directive, the Judicial Conference submitted reports to Congress in 2009 and 2011. The Committee recommends that the Judicial Conference approve this third report (the "2022 Report"), which covers the period from 2011 to date. Future reports will be submitted beginning in 2024 and every two years thereafter.

The 2022 Report discusses rule and form amendments relevant to privacy issues that were adopted since the 2011 report. There have been changes to then-Bankruptcy Forms 9 and 21 in 2012; Appellate Form 4 in 2013 and 2018; Bankruptcy Rule 9037 in 2019; and Appellate Rule 25(a)(5) (this amendment is on track to take effect on December 1, 2022, absent contrary action by Congress). In addition, privacy concerns also shaped the content of Rule 2 in the new set of Supplemental Rules for Social Security Actions Under 42 U.S.C. § 405(g) (which is on track to take effect on December 1, 2022, absent contrary action by Congress).

The 2022 Report also discusses privacy-related topics currently pending on the Rules Committees' dockets, and deliberations in which the Rules Committees considered but rejected additional privacy-related rule amendments.

> **Recommendation:** That the Judicial Conference approve the proposed 2022 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 F, and ask the Administrative Office Director to transmit it to Congress in accordance with the law.

JUDICIARY STRATEGIC PLANNING

The Committee was asked to consider the Executive Committee's request for a report on the strategic initiatives that the Standing Committee is pursuing to implement the *Strategic Plan for the Federal Judiciary*. The Committee's views were communicated to Chief Judge Scott Coogler, judiciary planning coordinator.

Respectfully submitted,

John D. Bates, Chair

Elizabeth J. Cabraser	Troy A. McKenzie
Jesse M. Furman	Patricia Ann Millett
Robert J. Giuffra, Jr.	Lisa O. Monaco
Frank Mays Hull	Gene E.K. Pratter
William J. Kayatta, Jr.	Kosta Stojilkovic
Peter D. Keisler	Jennifer G. Zipps
Carolyn B. Kuhl	

* * * * *

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Adopted by Supreme Court and transmitted to Congress (Apr 2022)

REA History:

- Transmitted to Supreme Court (Oct 2021)
- Approved by Judicial Conference (Sept 2021 unless otherwise noted)
- Approved by Standing Committee (June 2021 unless otherwise noted)
- Published for public comment (Aug 2020 – Feb 2021 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 25	The proposed amendment to Rule 25 extends the privacy protections afforded in Social Security benefit cases to Railroad Retirement Act benefit cases.	
AP 42	The proposed amendment to Rule 42 clarifies the distinction between situations where dismissal is mandated by stipulation of the parties and other situations. (These proposed amendments were published Aug 2019 – Feb 2020).	
BK 3002	The proposed amendment would allow an extension of time to file proofs of claim for both domestic and foreign creditors if "the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim."	
BK 5005	The proposed changes would allow papers to be transmitted to the U.S. trustee by electronic means rather than by mail, and would eliminate the requirement that the filed statement evidencing transmittal be verified.	
BK 7004	The proposed amendments add a new Rule 7004(*i*) clarifying that service can be made under Rule 7004(b)(3) or Rule 7004(h) by position or title rather than specific name and, if the recipient is named, that the name need not be correct if service is made to the proper address and position or title.	
BK 8023	The proposed amendments conform the rule to pending amendments to Appellate Rule 42(b) that would make dismissal of an appeal mandatory upon agreement by the parties.	AP 42(b)
SBRA Rules (BK 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2 (new), 3018, 3019)	The SBRA Rules would make necessary rule changes in response to the Small Business Reorganization Act of 2019. The SBRA Rules are based on Interim Bankruptcy Rules adopted by the courts as local rules in February 2020 in order to implement the SBRA which went into effect February 19, 2020.	
Official Form 101	Updates are made to lines 2 and 4 of the form to clarify how the debtor should report the names of related separate legal entities that are not filing the petition. If approved by the Standing Committee, and the Judicial Conference, the proposed change to Form 101 (published in Aug. 2021) will go into effect December 1, 2022.	

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Adopted by Supreme Court and transmitted to Congress (Apr 2022)

REA History:

- Transmitted to Supreme Court (Oct 2021)
- Approved by Judicial Conference (Sept 2021 unless otherwise noted)
- Approved by Standing Committee (June 2021 unless otherwise noted)
- Published for public comment (Aug 2020 – Feb 2021 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
Official Forms 309E1 and 309E2	Form 309E1, line 7 and Form 309E2, line 8, are amended to clarify which deadline applies for filing complaints to deny the debtor a discharge and which applies for filing complaints seeking to except a particular debt from discharge. If approved by the Standing Committee, and the Judicial Conference, the proposed change to Forms 309E1 and 309E2 (published in Aug. 2021) will go into effect December 1, 2022.	
CV 7.1	An amendment to subdivision (a) was published for public comment in Aug 2019 – Feb 2020. As a result of comments received during the public comment period, a technical conforming amendment was made to subdivision (b). The conforming amendment to subdivision (b) was not published for public comment. The proposed amendments to (a) and (b) were approved by the Standing Committee in Jan 2021, and approved by the Judicial Conference in Mar 2021. The proposed amendment to Rule 7.1(a)(1) would require the filing of a disclosure statement by a nongovernmental corporation that seeks to intervene. This change would conform the rule to the recent amendments to FRAP 26.1 (effective Dec 2019) and Bankruptcy Rule 8012 (effective Dec 2020). The proposed amendment to Rule 7.1(a)(2) would create a new disclosure aimed at facilitating the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of a nonparty individual or entity because that citizenship is attributed to a party.	AP 26.1 and BK 8012
CV Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g)	Proposed set of uniform procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).	
CR 16	Proposed amendment addresses the lack of timing and specificity in the current rule with regard to expert witness disclosures, while maintaining reciprocal structure of the current rule.	

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Approved by Standing Committee (June 2022 unless otherwise noted)

REA History:

- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 2	Proposed amendment developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	BK 9038, CV 87, and CR 62
AP 4	The proposed amendment is designed to make Rule 4 operate with Emergency Civil Rule 6(b)(2) if that rule is ever in effect by adding a reference to Civil Rule 59 in subdivision (a)(4)(A)(vi) of FRAP 4.	CV 87 (Emergency CV 6(b)(2))
AP 26	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 45, BK 9006, CV 6, CR 45, and CR 56
AP 45	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, BK 9006, CV 6, CR 45, and CR 56
BK 3002.1 and five new related Official Forms	The proposed rule amendment and the five related forms (410C13-1N, 410C13-1R, 410C13-10C, 410C13-10NC, and 410C13-10R) are designed to increase disclosure concerning the ongoing payment status of a debtor's mortgage and of claims secured by a debtor's home in chapter 13 case. At its March 2022 meeting, the Bankruptcy Rules Committee remanded the Rule and Forms to the Consumer and Forms Subcommittee for further consideration in light of comments received. This action will delay the effective date of the proposed changes to no earlier than December 1, 2024.	
BK 3011	Proposed new subdivision (b) would require courts to provide searchable access to unclaimed funds on local court websites.	
BK 8003 and Official Form 417A	Proposed rule and form amendments are designed to conform to amendments to FRAP 3(c) clarifying that the designation of a particular interlocutory order in a notice of appeal does not prevent the appellate court from reviewing all orders that merged into the judgment, or appealable order or degree.	AP 3
BK 9038 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, CV 87, and CR 62
BK 9006(a)(6)(A)	Technical amendment approved by Advisory Committee without publication would add Juneteenth National Independence Day to the list of legal holidays.	AP 26, AP 45, CV 6, CR 45, and CR 56

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Approved by Standing Committee (June 2022 unless otherwise noted)

REA History:

- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
CV 6	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CR 45, and CR 56
CV 15	The proposed amendment to Rule 15(a)(1) is intended to remove the possibility for a literal reading of the existing rule to create an unintended gap. A literal reading of "A party may amend its pleading once as a matter of course within . . . 21 days after service of a responsive pleading or [pre-answer motion]" would suggest that the Rule 15(a)(1)(B) period does not commence until the service of the responsive pleading or pre-answer motion – with the unintended result that there could be a gap period (beginning on the 22nd day after service of the pleading and extending to service of the responsive pleading or pre-answer motion) within which amendment as of right is not permitted. The proposed amendment would preclude this interpretation by replacing the word "within" with "no later than."	
CV 72	The proposed amendment would replace the requirement that the magistrate judge's findings and recommendations be mailed to the parties with a requirement that a copy be served on the parties as provided in Rule 5(b).	
CV 87 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CR 62
CR 45	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CV 6, and CR 56
CR 56	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CV 6, and CR 45
CR 62 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CV 87
EV 106	The proposed amendment would allow a completing statement to be admissible over a hearsay objection and cover unrecorded oral statements.	
EV 615	The proposed amendment limits an exclusion order to the exclusion of witnesses from the courtroom. A new subdivision would provide that the court has discretion to issue further orders to "(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) prohibit excluded witnesses from accessing trial testimony." Finally, the proposed amendment clarifies that the existing provision that allows an entity-party to	

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Approved by Standing Committee (June 2022 unless otherwise noted)

REA History:

- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
	designate "an officer or employee" to be exempt from exclusion is limited to one officer or employee.	
EV 702	The proposed amendment would amend Rule 702(d) to require the court to find that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." In addition, the proposed amendment would explicitly add the preponderance of the evidence standard to Rule 702(b)–(d).	

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Published for public comment (Aug 2022 – Feb 2023)

REA History:

- Approved for publication by Standing Committee (Jan and June 2022)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 32	Conforming proposed amendment to subdivision (g) to reflect the 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 Stated in the Federal Rules of Appellate Procedure	Conforming proposed amendments would reflect the 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.	
BK Restyled Rules (Parts VII-IX)	The third and final set, approximately 1/3 of current Bankruptcy Rules, 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.	
BK Form 410A	The proposed amendments are to Part 3 (Arrearage as of Date of the Petition) of Official Form 410A and would replace the first line (which currently asks for "Principal & Interest") with two lines, one for "Principal" and one for "Interest."	

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Published for public comment (Aug 2022 – Feb 2023)

REA History:

- Approved for publication by Standing Committee (Jan and June 2022)

Rule	Summary of Proposal	Related or Coordinated Amendments
	The amendments would put the burden on the claim holder to identify the elements of its claim.	
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 611(d)	The proposed new subdivision (d) would provide standards for the use of illustrative aids.	EV 1006
EV 613	The proposed amendment would require that, prior to the introduction of extrinsic evidence of a witness's prior inconsistent statement, the witness receive an opportunity to explain or deny the statement.	
EV 801	The proposed amendment to paragraph (d)(2) would provide that when a party stands in the shoes of a declarant or declarant's principal, hearsay statements made by the declarant or declarant's principal are admissible against the party.	
EV 804	The proposed amendment to subparagraph (b)(3)(B) would provide that when assessing whether a statement is supported by corroborating circumstances that clearly indicate its trustworthiness, the court must consider the totality of the circumstances and evidence, if any, corroborating the statement.	
EV 1006	The proposed changes would permit a properly supported summary to be admitted into evidence whether or not the underlying voluminous materials have been admitted. The proposed changes would also clarify that illustrative aids not admitted under Rule 1006 are governed by proposed new subdivision (d) of Rule 611.	EV 611

Legislation That Directly or Effectively Amends the Federal Rules
117th Congress
(January 3, 2021–January 3, 2023)

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
Protect the Gig Economy Act of 2021	**H.R. 41** *Sponsor:* Biggs (R-AZ)	CV 23	**Bill Text:** https://www.congress.gov/117/bills/hr41/BILLS-117hr41ih.pdf **Summary:** Prohibits in class actions any allegation that an employee was misclassified as an independent contractor.	• 03/01/2021: Judiciary Committee referred to Courts, Intellectual Property & Internet Subcommittee • 01/04/2021: Introduced in House; referred to Judiciary Committee
Injunctive Authority Clarification Act of 2021	**H.R. 43** *Sponsor:* Biggs (R-AZ) *Cosponsor:* Rose (R-TN)	CV	**Bill Text:** https://www.congress.gov/117/bills/hr43/BILLS-117hr43ih.pdf **Summary:** Prohibits federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty unless the nonparty is represented by a party in a class action.	• 03/01/2021: Judiciary Committee referred to Courts, Intellectual Property & Internet Subcommittee • 01/04/2021: Introduced in House; referred to Judiciary Committee
Mutual Fund Litigation Reform Act	**H.R. 699** *Sponsor:* Emmer (R-MN)	CV 8 & 9	**Bill Text:** https://www.congress.gov/117/bills/hr699/BILLS-117hr699ih.pdf **Summary:** Creates a heightened pleading standard for actions alleging breach of fiduciary duty under the Investment Company Act of 1940, requiring that "all facts establishing a breach of fiduciary duty" be "state[d] with particularity."	• 03/22/2021: Judiciary Committee referred to Courts, Intellectual Property & Internet Subcommittee • 02/02/2021: Introduced in House; referred to Judiciary Committee
Providing Responsible Oversight of Trusts to Ensure Compensation and Transparency (PROTECT) Asbestos Victims Act of 2021	**S. 574** *Sponsor:* Tillis (R-NC) *Cosponsors:* Cornyn (R-TX) Grassley (R-IA)	BK	**Bill Text:** https://www.congress.gov/117/bills/s574/BILLS-117s574is.pdf **Summary:** Amends 11 U.S.C. § 524(g) "to promote the investigation of fraudulent claims against [asbestosis trusts]." Allows outside parties to demand information from administrators of such trusts regarding payment to claimants. Gives the U.S. Trustee investigative powers with respect to asbestosis trusts set up under § 524, even in the districts in North Carolina & Alabama where Bankruptcy Administrators or the federal courts currently take on U.S. Trustee functions in bankruptcy cases. May provide reason to amend BK 9035.	• 03/03/2021: Introduced in Senate; referred to Judiciary Committee

Last updated October 6, 2022

Eliminating a Quantifiably Unjust Application of the Law (EQUAL) Act of 2021	**H.R. 1693** *Sponsor:* Jeffries (D-NY) *Cosponsors:* 56 bipartisan cosponsors	CR 43	**Bill Text:** https://www.congress.gov/117/bills/hr1693/BILLS-117hr1693rfs.pdf **Summary:** Decreases penalties for certain cocaine-related crimes and allows those convicted under prior law to petition for a lower sentence. Provides that, notwithstanding CR 43, defendant not required to be present at hearing to reduce a sentence under this bill. **House Committee Report:** https://www.congress.gov/117/crpt/hrpt128/CRPT-117hrpt128.pdf	• 09/29/2021: Received in Senate; referred to Judiciary Committee • 09/28/2021: Passed in House on Yeas & Nays (361–66) • 03/09/2021: Introduced in House
Sunshine in the Courtroom Act of 2021	**S. 818** *Sponsor:* Grassley (R-IA) *Cosponsors*: Klobuchar (D-MN) Cornyn (R-TX) Durbin (D-IL) Leahy (D-VT) Blumenthal (D-CT) Markey (D-MA)	CR 53	**Bill Text:** https://www.congress.gov/117/bills/s818/BILLS-117s818is.pdf **Summary:** Allows presiding judges in district courts and courts of appeals to "permit the photographing, electronic recording, broadcasting, or televising to the public of any court proceeding over which that judge presides." Tasks Judicial Conference with promulgating guidelines. Expands statutory exception to prohibition on photography and broadcasting of criminal proceedings.	• 06/24/2021: Judiciary Committee ordered reported favorably (no amendments) • 06/23/2021: Letters expressing opposition by the Judicial Conference and the Rules Committees sent to Senators Durbin and Grassley • 03/18/2021: Introduced in Senate; referred to Judiciary Committee
Litigation Funding Transparency Act of 2021	**S. 840** *Sponsor:* Grassley (R-IA) *Cosponsors:* Cornyn (R-TX) Sasse (R-NE) Tillis (R-NC) **H.R. 2025** *Sponsor:* Issa (R-CA)	CV	**Bill Text:** https://www.congress.gov/117/bills/s840/BILLS-117s840is.pdf [Senate] https://www.congress.gov/117/bills/hr2025/BILLS-117hr2025ih.pdf [House] **Summary:** Requires disclosure and oversight of third-party-litigation-funding agreements in MDLs and in "any class action."	• 10/19/2021: House Judiciary Committee referred to Courts, Intellectual Property & Internet Subcommittee • 05/10/2021: Response letter sent from Judge Bates to Sen. Grassley and Rep. Issa • 05/03/2021: Letter received from Sen. Grassley and Rep. Issa • 03/18/2021: Introduced in House and Senate; referred to Judiciary Committees
Justice in Forensic Algorithms Act of 2021	**H.R. 2438** *Sponsor:* Takano (D-CA) *Cosponsor:* Evans (D-PA)	EV 702	**Bill Text:** https://www.congress.gov/117/bills/hr2438/BILLS-117hr2438ih.pdf **Summary:** Precludes trade-secret evidentiary privilege and restricts admissibility of forensic computer evidence in criminal proceedings.	• 10/19/2021: Judiciary Committee referred to Crime, Terrorism & Homeland Security Subcommittee • 04/08/2021: Introduced in House; referred to Judiciary Committee and to Science, Space &

				Technology Committee, which referred to Research & Technology Subcommittee
Juneteenth National Independence Day Act	**S. 475** *Sponsor*: Markey (D-MA) *Cosponsors:* 60 bipartisan cosponsors	AP 26; BK 9006; CV 6; CR 45	**Bill Text:** https://www.congress.gov/117/plaws/publ17/PLAW-117publ17.pdf **Summary:** Establishes Juneteenth National Independence Day (June 19) as a federal public holiday.	• 6/17/2021: Became Public Law No. 117-17
Bankruptcy Venue Reform Act of 2021	**H.R. 4193** *Sponsor*: Lofgren (D-CA) *Cosponsors:* 15 bipartisan cosponsors **S. 2827** *Sponsor:* Cornyn (R-TX) *Cosponsor:* Warren (D-MA)	BK	**Bill Text:** https://www.congress.gov/117/bills/hr4193/BILLS-117hr4193ih.pdf [House] https://www.congress.gov/117/bills/s2827/BILLS-117s2827is.pdf [Senate] **Summary:** Modifies venue requirements relating to bankruptcy proceedings. Senate version includes a provision (absent from the House version) giving "no effect" in venue determinations to certain mergers, dissolutions, spinoffs, and divisive mergers of entities. Requires rulemaking under § 2075 to allow an attorney to appear on behalf of a governmental unit and intervene without charge or meeting local rule requirements in bankruptcy cases and arising under or related to proceedings before bankruptcy courts, district courts, and BAPs.	• 09/23/2021: S. 2827 introduced in Senate; referred to Judiciary Committee • 06/28/2021: H.R. 4193 introduced in House; referred to Judiciary Committee
Nondebtor Release Prohibition Act of 2021	**S. 2497** *Sponsor*: Warren (D-MA) *Cosponsors:* Durbin (D-IL) Blumenthal (D-CT) Booker (D-NJ) Sanders (I-VT)	BK	**Bill Text:** https://www.congress.gov/117/bills/s2497/BILLS-117s2497is.pdf **Summary:** Prevents individuals who have not filed for bankruptcy from obtaining releases from lawsuits brought by private parties, states, and others in bankruptcy by: • Prohibiting court from discharging, releasing, terminating, or modifying liability of or claim or cause of action against an entity other than the debtor or estate. • Prohibiting court from permanently enjoining commencement or continuation of any action with respect to an entity other than debtor or estate.	• 07/28/2021: Introduced in Senate; referred to Judiciary Committee

Protecting Our Democracy Act	**H.R. 5314** *Sponsor:* Schiff (D-CA) *Cosponsors:* 168 Democratic cosponsors **S. 2921** *Sponsor:* Klobuchar (D-MN) *Cosponsors:* 10 Democratic-caucusing co-sponsors	CR 6; CV	**Bill Text:** https://www.congress.gov/117/bills/hr5314/BILLS-117hr5314rds.pdf [House] https://www.congress.gov/117/bills/s2921/BILLS-117s2921is.pdf [Senate] **Summary:** Amends existing rules and directs Judicial Conference to promulgate additional rules to, for example: • Preclude any interpretation of CR 6(e) to prohibit disclosure to Congress of certain grand-jury materials related to individuals pardoned by the President. • "[E]nsure the expeditious treatment of" civil actions to enforce congressional subpoenas. Requires that the new rules be transmitted within 6 months of the effective date of the bill. **Committee Report:** https://www.congress.gov/117/cprt/HPRT46236/CPRT-117HPRT46236.pdf	• 12/13/2021: H.R. 5314 received in Senate • 12/09/2021: H.R. 5314 passed in House on Yeas & Nays (220–208) • 9/30/2021: S. 2921 introduced in Senate; referred to Homeland Security & Governmental Affairs Committee • 9/21/2021: H.R. 5314 introduced in House
Congressional Subpoena Compliance and Enforcement Act	**H.R. 6079** *Sponsor:* Dean (D-PA) *Cosponsors:* Nadler (D-NY) Schiff (D-CA)	CV	**Bill Text:** https://www.congress.gov/117/bills/hr6079/BILLS-117hr6079ih.pdf **Summary:** Requires Judicial Conference to promulgate rules "to ensure the expeditious treatment of" civil actions to enforce congressional subpoenas. Requires that the new rules be transmitted within 6 months of the effective date of the bill.	• 11/26/2021: Introduced in House; referred to Judiciary Committee
Assessing Monetary Influence in the Courts of the United States (AMICUS) Act	**S. 3385** *Sponsor:* Whitehouse (D-RI) *Cosponsors:* Sanders (I-VT) Blumenthal (D-CT) Hirono (D-HI) Warren (D-MA) Lujan (D-NM)	AP 29	**Bill Text:** https://www.congress.gov/117/bills/s3385/BILLS-117s3385is.pdf **Summary:** Requires amici curiae to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel made a monetary contribution intended to fund preparation or submission of amicus brief.	• 12/14/2021: Introduced in Senate; referred to Judiciary Committee
Courtroom Video-conferencing Act of 2022	**H.R. 6472** *Sponsor:* Morelle (D-NY) *Cosponsors:* Fischbach (R-MN) Bacon (R-NE)	CR	**Bill Text:** https://www.congress.gov/117/bills/hr6472/BILLS-117hr6472ih.pdf **Summary:** Makes permanent (even in absence of emergency situations) certain CARES Act	• 01/21/2022: Introduced in House; referred to Judiciary Committee

	Tiffany (R-WI)		provisions, including allowing the chief judge of a district court to authorize teleconferencing for initial appearances, arraignments, and misdemeanor pleas or sentencing. Requires defendant's consent before proceeding via teleconferencing and ensures that defendants can utilize video or telephone conferencing to privately consult with counsel.	
Save Americans from the Fentanyl Emergency (SAFE) Act of 2022	**H.R. 6946** *Sponsor:* Pappas (D-NH) *Cosponsors:* 10 bipartisan cosponsors	CR 43	**Bill Text:** https://www.congress.gov/117/bills/hr6946/BILLS-117hr6946ih.pdf **Summary:** Decreases penalties for certain fentanyl-related crimes and allows those convicted under prior law to petition for a lower sentence. Provides that, notwithstanding CR 43, defendant not required to be present at hearing to reduce a sentence under this bill.	• 03/08/2022: Energy & Commerce Committee referred to Health Subcommittee • 03/07/2022: Introduced in House; referred to Energy & Commerce Committee and to Judiciary Committee
Bankruptcy Threshold Adjustment and Technical Corrections Act	**S. 3823** *Sponsor:* Grassley (R-IA) *Cosponsors:* Durbin (D-IL) Whitehouse (D-RI) Cornyn (R-TX)	BK 1020; BK Forms 101 & 201	**Bill Text:** https://www.congress.gov/117/plaws/publ151/PLAW-117publ151.pdf **Summary:** Retroactively reinstates for further 2 years from date of enactment the CARES Act definition of "debtor" in § 1182(1), with its $7.5 million subchapter V debt limit.	• 06/21/2022: Became Public Law No. 117-151
Government Surveillance Transparency Act of 2022	**S. 3888** *Sponsor:* Wyden (D-OR) *Cosponsors:* Daines (R-MT) Lee (R-UT) Booker (D-NJ) **H.R. 7214** *Sponsor:* Lieu (D-CA) *Cosponsor:* Davidson (R-OH)	CR 41	**Bill Text:** https://www.congress.gov/117/bills/s3888/BILLS-117s3888is.pdf [Senate] https://www.congress.gov/117/bills/hr7214/BILLS-117hr7214ih.pdf [House] **Summary:** Adds a sentence and two subdivisions of text to CR 41(f)(1)(B) regarding what the government must disclose in an inventory taken under the Rule. (See page 25 of either PDF for full text.)	• 03/24/2022: H.R. 7214 introduced in House; referred to Judiciary Committee • 03/22/2022: S. 3888 introduced in Senate; referred to Judiciary Committee
21st Century Courts Act of 2022	**S. 4010** *Sponsor:* Whitehouse (D-RI) *Cosponsors:* Blumenthal (D-CT) Hirono (D-HI) **H.R. 7426** *Sponsor:* Johnson (D-GA)	AP 29; CV; CR	**Bill Text:** https://www.congress.gov/117/bills/s4010/BILLS-117s4010is.pdf [Senate] https://www.congress.gov/117/bills/hr7426/BILLS-117hr7426ih.pdf [House] **Summary:** Requires amici curiae to disclose whether counsel for a party authored amicus brief in whole or in part and whether a party or a party's counsel made a monetary	• 04/06/2022: S. 4010 introduced in Senate; referred to Judiciary Committee • 04/06/2022: H.R. 7426 introduced in House; referred to Judiciary Committee, to Oversight & Reform Committee, and to House Administration

	Cosponsors: 8 Democratic cosponsors		contribution intended to fund preparation or submission of the brief. Also requires (within 1 year) promulgation of rules regarding procedures for the public to contest a motion to seal a judicial record.	
Supreme Court Ethics, Recusal, and Transparency Act of 2022	**H.R. 7647** *Sponsor:* Johnson (D-GA) *Cosponsors:* 60 Democratic cosponsors **S. 4188** *Sponsor:* Whitehouse (D-RI) *Cosponsors:* 12 Democratic cosponsors	AP 29; CV; CR; BK	**Bill Text:** https://www.congress.gov/117/bills/hr7647/BILLS-117hr7647ih.pdf [House] https://www.congress.gov/117/bills/s4188/BILLS-117s4188is.pdf [Senate] **Summary:** Directs rulemaking regarding party and amici disclosures in the Supreme Court. Also requires amici in any court to disclose whether counsel for a party authored amicus brief in whole or in part and whether a party or a party's counsel made a monetary contribution intended to preparation or submission of the brief. Directs rulemaking to prohibit filing or to strike an "amicus brief that would result in the disqualification of a justice, judge, or magistrate judge."	• 05/11/2022: S. 4188 introduced in Senate; referred to Judiciary Committee • 05/11/2022: House Judiciary Committee consideration & mark-up session; ordered to be reported (amended) (22–16) • 05/03/2022: H.R. 7647 introduced in House; referred to Judiciary Committee
Restoring Artistic Protection Act of 2022	**H.R. 8531** *Sponsor:* Johnson (D-GA) *Cosponsors:* Bowman (D-NY) Maloney (D-NY) Jayapal (D-WA) Thompson (D-MS) Bush (D-MO)	EV	**Bill Text:** https://www.congress.gov/117/bills/hr8531/BILLS-117hr8531ih.pdf **Summary:** Enacts new EV rule that would make inadmissible in criminal cases evidence of a defendant's creative or artistic expression unless the court finds by clear and convincing evidence that four factors are met.	• 07/27/2022: Introduced in House; referred to Judiciary Committee
Competitive Prices Act	**H.R. 8777** *Sponsor:* Porter (D-CA) *Cosponsors:* Nadler (D-NY) Cicilline (D-RI) Jaypal (D-WA) Jeffries (D-NY)	CV 8, 12(b)(6), 56	**Bill Text:** https://www.congress.gov/117/bills/hr8777/BILLS-117hr8777ih.pdf **Summary:** Abrogates *Twombly* pleading standard in antitrust actions; specifies standards necessary to state a plausible claim or demonstrate a genuine dispute of material fact. ("Consciously parallel conduct" could be enough to state a plausible claim.)	• 09/06/2022: Introduced in House; referred to Judiciary Committee
Democracy Is Strengthened by Casting Light On Spending in Elections (DISCLOSE) Act of 2022	**S. 4822** *Sponsor:* Whitehouse (D-RI) *Cosponsors:* 49 Democratic-caucusing cosponsors	CV 5.1, 24	**Bill Text:** https://www.congress.gov/117/bills/s4822/BILLS-117s4822pcs.pdf **Summary:** Requires declaratory and injunctive challenges to constitutionality or lawfulness of bill to be brought in D.D.C. and appealed	• 09/22/2022: Cloture failed (49–49) • 09/19/2022: Motion made to proceed in Senate; cloture motion made on motion to proceed

			to CADC; copy of complaint must be delivered to Clerk of House and Secretary of Senate; D.D.C. and CADC must expedite dispositions; action must be transferred to D.D.C. if amendment/counterclaim/cross-claim/affirmative defense/other pleading or motion challenges Act; any member of House or Senate has right to bring such an action or intervene in such an action	• 09/13/2022: Placed on Senate Legislative Calendar under General Orders • 09/12/2022: Introduced in Senate
Protect Reporters from Exploitative State Spying (PRESS) Act	**H.R. 4330** *Sponsor:* Raskin (D-MD) *Cosponsors:* Lieu (D-CA) Yarmuth (D-KY) Norton (D-DC) Blumenauer (D-OR) Eshoo (D-CA) Demings (D-FL) Scanlon (D-PA)	CV 26–37, 45; BK 7026–37, 9016; CR 16, 17	**Bill Text:** https://www.congress.gov/117/bills/hr4330/BILLS-117hr4330eh.pdf **Summary:** Imposes notice-and-hearing requirements and substantive standards for subpoenas to issue against journalists and service providers holding journalists' records; limits scope of compelled testimony or document production. **Committee Report:** https://www.congress.gov/117/crpt/hrpt354/CRPT-117hrpt354.pdf	• 09/20/2022: Received in Senate; referred to Judiciary Committee • 09/19/2022: Passed in House by voice vote • 06/07/2022: Reported as amended by Judiciary Committee • 07/01/2021: Introduced in House; referred to Judiciary Committee
Strategic Lawsuits Against Public Participation (SLAPP) Protection Act of 2022	**H.R. 8864** *Sponsor:* Raskin (D-MD) *Cosponsors:* Cohen (D-TN)	CV 12; CV 56	**Bill Text:** https://www.congress.gov/117/bills/hr8864/BILLS-117hr8864ih.pdf **Summary:** Imposes special procedures for motions to dismiss SLAPPs. Special motion for dismissal must be made within 60 days of service or removal. Stays all other proceedings except remand proceedings. Movant must put forward evidence establishing that the claim "is based on, or in response to, the party's lawful exercise of the constitutional right of petition, freedom of the press, peaceful assembly, free speech on a matter of public concern, or other expressive conduct on a matter of public concern"; respondent has burden to show statutory exception and must put forward prima facie evidence as to each element of the claim "under the standard of [CV] 56"; and then movant still has opportunity to show no genuine issue of material fact and that movant is entitled to judgment as a matter of law under CV 56. Court must expedite ruling but may extend statutory deadline for docket delays, discovery, or good cause.	• 09/15/2022: Received in House; referred to Judiciary Committee
Clean Slate Act of 2021	**H.R. 2864** *Sponsor:* Blunt Rochester (D-DE)	CR 49.1	**Bill Text:** https://www.congress.gov/117/bills/hr2864/BILLS-117hr2864ih.pdf	• 09/21/2022: Subcommittee discharged; Judiciary Committee

	Cosponsors: 21 bipartisan cosponsors		**Summary:** Mandates sealing of nonviolent federal marijuana offenses 1 year after sentence completed. Mandates sealing of federal criminal records relating to judgment of acquittal or dismissal. Mandatory sealing rules have retroactive effect. Allows certain nonviolent offenders convicted of no more than 2 felonies to petition for sealing of federal criminal records—hearing procedures might need rulemaking.	consideration & mark-up session held; ordered reported with amendments (20–12) • 10/19/2021: Referred to Crime, Terrorism & Homeland Security Subcommittee • 04/28/2021: Introduced in House; referred to Judiciary Committee
National Defense Authorization Act for Fiscal Year 2023	**H.R. 7900** *Sponsor:* Smith (D-WA)	CV, CR, EV	**Bill Text:** https://www.congress.gov/117/bills/hr7900/BILLS-117hr7900pcs.pdf **Summary:** • Excludes from evidence in any court hearing and any grand jury "any information obtained by or with the assistance of a member of the Armed Forces in violation of" 18 U.S.C. § 1385 (the Posse Comitatus Act). (Title IV, subtitle E, § 549B) • Decreases penalties for certain cocaine-related crimes and allows those convicted under prior law to petition for a lower sentence. Provides that, notwithstanding CR 43, defendant not required to be present at hearing to reduce a sentence under this bill. (Title LVIII, subtitle A, § 5848) **Proposed Amendments:** • SA 6392, by Sen. Whitehouse (D-RI), provides that "[n]otwithstanding rule 41 of the Federal Rules of Criminal Procedure, a warrant for the seizure of any property identified [in a different subsection] may be . . . issued by a judicial officer of the United States District Court for the District of Columbia; and . . . executed in any district in which the property is found or transmitted to the government of a foreign country for service in accordance with an applicable treaty or other international agreement." It also provides that, for judicial review of a forfeiture determination by Treasury (which would be in D.D.C.), "there shall be	• 08/03/2022: Placed on Legislative Calendar under General Orders • 07/28/2022: Received in Senate • 07/14/2022: Passed in House (329–101) • 07/01/2022: Armed Services Committee reported with amendment • 05/27/2022: Introduced in House; referred to Armed Services Committee

			no discovery in a proceeding under this section" except upon motion and a showing by the petitioner that there is both good cause for discovery and that discovery would be in the interest of justice. • SA 6084, SA 6347, and SA 6438, by Sen. Peters (D-MI), bar the discovery of, reception into evidence of, and testimony about certain "medical quality assurance records" except in specified circumstances, such as civil or criminal law enforcement. **Committee Report:** Although there is a committee report from the House Armed Services Committee and a supplement to that report, neither addresses the above provisions.	

TAB 2

TO: Advisory Committee on the Federal Rules of Criminal Procedure

FROM: Professors Sara Beale and Nancy King, Reporters

RE: Recommendation of the Rule 49.1 Subcommittee on 21-CR-I

DATE: September 29, 2022

The Rule 49.1 Subcommittee met by teleconference in February and September to discuss a proposal to amend Rule 49.1 submitted by Judge Jesse Furman. Judge Furman proposed adding the clause, "Subject to any applicable right of public access," to the beginning of Rule 49.1(d) to correct what he views as "problematic, if not unconstitutional" language in the existing Committee Note accompanying the adoption of the Rule.

I. Judge Furman's suggestion

Judge Furman expressed concern about that portion of the Note that quotes the "Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files," issued by the Judicial Conference Committee on Court Administration and Case Management in 2004. The quoted language of the Guidance includes "financial affidavits filed in seeking representation pursuant to the Criminal Justice Act" ("CJA Form 23s") in its list of "documents [that] shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access." The Note goes on to state, "To the extent that the Rule does not exempt these materials from disclosure, the privacy and law enforcement concerns implicated by the above documents in criminal cases can be accommodated under the rule through the sealing provision . . . or a protective order . . . ." Judge Furman's position, detailed in his decision in *United States v. Avenatti*, 550 F. Supp. 3d 36 (S.D.N.Y. 2021), is that the Note's inclusion of the Guidance is an inaccurate statement of the law because CJA Form 23s are judicial documents to which the public has a right of access under both the common law and the First Amendment.

Because each Note is provided as an explanation for the adoption of specific text in a Rule, it is not possible to revise directly the language in the Note that accompanied the adoption of Rule 49.1. Only by revising the text of Rule 49.1 could a new Note be added to explain the reasons for that new revision. The introductory phrase proposed by Judge Furman is intended to signal that there are potentially applicable rights of public access and to allow a new Note explaining why the phrase was added. His suggested amendment would read:

> **(d) Filings Made Under Seal.** Subject to any applicable right of public access, t~~T~~he court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

II. The Subcommittee's recommendation

The Subcommittee unanimously recommends that the Committee take no further action on the proposal.

From the outset, the Subcommittee declined to take a position on the merits of any substantive dispute about the scope of common law or constitutional rights of access, including whether the financial forms in question are judicial documents subject to disclosure under the First Amendment. Deciding such substantive questions is beyond the authority of the Committee, and the Subcommittee rejected the proposal for reasons unrelated to the merits of whether the quoted Guidance in the existing Note is right or wrong.

A. There is no problem requiring an amendment

The Subcommittee was not persuaded that the existing text of the rule is creating a problem that requires an amendment. The text itself states only that "the court *may* order that a filing be made under seal without redaction" and that "[f]or good cause, the court *may*" order redaction or limited remote electronic access. (Emphasis added.) The text is entirely neutral on the question of if and when to seal documents or what to consider when doing so, and leaves these decisions to the discretion of the court.

In cases applying Rule 49.1 to CJA Form 23, the courts have disagreed about whether the form is a judicial document subject to public rights of access and about the appropriate method of determining when it should be sealed. In other words, courts are already addressing the substantive questions, and the decision in *Avenatti* is an example of the thoughtful consideration these issues already receive in light of the existing Rule text.

The Subcommittee also was not persuaded of any significant risk that courts were interpreting the Note's reference to the Guidance as withdrawing the discretion plainly granted by the text or settling substantive questions that the text itself does not address. The research of our Rules Law Clerk revealed that the language in the Note has received little attention in the opinions, and it has not prevented the courts from making an independent inquiry into the substantive issues.

Moreover, as some members noted, the current language in the Note does no more than restate the Guidance promulgated by the Committee on Court Administration and Case Management, which remains in effect. The Note states:

> The Judicial Conference Committee on Court Administration and Case Management has issued "Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files" (March 2004). This document sets out limitations on remote electronic access to certain sensitive materials in criminal cases. It provides in part as follows:
>
> > The following documents shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access:

• unexecuted summonses or warrants of any kind (*e.g.*, search warrants, arrest warrants);

• pretrial bail or presentence investigation reports;

• statements of reasons in the judgment of conviction;

• juvenile records;

• documents containing identifying information about jurors or potential jurors;

• financial affidavits filed in seeking representation pursuant to the Criminal Justice Act;

• ex parte requests for authorization of investigative, expert or other services pursuant to the Criminal Justice Act; and

• sealed documents (*e.g.*, motions for downward departure for substantial assistance, plea agreements indicating cooperation).

To the extent that the Rule does not exempt these materials from disclosure, the privacy and law enforcement concerns implicated by the above documents in criminal cases can be accommodated under the rule through the sealing provision of subdivision (d) or a protective order provision of subdivision (e).

B. Any amendment would create new problems

The Subcommittee also concluded that the proposed amendment posed several problems. Most importantly in the Subcommittee's view, the adoption of an amendment—even one that was phrased neutrally—would inevitably be read as taking a position on the merits of the question whether the financial forms in question are judicial documents subject to disclosure under the First Amendment. The only reasons to amend Rule 49.1 now are to contest the position taken by the Guidance quoted in the existing Note, or to suggest courts should give greater weight to the rights of access. Neither is an appropriate basis for gearing up the Rules Enabling Act process. Even explaining the amendment as correcting the error of including any substantive views in the original Note would raise the inference that the Committee saw the need to distance itself from the views in the Guidance, particularly in light of the origins of the proposed amendment.

The Subcommittee also identified two additional problems with the proposal.

First, the proposed addition to the text would make the court's authority to seal "[s]ubject to any applicable right of public access," in order to signal the need to consider the First Amendment and common law rights of access. But as the style consultants have repeatedly reminded the Committee, it is not appropriate to add admonitions to comply with constitutional restraints to the text of the rules. Including such language in one rule could create a negative

implication in rules without such language, though compliance with the Constitution is required in the application of every single rule.

Finally, the change would be controversial. One article has already been published opposing the amendment,[1] and the Subcommittee anticipated that the proposal would generate opposition from the defense bar, which generally supports limiting access to CJA forms to protect the constitutional rights of defendants.

[1] Stephen R. Sady, *The Rule's All Right: Defend the Confidentiality of Financial Affidavits Required for Representation Under the Criminal Justice Act*, Champion, Jan./Feb. 2022, at 46.

From: Jesse Furman
Sent: Thursday, August 12, 2021 6:04 PM
To: RulesCommittee Secretary
Subject: Suggestion re Criminal Rule 49.1
Attachments: United States v Avenatti.pdf

To the Rules Committee Secretary,

I write to suggest that the Criminal Rules Committee consider a change to Rule 49.1 to acknowledge that the financial disclosure forms that defendants submit to demonstrate financial eligibility for appointed counsel (CJA Form 23s or the equivalent) may be judicial documents subject to a right of public access under either or both the common law or the First Amendment. I addressed the issue in *United States v. Avenatti*, No. 19-CR-374-1 (JMF), 2021 WL 3168145 (S.D.N.Y. July 27, 2021), which is attached for your consideration. As you'll see, I concluded that the defendant's CJA Form 23s (and related affidavits) are indeed "judicial documents" that must be disclosed (subject to appropriate redactions) under both the common law and the First Amendment. In the process, I questioned the language that appears in the Note to Rule 49.1 (and the guidance from CACM and the Judicial Conference upon which it is based), which appears to suggest that such forms should never be made available to the public. *See* pages *3 and *11 n.7. For reasons I explain in the opinion, I think the language in the Note (and the guidance on which it is based) is problematic, if not unconstitutional. Notably, although courts around the country have taken different approaches to the issues (and some have been more friendly toward sealing than I was), I think that the Note language and guidance is inconsistent with the views taken by most, if not all, of the courts that have ruled on the issue to date.

I am aware that amendments to the Note without a corresponding amendment of the Rule are disfavored. To that end, I would propose the following amendment to Rule 49.1(d):

> **(d) Filings Made Under Seal. Subject to any applicable right of public access, t~~T~~he court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

I would then propose deleting from the Note the following reference to the CACM Guidance:

> The Judicial Conference Committee on Court Administration and Case Management has issued "Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files" (March 2004). This document sets out limitations on remote electronic access to certain sensitive materials in criminal cases. It provides in part as follows:
> The following documents shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access:
> - unexecuted summonses or warrants of any kind (*e.g.*, search warrants, arrest warrants);
> - pretrial bail or presentence investigation reports;
> - statements of reasons in the judgment of conviction;
> - juvenile records;
> - documents containing identifying information about jurors or potential jurors;
> - financial affidavits filed in seeking representation pursuant to the Criminal Justice Act;
> - ex parte requests for authorization of investigative, expert or other services pursuant to the Criminal Justice Act; and
> - sealed documents (*e.g.*, motions for downward departure for substantial assistance, plea agreements indicating cooperation).

To the extent that the Rule does not exempt these materials from disclosure, the privacy and law enforcement concerns implicated by the above documents in criminal cases can be accommodated under the rule through the sealing provision of subdivision (d) or a protective order provision of subdivision (e).

In my view, the Guidance is unnecessary and only likely to invite problems. At a minimum, I would propose adding a Note stating something to the effect of the following: "Subsection (d) of the rule was amended to add the words 'Subject to any applicable right of public access' to ensure that parties and courts are mindful of any applicable law providing a right to public access to a document. *See, e.g.*, *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119–20 (2d Cir. 2006) (holding that there is a common law right of public access to judicial documents and a qualified First Amendment right of public access to certain judicial documents)."

Please let me know if you have any questions or need additional information. Otherwise, thank you for your consideration.

Yours,
Jesse M. Furman

Jesse M. Furman
United States District Judge
United States District Court
Southern District of New York
40 Centre Street, Room 2202
New York, NY 10007
Email [redacted]
Office: [redacted]
Fax: [redacted]

2021 WL 3168145
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

UNITED STATES of America,
v.
Michael AVENATTI, Defendant.

19-CR-374-1 (JMF)
|
Signed 07/27/2021

Attorneys and Law Firms

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OPINION AND ORDER

JESSE M. FURMAN, United States District Judge:

***1** The Sixth Amendment to the Constitution guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The Supreme Court has interpreted this guarantee to require the appointment of counsel, at public expense, to represent indigent defendants in most criminal cases. *See Alabama v. Shelton*, 535 U.S. 654 (2002); *Gideon v. Wainwright*, 372 U.S. 335 (1963). The Criminal Justice Act ("CJA"), enacted by Congress in 1964, governs such appointments in federal criminal cases. *See* 18 U.S.C. § 3006A. To the extent relevant here, it mandates the appointment of counsel for any person charged with a felony if the court is "satisfied after appropriate inquiry that the person is financially unable to obtain counsel." *Id.* § 3006A(b). The Act itself does not prescribe what form the court's required "inquiry" must take. In practice, however, it usually involves the defendant's submission of an affidavit describing his or her financial circumstances. To that end, the Administrative Office of the United States Courts has created a standard form for the purpose, commonly known as CJA Form 23.

The questions presented here are whether or when the CJA Form 23 or similar documents may be sealed and whether or when they must be made available to the public — questions that are surprisingly unsettled despite the more than half century of experience with the CJA. They arise in connection with the prosecution of Michael Avenatti, a formerly high-profile and seemingly successful lawyer, for an alleged scheme to defraud a former client. In August 2020, the Court appointed counsel for Avenatti pursuant to the CJA based on affidavits he had filed attesting to his inability to afford counsel. The Court temporarily granted Avenatti's request to file the affidavits under seal — and did the same with respect to affidavits he has since filed attesting to his continuing eligibility (together with the initial affidavits, the "Financial Affidavits") — but directed him to show cause why they should remain sealed. He argues that sealing is necessary to protect his Fifth Amendment privilege against self-incrimination because the Government could use his statements in the affidavits against him. A member of the press, having intervened, argues that the affidavits must be disclosed because they qualify as judicial documents to which the public, under the common law and the First Amendment, has a right of access and that Avenatti's Fifth Amendment interests do not outweigh the public's rights.

For the reasons that follow, the Court holds that Avenatti's Financial Affidavits are indeed judicial documents subject to the common law and First Amendment rights of public access. Additionally, in light of Second Circuit precedent emphasizing that determinations regarding the appointment of counsel pursuant to the CJA should be made in traditional, open adversary proceedings and holding that a defendant's Fifth Amendment interests are adequately protected by a prohibition on the use of the defendant's statements as part of the prosecution's case-in-chief, the Court concludes that there are no countervailing factors or higher values sufficient to outweigh the public's right to access the documents. Accordingly, and for the reasons that follow, the Court holds that Avenatti's Financial Affidavits must be unsealed (subject to the possibility of narrowly tailored redactions to serve other interests).

BACKGROUND

***2** The Court begins with a brief discussion of the relevant background, starting with the CJA and the role of the documents at issue here and then turning to the history of this case.

A. The Criminal Justice Act

Congress enacted the CJA to effectuate the Sixth Amendment right to counsel "[i]n all criminal prosecutions," U.S. Const. amend. VI, which the Supreme Court has construed to mean that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial," *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). The Act "establishes the broad institutional framework for appointing counsel for a criminal defendant who is financially unable to obtain representation." *United States v. Parker*, 439 F.3d 81, 91 (2d Cir. 2006). It provides that "[e]ach United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation." 18 U.S.C. § 3006A(a). In accordance with the Act, this District has a Plan for Furnishing Representation Pursuant to the Criminal Justice Act (the "CJA Plan"), the operative version of which was adopted in 2019. *See* U.S. DIST. CT., S. DIST. OF N.Y., REVISED PLAN FOR FURNISHING REPRESENTATION PURSUANT TO THE CRIMINAL JUSTICE ACT (2019), https://www.nysd.uscourts.gov/sites/default/files/2019-11/1-2019-plan-final-october.pdf ("CJA Plan").

To the extent relevant here, the CJA mandates the appointment of counsel "for any person" charged with a felony offense who is "financially unable to obtain adequate representation." 18 U.S.C. § 3006A(a); *see id.* § 3006A(c) (providing for the appointment of counsel if, "at any stage of the proceedings, ... the court finds that the person is financially unable to pay counsel whom he had retained"). The Court may appoint counsel in this manner, however, only "if [it is] satisfied after appropriate inquiry that the [defendant] is financially unable to obtain counsel." *Id.* § 3006A(b). It is the defendant's burden to establish financial eligibility. *See United States v. O'Neil*, 118 F.3d 65, 74 (2d Cir. 1997). The court's inquiry is usually based, at least in part, on information "provided by the person seeking the appointment of counsel either: 1) by affidavit sworn to before a district judge, magistrate judge, court clerk, deputy clerk, or notary public; or 2) under oath in open court before a district judge or magistrate judge." CJA Plan 5; *see Parker*, 439 F.3d at 93 ("Courts have utilized a broad range of considerations in conducting an 'appropriate inquiry' into financial eligibility under 18 U.S.C. § 3006A.... In many cases, the court's inquiry may properly be limited to review of financial information supplied on the standard form financial affidavit." (internal quotation marks omitted)). Indeed, the CJA Plan provides that, "[w]henever possible," a defendant "shall" complete and use a standard financial affidavit created by the Administrative Office of the United States Courts — known as CJA Form 23, a blank copy of which is attached as Exhibit A. CJA Plan 5. "CJA Form 23, a standard financial affidavit, requires comprehensive financial data, including employment income of the defendant and his or her spouse; all other income, cash, and property; identification of the defendant's dependents; and all obligations, debts, and monthly bills." *Parker*, 439 F.3d at 86 (internal quotation marks omitted).

***3** Notably, the CJA explicitly provides that a defendant may seek certain services — namely, "investigative, expert, or other services necessary for adequate representation" — by way of "an ex parte application" and provides that a court's determination of an application for such services is to be made "after appropriate inquiry in an ex parte proceeding." 18 U.S.C. § 3006A(e)(1). Another subsection of the Act provides that "the amounts paid ... for services in any case shall be made available to the public ... upon the court's approval of the payment," but it permits a court to delay or limit such disclosure if necessary to protect, among other things, "any person's 5th amendment right against self-incrimination," "the defendant's 6th amendment rights to effective assistance of counsel," "the defendant's attorney-client privilege" or "the work product privilege of the defendant's counsel." *Id.* § 3006A(d)(4). By contrast, the CJA is conspicuously silent on how a court should handle documents demonstrating a defendant's financial eligibility for appointed counsel in the first instance — that is, whether and when such documents (including but not limited to the CJA Form 23) should be sealed or disclosed and whether and whether or how they may be used. This District's CJA Plan, however, provides that "[t]he Government may not use as part of its direct case, other than a prosecution for perjury or false statements, any information provided by a defendant in connection with his or her request for the appointment of counsel pursuant to this Plan." CJA Plan 6.

Meanwhile, the Judicial Conference of the United States (in its Guide to Judiciary Policy and its current Policy on Privacy and Public Access to Electronic Case Files) and the Advisory Committee on the Criminal Rules (in the Advisory Committee note to Rule 49.1 of the Federal Rules of Criminal Procedure) have gone further, stating that "financial affidavits filed in seeking representation pursuant to" the CJA and "ex parte requests for authorization of investigative, expert or other services pursuant to" the CJA "shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access." Fed. R. Crim. P. 49.1 note; 10 JUD. CONF. OF THE U.S., GUIDE TO JUDICIARY POLICY § 340; Jud. Conf. of the U.S., *Judicial Conference Policy on Privacy and Public Access to Electronic Case Files* (March 2008), https://www.uscourts.gov/rules-policies/judiciary-policies/privacy-policy-electronic-case-files. Neither explains the rationale for that direction, but the Advisory Committee note cites March 2004 Guidance from the Judicial Conference Committee on Court Administration and Case Management ("CACM"). The CACM Guidance, in turn, provides no explanation of why "financial affidavits filed in seeking representation pursuant to" the CJA made its list of documents to be withheld from the public or how the list was compiled, noting only that "because of the security and law enforcement issues unique to criminal case file information, some specific criminal case file documents will not be available to the public remotely or at the courthouse." JUD. CONF. COMM. ON CT. ADMIN. & CASE MGMT., GUIDANCE FOR IMPLEMENTATION OF THE JUDICIAL CONFERENCE POLICY ON PRIVACY AND PUBLIC ACCESS TO ELECTRONIC CRIMINAL CASE FILES 3, 5 (2004), https://www.uscourts.gov/sites/default/files/implement031604.pdf.

B. Relevant Factual Background

Until 2019, Avenatti was a high-profile attorney who, at least publicly, seemed to be quite financially successful. As he describes it in a submission unrelated to the treatment of his Financial Affidavits, as of early 2018, he "was a practicing civil trial lawyer in California who had obtained numerous multi-million dollar judgments for his clients through various verdicts and settlements in courts throughout the United States. Many of Mr. Avenatti's cases received extensive local and national press coverage." ECF No. 115, at 6. In February 2018, Avenatti was hired to represent Stephanie Clifford, an adult entertainer more commonly known by her stage name, Stormy Daniels, "in connection with various matters relating to her previous liaison with the 45th President of the United States," Donald J. Trump. *Id.* at 6. As part of what he describes as "an extensive legal and media strategy," Avenatti "represented Ms. Clifford in various forums, including the court of public opinion." *Id.* at 7. As a result, it is fair to say that by late 2018, Avenatti, like Ms. Clifford, had become "a household name." *Id.*

***4** Avenatti's life took a dramatic turn in early 2019. First, in March 2019, he was arrested and charged in this District with bank and wire fraud related to an alleged scheme to extort Nike ("*Avenatti I*"). *See* Sealed Compl., *United States v. Avenatti*, No. 19-CR-373 (PGG) (S.D.N.Y. March 24, 2019), ECF No. 1. Then, in April 2019, he was indicted in the Central District of California on charges stemming from an alleged scheme to defraud and embezzle several of his clients. Indictment, *United States v. Avenatti*, No. 8:19-CR-61 (JVS) (C.D. Cal. Apr. 19, 2019), ECF No. 16. Finally, in May 2019, he was indicted in this case with a scheme to defraud Ms. Clifford. *See* ECF No. 1 ("Indictment"). In February 2020, after a trial before Judge Gardephe, a jury found Avenatti guilty of transmission of interstate communications with intent to extort (Count One), attempted extortion (Count Two), and honest services wire fraud (Count Three) in *Avenatti I*. *See* Verdict, *Avenatti I*, No. 19-CR-373 (PGG) (S.D.N.Y. Feb. 14, 2020), ECF No. 265. On July 8, 2021, Judge Gardephe sentenced him to twenty-four months' imprisonment on Count One and thirty months' imprisonment on Counts Two and Three, with all terms to be served concurrently. Judgment, *Avenatti I*, No. 19-CR-373 (PGG) (S.D.N.Y. July 15, 20201), ECF No. 339. The California case, meanwhile, was severed into two sets of charges. Trial on one set of the charges began July 13, 2021. Minutes, *United States v. Avenatti*, No. 8:19-CR-61 (JVS) (C.D. Cal. July 13, 2021), ECF No. 553. The second trial is scheduled to begin October 12, 2021. *See* Order, *United States v. Avenatti*, No. 8:19-CR-61 (JVS) (C.D. Cal. Nov. 13, 2020), ECF No. 386.

In this case, trial was originally scheduled to begin on April 21, 2020, ECF Nos. 23, 36, but due to the COVID-19 pandemic it was adjourned to January 10, 2022, ECF No. 103. On July 27, 2020, the attorneys who had been retained to represent Avenatti moved to withdraw, *see* ECF No. 61, and shortly thereafter, he applied for an order pursuant to the CJA appointing the Federal Defenders of New York to be his counsel going forward, ECF No. 66. To demonstrate his eligibility for appointment of counsel, Avenatti filed a CJA Form 23 and an attached declaration (together, the "Initial

Financial Affidavit"). By letter dated July 31, 2020, his then-counsel moved for the Initial Financial Affidavit to be kept under seal until the conclusion of these proceedings and the criminal proceedings pending against Avenatti in the Central District of California. *See* ECF No. 68. In support of that request, counsel explained only that the judge presiding over the California case had granted a request two days earlier to seal the same documents. *See id.* "A contrary ruling in this case," counsel contended, "would frustrate [the California] Order and prejudice Mr. Avenatti." *Id.* The Court granted the request. *Id.*

On August 7, 2020, during a conference conducted on the record by telephone, the Court granted counsel's motion to withdraw. ECF No. 87 ("Aug. 7, 2020 Tr."), at 13; *see also* ECF No. 73. Based on a review of the Initial Financial Affidavit, the Court found that Avenatti was eligible for the appointment of counsel and, on that basis, appointed Federal Defenders to be his new counsel. *See* Aug. 7, 2020 Tr. 15; ECF No. 73. In doing so, however, the Court noted Avenatti's acknowledgement in the Initial Financial Affidavit that he had "certain assets" with an "undetermined" value "that might yield funds in the future such as contingency lawsuits and the like." Aug. 7, 2020 Tr. 15. That raised "the possibility, however remote," that Avenatti's financial circumstances could change such that he would no longer be eligible for appointed counsel. *Id.* at 16. To ensure that it would be aware of any such change, the Court ordered Avenatti to submit an affidavit every four months "regarding his financial circumstances and noting with specificity any change in those circumstances since the prior affidavit." *Id.* The Court also directed counsel from Federal Defenders to keep track of their hours to ensure that, if there was a basis to do so, it could order Avenatti to reimburse the taxpayers for legal fees. *Id.*; *see* 18 U.S.C. § 3006A(f) ("Whenever the ... court finds that funds are available for payment from or on behalf of a person furnished representation, it may authorize or direct that such funds be paid ... to the court for deposit in the Treasury as a reimbursement to the appropriation ....").

***5** Additionally, the Court ordered Avenatti to show cause in writing why the Initial Financial Affidavit (and, by implication, any of the affidavits to be filed every four months thereafter) should not be unsealed. Aug. 7, 2020 Tr. 10-12; ECF No. 73. The Court noted that, "upon reflection," it had decided that "the question of whether [the Initial Financial Affidavit] should be public in this case warrants further briefing." Aug. 7, 2020 Tr. 10. The Court acknowledged that the documents may "contain private information or information that Mr. Avenatti may not want to share with the public. But at the same time, there is obviously some public interest in ensuring that taxpayer dollars are spent appropriately," particularly "given that not long ago, Mr. Avenatti certainly had sufficient funds to afford plenty of lawyers." *Id.* at 10-11. The Court noted also that the mere fact that the California judge had agreed to seal a similar document — the sole basis for Avenatti's July 31, 2020 application to seal — was not sufficient reason to maintain the Initial Financial Affidavit under seal, particularly because the law on public access in the Second and Ninth Circuits might differ. *Id.* at 11. In response to the Court's Order, Avenatti filed a letter brief arguing that the Initial Financial Affidavit should remain under seal. ECF No. 80 ("Def.'s Mem."). Thereafter, the Court received submissions from Inner City Press, a media outlet that intervened to seek disclosure of the Financial Affidavits, ECF Nos. 85, 90, 99; a letter from the Government, ECF No. 86 ("Gov't Opp'n"); and additional submissions from Avenatti, ECF Nos. 89 ("Def.'s Reply"), 91 ("Def.'s Sur-Reply"). Since that time, in compliance with the Court's directives, Avenatti has filed supplemental affidavits every four months, all of which — like the Initial Financial Affidavit itself — remain under seal.

DISCUSSION

Avenatti contends that his Financial Affidavits should remain under seal in their entirety. His primary argument is that sealing the documents is necessary to safeguard his Fifth Amendment privilege against self-incrimination because "there is a real and appreciable risk" that the Government will use his sworn statements against him." Def.'s Mem. 1. But he also disputes the proposition, advanced primarily by Inner City Press, ECF No. 85, at 2-3; ECF No. 99, at 2-3, [1] that the documents are judicial documents subject to a right of public access in the first instance. *See* Def.'s Reply 1 n.1; Def.'s Sur-Reply 1. [2] In the alternative, Avenatti asks the Court to delay disclosure of his Financial Affidavits until after the Government has presented its case-in-chief at trial and to give him an opportunity to propose redactions to the documents. *See* Def.'s Reply 4-5. The Court will begin with an overview of the well-established legal principles that govern whether and when the public has either a First Amendment or common law right to access documents in criminal cases before explaining why, in light of those principles, disclosure of Avenatti's Financial Affidavits (subject to the possibility of narrowly tailored redactions) is required.

[1] References to page numbers in the submissions by Inner City Press are to the page numbers automatically generated by the Court's Electronic Case Filing ("ECF") system.

[2] The Defendant initially argued that the Government lacked standing "to assert any right on behalf of the public to access Mr. Avenatti's sworn financial statements." Def.'s Mem. 7 n.1 (citing *United States v. Hickey*, 185 F.3d 1064 (9th Cir. 1999)). Subsequently, however, the Court granted leave to Inner City Press to be heard on the Defendant's motion, ECF No. 85, which indisputably does have standing to assert such rights.

A. Applicable Legal Principles Regarding Public Access to Judicial Documents

It is well established that the First Amendment provides a qualified right of access to criminal proceedings, *see Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (plurality op.), including pretrial proceedings, *Press-Enter. Co. v. Superior Ct.* ("*Press-Enter. II*"), 478 U.S. 1, 10 (1986), and to certain documents filed in connection with criminal proceedings, *see United States v. Biaggi* (*In re N.Y. Times Co.*), 828 F.2d 110, 114 (2d Cir. 1987); *see also Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91 (2d Cir. 2004) ("[O]ur precedents establish[ ] the public's and the press's qualified First Amendment right to attend judicial proceedings and to access certain judicial documents."). Separate and apart from the First Amendment, the common law provides a "right of public access to judicial documents." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006). The common law right arises from "the need for federal courts, although independent — indeed, particularly because they are independent — to have a measure of accountability and for the public to have confidence in the administration of justice." *United States v. Amodeo* ("*Amodeo II*"), 71 F.3d 1044, 1048 (2d Cir. 1995).

***6** In light of the common law presumption in favor of public access, "the Second Circuit has established a three-part test for determining whether documents may be placed under seal." *Coscarelli v. ESquared Hosp. LLC*, No. 18-CV-5943 (JMF), 2020 WL 6802516, at *1 (S.D.N.Y. Nov. 19, 2020). First, a court must determine whether "the documents at issue are indeed 'judicial documents' " to which the "presumption of access attaches." *Lugosch*, 435 F.3d at 119. The Second Circuit has defined a "judicial document" as one that is "relevant to the performance of the judicial function and useful in the judicial process," *United States v. Amodeo* ("*Amodeo I*"), 44 F.3d 141, 145 (2d Cir. 1995). "A document is ... relevant to the performance of the judicial function if it would reasonably have the *tendency* to influence a district court's ruling on a motion or in the exercise of its supervisory powers, without regard to which way the court ultimately rules or whether the document ultimately in fact influences the court's decision." *Brown v. Maxwell*, 929 F.3d 41, 49 (2d Cir. 2019) (internal quotation marks omitted). Second, the court "must determine the weight of that presumption," which is "governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts." *Lugosch*, 435 F.3d at 119 (internal quotation marks omitted). "The weight of the common law presumption is strongest for 'matters that directly affect an adjudication ....' " *United States v. Correia*, No. 19-CR-725-3 (JPO), 2020 WL 6683097, at *1 (S.D.N.Y. Nov. 12, 2020) (quoting *Lugosch*, 435 F.3d at 119). "Finally, ... the court must balance competing considerations," including "the danger of impairing law enforcement or judicial efficiency and the privacy interests of those resisting disclosure," against the presumption. *Lugosch*, 435 F.3d at 120 (internal quotation marks omitted).

Separate and apart from whether the common law presumption of access mandates disclosure of a document, the Court must determine "whether a First Amendment presumption of access also exists," because the constitutional presumption "gives rise to a higher burden on the party seeking to prevent disclosure than does the common law presumption." *Id.* at 124, 126. In determining whether a First Amendment right of access attaches to a particular filing, courts should consider (1) whether the filing at issue has "historically been open to the press and general public" and (2) whether "public access plays a significant positive role in the functioning of the particular process in question." *Press-Enter. II*, 478 U.S. at 8. A court should also ask "whether the documents at issue 'are derived from or are a necessary corollary of the capacity to attend the relevant proceedings.' " *Newsday LLC v. County of Nassau*, 730 F.3d 156, 164 (2d Cir. 2013) (quoting *Lugosch,* 435 F.3d at 120). Applying these tests, "[t]he Second Circuit has recognized a qualified First Amendment right of access to a wide variety of judicial documents associated with criminal proceedings, including pretrial suppression hearings, suppression motion papers, voir dire, and more." *Correia*, 2020 WL 6683097, at *2. "Indeed, the Second Circuit has consistently affirmed that the right

of access applies to 'judicial documents' in criminal cases." *United States v. Smith*, 985 F. Supp. 2d 506, 517 (S.D.N.Y. 2013) (citing cases). If the "more stringent First Amendment framework applies, continued sealing of the documents may be justified only with specific, on-the-record findings that sealing is necessary to preserve higher values and only if the sealing order is narrowly tailored to achieve that aim." *Lugosch*, 435 F.3d at 124 (*citing In re N.Y. Times*, 828 F.2d at 116).

B. The Rights of Public Access Apply to Avenatti's Financial Affidavits

As an initial matter, there is no question that the Financial Affidavits are judicial documents subject to the common law presumption of public access. As discussed above, the Second Circuit has broadly defined a "judicial document" for purposes of the common law as a document that is "relevant to the performance of the judicial function" — meaning "it would reasonably have the *tendency* to influence a district court's ruling on a motion" — "and useful in the judicial process." *Brown*, 929 F.3d at 49 (internal quotation marks omitted). CJA Form 23s generally — and, *a fortiori*, the Financial Affidavits specifically — "fit comfortably within the Second Circuit's capacious definition," *Correia*, 2020 WL 6683097, at *1: They are relevant, indeed critical, to the "appropriate inquiry" a court is statutorily mandated to conduct when tasked with determining if a criminal defendant is financially eligible for appointment of counsel at public expense. 18 U.S.C. § 3006A(b); *see Parker*, 439 F.3d at 93-96 (discussing the role of CJA Form 23s in connection with fulfilling the CJA's mandate to conduct "appropriate inquiry" regarding the eligibility for appointment of counsel); 7 JUD. CONF. OF THE U.S., GUIDE TO JUDICIARY POLICY § 210.40.20(a) ("The determination of eligibility for representation under the CJA is a *judicial function* to be performed by the court or U.S. magistrate judge after making appropriate inquiries concerning the person's financial condition." (emphasis added)); *see also, e.g.*, *United States v. Hadden*, No. 20-CR-468 (RMB), 2020 WL 7640672, at *2 (S.D.N.Y. Dec. 23, 2020) (rejecting a request to seal financial statements submitted in connection with an application for CJA counsel "because the documents are both useful and relevant to the judicial process and the application for appointed counsel").

***7** So too, the Court concludes that there is a qualified First Amendment right of access to the Financial Affidavits. Significantly, the Second Circuit addressed a similar issue in *United States v. Suarez*, 880 F.2d 626 (2d Cir. 1989), holding that there is a First Amendment right to access to "CJA forms on which judicial officers have approved payments to attorneys or to others who provided expert or other services to appellants, such as investigators, interpreters and computer experts," *id.* at 629-30. Citing "recent decisions ... dealing with the public's right of access to courtroom proceedings in criminal cases and to papers filed in connection with them," the court held that "the principles" of these cases applied to the CJA forms at issue given that they "were submitted to the federal district judge in charge of the criminal case ... and the submission was obviously in connection with the criminal proceeding." *Id.* at 630-31. The court acknowledged that "there is no long tradition of accessibility to CJA forms," but it noted "that is because the CJA itself is, in terms of tradition, a fairly recent development." *Id.* at 631 (internal quotation marks omitted). Moreover, the court reasoned, "[t]he lack of tradition with respect to the CJA forms does not detract from the public's strong interest in how its funds are being spent in the administration of criminal justice and what amounts of public funds are paid to particular private attorneys or firms." *Id.* (internal quotation marks omitted). The court concluded: "Because there is no persuasive reason to ignore the presumption of openness that applies to documents submitted in connection with a criminal proceeding, ... the public has a qualified First Amendment right of access to the CJA forms after payment has been approved." *Id.*

Suarez all but compels the conclusion that the Financial Affidavits at issue here are judicial documents subject to the First Amendment right of public access. *See Correia*, 2020 WL 6683097, at *2 ("The Court sees no reason why the declarations at issue depart from judicial documents associated with criminal pretrial proceedings as to which the Second Circuit has previously recognized the First Amendment right of access." (citing *Suarez*, 880 F.2d at 631)). In fact, if anything, there is a stronger argument for granting First Amendment status to the CJA Form 23 and similar documents than there was for granting it to the forms at issue in *Suarez*. Whereas the forms at issue in *Suarez* provided only "barebones data" regarding "who was paid, how much and for what services," 880 F.2d at 631 (internal quotation marks omitted), the CJA Form 23 plays a critical role in the determination of an applicant's substantive right to appointed counsel under both the CJA and the Sixth Amendment — a right that is fundamental to the fairness of many criminal trials and the criminal justice system as a whole. In addition, an applicant's statements on the CJA Form 23 are subject to the penalties of perjury, the court's inquiry

is generally made in the context of the adversarial process, and the decision to deny or terminate appointed counsel can be appealed. *See, e.g.*, *United States v. Harris*, 707 F.2d 653, 658, 660-62 (2d Cir. 1983); *see also United States v. Coniam*, 574 F. Supp. 615, 617 (D. Conn. 1983) (noting the "role of the government" and the "adversarial process" in "[e]nsur[ing] the propriety of [a] defendant's receipt of services of counsel under the CJA").

In short, here, as in *Suarez*, "there is no persuasive reason to ignore the presumption of openness that applies to documents submitted in connection with a criminal proceeding." 880 F.2d at 631. Put differently, "public access plays a significant positive role in the functioning of the particular process in question." *Press-Enter. II*, 478 U.S. at 8-9. Much like the right to a public trial generally, the right to public access here ensures that "the public may see [a defendant] is fairly dealt with and not unjustly" denied an important substantive right. *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (internal quotation marks omitted). Further, knowledge that the form is subject to public scrutiny serves to "keep [a defendant's] triers keenly alive to a sense of their responsibility and to the importance of their functions" — that is, it helps ensure "that judge and prosecutor carry out their duties responsibly" — and it "discourages perjury." *Id.* (internal quotation marks omitted). Critically, these values inhere even where there is no reason to believe that an applicant has lied, and the prosecution does not question the applicant's eligibility for the appointment of counsel. That is, "the sure knowledge that *anyone* is free" to access a CJA Form 23 "gives assurance that established procedures are being followed and that deviations will become known." *Press-Enter. Co. v. Superior Ct.* ("*Press-Enter. I*"), 464 U.S. 501, 508 (1984). While public scrutiny "will more likely bring to light any errors that do occur, it is the openness of the [document] itself, regardless of [what is actually in the document or whether anyone accesses it], that imparts 'the appearance of fairness so essential to public confidence in the system' as a whole." *United States v. Gupta*, 699 F.3d 682, 689 (2d Cir. 2012) (quoting *Press-Enter. I*, 464 U.S. at 508).

***8** Notably, Avenatti barely disputes that the Financial Affidavits are subject to both the First Amendment right of public access and the common law presumption in favor of public access. Indeed, he relegates the issue to a footnote in his reply, *see* Def.'s Reply 2 n.1, and to one sentence in his sur-reply, *see* Def.'s Sur-Reply 1, neither of which is sufficient to raise the issue, *see, e.g.*, *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs are considered waived ...."); *Pirnik v. Fiat Chrysler Autos., N.V.*, 327 F.R.D. 38, 43 n.2 (S.D.N.Y. 2018) (stating that an argument "relegated to a footnote ... does not suffice to raise [an] issue" and citing cases). In any event, his argument is easily rejected, as he relies solely on the majority opinion in *United States v. Connolly* (*In re Boston Herald, Inc.*), 321 F.3d 174 (1st Cir. 2003). The *Boston Herald* majority did indeed hold (in what appears to be the only court of appeals decision squarely addressing the issue) "that neither the First Amendment nor the common law provides a right of access to financial documents submitted with an initial application to demonstrate a defendant's eligibility for CJA assistance." *Id.* at 191. But that holding is obviously not binding here and, if the Court were writing on a blank slate, it would conclude that Judge Lipez, writing in dissent, had the better of the argument. *See id.* at 191-206 (Lipez, J., dissenting). In any event, the Court does not write on a blank slate, but is bound by both *Suarez* and the Second Circuit's broad definition of "judicial documents" for purposes of the common law right. As Judge Lipez's dissent confirms, it is difficult, if not impossible, to reconcile the *Boston Herald* majority's analysis and conclusion with these precedents. *See id.* at 200-01 & n.13 (Lipez, J., dissenting) (relying on *Suarez*).

In sum, the Financial Affidavits are subject to a right of public access under both the First Amendment and the common law. That said, this "right of access ... is a qualified one; it is not absolute." *Suarez*, 880 F.2d at 631. Thus, the Financial Affidavits "may be kept under seal if 'countervailing factors' in the common law framework or 'higher values' in the First Amendment framework so demand." *Lugosch*, 435 F.3d at 124. That is the primary basis on which Avenatti resists disclosure. To these arguments, the Court thus turns. [3]

3 Strictly speaking, the second step of the common law analysis is to "determine the weight" of the presumption in favor of public access, which is "governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts." *Lugosch*, 435 F.3d at 119 (internal quotation marks omitted). In *Correia*, Judge Oetken concluded that similar documents (namely, declarations submitted by counsel explaining a defendant's non-payment as the reason for a motion to withdraw) were subject to only a "moderate presumption of access" because they "related to the court's supervision or management of counsel, authority ancillary to the

court's core role in adjudicating a case, and closer in nature to filings associated with discovery or in limine proceedings than to dispositive motions or trial documents." 2020 WL 6683097, at *1 (cleaned up). By contrast, in *Boston Herald*, Judge Lipez took the position that "the CJA Form 23 information unmistakably falls on the 'strong presumption' end of the Article III continuum" because it is of "the utmost importance to the court" and, "[i]n many cases, ... may be the only evidence submitted in the eligibility proceeding." 321 F.3d at 198 (Lipez, J., dissenting). The Court need not and does not wade into this debate because, whatever weight the presumption has here, there are — for the reasons discussed below — no countervailing interests that would justify sealing.

C. There Are No Countervailing Factors or Higher Values that Justify Sealing

Avenatti proffers only one countervailing factor or higher value in an effort to justify sealing of the Financial Affidavit: his Fifth Amendment privilege against self-incrimination. Avenatti argues that he "was compelled to make" the statements in the Financial Affidavit "to obtain counsel under the Sixth Amendment." Def.'s Mem. 1. "His Fifth Amendment right against self-incrimination," Avenatti continues, "prevents those very same statements from being weaponized against him." *Id.* at 4; *see* Def.'s Mem. 4-9; Def.'s Reply 2-4.

The courts of appeals have taken varying approaches to the question of whether and when CJA Form 23s can or should be sealed, *see United States v. Hilsen*, No. 03-CR-919 (RWS), 2004 WL 2284388, at *8-9 & nn.7-9 (S.D.N.Y. Oct. 12, 2004) (citing and discussing cases), but at least one — the Eighth Circuit — has adopted the theory pressed by Avenatti in explicitly approving the sealing of CJA Form 23s, *see United States v. Anderson*, 567 F.2d 839, 840-41 (8th Cir. 1977) (per curiam); *see also United States v. Gravatt*, 868 F.2d 585, 590-91 (3d Cir. 1989) (holding that, where a defendant refuses to complete a CJA Form 23, a district court has "discretion" either to require the applicant to submit the information for *in camera* review, following which "the financial data should be sealed," or, if the district court "deems an adversary hearing ... to be appropriate," to "grant use immunity to the defendant's testimony at that hearing" (internal quotation marks omitted)). [4] As the Eighth Circuit put it, to require a defendant seeking appointed counsel to disclose the financial information requested by the CJA Form 23 "would force [him] to choose between his Sixth Amendment right to counsel and his Fifth Amendment right against self-incrimination. Such a choice is constitutionally impermissible." *Anderson*, 567 F.2d at 840-41 (citing *United States v. Branker*, 418 F.2d 378, 380 (2d Cir. 1969), and *Simmons v. United States*, 390 U.S. 377 (1968)).

4 Avenatti asserts that the Third, Fourth, Fifth, and Ninth Circuits have also held that defendants' financial affidavits "should be sealed and reviewed by courts *in camera*," Def.'s Reply 2; *see also* Def.'s Mem. 4-6, but that is not accurate. In the Third Circuit case cited by Avenatti, *Gravatt*, the court (as noted above) held that district courts *could* seal such documents, not that they "should" do so. 868 F.2d at 590-91. In the Fourth Circuit case, *United States v. Davis*, 958 F.2d 47, 49 n.4 (4th Cir. 1992) (per curiam), *abrogation on other grounds recognized in United States v. Ductan*, 800 F.3d 642, 652 n.5 (4th Cir. 2015) (per curiam), the court merely observed that the district court had "avoided any serious Fifth Amendment challenge by conducting an *ex parte* examination" of the defendant and sealing his answers; it did not opine on the propriety of sealing. In *Seattle Times Co. v. United States District Court for the Western District of Washington*, 845 F.2d 1513, 1519 (9th Cir. 1988), the Ninth Circuit actually *reversed* a district court's decision to seal a financial affidavit. (Although not cited by Avenatti, the Ninth Circuit's decision in *United States v. Ellsworth*, 547 F.2d 1096, 1097-98 (9th Cir. 1976), upheld the denial of an application for CJA counsel where the defendant had refused to complete the CJA Form 23 despite having been assured that it would "be sealed after review." But like the *Davis* Court, it did not address the propriety of sealing.) Avenatti, meanwhile, does not actually cite a decision from the Fifth Circuit. Judge Sweet's decision in *Hilsen* provides a helpful survey of the differing approaches among the circuits. *See* 2004 WL 2284388, at *4, *9 & nn.6-9.

***9** The problem for Avenatti is that the Second Circuit has explicitly rejected the Eighth Circuit's decision in *Anderson* and adopted a different approach to the balancing of a defendant's Fifth Amendment and Sixth Amendment rights in connection with the appointment of CJA counsel. In *Harris*, the district court had appointed counsel to represent John L. Harris based on his CJA Form 23. *See* 707 F.2d at 654-55.

A few months later, however, the prosecution moved for a determination that Harris "was not financially unable to obtain counsel and hence [wa]s not entitled" to appointed counsel under the CJA. *Id.* at 655 (internal quotation marks omitted). Harris disputed the prosecution's conclusions but refused to submit additional evidence when the district court denied his request to do so "at an in camera, ex parte proceeding." *Id.* Thereafter, the district court terminated Harris's appointment of counsel. *See id.* In an interlocutory appeal, he argued that "further inquiry should have been appropriately conducted through an ex parte, sealed in camera hearing." *Id.* at 662. The Second Circuit acknowledged that *Anderson* provided "some support" for this argument, but it rejected the Eighth Circuit's approach for several reasons. *Harris*, 707 F.2d at 662. First, citing 18 U.S.C. § 3006A(e)(1), the court noted that the CJA "specifically provides for ex parte applications for services other than counsel, while there is no such requirement for proceedings involving the appointment or termination of counsel." *Id.* (citation omitted). [5] "[S]ince Congress obviously knew how to provide for an ex parte proceeding when it seemed appropriate," the court observed, "the failure to do so in the context of appointment of counsel seems significant." *Id.* Second, the court reasoned that "our legal system is rooted in the idea that facts are best determined in adversary proceedings; secret, ex parte hearings are manifestly conceptually incompatible with our system of criminal jurisprudence." *Id.* (internal quotation marks omitted).

5 As the *Harris* court explained, "ex parte proceedings for services other than counsel are provided for to ensure that a defense would not be 'prematurely' or 'ill-advisedly' disclosed" — "considerations" that "are not relevant to proceedings concerning the appointment or termination of counsel." *Id.* (quoting *Criminal Justice Act of 1963: Hearings on S.63 and S.1057 Before the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. 173 (1963)).

Finally, the court observed that there "are numerous situations where a defendant must face the unappealing choice ... of testifying in open court or losing a constitutional claim." *Id.* (internal quotation marks omitted). Quoting from the Supreme Court's decision in *Simmons* and its own earlier decision in *Branker* — the same two cases cited by the Eighth Circuit in *Anderson* — the Second Circuit continued:

> However, "intolerable tension[s]" between constitutional rights have been alleviated by applying the rule that a defendant's testimony at a pretrial hearing will not be admissible at trial on the issue of guilt unless he fails to object. See *Simmons v. United States*, supra, 390 U.S. at 394; see also Note, *Resolving Tensions Between Constitutional Rights: Use Immunity in Concurrent or Related Proceedings*, 76 Colum. L. Rev. 674, 678-81 (1976). We have held that "the government should not be permitted to use as part of its direct case any testimony given by a defendant at a hearing where he is seeking *forma pauperis* relief or the assignment of counsel on the ground of his financial inability to ... afford counsel," *United States v. Branker*, 418 F.2d 378, 380 (2d Cir. 1969), and that holding is directly applicable to the case before us.

Harris, 707 F.2d at 662-63. [6] The court found no merit to Harris's contention that the "*Simmons* and *Branker* rule ... affords inadequate protection." *Id.* at 663. "Harris's claim of fifth amendment violation by use of his testimony at a later time," the court explained, "is speculative at this point. See *United States v. Peister*, 631 F.2d [658, 662 (2d Cir. 1980)]. Moreover, we believe that the speculative possibility of inadequate protection of defendant's fifth amendment rights is outweighed by the need to determine facts through adversarial proceedings." *Id.*

6 Needless to say, the Second Circuit's reading of *Simmons* and *Branker* casts some doubt on the soundness of the Eighth Circuit's decision in *Anderson*. But because this Court is bound by the Second Circuit's decisions, whether *Anderson* is sound or not is irrelevant.

In short, the Second Circuit in *Harris* held that applications for appointment of counsel pursuant to the CJA should be addressed in traditional, open "adversarial proceedings" and "that constraints on the subsequent use of a defendant's testimony submitted in support of an application for appointed counsel" — that is, "use immunity" — "will strike an appropriate balance between a defendant's Fifth and Sixth Amendment rights where those rights are arguably in conflict." *Hilsen*, 2004 WL 2284388, at *4. Following *Harris*, "courts in this circuit have almost uniformly denied requests to file a CJA affidavit *ex parte*, including where the defendants were charged with fraud." *United States v. Kolfage*, — F. Supp. 3d —, No. 20-CR-412 (AT), 2021 WL 1792052, at *6 (S.D.N.Y. May 5, 2021) (discussing cases in denying the "analogous" request of a defendant charged with fraud to file financial data under seal in seeking the release of seized assets to hire counsel); *see, e.g.*, *Hilsen*, 2004 WL 2284388, at *1 (denying leave to file the CJA Form

23 under seal despite the defendant's argument that it would disclose facts "directly related, if not identical, to the facts the government must establish at trial"); *Coniam*, 574 F. Supp. at 616-17 & n.2 (explaining, in rejecting a request to seal the defendant's CJA Form 23 in a prosecution for securities fraud and mail fraud, that "[e]x parte proceedings are not consistent with traditional adversarial proceedings. The evidence in a preliminary hearing on qualification can be excluded. The conflict between the Fifth and Sixth Amendments is not unreconcilable."); *United States v. Hennessey*, 575 F. Supp. 119, 120 (N.D.N.Y. 1983) (Miner, J.) (describing a tax prosecution in which the defendant submitted a CJA Form 23 after the court had deemed his asserted Fifth Amendment privilege "premature" and ordered that the prosecution "would be prohibited from using as part of its direct case any information supplied by [the] defendant demonstrating inability to obtain counsel"), *aff'd*, 751 F.2d 372 (2d Cir. 1984) (unpublished table decision); *see also Correia*, 2020 WL 6683097, at *1-2 (denying a motion to seal a lawyer's declaration, submitted in support of a motion to withdraw, explaining that the defendant had not paid his fees and would likely qualify for appointed counsel). *But see United States v. McPartland*, No. 17-CR-587 (JMA), 2021 WL 722496, at *4 & n.1 (E.D.N.Y. Feb. 23, 2021) (relying in part on *Boston Herald* in holding that the defendants' "CJA-related applications" could remain under seal, without citing either *Suarez* or *Harris*).

***10** Avenatti attempts to distinguish *Harris* and its progeny on two grounds, but his arguments are unpersuasive. First, he contends that, unlike the defendants in these cases, "whose Fifth Amendment concerns were deemed premature or insubstantial, there can be no question that disclosing [his] sworn financial statements to the government would render his right against self-incrimination null and void." Def.'s Reply 3-4; *see* Def.'s Mem. 10 (arguing that, in contrast to *Harris*, "the risk of self-incrimination should Mr. Avenatti's sworn statements be unsealed is not speculative; it is a near certainty"). "[T]he government," Avenatti asserts, "allege[s] a direct, nefarious connection between discrete sources of [his] income and outstanding financial obligations, inextricably intertwining [his] finances with his alleged misconduct. [His] sworn statements are therefore replete with information that could provide leads for probative evidence ...." Def.'s Mem. 9. As evidence that these risks are not speculative, Avenatti points to the trial before Judge Gardephe in *Avenatti I*, in which "the same prosecutors litigating this case" used his "lack of income and indebtedness against him" by arguing that they "demonstrated his need and motive to quickly generate substantial sums of money, at the time when he engaged in the charged conduct." *Id.* at 2-3 (internal quotation marks omitted). In short, Avenatti argues that, unlike the defendants in *Harris* and its progeny, he faces a " 'real and appreciable' hazard of self-incrimination" that justifies sealing the Financial Affidavits altogether. *Id.* at 6 (quoting *United States v. Hyde*, 208 F. Supp. 2d 1052, 1056 (N.D. Cal. 2002)).

Admittedly, Avenatti's argument does find some support in a handful of decisions by district courts in other circuits. *See Hilsen*, 2004 WL 2284388, at *8-10 (noting that some courts have approved *ex parte* proceedings where "the conflict between a defendant's Fifth and Sixth Amendment rights is deemed to be immediate and real" and citing cases). But it cannot be squared with *Harris*, which "did not limit its discussion of the proper balance to strike between assertions of Fifth Amendment privilege made in conjunction with applications for appointed counsel pursuant to the Sixth Amendment to the particular facts before it." *Hilsen*, 2004 WL 2284388, at *10. Yes, the Second Circuit observed that "Harris's claim of fifth amendment violation by use of his testimony at a later time is speculative at this point." *Harris*, 707 F.2d at 663. In support of that proposition, however, the *Harris* Court cited the Tenth Circuit's decision in *Peister*, which rejected a defendant's refusal to complete a financial affidavit on Fifth Amendment grounds. *See Peister*, 631 F.3d at 661-62. Critically, though, the Tenth Circuit's decision was *not* based on the nature of the information or relationship between that information and the charges in the case; it was based on the fact that, *until trial*, "any conflict with the Fifth Amendment right" was "speculative and prospective only." *Id.* at 662; *cf. United States v. Allen*, 864 F.3d 63, 86 (2d Cir. 2017) ("[T]he Fifth Amendment is a personal *trial* right — one violated only at the time of 'use' rather than at the time of 'compulsion.' "). As the *Peister* Court put it: "The time for protection will come when, if ever, the government attempts to use the information against the defendant at trial. We are not willing to assume that the government will make such use, or if it does, that a court will allow it to do so." 631 F.2d at 662. Harris's claim, in other words, was "speculative" because it was pressed before trial, not because the defendant's financial status lacked a sufficient nexus to the charges against him. It follows that the Second Circuit's solution for the tension between a defendant's Fifth and Sixth Amendment rights — use immunity — applies to all cases and is not dependent on the nature of the charges against the defendant.

In any event, assuming for the sake of argument that sealing *could* be justified where a defendant showed a "real and appreciable" risk of self-incrimination, Def.'s Mem. 6, it would not be justified here. As noted, in arguing otherwise, Avenatti relies heavily on the fact that "the same prosecutors ... already (and aggressively) used [his] financial condition against him in *Avenatti I*." *Id.* at 9. But far from supporting Avenatti's argument, that fact undermines it. That is, as Avenatti himself concedes, the Government *already has* ample evidence that he "is millions of dollars in debt." *Id.* at 9-10; *see* Gov't Opp'n 3 ("[T]he Government has already conducted a thorough financial investigation of the defendant and already has access to significant information about his finances relevant to the charged conduct."). Thus, it is pure speculation to suggest, as Avenatti does, *see* Def.'s Reply 4, that the information in the Financial Affidavits will lead the Government to "new" evidence, let alone evidence that the Government would endeavor to use at trial. *See, e.g.*, *Hilsen*, 2004 WL 2284388, at *10 (characterizing the defendant's claim "that the government may be able to develop leads from information contained in his CJA 23" as "mere speculation"); *see also Coniam*, 574 F. Supp. at 617 (similar). And even if it did, there is a good chance that the evidence would be inadmissible, either on relevance grounds (given that the Indictment charges a scheme between July 2018 and February 2019, *see* Indictment ¶¶ 32, 34, and the Financial Affidavits only contain information regarding Avenatti's financial circumstances in July 2020 or later) or on cumulativeness grounds. *See* Fed. R. Evid. 401-403. In short, Avenatti's assertion of a Fifth Amendment risk is indeed "both premature and speculative." *Hilsen*, 2004 WL 2284388, at *11. It is thus not weighty enough to override the common law presumption of public access, let alone the public's First Amendment right.

***11** Avenatti's second argument for distinguishing *Harris* and its progeny is that here, unlike in those cases, "there is no credible basis for challenging [his] financial eligibility." Def.'s Mem. 9; *see* Def.'s Reply 3-4. That is, whereas the prosecution disputed the defendant's eligibility for counsel in *Harris*, here "the government has been pellucid that there is no basis to question [Avenatti's] financial inability; accordingly, there is no dispute to resolve and no adversarial proceeding to protect." Def.'s Reply 3-4. But that argument misunderstands the nature of the common law and First Amendment rights — and overlooks that these rights belong to the *public*. Put simply, the "supposition that a bona fide public interest in CJA eligibility only materializes if and when" the prosecution contests a defendant's application "is difficult to harmonize with the principles underlying the common law presumption of access to judicial documents" and the First Amendment right. *Bos. Herald*, 321 F.3d at 196 (Lipez, J., dissenting). Or to put it differently: Much as the public's right to attend a trial for a witness's testimony does not rise or fall on whether the prosecution chooses to cross-examine the witness, the public's right to a CJA Form 23 does not rise or fall on whether the prosecution elects to contest it.

In any event, Avenatti overstates the Government's position. The Government does not concede that Avenatti qualifies for appointed counsel. Instead, it "take[s] no position, based on the information available to it, on the request." Gov't Opp'n 3. That is hardly surprising given that, to date, the Government has been kept in the dark with respect to what is in Avenatti's Financial Affidavits. As the Government notes, "[a]bsent knowledge of what is contained in the defendant's CJA form and accompanying affidavit, the Government is unable to advise the Court on its view of the accuracy of that information, or whether efforts to recoup fees would be appropriate." *Id.* Leaving the Government in such darkness is hard to justify given its right to be heard on the question of whether a defendant is eligible for appointment of counsel pursuant to the CJA. *See United States v. Herbawi*, 913 F. Supp. 170, 173 (W.D.N.Y. 1996); *see also United States v. Jenkins*, No. 5:11-CR-602 (GTS), 2012 WL 12952829, at *3 n.1 (N.D.N.Y. Oct. 9, 2012) ("[T]he government always has the right, and indeed is charged with the responsibility, of bringing to the Court's attention any possible misuse or waste of public funds." (internal quotation marks omitted)). More fundamentally, it cannot be reconciled with the Second Circuit's admonition that "our legal system is rooted in the idea that facts are best determined in adversary proceedings" and that "secret, ex parte hearings are manifestly conceptually incompatible with our system of criminal jurisprudence." *Harris*, 707 F.2d at 662 (internal quotation marks omitted); *see also Hilsen*, 2004 WL 2284388, at *8 ("[T]he *ex parte* approach ... is incompatible with [*Harris*'s] emphasis on adversarial proceedings ....").

In sum, Avenatti's proffered justifications for sealing his Financial Affidavits — that it is necessary to protect his Fifth Amendment and Sixth Amendment rights — fall short. That is, *Harris* and its progeny already provide Avenatti with the protection to which he is entitled: use immunity. It follows that Avenatti's Fifth Amendment interests are not sufficiently weighty "countervailing factors" to override the common law presumption in favor of public access. *Lugosch*, 435 F.3d at

124. Nor do they make sealing "necessary to preserve higher values." *Id.* [7]

7 Needless to say, the guidance of the Judicial Conference, the Advisory Committee on the Criminal Rules, and CACM — that financial affidavits to obtain CJA counsel should *never* be made available to the public — does not provide a basis for this Court to seal the Financial Affidavits, particularly given the First Amendment foundation of the public's right of access. Notably, their categorical guidance is hard to square even with those decisions that have allowed for the sealing of financial affidavits, which have generally required a showing that "the conflict between a defendant's Fifth and Sixth Amendment rights is ... immediate and real." *Hilsen*, 2004 WL 2284388, at *9 (citing cases). Even more notably, their guidance appears to have played a role in leading at least one district court in this Circuit astray. *See McPartland*, 2021 WL 722496, at *4 & n.1 (emphasizing the Judicial Conference and Advisory Committee guidance in holding that the defendants' "CJA-related applications and submissions" could remain under seal). In the Court's view, it would be appropriate for the Judicial Conference, the Advisory Committee, and CACM to revisit the issue and, if not change their guidance, at least alert courts that the common law or First Amendment may require public disclosure.

D. Avenatti's Alternative Requests for Delayed Release and Redaction

***12** That does not end the matter because Avenatti asks, in the alternative, for the Court to "delay disclosure of the documents until after the government rests and/or until the defense has had an opportunity to offer redactions for the Court's consideration." Def.'s Reply 5. The former request is easily rejected. As the Second Circuit has held, the presumption — "under both the common law and the First Amendment" — is for "*immediate* public access to" judicial documents. *Lugosch*, 435 F.3d at 126 (emphasis added). Given that, and the protections afforded by *Harris* and its progeny, there is no basis to delay public access any longer. By contrast, the Court grants Avenatti's request to keep the Financial Affidavits under seal so that he may propose for the Court's consideration redactions consistent with this Opinion and Order. *See, e.g.*, *Hadden*, 2020 WL 7640672, at *2 n.2 ("The Court will provide the defense the opportunity to redact personal information such as social security numbers, names of minor children, dates of birth, financial account numbers, and home addresses."); *see also Suarez*, 880 F.2d at 633 ("It may be ... that some modest redaction before disclosure of a particular CJA form will be justified ...."). To be clear, however, any such redactions would have to be justified by an interest other than the Fifth Amendment — with respect to which use immunity provides all the protection to which Avenatti is entitled — and narrowly tailored to that interest. [8]

8 In light of the fact that the Financial Affidavits will remain under seal pending the Court's consideration of any proposed redactions, Avenatti's request for a two-week stay of any order to unseal in order to consider an interlocutory appeal, *see* Def.'s Reply 2 n.2; Def.'s Sur-Reply 1 n.1, is denied as unripe. In the event that Avenatti believes such a stay would still be warranted, he may renew the request in conjunction with any request for redaction.

CONCLUSION

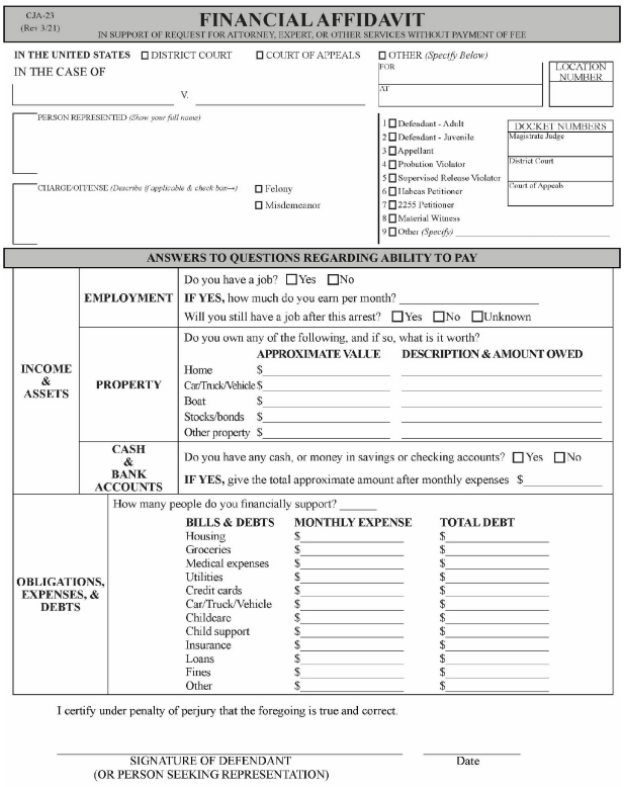
As is true for any criminal defendant, Avenatti's Fifth and Sixth Amendment rights are undoubtedly of paramount importance. Given the protections already available under Second Circuit law, however, the Court concludes that these rights are insufficient to override the public's rights — under both the First Amendment and the common law — to access the Financial Affidavits that Avenatti filed in this case to secure counsel at public expense. More specifically, the Court holds that:

- Avenatti's Financial Affidavits are "judicial documents" subject to the common law presumption in favor of public access and to the qualified First Amendment right of public access;
- that Avenatti's Fifth Amendment privilege against self-incrimination does not rebut the common law presumption or override the qualified First Amendment right because, under *Harris* and its progeny, Avenatti is adequately protected by the rule that his statements cannot be used against him in the Government's case-in-chief; and
- that Avenatti may propose limited redactions to protect other interests, but otherwise the public is entitled to immediate disclosure of the Financial Affidavits.

Avenatti shall propose any redactions to the Financial Affidavits, not inconsistent with this Opinion and Order, no later than **August 10, 2021**. Avenatti shall do so in accordance with the procedures set forth in Paragraph 10 of the Court's Individual Rules and Practices for Criminal Cases, available at https://nysd.uscourts.gov/hon-jesse-m-furman. As relevant here, those procedures require Avenatti to file a letter-motion seeking leave for any proposed redactions (other than redactions of two narrow categories of information for which Court permission is not required) that explains both the purpose of the proposed redactions and how they are narrowly tailored to serve an interest that outweighs the common law presumption and First Amendment right of public access. In the event that Avenatti does not seek leave for any redactions by the deadline, he shall promptly file all of the Financial Affidavits on ECF.

SO ORDERED.

EXHIBIT A



CJA-23 (Rev 3/21)

FINANCIAL AFFIDAVIT

IN SUPPORT OF REQUEST FOR ATTORNEY, EXPERT, OR OTHER SERVICES WITHOUT PAYMENT OF FEE

IN THE UNITED STATES ☐ DISTRICT COURT ☐ COURT OF APPEALS ☐ OTHER *(Specify Below)*

IN THE CASE OF

FOR

AT

LOCATION NUMBER

V.

PERSON REPRESENTED *(Show your full name)*

CHARGE/OFFENSE *(Describe if applicable & check box →)* ☐ Felony ☐ Misdemeanor

1 ☐ Defendant - Adult
2 ☐ Defendant - Juvenile
3 ☐ Appellant
4 ☐ Probation Violator
5 ☐ Supervised Release Violator
6 ☐ Habeas Petitioner
7 ☐ 2255 Petitioner
8 ☐ Material Witness
9 ☐ Other *(Specify)*

DOCKET NUMBERS
Magistrate Judge
District Court
Court of Appeals

ANSWERS TO QUESTIONS REGARDING ABILITY TO PAY

INCOME & ASSETS

EMPLOYMENT

Do you have a job? ☐ Yes ☐ No

IF YES, how much do you earn per month? _____

Will you still have a job after this arrest? ☐ Yes ☐ No ☐ Unknown

PROPERTY

Do you own any of the following, and if so, what is it worth?

	APPROXIMATE VALUE	DESCRIPTION & AMOUNT OWED
Home	$	
Car/Truck/Vehicle	$	
Boat	$	
Stocks/bonds	$	
Other property	$	

CASH & BANK ACCOUNTS

Do you have any cash, or money in savings or checking accounts? ☐ Yes ☐ No

IF YES, give the total approximate amount after monthly expenses $

OBLIGATIONS, EXPENSES, & DEBTS

How many people do you financially support? _____

BILLS & DEBTS	MONTHLY EXPENSE	TOTAL DEBT
Housing	$	$
Groceries	$	$
Medical expenses	$	$
Utilities	$	$
Credit cards	$	$
Car/Truck/Vehicle	$	$
Childeare	$	$
Child support	$	$
Insurance	$	$
Loans	$	$
Fines	$	$
Other	$	$

I certify under penalty of perjury that the foregoing is true and correct.

SIGNATURE OF DEFENDANT
(OR PERSON SEEKING REPRESENTATION)

Date

All Citations

Slip Copy, 2021 WL 3168145

TAB 3

TO: Advisory Committee on the Federal Rules of Criminal Procedure

FROM: Professors Sara Beale and Nancy King, Reporters

RE: Pro Se Access to Electronic Filing (Rule 49)

DATE: October 6, 2022

This memo provides an update on the consideration of the suggestion by Sai (21-CR-E) to expand pro se litigants' access to electronic filing under Criminal Rule 49, as well as the Rules of Civil, Bankruptcy, and Appellate Procedure.

The existing provisions on electronic filing in Criminal Rule 49, along with the provisions regulating e-filing in the Appellate, Civil, and Bankruptcy Rules, were added in 2018 as part of a cross-committee effort to "seize the advantages of electronic filing." 2018 Advisory Committee Note. In response to suggestions including 21-CR-E, a cross-committee working group was established in late 2021 to study whether developments since 2018 provide a reason to alter the rules' approach to e-filing by self-represented litigants. Professor Cathie Struve, Reporter to the Standing Committee, chairs the working group.

To gather input from the affected Rules Committees, the working group has asked each of the affected Committees to review at its fall meeting two documents developed as part of the working group's efforts: (1) a memorandum by Professor Struve, Tab 3B, that describes potential key issues for discussion by the individual rules committees; and (2) an extensive research study of filing by pro se litigants conducted by the Federal Judicial Center (FJC). Tab 3C.

The Pro Se Filing Subcommittee of the Criminal Rules Committee, chaired by Judge Burgess, met via Teams after reviewing the FJC study and the Struve memorandum to identify major issues for discussion and to provide some comments for the Committee's consideration. The Subcommittee now seeks the Committee's input on the following issues to guide both the Subcommittee and the working group.

Issue #1: Changing the rule's default position. Rule 49(b)(3)(B) provides: "A party not represented by an attorney must file nonelectronically, unless allowed to file electronically by court order or local rule." Thus, the current default rule for nonrepresented defendants is paper filing, unless the court allows something else.

The Subcommittee agreed that flipping this default so that nonrepresented defendants may or must file electronically unless excused from doing so is not warranted at the present time. Members expressed general support for the long-term goal of providing self-represented persons with equal access to electronic filing—noting its advantages for both litigants and courts—but

agreed that a national rule should presume pro se defendants will file electronically only when it has become logistically feasible for them to do so.[1]

The Subcommittee believes that currently it is not logistically feasible for all or even most pro se criminal defendants to file electronically. Members identified several problems. At present, many Clerk's offices do not have the necessary staff and IT resources to handle electronic filing by pro se criminal defendants safely. Concerns include not only the possibility of malware, but also very large or corrupted documents that could crash the CM/ECF system. Another problem is the difficulty of tracking non-lawyer filers, who may have common names and do not have unique identifying numbers like attorney bar numbers. Many are not citizens, so social security numbers cannot be used. Inmate numbers are a possibility for BOP inmates, but not for all defendants. Also, members noted, the volume of questions to be answered would greatly increase, requiring additional staff hours.

Members also noted that the context for this issue is very different in criminal cases than in civil or bankruptcy cases. All but a small percentage of defendants in criminal cases are represented by counsel who can file electronically for their clients. And in criminal cases with defendants who choose to represent themselves, courts often appoint standby counsel who assist with electronic filing.

Members also stressed that many criminal defendants—as well as habeas and Section 2255 petitioners and Section 1983 plaintiffs—are incarcerated in facilities, particularly state facilities such as county jails, that do not provide reliable access to the means to file electronically. (Several states, members noted, have not even managed to make electronic filing available in their own courts in civil cases.) Moreover, even if one facility has a computer available for filing, inmates are frequently moved from one facility to another.

Finally, members noted that the current rule already accommodates broader access to electronic filing by pro se defendants where logistics allow, by permitting judges to authorize electronic filing through CM/ECF or other electronic alternatives to paper filing in individual cases or district wide. The FJC study shows that some districts are already experimenting with alternatives such as permitting pro se filers to send documents to the court by email for filing. These may eventually provide a blueprint for other districts, as the next section notes.

Issue #2: Encouraging alternative means of electronic access and experimentation with expanding electronic filing. In light of its support for expanding access to electronic filing when logistically feasible, the Subcommittee agreed it would be helpful to expand resources to respond to the various technological barriers and resource issues. Clerks need more resources to deal with alternative means of electronic access, and Subcommittee

[1] One member did suggest that the Subcommittee consider whether the rule could take a middle position with no default, providing that unrepresented defendants "may file electronically or nonelectronically as determined by the local rules."

members expressed interest in determining what other Judicial Conference Committees might be enlisted in this effort. The Committee on Court Administration and Management was mentioned, as well as those developing Next Gen.

Members also noted that permitting pro se filing by email, for example, would raise new issues. For example, pro se individuals who filed by email during the pandemic used the email access to contact the clerk's office with questions and seek legal advice. A portal allowing documents to be uploaded would avoid those issues. If documents are emailed and then have to be scanned before they are filed in CM/ECF, the time period between when the email is sent and when the scan is uploaded to CM/ECF creates potential issues about the date of filing.

Issue #3: Service on registered CM/ECF users. As noted on pp. 13–15 of Professor Struve's memorandum, the working group also discussed whether the rules should be modified to eliminate the requirement that non-CM/ECF filers make separate service on CM/ECF users, which may be seen as an unnecessary and burdensome task because such users are notified electronically when documents are uploaded into the system. The Subcommittee identified a variety of concerns about eliminating this requirement. For example, determining the date of filing (when delivered to the Clerk's office or when scanned in), the increased burdens on the Clerk's office if it becomes responsible for service rather than the party, and the interaction with the prison mailbox rule.

MEMORANDUM

DATE: August 24, 2022

TO: Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules

FROM: Catherine T. Struve

RE: Project on electronic filing by pro se litigants

Under the national electronic-filing rules that took effect in 2018, self-represented litigants presumptively must file non-electronically, but they can file electronically if authorized to do so by court order or local rule. In late 2021, in response to a number of proposals submitted to the advisory committees, a cross-committee working group was formed to study whether developments since 2018[1] provide a reason to alter the rules' approach to e-filing by self-represented litigants. This working group includes the reporters for the Appellate, Bankruptcy, Civil, and Criminal Rules advisory committees as well as attorneys from the Rules Committee Support Office and researchers from the Federal Judicial Center (FJC). The working group has convened via Zoom for three discussions. The December 2021 discussion centered on potential research questions for a projected study by the FJC. By March 2022, Tim Reagan, Carly Giffin, and Roy Germano of the FJC had conducted the study and had circulated to the working group a draft of their report. The working group's March 2022 discussion focused on the study's findings. The final version of the report became available in May 2022,[2] and the working group met in August 2022 for further discussion of the study's findings.

This memo sketches possible topics that the advisory committees might discuss in light of the FJC's findings.[3] Part I.A of the memo provides a brief overview of the current rules on

1 For a review of current practices in the state courts, see National Center for State Courts, Self-Represented Efiling: Surveying the Accessible Implementations 3 (2022) (reporting that self-represented state-court litigants "often enjoy the same ability to efile as attorneys in the trial courts that offer electronic filing"), available at https://www.ncsc.org/__data/assets/pdf_file/0022/76432/SRL-efiling.pdf. An appendix to the study provides links to relevant e-filing programs by state. See id. Appendix A.

2 See Tim Reagan et al., Federal Courts' Electronic Filing by Pro Se Litigants (FJC 2022), available at https://www.fjc.gov/content/368499/federal-courts-electronic-filing-pro-se-litigants ("FJC Study").

3 The suggestions gathered in this memo reflect insights contributed by many working-group members. Those members have a variety of views on the issues discussed here, and the suggestions in the memo may not be endorsed by all working-group members. My goal here is to collect possible issues for discussion rather than to report a consensus view of the working group.

electronic filing and on service, while Part I.B summarizes pending proposals to amend the rules with respect to electronic filing by self-represented litigants. Part II outlines possible questions for discussion by the advisory committees as to both filing and service.

I. The current rules, and proposals to amend them

In Part I.A., I briefly summarize the current rules on self-represented electronic filing and on service. Part I.B synopsizes pending proposals to amend the electronic-filing rules.

A. The current rules

Under the rules as amended in 2018, pro se litigants can file electronically only if permitted to do so by court order or local rule. The Civil, Bankruptcy, and Appellate Rules contemplate that courts can require electronic filing by a pro se litigant, so long as they do so by order, or via a local rule that includes reasonable exceptions. The Criminal Rule does not permit a court to require pro se litigants to file electronically; the Committee Note observes that incarcerated defendants will typically lack the opportunity to file (and receive notices) electronically. As to service, requirements for separate service of a filing hinge on whether the filing was made via the court's case management / electronic case filing (CM/ECF) system or otherwise.

1. Filing

As amended in 2018, Civil Rule 5(d)(3) currently reads:

> (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. A person not represented by an attorney:**
> >
> > > **(i) may file electronically only if allowed by court order or by local rule; and**
> > >
> > > **(ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.**
> >
> > (C) Signing. A filing made through a person's electronic-

filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.

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

(Emphasis added.) Substantively similar electronic-filing provisions appear in Appellate Rules 25(a)(2)(B) and Bankruptcy Rules 5005(a)(2) and 8011(a)(2)(B).

The 2018 Committee Note to Civil Rule 5(d) states in part:

Filings by a person proceeding without an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules or court order. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in the courts, along with the greater availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication. Room is also left for a court to require electronic filing by a pro se litigant by court order or by local rule. Care should be taken to ensure that an order to file electronically does not impede access to the court, and reasonable exceptions must be included in a local rule that requires electronic filing by a pro se litigant. In the beginning, this authority is likely to be exercised only to support special programs, such as one requiring e-filing in collateral proceedings by state prisoners.

A similar passage appears (without the last sentence in the quote above) in the Committee Note to Bankruptcy Rule 5005(a)(2); the Committee Note to Appellate Rule 25(a)(2)(B) briefly observes that that provision parallels the approach taken in Civil Rule 5.

Criminal Rule 49(b)(3) provides:

(3) Means Used by Represented and Unrepresented Parties.

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

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

(Emphasis added.) The 2018 Committee Note to Criminal Rule 49(b)(3)(B) explains:

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

2. Service

The Appellate, Bankruptcy, Civil, and Criminal Rules require that litigants serve their filings[4] on all other parties to the litigation. But because notice through CM/ECF constitutes a method of service, the rules effectively exempt CM/ECF filers from separately serving their papers on persons that are registered users of CM/ECF. By contrast, the rules can be read to require non-CM/ECF filers to serve their papers on all other parties, even persons that are CM/ECF users.

A review of Civil Rule 5 illustrates the general approach.[5] Civil Rule 5(a)(1) sets the general requirement that litigation papers "must be served on every party."[6] Civil Rule 5(b)(2)(E) provides that one way to serve a paper is by "sending it to a registered user by filing it with the court's electronic-filing system."[7] Civil Rule 5(d)(1)(B) requires a certificate of service for every filing, except that "[n]o certificate of service is required when a paper is served by

4 The rules provide separately for the service of case-initiating filings. See, e.g., Civil Rule 4 (addressing service of summons and complaint). The discussion here focuses on filings subsequent to the initiation of a case.

5 Bankruptcy Rule 7005 expressly applies Civil Rule 5 to adversary proceedings in a bankruptcy. The footnotes that follow cite provisions in Appellate Rule 25, Bankruptcy Rule 8011 (concerning appeals in bankruptcy cases), and Criminal Rule 49 that are similar to those in Civil Rule 5.

6 See also Appellate Rule 25(b) ("Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review."); Bankruptcy Rule 8011(b) ("Unless a rule requires service by the clerk, a party must, at or before the time of the filing of a document, serve it on the other parties to the appeal."); Criminal Rule 49(a)(1) ("Each of the following must be served on every party: any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper.").

7 See also Appellate Rule 25(c)(2)(A); Criminal Rule 49(a)(3)(A).

filing it with the court's electronic-filing system."[8]

In a case where all parties are represented by counsel,[9] these provisions combine to exempt the litigants from any requirement that they separately serve other litigants; their filings via CM/ECF automatically effect service on all parties. In a case that involves one or more self-represented litigants, however, the situation is more complicated. Service on a self-represented litigant can only be made via CM/ECF if the self-represented litigant is a registered user of CM/ECF – which, as noted in Part I.A.1, occurs only if the litigant receives permission (to use CM/ECF) by court order or local rule.

As for service by a self-represented litigant on a registered user of CM/ECF, one might argue – as a policy matter – that separate service is just as unnecessary as it is when the filer is a registered user of CM/ECF. Because clerk's offices routinely scan paper filings and upload them into CM/ECF, registered users will receive a CM/ECF-generated notice of electronic filing each time a paper filing is uploaded into CM/ECF in one of their cases. However, a number of courts appear to interpret the current rules to require that a person filing by means other than CM/ECF must separately serve the filing, even when the recipient of the filing is a registered user of CM/ECF.[10]

It should be noted that, in its research, the FJC found at least one clerk's office that took a different view of Civil Rule 5(b)(2)(E). Under this office's interpretation, Civil Rule 5(b)(2)(E) exempts paper filers from serving registered users of CM/ECF. The argument is that when a filer submits a filing to the court by a means other than CM/ECF and the court staff then dockets the filing in CM/ECF, the filer has "sen[t the filing] to a registered user by filing it with the court's electronic-filing system" because the filing is eventually uploaded (by the clerk's office) into the court's electronic-filing system. A counter-argument,[11] though, might be that such an argument proves too much: All filings, no matter how submitted, are eventually uploaded into the CM/ECF system, and thus if that interpretation were correct, the drafters of Rule 5(b)(2)(E) could have

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8 See also Appellate Rule 25(d)(1); Criminal Rule 49(b)(1).

9 Civil Rule 5(b)(1) presumptively requires that service on a represented party "must be made on the attorney." See also Appellate Rule 25(b); Criminal Rule 49(a)(2). And Civil Rule 5(d)(3)(A)'s presumptive requirement that "[a] person represented by an attorney must file electronically" guarantees, in practice, that any attorney appearing as counsel of record will be a registered user of CM/ECF. See also Appellate Rule 25(a)(2)(B)(i); Criminal Rule 49(b)(3)(A).

10 See, e.g., Pro Se Handbook for Civil Suits, U.S. District Court, Northern District of Texas, § 6 ("If you and the opposing side are both ECF users, the ECF system will complete the service for you, and a Certificate of Service is not required. If either of you is not an ECF user, or if you learn that service sent through ECF did not reach the person, you must serve the document by other means …."), available at https://www.txnd.uscourts.gov/sites/default/files/documents/handbook.pdf; Electronic Submission For Pro Se Filers, U.S. District Court, Western District of Texas ("Service of pleadings filed in the drop box must be performed by the filing party."), available at https://www.txwd.uscourts.gov/filing-without-an-attorney/electronic-filing-for-pro-se/ .

11 Other possible counter-arguments exist. For example, some rules expressly distinguish between "service by the clerk" and service by "a party." See Appellate Rule 25(b); Bankruptcy Rule 8011(b).

saved eight or nine words by deleting "with the court's electronic-filing system" and instead saying simply, "sending the filing to a registered user by filing it."

B. Current proposals

Pending before the advisory committees are a number of proposals to amend one or more of the electronic filing rules so as to adopt a national rule permitting pro se litigants to file electronically. I will highlight in this section the two most detailed proposals.[12] Sai proposes adoption of nationwide presumptive permission for pro se litigants to file electronically.[13] John Hawkinson, by contrast, proposes that if the requirement of permission by court order or local rule is retained, then the national rules[14] could be amended to address the standard for granting permission.

Sai initially submitted Sai's proposal as a response to the package that became the 2018 electronic filing amendments. Sai has re-submitted the proposal, which includes the following elements:[15]

> 1. Remove the presumptive prohibition on pro se use of CM/ECF, and instead grant presumptive access. This includes CM/ECF access for case initiation filings.
>
> 2. Treat pro se status as a rebuttably presumed good cause for nonelectronic filing.
>
> > a. For pro se prisoners, this is treated as an irrebutable presumption, in the spirit of the FRCrP Committee's notes and for conformity across all the rules.
>
> 3. Require courts to allow pro se CM/ECF access on par with attorney filers, prohibiting any restriction merely for being pro se or a non-attorney, and prohibiting registration fees.
>
> 4. Permit *individualized* prohibitions on CM/ECF access for good cause, e.g. for vexatious litigants, and (in the notes) construe pre-enactment vexatious designation as such a prohibition.

John Hawkinson proposes that Civil Rule 5 be amended to address local court bans on pro se electronic filing, and perhaps to address the standard for granting leave to file

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12 Other suggestions also support a national rule allowing pro se electronic filing and offer policy reasons to adopt such a rule. See, e.g., infra note 40 (citing one such suggestion).
13 I focus here on Sai's suggestion No. 21-CV-J, submitted to the Civil Rules Committee.
14 Mr. Hawkinson's suggestion focuses on Civil Rule 5. See Suggestion No. 20-CV-EE.
15 This is an excerpt from Sai's 2017 proposal.

electronically:

> I recently became aware that some districts by standing order unconditionally bar non-attorney pro se litigants from even seeking electronic filing privileges and routinely deny their motions, a sharp contrast from the prevailing practice nationwide. N.D. Ga. Standing Order 19-01 ¶5; LR App.H I(A)(2), III(A). See Perdum v. Wells Fargo Home Mortg., No. 17-cv-972-SCJ-JCF, ECF No. 61 (N.D. Ga., April 12, 2018) (collecting cases). See also Oliver v. Cnty. of Chatham, 2017 U.S. Dist. LEXIS 90362, No. 4:17-cv-101-WTM-BKE (S.D. Ga., June 13, 2017).
>
> The Committee might recommend language in Rule 5 discouraging such blanket bans, and perhaps even that leave should be freely given (such courts have found a "good cause" standard is not met, although it is unclear why. Oliver at *1). It seems an easier lift than removing the motion requirement, and goes to administrative fairness.

II. Possible discussion topics

This section sketches some topics that the advisory committees might consider at their fall meetings. In II.A, I outline some issues about electronic filing, and in II.B, I sketch questions about service.

A. Electronic filing

On the topic of electronic filing, there are questions both about access to the CM/ECF system and about other electronic methods for submitting filings to the court. There are also questions about whether the best way forward is through rule amendments or whether other measures could increase self-represented litigants' electronic access.

Shifting the rules' default position. As noted in Part I.A.1, the current rules permit, but do not require, the courts to provide self-represented litigants with access to CM/ECF. A court can provide such access either by local rule or by order in a case. Should the rules be amended to provide the opposite default rule – namely, that self-represented litigants may[16] use CM/ECF unless the court otherwise provides (by local rule or order in a case)? In assessing this question, it seems important to consider the current practices in the various types of court. Qualitatively, the FJC study reports that "[m]any courts are leery of letting pro se litigants use CM/ECF, but those that have done so reported fewer problems than expected."[17]

16 None of the pending proposals suggests that self-represented litigants should be *required* to use CM/ECF.

17 FJC Study, supra note 2, at 7.

Quantitatively, the study found that, among the courts of appeals, five circuits[18] presumptively permit CM/ECF access for non-incarcerated self-represented litigants,[19] seven circuits allow it with permission in an individual case, and one circuit has a rule against such access (but has made exceptions in some instances).[20] The FJC Study used two techniques to ascertain what district courts are doing on this question: Researchers (in a separate 2019-2022 study) reviewed the local rules for all 94 districts,[21] and researchers in the FJC Study conducted interviews with personnel in 39 district clerks' offices.[22] The researchers report that, based on the local rules, at least[23] 9.6% of districts "permit nonprisoner pro se litigants to register as CM/ECF users without advance permission" (in existing cases, though typically not to file complaints);[24] 55% of districts "state that nonprisoner pro se litigants are permitted to use CM/ECF to file in their existing cases with individual permission"; 15% state "that pro se litigants may not use CM/ECF"; and 19% fail to "specify one way or the other whether pro se litigants can use CM/ECF."[25] Further along the spectrum, the study found that it is "very unusual for pro se debtors to receive CM/ECF" access in the bankruptcy courts.[26]

A proposed rule amendment that flatly required courts to provide self-represented litigants with access to CM/ECF would confront opposition from stakeholders, given that most courts do not offer blanket permission for CM/ECF use by self-represented litigants and some courts bar such use altogether. A proposal to shift the presumption (that is, to presumptively permit rather than to presumptively disallow CM/ECF access for self-represented litigants)

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18 The five-circuit figure excludes the Ninth Circuit, see FJC Study at 7 nn. 3 & 4. But the FJC Study reports, based on its interview(s) with court staff, that "[i]n fact, the [Ninth Circuit] encourages pro se use of CM/ECF." FJC Study at 13; see also Ninth Circuit Rule 25-5(a).

19 In the interests of simplicity, this discussion of e-filing access focuses on non-incarcerated self-represented litigants. Access policies for incarcerated self-represented litigants present distinct issues.

20 See FJC Study, supra note 2, at 6-7.

21 See id. at 4.

22 See id.

23 Given the timing of the FJC's local-rules study, it may not fully capture courts' adoption of more permissive practices specifically during COVID. For instance, "[e]ffective May 1, 2020, and until further notice," the Northern District of California granted blanket permission for self-represented litigants to register for CM/ECF in existing cases. See https://cand.uscourts.gov/cases-e-filing/cm-ecf/setting-up-my-account/e-filing-self-registration-instructions-for-pro-se-litigants/ . This district is not listed as one that has a local rule granting blanket permission. See FJC Study at 7 n.7.

24 The districts with local provisions providing blanket permission include three that have a large volume of cases involving pro se litigants (the Northern District of Texas, the Northern District of California, see supra note 23, and the Northern District of Illinois) as well as districts with a more moderate volume of such cases (the Western District of Washington, the Western District of Missouri, the District of Kansas, and the Southern District of Illinois) and districts with a smaller volume of such cases (the Western District of Wisconsin, the District of Nebraska, and the District of Vermont). See https://www.uscourts.gov/news/2021/02/11/just-facts-trends-pro-se-civil-litigation-2000-2019#figures_map (showing volume of pro se civil cases filed 2000-2019, by district).

25 FJC Study at 7.

26 Id. at 8.

would allow courts to continue their current practices. Under such a shifted presumption, a court wishing to limit or disallow CM/ECF access for self-represented litigants would have to do so by local rule or court order; this would impose on courts the costs of taking such action, but it might also nudge some courts to reconsider their current reluctance to permit such access.

However, participants in the working group discussions have asked whether it would make sense to adopt a default rule that is out of step with the practices of most courts. If not, that might raise the possibility that the case for switching the default rule is stronger with respect to the courts of appeals, where the practice has already moved farthest in the direction of presumptive access to CM/ECF.[27] On the other hand, the fact that the courts of appeals are already moving to increase access without being required to do so by the national rules might be taken, instead, as a reason that a national rule change is not necessary.

Proscribing outright bans. The FJC study found a number of district courts[28] – and, at least nominally, one court of appeals[29] – that do not permit any self-represented litigants to access CM/ECF. As noted in Part I.A, the current rules permit outright bans, in the sense that the rules permit, but do not require, the courts to grant access by local rule or by order in a case. Mr. Hawkinson proposes that the rules be revised to "discourag[e] such blanket bans, and perhaps even [to provide] that leave should be freely given."[30]

Treating case-initiating filings differently. A number of courts are more restrictive with respect to case-initiating filings. The FJC Study notes courts that permit self-represented litigants access to CM/ECF but only for filings after case initiation,[31] as well as a few districts that are similarly restrictive even as to attorneys' filings.[32] Thus, although one proponent of increased CM/ECF access argues that case-initiating access is important,[33] it seems likely that increasing

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27 Participants have suggested that the appellate courts' relative willingness to provide CM/ECF access to self-represented litigants may be connected to the relative simplicity of the dockets on appeal (compared with the dockets in the district courts and bankruptcy courts).

28 The FJC Study observes that "[t]he rules for fourteen district courts state that pro se litigants may not use CM/ECF." Id. at 7. In addition to the 14 districts noted in that passage, the study found three other districts that appear to take the same position. See id. at 16 (noting that despite local provisions nominally permitting access by permission, "[i]n fact, pro se litigants are never granted CM/ECF filing privileges" in the District of Idaho); id. at 27 (reporting that in the Southern District of Georgia, "[p]ro se litigants may not file using CM/ECF"); id. at 43 (reporting that in the District of Utah, "[p]ro se parties may not use CM/ECF.").

29 "The electronic filing guide for [the Sixth Circuit] states that the court does not permit pro se litigants to use CM/ECF, … but some pro se litigants have been granted electronic filing privileges as exceptions to the rule." FJC Study at 7. See id. at 12 ("Pro se litigants have occasionally been granted individual exceptions to this proscription. The court is exploring more expansive permission for pro se electronic filing.").

30 See Hawkinson suggestion, supra note 14.

31 See, e.g., FJC Study at 7 ("Pro se plaintiffs seldom can use CM/ECF to file their complaints.").

32 See id. at 23-24 (discussing Western District of Arkansas); id. at 43 (discussing District of Utah).

33 See Sai's proposal, supra note 13, at 24 (arguing that inability to initiate a case via electronic filing

CM/ECF access for case-initiating filings could meet with particular resistance. A prime concern, here, is the difficulty that can ensue if a person uses CM/ECF to mistakenly create a new record with a new case number.[34] However, as a matter of court practice, an intermediate possibility may exist: a number of courts permit attorneys to file complaints via CM/ECF without opening a new case file; the filing goes into a shell case, and the clerk's office then (if appropriate) opens the new case file and transfers the filing into it.[35]

Treating incarcerated self-represented litigants differently. It is not uncommon for local provisions on self-represented filing to distinguish between incarcerated and non-incarcerated self-represented litigants. As the FJC Study found:

> Prisoners cannot use CM/ECF, because they do not have sufficient access to the internet. Some courts have arrangements with some prisons, generally state rather than federal prisons, for electronic submission of prisoner filings. In some arrangements, electronic submission is mandatory and prisoners are not permitted to file on paper.
>
> Typically, a prisoner presents a filing to the prison librarian, who scans it and emails it to the court. Some prisons accept electronic notices on behalf of the prisoners, and then convert them to paper documents. Many prisons do not, so prisoners must be served with other parties' filings and court filings by regular mail.[36]

In considering possible rule changes, it will be important to consider how to take account of the specific issues arising in carceral settings.[37]

Encouraging alternative means of electronic access. One topic of discussion is whether courts could provide self-represented litigants with benefits akin to those of CM/ECF through electronic-submission avenues that do not carry CM/ECF's projected disadvantages.[38] The FJC

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could impede a litigant's ability to timely file a case or to obtain time sensitive interim relief).

34 See FJC Study at 6.

35 See id.

36 Id. at 8.

37 Among the potential complicating factors for incarcerated litigants' access to courts is the fact that they may be moved among different facilities during the pendency of a case. And even if a particular institution provides an opportunity to *file* documents electronically, it may not similarly facilitate receiving and retrieving notices and documents electronically.

38 During prior discussions of CM/ECF access for self-represented litigants, participants cited – as possible downsides of such access – litigants' lack of competence to use CM/ECF; the burden on clerk's offices of training litigants to use CM/ECF and of addressing filing errors; inappropriate filings; inappropriate docketing practices (wrong event or wrong case) and sharing of credentials. See, e.g., Minutes of April 2017 Meeting of Bankruptcy Rules Committee; Minutes of April 2016 Meeting of Civil Rules Committee; Minutes of April 2015 Meeting of Civil Rules Committee; Minutes of March 2015 Criminal Rules Committee Meeting. Compare FJC Study at 7 (stating that courts that have allowed self-

Study observes that "[s]ome courts … accept submissions by email" and "[a] few accept submissions by electronic drop box, a web portal that allows a user to upload a PDF," but that "[m]any to most courts do not accept such electronic submissions."[39]

An avenue for electronic submission of filings to the court would offer self-represented litigants a number of the advantages offered by CM/ECF access. Litigants would avoid the costs and logistical challenges[40] of printing and mailing the papers filed with the court, and their filings would reach the court more quickly than if they were filed by mail. Advantages would also accrue to court personnel who would spend less time scanning paper filings. And court personnel and litigants who have visual impairments could benefit because files submitted electronically may be more likely to be accessible to those with visual impairments than files created by scanning paper filings.[41]

A perhaps unsettled question is whether an alternative electronic-submission system would automatically offer self-represented litigants the benefit of a later filing deadline. Under the time-computation rules, those using "electronic filing" presumptively may file up to midnight in the court's time zone, whereas those using "other means" of filing must file before the scheduled closing of the clerk's office.[42] If submission via email to a court-provided email address or via upload to a court's electronic drop box were regarded as "electronic filing," then the users of such systems could benefit from that extended filing time. However, it is not entirely certain that all courts would take this view; accordingly, it seems useful for a court adopting such a submission system to clarify by local rule the time-of-day deadline for such electronic submissions.[43]

It should be noted that provision of an alternative method for electronic *submission to the court* will not by itself offer self-represented litigants all of the advantages of CM/ECF participation. Two of those advantages merit separate discussion: electronic noticing, and avoiding the need for separate service on registered CM/ECF users. The CM/ECF system automatically provides registered users with electronic notice (and a free download) of any filings in their cases. A number of courts separately provide self-represented litigants who are

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represented litigants to use CM/ECF "reported fewer problems than expected").

39 FJC Study at 9.

40 Logistical challenges include those faced by filers outside the country, those with a disability, and those who have health concerns about visiting public spaces during the pandemic. See Sai's proposal, supra note 13, at 27; comment of Dr. Usha Jain, Nos. 20-AP-C & 20-CV-J.

41 See infra note 47.

42 See Bankruptcy Rule 9006(a)(4); Civil Rule 6(a)(4); Criminal Rule 45(a)(4). Appellate Rule 26(a)(4) includes a few more tailored approaches for particular filing scenarios, but adopts the same basic idea that electronic filers get the latest deadline – midnight in the relevant time zone.

This feature of the time-computation rules is currently under study. See generally Tim Reagan et al., Electronic Filing Times in Federal Courts (FJC 2022), available at https://www.fjc.gov/content/365889/electronic-filing-times-federal-courts .

43 The time-computation rules permit courts to specify a different time of day via local rule or order in a case. See the rules cited supra note 42.

not users of CM/ECF with the opportunity to register to receive electronic notice of filings in their case.[44] Such an electronic-notice mechanism seems to be an important component of a program to provide self-represented litigants with access equivalent to that furnished by CM/ECF – both because it provides an avenue for notice that may be more timely and effective than service by mail[45] and because the notice recipient receives an opportunity to download an electronic copy of the relevant filing.[46] Among other advantages, such an electronic copy may increase accessibility for readers with visual disabilities, because this electronic copy will likely be more amenable to use by text-to-speech programs than a copy made by scanning a paper received in the mail.[47] On the other hand, it makes sense that the courts providing an electronic-noticing program typically make it optional, not mandatory – because some self-represented litigants could not navigate the electronic-notice-and-download tasks and, for those litigants, hard copies sent by mail are the better option.

As noted in Part I.A.2, because notice through CM/ECF constitutes a method of service, the rules effectively exempt CM/ECF filers from separately serving their papers on persons that are registered users of CM/ECF. To qualify for this exemption the litigant must "send[the paper] to a registered user by filing it with the court's electronic-filing system." For the reasons noted in Part I.A.2, a court might conclude that submission via an alternative means of electronic access (email or upload to a court portal) does not fit within this description. In that view, electronic submission to the court outside of CM/ECF might not exempt a self-represented litigant from the duty to separately serve all other parties (even those that are registered users of CM/ECF). This issue could be addressed by adopting a local rule exempting non-CM/ECF users from separately serving registered CM/ECF users,[48] or by revising the national rules concerning service. I turn to the latter possibility in Part II.B.

Non-rule-based avenues for change. A recurring question during the working group's discussions has been whether the rules themselves are an impediment to increasing access for

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44 See FJC Study at 11. See also, e.g., U.S. District Court, S.D.N.Y., Pro Se (Nonprisoner) Consent & Registration Form to Receive Documents Electronically, available at https://www.nysd.uscourts.gov/sites/default/files/pdf/proseconsentecfnotice-final.pdf .

45 Sai has pointed out that the ability to receive electronic notice of filings is particularly important for litigants who are traveling or who have a disability. See Sai's proposal, supra note 13, at 24-25.

46 See FJC Study at 11 ("CM/ECF electronic notice gives an attorney or a pro se litigant one free look at the filing. If the recipient of the notice does not print or download the document during the one free look, then the recipient will have to pay Pacer fees to look at it again.").

47 As Sai points out, a text-to-speech program cannot read a scanned PDF unless the scanned PDF is first processed using optical character recognition ("OCR") technology; and the resulting OCR-processed file may contain errors that would not be present in the same document if it were in native PDF format. See Sai's proposal, supra note 13, at 28.

48 Local rules, of course, must be "consistent with" the national rules. Civil Rule 83(a)(1); see also Appellate Rule 47(a)(1); Bankruptcy Rule 9029(a)(1); Criminal Rule 57(a)(1). For the reasons discussed in Part I.A.2, perhaps the national service rules might be viewed as ambiguous on the question of what counts as "sending … to a registered user by filing … with the court's electronic-filing system." If so, then a local rule could be viewed as clarifying that ambiguity.

self-represented litigants. With the possible exception of the service issue (discussed in Part II.B), the access issues noted in this memo could be addressed by a court entirely through local provisions, consistent with the current national Rules. A court could offer self-represented litigants access to CM/ECF. Or it could offer self-represented litigants a non-CM/ECF option to email or upload documents plus an option to register to receive electronic notices of others' filings in the case. While the current rules do not nudge the courts in this direction, neither do they impede a court from pursuing this direction if it wishes to do so.

Thus, some participants have asked whether the proposals to increase electronic-filing access are best addressed by measures other than a rule amendment. A helpful approach might be to provide resources and training that could address underlying reasons for reluctance to expand electronic access for self-represented litigants. Resources might include, for example, training modules that could be provided to self-represented litigants on the use of CM/ECF, and anti-malware technology that could be provided to courts to screen electronic files submitted via email or upload. Such matters lie outside the province of the rules committees, but it could be useful for the rules committees to consider making a recommendation that other federal-judiciary actors study these matters – for example, the Judicial Conference Committee on Court Administration and Case Management and perhaps the Judicial Conference Committee on Information Technology, in coordination with any existing working group that is addressing issues facing self-represented litigants.

The need for broad consultation. The public suggestions proposing greater access for self-represented litigants have raised important points about the experience of those who represent themselves in federal court. Further insights on the experience of pro se litigants might be gained by consulting lawyers with experience assisting pro se litigants in federal court.[49] It is likewise important to gain perspective from clerks' office personnel. The interviews conducted by the FJC provide a head start on that task; as proposals are developed, it could also be useful to solicit views from organizations such as the National Conference of Bankruptcy Clerks, the Federal Court Clerks Association, the Administrative Office's Bankruptcy and District Clerk Advisory Groups, and the circuit clerks.

B. Service on registered CM/ECF users

Part I.A.2 observed that because notice through CM/ECF constitutes a method of service, the rules effectively exempt CM/ECF filers from separately serving their papers on persons that are registered users of CM/ECF. By contrast, the rules can be read to require non-CM/ECF filers to serve their papers on all other parties, even persons that are CM/ECF users. It would be useful for the advisory committees to consider whether this difference in treatment is desirable.

Requiring self-represented litigants to make separate service on registered CM/ECF users may impose an unnecessary task. Each filing a self-represented litigant makes by a means other

49 A potential resource, in this regard, is the Federal Courts working group of the Self-Represented Litigation Network, see https://www.srln.org/taxonomy/term/677.

than CM/ECF will eventually be uploaded by the clerk's office into CM/ECF, and at that point all registered CM/ECF users in the case will receive a notice of electronic filing and an opportunity to download the document. As a practical matter, though there may be a lag between the submission of the document and the time when the court clerk uploads it into CM/ECF, it seems plausible to surmise that the document will ordinarily become available to the judge no sooner than it becomes available to registered users via the notice of electronic filing.

The hardship imposed by that additional task (serving registered CM/ECF users) will depend on the circumstances of the case and the litigant. For some litigants, effecting separate service might not be onerous; this would be true if the self-represented litigant is thoroughly conversant with email and has been able to obtain all other litigants' consent to email service. But for self-represented litigants who lack reliable access[50] to or proficiency with email – or who have not been able to obtain their opponent's consent to email service – the separate-service requirement means making additional hard copies of the paper in question and delivering them by non-electronic means. And regardless of the alternate service method (email or paper), the rules require a certificate of service, which is an additional technical requirement that might trip up a self-represented litigant.

Presumably for these reasons, some courts have adopted local provisions eliminating the requirement of separate service on registered users of CM/ECF.[51] A question for the advisory committees is whether it would be useful to amend the national rules to adopt that approach. Such an amendment would provide a national imprimatur for the existing local rules, and would also change the practice in districts that currently require separate service even on registered CM/ECF users. Because some districts have already adopted this practice, there is a reservoir of experience on which the committees could draw in determining whether the practice has any downsides.[52]

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50 For instance, many incarcerated litigants likely lack reliable access to email.

51 See, e.g., D. Ariz. E.C.F. Admin. Policies & Procedures Manual II.D.3 ("A non-registered filing party who files document(s) with the Clerk's Office for scanning and entry to ECF must serve paper copies on all non-registered parties to the case. There will be some delay in the scanning, electronic filing and subsequent electronic noticing to registered users. If time is an issue, non-registered filers should consider paper service of the document(s) to all parties."); S.D.N.Y. Electronic Case Filing Rule 9.2 ("Attorneys and pro se parties who are not Filing or Receiving Users must be served with a paper copy of any electronically filed pleading or other document. Service of such paper copy must be made according to the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure and the Local Rules. Such paper service must be documented by electronically filing proof of service. Where the Clerk scans and electronically files pleadings and documents on behalf of a pro se party, the associated NEF constitutes service.").

52 Personnel in those courts could tell us, for example, how non-CM/ECF users discern which other litigants are and are not registered CM/ECF users. Litigants who file via CM/ECF receive a system-generated notice of electronic filing that says who is being automatically served and who is not. Paper filers will not receive the notice of electronic filing (unless, perhaps, they are registered for electronic noticing). Such filers might instead draw inferences from a party's status as counseled or self-represented, or from the contact information listed on the docket sheet; or they might ask the clerk's office.

If the advisory committees are inclined to consider such amendments, questions about implementation arise. For example, should the exemption extend only to service on registered CM/ECF users, or should it also encompass service on non-CM/ECF users who have registered with the court to receive notices of electronic filing in the case? And, of course, there are drafting questions. As to the latter, I sketch below – purely for purposes of illustration – one possible way to accomplish this type of amendment; but there may well be better ways to implement the idea. The sketch below illustrates a possible amendment to Civil Rule 5:

Rule 5. Serving and Filing Pleadings and Other Papers

* * *

(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 <u>on non-users of electronic-filing [and electronic-noticing] system[s]</u> ~~in General~~. A paper is served under this rule <u>on [one who has not registered for the court's electronic-filing system] [one who has not registered for either the court's electronic-filing system or a court-provided electronic-noticing system]</u> by:

(A) handing it to the person;

(B) leaving it:

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

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

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

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

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

(F) delivering it by any other means that the person 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.)]~~ **Service on users of the court's electronic-filing [or electronic-noticing] system**. A paper is served under this rule on a registered user of [either] the court's electronic-filing system [or a court-provided electronic-noticing system] by filing it, in which event service is complete upon filing, but is not effective if the filer learns that it did not reach the person to be served.

* * *

(d) Filing.

(1) Required Filings; Certificate of Service.

* * *

(B) Certificate of Service. No certificate of service is required when a paper is served ~~by filing it with the court's electronic-filing system~~ under subdivision (b)(3). 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.

* * *

III. Conclusion

The FJC Study has given the advisory committees an invaluable factual basis on which to consider whether amendments to the national rules might usefully address questions of electronic filing, and questions of service, by self-represented litigants. As noted in Part II, an additional question is whether the rulemaking committees might recommend that other groups within the federal judiciary consider fostering increased access through means other than rule amendments. I look forward to learning from the advisory committees' discussion of those possibilities.

Federal Courts'

Electronic Filing by Pro Se Litigants

Federal Judicial Center
2022

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FEDERAL COURTS' ELECTRONIC FILING BY PRO SE LITIGANTS

Tim Reagan, Carly Giffin, and Roy Germano
Federal Judicial Center 2022

We learned from several dozen federal clerks of court and members of their staffs that pro se litigants[1] are sometimes able to file electronically using the federal courts' Case Management/Electronic Case Files (CM/ECF) system, but many courts are hesitant to allow pro se filing in CM/ECF. Prisoners have limited access to the internet at most, so it is seldom feasible for them to use CM/ECF.

Many courts accept filings from pro se litigants, including prisoners, by electronic submission: email, PDF upload, or online form. Like paper submissions, the electronic submissions are docketed as electronic filings by the court's staff. Concerns about malware and cost are among the reasons that courts have not embraced more extensively electronic submission alternatives to CM/ECF.

We conducted this research at the request of the federal rules committees' working group on pro se electronic filing. The most salient rules-related lessons of this research are (1) perhaps paper filers should not be required to serve their filings on parties already receiving electronic service; and (2) because electronic filing is sometimes understood to mean filing using CM/ECF and sometimes understood to mean submitting filings electronically, such as by email, perhaps the rules should clarify their references to electronic filing.

Contents

1. We use the expression "pro se," but we recognize the growing trend to use less jargony expressions, such as "self represented," "unrepresented," "not represented," "uncounseled," "lawyerless," "without an attorney," and "without counsel." The legal community has not yet settled on a preferred alternative to "pro se," and we have declined to weigh in.

Method

Important Distinctions

We kept four distinctions in mind:

1. *Case Initiation.* There is a big difference between using CM/ECF to file in an existing case and using CM/ECF to initiate a case. The former is much more available to pro se litigants than the latter.
2. *Electronic Submission.* There is a difference between electronically submitting something to the court—by email, electronic drop box, or preparation software—and actually using CM/ECF to file it. Submissions are converted into filings by the court's staff after a quality control review.
3. *Prisoners.* Prisoners do not have unrestricted access to the internet, so their ability even to submit things electronically depends upon procedures developed by the prisons.
4. *Case Types.* Appeals, civil cases, criminal cases, and bankruptcy cases present different pro se electronic filing challenges and opportunities.

Interview Questions

There are 190 clerks of court. This includes one for each of the ninety-four district courts and the thirteen courts of appeals. There are only ninety bankruptcy courts, because there is one bankruptcy court for both districts in Arkansas and three territorial districts have bankruptcy divisions, not separate bankruptcy courts. There seven districts with district court clerks who also oversee the districts' bankruptcy courts. We contacted seventy-nine clerks of court, and all but one agreed to participate in this study. We found a loosely structured interview to be an effective method. We spoke with the clerks or other knowledgeable members of their staffs.

Following are the topics that we discussed.

1. *Permitted.* Are pro se litigants permitted to file electronically?
2. *Prisoners.* Are prisoners ever able to submit filings electronically?
3. *Other Filers.* In bankruptcy cases, to what extent can parties appearing without attorneys, such as pro se creditors, use CM/ECF?
4. *Procedures.* What are the procedures that pro se litigants follow to become electronic filers?
5. *Initiating Cases.* Can pro se litigants initiate cases electronically? In some courts, even attorneys do not open cases in CM/ECF directly; they may submit initial documents to the court electronically, but it is the court that actually opens the case and assigns it a case number.

6. *Criminal Cases.* Are criminal cases opened electronically by the U.S. Attorney's office, or are they opened with the submission of a paper indictment or other charging document? Are criminal defendants ever able to file electronically? Few criminal defendants are pro se, they are typically detained, and they usually have assigned stand-by counsel who help them with filing and service.
7. *Service.* Are paper filers required to provide paper service to parties who are receiving electronic service? Paper filings are docketed electronically by the court, so electronic service on other parties occurs as a matter of course. But some courts require separate service.
8. *Email and Fax.* Does the court ever accept filings by email, fax, or electronic drop box?
9. *Signatures.* When the court receives electronic submissions, as by email or fax, what are the court's requirements for signatures?
10. *Drop Box.* Does the court have a physical drop box? Where is it located? When is it available? Physical drop boxes often were removed when the court began using electronic filing, and they often came back because of the COVID-19 pandemic.
11. *Time Stamp.* How do things submitted to a drop box get a time stamp?

Court Selection

From December 2021 through March 2022, we interviewed clerks' offices for five of the thirteen courts of appeals, thirty-nine of the ninety-four district courts, and forty of the ninety-three bankruptcy courts and divisions.

From 2019 through 2022, we studied filing times of day for another project.[2] From a review of court rules for the filing-time project, we were able to classify courts into those that (1) generally permit the use of CM/ECF by pro se litigants, (2) permit pro se use of CM/ECF with permission, (3) forbid pro se use of CM/ECF, and (4) do not clearly state one way or the other whether pro se litigants can seek permission to use CM/ECF.

Among the courts of appeals, five generally permit pro se use of CM/ECF, seven permit it with permission, and one forbids it. We selected one court at random from each group, and we also interviewed the courts of appeals for two unusual circuits: the Ninth, because of its unusual size and complexity, and the Federal, because of its unusual jurisdiction.

There are ten districts that do not have separate bankruptcy clerks of court, including the three territorial courts without separate bankruptcy courts. We interviewed the clerks' offices for four selected at random. In addition, we interviewed the clerks' offices for the two other districts that explicitly authorize pro se use of CM/ECF in the district court, one generally (the District of Vermont) and one with permission (the District of Columbia).

2. Tim Reagan, Carly Giffin, Jessica Snowden, George Cort, Jana Laks, Roy Germano, Marie Leary, Saroja Koneru, Jasmine Elmasry, Nafeesah Attah, Rachel Palmer, Annmarie Khairalla, and Danielle Rich, Electronic Filing Times in Federal Courts (Federal Judicial Center 2022), www.fjc.gov/content/365889/electronic-filing-times-federal-courts.

We interviewed thirty-three district courts where the same clerk does not oversee both district court and bankruptcy cases. We interviewed eighteen selected at random. We interviewed five additional district courts so that we would have interviewed all seven that generally permit nonprisoner pro se use of CM/ECF in civil cases, including one that requires pro se use of CM/ECF unless the judge grants an exception (the Northern District of Texas). We interviewed an additional district court that we initially but erroneously thought generally permitted nonprisoner pro se use of CM/ECF. We interviewed one additional district court so that we would have interviewed four of the fourteen that do not clearly state one way or the other whether pro se use of CM/ECF is permitted. We selected to interview at random two of the thirteen district courts that forbid pro se use of CM/ECF, but one court declined to participate. We interviewed another two with rules forbidding pro se use of CM/ECF, because in the filing-time project we observed pro se use of CM/ECF in 2018.

We interviewed the Eastern District of Washington, because its rules state that pro se electronic filing is possible for prisoners. It turns out to be electronic submission rather than use of CM/ECF. We interviewed the Southern District of Alabama, because its rules state that pro se use of CM/ECF can be ordered. The judges wanted this option, but they have never used it. We decided to interview the District of Arizona, because it is often regarded as a model court with respect to judicial policy initiatives. And we interviewed two district courts because their rules provide for a time-of-day deadline before midnight, a feature relevant to the filing-time project.

We interviewed thirty-four bankruptcy courts where the same clerk does not oversee both district court and bankruptcy cases. We interviewed twenty-one selected at random. We interviewed seven additional bankruptcy courts so that we would have interviewed all eight with rules stating that they permit pro se use of CM/ECF with permission. We interviewed one of the remaining six bankruptcy courts, out of eight total, with rules explicitly forbidding pro se use of CM/ECF.

We interviewed another five bankruptcy courts that use the "electronic self-representation" (eSR) module for electronic submission of bankruptcy petitions. These were not selected precisely at random, because we learned about some using eSR after we made the selections.

Observations

Electronic Filing by Attorneys

Electronic presentation to the court of a document to be included in the case file is faster than regular mail and faster than personal delivery, if the filer has the necessary electronic equipment. Electronic filing has been an option in federal courts for about two decades.

There has long been a distinction between submission of a document to the court and filing it. In the days of paper filing, if a document was obviously suitable for filing, a counter clerk would stamp copies "filed" and add the document to the appropriate case file. Otherwise, the counter clerk would stamp

copies something like "received," and the court would later determine whether it would be included in the case file. A document presented to the court but not immediately accepted for filing was frequently referred to as "lodged" with the court.

With CM/ECF, there is an important distinction between using CM/ECF to immediately add a document to a case file, true e-filing, and otherwise submitting a document to the court, which then perhaps uses CM/ECF to add the document to the case file. The court may do this with a document it receives electronically or with a document it receives on paper.

In most district courts, an attorney opens a civil case directly by filing a complaint in CM/ECF, thereby immediately creating a new case record with a new case number. Attorneys are sometimes interrupted, and they sometimes make mistakes. Failed attempts to create new cases used to result in skipped case numbers. Because skipped case numbers look like sealed cases, courts now typically reuse case numbers for cases that were never fully opened.

In some courts, attorneys may use CM/ECF to file complaints, but they do not create new cases that way. The complaint may be filed in a shell case, and then deputy clerks transfer the new filing to a new case record. A few courts still receive complaints on paper, even from attorneys who will use CM/ECF for later filings in existing cases.

Procedures for filing a bankruptcy petition are similar to procedures for filing a civil complaint.

Criminal cases are typically opened by paper indictment, information, or complaint, which deputy clerks file into new cases. Even if the court accepts filings for new criminal cases electronically, it is typically the court and not the U.S. attorney's office that opens the case in CM/ECF.

In the courts of appeals, it is always members of the court staff who open the cases. When a notice of appeal is filed in a district court, and the filing fee paid to the district court, the staff of the district court electronically transmits the most relevant parts of the record to the court of appeals, and the staff of the court of appeals opens a new case, assigning it a case number. Agency appeals and mandamus actions—original cases in the courts of appeals—can be opened using CM/ECF, but attorneys do not open the cases directly. Similar to how some district courts accept new complaints in shell cases, CM/ECF is used in the courts of appeals to submit an original action electronically, but it is court staff that actually make the new case's electronic record live with a case number.

Once a case is opened, attorneys generally are required to use CM/ECF to file.

Pro Se Filing in the Courts of Appeals

Filing in the courts of appeals is less complicated than filing in the district and bankruptcy courts. It is mostly briefs, with the occasional motion practice. The typical case has an appellant brief, an appellee brief, maybe a reply brief, and a decision. According to their local rules and administrative procedures, five

courts of appeals generally permit pro se litigants to register as CM/ECF users[3] and seven allow them to do so with individual permission.[4] The electronic filing guide for one court states that the court does not permit pro se litigants to use CM/ECF,[5] but some pro se litigants have been granted electronic filing privileges as exceptions to the rule.

Nonprisoner Civil Cases

Based on a review of all local rules,[6] the rules for somewhat more than half of the district courts state that nonprisoner pro se litigants are permitted to use CM/ECF to file in their existing cases with individual permission (55%). At least nine courts permit nonprisoner pro se litigants to register as CM/ECF users without advance permission (9.6%),[7] but they usually can file only in their existing cases. Pro se plaintiffs seldom can use CM/ECF to file their complaints. The rules for fourteen district courts state that pro se litigants may not use CM/ECF (15%).[8] The rules for the other district courts do not specify one way or the other whether pro se litigants can use CM/ECF (19%).

To use CM/ECF, the filer must have an email address and be able to create PDFs. Typically it is the presiding judge who considers pro se requests to use CM/ECF, which typically are presented by formal motion. In some courts, the approval decision is made by the clerk's office, and a less formal application is required. Courts generally avoid giving electronic filing privileges to vexatious litigants.

Many courts are leery of letting pro se litigants use CM/ECF, but those that have done so reported fewer problems than expected. Electronic filing saves court time that otherwise would be spent scanning documents.

Pro se litigants sometimes have mental health issues that might result in filings that depart from customary practice. Even without mental health issues, they sometimes make errors using CM/ECF. Attorneys make errors sometimes as well. But attorney errors are somewhat easier to correct than pro se

3. The courts of appeals for the First, Third, Eighth, Eleventh, and Federal Circuits.

4. The courts of appeals for the District of Columbia, Second, Fourth, Fifth, Seventh, Ninth, and Tenth Circuits.

5. The court of appeals for the Sixth Circuit.

6. A review for another project of all of the courts' local rules and all of the courts' office hours was conducted by Tim Reagan, Carly Giffin, Jessica Snowden, Saroja Koneru, Jasmine Elmasry, Nafeesah Attah, Rachel Palmer, Annmarie Khairalla, and Danielle Rich.

7. The district courts for the Northern District of Illinois, the Southern District of Illinois, the District of Kansas, the Western District of Missouri, the District of Nebraska, the Northern District of Texas (where nonprisoner pro se litigants are typically required to use CM/ECF), the District of Vermont, the Western District of Washington, and the Western District of Wisconsin.

8. The district courts for the Middle District of Alabama, the Northern District of Alabama, the District of Alaska, the Northern District of Georgia, the Northern District of Mississippi, the Southern District of Mississippi, the District of Montana, the District of New Jersey, the Eastern District of North Carolina, the Western District of North Carolina, the District of North Dakota, the Western District of Oklahoma, the Eastern District of Virginia, the District of Wyoming.

errors, because the court does not owe attorneys the same level of forgiveness that it owes pro se litigants. Also, because attorneys are familiar with the rules, their mistakes do not arise from substantial misunderstandings about procedures.

Courts that have transitioned to the Next Generation of CM/ECF (NextGen) do not give litigants CM/ECF filing privileges directly. A litigant first registers with Pacer (the federal courts' Public Access to Court Electronic Records). Then the court links the Pacer account to CM/ECF filing privileges in the court. Typically the court limits the filing privileges to the pro se litigants' existing cases.

Electronic Filing in Civil Cases by Prisoners

Prisoners cannot use CM/ECF, because they do not have sufficient access to the internet. Some courts have arrangements with some prisons, generally state rather than federal prisons, for electronic submission of prisoner filings. In some arrangements, electronic submission is mandatory and prisoners are not permitted to file on paper.

Typically, a prisoner presents a filing to the prison librarian, who scans it and emails it to the court. Some prisons accept electronic notices on behalf of the prisoners, and then convert them to paper documents. Many prisons do not, so prisoners must be served with other parties' filings and court filings by regular mail.

Courts that have adopted electronic communications with prisoners reported a reduction in controversies over the reliability of prison mail.

Some courts currently require, or used to require, prisons to send to the court in batches the original documents that were scanned and submitted electronically for the prisoners. That provides the court with originals in case there is a problem with the scans, and it provides the court with wet signatures.[9]

Criminal Cases

It is theoretically possible for a pro se criminal defendant who is not detained to obtain CM/ECF filing privileges in some district courts. But criminal defendants are often detained. Very few are pro se. Even those that are pro se typically have appointed standby counsel, and one of the things that standby counsel does is assist the defendants with filing.

Pro Se Electronic Filing in Bankruptcy Cases

It is very unusual for pro se debtors to receive CM/ECF privileges.

Several courts offer eSR, which is now easily available to courts using NextGen CM/ECF. This "electronic self-representation" module allows the

9. A wet signature is an original signature made with a writing device (generally with temporarily wet ink) on physical paper. *See generally* Molly T. Johnson, Bankruptcy Court Rules and Procedures Regarding Electronic Signatures of Persons Other than Filing Attorneys (Federal Judicial Center 2013), www.fjc.gov/content/317113/bankruptcy-court-rules-and-procedures-regarding-electronic-signatures-persons-other.

debtor to prepare a bankruptcy petition package on the court's website, including the petition itself, statements, schedules, and the creditor matrix. The package is electronically submitted to the court, and the debtor must provide payment and signature pages separately, either by regular mail or by a visit to the court.

One of eSR's advantages for the court is that the petitions generated with eSR are structurally whole. The petitions are legible, because they are not handwritten. The debtor benefits from eSR's helping the debtor to create the petition in addition to the obvious benefits of avoiding the inconvenience of travel to the court or the delay of regular mail. Some courts are concerned, however, that eSR may make filing a petition too easy, because the debtor receives no advice on whether bankruptcy is the right way to go. Also, eSR does not really provide electronic self-representation, because actual representation would extend beyond the filing of a petition. Subsequent filings cannot be submitted with eSR. Still, some bankruptcies are "one and done," in that the debtor does not file anything after the initial petition package, which includes the petition itself and the necessary schedules and statements.

Many bankruptcy courts allow pro se creditors to register with CM/ECF as limited filers. Alternatively, most courts allow pro se creditors to use the courts' electronic proof of claim (ePOC) portals. CM/ECF filing privileges are more likely to be granted to and used by large businesses that are frequent filers.

Electronic Submission

Forms of electronic submission other than filing in CM/ECF offer many of the benefits of true electronic filing without requiring a pro se litigant to master CM/ECF. Arrangements with prisons for electronic submissions by prisoners are an example. Some courts otherwise accept submissions by email. A few accept submissions by electronic drop box, a web portal that allows a user to upload a PDF. Many to most courts do not accept such electronic submissions.

Electronic submission saves the court the time required to scan paper documents, and it relieves courts of the sometimes physically difficult mail they can get from prisons. Electronic submissions often do require staff time to organize or even sift through PDFs to convert submissions to proper filings. And there are security concerns when the court gets electronic submissions directly from pro se litigants. The court does not have to scan a paper document into an electronic one, but it may need to scan the email for malware.

Although the Administrative Office has developed eSR for bankruptcy petitions, it does not appear to have developed a module for courts to receive other electronic submissions, and costly security requirements have dissuaded some courts from developing their own. Several courts reported that they developed their own electronic drop boxes, typically called the Electronic Document Submission System (EDSS). Courts are also looking at Box.com as an option.

Most courts do not generally accept filings by email or fax, and fax is now a seldom-used method of submission anyway. Many courts have accepted

emergency filings by email with individual special arrangements. During the COVID-19 pandemic, some courts became more lenient with email filings, and some of those courts have become less lenient again as the pandemic eased.

Considering our sampling scheme, we can estimate how many courts have accepted electronic submissions by prisoner or nonprisoner pro se litigants for filing, one way or another, at least occasionally, and perhaps because of the COVID-19 pandemic: 69% of the courts of appeals, 80% of the courts where the same clerk oversees both district court and bankruptcy cases, 50% of the other district courts, and 78% of the other bankruptcy courts.

Physical Drop Boxes

Many courts stopped using drop boxes with the advent of electronic filing. Some began to use them again during the COVID-19 pandemic, when many intake counters closed or reduced their hours.[10] Drop boxes also facilitated social distancing by relieving a filer of a visit to the counter. Some courts that established drop boxes during the pandemic have continued to use them, and some have not.

In a few courts, the drop box is available at all hours, typically because it is outside the building, but in at least one location because the building never closes. Much more commonly, the drop box is available only for a short time before the clerk's office opens and for a short time after it closes, because it is only available during the building's open hours. Although it is typical for a time stamp to be at the drop box, some drop boxes do not have time stamps. If the drop box does not have a time stamp, documents retrieved in the morning typically are dated as received the day before.

Many courts are concerned about the security threat posed by a drop box, especially if it were to be accessible from outside the building's security. Use of drop boxes that do exist appears to be light.

Filing Fees

In many courts, filing fees can be paid electronically using Pay.gov.

Interestingly, many courts no longer accept cash, and those that do often cannot make change. It is sometimes more expensive to maintain bank accounts and transport cash to the bank than the court receives in cash fees.

Bankruptcy courts generally do not accept payment by personal check, debit card, or credit card for bankruptcy petition filing fees. Cashier's check, money order, and sometimes cash are accepted. Some bankruptcy courts accept payments via Pay.gov, but that requires special arrangements with Pay.gov to block credit card and debit card options.

10. Court hours are given in this report for each court in the study based on research done in 2019, before the COVID-19 pandemic.

Signatures

Electronic signatures are a part of using CM/ECF. Documents submitted electronically some other way will not have wet signatures, but they may have images of original signatures.

The bankruptcy courts are much more concerned about original signatures than the district courts and the courts of appeals are. Filings in the district courts and the courts of appeals do not generally have the same immediate impact on the filer and others, aside from an obligation to respond, as the filing of a bankruptcy petition does. In the district courts and the courts of appeals, an impact on others generally requires court action.

During the COVID-19 pandemic, some courts accepted images of original signatures without requiring wet signatures as an emergency measure.

If a wet signature is required, it must be submitted within a certain number of days after an electronic submission. That is generally the requirement for use of eSR. In the district courts, filers are sometimes required only to maintain original wet signatures for a period of time in case they are needed.

Electronic Notice and Service

Some courts permit pro se litigants to register for electronic notice of other parties' filings without having CM/ECF filing privileges. CM/ECF electronic notice gives an attorney or a pro se litigant one free look at the filing. If the recipient of the notice does not print or download the document during the one free look, then the recipient will have to pay Pacer fees to look at it again. If a party is represented by more than one attorney, each attorney may get his or her own one free look.

In the bankruptcy courts, pro se debtors can register for the Bankruptcy Noticing Center's debtor electronic bankruptcy noticing (DeBN).

Some courts do not require paper filers to separately serve other parties who already are receiving electronic notice. In some courts, there still is a separate service requirement on paper, but it may not be enforced. Rules are rules, except when they are not rules. But when rules are not rules, when are rules rules? In some courts, separate service is required, and certificates of service are carefully examined to make sure they reflect service on all parties.

Information About Individual Courts

The following narratives present what we learned from each of the seventy-eight clerks' offices participating in this study (a sample size of 41%).

Courts of Appeals

The Court of Appeals for the First Circuit

This court was selected for this study at random from among the courts of appeals.

The United States Court of Appeals for the First Circuit has six judgeships. The clerk's office in Boston is open from 8:30 to 5:00. 1st Cir. I.O.P. ¶ I.B.

Electronic filing is governed by the court's Rule 25.0. Nonprisoner pro se litigants are permitted to register as filers in CM/ECF. *Id.* R. 25.0(c). "Unless otherwise required by statute, rule, or court order, filing must be completed by midnight in the time zone of the circuit clerk's office in Boston to be considered timely filed that day." *Id.* R. 25.0(d)(3).

Pro se litigants can use CM/ECF without advance permission, but only the clerk's office actually opens cases. Direct appeals begin with the submission of records by the district courts or the Bankruptcy Appellate Panel (BAP) following notices of appeal; the staff in the court of appeals uses those submissions to open cases and assign case numbers. In direct appeals, the filing fee is paid to the district court or to the BAP. Electronic filers can submit initial documents using CM/ECF in petitions for review of agency decisions, mandamus actions, and applications to file successive habeas corpus petitions. The clerk's office uses the electronic submissions to open the cases.

Except on rare occasions, the court does not accept submissions from filers by email or fax. Because of office closures during the COVID-19 pandemic, it established a drop box, which is available when the building is open, a few hours longer than regular court hours. There is a time stamp available at the drop box for filers' use, and the drop box is checked by the court's staff at least twice a day.

There is no procedure for prisoners to file electronically.

The Court of Appeals for the Sixth Circuit

This court of appeals was selected for this study because it is the only one with rules forbidding electronic filing by pro se litigants.

The United States Court of Appeals for the Sixth Circuit has sixteen judgeships. The clerk's office in Cincinnati is open from 8:00 to 5:00.

Electronic filing is governed by the court's Rule 25 and the court's Guide to Electronic Filing [hereinafter ECF Guide], *see* 6th Cir. R. 15. "No unrepresented party may file electronically; unrepresented parties must submit documents in paper format. The clerk will scan such documents into the ECF system, and the electronic version scanned in by the clerk will constitute the appeal record of the court as reflected on its docket." 6th Cir. ECF Guide ¶ 3.3. Pro se litigants have occasionally been granted individual exceptions to this proscription. The court is exploring more expansive permission for pro se electronic filing.

Because of the COVID-19 pandemic, the court began permitting nonprisoner pro se litigants to submit filings by email without advance permission. This resulted in some improper emails, such as an article a pro se litigant thought, in the middle of the night, that the court should read. The court is more comfortable with email submission than CM/ECF filing for pro se litigants because it gives the clerk's office a chance to review submissions before they are docketed. As it is, even attorneys sometimes make mistakes with their filings, incorrect docket entries are locked, and attorneys are notified of the errors so that they can correct them.

There is no provision in the circuit for electronic submission by prisoners. Paper submissions by prisoners are sometimes physically filthy.

Signatures in email submissions must be handwritten and scanned.

Paper filers must provide paper service even to parties receiving electronic service. Case managers scrutinize certificates of service.

Fax submissions are not accepted. Nor does the court have a physical drop box.

One challenge of electronic docketing is electronic notice. Sometimes attorneys' email addresses change, such as when they change firms. The clerk's office has to track down new email addresses for those attorneys. Electronic notice to pro se filers could pose similar problems, although litigants' street addresses also could change. Pro se litigants currently receive notice only by regular mail. A temporary difficulty arose when the Ohio Department of Corrections decided that each piece of mail to a prisoner had to be registered electronically and individually in advance. The problem was remedied by granting the federal courts an exception, although they still had to register as recognized senders.

The Court of Appeals for the Ninth Circuit

This court of appeals was selected for this study because of its unusual size and complexity.

The United States Court of Appeals for the Ninth Circuit has twenty-nine judgeships. The clerk's office in San Francisco is open from 8:30 to 5:00.

Electronic filing is governed by the court's Rule 25-5 and the court's CM/ECF User Guide. Instructions in the Guide for pro se filers imply opportunities for pro se litigants to file electronically.

In fact, the court encourages pro se use of CM/ECF. Pro se litigants can register through Pacer to use CM/ECF, and they are not limited to use of CM/ECF in pending cases. The clerk regards litigants as customers, so pro se litigants should be afforded high-quality customer service.

Prisoners who can submit filings to the district courts electronically, generally with the help of prison librarians, can also submit filings electronically to the court of appeals. During the COVID-19 pandemic, the court began to more generally allow pro se filing by email.

The courts of appeals for the Ninth and Second Circuits are developing a new case-management system to replace CM/ECF. Pro se litigants are not yet given filing privileges in the new system.

Electronic filings made by 11:59 p.m. are docketed as filed that day. 9th Cir. R. 25-5(c)(2).

The Court of Appeals for the Tenth Circuit

This court was selected for this study at random from among the courts of appeals with rules stating that pro se litigants can file electronically with permission.

The United States Court of Appeals for the Tenth Circuit has twelve judgeships. The clerk's office in Denver is open from 8:00 to 5:00.

Electronic filing is governed by the court's Rule 25.3 and the court's CM/ECF User's Manual. A pro se litigant may seek permission to file electronically. 10th Cir. CM/ECF User's Man. ¶¶ II.A.2 and .C.2. The court has delegated to the clerk's office authority to grant electronic filing privileges to pro se litigants. It is on a case-by-case basis, and available only in pending cases. The request can be made by motion or more informally by letter. There are no specific form or content requirements. The court looks at prospective electronic filers' litigation history for evidence of vexatious filing.

Electronic filing privileges have not been granted to criminal defendants or prisoners. But during the COVID-19 pandemic, the court did arrange with a medium-security facility in Wyoming for electronic transmission of a prisoner's filings to the court and electronic transmission to the facility of the court's filings.

The court has a new rule in 2022 that relieves paper filers of the obligation of paper service on parties receiving electronic notice. 10th Cir. R. 25.4(C).

The court does not accept filings by email or fax, except in emergencies. It does have a drop box in its Denver courthouse with a time-stamp machine. The drop box was set up because of COVID-19 closures, but it will remain. It is only available during the court's business hours, but it is available to persons who do not wish to comply with the court's COVID-19 vaccination requirement for entry, and they do not have to go through security.

"Electronic filing must be completed before midnight, Mountain Standard Time, as shown on the Notice of Docket Activity, to be considered timely filed on the day it is due." 10th Cir. CM/ECF User's Man. ¶ II.D.1.

The Court of Appeals for the Federal Circuit

This court of appeals was selected for this study because of its unusual jurisdiction.

The United States Court of Appeals for the Federal Circuit has twelve judgeships. The clerk's office in Washington is open from 8:30 to 4:30.

Electronic filing is governed by the court's Rule 25 and the court's Electronic Filing Procedures [hereinafter ECF Procs.]. The court also has a Guide for Unrepresented Parties [hereinafter Pro Se Guide]. Unrepresented parties may register as CM/ECF users, "but new notices of appeal or petitions for review must be filed in paper or by email." Fed. Cir. ECF Procs. ¶ II.A; *see* Fed. Cir. R. 25(a)(1)(B) (permitting the clerk to allow pro se electronic filing); Fed Cir. Pro Se Guide ¶ I.C.

An appeal is initiated by filing a notice of appeal and paying the filing fee in the district court, which transfers to the court of appeals a partial record: the docket sheet, the notice of appeal, and the order being appealed. The clerk's office for the court of appeals then electronically opens the appeal. Counsel can open agency appeals using CM/ECF; they electronically submit initiating

documents to the clerk's office, which then opens the case. Pro se litigants cannot use CM/ECF to initiate cases, but they can initiate agency appeals by email. The court does not otherwise accept filings by email or fax. Currently, pro se litigants who initiate cases by email have the option to continue as either electronic or paper filers.

The court requires courtesy paper copies of all briefs to be delivered or shipped to the court.

"Papers may be deposited until midnight on weekdays in the night box at the garage entrance . . . ." Fed Cir. Pro Se Guide ¶ I.A. Documents are time stamped for the previous day when the clerk's office retrieves them in the morning.

Although the rules technically require paper filers to serve parties receiving electronic service, this is not enforced. Parties, counseled or otherwise, can agree with each other to service by email.

"Unless a time for filing is ordered by the court, filing must be completed before midnight Eastern Time on the due date to be considered timely." Fed. Cir. R. 26(a)(2); *see* Fed. Cir. ECF Procs. ¶ IV.A.16(a) ("Filers in other time zones must account for any time difference to ensure a filing is completed before midnight (Eastern) on the day the document is due.").

Combined District and Bankruptcy Courts

The District and Bankruptcy Courts for the District of Columbia

This district was selected for this study because its district court rules state that pro se electronic filing is allowed with permission in both civil and criminal cases. It is one of the districts where the district court clerk is also the bankruptcy court clerk.

The United States District Court for the District of Columbia has fifteen judgeships and one office code: Washington (office code 1). The United States Bankruptcy Court for the District of Columbia has one judgeship and one office, also Washington.

The clerk's office is open from 9:00 to 4:00.

Electronic filing in the district court is governed by the court's Civil Rule 5.4 and the court's Criminal Rule 49. "A *pro se* party may obtain a CM/ECF user name and password from the Clerk with leave of Court." D.D.C. Civ. R. 5.4(b)(2); *id.* Crim. R. 49(b)(2). Pro se parties cannot open cases electronically, but they can receive permission from the presiding judge to use CM/ECF in pending cases. The court has not experienced much in the way of abuse of the privilege.

Electronic filing in the bankruptcy court is governed by the court's Rule 5005-4 and the court's Administrative Procedures for Filing, Signing, and Verifying Documents by Electronic Means [hereinafter ECF Procs]. "Pro se debtors and other parties (other than creditors and claimants) not represented by counsel may not file electronically; therefore, the Administrative Procedures do not apply to such filers." Bankr. D.C. Administrative Order Relating to

Electronic Case Filing ¶ 2. Pro se creditors and financial management agents can receive limited electronic filing privileges.

Because of the challenges posed by the COVID-19 pandemic, the courts began to allow submissions of filings by email. That option may extend beyond the pandemic.

Attorneys open civil and bankruptcy cases directly with CM/ECF. Criminal cases are opened by the clerk's office from a paper indictment or complaint. Some criminal complaints may be submitted electronically.

Paper filers do not have to separately serve other parties receiving electronic service, except for filings that initiate contested or adversary matters in the bankruptcy court.

The courts' drop box is available at all hours. If the building is closed, a security officer will respond to a buzzer to allow entry for use of the drop box. There is a time stamp present.

In the bankruptcy court, "The 'last day' set for filing a paper ends at midnight in the Court's time zone, unless otherwise specified, whether the filing is an electronic filing or a filing in paper form." Bankr. D.C. R. 9006-1(b); *see* Bankr. D.C. ECF Procs. ¶ II.A.5 ("The deadline for filing, unless otherwise specifically set, is 11:59:59 P.M. of the due date (Eastern Time).").

The District and Bankruptcy Courts for the District of Idaho

This district was selected for this study at random from among the districts where the district court clerk is also the bankruptcy court clerk.

The United States District Court for the District of Idaho has two judgeships. The United States Bankruptcy Court for the District of Idaho also has two judgeships. Both courts have the following four office codes: Boise (office code 1), Pocatello (office code 4), Coeur d'Alene (office code 2), and Moscow (office code 3). The bankruptcy court also has an office in Twin Falls (office code 8).

The clerk's office is open from 9:00 to 4:00. D. Idaho Civ. R. 77.1; Bankr. Idaho R. 1001.2.

Electronic filing in the district court is governed by the court's Civil Rule 5.1, and electronic filing in the bankruptcy court is governed by the court's Rule 5003.1. Electronic filing in both courts is also governed by the courts' Electronic Case Filing Procedures [hereinafter ECF Procs.]. D. Idaho Civ. R. 5.1(b); Bankr. Idaho R. 5003.1(b). According to them, "If the Court permits, a party to a pending action who is not represented by an attorney may register as a Registered Participant in the Electronic Filing System solely for purposes of the action." Bankr. Idaho ECF Procs. ¶ 3.A.4.

In fact, pro se litigants are never granted CM/ECF filing privileges. The court has a substantial pro se caseload, and it does not have the staff to provide pro se CM/ECF filings with adequate quality control. Pro se creditors may receive limited CM/ECF filing privileges to file their proofs of claim.

Detention facilities have acquired scanners, and paralegals there submit a majority of pro se filing from there electronically. About the only filings that

the court receives by regular mail from there are very long evidentiary documents.

Because CM/ECF registration waives the right to paper service, paper filers do not have to separately serve other parties who are already receiving electronic service.

The courts do not have a physical drop box.

"An electronic document is considered timely if received by the Court before midnight, Mountain Time, on the date set as a deadline, unless the judge specifically requires another time frame." D. Idaho ECF Procs. ¶ 2.B.2.

The District and Bankruptcy Courts for the Western District of Missouri

This district was selected for this study at random from among the districts where the district court clerk is also the bankruptcy court clerk.

The United States District Court for the Western District of Missouri has five judgeships, and it shares two additional judgeships with the Eastern District. The United States Bankruptcy Court for the Western District of Missouri has three judgeships. The courts have five office codes: Kansas City (office code 4), Springfield (office code 6), Jefferson City (office code 2), St. Joseph (office code 5), and Joplin (office code 3).

The clerk's office is open from 9:00 to 4:30. *See* Bankr. W.D. Mo. NextGen CM/ECF Procs. ¶ V.A.

Electronic filing in the bankruptcy court is governed by the court's NextGen CM/ECF Administrative Procedures Manual. Electronic filing by pro se debtors is not permitted.

Electronic filing in the district court is governed by the court's Rule 5.1 and the court's CM/ECF Civil and Criminal Administrative Procedures Manual and User's Guide. Pro se filers may use CM/ECF in civil cases but not in criminal cases. *See* W.D. Mo. R. 5.1. They must initiate cases on paper, but the court approves CM/ECF filing privileges for subsequent filings in active cases. Litigants register through Pacer, and their filings immediately appear on the docket. Most pro se litigants still file on paper, but there are currently a little over a dozen electronic filers. Paper filers cannot opt for electronic notice.

Pro se litigants in active civil cases, not bankruptcy cases, can use the court's electronic drop box: Electronic Document Submission System (EDSS). When a litigant begins to use EDSS, the litigant consents to electronic notice and service going forward. Pro se filers are encouraged to either use EDSS or file on paper, but not both. Scanned signatures are adequate; paper signatures are not required. Approximately two dozen pro se litigants are currently using EDSS. Submissions by email or fax are not otherwise accepted.

The court accepts electronic submissions from prisoners in ten state prisons, and in those prisons electronic submission is mandatory. *See* W.D. Mo. Procedures for the Prisoner Electronic Filing Program. Paper submissions are returned. The court has provided scanners, which the prisoners use themselves. Electronic notices of other filings are sent to the prisons, and librarians

or other staff members print out the notices for the prisoners. In the future, the court would like to be able to receive submissions from federal prisoners electronically.

Paper filers are not required to provide paper service on parties receiving electronic service.

The court has a drop box in the clerk's office, which is checked each morning. Submissions are deemed filed on the previous day.

The District Court for the District of the Northern Mariana Islands, Including Its Bankruptcy Division

This district was selected for this study at random from among the districts where the district court clerk is also the clerk of court for bankruptcy cases.

The United States District Court for the District of the Northern Mariana Islands has one judgeship and one office code: Saipan (office code 1). Bankruptcy cases are heard in the district court's bankruptcy division.

The clerk's office is open from 8:00 to 12:00 and from 1:00 to 4:30.

The court's Administrative Procedures for Electronic Filing and Electronic Service for the United States District Court for the Northern Mariana Islands are included as Appendix A to the court's local rules. *See* D.N.M.I. R. 5.1. Pro se parties may register as e-mail filers. *Id.* app. A § 2. The clerk's office converts the emails to filings, and it does not otherwise accept filings by email or fax. Scanned signatures are adequate.

Permission to file by email is granted by the judge based on a written application. Access to technology and fluency in English are considerations. Many pro se litigants are not fluent in English, and they benefit from interaction with court staff when they file. The clerk's office must be careful not to provide the legal advice that litigants often seek.

Even attorneys do not initiate cases in CM/ECF. The clerk's office opens cases on paper filings.

There is no arrangement for electronic submission by prisoners, who are not located on the island.

Paper filers do not have to separately serve other parties who are receiving electronic notice.

The court does not have a drop box.

"Filing must be completed before midnight local time for the Northern Mariana Islands in order to be considered timely filed that day." D.N.M.I. R. app. A § 3.

The District and Bankruptcy Courts for the District of Vermont

This district was selected for this study because its district court rules state that pro se litigants can file electronically. It is one of the districts where the district court clerk is also the bankruptcy court clerk.

The United States District Court for the District of Vermont has two judgeships and two office codes: Burlington (office code 2) and Rutland (office

code 5). The United States Bankruptcy Court for the District of Vermont has one judgeship and one office, in Burlington.

The clerk's office is open from 8:30 to 5:00.

Electronic filing in the district court is governed by the court's Administrative Procedures for Electronic Case Filing [hereinafter ECF Procs.]. D. Vt. R. 5(b). "A non-prisoner who is a party to a civil action and who is not represented by an attorney may register as an ECF user." D. Vt. ECF Procs. ¶ (E)(2); *see also id.* ¶ (Q). Rarely to never have electronic filing privileges been denied or abused. It is possible to register as an ECF user and file on paper but receive electronic service of other parties' filings. There are no provisions for electronic submissions to the court by prisoners.

All cases in the district court are initiated on paper.

In bankruptcy cases, "The Clerk accepts documents by e-mail for filing. The Court prefers attorneys file documents via CM/ECF, rather than e-mailing them to the Clerk for filing, and requires non-attorneys who wish to file documents electronically to transmit their documents to the Clerk via e-mail." Bankr. Vt. R. 5005-4(a)(1). Only once has a pro se debtor ever requested CM/ECF privileges.

Paper filers do not have to separately serve other parties who are receiving electronic notices.

The courts do not accept filings by fax, and they do not have a drop box. The courts never closed during the COVID-19 pandemic.

In the district court, "All electronic transmissions of documents must be completed prior to midnight, Eastern Time, in order to be considered timely filed that day. D. Vt. ECF Procs. ¶ (H).

The District Court for the District of the Virgin Islands, Including Its Bankruptcy Division

This district was selected for this study at random from among the districts where the district court clerk is also the clerk of court for bankruptcy cases.

The United States District Court for the District of the Virgin Islands has two judgeships and two office codes: Charlotte Amalie, St. Thomas (office code 3), and Christiansted, St. Croix (office code 1). The district court has a bankruptcy division.

The clerk's office is open from 8:00 to 5:00.

Electronic filing is governed by Civil Rule 5.4. Electronic filing in bankruptcy cases is governed by the court's Bankruptcy Rule 1002-2 and the court's Electronic Case Filing Procedures [hereinafter ECF Procs.].

Pro se litigants may receive permission to use CM/ECF, but once they become represented by counsel their electronic filing privileges must be terminated. D.V.I. Civ. R. 5.4(b)(2). Permission is granted by the presiding judge on a motion filed in the case, and it is typically granted. Litigants register for CM/ECF through Pacer, complete a Pro Se ECF Registration Form, and then receive training with the clerk's office or online. They typically get the hang of it. It would be possible for a pro se debtor to request CM/ECF privileges, but

the court has few pro se debtors, and none has requested electronic filing privileges.

Attorneys open civil cases directly, but pro se plaintiffs file their complaints on paper. The clerk's office scans and electronically dockets pro se complaints. The clerk's office opens criminal cases from paper indictments, informations, and complaints.

The court does not have an arrangement with a prison facility for electronic submission of prisoner filings.

Paper filers do not have to serve other parties already receiving electronic service.

The court's two locations have drop boxes, which are used during court closures. They are available when the building is open.

In emergencies, the court can accept pro se filings by email. The court does not accept filings by fax.

"Unless otherwise ordered by the Court, a filing must be completed before 11:59 p.m. U.S. Virgin Islands time in order to be considered timely filed that day." *Id.* Civ. R. 5.4(c)(4); *see* D.V.I. Bankr. R. 1002-2.F ("Filing a document electronically must be completed by midnight local time on the applicable deadline for filing."); *see also* D.V.I. Bankr. ECF Proc. 5.

District Courts

The District Court for the Northern District of Alabama

This court was selected for this study at random from among the district courts with rules stating that pro se electronic filing is not permitted.

The United States District Court for the Northern District of Alabama has eight judgeships and seven office codes: Birmingham (office code 2), Huntsville (office code 5), Gadsen (office code 4), Tuscaloosa (office code 7), Anniston (office code 1), Florence (office code 3), and Jasper (office code 6).

The clerk's office is open from 8:30 to 4:30.

Electronic filing is governed by two documents, one for civil cases and one for criminal cases: Administrative Procedures for Filing, Signing, and Verifying Pleadings and Documents in the District Court Under the Case Management/Electronic Case Files System [hereinafter ECF Procs.]. "Pro se litigants shall [conventionally] file paper originals of all complaints, pleadings, motions, affidavits, briefs, and other documents which must be signed or which require either verification or an unsworn declaration under any rule or statue." N.D. Ala. Civ. ECF Procs. ¶ III.B (omitting the word "conventionally"); N.D. Ala. Crim. ECF Procs. ¶ III.B (including the word "conventionally"). The court has not granted any exceptions to the proscription on use of CM/ECF by pro se litigants.

Generally, paper filers are required to serve paper copies of their filings on other parties, even parties receiving electronic service. On occasion, a sophisticated pro se litigant has been excused by the presiding judge from paper service on parties receiving electronic service. Pro se litigants themselves may opt

for electronic service, but they often also request paper copies of individual documents, perhaps because they have not saved their one free look.

The court does not accept filings by email or fax. For security reasons, neither does it have a drop box.

"Pleadings or documents will be deemed timely filed on any particular date if filed prior to midnight on that date unless otherwise limited by order of this court." N.D. Ala. Civ. ECF Procs. ¶ II.A.4; N.D. Ala. Crim. ECF Procs. ¶ II.A.3.

The District Court for the Southern District of Alabama

This court was selected for this study because its rules provide for requiring electronic filing by pro se litigants.

The United States District Court for the Southern District of Alabama has three judges and two office codes: Mobile (office code 1) and Selma (office code 2).

The clerk's office is open from 10:00 to 3:00.

Electronic filing is governed by the court's General Rule 5(b) and the court's Administrative Procedure for Filing, Signing, and Verifying Documents by Electronic Means in the United States District Court for the Southern District of Alabama [hereinafter ECF Procs.]. "Any party not represented by an attorney must file conventionally unless specifically allowed by the Clerk's Office or required by court order to file electronically." S.D. Ala. ECF Procs. ¶ I.B.4; *see id.* ¶ III.B ("Pro se filers may . . . register for electronic filing, subject to approval by the Clerk's Office in its discretion."). According to the court's Pro Se Litigant Handbook, "A judge may order that you use CM/ECF to understand what is happening with your case and to file documents. . . . You may also request that the Court grant you filing privileges on the CM/ECF system." *Id.* at 20.

Pro se use of CM/ECF is not common. The judges wanted to be able to order pro se electronic filing, but it does not appear that any has done so. Permission is granted by the clerk's office upon an oral request. It is not possible for prisoners to use CM/ECF.

Attorneys can use CM/ECF to open civil cases. The clerk's office cleans up errors and provides for the reuse of case numbers for cases that were never completely opened. As in other courts, criminal cases are opened by the clerk's office based on paper filings. It has not been the case that a pro se litigant has been able to use CM/ECF to open a case. It is theoretically possible for a pro se criminal defendant to be granted electronic filing privileges, but that has never happened. Pro se defendants have appointed standby counsel.

It may be the case that paper filers technically are required to do paper service on other parties, but in practice paper service on parties receiving electronic service is not necessary. Pro se filers given CM/ECF privileges must understand that the court will not provide them with paper service.

The court does not accept filings by email or fax. Before moving to its new location, the court did have a nighttime drop box, available at all hours, with

a time stamp machine. It was checked every court day. A drop box has not yet been established at the courthouse that the court moved to in 2018.

There is an interest in expanding electronic filing by pro se litigants and ensuring consistency in how the privilege is granted.

"Generally, a document will be deemed timely if electronically filed prior to midnight on the deadline fixed by court order or applicable rule or statute." S.D. Ala. ECF Procs. ¶ II.A.5.

The District Court for the District of Arizona

This court was selected for this study because it is often regarded as a model court with respect to judicial policy initiatives.

The United States District Court for the District of Arizona has thirteen judgeships and three office codes: Phoenix (office code 2), Tucson (office code 4), and Prescott (office code 3).

The clerk's office is open from 8:30 to 4:30.

Electronic filing is governed by the court's Electronic Case Filing Administrative Policies and Procedures Manual [hereinafter ECF Procs.]. *See* D. Ariz. Civ. R. 5.5(a); *id.* Crim. R. 49.3.

> *Pro Se Filers.* Unless otherwise authorized by the court, all documents submitted for filing to the Clerk's Office by parties appearing without an attorney must be in legible, paper form. The Clerk's Office will scan and electronically file the document.
>
> A pro se party seeking leave to electronically file documents must file a motion and demonstrate the means to do so properly by stating their equipment and software capabilities in addition to agreeing to follow all rules and policies referred to in the ECF Administrative Policies and Procedures Manual. If granted leave to electronically file, the pro se party must register as a user with the Clerk's Office and as a subscriber to PACER within five (5) days.
>
> A pro se party must seek leave to electronically file documents in each case filed. If an attorney enters an appearance on behalf of a pro se party, the attorney must advise the Clerk's Office to terminate the login and password for the pro se party.

D. Ariz. ECF Procs. § II.B.3.

The court's judges consistently require permission for pro se use of CM/ECF to be by formal motion.

The court's website has an e-Pro Se page that helps pro se litigants fill out complaints, but the complaints are submitted on paper. This option is not available to prisoners. Electronic submission is available at a limited number of state prisons, including the two largest. The court does not otherwise accept filings by email or fax.

Civil cases in this court are not initiated directly by attorneys; complaints are filed in a shell case, and then the clerk's office uses those filings to open new cases.

Paper filers need not serve other parties who receive electronic service.

The court has drop boxes in Phoenix and Tucson, which it set up because of the COVID-19 pandemic. The drop boxes are available from about half an

hour before court hours to about half an hour after court hours. Submissions are retrieved at least twice a day, and they are date stamped when retrieved.

The District Court for the Eastern District of Arkansas

This court was selected for this study because it has a filing deadline relevant to another study.

The United States District Court for the Eastern District of Arkansas has five judgeships and five office codes: Little Rock (Central Division, office code 4, the main courthouse), Jonesboro (Northern Division, office code 3, a clerk's office and courtroom in a federal building), and Helena (Delta Division, office code 2, a courtroom but no clerk's office).

The clerk's office is open from 8:00 to 5:00.

The Eastern and Western Districts of Arkansas share a single set of local rules. Electronic filing in the Eastern District is governed by the Eastern District's CM/ECF Administrative Policies and Procedures Manual for Civil Filings [hereinafter Civ. ECF Procs.] and the court's CM/ECF Administrative Policies and Procedures Manual for Criminal Filings [hereinafter Crim. ECF Procs.]. "A person not represented by an attorney is generally not allowed to electronically file and must submit paper for filing. Electronic filing is only permitted by court order." E.D. & W.D. Ark. R. 5.1; *but see* E.D. Ark. Civ. ECF Procs. ¶ I.B ("Pro se parties shall not be permitted to file electronically."); E.D. Ark. Crim. ECF Procs. ¶ I.B (same). According to the clerk, pro se filings must be made by mail or hand delivery. There is no drop box.

The court has a heavy caseload of prisoner petitions, but also a substantial number of pro se filings by nonprisoners.

"If a document is filed prior to midnight, it shall be docketed on that day. However, time sensitive filings, which are electronically filed on the last day of any given deadline, shall be filed by 5:00 p.m., unless otherwise ordered by the Court." E.D. Ark. Civ. ECF Procs. ¶ III.A.3; E.D. Ark. Crim. ECF Procs. ¶ III.A.3. In practice, "time sensitive" means having a due date, so the 5:00 rule applies quite generally. It was established when the court discontinued use of a drop box at the advent of electronic filing as a matter of equity for attorneys, who can file electronically after hours, and pro se litigants, who cannot.

The District Court for the Western District of Arkansas

This court was selected for this study at random from among the district courts.

The United States District Court for the Western District of Arkansas has three judgeships and six office codes: Fayetteville (office code 5), Hot Springs (office code 6), Fort Smith (office code 2), Texarkana (office code 4), Harrison (office code 3), and El Dorado (office code 1).

The clerk's office is open from 8:00 to 5:00.

The Eastern and Western Districts of Arkansas share a single set of local rules. Electronic filing is governed by the court's Administrative Policies and Procedures Manual for Civil and Criminal Filings [hereinafter ECF Procs.].

"A person not represented by an attorney is generally not allowed to electronically file and must submit paper for filing. Electronic filing is only permitted by court order." E.D. & W.D. Ark. R. 5.1 "All case initiating documents (*e.g.*, civil complaint, notice of removal, criminal complaint, indictment, information, etc.), any pleading or document that adds a party or criminal count (*e.g.*, amended complaint, third-party complaint, superseding indictment, etc.) must be filed conventionally." W.D. Ark. ECF Procs. ¶ III.A.1.a. Electronic submissions, such as by email or on disc, are accepted. *Id.* "Pro se parties may request permission from the presiding judge to submit documents for filing to a designated email address on a case-by-case basis." *Id.* ¶ I.B.

CM/ECF privileges have been granted to pro se litigants quite rarely. The court believes that pro se use of CM/ECF would only work for a sophisticated party without a history of vexatious filing.

There are no procedures for receiving filings by email from prisons; email and fax filings in general are permitted on rare occasions with the judge's permission. Paper filings received from pro se litigants are scanned and shredded.

The court sometimes uses drop boxes at some of its facilities when the clerk's office is closed, such as because of the COVID-19 pandemic. Documents retrieved in the morning are time stamped for the previous day.

"A document will be deemed timely filed if CM/ECF generates an NEF prior to midnight, Central Time, on the date it is due. However, the assigned Judge may order that the document must be filed by a specific time." W.D. Ark. ECF Procs. ¶ III.A.3.

The District Court for the Eastern District of California

This court was selected for this study at random from among the district courts.

The United States District Court for the Eastern District of California has six judgeships and five office codes: Sacramento (office code 2), Fresno (office code 1), Yosemite (office code 6), Bakersfield (office code 5), and Redding (office code 3).

The clerk's office is open from 9:00 to 4:00.

Electronic filing is governed by the court's Rules 133(a) and (b) and by its CM/ECF User Manual. *See also* E.D. Cal. R. 400(a) ("Local Rules 100 to 199 and 300 to 399 are fully applicable in criminal actions in the absence of a specific Criminal Rule directly on point."). "Any person appearing pro se may **not** utilize electronic filing except with the permission of the assigned Judge or Magistrate judge." E.D. Cal. R. 133(b)(2). Pro se use of CM/ECF is rare. Permission typically is reviewed by the magistrate judge assigned to the case. Considerations are capable and responsible use.

The procedure for a pro se litigant to become an e-filer has grown more challenging with NextGen CM/ECF.

For prisoners, there is an arrangement with the state prison system for prison librarians to scan and submit by email initiating documents. *See* Stand-

ing Order, *In re Procedural Rules for Electronic Submission of Prisoner Litigation Filed by Plaintiffs Incarcerated at Participating Penal Institutions* (E.D. Cal. Feb. 24, 2016, effective Mar. 1, 2016); Standing Order, *In re Procedural Rules for Electronic Submission of Prisoner Litigation Filed by Plaintiffs Incarcerated at Corcoran and Pleasant Valley State Prisons* (E.D. Cal. Sept. 24, 2014). This option is not currently available for later filings in the case. Over time, the prisons will consider whether the burdens of scanning and emailing are outweighed by the burdens of handling regular mail. Electronic submission of complaints has not opened litigation floodgates.

The court has made arrangements with the California Department of Corrections and Rehabilitation to accept service by email on behalf of prison defendants. This has proved to be much faster than waiting for service by the U.S. marshal.

There are few pro se filings by federal prisoners.

The court does not otherwise accept filings by email, and it does not accept filings by fax. Because of the COVID-19 pandemic, the court established drop boxes at its main offices when the buildings were closed. A difficultly with drop boxes is that court staff cannot review a filing for compliance while the filer is in the building.

"A document will generally be deemed filed on a particular day if filed before midnight (Pacific Time) on that business day." E.D. Cal. R. 134(b).

The District Court for the District of Colorado

This court was selected for this study at random from among the district courts.

The United States District Court for the District of Colorado has seven judgeships and one office code: Denver (office code 1).

The clerk's office is open from 8:00 to 5:00.

Electronic filing is governed by the court's Civil Rule 5.1(a), the court's Electronic Case Filing Procedures for (Civil Cases) [hereinafter Civ. ECF Procs.], and the court's Electronic Case Filing Procedures for the District of Colorado (Criminal Cases) [hereinafter Crim. ECF Procs.]. Nonprisoner pro se parties may use CM/ECF in civil cases after training and the court's approval. D. Colo. Civ. R. 5.1(b)(3); D. Colo. Civ. ECF Procs. ¶ 2.2(b). Before NextGen CM/ECF, parties would request registration from the court. Now they register with Pacer and make a request to the court for a link between their Pacer account and the court's filing system. Approval comes from the clerk's office; judicial approval is not necessary. Approval requires a pending case, so initiating documents are not filed by pro se litigants in CM/ECF.

Attorneys must use CM/ECF, and they initiate civil cases directly. Criminal cases are opened by the clerk's office based on paper indictments. It has probably not been the case that a pro se criminal defendant used CM/ECF. The local rules do not contemplate that.

At the beginning of the COVID-19 pandemic, the court put out a drop box when the intake counter was closed, but it removed the drop box when the

counter opened again. The court also set up an email address for pro se parties to submit filings electronically, and the court is likely to retain this option. Court staff members are pleased to not have to scan or touch the filings that come in this way. The court gave up fax communications years ago.

A few years ago, the court established an arrangement with a state prison for electronic submissions from prisoners. That relationship ended, but now the court has a relationship with another state prison. The court provided the scanner. The prison does not accept electronic notices on behalf of prisoners. Paper filers must serve even parties receiving electronic service.

The clerk's office likes receiving filings electronically. Pro se users of CM/ECF often appreciate immediate confirmation that their filings are part of the court record.

"Unless otherwise ordered, an electronically filed pleading or document shall be filed no later than 11:59:59 p.m. (Mountain Time) on the day required." D. Colo. Civ. R. 77.1; *id.* Crim. R. 56.1; *see also* D. Colo. Civ. ECF Procs. ¶ 4.2(a) (similar); D. Colo. Crim. ECF Procs. ¶ 4.2(a) (similar).

The District Court for the District of Delaware

This court was selected for this study at random from among the district courts.

The United States District Court for the District of Delaware has four judgeships and one office code: Wilmington (office code 1).

The court's office hours are 8:30 to 4:00. D. Del. R. 77.1. The court never closed during the pandemic, and the office hours never changed.

Electronic filing is governed by the court's Administrative Procedures Governing Filing and Service by Electronic Means [hereinafter ECF Procs.]. D. Del. R. 5.1(a). With the court's permission, pro se parties may file using CM/ECF. D. Del. ECF Procs. ¶ N.

Pro se CM/ECF filing privileges are obtained by motion to the presiding judge. Applicants are required to read the court's electronic filing tips and create a Pacer account. Judges almost always grant electronic filing privileges to pro se litigants. The court typically relates multiple cases with the same pro se litigant. Electronic filing privileges terminate when the case is over, or because of problem filings.

Since 2017, pro se prisoners can file by email. There is a scanner in the principal federal prison in Delaware. No other litigants are permitted to file by email. Prisoners can initiate cases by email; nonprisoner pro se litigants cannot. Nor can attorneys.

The court does not have a drop box.

In civil cases, only members of the Delaware bar may submit court filings. In criminal cases, attorneys in good standing with other bars may apply for filing privileges.

> Aside from initial pleadings, all electronic transmissions of documents (including, but not limited to, motions, briefs, appendices, and discovery re-

> sponses) must be completed by 6:00 p.m. Eastern Time, in order to be considered timely filed and served that day. All electronic transmissions of initial pleadings must be completed prior to midnight Eastern Time, in order to be considered timely filed that day.

D. Del. ECF Procs. ¶ F.

The District Court for the Northern District of Florida

This court was selected for this study at random from among the district courts with rules that do not state whether pro se electronic filing is permitted.

The United States District Court for the Northern District of Florida has four judgeships and four office codes: Pensacola (office code 3), Tallahassee (office code 4), Panama City (office code 5), and Gainesville (office code 1). The Panama City intake counter has been closed since it was destroyed by a hurricane.

The clerk's office is open from 8:00 to 4:30 in Pensacola and from 8:30 to 5:00 in Tallahassee.

Electronic filing is governed by the court's Rule 5.4.

Pro se electronic filing is permitted with a judge's permission, but permission has only been granted once, several years ago.

Attorneys open civil cases directly; criminal cases are opened by the clerk's office from paper indictments, informations, or complaints.

Paper filers are required to serve even parties receiving electronic service. The court is looking into whether that rule can be adjusted for prisoners, and the court is interested in cooperating with state and federal facilities for electronic submission of filings.

The court does not accept filings by email or fax, and it only uses drop boxes when the court is closed because of things like the COVID-19 pandemic.

"A filing is made on a date if it is made prior to midnight on that date in local time at the place of holding court in the division where the case is pending." N.D. Fla. R. 5.4(E).

The District Court for the Southern District of Georgia

This court was selected for this study at random from among the district courts.

The United States District Court for the Southern District of Georgia has three judgeships and six office codes: Savannah (office code 4), Augusta (office code 1), Brunswick (office code 2), Waycross (office code 5), Statesboro (office code 6), and Dublin (office code 3).

The clerk's office is open from 8:30 to 5:00.

Electronic filing is governed by the court's General Administrative Procedures for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means [hereinafter ECF Procs.]. S.D. Ga. R. 5.5.

Pro se litigants may not file using CM/ECF. Filings are accepted by email only in special circumstances ordered by a judge, and not by fax.

Attorneys submit complaints in CM/ECF to a shell case, and after a review the clerk's office uses a shell-case filing to open a civil case. Criminal cases also are opened by the clerk's office, from paper indictments and complaints.

The court used a drop box when the counter was closed because of the COVID-19 pandemic, but it does not use one now.

> The Notice of Electronic Filing reflects the date and time the electronic transmission of a document is completed. Accordingly, a document will be deemed timely filed if the Notice of Electronic Filing reflects a time *prior* to midnight on the due date. However, the assigned judge may order that a document be filed by a certain time, which then becomes the filing deadline.

S.D. Ga. ECF Procs. ¶ II.A.1.c.

The District Court for the Northern District of Illinois

This court was selected for this study because its rules state that pro se litigants can file electronically.

The United States District Court for the Northern District of Illinois has twenty-two judgeships and two office codes: Chicago (office code 1) and Rockford (office code 3).

The clerk's office is open from 8:30 to 4:30.

The court has a general order on Electronic Case Filing. N.D. Ill. Gen. Ord. 16-0020 (Nov. 16, 2004). "A party to a pending civil action who is not represented by an attorney and who is not under filing restrictions imposed by the Executive Committee of this Court, may register as an E-Filer solely for purposes of the case." *Id.* IV(B)(1). "Parties who are in custody are not permitted to register as E-Filers." *Id.* IV(B)(3).

The court is in the process of converting to NextGen CM/ECF. The court permits a nonprisoner pro se litigant to register as a CM/ECF filer in the litigant's existing case after successfully completing an online training module. They are allowed two attempts to complete the training successfully. No judicial approval is required. CM/ECF filing privileges have never been granted to a pro se criminal defendant.

Pro se litigants who are not filing electronically can sign up to receive electronic notice of other parties' filings.

The districts in Illinois have an arrangement with the state prisons for mandatory electronic submission of filings by pro se prisoners. (Electronic submission is not mandatory when a prison is on lockdown.) The court provides the scanners, which scan and email the submissions for filing. Prisoners still receive service of other parties' filings by regular mail. The filers' scanned signatures are adequate.

Paper filers do not have to serve other parties already receiving electronic service.

The court has never accepted filings by fax, but during the COVID-19 pandemic it began to accept filings from pro se litigants by email. The emails must be sent to a designated email address, the subject line and the email text must

contain certain information, and the filing must be in PDF form. The court is considering a move to Box.com.

The Chicago courthouse has a drop box available at all hours in the building lobby, and it is accompanied by a time stamp. The building housing the Rockford courthouse is not open overnight, but it does open a bit before the clerk's office and closes a bit later. The drop box there also has a time stamp.

An aspiration of the court's is a way for pro se litigants to submit digital exhibits.

"Filing must be completed before midnight Central Time in the Northern District of Illinois in order to be considered timely filed that day." N.D. Ill. Gen. Ord. 16-0020 V(G).

The District Court for the Southern District of Illinois

This court was selected for this study because its rules state that pro se litigants can file electronically.

The United States District Court for the Southern District of Illinois has four judgeships and two office codes: East St. Louis (office code 3) and Benton (office code 4).

The clerk's office is open from 9:00 to 4:30.

Electronic filing is governed by the court's Electronic Filing Rules. "Pro se filers *may*, but do not have to utilize the ECF system." *Id.* R. 1. CM/ECF privileges are granted by motion to the chief judge. About 90% of the motions are granted. The court typically has four or five active pro se users of CM/ECF.

The court has an arrangement with several of the state's prisons for electronic submission of prisoner filings. The prisons also accept electronic notice of other parties' filings on behalf of the prisoners, but the notices do not include the actual filings. Those still have to be mailed to the prisoners.

Aside from the arrangement with prisons, the court does not accept filings by email or fax. Earlier in the COVID-19 pandemic, while members of the clerk's staff were working at home, the court accepted pro se filings by email.

Scanned signatures are acceptable.

Criminal cases are opened by the clerk's office on paper filings. It would theoretically be possible for a pro se criminal defendant who is not detained to be granted CM/ECF filing privileges, but it has not happened.

The court does not have an after-hours drop box at either of its locations.

"Filing must be completed before midnight local time where the court is located in order to be considered timely filed that day, unless a specific time is set by the court." S.D. Ill. ECF R. 3.

The District Court for the Southern District of Indiana

This court was selected for this study at random from among the district courts.

The United States District Court for the Southern District of Indiana has five judgeships and four office codes: Indianapolis (office code 1), Evansville (office code 3), Terre Haute (office code 2), and New Albany (office code 4).

The clerk's office is open from 8:30 to 4:30.

Electronic filing is governed by the court's Electronic Case Filing Policies and Procedures Manual [hereinafter ECF Procs.]. The court's local rules acknowledge the possibility of pro se electronic filing: "**Electronic Filing by an Unrepresented Person.** If authorized to file electronically pursuant to Fed. R. Civ. P. 5(d)(3)(B), the person's electronic signature . . . ." S.D. Ind. R. 5-3(e). Pro se litigants rarely seek permission from the presiding judge to use CM/ECF. It is theoretically possible for a pro se criminal defendant who is not detained to get CM/ECF privileges.

The court now permits pro se litigants to file by email. General Order, *In re Email Submissions to the Court*, No. 1:22-mc-1 (S.D. Ind. Jan. 14, 2022, D.E. 2). The court converts email submissions to filings. Faxes are not accepted. Pro se litigants can file complaints by email, but not using CM/ECF.

All four courthouses have drop boxes. In Indianapolis and Evansville, each drop box is outside the courthouse in a federal building, outside security and available when the building is open, with somewhat more expanded hours than the clerk's office. Submissions are automatically time stamped.

The court's General Order 2014-1 established an "E-Filing Program" for state prisoners. The program is in place in all of Indiana's state prisons except for the one private prison. There is no similar program for federal prisoners.

Prison librarians scan documents and submit them to the court for filing. The court serves complaints on defendants. Notices of electronic filing are sent to prison librarians. Defendants are required to mail copies of documents that they file to the prisoners.

Prison librarians periodically mail batches of originals to the court, where they are held for three months and then shredded. This permits rescanning if an original scan is bad.

"A document due on a particular day must be filed before midnight local time of the division where the case is pending." S.D. Ind. R. 5-4(a).

The District Court for the District of Kansas

This court was selected for this study because its rules state that pro se litigants can file electronically.

The United States District Court for the District of Kansas has six judgeships and five office codes: Kansas City (office code 2), Wichita (office code 6), Topeka (office code 5), Junction City (office code B), and Leavenworth (office code 3).

The clerk's office is open from 9:00 to noon and from 12:30 to 4:30.

Electronic filing is governed by the court's Rules 5.4.2 through 5.4.13, the court's Criminal Rules 49.1 through 49.13, and the court's Administrative Procedures for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means in the United States District Court for the District of Kansas [hereinafter ECF Procs.], one set of procedures for civil cases and another set of procedures for criminal cases. "A party [in a civil case] who is not represented by an attorney may register as a Filing User in the Electronic Filing System." D. Kan.

R. 5.4.2(d); *see* D. Kan. Civ. ECF Procs. ¶ I.C.5.a. Registration requires a wet signature. Pro se litigants are not permitted to use CM/ECF to open cases; their CM/ECF privileges are limited to the existing case or cases for which they have registered for privileges. A CM/ECF registration form may accompany the complaint. Many pro se litigants register to receive electronic notices without doing electronic filing. They understand that the court cannot provide them with technical assistance using their own equipment.

Pro se litigants are permitted to email or fax filings to the court. Other parties are not, except in extraordinary circumstances. Filers by email or fax must follow up with wet signatures.

Prisoners in state facilities transmit filings to the court through the prison librarian, who scans the filings and emails them to the court. The prison receives electronic notice of other parties' filings, but the court also sends paper copies to the prisoners. Persons in federal facilities and local jails must file on paper.

"A party to a criminal action who is not represented by an attorney may not register as a Filing User in the Electronic Filing System unless the court permits." D. Kan. Crim. R. 49.2. Pro se use of CM/ECF in a criminal case may have never come up. Criminal cases are opened by flash drive from the U.S. attorney's office.

Paper filers are supposed to serve on paper even other parties who receive electronic service, but this requirement is not enforced and probably at least frequently not followed.

Drop boxes were removed several years ago.

"Filing must be completed before midnight central time to be considered timely filed that day." D. Kan. R. 5.4.3(e); *id.* Crim. R. 49.3; *see* D. Kan. Civ. ECF Procs. ¶ II.A.5; *id.* Crim. ECF Procs. ¶ II.A.4.

The District Court for the District of Maine

This court was selected for this study because we thought that its rules state that pro se litigants can file electronically, but we misread the rules. Pro se litigants can receive permission to submit filings electronically.

The United States District Court for the District of Maine has three judgeships and two office codes: Portland (office code 2) and Bangor (office code 1).

The clerk's office is open from 8:00 to 4:30.

Electronic filing is governed by the court's Rule 5(c) and the court's Administrative Procedures Governing the Filing and Service by Electronic Means, D. Me. R. app. IV. "A non-prisoner who is a party to a civil action and who is not represented by an attorney may register to receive service electronically and to electronically transmit their documents to the Court for filing in the ECF system." *Id.* app. IV, ¶ (b)(2); *see id.* ¶ (o) ("Non-prisoner pro se litigants in civil actions may register with ECF or may file (and serve) all pleadings and other documents in paper."); *see also* D. Me. Information for Pro Se Parties at 8 ("By registering to file electronically you are also consenting to be served electronically . . . ."). Pro se litigants approved for CM/ECF registration

are permitted to submit filings to a court email address. The court then scans and electronically dockets the submissions. This policy has been in place since the court began using CM/ECF. The "/s/" format for a signature is now acceptable.

Until the COVID-19 pandemic, registration for email submission happened after the complaint was filed on paper. During the pandemic, some litigants were granted permission to email their complaints.

Prisoners still file on paper.

The court has very rarely received and accepted filings by fax.

The court has a drop box at each location, which filers can access when the building is open. There is not a time stamp there. During the COVID-19 pandemic closure, filers were instructed to write the date and time of the deposit on the envelope containing the filing.

"All electronic transmissions of documents must be completed prior to midnight, Eastern Time, in order to be considered timely filed that day." D. Me. R. app. IV, ¶ (f).

The District Court for the District of Massachusetts

This court was selected for this study because it has a filing deadline relevant to another study.

The United States District Court for the District of Massachusetts has thirteen judgeships and three office codes: Boston (office code 1), Springfield (office code 3), and Worcester (office code 4).

The clerk's office is open from 8:30 to 4:30.

Electronic filing is governed by the court's Rule 5.4 and the court's CM/ECF Case Management/Electronic Case Files Administrative Procedures [hereinafter ECF Procs.]. *See* D. Mass. R. 5.4(b). Nonprisoner pro se parties may register as CM/ECF filers after training and with the court's permission. D. Mass. ECF Procs. ¶ E.2. The court gets about five dozen requests a year, and a substantial majority of the requests are granted. The court does not have procedures for prisoners to submit filings electronically.

On at least one occasion, the court granted electronic filing privileges to a criminal defendant. It took a bit of research to configure the user's account to make it work.

Complaints must be filed in paper form by pro se litigants. The court does not accept filings by fax or email. It is exploring the possibility of creating a way for pro se litigants to use the court's website to upload a complaint that the court can convert into a filing.

The court is interested in exploring software that asks a litigant questions and then generates a text document that the litigant can edit before filing. The court is also contemplating a kiosk where a pro se litigant could scan and upload a filing.

Filing must be complete by 6:00 p.m. on the date due. D. Mass. R. 5.4(d); D. Mass. ECF Procs. ¶ K. The 6:00 rule was established when the court began using CM/ECF. The court does not have physical drop boxes. During the early

months of the COVID-19 pandemic, the court used drop boxes when the court's hours were curtailed.

The District Court for the District of Minnesota

This court was selected for this study at random from among the district courts.

The United States District Court for the District of Minnesota has seven judgeships and four office codes: Minneapolis (office code 4), St. Paul (office code 3), Duluth (office code 5), and Fergus Falls (office code 6). Cases other than petty offense cases generally are assigned 0 as the office code; infractions on federal property generally are assigned C as the office code.

The clerk's office is open from 8:00 to 4:30.

Electronic filing is governed by the court's Rule 5.1 and the court's civil and criminal Electronic Case Filing Procedures Guides [hereinafter ECF Procs.]. D. Minn. R. 5.1. "Pro se filers (including prisoners) cannot open new cases electronically; they must submit the initiating documents in paper." D. Minn. Civ. ECF Procs. at 7. Nonprisoner pro se parties may apply for permission to use CM/ECF to file other documents in civil cases. D. Minn. Civ. ECF Procs. at 3; D. Minn. Crim. ECF Procs. at 3. Permission is granted by the clerk's office. The court does not generally allow pro se litigants who are not CM/ECF filers to register for electronic notices; judges have ordered a few exceptions. The court has a pro se mailing program that automatically prints out filings by the court, such as judicial orders, with mailing labels for pro se litigants who are paper filers.

The court began granting CM/ECF filing privileges to pro se litigants in 2009, and about 350 pro se litigants have used CM/ECF since then. Some have signed up and then later realized what they got themselves into. For example, some were surprised that they were no longer receiving paper notices. Some pro se CM/ECF filers went back to paper filing. Since the court began using NextGen CM/ECF, the more complicated method for signing up to use CM/ECF—registering as a Pacer user first—weeded out some of the technically unsophisticated.

On one occasion, a pro se criminal defendant sought permission to use CM/ECF. The clerk's office consulted the presiding judge, who denied the request, because the defendant had standby counsel.

The court would like to receive electronic submissions from prisoners, but explorations of that possibility were interrupted by the COVID-19 pandemic.

Attorneys open their civil cases on CM/ECF directly. The clerk's office opens criminal cases, typically from paperless submissions. Some matters, such as pen registers, can be opened directly by the U.S. attorney's office.

Aside from documents opening criminal cases, the court does not accept filings by email or fax.

Paper filers are supposed to serve all other parties, even those receiving electronic service, but that may not always happen.

All four court locations have intake counters. The court only uses a drop box when the counter is closed for weather or the COVID-19 pandemic. Most paper filing comes in by mail.

A document will be deemed to be filed on time if filed electronically before midnight or filed conventionally before 4:30 p.m. on the day that it is due, unless the presiding judge orders otherwise. D. Minn. Civ. ECF Procs. at 2; D. Minn. Crim. ECF Procs. at 2.

The District Court for the District of Nebraska

This court was selected for this study at random from among the district courts. Its rules state that pro se electronic filing is permitted.

The United States District Court for the District of Nebraska has three judgeships and three office codes: Omaha (office code 8), Lincoln (office code 4), and North Platte (office code 7).

The clerk's office is open from 8:00 to 4:30.

Electronic filing is governed by the court's General Rule 1.3, Civil Rule 5.1, and Criminal Rule 49.1. Pro se parties in pending civil cases may register as CM/ECF filers. *Id.* Gen. R. 1.3(b)(1). A pro se party with a pending case can request a login and password in Pacer, and this happens fairly frequently in this court. If a pro se party does not have a pending case, the request is denied. The unsuccessful filing request typically is a mistaken effort to obtain Pacer access. Pro se parties cannot initiate cases electronically; only at the counter, by mail, or using the court's drop box.

Pro se criminal defendants have occasionally been granted CM/ECF filing privileges by presiding judges on a case-by-case basis.

There is no procedure in this district for electronic submissions from prisoners. A document scanned in prison would not provide the court with an original signature.

The court does not generally accept filings by email or fax, but an exception was granted to a litigant with vision issues when CM/ECF vision accommodations were not working.

Paper filers are required to serve their filings on other parties, even parties receiving electronic service, and the court typically does not intervene if it sees service was by email. Parties can work out service among themselves, and motions for failure to serve are rare.

During closures for the COVID-19 pandemic, the court established drop boxes, which have been available during building hours, slightly more expansive than clerk hours. There are time stamps at the drop boxes.

The court maintains a miscellaneous case record for pro se filings that do not appear to relate to pending cases. It creates a record of the filings, which often are meant for other courts.

"A document is considered timely filed if filed before midnight Central Standard Time (or Central Daylight Time, if in effect). However, the assigned judge may order a document filed by a time certain." D. Neb. Civ. R. 5.1(d); *id.* Crim. R. 49.1(d).

The District Court for the Northern District of New York

This court was selected for this study at random from among the district courts.

The United States District Court for the Northern District of New York has five judgeships and seven office codes: Albany (office code 1), Syracuse (office code 5), Plattsburgh (office code 8), Binghamton (office code 3), Utica (office code 6), Watertown (office code 7), and prisoner petitions (office code 9).

The clerk's office is open from 9:00 to 4:00.

The clerk's office is open from 10:00 to 3:00.

Electronic filing is governed by the court's Administrative Procedures for Electronic Case Filing [hereinafter ECF Procs.]. *See* N.D.N.Y. R. 5.1.1; N.D.N.Y. Gen. Order No. 22, *Procedural Order on Electronic Case Filing* (Dec. 10, 2021). Nonprisoner pro se parties may be granted permission by the court to file using CM/ECF. N.D.N.Y. ECF Procs. ¶ 12.1. The motion is reviewed by the magistrate judge assigned to the case. The clerk recommends that the motion be considered after the Rule 16 conference so that the court can assess whether the litigant can handle electronic filing.

The judges were reluctant to allow pro se use of CM/ECF, because they expected a lot of inaccurate filings, but experience has been positive. Electronic filing privileges are infrequently requested.

The court has recently used Microsoft Teams to give litigants a virtual visit to the clerk's office for guidance on how to file. This is expected to be especially useful at the smaller locations where each absence by a member of the clerk's staff can hinder customer service.

Pro se parties cannot open cases in CM/ECF. Attorneys do not open cases directly; they make filings in a shell case.

Pro se filing fees can be paid by cash or check at the counter or by check through the mail.

There is no provision for electronic submissions by prisoners.

Drop boxes at the courthouses are available a few more hours than the counters are. The larger courthouses added them because of the COVID-19 pandemic, but the drop boxes are expected to remain beyond that. There is a time stamp at each box.

The court is exploring the development of an electronic drop box which would require malware scanning.

Paper filers are required to serve even parties otherwise receiving electronic service.

"A document will be deemed timely filed if electronically filed prior to midnight Eastern Time." N.D.N.Y. ECF Procs. ¶ 4.3.

The District Court for the Southern District of Ohio

This court was selected for this study at random from among the district courts.

The United States District Court for the Southern District of Ohio has eight judgeships and three office codes: Columbus (office code 2), Cincinnati (office code 1), and Dayton (office code 3).

The clerk's office is open from 9:00 to 4:00.

Electronic filing is governed by the court's CM/ECF Procedures Guide [hereinafter ECF Procs.]. *See* S.D. Ohio R. 1.1(e). "After making a first appearance, non-incarcerated pro se parties may seek leave of Court to file electronically (e-file) with CM/ECF." S.D. Ohio ECF Procs. § 1.2. The litigant must have a scanner, a printer, and an email address. Electronic filing privileges are revoked on the very rare occasion of repeated improper filings. Pro se litigants may not use CM/ECF to initiate cases.

The court has arrangements with Ohio's five largest state prisons for electronic submission of filings by pro se prisoners. The court provides the prisons with scanners, and the court replaces and updates the scanners regularly. Originally, prison officials would mail the originals to the court so the authenticity of the scans could be verified, but originals are no longer mailed. A big advantage of electronic submission is the elimination of uncertainty about materials delayed or lost in the mail. Prisoners retain the option to file by mail.

The court does not otherwise accept filings by email or fax. Because of the court's shutdown for a few months in 2020 accommodating the COVID-19 pandemic, the court established drop boxes at each of its locations. Even when the court was shut down, there was at least one person in the clerk's office who checked the drop box regularly throughout the day. When the court reopened, the drop box remained useful for persons not adhering to vaccination or mask requirements.

Paper filers are still required to serve other parties on paper, even parties receiving electronic service. Pro se paper filers may request electronic notice.

"Filing must be completed before midnight Eastern Time Zone in order to be considered timely filed that day." S.D. Ohio R. 5.1(e); *see* S.D. Ohio ECF Procs. § 1.1 ("A document will be deemed timely filed if electronically filed prior to midnight on the due date, unless the assigned Judicial Officer has ordered the document to be filed by an earlier time on that date.").

The District Court for the Western District of Oklahoma

This court was selected for this study because although its rules state that pro se electronic filing is not permitted, we observed in the filing-time project pro se electronic filing in 2018.

The United States District Court for the Western District of Oklahoma has six judgeships, and it shares an additional judgeship with the Eastern and Northern Districts. The Western District has one office code: Oklahoma City (office code 5).

The clerk's office is open from 8:30 to 4:30.

Electronic filing is governed by the court's Civil Rule 5.1, the court's Criminal Rule 49.1, and the court's Electronic Filing Policies & Procedures Manual [hereinafter ECF Procs.]. The court's electronic procedures specify that pro se

parties may not file electronically. W.D. Okla. ECF Procs. ¶ I.A.1. Some pro se parties, however, have been granted permission by the presiding judge to use CM/ECF, and we observed in a study of 2018 filings permission granted to two plaintiffs in four cases.

Civil cases are opened by electronic submission to the court's new cases mailbox. The court converts the submissions to filed and docketed complaints; at the same time, the court seeks filing fees from the filers. On very rare occasions, pro se parties have been granted permission by presiding judges to submit filings by email, and the submissions would go to the new cases mailbox. Criminal cases are initiated with paper filings, which are scanned and docketed by the clerk's office. The court does not accept filings by fax.

There are no provisions for electronic submissions by prisoners.

Paper filers are obligated to serve other parties, even those receiving electronic service when the court converts paper filings to electronic filings.

The court has a drop box available during building hours. It is rarely used. It is checked every morning, and anything there is deemed filed the night before.

Unless otherwise ordered, a filing must be complete by midnight central time on the day that it is due to be considered filed on time. W.D. Okla. ECF Procs. ¶ II.A.1.f.

Possible things to think about for the future include providing prisoners with access to computers for word processing so that their filings are legible. Provisions for electronic submission would enhance efficiency and mitigate angst caused by delay.

The District Court for the District of Oregon

This court was selected for this study at random from among the district courts.

The United States District Court for the District of Oregon has six judgeships and has four office codes: Portland (office code 3), Eugene (office code 6), Pendleton (office code 2), and Medford (office code 1).

The clerk's office is open from 8:30 to 4:30 Monday through Thursday and from 9:30 to 4:30 on Friday.

Electronic filing is covered by the court's Civil Rule 5-2, the court's Criminal Rule 49, and the court's CM/ECF User Manual. "A *pro se* party who is not incarcerated may apply to the assigned judge for permission to become a Registered [CM/ECF] User . . . ." D. Or. Civ. R. 5-1(a)(2); *id.* Crim. R. 49-4(b). The pro se party must have suitable technical equipment, including the ability to make PDFs. CM/ECF users must show that they have read the rules and completed Pacer training. It is possible for a pro se litigant to receive electronic notices and not electronic filing privileges. Most pro se litigants file on paper. A more user-friendly CM/ECF would make it easier for pro se litigants to use it.

The court has arrangements with two of the state's fourteen prisons—the two with the highest rates of litigation—for electronic submission of pro se

prisoner filings. The court provides the scanners. The prisons accept electronic notices on behalf of the prisoners and print them out for the prisoner litigants. It would be very expensive for the court to provide scanners to all fourteen prisons. Some of the prisons have more than one library, so to provide fair access a scanner would have to be provided to each.

According to the court's Standing Order 2021-1, *In re Inmate Electronic Filing Program* (Jan. 8, 2021), electronic submission is mandatory where available, prisoners are expected to retain originals in case production is later ordered, and the electronic submission procedures cannot be used for discovery requests.

On one occasion, the court granted CM/ECF privileges to a criminal defendant. It was not an especially positive experience, because the filer's not following rules resulted in substantial time spent by the court's staff to untangle and correct filing mistakes.

When the clerk's counter closed because of the COVID-19 pandemic, the court accepted pro se filings by email. The court discontinued that as soon as the counter reopened. Because email submissions are easier to make than paper submissions, the court received even more improper and difficult-to-organize submissions. Fax is a valid way to communicate with the court, but not to submit filings.

The court has a drop box with a time stamp machine at the drop box.

Paper filers must serve other parties, even those receiving electronic service, with some exceptions in social security cases.

"The filing deadline for any document is 11:59 p.m. (Pacific Time) on the day the document is required to be filed." D. Or. Civ. R. 5-3(b).

The District Court for the Eastern District of Pennsylvania

This court was selected for this study at random from among the district courts.

The United States District Court for the Eastern District of Pennsylvania has twenty-two judgeships and two office codes: Philadelphia (office code 2) and Allentown (office code 5).

The clerk's office used to be open from 8:30 to 5:00. Because of reduced foot traffic, the hours are now from 9:00 to 3:00.

Electronic filing in both civil and criminal cases is governed by the court's Civil Rule 5.1.2, *see id.* Crim. R. 1.2, Electronic Case Filing System (ECF) Attorney User Manual for Civil Cases, and Electronic Case Filing System (ECF) Attorney User Manual for Criminal Cases. "Upon the approval of the judge, a party to a case who is not represented by an attorney may register as an ECF Filing User in the ECF System solely for purposes of the action." E.D. Pa. Civ. R. 5.1.2.4(b). Pro se litigants who move for CM/ECF filing privileges tend to be very savvy technologically, and they rarely make mistakes. They must file their complaints on paper or by email.

The court established an email address for pro se litigants to submit filings at the beginning of the COVID-19 pandemic. The court does not accept filings

by fax. The court accepts PDFs, Word documents, and photos of documents in email submissions, and the court converts the submissions to PDFs. It wants to make access to electronic submission as broad as possible. Anyone who provides the court with an email address—even if they are filing on paper—can receive electronic notices of other parties' filings.

The court has tried to make filing as accessible as possible, and it has been pleasantly surprised by how few problems it has encountered. The broader access to the court has been worth the occasional nonsense submission. Individual abusers can be disciplined, but this is rarely necessary.

The court has had some discussions, but it has not yet established relationships with state prisons for electronic submission of prisoner filings. The court sometimes receives prisoner filings by email: either from family members or from prison social workers. The court is pleased to provide such broad access to electronic submission. The prisoner is mailed a paper notice that the court received by email a filing on behalf of the prisoner, and the prisoner is asked to return a signed statement confirming that the submission was a genuine filing on behalf of the prisoner.

The court accepts electronic signatures, copies of signatures, and even typed signatures in email submissions. The court requests a more reliable signature when there is a question whether the filing came from the litigant.

It is probably not the case that a criminal defendant has ever used the court's CM/ECF, but the court has received email filings from criminal defendants after release.

Each office has a drop box available at all hours. The one in Allentown was added during the COVID-19 pandemic. To submit a document after hours, the filer buzzes for entry into the building, and a security guard lets the filer in to submit the filing.

The District Court for the Western District of Pennsylvania

This court was selected for this study at random from among the district courts.

The United States District Court for the Western District of Pennsylvania has ten judgeships and three office codes: Pittsburgh (office code 2), Erie (office code 1), and Johnstown (office coded 3).

The clerk's office is open from 8:30 to 4:30.

Electronic filing is governed by the court's Civil Rule 5.5, the court's Criminal Rule 49, the court's Electronic Case Filing Policies and Procedures, and the court's Guide to Working with CM/ECF [hereinafter ECF Guide].

"A party who is not represented by counsel may file papers with the clerk in the traditional manner, but is not precluded from filing electronically." W.D. Pa. ECF Guide at 6. Pro se litigants can register for CM/ECF filing privileges the same way that attorneys can: through Pacer. The court grants pro se litigants CM/ECF filing privileges if they complete training, read the court's policies, and have sufficient technical resources. CM/ECF privileges are granted by the clerk's office, and they can be granted before a case is filed.

Civil cases are opened electronically by uploading a complaint to a shell case, and the clerk's office uses the complaint to open a new case record. Pro se litigants can open cases the same way that attorneys can. Criminal indictments are opened by submission of a paper indictment, but criminal complaints are now opened electronically. It would be theoretically possible for a pro se criminal defendant to use CM/ECF, but they typically are detained, and there are no arrangements with any facility for electronic submissions by prisoners.

The court does not accept filings by fax. It accepts sealed filings by email. Because of the COVID-19 pandemic, the court has from time to time allowed other filings by email on a don't-let-this-happen-again basis. The court does not have a drop box.

Paper filers are not required to do paper service on parties receiving electronic service.

The court expects to expand electronic filing options, such as by allowing attorneys to open civil cases and perhaps establish agreements with prison facilities for electronic submissions.

"Electronic filing must be completed before midnight Eastern Time in order to be considered timely filed that day." W.D. Pa. ECF Guide at 10–11.

The District Court for the District of Puerto Rico

This court was selected for this study at random from among the district courts.

The United States District Court for the District of Puerto Rico has seven judgeships and one office code: San Juan (office code 3).

The clerk's office is open from 8:30 to noon and from 1:00 to 4:45.

Electronic filing is governed by the court's CM/ECF Manual, currently under revision. "Unrepresented parties (*pro se*) shall not file pleadings or other papers electronically unless allowed to do so by court order." D.P.R. R. 5(a)(1). It has been a very rare event for the presiding judge to approve pro se use of CM/ECF.

Filing by email is not permitted. There is no provision for electronic submission by prisoners. There is a transfer facility on the island, but no prison, so prison mail must come from quite a distance away.

Paper filers do not need to serve parties receiving electronic service.

The court has a drop box, with a time stamp, that is available a little bit beyond court hours. It is seldom used. Many pro se filers are not fluent in English, so they benefit from personal contact with court staff.

"Deadlines expire prior to midnight of a pleading's or document's due date, unless otherwise ordered by the Court." D.P.R. CM/ECF Man. ¶ II.B.7.a.

The District Court for the Middle District of Tennessee

This court was selected for this study at random from among the district courts.

The United States District Court for the Middle District of Tennessee has four judgeships and three office codes: Nashville (office code 3), Columbia (office code 1), and Cookeville (office code 2).

The clerk's office is open from 8:00 to 5:00.

Electronic filing is governed by the court's Rule 5.02 and the court's Administrative Practices and Procedures: Electronic Case Filing [hereinafter ECF Procs.]. "A party to an action who is not represented by an attorney may, with the Court's permission, register as a [CM/ECF] Filing User solely for purposes of that action." M.D. Tenn. ECF Procs. § 7. The request is made by formal motion to the presiding judge.

Pro se parties cannot initiate cases in CM/ECF; they can do that by submitting paper documents to the clerk's office. Attorneys do not open cases; they file complaints into a shell case, and the clerk's office opens the case.

Pro se filers must pay filing fees in cash—exact change—or money orders.

Paper filers are required to serve even other parties otherwise receiving electronic service.

The court does not accept filings by email or fax. There is a drop box outside the building that is available at all hours. Submissions are retrieved first thing in the morning and time stamped for the previous work day.

"In order for a document to be considered timely filed on a deadline date, the filing must be completed on the deadline date before midnight (local time at the Court's location)." M.D. Tenn. ECF Procs. § 6.

The District Court for the Eastern District of Texas

This court was selected for this study at random from among the district courts.

The United States District Court for the Eastern District of Texas has eight judgeships and six office codes: Sherman (office code 4), Marshall (office code 2), Tyler (office code 6), Beaumont (office code 1), Lufkin (office code 9), and Texarkana (office code 5).

The clerk's office is open from 8:00 to 5:00.

Electronic filing is governed by the court's Rules CV-5 and CR-49. In civil cases, "[w]ith court permission, a *pro se* litigant may register as a Filing User in the Electronic Filing System solely for purposes of the action." *Id.* R. CV-5(a)(2)(B). A pro se litigant cannot initiate a case electronically, but the litigant can seek permission to file subsequent documents electronically at the time that the complaint is filed. The presiding judge decides. Electronic filing by pro se litigants is seldom denied, but it is also seldom requested. Suitable equipment is required.

Some judges allow pro se litigants to receive electronic notices without CM/ECF filing privileges. A motion is required.

To minimize the need for travel and contact during the COVID-19 pandemic, the court issued General Order 20-05, which allowed pro se litigants to submit documents to the court for filing by email and fax as well as by regular mail. "It is not necessary to mail the original paper to the Court after it is

emailed or faxed. It is, however, important for pro se parties to retain the original signed copy of the paper and present it to the Court upon request." *Id.* The order has now expired, and the court deactivated the email address. Some pro se filers were scanning very large or irrelevant documents, and the court is unlikely to allow email filing in the future.

Prisons in Texas have not been interested in setting up electronic submission possibilities for prisoners.

Theoretically it would be possible for a pro se criminal defendant to file electronically if not detained, but that combination is quite rare.

Paper filers do not have to serve their filings on parties receiving electronic service, but they do have to submit a certificate of service.

The court discontinued physical drop boxes when it started accepting electronic filing.

"Filing must be completed before midnight Central Time in order to be considered timely filed that day." E.D. Tex. R. CV-5(a)(3)(D).

The District Court for the Northern District of Texas

This court was selected for this study because its rules state that pro se litigants can file electronically.

The United States District Court for the Northern District of Texas has twelve judgeships and seven office codes: Dallas (office code 3), Fort Worth (office code 4), Amarillo (office code 2), Lubbock (office code 5), Abilene (office code 1), Wichita Falls (office code 7), and San Angelo (office code 6).

The clerk's office is open from 8:30 to 4:30. Offices other than Dallas, Fort Worth, and Wichita Falls close for an hour at noon.

Electronic filing is governed by the court's ECF Administrative Procedures Manual. N.D. Tex. R. 3.1. The court's Pro Se Handbook for Civil Suits instructs pro se litigants as follows: "you must file a Complaint on paper but must file any other pleading, motion, or other paper by electronic means, unless you have been excused from this requirement for cause by the presiding judge." *Id.* § 4.G; *see* N.D. Tex. R. 5.1(e). This rule has been in place for several years. Some pro se litigants file on paper. Pro se electronic filers have the same burden as attorneys to retain originals signed by another party until a year after the case is over.

One challenge for pro se litigants using CM/ECF is that CM/ECF gives them one free look at other parties' filings, but after that they have to pay Pacer fees, and log in separately to Pacer, to see the documents if they have not saved them. Attorneys face the same challenge, but they typically acclimate to it.

When a pro se litigant files something on paper, the court's staff converts it to an electronic filing, and parties who are CM/ECF users receive electronic service.

All prisoners file on paper. The court has explored arrangements with state and federal facilities for electronic submission of prisoner filings to the court, but nothing has yet been approved. One possibility explored but not yet

adopted was a dedicated fax machine that would convert scans directly to electronic submissions to the court, and then the court's staff would docket the submissions in CM/ECF.

The court's website has a page on Emergency Filing Procedures that describes how emergency filings may be emailed to the court after hours when CM/ECF is unavailable for any reason. The court does not accept filings by fax. It no longer uses physical drop boxes, except when the court is briefly closed, such as for an annual staff development gathering.

"A pleading, motion, or other paper that is filed by electronic means before midnight central time of any day will be deemed filed on that day." N.D. Tex. R. 6.1; *id.* Crim. R. 45.1.

The District Court for the District of Utah

This court was selected for this study at random from among the district courts.

The United States District Court for the District of Utah has five judgeships and three office codes: Central Region (office code 2), Northern Region (office code 1), and Southern Region (office code 4). The court's only intake counter is in Salt Lake City.

The clerk's office is open from 8:30 to 4:30.

Electronic filing is governed by the court's CM/ECF and E-Filing Administrative Procedures Manual [hereinafter ECF Procs.]. D. Utah Civ. R. 5-1(a). For some time, pro se parties could seek permission from the court to submit filings by email. *See* D. Utah ECF Procs. ¶ I.A.4. Judicial permission is no longer required. On the court's website is an "Email Filing and Electronic Notification Form for Unrepresented Parties." Pro se parties can register for email filing and electronic notification or judge electronic notification. Scanned signatures in email filings are sufficient. Pro se parties may not use CM/ECF. The court does not accept filings by fax.

The court does not currently have anything set up to receive electronic submissions from prisoners. Nothing precludes pro se criminal defendants from registering as email filers.

Attorneys do not open civil cases directly on CM/ECF; they email the complaint and the civil cover sheet to the clerk's office, which then opens the case. Criminal cases are opened on paper indictments. Informations are usually received by email.

Attorneys do not have electronic access to sealed filings. Filings in sealed cases, such as criminal cases before the defendants have appeared, must be emailed to the court. CM/ECF can be used to file sealed filings in cases not otherwise sealed, but the filers will not be able to see the filings on CM/ECF.

Paper and email filers do not have to serve other parties who are already receiving electronic service.

The court does not have a drop box. The assistant marshals asked the court to stop using one when the court moved to its new building.

Concerns about allowing pro se litigants to use CM/ECF include proper use of event codes, proper formatting of PDFs, and adherence to redaction requirements.

The District Court for the Eastern District of Virginia

This court was selected for this study because although its rules state that pro se electronic filing is not permitted, we observed in the filing-time project pro se electronic filing in 2018.

The United States District Court for the Eastern District of Virginia has eleven judgeships and four office codes: Alexandria (office code 1), Richmond (office code 3), Norfolk (office code 2), and Newport News (office code 4).

The clerk's office is open from 8:30 to 5:00.

Electronic filing is governed by the court's Electronic Case Filing Policies and Procedures. E.D. Va. Civ. R. 1(A); *id.* Crim. R. 1(A). Pro se litigants are prohibited from filing documents electronically. E.D. Va. Electronic Case Filing Policies and Procedures at 12; E.D. Va. Pro Se Reference Handbook at 7. On some occasions, judges have granted exceptions to this rule and allowed pro se litigants to use CM/ECF. Their permissions are set so that they can file only in their cases.

Filing by email or fax is not permitted.

More expansive opportunities for electronic filing by pro se litigants would save court staff a lot of time spent scanning documents.

Attorneys in this district can open cases directly in CM/ECF.

Paper filers are required to serve other parties on paper, even parties receiving electronic service. Case managers scrutinize certificates of service.

The courthouses have drop boxes outside the clerk's offices but inside the buildings. The buildings are open until 6:30, but members of the public generally are not admitted after 5:00, closing time for the clerk's office. Sometimes a security officer will allow someone access to the drop box after 5:00. At the drop box is a time stamp and a telephone connection to the clerk's office. The drop boxes were put in place to mitigate personal contact during the COVID-19 pandemic.

The District Court for the Eastern District of Washington

This court was selected for this study because its rules state that pro se electronic filing is possible for prisoners.

The United States District Court for the Eastern District of Washington has four judgeships and three office codes: Spokane (office code 2), Yakima (office code 1), and Richland (office code 4).

The clerk's office is open from 9:00 to 4:30.

Electronic filing is governed by the court's ECF Administrative Procedures [hereinafter ECF Procs.]. E.D. Wash. Civ. R. 3(b)(1). "Self-represented filers (pro se) may, but are not required to, electronically file documents and register in the System." E.D. Wash. ECF Procs. ¶ III.B.3.

> A non-prisoner who is a party to a civil action and who is not represented by an attorney may file a motion to obtain a ECF Filing Authorization on a form prescribed by the clerk's office. Only after the court has granted such a motion may a pro se party attempt to register for ECF.

Id. ¶ IV.A.2.a. Electronic filing privileges are granted by the presiding judge on a case-by-case basis for pending cases.

> A prisoner who is a party to a civil action, is not represented by an attorney and resides in a correction facility that participates in the prison electronic filing initiative is required to adhere to the procedures established in General Orders 15-35-1 and 16-35-1, absent a court order to the contrary.

Id. ¶ IV.A.3.a. All state prisoners must present pro se filings to their prison librarian, who scans them and submits them electronically to the court. The librarian receives electronic notice of other parties' filings and prints them out for the pro se prisoners. There is no federal facility in the state, and county jails do not participate in the electronic submission program.

The court does not receive original signatures this way, but neither does the court retain original signatures with paper filings.

Paper service by paper filers is not required on parties who have agreed that electronic service is enough.

"At this time, pro se filers are not permitted to electronically file new cases. Only prisoners assigned to facilities participating in the prison electronic filing initiatives are permitted to file new cases electronically." E.D. Wash. ECF Procs. ¶ V.B.2.

The court has a pro se criminal defendant who is not detained, who does not have standby counsel, and who has been granted use of CM/ECF.

The court does not accept filings by email or fax, aside from electronic submissions by prisoners. The court uses a physical drop box only when the court is closed, such as because of COVID-19.

"Unless otherwise ordered by the court, filing deadlines shall be Midnight Pacific Time on the day the documents are required to be filed." E.D. Wash. ECF Procs. ¶ II.E.

The District Court for the Western District of Washington

This court was selected for this study because its rules state that pro se litigants can file electronically.

The United States District Court for the Western District of Washington has seven judgeships and two office codes: Seattle (office code 2) and Tacoma (office code 3).

The clerk's office is open from 9:00 to 4:00.

Electronic filing is governed by the court's Electronic Filing Procedures for Civil and Criminal Cases [hereinafter ECF Procs.]. *See* W.D. Wash. Civ. R. 5(d). Pro se parties may register to use CM/ECF, but they may not initiate cases electronically. W.D. Wash. R. 5(d); W.D. Wash. ECF Procs. §§ I.A, III.B. The litigant registers as a Pacer user, and then the court grants the user filing

privileges for a specific case. The pro se user cannot use CM/ECF to file complaints the way that attorneys can, because the privileges are tied to an existing case number. Pro se litigants can, however, email their complaints to the court. The court has allowed pro se use of CM/ECF since the beginning, and privileges have seldom been revoked.

One challenge with pro se electronic filing is that the filings sometimes include personal information that should be sealed. The court staff could catch that before filing when documents were presented on paper. Now corrections are made after filing.

The court has established a Prisoner E-Filing Initiative for prisoners to submit filings to the court electronically. W.D. Wash. ECF Procs. § III.B. All prisoners in Washington's state facilities submit filings to the court electronically. Prison librarians scan and email the filings. Prison librarians also receive electronic notices for the prisoners and convert them into paper documents. There is no such process for federal or local facilities. Before the E-Filing Initiative, there were complaints about prison mail, and electronic submissions mitigate that issue.

Criminal cases are opened by the court staff on paper filings. On a couple of occasions, judges have granted pro se criminal defendants CM/ECF filing privileges.

Aside from submissions from prisoners and other pro se complaints, the court does not accept filings by email.

There is a drop box at each of the court's intake counter locations. The drop boxes are available when the buildings are open, and they facilitate social distancing. There is a date stamp at each.

This is one of the courts that no longer accepts cash for filing fees.

"Unless otherwise ordered by the court, filing deadlines shall be 11:59 PM Pacific Time on the day the pleadings are to be filed." W.D. Wash. ECF Procs. § I.B.

The District Court for the Western District of Wisconsin

This court was selected for this study at random from among the district courts. It is one of the district courts with rules stating that pro se litigants can file electronically.

The United States District Court for the Western District of Wisconsin has two judgeships and one office code: Madison (office code 3).

The clerk's office is open from 8:00 to 4:30.

Electronic filing is governed by the court's Electronic Filing Procedures for the United States District Court for the Western District of Wisconsin. The procedures define filing user as "a lawyer or pro se party who has a registered username and password to file documents electronically in this court." *Id.* § I. The court's pro se guide explicitly tells pro se litigants, "You can file your documents electronically." W.D. Wis. Guide for Litigants Without a Lawyer at 38.

Nonprisoner pro se litigants do not need special permission to register as CM/ECF users in existing cases, just an email address and an ability to create PDFs. Their obligation to retain originals is the same as attorneys'.

Pro se litigants are not permitted to use CM/ECF to open cases, however. Nor are criminal defendants permitted to use CM/ECF; there are too many background features and schedules that would be adversely affected if something was filed incorrectly.

Some of the prisons have a way for a pro se litigant to present a filing to a prison librarian who will scan and email the filing to the court. The court generally does not otherwise accept filings by email or fax. The court would be amenable to procedures that allowed prisoners to file electronically pro se from the prisons.

The court does not have a drop box. It had one briefly during a COVID-19 shutdown.

Bankruptcy Courts

The Bankruptcy Court for the Northern District of Alabama

This court was selected for this study at random from among the bankruptcy courts.

The United States Bankruptcy Court for the Northern District of Alabama has five judgeships and four office codes: Birmingham (office code 2), Decatur (office code 8), Tuscaloosa (office code 7), and Anniston (office code 1). *See* Bankr. N.D. Ala. R. 1071-1. Each office has an intake counter.

The clerk's office is open from 8:00 to 4:00.

Electronic filing is governed by the court's Administrative Procedures for Filing, Signing, Retaining, and Verification of Pleadings and Papers in the Case Management/Electronic Case Filing (CM/ECF) System. Bankr. N.D. Ala. R. 5005-4. The court does not permit pro se use of CM/ECF. Pro se creditors can use the court's electronic proof of claim (ePOC) portal.

During the COVID-19 pandemic, the court accepted filings by email and suspended the requirement for original signatures. But the court is again accepting pro se filings only on paper. When it accepted filings by email, the court sometimes received improper submissions, such as redundant pleadings or legal questions.

The court no longer accepts cash for filing fees, and it does not have a drop box. In an emergency, a party can contact the court by telephone and make special arrangements for filing.

The court is considering use of the electronic self-representation (eSR) module used by some other courts for the electronic submission of pro se bankruptcy petitions to the court, but the court does not have a very large pro se debtor caseload.

The Bankruptcy Court for the Central District of California

This court was selected for this study because it is one of the bankruptcy courts that has an electronic self-representation (eSR) portal.

The United States Bankruptcy Court for the Central District of California has twenty-one judgeships and five office codes: Los Angeles (office code 2), Riverside (office code 6), Santa Ana (office code 8), San Fernando Valley (office code 1), and Santa Barbara (Northern Division, office code 9).

The clerk's office is open from 9:00 to 4:00. Bankr. C.D. Cal. Ct. Man. § 1.1.

Electronic filing is governed by the court's Rule 5005-4 and the court's CM/ECF Procedures, which are section 3 of the Court Manual.

On rare occasions, the court has permitted electronic filing by pro se litigants. In one case, the litigant already had successfully filed electronically in the district court with the district court's permission, and the presiding bankruptcy judge granted the litigant permission to file electronically in a bankruptcy case.

The court's website offers an Electronic Self-Representation (eSR) Bankruptcy Petition Preparation System for Chapter 7 and Chapter 13. Originally, the court offered eSR only for chapter 7 cases, because chapter 13 cases are much more likely to fail without attorney representation. During the COVID-19 pandemic, when the courthouse was closed, the court began to allow the use of eSR for chapter 13 cases, and it kept the chapter 13 option with cooperation of the local bar in linking chapter 13 debtors with attorneys. The court tries to balance the promotion of electronic tools for pro se litigants with the encouragement of qualified legal representation.

Using eSR requires registration with an email address and a password. It results in a petition that is submitted electronically to the court. Filing requires the additional preparation of local forms and payment, which are returned in person or by mail. The local forms for chapter 13 cases are more complex than the local forms for chapter 7 cases. The court no longer accepts cash, and it does not accept personal checks or credit cards from pro se debtors.

When pro se debtors submit petitions either in person or using eSR, they are asked to provide identification, but they are not required to. It is permissible for family members or close friends to assist debtors' use of eSR, but the court is vigilant against the use of eSR by professional filing assistants, who often have words like "legal," "paralegal," or "notary" in their email addresses.

Once a case is open, the court will accept pro se filings by email.

Four of the five courthouses—all except Santa Ana—have physical drop boxes in the building lobbies outside the clerk's offices. The court discontinued the use of drop boxes after September 11, 2001, but it resumed their use when the courts were closed for the COVID-19 pandemic. The drop boxes are available after court hours, but only until the building closes to the public. Documents are date stamped when retrieved by the court's staff. Documents retrieved first thing in the morning, before the clerk's office opens, are stamped with the previous day's date.

The court also uses an Electronic Drop Box, and its website states the following:

> The Electronic Drop Box (EDB) is a tool available to self-represented litigants that enables them to upload court documents for filing electronically in bankruptcy cases and adversary proceedings pending in this District. Once you are determined to be eligible to use the Electronic Drop Box, the court will provide you with a link to upload your documents. After the court reviews the uploaded document it will be filed with the court.

"Filing must be completed before midnight, Pacific Standard or Daylight Saving Time, whichever is then in effect, to be considered timely filed that day." Bankr. C.D. Cal. Ct. Man. § 3.3(b).

The Bankruptcy Court for the District of Delaware

This court was selected for this study at random from among the bankruptcy courts.

The United States Bankruptcy Court for the District of Delaware has eight judgeships and one office code: Wilmington (office code 1).

The clerk's office is open from 8:00 to 4:00. Bankr. Del. R. 5001-2(a).

Electronic filing is governed by the court's Rule 5005-4 and the court's Administrative Procedures for Electronically Filed Cases. "[T]he District Court's standing order dated October 2, 2014, requiring that all electronic filings be submitted by 6:00 p.m. Eastern Time will not apply to filings that are made in the Bankruptcy Court." *Id.* R. 1001-1(f). Filings in bankruptcy cases are much more of a twenty-four-hour enterprise.

Pro se litigants are not permitted to file electronically. During the court's COVID-19 closure, the court established a web page that allowed a pro se filer to initiate a case online; the website emailed the petition to the clerk's office. Only one filer took advantage of that process, and the court discontinued it when the office opened again.

There is a twenty-four-hour drop box in the lobby of the commercial building where the court sits. There is a time stamp at the drop box. Filings are retrieved every morning.

A big challenge for permitting debtors to file petitions online is proof of identity. Payment is also a challenge, because once the petition is filed, the debtor's personal checks and credit cards are no longer usable.

The Bankruptcy Court for the Middle District of Georgia

This court was selected for this study because it has rules stating that pro se litigants can file electronically with permission.

The United States Bankruptcy Court for the Middle District of Georgia has three judgeships and six office codes: Macon (office code 5), Albany (office code 1), Valdosta (office code 7), Athens (office code 3), Columbus (office code 4), and Thomasville (office code 6). There are intake counters in Macon and Columbus. The Thomasville location closed several years ago.

The clerk's office is open from 8:30 to 5:00.

Electronic filing is governed by the court's Rule 5005-4 and the court's Clerk's Instructions, especially "II. Filing Information and Requirements." Pro se parties whom the clerk determines file frequently can register as CM/ECF users. Bankr. M.D. Ga. R. 5005-4(a)(2). Judges have granted permission in approximately two cases. In those cases, the debtors were able to use CM/ECF to file their petitions. One of the debtors overused the privilege and tried to file excessive appeals. Most requests are declined after determining that the debtors are unsuitable candidates.

The court is considering the use of the electronic self-representation (eSR) module used by some other courts for the electronic submission of pro se bankruptcy petitions to the court, but the court is concerned about the technical sophistication required to use it. The court is also concerned about the amount of staff time that might be required to fix faulty submissions.

Pro se creditors can receive limited CM/ECF privileges, or they can use the court's electronic proof of claim (ePOC) portal.

The court has traditionally accepted filings be email if travel to the court would be a hardship or regular mail would be too slow. During the COVID-19 pandemic, the court began accepting filings by email more generally. A concern with email submissions is identification verification.

The court does not have a drop box.

Paper filers are not required to serve other parties receiving electronic service.

The Bankruptcy Court for the District of Hawaii

This court was selected for this study at random from among the bankruptcy courts.

The United States Bankruptcy Court for the District of Hawaii has one judgeship and one office code: Honolulu (office code 1).

The clerk's office is open from 8:30 to noon and from 1:00 to 4:00.

Electronic filing is governed by the court's Rule 5005-4. "The clerk may authorize [individuals other than attorneys] to be ECF Users with full or limited participation in the CM/ECF system, including an unrepresented individual." *Id.* R. 5005-4(b)(1). Creditors and pro se litigants have limited CM/ECF menus. Pro se litigants' electronic filing privileges are limited to the cases for which they receive permission, and the privileges expire at the end of their cases. The single bankruptcy judge in the district delegated approval responsibilities to the clerk's office; pro se CM/ECF filing privileges are obtained by written application. Pro se litigants cannot open cases electronically.

Pro se litigants who file on paper have to serve on paper only parties who do not receive electronic service. Certificates of service are supposed to detail who gets service electronically and who gets service on paper.

The court transitioned to NextGen CM/ECF in November 2021, and NextGen makes granting electronic filing privileges to pro se litigants more complicated.

Electronic filing is regarded as a privilege. An attorney's electronic filing privileges were revoked when the attorney opened a case that was not supported by a signed petition.

On rare occasions, the judge has granted permission for some litigants to submit filings to the court by email or fax. The court does not have a drop box.

"Filing must be completed by 11:59 p.m. Hawaiian Standard Time as recorded by the court's CM/ECF server in order to be considered timely filed that day." Bankr. Haw. R. 5005-4(c)(3).

The Bankruptcy Court for the Central District of Illinois

This court was selected for this study because it has rules stating that pro se litigants can file electronically with permission.

The United States Bankruptcy Court for the Central District of Illinois has three judgeships and three office codes: Peoria (office code 1), Springfield (office code 3), and Urbana (office code 2).

The clerk's office is open from 8:00 to 5:00.

The district court's local rules govern cases in the district's bankruptcy court. Electronic filing is governed by the district court's Civil Rules 5.2 through 5.9 and by the bankruptcy court's Administrative Procedures for the Case Management/Electronic Case Filing System. "Pro se parties are not required to register for electronic filing but may apply to the court for leave to file electronically." C.D. Ill. Civ. R. 5.2. One pro se debtor has requested and received CM/ECF filing privileges in the past several years.

The court also accepts electronic submissions through its Electronic Documents Submission System (EDSS). Pro se debtors can submit both petitions and later filings this way. The court allows the "/s/" format for signatures. Payment of the filing fee would have to be delivered to the court promptly, but all users have requested fee waivers or installments.

The COVID-19 pandemic showed how important electronic forms of communication are. The court borrowed code from another court to set up its EDSS, which took several hours to install and test.

Pro se creditors can be granted limited filing privileges in CM/ECF after training, or they can use EDSS. Pro se creditors can also use the court's electronic proof of claim (ePOC) portal.

The court does not accept filings by email or fax.

The court has a drop box at each of its locations, just inside the front door on the ground floor. The intake counter is on the second floor, so the drop box helps to maintain social distancing.

The court still accepts cash at the counter, but exact change is required. Cash should not be put in the drop box.

"A document filed electronically by 11:59 p.m. central standard time will be deemed filed on that date." C.D. Ill. Civ. R. 5.7(A)(3); *id.* Crim. R. 49.6(B)(4).

The Bankruptcy Court for the Northern District of Indiana

This court was selected for this study at random from among the bankruptcy courts.

The United States Bankruptcy Court for the Northern District of Indiana has three judgeships and four office codes: Hammond (office code 2), Fort Wayne (office code 1), South Bend (office code 3), and Lafayette (office code 4). The clerk has an intake counter at all four locations.

The clerk's office is open from 9:00 to 4:00.

Electronic filing is governed by the court's Seventh Amended Order Authorizing Electronic Case Filing, *In re Electronic Case Filing* (Jan. 14, 2022) [hereinafter ECF Order]. Pro se debtors are not permitted to use CM/ECF. Pro se creditors, especially frequent filers, can receive limited CM/ECF privileges.

The court does not accept filings by email or fax. It uses drop boxes only when the staff is not present for some occasional reason. The court will accommodate requests for emergency filings.

Paper filers do not have to separately serve parties already receiving electronic service.

Currently, about 2% of the court's cases have pro se debtors. Because of the low number of pro se filings, the court does not have a formal program to assist pro se filers, but neither does it discourage them. Access to representation may be more important than ease of pro se filing given the long-term consequences of a bankruptcy petition. Making pro se filing easier without also ensuring debtors have a sufficient opportunity to determine if bankruptcy is really the right choice may not be the best approach. The court's local practice and procedures committee has looked into this question on several occasions and concluded that programs sponsored by the various county bar associations and legal service organizations adequately balance these concerns, so no formal court-sponsored program is necessary.

"Filing in the Northern District of Indiana must be completed before midnight in South Bend, Indiana, where the court's ECF server is located, to be considered filed that day." ECF Order ¶ 7.

The Bankruptcy Court for the District of Kansas

This court was selected for this study because it has rules stating that pro se litigants can file electronically with permission.

The United States Bankruptcy Court for the District of Kansas has four judgeships and three office codes: Kansas City (office code 2), Wichita (office code 6), and Topeka (office code 5).

The clerk's office is open from 9:00 to 4:00.

Electronic filing is governed by the court's Rule 5005.1 and the court's Administrative Procedures for Filing, Signing, and Verifying Pleadings and Documents by Electronic Means [hereinafter ECF Procs.], which is appendix 1-01 to Rule 5005.1. "If the court permits, a party to a pending action who is not represented by an attorney may register as a Filing User in the Electronic Filing System solely for purposes of the action." Bankr. Kan. ECF Procs. ¶ II.B. In

practice, pro se debtors have not been granted CM/ECF filing privileges, but some pro se creditors have been granted limited CM/ECF filing privileges.

The court accepts filings from pro se debtors by email as well as by regular mail, and this includes the bankruptcy petition. The court's "How to File" webpage under "Filing Without an Attorney" provides an email address for each of the three court offices.

For creditors, the court offers several KASBFastFile options for uploading filings without the need for a CM/ECF account: electronic proof of claim (ePOC), electronic reaffirmation agreement (eReaf), and electronic request for notice.

During the COVID-19 pandemic, the court relaxed requirements for wet signatures. A local rule amended on March 17, 2022, keeps in place some relaxation. D. Kan. Bankr. R. 9011.4. A copy of a handwritten signature is sufficient for pro se debtors. For a filing by an attorney that includes someone else's signature, an electronic signature using something like DocuSign suffices if the attorney vouches for the authenticity of the signature. DocuSign signatures are not sufficient for pro se parties.

Paper (or email) filers do not have to separately serve other parties already receiving electronic service.

The court does not have a drop box, but it does have a mail slot at each location that is available when the building is open. Also, if a filer were to knock on the door and there was someone in the office, a filing would be accepted.

The court accepts cash, but exact change is required.

"Filing must be completed before midnight local time where the court is located in order to be considered timely filed that day." Bankr. Kan. ECF Procs. ¶ III.D.

The court is considering use of the electronic self-representation (eSR) module used by some other courts for the electronic submission of pro se bankruptcy petitions to the court. The court would like to see improvements in electronic noticing so that all parties can receive electronic notices instantaneously. A way for pro se debtors to pay filing fees electronically also would be helpful.

The Bankruptcy Court for the Eastern District of Kentucky

This court was selected for this study at random from among the bankruptcy courts.

The United States Bankruptcy Court for the Eastern District of Kentucky has two judgeships and six office codes: Lexington (office code 5), Covington (office code 2), London (office code 6), Pikeville (office code 7), Frankfort (office code 3), and Ashland (office code 1). The court relinquished its space in Frankfort to the district court and now hears Frankfort cases in Lexington, about forty-five minutes away. The court's intake counter is in Lexington.

The clerk's office is open from 9:00 to 3:00.

Electronic filing is governed by the court's Rule 5005-4 and the court's Administrative Procedures Manual [hereinafter ECF Procs.]. The court does not permit either debtors or other parties appearing pro se to use CM/ECF. Because of the COVID-19 pandemic, the court set up an email address for electronic submissions by pro se parties. The court is very pleased with how this has worked and plans to keep this option. Counter traffic has dropped substantially since virtual filing was adopted.

Virtual filings received after the clerk's office closing time of 3:00 p.m. generally are regarded as received on the following day. Paper originals are required within two weeks, and they will include wet signatures. For filing fees, the court accepts cash and money orders, but not electronic payments. There is a bank in the same building as the court, which facilitates both payment by money order and depositing of cash by the court. The court does not make change.

The court is considering the use of the electronic self-representation (eSR) module used by some other courts for the electronic submission of pro se bankruptcy petitions to the court. The court has adopted the courts' electronic submission modules for proofs of claim, requests for service, and reaffirmation agreements. These submission modules provide for electronic signatures.

The court otherwise does not generally accept filings by email or fax. The court does not have a drop box.

Use of CM/ECF by attorneys, which is required, generally constitutes waiver of separate service, so paper servers do not generally have to separately serve parties receiving electronic service. Bankr. E.D. Ky. ECF Procs. § V.

The court is very interested in expanded opportunities for electronic submissions.

The Bankruptcy Court for the Eastern District of Louisiana

This court was selected for this study because it is one of the bankruptcy courts that has an electronic self-representation (eSR) portal.

The United States Bankruptcy Court for the Eastern District of Louisiana has two judgeships and one office code: New Orleans (office code 2).

The clerk's office is open from 8:30 to 4:30.

Electronic filing is governed by the court's Rule 2014-1(D) and the court's Administrative Procedures Manual.

The court does not allow pro se use of CM/ECF. Pro se debtors can submit petitions electronically using the court's online tool: Electronic Self-Representation (eSR) Bankruptcy Petition Preparation System for Chapter 7 and Chapter 13. Within ten days of submission, the debtor must provide in paper form a signed declaration, a Social Security statement, and a credit counseling form as well as payment of the filing fee. The case is opened upon initial submission, but it is dismissed if not completed. Users of eSR can receive electronic notice of other parties' filings; pro se debtors who do not use eSR cannot.

Pro se creditors can file claims using the court's electronic proof of claim (ePOC) portal.

Pro se debtors can file emergency petitions by fax (or email during the COVID-19 pandemic) outside of the court's operating hours, but then must file the originals by noon on the next court day.

When the court closed because of the COVID-19 pandemic, it established a drop box with a time stamp available. When the court reopened, the drop box was available only for persons declining to comply with the building's vaccination and testing requirements. When those requirements were lifted, the drop box was removed.

The Bankruptcy Court for the District of Massachusetts

This court was selected for this study at random from among the bankruptcy courts.

The United States Bankruptcy Court for the District of Massachusetts has five judgeships and three office codes: Boston (office code 1), Worcester (office code 4), and Springfield (office code 3).

The clerk's office is open from 8:30 to 5:00.

Electronic filing is covered by the court's Electronic Filing Rules [hereinafter ECF R.], Bankr. Mass. R. app. 8; *see id.* R. 9036-1, and the court's ECF User Manual.

Pro se parties are not permitted to file using CM/ECF, but to accommodate the COVID-19 pandemic the court now accepts filings from pro se litigants by email and fax. If an emailed petition does not come with a request for a fee waiver or installment payments, then the court issues a notice of deficiency and payment can follow. A scanned signature is required within thirty days, and an original must be produced if requested.

The court uses drop boxes only when the court is closed for some reason, such as during the COVID-19 pandemic.

"[W]here the Court orders that filing must be completed by a specific date but does not specify the time, entry of the document into the ECF System must be completed before 4:30 Eastern Standard (or Daylight, if applicable) Time in order to be deemed timely filed." Bankr. Mass. ECF R. 3(c)(2).

The Bankruptcy Court for the Eastern District of Missouri

This court was selected for this study at random from among the bankruptcy courts. It is one of the bankruptcy courts that has an electronic self-representation (eSR) portal.

The United States Bankruptcy Court for the Eastern District of Missouri has three judgeships and three office codes: St. Louis (office code 4), Cape Girardeau (office code 1), and Hannibal (office code 2). The court's only intake counter is in St. Louis.

The clerk's office is open from 8:30 to 4:30.

Pro se debtors can file petitions using the court's eSR module. This facilitates the filing of a petition, statements, schedules, and the creditor matrix, but not any filings after a case's opening. Users of eSR must submit a signed dec-

laration and payment separately, and the petition is not filed until that happens. The court has had two dozen users since it began offering eSR in April 2021. On a few occasions, someone began to use it, but they did not go all the way through to complete the petition.

The court does not otherwise accept filings by email or fax, except in the occasional emergency.

The court accepts cash as a payment option, retaining that option to promote access to justice. But exact change is required. The court lets debtors know this in advance.

Pro se debtors may not register for CM/ECF filing privileges. Institutional and professional pro se creditors may receive limited CM/ECF filing privileges; other pro se creditors can use the court's electronic proof of claim (ePOC) portal.

Paper filers must file certificates of service showing service on other parties, even if the other parties receive electronic service.

The eSR portal facilitates the filing of a petition, but not anything else. An electronic drop box for later filings would be cost prohibitive, because of the security protections it would have to include. It would be an easier option for a court with more cases, and that difference presents an access-to-justice issue.

It is not common for debtors to proceed pro se in this court. The local bar has worked hard to make representation affordable.

"All documents filed by an attorney shall be filed electronically in accordance with the procedures for electronic case filing set forth in the Procedures Manual." Bankr. E.D. Mo. R. 5005.A; *see* Bankr. E.D. Mo. Procs.

The Bankruptcy Court for the District of Nebraska

This court was selected for this study at random from among the bankruptcy courts.

The United States Bankruptcy Court for the District of Nebraska has two judgeships and two office codes: Omaha (office code 8) and Lincoln (office code 4).

The clerk's office is open from 8:00 to 4:30.

Electronic filing is governed by the court's Rule 5005-1.A.

The court is not in a big hurry to implement the electronic self-representation (eSR) module for submission of bankruptcy petitions used by some other courts. Pro se creditors can receive limited CM/ECF privileges for specific filings.

The court's local rules permit fax submissions of filings in an emergency. Bankr. Neb. R. 5005-1.B. Email submissions are accepted on a very limited basis.

Because of the COVID-19 pandemic, the court established a drop box, which is available when the federal building is open. There is a time stamp at the drop box. The filing fee cannot be submitted there; it must be mailed.

The Bankruptcy Court for the District of New Jersey

This court was selected for this study because it is one of the bankruptcy courts that has an electronic self-representation (eSR) portal.

The United States Bankruptcy Court for the District of New Jersey has eight judgeships and three office codes: Newark (office code 2), Camden (office code 1), and Trenton (office code 3).

The clerk's office was open from 8:30 to 4:00 before the COVID-19 pandemic. Now the counter has limited hours: from 10:00 to 2:00. (Until March 21, 2022, the court's counter hours were further limited to Tuesday through Thursday.) Many members of the court's staff frequently work remotely now.

Electronic filing is governed by the court's Rule 5005-1. The court does not permit pro se litigants to use CM/ECF.

The court, however, is one of the courts that offers pro se debtors a way to submit their petitions electronically: a web page dedicated to Submitting a Bankruptcy Package Electronically (eSR). After the debtor submits the petition, the debtor receives an email requesting additional documents, including the social security number declaration, which is filed separately and restricted from public view.

The filing fee must be paid conventionally, either in person or by mail. Only money orders and certified checks are accepted; the court has not accepted cash for more than fifteen years.

The courthouses have drop boxes that are available outside of the clerk's office hours, but only when the buildings are open. Entry to the buildings requires proof of COVID-19 vaccination or a recent negative test. (The wearing of a face mask also was required until March 16 of this year.) Sometimes members of the clerk's staff have met debtors outside the building to receive documents. Although the counter has limited hours, counter service is available outside those hours by appointment.

The predecessor to eSR was called Pathfinder; New Jersey was a pilot court for that project. It was discontinued when the court moved to NextGen CM/ECF because of incompatibility. The court adopted eSR when the NextGen-compatible eSR module was developed.

A great benefit of eSR is that court staff members do not have to decipher handwriting. But sometimes there is a lot of back and forth with a debtor to get the papers prepared properly. Sometimes face-to-face contact is more efficient than remote contact.

The Bankruptcy Court for the District of New Mexico

This court was selected for this study at random from among the bankruptcy courts. It is one of the bankruptcy courts that has an electronic self-representation (eSR) portal.

The United States Bankruptcy Court for the District of New Mexico has two judgeships and one office code: Albuquerque (office code 1).

The clerk's office is open from 8:30 to 4:00.

Electronic filing is governed by the court's Rule 5005-2. Pro se parties may be granted permission to use CM/ECF. *See id.* R. 5005-3.

Electronic submission of bankruptcy petitions by chapter 7 pro se debtors is possible using the court's eSR portal, but that is used only rarely. The local bar is concerned about eSR's impact on their practice. A user of eSR must separately submit a paper signature page and pay the filing fee.

The court developed an electronic drop box (EDB) for use by pro se litigants, with the permission of the presiding judge. The clerk's office reviews the electronic submissions and transfers them to the case record. Scanned signatures are accepted.

Since the beginning of the COVID-19 pandemic, the court has accepted personal checks for filing fees, because of the difficulties during the pandemic of getting money orders. The court accepts cash, but it discourages cash payments because of the difficulties sometimes of making change. The court accepts debit card payments, but not credit card payments, from pro se debtors.

Paper filers are not required to separately serve other parties receiving electronic service.

The bankruptcy court and the district court jointly used a drop box during the COVID-19 pandemic closure, but they do not use it now that the courts are open again.

Interest in joining the local bankruptcy bar is mitigated by low bankruptcy filing rates. The U.S. trustees' decision to start doing section 341 creditor meetings by Zoom has made out-of-state attorneys more interested in practicing in New Mexico.

"Unless otherwise ordered, any paper filed electronically must be filed before midnight local time to be considered timely filed that day." Bankr. N.M. R. 5005-2(b).

The Bankruptcy Court for the Southern District of New York

This court was selected for this study because it has a filing deadline relevant to another study.

The United States Bankruptcy Court for the Southern District of New York has nine judgeships and three office codes: Manhattan (office code 1), Poughkeepsie (office code 4), and White Plains (office code 7).

The clerk's office is open from 8:30 to 5:00. Bankr. S.D.N.Y. R. 5001-1.

"This Court has authorized the limited use of the [electronic filing system] by non-attorneys who obtain a limited-access account." Bankr. S.D.N.Y. Procedures for the Filing, Signing, and Verification of Documents by Electronic Means ¶ I.A.2; *see id.* ¶ I.B. This does not include pro se debtors. With a very large caseload, the court already has to manage CM/ECF accounts for more than twenty thousand attorneys.

Because of the COVID-19 pandemic, the court has accepted filings using an online uploader. Scanned signatures are treated as originals. The court is exploring using the electronic self-representation (eSR) portal used by some other courts for the electronic submission of pro se bankruptcy petitions to

the court, but because eSR only provides a way to submit the petition, other electronic submissions would have to be received a different way. The court is concerned that having to use two different methods to file would be confusing. The court is looking for the best way to expand electronic submission.

Cash, cashier's checks, and money orders are accepted for filing fees. The challenge with using Pay.gov is disabling payment methods, such as credit cards, that the court does not accept from pro se debtors.

The courthouses have drop boxes. In Manhattan, documents can be left in the district court night box, which is available at all hours. There are time stamps at the drop boxes.

Because email notification does not always constitute service, paper filers generally must still serve other parties with their filings, even if the other parties receive electronic service.

Unless an earlier deadline is set, filings are due at midnight on the day due. But motion replies generally must be received by 4:00 p.m. three days before the hearing. Bankr. S.D.N.Y. R. 9006-1(b).

The Bankruptcy Court for the Western District of New York

This court was selected for this study at random from among the bankruptcy courts.

The United States Bankruptcy Court for the Western District of New York has three judgeships and two office codes: Buffalo (office code 1) and Rochester (office code 2).

The clerk's office is open from 8:00 to 4:30.

Electronic filing is governed by the court's Amended Administrative Procedures for Filing, Signing and Verifying Pleadings and Papers Electronically [hereinafter ECF Procs.]. "Parties proceeding *pro se* . . . will not be permitted to file electronically and must follow all filing requirements of the Bankruptcy Rules and Local Rules." *Id.* § 1.A.3. Even individual creditors appearing pro se must file on paper. Institutional creditors can receive limited CM/ECF filing privileges.

Over the past five years, the percentage of cases that are pro se has ranged from 2% to 4%.

There are drop boxes with time stamps at the clerk's two locations, in buildings that open a little earlier and close a little later than the clerk's offices do. The drop boxes are infrequently used. The clerk's offices never closed altogether for the COVID-19 pandemic. A filer who comes to the court usually comes to the counter.

"Filings are considered timely if received by the Court before midnight on the date set as a deadline, unless the presiding Judge specifically requires an earlier filing, such as by the close of business." Bankr. W.D.N.Y. ECF Procs. § 3.D.2.

The Bankruptcy Court for the Western District of North Carolina

This court was selected for this study at random from among the bankruptcy courts.

The United States Bankruptcy Court for the Western District of North Carolina has two judgeships and five office codes: Charlotte (office code 3), Statesville (office code 5), Shelby (office code 4), Asheville (office code 1), and Bryson City (office code 2).

The clerk's office is open in Charlotte from 8:30 to 12:30 and from 1:30 to 4:30.

The court's Rule 5005-1 governs electronic case filing. *See also* Administrative Order Adopting Electronic Case Filing Procedures, *In re Order in Aid of Case Administration: Electronic Case Filing Procedures* (Feb. 2, 2001).

The only time that the court ever accepted pro se filings electronically was by email earlier in the COVID-19 pandemic.

The Bankruptcy Court for the Northern District of Oklahoma

This court was selected for this study at random from among the bankruptcy courts with rules stating that pro se electronic filing is not permitted.

The United States Bankruptcy Court for the Northern District of Oklahoma has two judgeships and one office code: Tulsa (office code 4).

The clerk's office is open from 8:30 to 4:30, except that it closes at 3:00 on Tuesdays.

Electronic filing is governed by the court's CM/ECF Administrative Guide of Policies and Procedures [hereinafter ECF Procs.], the first appendix to the court's local rules. "Generally, parties proceeding pro se will not be authorized to file electronically." *Id.* ¶ III.B.

Pro se debtors cannot receive notices electronically. The court does not use the Bankruptcy Noticing Center for service of orders and notices on pro se debtors, because the BNC is not required to notify the court when notices are returned as undeliverable. The court does use the BNC for pro se creditors.

The court plans to use the electronic self-representation (eSR) module used by some other courts for the electronic submission of pro se bankruptcy petitions to the court, but setting that up is not currently a high priority.

Creditors can use the court's electronic proof of claim (ePOC) portal. Creditors who file many transfers of claims pro se may be granted limited CM/ECF privileges.

Paper filers must serve even parties receiving electronic service.

The court does not have a drop box. The counter did not close during the COVID-19 pandemic. The Department of Homeland Security advised against a drop box outside the courthouse building.

"Filing must be completed before midnight Central Time in order to be considered timely filed that day." Bankr. N.D. Okla. ECF Procs. ¶ II.B.

The Bankruptcy Court for the Western District of Oklahoma

This court was selected for this study because it has rules stating that pro se litigants can file electronically with permission.

The United States Bankruptcy Court for the Western District of Oklahoma has three judgeships and one office code: Oklahoma City (office code 5).

The clerk's office is open from 8:30 to 4:30.

Electronic filing is governed by the court's Administrative Guidelines for Electronic Case Filing, appendix A of the court's Rules, Bankr. W.D. Okla. R. 1001-1.E, 5005-1.A, and the court's CM/ECF Style Guide. "Pro se parties and bankruptcy petition preparers will not be Registered [CM/ECF] Participants, unless permitted by the Court." Bankr. W.D. Okla. R. app. A § 5.A.

In practice, pro se debtors do not use CM/ECF. Until recently, the court did not use the electronic self-representation (eSR) portal that some other courts use; instead, it developed during the COVID-19 pandemic its own Electronic Document Submission System (EDSS). The court developed three pages of EDSS administrative procedures. Only pro se filers can use EDSS. A scanned signature is sufficient, but the original must be retained for one year beyond final resolution of the case. Electronic submissions are faster for debtors than regular mail, and they do not require taking time off work to visit the courthouse.

In practice, EDSS submissions frequently require work by the court's staff to put in order. Documents may not be in the correct sequence, and file sizes may be excessive.

The court recently decided to offer eSR as an option for filing pro se petitions, and the court will continue to accept subsequent pro se filings in EDSS. Most pro se debtors still file on paper.

Filing fees can be paid using Pay.gov, and they must be paid by midnight or the filing will not be docketed.

Filers without CM/ECF filing privileges cannot receive electronic notices through CM/ECF, but they can through the Bankruptcy Noticing Center's debtor electronic bankruptcy noticing (DeBN). Few do.

Paper and EDSS filers must serve other parties, even those receiving electronic service.

The court does not accept filings by fax. There is a drop box outside the clerk's office, which is seldom used. There used to be a time stamp at the drop box, but there is not one there now.

"The deadline for filing, unless otherwise specifically set, is midnight of the due date, Central Time." Bankr. W.D. Okla. R. app. A § 4.G.

The Bankruptcy Court for the District of Oregon

This court was selected for this study because it has rules stating that pro se litigants can file electronically with permission. It is one of the bankruptcy courts that has an electronic self-representation (eSR) portal.

The United States Bankruptcy Court for the District of Oregon has five judgeships and two office codes: Portland (office code 3) and Eugene (office code 6).

The clerk's office is open from 9:00 to 4:30.

Electronic filing is governed by the court's Rule 5005-4 and the court's Administrative Procedures for Electronically Filing Case Documents [hereinafter ECF Procs.]. Parties other than attorneys, trustees, and creditors "may also be eligible to request a login for possible ECF participation upon approval of the chief bankruptcy judge." Bankr. Or. ECF Procs. ¶ II.A.

On very few occasions, presiding judges have granted CM/ECF privileges to pro se debtors. One was a former attorney. Another previously clerked for a court. For one chapter 11 debtor, it was easier to let the debtor use CM/ECF so that the court's staff did not have to figure out how to docket the filings.

The court has several alternatives to paper submission of bankruptcy petitions. The court uses the eSR module. Some users find it intimidating. The court also has a Public Document Upload (PDU) page that can be used both for the petition and for later filings. PDU submissions are often out of order or complex, with large documents broken into separate uploads. The court accepts submissions by fax, but not by email.

Written signatures are not required for uploaded submissions. Submission entails an agreement that the submitter is the filer and has signed the documents. Faxes must include copies of written signatures, but the original signatures do not need to be submitted.

Pro se debtors not using CM/ECF do not get electronic notice. The court does not use the Bankruptcy Noticing Center's debtor electronic bankruptcy noticing (DeBN).

Creditors can receive limited CM/ECF privileges, or they can use the court's electronic proof of claim (ePOC) portal.

The court brought back the drop box during the COVID-19 pandemic. It is available when the building is open. It does not have a time stamp. Documents are retrieved each morning.

"Electronic filing must be completed before midnight Pacific time to be considered filed on that day." Bankr. Or. R. 5005-4(f)(1).

The Bankruptcy Court for the Eastern District of Pennsylvania

This court was selected for this study at random from among the bankruptcy courts. It is one of the bankruptcy courts with rules stating that pro se litigants can file electronically with permission.

The United States Bankruptcy Court for the Eastern District of Pennsylvania has five judgeships and two office codes: Philadelphia (office code 2) and Reading (office code 4).

The clerk's office is open from 8:00 to 4:30 in Reading and from 8:30 to 5:00 in Philadelphia.

Electronic filing is governed by the court's Rules 5005-1 through 5005-8 and by the district court's Rule 5.1.2, Bankr. E.D. Pa. R. 8011-1. According to

Rule 5005-3(c), the court may grant pro se parties permission to use CM/ECF in their cases. In practice, pro se bankruptcy petitions are always filed on paper. The court has considered electronic submission, but it is concerned about legal issues, including issues related to original signatures. A challenge for electronic submission is the heavy use of mobile devices for access to the internet, and filers may have more access to a phone camera than to a scanner.

Creditors and trustees who are not attorneys can apply to use CM/ECF.

The court does not accept filings by email or fax. There is a drop box in the building with hours somewhat longer than the court's. Documents are scanned at the drop box and time-stamped on the spot.

"The electronic filing of a document must be completed before midnight prevailing Eastern Time, to be timely filed on that day." Bankr. E.D. Pa. R. 5005-2(f).

The Bankruptcy Court for the Middle District of Pennsylvania

This court was selected for this study because it has rules stating that pro se litigants can file electronically with permission.

The United States Bankruptcy Court for the Middle District of Pennsylvania has two judgeships and three office codes: Harrisburg (office code 1), Wilkes-Barre (office code 5), and Williamsport (office code 4). (The district court also has offices in Scranton and Lewisburg.)

The clerk's office is open from 9:00 to 4:00 in Harrisburg and Wilkes-Barre. Bankr. M.D. Pa. R. 5001-1.

Electronic filing is governed by the court's CM/ECF Administrative Procedures. They and the court's local rules state that pro se parties may be given permission by the court to file electronically. *See id.* ¶ I.C. "The Filing must be completed before midnight Eastern Standard Time to be considered timely filed that day." *Id.* ¶ III.B.

> **Rule 5005-1** *Filing and Transmittal of Papers.*
>
> (a) *Electronic Filing and Signing.*
>
> (1) *By a Represented Entity.* An entity represented by an attorney must file documents by using the Court's Electronic Case Filing system ("ECF" or "CM/ECF") in accordance with the CM/ECF Administrative Procedures available on the court's website (www.pamb.uscourts.gov). However, nonelectronic filing may be allowed for good cause, or as otherwise provided for by these rules;
>
> (2) *By a Self-Represented Individual.*
>
> (A) *Using the Electronic Document Submission System ("EDSS").* A self-represented individual may file documents (other than proofs of claim) electronically using the EDSS. . . .
>
> (B) *Using the Court's Electronic Case Filing ("CM/ECF") system.* An individual not represented by an attorney:
>
> (i) may file electronically using CM/ECF only if allowed by court order or through compliance with the conditions authorizing same as set forth in the CM/ECF Administrative Procedures adopted by this District; and

(ii) may be required to file electronically only by court order or as otherwise provided for in the CM/ECF Administrative Procedures adopted by this District.

Bankr. M.D. Pa. Bankr. R. 5005-1.

Although the court has received a few requests for use of CM/ECF by pro se debtors, the requests have always been denied. The risk of error is considered too great. A pro se debtor with a law degree was once given permission to read documents in CM/ECF but not file them.

The court created an Electronic Document Submission System (EDSS). Submissions are converted into electronic filings by the court's staff. Scanned signatures are regarded as sufficient, but originals must be retained for up to seven years. Payment must follow within a week. The court does not use Pay.gov. Most pro se debtors use EDSS now. Because EDSS allows for the filing of all documents, the court does not intend to use the electronic self-representation (eSR) portal that some other courts use. For electronic notifications, pro se debtors can sign up for the Bankruptcy Noticing Center's debtor electronic bankruptcy noticing (DeBN).

The court does not accept filings by email. Fax is still an option for after-hour filings and emergency petitions, but EDSS has displaced the use of fax in practice.

Creditors can use the court's electronic proof of claim (ePOC) portal. Some file on paper.

Because of security concerns, the court does not have a drop box.

The Bankruptcy Court for the Western District of Pennsylvania

This court was selected for this study because it has rules stating that pro se litigants can file electronically with permission.

The United States Bankruptcy Court for the Western District of Pennsylvania has four judgeships and three office codes: Pittsburgh (office code 2), Erie (office code 1), and Johnstown (office code 7).

The clerk's office is open from 9:00 to 4:30. Bankr. W.D. Pa. R. 1002-1(b).

Electronic filing is governed by the court's Rules 5005-1 through 5005-14 and 5005-21. "The Court may grant a *pro se* party to a pending action permission to apply for registration as a Filing User, subject to attending CM/ECF System training provided by the Clerk." *Id.* R. 5005-2(c). The court's debtors are seldom pro se, and it is possible that none has ever sought CM/ECF filing privileges.

Creditors and other unrepresented parties can register as limited users of CM/ECF. Pro se creditors can also file claims using the court's electronic proof of claim (ePOC) portal.

The court uses an Electronic Document Submission System (EDSS), an electronic drop box. Attorneys can use the electronic drop box to submit declarations of emergency filing at case initiation, but they have to use CM/ECF after that.

Pro se debtors can initiate cases using EDSS. The scanned signature is adequate, but filers must retain originals. The court also posted on its COVID-19 web page a link to a fillable "Emergency Petition" that has a submit button at the bottom.

Submissions otherwise by email and fax are not allowed, but the court still receives them, and if they are proper filings the court will accept them. The court has drop boxes with time stamps in Pittsburgh and Erie.

Paper filers do not have to separately serve parties receiving electronic service.

The court is interested in the Bankruptcy Noticing Center's debtor electronic bankruptcy noticing (DeBN), but the court has not set that up yet.

The Bankruptcy Court for the District of Rhode Island

This court was selected for this study at random from among the bankruptcy courts.

The United States Bankruptcy Court for the District of Rhode Island has one judgeship and one office code: Providence (office code 1).

The clerk's office is open from 9:00 to 4:00.

Electronic filing is governed by the court's Rule 5005-4 and the court's Electronic Filer User Manual.

The only pro se debtors who have used CM/ECF are attorneys who already had electronic filing privileges and who were representing themselves in bankruptcy cases.

At the beginning of the COVID-19 pandemic, the court set up a Self Represented Party Electronic Drop Box (EDB). They acquired the code from another court and set it up in a month or two. The court also began accepting filing fees through Pay.gov.

The court's website provides an email address for submission of an application to use the EDB. The application includes a copy of identification, and there is a separate application for the petition and for later documents. When the court's staff approves the application, the debtor receives by email a unique link for uploading documents for filing. Original paper documents, including wet signatures, must follow within two weeks.

EDB is not used to receive electronic notices of others' filings. Debtors can sign up for the Bankruptcy Noticing Center's debtor electronic bankruptcy noticing (DeBN).

As a small court, with only one judge, they decided not to offer the electronic self-representation (eSR) module used by some other courts for the electronic submission of pro se bankruptcy petitions to the court, because it would be too resource intensive.

Creditors can receive limited CM/ECF privileges, or they can use the court's electronic proof of claim (ePOC) portal.

The court can receive emergency filings by email or fax, but it has been years since anyone has used fax.

The court has had a drop box for a few decades, but after the Oklahoma City bombing, it was moved inside the building. It is useful when the clerk's office is closed for weather or pandemic. It does not have a time stamp. Users of the drop box must contact the court to let them know when they have deposited something.

Paper filers do not have to serve parties otherwise receiving electronic service.

"The deadline for filing, unless otherwise specifically set, is 11:59 P.M. (E.S.T.)." Bankr. R.I. R. 5005-4(f).

The Bankruptcy Court for the District of South Carolina

This court was selected for this study at random from among the bankruptcy courts.

The United States Bankruptcy Court for the District of South Carolina has three judgeships and three office codes: Columbia (office code 3), Charleston (office code 2), and Greenville (office code 6). The Spartanburg court (office code 7) recently moved to Greenville.

The clerk's office is open from 9:00 to 5:00 in Columbia.

Electronic filing is governed by the court's Rule 5005-4.

Pro se debtors are not permitted to use CM/ECF. Pro se creditors can register as limited filers in CM/ECF. Most creditors are pro se.

Because of the COVID-19 pandemic, the court has been accepting pro se debtor submissions by email or fax. Original signatures must follow on paper. The court has looked at the electronic self-representation (eSR) module used by some other courts for the electronic submission of pro se bankruptcy petitions to the court, but that does not allow for the electronic submission of filings after the petition. When the court receives a bankruptcy petition by email or fax, it issues a notice to pay the filing fee. The court still accepts cash.

Walk-in filings are accepted in Columbia. There are drop boxes in the other two locations; the office staff mails submissions to Columbia. There is a drop box in the Columbia clerk's office for use when the office only has a skeleton crew, or by filers who wish to avoid personal contact. Materials submitted in drop boxes are retrieved immediately, so there is no need for a time stamp.

The Bankruptcy Court for the District of South Dakota

This court was selected for this study at random from among the bankruptcy courts.

The United States Bankruptcy Court for the District of South Dakota has two judgeships and four office codes: Sioux Falls (office code 4), Rapid City (office code 5), Aberdeen (office code 1), and Pierre (office code 3).

The clerk's office is open from 8:00 to 5:00.

Electronic filing is governed by the court's Electronic Case Filing Administrative Procedures [hereinafter ECF Procs.]. Bankr. S.D. R. 5005-4, 7001-1. "A debtor not represented by an attorney shall either mail documents to the Clerk or deliver them in person to the Clerk's office . . . ." Bankr. S.D. R. app.

1A. The clerk cannot recall a pro se debtor who was able to file electronically. Filings cannot be submitted by email or fax. Petition fees must be paid by cash, cashier's check, or money order.

Paper service by paper filers is not required for persons receiving electronic service.

The court offered a drop box during the COVID-19 pandemic, but it was seldom used. Filers in divisions not staffed can leave filings with the district court.

The court is interested in the electronic self-representation (eSR) module used by some other courts, with which pro se debtors can submit petitions to the court electronically, and the District of South Dakota is watching the District of North Dakota's exploration of that resource.

"Unless the Court sets a different deadline, filing must be completed before midnight (Central Standard Time or Central Daylight Time, whichever is in effect) on the last day to file to be considered timely filed with respect to any such filing deadline." Bankr. S.D. ECF Procs. ¶ VI.D.

The Bankruptcy Court for the Eastern District of Tennessee

This court was selected for this study at random from among the bankruptcy courts.

The United States Bankruptcy Court for the Eastern District of Tennessee has four judgeships and five office codes: Chattanooga (office code 1), Knoxville (office code 3), Greenville (office code 2), Winchester (office code 4), and Johnson City (office code 5).

The clerk's office is open from 8:00 to 4:30.

Electronic filing is governed by the court's Rule 5005-4.

It does not appear that a pro se debtor has ever filed using CM/ECF. Pro se creditors can register for limited use of CM/ECF. They receive a very limited menu of filing options.

The court does not accept filings by email or fax, and it does not have a drop box. Earlier during the COVID-19 pandemic, the court accepted filings by fax, but it does not now. When the court converted to NextGen CM/ECF recently, it accepted filings from attorneys by email during a period when the system was down. The court is considering the use of the electronic self-representation (eSR) module used by some other courts for the electronic submission of pro se bankruptcy petitions to the court.

Filing fees can be paid by cashier's check, money order, or cash, with exact change. Attorneys can use Pay.gov.

"An electronic filing is timely if it is entered into ECF before midnight of the due date, [Eastern Time]." Bankr. E.D. Tenn. R. 5005-4(f).

The Bankruptcy Court for the Western District of Tennessee

This court was selected for this study at random from among the bankruptcy courts.

The United States Bankruptcy Court for the Western District of Tennessee has four judgeships and two office codes: Memphis (office code 2) and Jackson (office code 1).

The clerk's office is open from 8:30 to 4:00.

Electronic filing is governed by the court's Electronic Case Filing Guidelines. *See* Bankr. W.D. Tenn. R. 1001-1(b), 1001-2(7). The court does not permit electronic filing by pro se litigants. Nor does the court accept any filings by email.

Each courthouse has a drop box.

The Memphis courthouse is in leased space. The drop box serves only the court, and it is only available when the building is open. The building opens about one-and-a-half hours before the court does, and it closes about two hours later than the court does. It also has Saturday morning hours. Materials retrieved from the drop box are marked received on the business day that they are retrieved. During the COVID-19 shutdown, the drop box was the only way to file hard copies in person.

The Jackson courthouse is in a federal building that also houses the district court, and the drop box there serves the building, not just the bankruptcy court. It also is only available when the building is open. It was reopened during the COVID-19 pandemic after being closed for some time because of security concerns related to issues such as anthrax. The drop box facilitates contact-free filing.

Two important challenges posed by allowing pro se litigants to file electronically—an advancement that also would provide many benefits—are (1) establishing a procedure for retention of original documents, especially signatures, by pro se litigants, and (2) establishing a form of payment, because pro se litigants are currently not permitted to pay the initial filing fee with a personal check or a credit card, just cash, money order, or cashier's check.

A procedure that probably would work well would involve online forms that generate PDFs. There is some concern about developing procedures for electronic filing by pro se litigants, even by modeling what some other courts do, ahead of the development of national standards and procedures.

The Bankruptcy Court for the Eastern District of Texas

This court was selected for this study at random from among the bankruptcy courts. It is one of the bankruptcy courts that has an electronic self-representation (eSR) portal.

The United States Bankruptcy Court for the Eastern District of Texas has two judgeships and six office codes: Sherman (office code 4), Tyler (office code 6), Beaumont (office code 1), Lufkin (office code 9), Marshall (office code 2), and Texarkana (office code 5).

The clerk's office is open from 8:00 to 4:00. Bankr. E.D. Tex. External Operating Procedures ¶ II.A.

Electronic filing is governed by the four Texas districts' Administrative Procedures for the Filing, Signing, and Verifying of Documents by Electronic

Means in Texas Bankruptcy Courts [hereinafter Tex. Bankr. ECF Procs.]. Bank. E.D. Tex. R. 1001-1(b)(4), 5005-1. Electronic submission of bankruptcy petitions by pro se debtors is possible using the court's eSR portal, which the court adopted early during the COVID-19 pandemic. Because the court is using NextGen CM/ECF, it was just a matter of turning on that option.

Pro se litigants are not permitted to make subsequent filings using either eSR or CM/ECF, but the court does have an electronic drop box. Within two days of a debtor's submitting a petition using eSR, the debtor must upload a copy of a signed declaration, a Social Security statement, and government identification. A wet signature is due within two weeks.

The court worked with Pay.gov to establish an electronic payment option that supports only the types of payment permitted by the court. This court accepts pro se payments by debit card or ACH.

The court does not have a physical drop box, because of security concerns. Before the court established an electronic drop box, the court accommodated the pandemic with an email option, but the electronic drop box gives the court greater control over what can be submitted, such as by requiring PDFs.

"A document is filed on a particular day if the transmission of the document is completed prior to midnight in the Central time zone." Bankr. Tex. ECF Procs. ¶ III.F.

The Bankruptcy Court for the Eastern District of Virginia

This court was selected for this study at random from among the bankruptcy courts.

The United States Bankruptcy Court for the Eastern District of Virginia has six judgeships and four office codes: Richmond (office code 3), Norfolk (office code 2), Alexandria (office code 1), and Newport News (office code 4).

The clerk's office is open from 9:00 to 4:00.

Electronic filing is governed by the court's Rule 5005-2 and the court's CM/ECF Attorney Users' Guide. The court has very recently adopted NextGen CM/ECF.

It is possible for a pro se debtor to make a formal motion to use CM/ECF, and the motion receives careful screening by the presiding judge to determine whether the debtor has sufficient technical ability. These motions are rarely granted.

The court plans to adopt an electronic proof of claim (ePOC) portal for pro se creditors. Pro se creditors sometimes receive limited CM/ECF privileges.

Even attorneys do not currently open cases directly in CM/ECF. Petitions are filed in a shell case.

The court temporarily accepted filings by email during the COVID-19 pandemic.

The court has drop boxes, which it established during the COVID-19 pandemic and which the court plans to keep. They are available when the buildings are open, a little beyond counter hours. At each drop box is an electronic

time stamp and a telephone connection to the clerk's office. Filing fees paid in cash must be delivered directly to the counter rather left in a drop box.

The Bankruptcy Court for the Western District of Virginia

This court was selected for this study at random from among the bankruptcy courts. It is one of the bankruptcy courts that has an electronic self-representation (eSR) portal.

The United States Bankruptcy Court for the Western District of Virginia has three judgeships and three office codes: Lynchburg (office code 6), Roanoke (office code 7), and Harrisonburg (office code 5).

The clerk's office is open from 8:00 to 4:30.

Electronic filing is governed by the court's Rule 5005-4 and the court's Amended Administrative Procedures for Filing, Signing, Retaining and Verification of Pleadings and Papers in the Case Management/Electronic Case Filing (CM/ECF) System. *See* Bankr. W.D. Va. R. 1002-1.D.

The court does not permit pro se debtors to use CM/ECF, but it is thinking about it for the future. Institutional pro se creditors can register as limited filers in CM/ECF.

Pro se debtors have very successfully used the court's eSR portal. Because the program is designed so that all questions must be answered before the petition can be submitted, the court receives complete and legible petitions. A filing fee and a wet signature must follow. Most are mailed. Only the Roanoke location accepts cash.

During the COVID-19 pandemic, the court has allowed pro se debtors to submit their filings to the court by email. Fax submissions would be permitted, but they have not happened. Because email submission of a petition includes only a photocopy of a signature, the court will not continue the email option once the pandemic is over.

The court does not have drop boxes.

The court's biggest challenge with respect to eSR is getting the word out that it is an option for pro se debtors.

The Bankruptcy Court for the Northern District of West Virginia

This court was selected for this study because it is one of the bankruptcy courts that has an electronic self-representation (eSR) portal.

The United States Bankruptcy Court for the Northern District of West Virginia has one judgeship and four office codes: Martinsburg (office code 3), Clarksburg (office code 1), Wheeling (office code 5), and Elkins (office code 2).

The clerk's office in Wheeling is open from 8:30 to noon and from 1:00 to 4:00. The clerk's office in Clarksburg is open Tuesdays through Thursdays from 9:30 to 3:00 but closed for lunch.

Electronic filing is governed by the court's Rule 5005-4. The rule states that pro se parties may file electronically using the Clerk's Pro Se Party E-Filing

Program. *Id.* R. 5005-4(b). The court may require electronic filing for pro se parties so long as that would not create a hardship or denial of access to the court. *Id.* R. 5005-4(a)–(b). This program allows a pro se litigant to use CM/ECF to electronically submit a filing to the court. After a review and proper classification, the court administrator converts the submission to a public docket entry. Pro se litigants do not use CM/ECF to create docket entries.

The court's website has an Electronic Self-Representation (eSR) Bankruptcy Petition Preparation System for Chapter 7. The petition is filed after the debtor submits to the court in paper form, by mail or in person, (1) a declaration of electronic filing, which includes the debtor's wet signature, (2) a certificate of credit counseling, and (3) a copy of identification, such as a driver's license. The court accepts payment by money order, cashier's check, or credit card. Payment can be made through the court's website pursuant to an order to pay the fee in installments.

Pro se filers must serve on other parties motions that initiate contested matters or adversary complaints, but for other filings service is complete upon filing if the other parties receive electronic service. Parties who receive electronic service of filing might not be inclined to enforce a requirement of separate service by paper filers.

Email filing in general would only be permitted in an emergency, followed by prompt submission of originals, including original signatures. The court does not have a drop box.

A document is timely if filed before midnight on the day that it is due. Bankr. N.D. W. Va. R. 5005-5(b)(1).

The Bankruptcy Court for the District of Wyoming

This court was selected for this study at random from among the bankruptcy courts.

The United States Bankruptcy Court for the District of Wyoming has one judgeship and one office code: Cheyenne (office code 2).

The clerk's office is open from 8:30 to noon and from 1:00 to 4:00.

Electronic filing is governed by the court's Rule 5005-2.

The court had about two dozen pro se debtors in 2021. In earlier years, it would have been one hundred or so. Pro se debtors typically file their petitions on paper and do not again interact with the court: "one and done."

Pro se debtors occasionally email or fax their petitions. Faxed petitions are converted into emails. The court accepts electronic submissions of petitions so long as the filing fee is addressed. If the petition includes an application for a waiver or an installment plan, then there is no problem. Otherwise the submission must be followed by payment, and the court may ask for an emailed copy of a money order or cashier's check. Rule 5005-1 provides for email or fax submissions with clerk permission, and originals are required seven days later.

What the court is most concerned about with electronic submissions is payment. The court does not use Pay.gov because of the credit card option.

Pro se debtors can arrange with the Bankruptcy Noticing Center for debtor electronic bankruptcy noticing (DeBN), and in a few cases the debtors have been granted electronic noticing in CM/ECF.

Because pro se debtors' interaction with the court after the petition is filed is so limited, there is not much motivation to enhance electronic filing and noticing.

The court does not use an electronic proof of claim (ePOC) portal for pro se creditors. They use CM/ECF.

There is a drop box available when the building is open. It does not have a time stamp; when members of the court's staff retrieve documents in the morning, they time-stamp the documents for the previous day.

Electronic Self Representation Confirmation Letter

This is an automatically generated email. Please do not reply to this message.

Electronic Self Representation
United States Bankruptcy Court (Central District of California)

Dear _____,

This email confirms the electronic receipt of the bankruptcy petition submitted to the Court as of the date of this email. Please note that the bankruptcy petition has NOT been filed and has NOT been assigned a case number, until the items listed below are received by the Bankruptcy Court. The Court will file this submission if it contains all that we require to file a bankruptcy case. Please note that the minimum items listed below must be received by the Bankruptcy Court within 10 days of the date of this confirmation email. These items must be either hand-delivered or mailed to the court.

To determine where you must submit the items listed below, please visit the Court Locator section of our website. The specific location of where to file for bankruptcy is determined by the zip code of a debtor's residential address.

You may view or print your submitted bankruptcy petition paperwork by logging in to the Electronic Self-Representation (eSR) Bankruptcy Petition site with the password you previously created. The information that you enter in the bankruptcy petition cannot be changed once it is submitted to the Court.

FILING FEE. Payable to "U.S. Bankruptcy Court," the full amount of the filing fee must be MAILED or HAND-DELIVERED by one of the following methods:

- Cashier's check issued by an acceptable financial institution, or
- U.S. Postal money order

NOTE: If you are applying for a fee waiver [CHAPTER 7 CASES ONLY] or fee installments, you must hand-deliver the remaining documents in person to the court.

LIST OF MINIMUM ITEMS REQUIRED WITHIN 10 DAYS:

1. A signed Declaration Regarding Electronic Filing (Self-Represented Individual) [SEE ATTACHED PDF]
2. A signed Statement About Your Social Security Numbers (Form 121) [SEE ATTACHED PDF]
3. A photocopy of your government-issued photo identification such as your driver's license or passport.
4. Copy of the Certificate of Credit Counseling for each Debtor(s) (or printed copy of electronic version).

NOTE: The electronically submitted petition will expire within 10 days of the date of this confirmation email. If you do not provide the items listed above before the expiration date, your case information will be removed from the system and you will not receive a bankruptcy case number.

Additional items may be submitted either by mail or through the Electronic Drop Box. In order to submit documents that do not require a signature or don't include a fee, you may request access to the Court's Electronic Drop Box: https://www.cacb.uscourts.gov/request-access-electronic-drop-box.

Complete, print and sign these additional required documents:
1. Statement of Related Cases F 1015-2.1.STMT.RELATED.CASES
2. Disclosure of Compensation of Bankruptcy Petition Preparer (Form B2800) (if applicable)
3. Bankruptcy Petition Preparer's Notice, Declaration and Signature (Form 119) (if applicable)
4. Verification of Master Mailing List of Creditors (F 1007-1.MAILING.LIST.VERIFICATION)
5. Declaration By Debtor(s) as to Whether Income Was Received From An Employer Within 60 Days of the Petition Date [Include Paystubs (if applicable)]
6. Initial Statement About an Eviction Judgment Against You (Form 101A) (if applicable)
7. Statement About Payment of an Eviction Judgment Against You (Form 101B) (if applicable)
8. Chapter 13 Plan [For Chapter 13 Cases Only]

DISMISSAL OF BANKRUPTCY CASE:

If the petition filing fee is not received within 10 days from the date of filing, your case will be dismissed. Additionally, if any of the required documents are not received by the Court by the deadline, your case will be dismissed.

ONCE YOUR CASE HAS BEEN FILED BY THE COURT:

The official time of filing is when a document is entered and docketed in the case management/electronic case filing system (CM/ECF), regardless of the filing method (in person, electronically through CM/ECF, through eSR or EDB, or placed in a physical drop box).

Once your case has been filed and issued a case number, a Notice of Bankruptcy Case Filing with your bankruptcy case number will be handed, mailed, or emailed to you. The case number is proof of your official bankruptcy filing. You may access the Court's automated Voice Case Information System (VCIS) 24 hours/7 days a week, toll free at (866) 222-8029.

You may request electronic notification for orders and court-generated notices by visiting the Debtor's Electronic Bankruptcy Noticing (DeBN) page and completing a request form: https://www.cacb.uscourts.gov/debtor-electronic-bankruptcy-noticing-debn.

FREE OR LOW COST ASSISTANCE:

If you cannot afford an attorney, the Court offers Help Desks at each court location with volunteer attorneys who may assist you. Visit the Court's Don't Have an Attorney web page for a complete listing of court resources. For information on low cost assistance in a chapter 13 case, view the following link to see the Chapter 13 Panel information: https://www.cacb.uscourts.gov/local-and-county-bar-associations-lawyer-referral-options.

SURVEY:

Please participate in a brief survey to share your experience using eSR. Your responses will be anonymous. You may reach the eSR survey at the following link: https://www.surveymonkey.com/r/CW2W363

Did you access any of the Court's Help Desks for free legal assistance? If so, please participate in a survey regarding your experience, using the following link: https://www.surveymonkey.com/s/CACBSelfHelp

Regards,
The eSR Team

Access the Bankruptcy Court in Person or Using Remote Access

eSR
electronic Self-Representation

To file petitions electronically, use eSR. eSR is a free online tool for self-represented debtors to use to prepare the bankruptcy forms.

How to find an attorney or access free/low cost help:

Find an attorney at www.cacb.uscourts.gov
Local and County Bar Associations & Lawyer Referral Options

Intake Appointment Scheduling System

This service provides debtors the ability to schedule online appointments with our Intake offices at each Division.

For appointments with the Self Help Desk, please visit our For Debtors page and locate the information under "Free or Low Cost Bankruptcy Help".

Pay.gov

Free online payment for copies, certified copies and installment payments after the first installment. Visit Online Payments for Self-Represented Litigants for details.

eDB

To submit non-fee documents electronically, use the Electronic Drop Box. The Electronic Drop Box is for self-represented litigants only.

https://www.cacb.uscourts.gov/request-access-electronic-drop-box

To file documents by mail, send to:

(Mail to the division assigned, based on the bankruptcy case. See website for additional details.)

U.S. Bankruptcy Court
Attention: Intake Department
255 E Temple St.
Los Angeles, CA 90012

U.S. Bankruptcy Court
Attention: Intake Department
411 West Fourth Street
Santa Ana, CA 92701

U.S. Bankruptcy Court
Attention: Intake Department
3420 Twelfth Street
Riverside, CA 92501

U.S. Bankruptcy Court
Attention: Intake Department
1415 State Street
Santa Barbara, CA 93101

U.S. Bankruptcy Court
Attention: Intake Department
21041 Burbank Boulevard
Woodland Hills, CA 91367

Have a question?

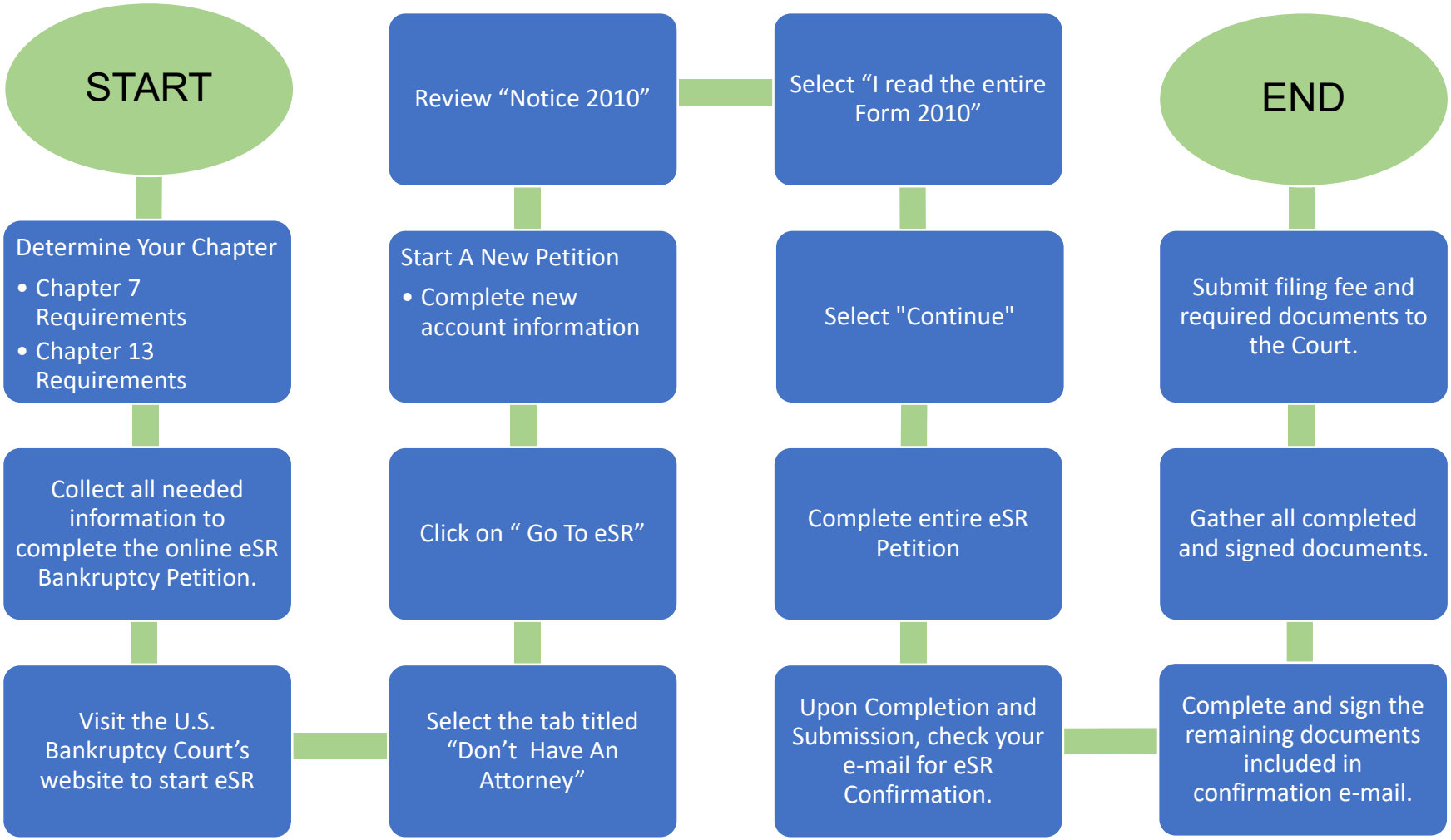
Call toll free
(855) 460-9641

www.cacb.uscourts.gov

Chat Live!
9am-4pm PST
Online

U.S. BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI

HOW TO PREPARE A PETITION USING eSR



Thomas F. Eagleton U.S. Courthouse
111 S. 10th Street, 4th Floor
St. Louis, MO 63102

(314) 244-4500
www.moeb.uscourts.gov
Office Hours: Mon – Fri, 8:30 AM – 4:30 PM

Dear Committee on Federal Rules of Civil Procedure —

I've submitted a proposal to amend FRCP 4(i) for more efficient summons on the Government. I note that it almost exclusively benefits those who can *initiate* a case through CM/ECF.

As the Committee may recall from my in-person testimony at the Nov. 2016 FRCP hearing, where I was the only person to speak about the proposed change to Rule 5, I strongly oppose the current Rule 5(d)(3). It acts as a total bar to CM/ECF case initiation for *pro se* litigants.

The Committee based its denial of my counter-proposal, *attached*, entirely on

1. a desire to put prior restraint on certain speech by a class that the Committee disfavors
2. to prevent harms that are implausible, remediable *post hoc*, or actually Constitutional rights
3. based on speculative hypotheticals unsupported by evidence, but rooted in a paternalistic and sometimes hostile view of *pro se* litigants as a class.

I had considered asking you to at least conduct a test run, so you'd see your fears were unfounded. Fortunately — to the sad extent that such a word can be applied to a pandemic — many courts have been forced to conduct that experiment by intervening circumstances. So instead, I now ask you to:

1. submit my counter-proposal[1], together with the full record[2], as a new suggestion;
2. survey the courts that have accepted electronic *pro se* case initiation (e.g. by email); and
3. pass my proposal based on the empirical evidence (i.e. if indeed the sky *hasn't* fallen[3]).

[1] Version dated Feb. 15, 2017, "Comments re proposed changes to CM/ECF filing rules for pro se litigants".
[2] *Attached*, including transcript of my testimony, and all substantive Committee discussion of the iterations.
[3] Please specifically compare to the scenarios claimed in opposition to my proposal: in *case initiation* filings, has there been an *unusually* high rate of: porn? libel? improper participation in others' cases? large filings, e.g. from *Meads* style OPCALs? bad docketing? ...? I doubt it, but if the facts are against me, I'll freely admit error. Please do likewise.

I request to participate remotely at any hearing on the matter, and to receive emailed copies of all relevant agendas, minutes, reports, or other documents.

Respectfully submitted,
Sai[4]
President, Fiat Fiendum, Inc.
sai@fiatfiendum.org
April 14, 2021

[4] Sai is my full legal name; I am mononymous. I am agender; please use gender-neutral pronouns. I am partially blind. Please send all communications, in § 508 accessible format, by email.

Committee on Rules of Practice and Procedure of the Judicial Conference of the United States
Standing Committee and Advisory Committees on Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure
Rebecca A. Womeldorf, Secretary
Rules_ Support@ao.uscourts.gov

Comments re proposed changes to CM/ECF filing rules for *pro se* litigants

As the proponent of 15-AP-E, 15-BK-I, 15-CR-D, 15-CV-EE, and 15-CV-GG, which are in part to be discussed at the upcoming hearings, I submit these comments on the proposed amendments, in opposition to the proposed language that would require *pro se* litigants to obtain leave of court before being allowed to use CM/ECF, and proposing alternative rules that avoid these problems while accomplishing the legitimate objectives raised by the committees.

First, however, I would like to point out a problem of representation. While attorneys and judges are very well represented on the Committee — both as commenters and members — there are few if any proponents of the rights of *pro se* litigants. This is a structural problem; among other things, *pro se* litigants are mostly unaware of the judicial rulemaking process, are not invited to contribute, and (unlike other participants, like class action lawyers) have no organization.

As far as I can tell from the committee notes and minutes on this matter, not a single *pro se* litigant, except for myself and one brief commenter[1], has been involved in this rulemaking. Comments have been from people with a quasi-adversarial relationship with *pro se* litigants, such as having to manage difficult cases — resulting in a patronizing, limiting perspective that does not adequately weigh the impacts on the affected *pro se* litigants. I urge the Committee to take serious consideration of the one-sided nature of advocacy on this matter.

While I recognize that there are difficulties with *pro se* litigants, and have had some myself, these are not sufficient reasons for a rule that would presumptively treat all *pro se* litigants as vexatious, and impair their Constitutional rights to *equal* access to the courts.

Respectfully submitted,
/s/ Sai
legal@s.ai

[1] *See* suggestion of Dr. Robert Miller, 15-AP-H / 15-CR-EE / 15-CV-JJ.

A. Summary of proposed changes

The proposed changes below alter the Committee's proposal to:

1. Remove the presumptive prohibition on *pro se* use of CM/ECF, and instead grant presumptive access. This includes CM/ECF access for case initiation filings.
2. Treat *pro se* status as a rebuttably presumed good cause for nonelectronic filing.
    a. For *pro se* prisoners, this is treated as an irrebutable presumption, in the spirit of the FRCrP Committee's notes and for conformity across all the rules.
3. Require courts to allow *pro se* CM/ECF access on par with attorney filers, prohibiting any restriction merely for being *pro se* or a non-attorney, and prohibiting registration fees.
4. Permit *individualized* prohibitions on CM/ECF access for good cause, e.g. for vexatious litigants, and (in the notes) construe pre-enactment vexatious designation as such a prohibition.
5. Change the "signature" paragraph for the reasons stated in my comment re proposed FRAP 25(a)(2)(B)(iii), USC-RULES-AP-2016-0002-0011, *posted* Feb 3, 2017.
6. Conform the signature paragraph in the FRCrP version to the location used in the other rules.

B. Proposed rules

The Committees have proposed the following parallel rule changes. On the left are the committee's proposed changes; on the right are my proposed alternatives. Differences marked in **bold**; ~~strikeout~~ is used only in the notes, so as to not conflict with strikeout of prior rule. Italics are additions to the prior rule.

I. F. R. Appellate P. — Rule 25. Filing and Service

A. …
1. …
2. Filing: Method and Timeliness.
a) *...*
b) ~~...~~
Electronic Filing and Signing
(1) 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.
(2) By an Unrepresented Person— When Allowed or Required. A person not represented by an attorney:
(a) may file electronically only if allowed by court order or by local rule; and
(b) may be required to file electronically only by court order, or by a local rule that includes

II. F. R. Appellate P. — Rule 25. Filing and Service

A. …
1. …
2. Filing: Method and Timeliness.
a) *...*
b) *...*
Electronic Filing and Signing
(1) Generally Required. Unless an exception or prohibition applies, every person must file electronically.
(2) Exceptions. A person may file nonelectronically if:
*(a) nonelectronic filing is allowed by the court for good cause**,** or is allowed or required by local rule**, or***
(b) the person is not represented by an attorney; unless the court orders, for good cause, that the person must file electronically.
(i) No court may require a prisoner not represented by an attorney

reasonable exceptions.

(3) Signing. The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

to file electronically.

(3) Prohibition. A person must not file electronically if prohibited, for good cause, by court order.

(a) No court may prohibit electronic filing on the basis that a person is not represented by an attorney or is not an attorney.

(4) Signing. ***Any document filed electronically that has a signature block attributing the document to the filer is considered to be signed by the filer.***

Committee Note

The amendments conform Rule 25 to the amendments to Federal Rule of Civil Procedure 5 on electronic filing, signature, service, and proof of service. They establish, in Rule 25(a)(2)(B), a new national rule that generally makes electronic filing mandatory. The rule recognizes exceptions for persons proceeding without an attorney, exceptions for good cause, and variations established by local rule. The amendments establish national rules regarding the methods of signing and serving electronic documents in Rule 25(a)(2)(B)(iii) …

Committee Note

The amendments conform Rule 25 to the amendments to Federal Rule of Civil Procedure 5 on electronic filing, signature, service, and proof of service. They establish, in Rule 25(a)(2)(B), a new national rule that generally makes electronic filing mandatory. The rule recognizes exceptions for persons proceeding without an attorney, exceptions for good cause, and variations established by local rule. The amendments establish national rules regarding the methods of signing and serving electronic documents in Rule 25(a)(2)(B)(**iv**) …

Rule 25(a)(2)(B)(iii). Orders issued before the enactment of this rule declaring a person to be a vexatious litigant, and otherwise silent on electronic filing, shall be considered to prohibit electronic filing. Orders issued after the enactment of this rule must clearly state a prohibition on

electronic filing. Such prohibitions may be modified by superceding order.

Rule 25(a)(2)(B)(iii)(a). Courts may require *pro se* or non-attorney filers to complete the same CM/ECF training, registration, or similar requirements ordinarily imposed on attorney filers, except for registration fees. Courts may also require that *pro se* or non-attorney filers sign an electronic affidavit about having read, understood, and agreed to the court's rules; and may require different affidavits from attorneys and non-attorneys.

Courts must permit, but not require, electronic case initiation and other filing by *pro se* or non-attorney filers, except on a case-by-case determination of good cause.

III. F. R. Bankruptcy P. — Rule 5005. Filing and Transmittal of Papers

A. FILING.

1. …

2. *Electronic* Filing *and Signing* ~~by Electronic Means.~~

a) *By a Represented Entity—Generally Required; Exceptions.* ~~A court may by local rule permit or require documents to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes.~~ *An entity represented by an attorney shall file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.* ~~A local rule may require filing by electronic means only if reasonable exceptions are allowed.~~

b) *By an Unrepresented Individual— When Allowed or Required. An individual not represented by an attorney:*

(1) may file electronically only if allowed by court order or by local rule; and

(2) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

c) *Signing. The user name*

IV. F. R. Bankruptcy P. — Rule 5005. Filing and Transmittal of Papers

A. FILING.

1. …

2. *Electronic* Filing *and Signing* ~~by Electronic Means.~~

a) ~~A court may by local rule permit or require documents to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed.~~ ***Generally Required. Unless an exception or prohibition applies, every person must file electronically.***

b) ***Exceptions. A person may file nonelectronically if:***

*(1) nonelectronic filing is allowed by the court for good cause**,** or is allowed or required by local rule**, or***

(2) the person is not represented by an attorney; unless the court orders, for good cause, that the person must file electronically.

(a) No court may require a prisoner not represented by an attorney to file electronically.

c) ***Prohibition. A person must not file electronically if***

and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

prohibited, for good cause, by court order.

(1) No court may prohibit electronic filing on the basis that a person is not represented by an attorney or is not an attorney.

d) *Signing.* ***Any document filed electronically that has a signature block attributing the document to the filer is considered to be signed by the filer.***

Committee Note

Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts, except for filings made by an individual not represented by an attorney. But exceptions continue to be available. Paper filing must be allowed for good cause. And a local rule may allow or require paper filing for other reasons.

Filings by an individual not represented by an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules or court order. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic

Committee Note

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A *pro se* litigant enjoys a rebuttable presumption (and for a *pro se* prisoner, an irrebuttable presumption) of having good cause not to file electronically. Unless ordered otherwise on a case by case basis, they may file either electronically or nonelectronically, including for case initiation. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate

filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in these and other courts, along with the growing availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication.	electronic filing, filing by pro se litigants is left for governing by local rules or court order. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission**; this rule change requires that permission be given on the same terms as any other filer**. Such approaches may expand with growing experience in these and other courts, along with the growing availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication.
The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.	~~The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.~~

V. F. R. Civil P. — Rule 5. Serving and Filing Pleadings and Other Papers

A. …

D. Filing.

1. …

3. Electronic Filing~~,~~ *and* Signing~~,~~ ~~or Verification~~. ~~A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require electronic filing only if reasonable exceptions are allowed.~~

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. A person not represented by an attorney:

(1) may file electronically only if allowed by court order or by local rule; and

(2) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

c) Signing. The user name and password of an attorney of record, together with the attorney's name on

VI. F. R. Civil P. — Rule 5. Serving and Filing Pleadings and Other Papers

A. …

D. Filing.

1. …

3. Electronic Filing~~,~~ *and* Signing~~,~~ ~~or Verification~~. ~~A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require electronic filing only if reasonable exceptions are allowed.~~

a) ***Generally Required. Unless an exception or prohibition applies, every person must file electronically.***

b) ***Exceptions. A person*** *may* ***file nonelectronically if:***

*(1) nonelectronic filing is allowed by the court for good cause****,*** *or is allowed or required by local rule****, or***

(2) ***the person is not represented by an attorney; unless the court orders, for good cause, that the person must file electronically.***

(a) ***No court may require a prisoner not represented by an attorney to file electronically.***

c) ***Prohibition. A person must not file electronically if prohibited, for good cause, by court order.***

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(1) ***No court may prohibit electronic filing on the basis that a person is not represented by an attorney or is not an attorney.***

d) Signing. ***Any document filed electronically that has a signature block attributing the document to the filer is considered to be signed by the filer.***

Committee Note

Rule 5 is amended to reflect the widespread transition to electronic filing and service. Almost all filings by represented parties are now made with the court's electronic-filing system.

…

Amended Rule 5(d)(3) recognizes increased reliance on electronic filing. Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it generally mandatory in all districts for a person represented by an attorney. But exceptions continue to be available. Nonelectronic filing must be allowed for good cause. And a local rule may allow or require nonelectronic filing for other reasons.

Filings by a person not represented by an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties,

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The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.	~~The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.~~ **Rule 5(d)(3)(C). Orders issued before the enactment of this rule declaring a person to be a vexatious litigant, and otherwise silent on electronic filing, shall be considered to**

prohibit electronic filing. Orders issued after the enactment of this rule must clearly state a prohibition on electronic filing. Such prohibitions may be modified by superceding order.

Rule 5(d)(3)(C)(i). Courts may require *pro se* or non-attorney filers to complete the same CM/ECF training, registration, or similar requirements ordinarily imposed on attorney filers, except for registration fees. Courts may also require that *pro se* or non-attorney filers sign an electronic affidavit about having read, understood, and agreed to the court's rules; and may require different affidavits from attorneys and non-attorneys.

Courts must permit, but not require, electronic case initiation and other filing by *pro se* or non-attorney filers, except on a case-by-case determination of good cause.

VII. F. R. Criminal P. — Rule 49. Serving and Filing Papers

A. Service on a Party.

1. …

3. Service by Electronic Means.

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

b) …

4. …

B. Filing.

1. …

2. Means of Filing.

a) Electronically. A paper is filed electronically by filing it with the court's electronic-filing system. The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature. A paper filed electronically is written or in writing under these rules.

b) …

3. Means Used by Represented and Unrepresented Parties.

VIII. F. R. Criminal P. — Rule 49. Serving and Filing Papers

A. Service on a Party.

1. …

3. Service by Electronic Means.

*a) Using the Court's Electronic Filing System. **A registered user** may serve a paper on a registered user by filing it with the court's electronic-filing system. A party not represented by an attorney **is not required to do so unless otherwise required** by court order or local rule. Service is complete upon filing, but is not effective if the serving party learns that it did not reach the person to be served.*

b) …

4. …

B. Filing.

1. …

2. Means of Filing.

a) Electronically. A paper is filed electronically by filing it with the court's electronic-filing system. A paper filed electronically is written or in writing under these rules.

b) …

3. Electronic filing and signing

a) Generally Required. Unless an exception or prohibition applies, every person must file electronically.

b) Exceptions. A person may file nonelectronically if:

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

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

4. …

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

D. …

*(1) nonelectronic filing is allowed by the court for good cause**,** or is allowed or required by local rule**,***

(2) the person is not represented by an attorney; unless the court orders, for good cause, that the person must file electronically.

(a) No court may require a prisoner not represented by an attorney to file electronically.

c) Prohibition. A person must not file electronically if prohibited, for good cause, by court order.

(1) No court may prohibit electronic filing on the basis that a person is not represented by an attorney or is not an attorney.

d) Signing. Any document filed electronically that has a signature block attributing the document to the filer is considered to be signed by the filer.

4. …

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D. …

Committee Note

Rule 49 previously required service and filing in a "manner provided" in "a civil action." The amendments to Rule 49 move the instructions for filing and service from the Civil Rules into Rule 49. Placing instructions for filing and service in the criminal rule avoids the need to refer to two sets of rules, and permits independent development of those rules. Except where specifically noted, the amendments are intended to carry over the existing law on filing and service and to preserve parallelism with the Civil Rules.

Additionally, the amendments eliminate the provision permitting electronic filing only when authorized by local rules, moving—with the Rules governing Appellate, Civil, and Bankruptcy proceedings—to a national rule that mandates electronic filing for parties represented by an attorney with certain exceptions. Electronic filing has matured. Most districts have adopted local rules that require electronic filing by represented parties, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts for a party represented by an attorney, except that nonelectronic filing may be allowed by the court for good cause, or allowed or required by local rule.

…

Rule 49(a)(3) and (4). Subsections (a)(3) and (4) list the permissible means of service. These new provisions duplicate the description of permissible means from Civil Rule 5, carrying them into the criminal rule.

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widespread use in criminal cases by represented defendants and government attorneys.

But the e-filing system is designed for attorneys, and its use can pose many challenges for pro se parties. In the criminal context, the rules must ensure ready access to the courts by all pro se defendants and incarcerated individuals, filers who often lack reliable access to the internet or email. Although access to electronic filing systems may expand with time, presently many districts do not allow e-filing by unrepresented defendants or prisoners. Accordingly, subsection (3)(A) provides that represented parties may serve registered users by filing with the court's electronic-filing system, but unrepresented parties may do so only if allowed by court order or local rule.

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Rule 49(b)(2). New subsection (b)(2) lists the three ways papers can be filed. (A) provides for electronic filing using the court's electronic-filing system and includes a provision, drawn from the Civil Rule, stating that the user name and password of an attorney of record serves as the attorney's signature. The last sentence of subsection (b)(2)(A) contains the language of former Rule 49(d), providing that e-filed papers are "written or in writing," deleting the words "in compliance with a local rule" as no longer

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…	…
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Subsection (b)(3)(B) requires unrepresented parties to file nonelectronically, unless allowed to file electronically by court order or local rule. This language differs from that of the amended Civil Rule, which provides that an unrepresented party may be "required" to file electronically by a court order or local rule that allows reasonable exceptions. A different approach to electronic filing by unrepresented parties is needed in criminal cases, where electronic filing by pro se prisoners presents significant challenges. Pro se parties filing papers under the criminal rules generally lack the means to e-file or receive electronic confirmations, yet must be provided access to the courts under the Constitution.	Subsection (b)(3)(B)**(ii)(a) prohibits restriction on pro se prisoners' right to file nonelectronically** ~~requires unrepresented parties to file nonelectronically, unless allowed to file electronically by court order or local rule~~**.** ~~This language differs from that of the amended Civil Rule, which provides that an unrepresented party may be "required" to file electronically by a court order or local rule that allows reasonable exceptions. A different approach to electronic filing by unrepresented parties is needed in criminal cases, where e~~**E**lectronic filing by pro se prisoners presents significant challenges. Pro se parties filing papers under the criminal rules generally lack the means to e-file or receive electronic confirmations, yet must be provided access to the courts under the Constitution.
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Rule 49(c). This provision is new. It recognizes that in limited circumstances nonparties may file motions in criminal cases. Examples include representatives of the media challenging the closure of proceedings, material witnesses requesting to be deposed under Rule 15, or victims asserting rights	Rule 49(c). This provision is new. It recognizes that in limited circumstances nonparties may file motions in criminal cases. Examples include representatives of the media challenging the closure of proceedings, material witnesses requesting to be deposed under Rule 15, or victims asserting rights

under Rule 60. Subdivision (c) permits nonparties to file a paper in a criminal case, but only when required or permitted by law to do so. It also requires nonparties who file to serve every party and to use means authorized by subdivision (a).

The rule provides that nonparties, like unrepresented parties, may use the court's electronic-filing system only when permitted to do so by court order or local rule.

under Rule 60. Subdivision (c) permits nonparties to file a paper in a criminal case, but only when required or permitted by law to do so. It also requires nonparties who file to serve every party and to use means authorized by subdivision (a).

The rule provides that nonparties~~, like unrepresented parties,~~ may use the court's electronic-filing system ~~only when permitted to do so by court order or local rule~~ **on the same terms as any other person**.

…

Rule 49(b)(3)(C). Orders issued before the enactment of this rule declaring a person to be a vexatious litigant, and otherwise silent on electronic filing, shall be considered to prohibit electronic filing. Orders issued after the enactment of this rule must clearly state a prohibition on electronic filing. Such prohibitions may be modified by superceding order.

Rule 49(b)(3)(C)(i). Courts may require *pro se* or non-attorney filers to complete the same CM/ECF training, registration, or similar requirements ordinarily imposed on attorney filers, except for registration fees. Courts may also require that *pro se* or non-attorney filers sign an electronic affidavit about having read, understood, and agreed to the court's rules; and may require different affidavits from attorneys and non-attorneys.

Courts must permit, but not require, electronic case initiation and other filing by *pro se* or non-attorney filers, except on a case-by-case determination of good cause.

C. Introduction

My name is Sai[2]. I do many things, but relevant here is my legal advocacy work[3] and, to some extent, my disabilities. I have no formal training in law.

After being the victim of a series of abuses by the Transportation Security Administration (TSA) at airport checkpoints, I filed formal Rehabilitation Act complaints and Federal Tort Claims Act (FTCA) claims. This was followed by a variety of Freedom of Information Act (FOIA) and Privacy Act requests aimed both at investigating what happened to me and exposing TSA's secret policies and procedures.

When my efforts were met only by agency stonewalling, I sued — first under FOIA / Privacy Act, then under the APA / Rehabilitation Act. After a year of litigation in the latter, I prevailed and obtained an injunction[4], and was subsequently awarded prevailing party status and costs.[5]

These cases were my introduction to litigation; I learned by doing. To paraphrase another, I am too sensible of my defects not to realize that I committed many errors. No civil procedure text is adequate preparation, when compared to experience.

I have been *pro se* not from pride or lack of attempt to get counsel, but because I am both poor and principled. I was unable to obtain counsel without submitting my IFP affidavit on public record, 149 F. Supp. 3d 99, 126-28, in violation of my rights to privacy, which I refused to do.

My cases are not frivolous, and I am not vexatious — just poor, unwilling to give up my civil rights, and unable to find *pro bono* counsel to handle my primary litigation.

Despite the Supreme Court's assumptions in *Kay v. Ehrler*, 499 US 432, 437 (1991) as to "the overriding statutory concern is the interest in obtaining independent counsel for victims of civil

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[2] I am mononymic; Sai is my full legal name. I prefer to be addressed or referred to without any title (e.g. no "Mr.") and with gender-neutral language / pronouns (e.g. "they/their" or "Sai/Sai's").

[3] *See* https://s.ai/work/legal_resume.pdf

[4] *Sai v. DHS et al.,* 149 F. Supp. 3d 99, 110-21 (D. D.C. 2015)

[5] *Id.,* ECF No. 93 (April 15, 2016)

rights violations" — and indeed the general prejudice that equates "*pro se*" with "frivolous" — it is still true that "some civil rights claimants with meritorious cases [are] unable to obtain counsel". *Bradshaw v. Zoological Soc. of San Diego*, 662 F. 2d 1301, 1319 (9th Cir. 1981).

This category of meritorious plaintiffs unable to obtain a lawyer and forced to proceed *pro se* includes me and many others like me. Even when not facing a Hobson's choice between privacy and access to counsel, *In re Boston Herald, Inc. v John J. Connolly, Jr.*, 321 F.3d 174, 188 (1st Cir. 2003), the financial and structural barriers to obtaining counsel are often insurmountable.

These barriers are compounded by inequities in accessing the courts *pro se*. Not only do I not have the skill and training of my opponents from the Department of Justice, I do not have access to a legal research staff, Lexis, WestLaw, or a law library. Due to my disabilities, I face further difficulties dealing with non-electronic documents. CM/ECF helps, and I use it regularly.

The Committee's proposed rule would worsen this situation — creating a presumptive *de facto* sanction akin to those applied to vexatious litigants — when instead it should be improved, by allowing *pro se* litigants fully equal access to CM/ECF and the many benefits thereof.

D. Argument

1. The proposed rule[6] confuses permission with requirement

The official committee notes on the proposed rule, and the final committee comments, make clear that the intent of the rule is to protect *pro se* filers from the electronic filing mandate that the rules change would otherwise impose on represented plaintiffs.

I fully support this motivation, so far as it goes.[7] It is indeed true that many *pro se* filers may not have the skills, equipment, Internet access, electronic document creation and redaction software, etc. that are required to fully participate in CM/ECF. This is particularly acute, as the FRCrP committee points out, for *pro se* prisoners, whose institutions may severely limit their access to email, computers, Internet, and other critical resources.

The proposed rule, for represented parties, permits non-electronic filing on a showing of good cause. In effect — and in my proposed alternative — *pro se* filers should be given a rebuttable presumption of this same good cause, permitting them to file non-electronically without first seeking leave of court. *Pro se* prisoners should be given an *irrebuttable* presumption, in consideration of their much more restrictive and sometimes unpredictable situations.

However, the proposed rule goes much farther: it does not merely permit non-electronic filing by *pro se* litigants (prisoners and otherwise). Rather, it *requires* non-electronic filing — *prohibiting* electronic filing — without a first showing of good cause.

This requirement imposes a wide array of seriously prejudicial, costly, and unequal effects on those *pro se* litigants who *are* capable of using electronic filing and desire to do so.

[6] Because the proposed changes to the FRAP, FRBP, FRCrP, and FRCvP are essentially equivalent, I treat them as a single 'rule', noting differences only where applicable.

[7] Prior committee minutes and comments make clear that there are in fact other motivations for the proposed rule that go beyond protection to prohibition. I oppose and address those below.

2. The proposed rule is overbroad, and ignores its procedural implications.

The proposed rule requires that a litigant obtain leave of court, *in each specific case*, to file electronically. Even if they have used CM/ECF before — indeed, even if they are currently a CM/ECF filer in the *same court* — they must obtain leave in each new case. The rule as drafted would even prohibit *attorneys* who are members of the court's bar from electronic filing if they appear *pro se*, i.e. without being "represented by" someone else.

Because leave of court cannot be obtained in a case before that case even exists on the docket, the procedural implication is that *pro se* filers — even those who would easily obtain leave of court — can *never* file case initiation by CM/ECF.

An attorney filer can simply fill out a form (often online), check their consent and agreement to the terms of use, possibly go through an online CM/ECF tutorial, and proceed — initiating the case electronically and having immediate NEFs of all proceedings.

A *pro se* filer must read the local rules (and CM/ECF guidelines) in detail, draft their own motion and affidavit noting every specific requirements of each court, file it by mail, and hope for the best. The rules give no form motion for this, and courts vary in their requirements. A response might come by mail or email, perhaps weeks later (if approved at all).

3. Harms from not allowing CM/ECF by *pro se* filers

Litigants have the right to appear pro se in all court proceedings. 28 U.S. Code § 1654.[8] This right is Constitutionally backed in multiple aspects: the 6th Amendment right to refuse counsel; substantive and procedural due process rights under the 14th Amendment; Constitutional rights of action, such as 42 U.S. Code § 1983 / Bivens; and the per se right to equal access to the courts.[9]

The proposed rule impairs these rights by prohibiting pro se litigants from accessing the benefits of CM/ECF on an equal basis with represented litigants. It does so without any particularized determination that a given pro se litigant, contrary to their presumptive desire to opt in[10], should

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[8] "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

[9] I am aware of only one case that has analyzed differential CM/ECF rules for *pro se* litigants: *Greenspan v. Administrative Office of U.S. Courts*, No. 5:14-cv-02396 (N.D. CA. Dec. 4, 2014) at *13-14 (upholding CAND L.R. 5-1(b), which prohibits *pro se* electronic filing without leave of court, under rational basis review). However, Greenspan did not raise, and that court did not consider, the arguments presented here; the case was principally about whether Greenspan could represent his corporation *pro se*.

Even there, the court's reasoning ("a number of *pro se* litigants lack access to a computer … or the skills needed to maneuver through the electronic case filing system", *id*. at *14) only supports a permissive rule exempting *pro se* litigants from otherwise-mandatory electronic filing (i.e. allowing them to file either way).

It does not indicate any rational basis for going further and *forbidding* all members of the class of *pro se* litigants from using electronic filing until leave of court is obtained, merely because some members of the class may not wish to, or may not be able to, take advantage of it.

This argument is especially weak when applied to to *pro se* litigants who actively wish to opt in. If, given access, someone can file a case initiation — perhaps the most complex single docket entry in the CM/ECF system — it would surely be hard to find any rational basis to assume that they are *not* able to use CM/ECF. If they are not able to, no harm is done in allowing them to try.

[10] I assume here that the *pro se* litigant in question would, if permitted, sign up for CM/ECF online and file everything electronically — but for a rule requiring them to first obtain leave of court. If they file on paper voluntarily, these harms are still present, but are at least consented to.

The alternative rule I proposed above would protect *pro se* litigants who can be presumed to have good cause not to use CM/ECF, by allowing them to continue to file by paper unless the

be barred from CM/ECF usage.[11]

a. Total ban on pro se CM/ECF case initiation

Because a case must be initiated before a motion for CM/ECF access can even be filed and an order issued, any requirement to first obtain permission means all *pro se* case initiation must be filed on paper. No CM/ECF permission order, no matter how timely granted, can cure this.

The types of harms this causes are detailed below — but case initiation is unique.

The exact filing time can be dispositive, as when there is a statute of limitations or other jurisdictional deadline. This is especially so if the deadline is over a weekend or other time when the court is physically closed, or if the situation precludes the luxury of additional time to file.

In cases seeking PI/TRO relief — particularly an emergency *ex parte* TRO — case initiation delays can cause a winnable issue to be mooted, or exacerbate an irreparable harm. While TROs are only rarely merited, a plaintiff is no less entitled to such relief merely for being *pro se*.

Case initiation documents may be larger than other motions — particularly now, when cautious plaintiffs may feel forced to provide extensive affidavits or exhibits upfront to avoid an *Iqbal* challenge. Especially when courts require multiple duplicates of case initiation documents for service, chambers, etc., the printing and mailing costs are higher than for other filings.

All *pro se* litigants are irreparably harmed by a rule that requires post-initiation CM/ECF permission. In at least some situations, this alone can make or break a case.

b. Delays

Filing on paper imposes numerous delays.

CM/ECF access is directly linked to receiving notices of electronic filing (NEFs). Where a

court makes a particularized determination overcoming this presumption.

[11] For instance, a court might determine that a given litigant is vexatious; that they do not appear to receive adequate notice by email, and should be served by mail instead; or that for some reason their CM/ECF usage is so severely impaired or abusive, where their paper filings would *not* be, that they should be prohibited from using CM/ECF.

CM/ECF filer receives immediate notice of every filing by email, a non-electronic filer must wait for physical mail to arrive (and possibly to be forwarded, scanned, etc) before even being aware of the filing.[12] For litigants with disabilities, who travel frequently, or reside overseas, such as me, waiting for and accessing physical mail imposes routinely delays of weeks.

This is just to *receive* filings; one must also respond.

Whereas CM/ECF allows *immediate* filing and docketing, paper filings must first be printed, mailed, processed by the court's mailroom, processed by the court's clerk, and docketed.

Depending on the location of the litigant and court, the price paid for printing & mailing services, and other factors, this can routinely take about a week to complete.

In most situations, paper filing cannot be completed at all on weekends or after business hours. Where a CM/ECF filer might stay up late to finish a brief, realize that it won't be done in time, and timely file a motion for extension at 11:50 pm that is nearly certain to be granted, it would be impossible for a paper filer to do the same.

If a dispositive motion is pending, such as MTD or MSJ, then the court could rule on the "unopposed" motion, against the *pro se* litigant — dismissing their case before their motion for extension even has the chance to reach the courthouse.

Due to these delays, a *pro se* litigant is impaired should they seek to file a timely *amicus curiae* brief or to intervene in a case.

People who can afford lawyers are not the only ones who can or should be friends of the court. “An amicus brief should normally be allowed” when “the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *Cmty. Ass’n for Restoration of Env’t (CARE) v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. WA. 1999) (citing *Northern Sec. Co. v. United States*, 191 U.S. 555, 556 (1903)). Presumptive CM/ECF prohibition imposes another unnecessary burden on would-be *amici* who

[12] Alternatively, they must check PACER on a daily basis, incurring fees that NEF recipients do not while also incurring a different burden on their work habits.

do not have the resources to hire a lawyer. These burdens cause the courts lose the voices of many who have "unique information or perspective" to proffer. As with so many parts of our justice system, this systemically and selectively silences people and groups with less money.[13]

Seeking leave to intervene in a case is hardly a sign of a frivolous filing. Motions to intervene as a member of the press, in order to challenge seal or protective order, is part of the "long-established legal tradition [of] the presumptive right of the public to inspect and copy judicial documents and files". *In re Knoxville News Sentinel Co.*, 723 F.2d 470, 473-74 (6th Cir. 1983), *citing* *Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978).[14] In today's era of

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[13] Recently, the Language Creation Society (a non-profit organization I founded) filed an *amicus* brief in *Paramount v. Axanar*, No. 2:15-cv-09938 (C.D. CA., *amicus filed* April 27, 2016) (re copyrightability of the Klingon language). *See* http://conlang.org/axanar.

Fortunately, we were able to obtain the services of an excellent First Amendment lawyer *pro bono*. Without his generosity, we could not have afforded counsel, and I would likely have drafted and filed the *amicus* myself. Within the LCS, I had the best combination of legal and linguistic expertise to present the court with "unique information or perspective" on an issue — whether or not languages can be copyrighted — that the parties only touched on in passing.

In an entirely different context, I have done similarly on behalf of another nonprofit I founded — opposing a poorly crafted FEC advisory opinion request on Bitcoin based campaign finance contributions. The proposal was backed by both an extremely experienced campaign finance lawyer and the Bitcoin Foundation, but I had the unique perspective on the *intersection* of law and technology needed to point out many severe loopholes in the plan. My opposition was successful (FEC deadlocked 3-3) — as was my later alternative proposal (approved 6-0). *See* https://www.makeyourlaws.org/fec/bitcoin/caf and https://www.makeyourlaws.org/fec/bitcoin/.

I recognize that this may seem like an attempt to brag, but it is not. I am perhaps unique in my particular combination of skills, but so is everyone. That is the whole point of *amici*: to encourage third parties to contribute their unique perspectives to courts' decisionmaking. This purpose is not served by discouraging *amici* who cannot afford a lawyer.

[14] The circuits are *unanimous* that third parties may permissively intervene for the specific purpose of accessing judicial records. *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783 (1st Cir. 1988); *Martindell v. International Telephone and Telegraph Corp.*, 594 F.2d 291, 294 (2nd Cir. 1979); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3rd Cir. 1994); *In re Beef Industry Antitrust Litigation*, 589 F.2d 786, 789 (5th Cir. 1979); *Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159, 162 (6th Cir. 1987); *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 896 (7th Cir. 1994); *Beckman Industries, Inc. v. International Insurance Co.*, 966 F.2d 470, 473 (9th Cir. 1992); *United Nuclear Corp. v. Cranford Insurance Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990).

citizen journalism, it is not only large media organizations who can afford lawyers that need to exercise this right. Independent journalists do too — and must file a *pro se* intervention to do so.

This inequity in access and delays results in two procedurally different systems. In one, a litigant can routinely work right up to the deadline, and quickly make last-minute filings if necessary. In the other, a litigant faces a *de facto* one week reduction of all their drafting times, and a total bar to last-minute filings.[15]

This inequity goes beyond mere convenience. If non-consensual, it is a substantial burden added to *every part* of litigating a case — from reducing the time one has to draft filings and access for independent journalists all the way to being dispositive of certain causes of action or barring some critical forms of relief, like last-minute extensions on dispositive motions, altogether.

c. Costs

Filing electronically, if one has the computer and Internet access needed to participate in CM/ECF, costs nothing. The entire cost of making, transferring, and serving PDFs, even hundreds of pages' worth (a few megabytes at most), amounts to not barely one *milli*-cent.[16]

By contrast, printing costs about 10-20¢ per page, and mailing an average sized motion via certified mail costs about $5. Paper filers must print and mail copies of every filing to the court and to all other parties. Court rules often require multiple copies for the court itself.[17]

This is on top of any cost or time required to get to a print shop or post office in the first place.

For litigants who are overseas or disabled, and therefore unable to access a U.S. post office in person in order to send certified mail, this creates additional costs and other barriers — requiring the use of online print and mail services, depending on friends, etc.

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[15] *Pro se* litigants are given no special consideration for procedural standards such as filing times.
[16] *See* e.g. https://aws.amazon.com/s3/pricing/ (storage and transfer costs ~2¢ per *gigabyte*).

[17] *See e.g.* Ninth Circuit Rule 25-5(f), FRAP 27(d)(3) (ordinarily requiring no paper copies of motions for CM/ECF users — but for paper filers, requiring one 'original' plus three 'copies' for the court).

With each filing costing about $5-20, and dozens of filings per case, these costs can easily accumulate to hundreds of dollars.

This is especially harmful for *pro se* litigants proceeding *in forma pauperis* ("IFP"), 28 U.S.C. § 1915. While IFP plaintiffs are excused from court fees, they are *not* protected from such costs. A court that requires a *pro se* IFP litigant to file on paper effectively imposes unnecessary extra costs on them — costs that their represented opponents do not bear. This goes directly against the intent of the IFP statute.

Even if the *pro se* IFP litigant is successful, and has the skill and awareness to file a motion for costs, such motions can generally only be filed after final judgment. In the meantime, the litigant must incur potentially hundreds of dollars — even though a court granting IFP status has already determined that its filing fee, ~$400, is more than they can reasonably bear.

These costs also hinder equality on the merits. A *pro se* litigant without CM/ECF access may easily be deterred from filing evidence, such as exhibits or affidavits, that could make the critical difference to whether a case survives *Iqbal* (or 28 USC § 1915(e)(2)(B)) review.

d. Accessibility and presentability

Properly made electronic PDFs are dramatically more accessible than scanned paper. CM/ECF normally generates the former; a "non-electronic filing" necessarily generates the latter.

For people with disabilities such as blindness, this difference is critical. Modern optical character recognition (OCR) technology is very inaccurate; a scanned and OCR'd document is functionally inaccessible to adaptive technology such as screen readers — whereas the electronic document from which it was printed is likely to be largely accessible.[18]

Electronic documents are better for everyone than scanned paper. They are more readable on a

[18] *Full* accessibility is more complicated, and requires paying attention to preserve structural metadata such as headers, as well adding metadata for some information, such as images. *See e.g.* the U.S. Access Board's new regulations under the Rehabilitation Act § 508: https://www.access-board.gov/guidelines-and-standards/communications-and-it/about-the-ict-refresh/overview-of-the-final-rule

screen; they can be more readily printed in large print or other adaptive formats; they preserve hyperlinks; and they permit PDF structuring, such as bookmarks for sections or exhibits.

These benefits are not only for the filer. Other parties' counsel may have disabilities[19], as may the judge[20]. Even for those without disabilities, very routine operations — for instance, copying a citation into a search engine, or pasting a quote into a draft response or opinion — are far easier with electronic documents, but can pose significant barriers with scanned paper documents.

Receiving paper filings hinders the litigant's own access to court documents.

Being required to file on paper hinders *everyone's* access to the litigant's filings, making them less likely to be read as carefully or treated as seriously as they might otherwise be — and creating yet another subtle but significant bias against the *pro se* litigant.[21]

e. Tracking cases of interest

Although not a formal part of the CM/ECF rules, part of how the current CM/ECF system works is that CM/ECF filers — but not ordinary PACER users — can track "cases of interest". This allows someone to receive the same NEFs as parties do (aside from certain sealed filings), for more or less any case in a court for which the person has CM/ECF access.

This is not merely a frivolous convenience. Cases of interest may be ones in which someone may wish to file an amicus or intervention. They frequently present similar issues to those one is litigating, and thereby give awareness of arguments to crib from or prepare against, evidence found by other litigants, or even intervening authority that may justify an FRAP 28(j) letter or a

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[19] *See e.g.* http://www.blindlawyer.org/

[20] For instance, Ninth Circuit Judge Ronald M. Gould, a widely respected and active jurist, has advanced multiple sclerosis. Although I do not know what specific tools Judge Gould uses, screen readers are a common adaptive technology for MS. *See e.g.*:
http://www.uscourts.gov/news/2013/12/16/focus-what-you-can-do-advises-judge-ms
http://www.gatfl.gatech.edu/tflwiki/images/5/59/UGA_-_AAC_DND_2014_Fall_Presentation.pdf

[21] *See* e.g. Judge Alex Kozinski, *The Wrong Stuff* (discussing ways to annoy a judge and thereby lose one's case — including through the format of briefs).

motion for reconsideration. They may be of journalistic interest, where immediate notification of developments is critical to presenting timely news to one's audience.

There is no good reason to restrict this functionality — but as is, non-attorneys cannot routinely and readily get access to this extremely useful tool unless they are first granted CM/ECF access in a particular court.

4. Concerns particular to prisoners

As the FRCrP committee correctly noted in comments on its version of the proposed rule, prisoners are often unable to obtain or maintain reliable access to the basic tools needed to use CM/ECF. Prisons may prohibit access to email, Internet, or even word processing software, and this access may vary if a prisoner is transferred or subjected to administrative punishments.

Where most *pro se* litigants should be presumed to have good cause not to use CM/ECF, a *pro se* prisoner should get an *irrebuttable* presumption of good cause. The court, and indeed the prisoner, may not always know or be able to predict when their access will be impaired. To the extent that the prisoner wants and is able to participate in CM/ECF, it should still be allowed, for all the above reasons. However, prisoners should *always* have the option of filing by paper, even if they are otherwise CM/ECF participants, without needing to seek any leave of court. The prisoner is in the best position to determine which option is best for them at any given time.

While it is true that the 6th Amendment *per se* only protects the right to participate *pro se* in criminal proceedings. However, prisoners have just as much right to participate *pro se* in other matters as anyone else, including under 28 U.S.C. § 1654.

The Supreme Court has explicitly "reject[ed] the … claim that inmates are ill-equipped to use the tools of the trade of the legal profession", *Bounds v. Smith*, 430 US 817, 826 (1977) (internal quotations omitted). CM/ECF is the modern "tool of the trade", and denying access to it would impair prisoners' "fundamental constitutional right of access to the courts", *id.* at 828, just as much in matters such as civil rights complaints as in criminal proceedings.

Filing accommodations that protect prisoners' rights to access the courts must therefore be made across *all* the rules of procedure, not just the criminal rules. My proposed alternative does so.

Further, not all *pro se* participants in criminal proceedings are prisoners. Some will be out on bail pending trial, or participating due to some post-release criminal proceeding. These *pro se* participants must have their 6th Amendment rights protected, and will often face the similar barriers to *pro se* IFP litigants, but do not have the concerns specific to the prison context.

5. Concerns raised in committee minutes not expressed in the final proposed note

The minutes of the committees discussing *pro se* access to CM/ECF demonstrate a range of concerns about possible abuse of the system. I believe it is clear that these concerns are the real reason — unexpressed in the final proposed note — for why the proposed rule goes beyond merely not requiring *pro se* CM/ECF use, to prohibiting it unless permission is first obtained.

As an initial matter, the Administrative Procedure Act, which applies to this rulemaking proceeding, does not permit such covert purposes. The official notes and comments simply do not support the extra step of a presumptive prohibition on *pro se* CM/ECF use; they only justify an exception from the CM/ECF requirement otherwise imposed on attorney filers.

If the Committee does wish to go this extra step, it must plainly justify its reasons, on the record.

I do not believe that any of the previously expressed concerns justify the proposed rule. In essence, it constitutes a presumptive sanction — equating "*pro se*" with "presumed vexatious".

Like all forms of prior restraint, this is anathema in our legal system.

The expressed concerns do not justify impairing the entire class of *pro se* litigants for the sins of a few; those sins are in some cases imaginary, or are even protected rights; and even for those few people who may abuse the system, a presumptive limitation on CM/ECF use *per se* either would not cure the issue or is not the appropriate remedy.

By analogy, suppose that an executive agency undergoing public APA notice & comment had a rule allowing lawyers to submit comments electronically immediately visible to everyone — but requiring that all others submit comments on paper, citing a concern that some citizens might file abusive content. That rule would surely be struck down on court challenge, as a clear example of First Amendment prior restraint.

This proposed rule is not exempt from the same inquiry, and the Committee should apply the same scrutiny it would apply to any other attempt at a prior restraint on speech.

With that said, let us examine the specific concerns raised.[22]

a. Not having the capability to use CM/ECF

Certainly many *pro se* litigants, particularly prisoners, will not have the ability to use CM/ECF — either due to lack of skill or comfort with the CM/ECF system itself, or lack of Internet and computer access, or some other such impediment.

First off, this concern only justifies an exemption, not a prohibition. Each individual litigant is the person who should decide their own capabilities and comfort, and opt in or out of CM/ECF as they see fit.

I hope that the Committee does not believe that *pro se* litigants are presumptively so incapable of judging for themselves whether or not they can use CM/ECF, receive email dependably enough, satisfactorily complete whatever CM/ECF training is available, etc. — even where they can be required, like any registrant, to fill out online forms and agreements stating otherwise — that courts should paternalistically take this decision away from the entire *class* of *pro se* litigants.

This of course in no way prevents a court from making an *individualized* determination about a specific *pro se* litigant, based on good cause — either that they are sophisticated enough that they should be required to file electronically like an attorney, or that they are so bad at using CM/ECF that they should be ordered to only file on paper. Such orders can be contingent (e.g. on completing some training), limited to a given case, or applied presumptively for *all* future filings (as with vexatious litigant orders prohibiting filing in general without permission, but particular to electronic filing).

My proposed alternative rule permits courts to make such determinations. It simply requires that they be made on a case by case basis, giving the *pro se* litigant the benefit of an initial presumption of good cause.

[22] I have not cited specific sources for each, as I do not wish to embarrass any individual Committee member. All can be found in the minutes and reports of committees' consideration of the proposed CM/ECF rules, except for one which was raised to me in person by a member of the FRCP committee following my testimony at the December 2016 hearing.

b. Filing pornographic or defamatory content

It is possible, though surely more apocryphal[23] than descriptive, that a *pro se* litigant may file pornographic or otherwise inappropriate material on the record.[24] But courts have wide powers to issue orders to show cause and create tailored sanctions for inappropriate behavior in court, including for abusive filings.[25]

When used as a direct part of litigation filings, e.g. as a legal tactic, what would otherwise be defamation is protected by absolute litigation privilege.[26] It may be unwise or uncouth, but courts routinely permit *pro se* litigants to attempt all kinds of unwise arguments. Should it stray outside the bounds of what is privileged, the defamed party has their usual remedies.

It is improper for courts to filter filings because they will publicly appear on PACER and *might* contain inappropriate content. A document merely being filed and available on PACER does not imply any imprimatur of approval by the court. Even so, courts are free to strike or seal filings, or to sanction litigants, if there is cause to do so.

Curtailing individual CM/ECF access does not even prevent this issue. Litigants can trivially post anything they would post in a filing in a blog or other website, outside the court's control.

In short, this concern is nearly a textbook definition of prior restraint, with the textbook response: apply tailored sanctions only afterwards, when and if they are appropriate punishment.

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[23] The legal humor site Lowering the Bar provides at least a couple examples, e.g.:
https://loweringthebar.net/2015/04/to-f-this-court.html
https://loweringthebar.net/2011/12/note-catholic-beast-is-not-a-legal-term-of-art.html

However, considering the huge number of *pro se* filings and tiny number of examples found even by such dedicated collectors as Kevin Underhill, this seems to be a case of the exception proving the rule.

[24] This assumes that the material is in fact inappropriate. There are surely some equally rare cases for which such material is entirely appropriate and necessary evidence.

[25] Lowering the Bar's case law hall of fame helpfully provides a florid example: *Washington v. Alaimo*, 934 F.Supp. 1395 (S.D. Ga. 1996).

[26] *See e.g.* http://www.abi.org/abi-journal/the-boundaries-of-litigation-privilege (collecting cases and noting several exceptions).

c. Improper docketing

Novice CM/ECF users may docket filings improperly — e.g. listing the wrong action or relief, joining separate motion documents in a single filing, misusing the 'emergency' label, failing to upload exhibits, etc. Some amount of this is simply part of learning the system.[27] Even in cases between giant corporations with very experienced counsel, one regularly sees docket clerk annotations of filing deficiencies or correcting docketing errors.

In non-electronic filing, the clerk must scan incoming documents, decide which sections are separate documents, exhibits, etc., and do all the docketing. Sometimes they too can get this wrong, e.g. attaching an affidavit as an exhibit to the wrong motion.

Even if someone is a somewhat inept CM/ECF user, docket clerks routinely screen incoming filings and will correct clear deficiencies or errors. Doing so based on at least the litigant's first pass attempt at classifying their own filing is surely easier than doing it whole cloth — and over time, *pro se* litigants will learn to avoid making the same mistakes.

If the litigant is truly so grossly incompetent and unable to improve that their use of CM/ECF filing is a serious burden to the court's clerks where their paper filings would not be, the court can of course determine that there is good cause to forbid CM/ECF use — presumably after first taking less drastic remedial measures, such as providing the litigant with learning materials, or ordering them to certify that they have completed online CM/ECF training.

This concern is inappropriately paternalistic, and does not justify the harms caused by lacking access to CM/ECF.

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[27] As a personal example: recently, when attempting to file a large number of exhibits for an MSJ opposition, I received a strange ECF error. I was stumped — as was the court's ECF help desk.

After discussion with the ECF coordinator, it turned out that ECF fails if attachments take more than 20 minutes to upload. The solution: split the filing into two separate docket events to limit the upload time per event, and tag the second using the special 'additional large files' event.

To my knowledge, this is not covered by the court's CM/ECF guidance. As I discovered when I first started to use it, the same is true for many other aspects of the system.

d. Improper participation in others' cases

Pro se litigants might make filings in others' cases. But as discussed above re *amicus* briefs and interventions, this is not presumptively improper. The CM/ECF system already has the functionality to limit users to certain types of filings or certain cases.

Pro se litigants — and indeed all CM/ECF users — could properly be limited to initiatory actions (e.g. motions for leave to file and replies thereto) in cases for which they are not participants. Improper filings can be summarily denied or, if necessary, sanctioned.

e. Filing large documents

Pro se litigants, like any other, may occasionally make voluminous filings.

Some judges have their chambers automatically print all documents filed in their cases, but this is their own choice. They could instead choose not to print documents over a certain size, and either deal with them electronically or order the filer to mail a chambers copy where necessary.

Preventing *pro se* litigants from accessing CM/ECF does not prevent them from making voluminous filings, nor is it presumptively appropriate to do so. Sometimes relevant exhibits simply are voluminous. Cross-motions in a copyright dispute can easily be a thousand pages in total. Again, this should be dealt with on a case by case basis — not by a presumptive bar to accessing CM/ECF.

f. Sharing access credentials with others

If a litigant shares their access credentials with someone else, the other person can file for them. They are just as responsible for this — and might have the same needs — as in the situation where an attorney shares access credentials with their paralegal.[28]

[28] I believe this is an inappropriate practice for security reasons, yet it is currently the mandated approach. *See* comment re proposed FRAP 25(a)(2)(B)(iii), USC-RULES-AP-2016-0002-0011, *posted* Feb 3, 2017.

6. Conclusion

Electronic filing comes with many benefits both to the filer and to all other participants. By the same token, any *prohibition* on electronic filing — including a requirement to first obtain leave of court — comes with many harms.

Pro se litigants should be allowed to make their own choice between paper and electronic filing, without having to seek any leave of court. In particular, they should be allowed full access to CM/ECF case initiation and case tracking. To do otherwise is to impose an unjustified, presumptive sanction on the entire class of *pro se* litigants, putting them at an unfair and unconstitutional disadvantage in exercising their rights to equal access to the courts.

Where a court makes an *individualized* determination of good cause, it should be permitted to require or prohibit a *pro se* litigant's use of CM/ECF — with the exception of prisoners, whose special situation requires protecting their absolute right to access the court, by paper if necessary.

My proposed alternative rule does all of the above. The proposed rule does not, and for the reasons detailed above, I oppose it.

I again urge the Committee to bear in mind both the standards that it would apply to any other governmental prior restraint on such fundamental rights as participation in the legal system, and the one-sided and unrepresentative nature of its own makeup and deliberation. There is an ironic dearth of zealous advocates of the rights of *pro se* litigants — and the Committee has its own biases, from habitually viewing *pro se* litigants as opponents or as problems to manage.

Pro se litigants' participation in the legal system presents many special challenges. From my own perspective as a flawed but successful *pro se* litigant, one of the biggest is in obtaining some semblance of equality with represented parties. At every step, we face numerous and systemic obstacles to the right of equality, yet are expected to keep pace with our represented opponents.

Before the law sit many gatekeepers. Let this not be one of them.

Respectfully submitted,
/s/ Sai

TAB 4

TO: Advisory Committee on the Federal Rules of Criminal Procedure

FROM: Professors Sara Beale and Nancy King, Reporters

RE: Pretrial Subpoena Authority (22-CR-A) (RULE 17)

DATE: September 30, 2022

The White Collar Crime Committee of the New York City Bar Association has written urging that the Committee amend Rule 17 to specify standards for obtaining third-party subpoenas that are easier to meet than those presently applied in many districts. See Tab 4C. Judge Kethledge referred this suggestion to the new Rule 17 Subcommittee chaired by Judge Nguyen.

The Rule 17 Subcommittee met once and concluded that it needs more information about the current use of third-party subpoenas in criminal cases to determine whether an amendment to Rule 17 is warranted and, if so, what features an amendment should contain. The Subcommittee is focusing first on learning how the Rule is currently functioning, with the goal of determining whether there is a need for any amendment. If it concludes that an amendment is warranted, The Subcommittee anticipates that it will need further information concerning multiple issues (such as protective orders, timing, related statutes, etc.). But it is deferring those issues for the present.

To gather more information about the present use of third-party subpoenas, the Subcommittee has invited a group of practitioners to participate in the Committee's October meeting to share their experiences. The participants include defense attorneys in private practice, Federal Defenders, and representatives from the Department of Justice. Each was recommended as a person with particular experience with Rule 17 subpoenas.

Our invitations asked participants to consider a variety of issues. For defense lawyers, we asked them to inform us about:

- Specific problems you or others with whom you work closely encountered in seeking a third-party subpoena;

- Examples of particular cases where you were unable to meet the standard the court required for issuance of a subpoena under Rule 17, and what effect that had, if any, on the defense of your clients in those cases;

- Examples of particular cases where you were able to secure a subpoena under Rule 17, and what effect that had, if any, on the defense of your clients in those cases;

- Examples of protective orders limiting your use or disclosure of subpoenaed materials;

- Examples of cases in which you did not seek a subpoena because you did not wish the judge and/or the prosecution to learn what you were seeking or from whom you were seeking it

And for prosecution participants, we asked them for information about:

- Specific problems you, or others with whom you work, have encountered when a defendant sought information or material from a third-party under Rule 17(c);

- Examples of cases in which you learned that a defendant had secured a subpoena to a third party under Rule 17(c) without the government having an opportunity to respond or comment;

- Examples of cases where a defendant sought information or material (other than "personal or confidential information about a victim") from a third party using a Rule 17(c) subpoena, and you argued the subpoena should be either denied or limited. On what basis did you oppose the subpoena, with what result?;

- Examples of cases where you *disagreed* with the defense on whether the material sought by a Rule 17(c) subpoena was "personal or confidential information about a victim";

- Examples of cases in which you sought a protective order limiting the use or disclosure of materials sought by the defense from a third party with a Rule 17 subpoena;

- Examples of cases where you sought information or material from a third-party using a subpoena under Rule 17 instead of a grand jury subpoena.

We are now working with the participants to determine which issues each wishes to focus on, and after we complete these discussions we will provide a schedule for this portion of the meeting.

We are particularly grateful that these distinguished practitioners are taking the time to participate in the meeting, particularly when we are not able to reimburse their expenses. A list of the participants is provided at Tab 4B.

October 27, 2022 – Meeting of the Advisory Committee on Criminal Rules

Panel Participants:

Michael Carter, Executive Director, Federal Defenders, EDMI

Robert Cary, Williams & Connolly, Washington, D.C.
Robert Cary - Williams & Connolly LLP (wc.com)

Mary Ellen Coleman, Asst. Federal Defender, WDNC

Donna Elm, CJA Panel Attorney, AZD, MDFL, CA9, CA11

James Felman, Kynes, Markman & Felman, Tampa, FL
Tampa Law Firm, Kynes, Markman & Felman, P.A. | James E. Felman (kmf-law.com)

Mike Gill, Criminal Chief, U.S. Attorney's Office, EDVA

Angie Halim, solo practitioner, Philadelphia, PA

Ellen Leonida, BraunHagey & Borden, San Francisco, CA
BraunHagey & Borden

Lisa Miller, Department of Justice, Deputy Assistant Attorney General, Criminal Division

Dimitra Sampson, Assistant United States Attorney, AZD

D. Stephen Wallin, solo practitioner, Phoenix, AZ

NEW YORK CITY BAR

WHITE COLLAR CRIME COMMITTEE

MARSHALL L. MILLER
CHAIR
mmiller@kaplanhecker.com

February 17, 2022

Honorable Raymond M. Kethledge
Chair, Advisory Committee on Criminal Rules
United States Court of Appeals
Federal Building
200 East Liberty Street, Suite 224
Ann Arbor, MI 48104

Re: **Proposed Amendment to Rule 17 of the Federal Rules of Criminal Procedure**

Dear Judge Kethledge:

This letter is submitted on behalf of the New York City Bar Association (the "City Bar"), to accompany a proposal formulated by the City Bar's White Collar Crime Committee (the "Committee").[1] We write to you in your capacity as Chair of the Advisory Committee on Criminal Rules of the Judicial Conference of the United States (the "Advisory Committee") to respectfully request that the Advisory Committee consider proposing to the Judicial Conference certain amendments to Federal Rule of Criminal Procedure 17 ("Rule 17"). The proposed amended rule is attached to this letter, both with changes tracked, *see* Exhibit A, and as a clean copy, *see* Exhibit B.

These changes seek to modernize and fine-tune Rule 17—a rule that has not been significantly updated since 1944 and that represents the only means by which criminal defendants can obtain information by subpoena in advance of trial—to reflect the reality of evidence-gathering in the electronic age and to eliminate ambiguities in the current rule as to when a court order is required. The City Bar supports the proposed amendments for the reasons stated below.

The mission of the City Bar is to equip and mobilize the legal profession to practice with excellence and to promote the rule of law and access to justice in support of a fair society in our

[1] The proposal was also endorsed by the City Bar's Federal Courts, Criminal Justice Operations, and Criminal Courts Committees and its Mass Incarceration Task Force.

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has approximately 24,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

community, our nation, and throughout the world. The City Bar's White Collar Crime Committee is comprised of over 35 experienced attorneys whose principal area of practice is the defense of complex criminal cases in federal and state courts and before regulatory tribunals. Our membership includes former state and federal prosecutors and career criminal defense attorneys, who regularly submit *amicus curiae* briefs on major questions of criminal law and advocate for reforms of penal statutes and procedural rules, both federal and state. Our members are among the most active trial lawyers in New York's federal courts. Our Committee has decades of hands-on experience with the Federal Rules of Criminal Procedure and is well-qualified to understand those places where the Rules, as currently written, have sown confusion in the criminal courts or appear to fall short of ensuring equal access to justice for all, irrespective of a defendant's wealth or status.[2]

Introduction and Reason for Proposed Amendments to Rule 17(c)

The complexity and breadth of federal criminal prosecutions have grown considerably in recent years as Congress has passed legislation expanding the reach of federal criminal law into new areas,[3] prosecutors have focused on novel theories of prosecution,[4] and the gathering of evidence in the digital age has become ever more sophisticated and technical.[5] But even as such developments have increased the burden on defense attorneys to adequately prepare to defend criminal cases, the rules governing the availability of subpoenas in criminal cases have not kept up. Rule 17 has stood relatively unchanged since it was adopted in 1944 and has been applied extremely narrowly by trial courts, largely based on the reasoning of two Supreme Court cases which, as discussed below, did not even address defense subpoenas directed to non-governmental third parties.

[2] The Committee also includes within its membership prosecutors and enforcement attorneys from federal government agencies; these government attorneys abstained from taking a position on this proposal, and this letter and the proposal thus do not reflect their views or those of the agencies with which they are employed.

[3] In one example, Congress enacted an anti-spoofing statute as part of the Dodd-Frank Act, and the Justice Department has dedicated a team to specifically address the conduct. *See* Pub. L. No. 111-203, § 747, 124 Stat. 1376, 1739 (2010); *see also* Dave Michaels, *Justice Department Presses Ahead with "Spoofing" Prosecutions Despite Mixed Record*, WALL ST. J. (Feb. 7, 2020, 1:55 PM), https://www.wsj.com/articles/justice-department-presses-ahead-with-spoofing-prosecutions-despite-mixed-record-11581095386.

[4] Two recent examples include prosecutions under the wire fraud statute in the NCAA bribery case and prosecutions under the Computer Fraud and Abuse Act. For a discussion of the propriety of the "right to control theory" of wire fraud, see Harry Sandick & Jared Buszin, *Justices Should Revisit 2nd Circ. Theory in NCAA Bribe Case*, LAW360 (Feb. 3, 2021), https://www.law360.com/whitecollar/articles/1350039/justices-should-revisit-2nd-circ-theory-in-ncaa-bribe-case (discussing *United States v. Gatto*, 986 F.3d 104 (2d Cir. 2021)). For a discussion of expanding criminal liability under the computer trespass statute, see Peter A. Crusco, 'Van Buren v. United States'*: 'Unauthorized Access' in the Virtual World of Expanding Federal Criminal Liability*, N.Y.L.J. (Dec. 21, 2020), https://www.law.com/newyorklawjournal/2020/12/21/van-buren-v-united-states-unauthorized-access-in-the-virtual-world-of-expanding-federal-criminal-liability.

[5] For an extensive examination of the unique challenges—including cost, volume, and complexity—that electronic discovery presents in the fair and accurate resolution of criminal cases, see, e.g., Jenia I. Turner, *Managing Digital Discovery in Criminal Cases*, 109 J. CRIM. L & CRIMINOLOGY 237 (2019).

The constrictive limitations on such subpoenas under Rule 17 stand in stark contrast to the rules controlling the government's discovery obligations, which have expanded to keep pace, at least to some extent, with changing times. As originally drafted, the rule governing the government's discovery obligations, Rule 16, provided for only limited discovery and, significantly, preserved the absolute discretion trial courts had previously exercised in permitting or denying any discovery in criminal cases. *See* FED. R. CRIM. P. 16 advisory committee's note to 1944 adoption. In a nod to prevailing practice at the time, the Advisory Committee's note observed that the permissibility of discovery in criminal cases as a matter of law "[was] doubtful" under "existing law." *See id; see also United States v. Rosenfeld*, 57 F.2d 74, 76-77 (2d Cir. 1932) (declining to extend the right to discovery in civil cases to criminal cases). But since 1944, that rule has been amended multiple times—in recognition of defendants' need for access to potentially exculpatory information, the Supreme Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963), and subsequent case law—so that it now permits discovery without the necessity of a court order and requires the government to produce all items in its "possession, custody or control" which are "material to preparing the defense."

As a result, if documents material to the preparation of the defense are in the possession of the government, the defense should have access to them under Rule 16. But if, as is often the case, documents and other items of potential value to the defense are in the possession of third parties, defense counsel face significant and often insurmountable barriers to obtain those materials. In most cases, the government develops much of its evidence through the grand jury investigative process. Even after indictment, use of grand jury subpoena authority remains available to the government provided that there is an ongoing investigation into any (1) potential new charges against the defendant in a superseding or separate indictment, or (2) possible addition of a new defendant or defendants to the existing indictment, a frequent occurrence. The result is an unfair imbalance between the prosecution and the defense in preparing for trial—an imbalance that is particularly acute where, as in the majority of cases, defendants and their counsel have limited resources to employ alternative means (such as private investigators) to obtain needed information, not only to address evidence already in the government's possession, but also to develop affirmative defenses.

The amendments we propose are enclosed with this letter.[6] These amendments have been drafted to address the systematic impediments to criminal defendants' ability to obtain documents and objects in support of their defenses and thus to promote fairness and accuracy in criminal adjudication, ensure equal access to justice, and prevent wrongful convictions; at the same time, the amendments have also been tailored to protect the privacy of individual third parties and empower courts to prevent misuse of the rule. We hope you will agree that the amendments we propose are consistent with the ideals that motivated the Supreme Court's decision in *Nixon*: "[t]he ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. *The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts*, within the framework of the rules of evidence." *United States v. Nixon*, 418 U.S. 683, 709 (1974) (emphasis added).

[6] We have set forth the proposal in two attachments: (1) Exhibit A, a redline against the current rule to reflect the proposed changes, and (2) Exhibit B, a clean copy of the proposed amended rule.

We first address a proposed amendment to Rule 17(c)(1), which currently authorizes subpoenas to obtain documents and other tangible items subject to certain limitations. We then discuss proposed amendments to sections concerning personal or confidential information ((17(c)(3)), information not subject to subpoena (17(h)), and judicial authority to issue modifying or protective orders (17(i)).

Proposed Amendments to Rule 17(c)(1) and (2)—Changes Directed at Scope of Items Sought

As currently drafted, Rule 17(c) provides:

> (c) *Producing Documents and Objects*.
>
> (1) *In General*. A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.
>
> (2) *Quashing or Modifying the Subpoena*. On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.

In *theory*, subsection (c) of Rule 17 permits criminal defendants to use subpoenas to obtain documents from third parties, although, unlike the subpoenas *ad testificandum* described in subsection (a) and while the language contains some ambiguity, prior judicial approval is arguably required before issuance of a subpoena *duces tecum* pursuant to Rule 17(c). In *practice*, however, Rule 17(c) is rarely, if ever, useful to criminal defendants because courts have interpreted its application so narrowly. The narrow interpretation stems from the initial but now outdated purpose of the rule when adopted in 1944 and from two Supreme Court opinions which applied the rule in unique circumstances, which had nothing to do with the defense's need to obtain material evidence from third parties.

Rule 17 has not changed significantly since its enactment almost 80 years ago. *See* FED. R. CRIM. P. 17 advisory committee's notes to amendments. Rule 17(c) in particular has not been amended apart from the general restyling of the criminal rules in 2002 and the inclusion of protective measures for victims in 2008. *See id.* It was not intended to provide a means of fact or defense development for criminal cases, but as a way to expedite the trial by bringing documents into court "in advance of the time that they are offered in evidence, so that they may then be inspected in advance, for the purpose . . . of enabling the party to see whether he can use (them)." *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 n.5 (1951) (internal citation omitted). The stated intention of the rule was consistent with the thinking of the time that defendants were entitled to little discovery.[7]

[7] *See* Benjamin E. Rosenberg and Robert W. Topp, *The By-Ways and Contours of Federal Rule of Criminal Procedure 17(c): A Guide Through Uncharted Territory*, CRIM. L. BULL., Vol. 45 No. 2 (2009), at page 8 & n. 19. ("Rosenberg Article").

The Supreme Court has twice addressed Rule 17(c), but neither case involved a defense subpoena of documents or information from a third party. In *Bowman Dairy*, the defendant, in an effort to circumvent the then-narrow scope of Rule 16 with respect to discovery from the government, served a broad subpoena on *the government.* *Bowman Dairy*, 341 U.S. at 215-16. Not surprisingly, the Court held that despite the seemingly broad language of Rule 17(c), the subpoena could not exceed the scope of Rule 16. *Id.* at 220-21. *Bowman Dairy* was followed by *United States v. Nixon*, 418 U.S. 683, 707 (1974), a case best remembered for ordering the production of the incriminating White House tapes that led shortly thereafter to President Nixon's resignation. In a less well-known part of the opinion, the Court addressed a motion *by government prosecutors*, not a criminal defendant, seeking a Rule 17(c) subpoena. Relying on *Bowman Dairy*, the Court held that when *government prosecutors* wish to issue a Rule 17(c) subpoena returnable before trial, the government must show:

> (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition."

Id. at 699-700. The *Nixon* test is strict and reflects to an important degree the fact that the prosecutors had served the subpoena after a grand jury had returned the indictment; the Court was apparently sensitive to the rule that the government cannot cause grand jury subpoenas to issue after an indictment to bolster its evidence for trial. Indeed, it is our experience that government prosecutors rarely attempt to satisfy the *Nixon* standard, but instead rely on grand jury subpoenas or search warrants to obtain documents from third parties.

Neither *Bowman Dairy* nor *Nixon* addressed the situation where a defendant was seeking documents from a third party. Nevertheless, most lower courts have embraced the *Nixon* standard and applied it to defense subpoenas of third parties. *See, e.g.*, *United States v. Wey*, 252 F. Supp. 3d 237, 253 (S.D.N.Y. 2017) (applying *Nixon* standard to third-party subpoenas); *United States v. Henry*, 482 F.3d 27, 30 (1st Cir. 2007) (affirming lower court's application of *Nixon* standard to third-party subpoena); *United States v. Stevenson*, 727 F.3d 826, 831 (8th Cir. 2013) (noting that the Eighth Circuit has applied the *Nixon* standard to third-party subpoenas).

Criminal defendants, however, unlike government prosecutors, do not have an alternative means of issuing subpoenas *duces tecum*. For this reason, a growing number of courts and commentators alike have questioned whether the strict *Nixon* standard should apply to third party subpoenas issued by a *defendant.* *See, e.g.*, *United States v. Tucker*, 249 F.R.D. 58, 63 (S.D.N.Y. 2008) ("It is [ ] fair to ask whether it makes sense to require a defendant seeking to obtain material from a non-party by means of a Rule 17(c) subpoena to meet the *Nixon* standard."); *United States v. Rajaratnam*, 753 F. Supp. 2d 317, 321 n.1 (S.D.N.Y. 2011) ("[I]t remains ironic that a defendant in a breach of contract case can call on the power of the courts to compel third-parties to produce any documents '*reasonably calculated to lead to the discovery of admissible evidence*,' . . . while a defendant on trial for his life or liberty does not even have the right to obtain documents '*material to his defense*' from those same third-parties. Applying a materiality standard to subpoenas *duces tecum* issued to third parties under Federal Rule of Criminal Procedure 17(c) would resolve that

puzzle at great benefit to the rights of defendants to compulsory process and at little cost to the enforcement of the criminal law, since Rule 17(c) permits the government to issue subpoenas as well."); *United States v. Smith*, No. 19-cr-00669, 2020 WL 4934990, at *3-4 (N.D. Ill. Aug. 23, 2020) (questioning appropriateness of *Nixon* admissibility standard but quashing subpoena for CFTC documents on deliberative process grounds).[8]

Despite this growing recognition, most trial courts still apply the narrow *Nixon* standard and restrict defense subpoenas on third parties.[9] The problems that result from this interpretation of Rule 17(c) cannot be overstated. For example, without a meaningful ability to require production of documents from third parties prior to trial, the defense is effectively restricted to information the government gathers in the scope of its investigation and is severely constrained in its ability to develop affirmative defenses. Why should this matter? Consider the following hypothetical posed by the authors of a recent article:

> The defendant is the CFO and 25 percent owner of a family-owned business. He is indicted for utilizing his position to embezzle several million dollars from that business by creating both a wholly owned company and false invoices from it to the family-owned business.
>
> He then [allegedly] used his position of trust to pay the false invoices to his own company from the family business. The defendant advises his counsel of the wrongdoing of his accuser and other exculpatory facts that, if true, could constitute a defense at trial, mitigation of punishment, and/or impeachment of the government's primary accuser. The family-owned business uses a highly sophisticated, respected financial software package . . . . The defense forensic accountant concludes that the truth or falsity of the defendant's allegations would be fully disclosed by the accounting software and its data.

[8] S*ee also* Peter J. Henning, *Defense Discovery in White Collar Criminal Prosecutions,* 15 GA. ST. U.L. REV. 601, 647 (1999) (*"Nixon* do[es] not forestall completely a defendant's efforts to secure documents before trial from third parties, but make[s] it unnecessarily difficult by imposing a high threshold for invoking Rule 17(c) that focuses on the evidentiary nature of the requested documents without reference to the defense at trial."); Robert G. Morvillo et al., *Motion Denied: Systematic Impediments to White Collar Criminal Defendants' Trial Preparation*, 42 AM. CRIM. L. REV. 157, 160 n.12 (2005) ("It is extraordinarily difficult for a defendant, who has limited ability to investigate, to know enough about the discovery he is seeking such that he can comply with the *Nixon* requirements."); Hon. H. Lee Sarokin & William E. Zuckerman, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie This Presumption,* 43 RUTGERS L. REV. 1089, 1089 (1991) ("It is an astonishing anomaly that in federal courts virtually unrestricted discovery is granted in civil cases, whereas discovery is severely limited in criminal matters."); Rosenberg Article at pages 17-20 (discussing cases that have questioned appropriateness and applicability of *Nixon* standard to defense efforts to obtain materials from non-parties).

[9] *See Henry*, 482 F.3d at 30 (noting that under Rule 17, "the defense may use subpoenas before trial to secure admissible evidence but not as a general discovery device" and affirming district court decision to quash third-party subpoena); *United States v. Bergstein*, 788 F. Appx 742, 746 (2d Cir. 2019) (citing *Nixon* standard for third-party subpoenas and noting that the Second Circuit has "applied the *Nixon* standard to Rule 17(c) subpoenas requested by a defendant") (summary order); *United States v. Tokash*, 282 F.3d 962, 971 (7th Cir. 2002) (citing *Nixon* standard without analysis as governing third-party subpoena); *Stevenson*, 727 F.3d at 831 (noting that the Eighth Circuit has applied the *Nixon* standard to third-party subpoenas); *United States v. Sleugh*, 896 F.3d 1007, 1012 (9th Cir. 2018) (citing *Nixon* rule in context of Rule 17 subpoenas to phone companies).

Alan Silber and Lin Solomon, *A Creative Approach for Obtaining Documentary Evidence From Third Parties*, NEW & INSIGHTS (July 17, 2017), https://www.pashmanstein.com/publication-a-creative-approach-for-obtaining-documentary-evidence-from-third-parties.

As the authors explain, the lawyer in this scenario has no way of knowing if the client's allegations are true and whether the client has a viable defense, and the only way to make that determination is to obtain and analyze the financial data in the business software. But under the *Nixon* standard employed by most courts, it is likely that the defendant's 17(c) subpoena for that financial data would be quashed because until the defense sees the evidence, it cannot establish that it is "evidentiary and relevant."[10]

This problem pertains not just at criminal trials, but also in the pre-plea stage of criminal cases. In this regard, it is worth noting that only 2% of federal criminal cases proceed to trial. A rule that limits the pre-trial ability of 98% of criminal defendants to obtain documents that may be relevant to their case (other than those documents produced by the government) has the effect of restricting virtually all defendants' ability to make a fully informed decision concerning the strengths or weaknesses of the government's case against them, incentivizes defendants to plead guilty without full exploration of the merit of the government's case, and, therefore, increases the risks of wrongful convictions of defendants who may have had a meritorious defense. This is especially true in cases where guilt depends not necessarily on what the defendant did or did not do, but how it was perceived and understood by others, such as in cases where the materiality of a false statement is at issue. Without the ability to subpoena documents from third parties to test the government's allegations or to develop an affirmative defense of which the government was not aware, a defendant may find himself pleading guilty instead of pursuing what could have been a meritorious defense. These perverse results cannot have been intended by the Federal Rules of Criminal Procedure.

The Committee therefore proposes that the Advisory Committee revise Rule 17(c) to grant both parties to a criminal proceeding the ability to marshal documents and information, so long as they are "relevant and material to the preparation of the prosecution or defense." Notably, this standard, which the Committee proposes incorporating by adding a new section (c)(2) to Rule 17, and which is taken from the standard defining the government's obligations under Rule 16, would still be markedly higher than the civil discovery standard,[11] and thus would not open the door to burdensome fishing expeditions. The new proposed section (c)(2) would authorize parties to subpoena impeachment material in advance of trial (and not just admissible evidence under the *Nixon* standard) because the ability to effectively confront and impeach a witness is essential to a fair adversarial process. *See*, *e.g.*, *United States v. Rodriguez*, 496 F.3d 221, 225 (2d Cir. 2007) (describing *Giglio* obligation to disclose impeachment information as "serv[ing] the objectives of

[10] *See also* Rosenberg Article at 12-13 (discussing difficulty of meeting *Nixon* evidentiary standard without even seeing documents that are being sought).

[11] *See* FED. R. CIV. PRO. 26(b)(1) ("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, 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.").

both fairness and accuracy in criminal prosecutions"). To further minimize the risk of undue burdens, we propose adding to the section of Rule 17(c) governing quashing or modifying the subpoena—section (c)(2) in the existing rule and section (c)(3) in the Committee's proposal—a provision for the subpoena to be quashed or modified not only if compliance would be "unreasonable or oppressive," as the rule currently provides, but also if the documents sought "are . . . otherwise procurable reasonably in advance of trial by exercise of due diligence," a standard drawn from *Nixon*. *See Nixon*, 418 U.S. at 699.

Next, the Committee proposes removing the last two sentences from Rule 17(c)(1) because they do not reflect how material is exchanged, as a practical matter, in the digital age. The change also makes clear that no court order is required to issue a subpoena, regardless of whether the documents and objects sought are to be produced in advance of trial.[12] Under current practice, courts differ on whether a court order is required when a subpoena seeks the production of materials in advance of trial.[13] In our view, such a requirement is unnecessary. Eliminating the requirement of a court order (except for circumstances set forth in Rule 17(c)(3), as discussed below) obviates the need for parties to reveal trial strategy in seeking court approval, unless they succeed in convincing the court to permit them to proceed *ex parte.* Any concerns about abusive subpoena practice can adequately be addressed either through motions to quash and rulings on the introduction of evidence obtained via Rule 17 subpoena or through the new modifying order that would be authorized by proposed Rule 17(i).

Proposed Amendment to Rule 17(c)(3)—Obtaining Personal or Confidential Information

The Committee also proposes amending the current Rule 17(c)(3) (which would become Rule 17(c)(4)) that currently governs subpoenas for personal or confidential information from a victim in two ways: (a) to broaden the provision so that it requires advance court approval for a subpoena for personal or confidential information from any individual, not just a victim, and (b) to make clear that such a subpoena, issued pursuant to Rule 17(c)(4), is the *only* type of Rule 17(c) subpoena that requires judicial approval prior to issuance.

This change would make clear that the Advisory Committee's previous inclusion of such a requirement for subpoenas seeking personal or confidential information was not intended merely to be surplusage, and that other subpoenas issued to other third parties—which do not call for personal or confidential information about an individual—do not require judicial approval prior to issuance and may be issued pursuant to the procedures set out in Rule 17(a).

In addition, the Committee proposes including within the rule examples of what constitutes "personal or confidential information," both to guide courts and counsel, while leaving the precise definitional contours of the phrase to case development. And the Committee proposes limiting the applicability of this portion of the rule to subpoenas that call for personal or confidential information about an individual who is a natural person, as opposed to a corporate entity. This change would serve to prevent corporate victims from claiming that virtually *all* of their documents

[12] We have also proposed a conforming change to Rule 17(a).

[13] Rosenberg Article at page 31 et seq.

and information are "confidential" and disregarding the original purpose of the rule, which was to ensure that individual crime victims were treated with "dignity and respect."

Proposed Amendment to Rule 17(h)—Scope of Limitation on Obtaining Witness Statements

The Committee also proposes adding language to Rule 17(h) to clarify the Rule's scope. Rule 17(h) currently provides:

> (h) *Information Not Subject to a Subpoena*. No party may subpoena a statement of a witness or of a prospective witness under this rule. Rule 26.2 governs the production of the statement.

As originally enacted, Rule 17(h) provided that "[s]tatements made by witnesses or prospective witnesses may not be subpoenaed *from the government or the defendant* under this rule, but shall be subject to production only in accordance with the provisions of Rule 26.2." *See* Order of the Supreme Court, 207 F.R.D. 89, 440 (2002) (emphasis added). This Rule implements the Jencks Act, which requires the government to produce witness statements "in [its] possession" only after the witness has "testified on direct examination." 18 U.S.C. § 3500(a), (b). Neither the Jencks Act nor Rule 26.2 imposes any restrictions or obligations regarding statements that are in the possession of third parties. When this provision was amended to its current version in 2002, the italicized language above was removed. But the Advisory Committee made clear that this "change[] [was] *intended to be stylistic only*," and was simply "part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules." 207 F.R.D. at 443 (emphasis added). Since that time, however, the Committee has seen an increasing number of cases in which third party subpoena recipients and/or the government have argued that Rule 17(h) does not allow the use of a Rule 17 subpoena to obtain *any* witness statements, even those in the hands of third parties. *See, e.g.*, *United States v. Yudong Zhu*, No. 13-cr-761, 2014 WL 5366107, at *3 (S.D.N.Y. Oct. 14, 2014); *United States v. Vasquez*, 258 F.R.D. 68, 72-73 (E.D.N.Y. May 20, 2009). Thus, the Committee proposes a revision to Rule 17(h) expressly limiting the applicability of the rule to subpoenas that call for witness statements "from the other party."

Proposed Addition of Rule 17(i)

To ensure that the broader availability of Rule 17(c) subpoenas to prosecution and defense counsel is not misused, the Committee proposes the addition of a new provision authorizing courts to issue modifying orders to require advance approval for all such subpoenas in individual cases, upon a showing of good cause and specific and articulable facts—including through an *ex parte* submission if necessary. This provision, whose language was drawn from Rule 16(d)(1), will enable courts to balance the proposal's goal of broadening subpoena authority to promote fairness and accuracy in criminal adjudication, ensure equal access to justice, and prevent wrongful convictions, with the need in specific cases to prevent misuse of subpoenas for intimidation or personal embarrassment.

Conclusion

This proposal to modernize Rule 17 is based on the real experiences of our membership regarding the limitations on the ability of criminal defendants to obtain critical documents, data, and information in complex cases in New York federal courts, as well as other federal courts throughout the country. The proposal would further the goal of increasing access to justice for all participants in the criminal justice system, a goal we understand to be shared by the government and defendants alike. We appreciate the opportunity to submit the City Bar's proposal to you and are available to provide any additional information the Advisory Committee may require.

Respectfully submitted,

Marshall L. Miller
Chair, White Collar Crime Committee
New York City Bar Association

Cc: Prof. Sara Sun Beale, Co-Reporter, Advisory Committee on Criminal Rules
Prof. Nancy King, Co-Reporter, Advisory Committee on Criminal Rules

EXHIBIT A

Rule 17. Subpoena (*WITH CHANGES TRACKED*)

(a) CONTENT. A subpoena must state the court's name and the title of the proceeding, include the seal of the court, and command ~~the witness to attend and testify at the time and place the subpoena specifies.~~each person to whom it is directed to do the following at a specified time and place: attend and testify or produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control. The clerk must issue a blank subpoena—signed and sealed—to the party requesting it, and that party must fill in the blanks before the subpoena is served.

(b) DEFENDANT UNABLE TO PAY. Upon a defendant's ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense. If the court orders a subpoena to be issued, the process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.

(c) PRODUCING DOCUMENTS AND OBJECTS.

(1) *In General*. A subpoena may order the witness to produce ~~any books, papers,~~ documents, ~~data~~electronically stored information, or ~~other objects the~~ tangible things in that person's possession, custody, or control. A command in a subpoena ~~designates. The court~~to produce documents, electronically stored information, or tangible things requires the responding person to permit inspection, copying, testing, or sampling of the materials at the time and place the subpoena specifies.

(2) *Scope*. A subpoena may ~~direct~~order the witness to produce ~~the designated~~ items ~~in court before trial or before they~~described in (1) that are ~~to be offered in evidence. When the items arrive, the court may permit~~ relevant and material to the ~~parties and their attorneys to inspect all or part of them~~preparation of the prosecution or defense, including for the impeachment of a potential witness.

(~~2~~) 3) *Quashing or Modifying the Subpoena*. On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive, or if the documents or objects sought are otherwise procurable by exercise of due diligence.

(~~3~~) 4) *Subpoena for Personal or Confidential Information ~~About a Victim.~~* . After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about ~~a victim~~an individual may be served on a third party only by court order. This is the only type of subpoena that requires judicial approval prior to issuance, absent entry of a modifying order under subsection (i). Personal or confidential information includes medical records, psychological records, school records, and other similar information. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the ~~victim~~individual so that the ~~victim~~individual can move to quash or modify the subpoena or otherwise object.

(d) SERVICE. A marshal, a deputy marshal, or any nonparty who is at least 18 years old may serve a subpoena. The server must deliver a copy of the subpoena to the witness and must tender

to the witness one day's witness-attendance fee and the legal mileage allowance. The server need not tender the attendance fee or mileage allowance when the United States, a federal officer, or a federal agency has requested the subpoena.

(e) PLACE OF SERVICE.

(1) *In the United States*. A subpoena requiring a witness to attend a hearing or trial may be served at any place within the United States.

(2) *In a Foreign Country*. If the witness is in a foreign country, 28 U.S.C. §1783 governs the subpoena's service.

(f) ISSUING A DEPOSITION SUBPOENA.

(1) *Issuance*. A court order to take a deposition authorizes the clerk in the district where the deposition is to be taken to issue a subpoena for any witness named or described in the order.

(2) *Place*. After considering the convenience of the witness and the parties, the court may order—and the subpoena may require—the witness to appear anywhere the court designates.

(g) CONTEMPT. The court (other than a magistrate judge) may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by a federal court in that district. A magistrate judge may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by that magistrate judge as provided in 28 U.S.C. §636(e).

(h) INFORMATION NOT SUBJECT TO A SUBPOENA. No party may subpoena a statement of a witness or of a prospective witness, from the other party, under this rule. Rule 26.2 governs the production of the statement.

(i) MODIFYING ORDER. At any time the court may, for good cause and based on specific and articulable facts, require a party to obtain court approval before issuing a subpoena under this rule. The court may permit a party to show good cause and provide specific and articulable facts by a written statement that the court will inspect ex parte.

EXHIBIT B

Rule 17. Subpoena (*CLEAN*)

(a) CONTENT. A subpoena must state the court's name and the title of the proceeding, include the seal of the court, and command each person to whom it is directed to do the following at a specified time and place: attend and testify or produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control. The clerk must issue a blank subpoena—signed and sealed—to the party requesting it, and that party must fill in the blanks before the subpoena is served.

(b) DEFENDANT UNABLE TO PAY. Upon a defendant's ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense. If the court orders a subpoena to be issued, the process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.

(c) PRODUCING DOCUMENTS AND OBJECTS.

(1) *In General*. A subpoena may order the witness to produce documents, electronically stored information, or tangible things in that person's possession, custody, or control. A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding person to permit inspection, copying, testing, or sampling of the materials at the time and place the subpoena specifies.

(2) *Scope*. A subpoena may order the witness to produce items described in (1) that are relevant and material to the preparation of the prosecution or defense, including for the impeachment of a potential witness.

(3) *Quashing or Modifying the Subpoena*. On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive, or if the documents or objects sought are otherwise procurable by exercise of due diligence.

(4) *Subpoena for Personal or Confidential Information*. After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about an individual may be served on a third party only by court order. This is the only type of subpoena that requires judicial approval prior to issuance, absent entry of a modifying order under subsection (i). Personal or confidential information includes medical records, psychological records, school records, and other similar information. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the individual so that the individual can move to quash or modify the subpoena or otherwise object.

(d) SERVICE. A marshal, a deputy marshal, or any nonparty who is at least 18 years old may serve a subpoena. The server must deliver a copy of the subpoena to the witness and must tender to the witness one day's witness-attendance fee and the legal mileage allowance. The server need not tender the attendance fee or mileage allowance when the United States, a federal officer, or a federal agency has requested the subpoena.

(e) PLACE OF SERVICE.

(1) *In the United States*. A subpoena requiring a witness to attend a hearing or trial may be served at any place within the United States.

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(1) *Issuance*. A court order to take a deposition authorizes the clerk in the district where the deposition is to be taken to issue a subpoena for any witness named or described in the order.

(2) *Place*. After considering the convenience of the witness and the parties, the court may order—and the subpoena may require—the witness to appear anywhere the court designates.

(g) CONTEMPT. The court (other than a magistrate judge) may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by a federal court in that district. A magistrate judge may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by that magistrate judge as provided in 28 U.S.C. §636(e).

(h) INFORMATION NOT SUBJECT TO A SUBPOENA. No party may subpoena a statement of a witness or of a prospective witness, from the other party, under this rule. Rule 26.2 governs the production of the statement.

(i) MODIFYING ORDER. At any time the court may, for good cause and based on specific and articulable facts, require a party to obtain court approval before issuing a subpoena under this rule. The court may permit a party to show good cause and provide specific and articulable facts by a written statement that the court will inspect ex parte.

SUPPLEMENT TO AGENDA
Meeting of the Advisory Committee on Criminal Rules
October 27, 2022 | Phoenix, Arizona

Pretrial Subpoena Authority (Rule 17)

I. Discussion format and schedule
II. Participant biographies

I. Discussion format and schedule

Each of the morning sessions focuses on specific questions noted below. We have asked that the initial speakers listed for these sessions restrict their initial comments to those questions, and to no more than 6 minutes each. Following these initial comments, the Chair will provide an opportunity for each subcommittee member, and then each other member of the Committee, to ask one question of the participants. If time allows after discussion of this initial round of questions, members may have more questions. Discussion of issues that warrant separate discussion may be postponed until the afternoon.

Before closing each of the two morning sessions, we hope to reserve a few minutes for each invited participant to provide a brief supplementary comment or response. If we do not have time for these additional comments or responses, we may be able return to these issues in the afternoon, which will be devoted to follow up and new issues. We would also be happy to receive comments in writing after the meeting.

The initial speakers listed in the first session after lunch will have the option of either raising additional issues that have not been discussed or following up on a previously discussed issue. We have asked each of the afternoon's initial speakers to limit their opening comments to 6 minutes, to be followed by questions and comments by subcommittee and committee members using the same procedure described above.

10:00-11:00 COMPLYING WITH DIFFERING STANDARDS FOR SECURING A SUBPOENA

- What standard (or standards) for securing a third-party subpoena is applied in the district (or districts) in which you practice?
- How difficult is it to meet that standard or those standards?
- What specific problems, if any, have you encountered in meeting these standards?

Please note that discussion of the pros and cons of obtaining a subpoena *without* judicial approval will be deferred until the second session.

Initial speakers (< 6m each)

- Robert Cary
- Jim Felman
- Stephen Wallin

11:00-12:15 THE CONSEQUENCES OF REQUIRING JUDICIAL OVERSIGHT

- In your experience do judges exercise oversight in approving third-party subpoenas and/or in filtering information received from a third party?
- Has that oversight caused problems, if so why?
- Has that oversight been beneficial, if so why?

Initial speakers (< 6m each)

- Mary Ellen Coleman

- Mike Gill
- Angie Hallim
- Dimitra Sampson

1:00-2:15 OTHER ISSUES; FOLLOW UP

Initial speakers (<6m each)

- Michael Carter
- Donna Elm
- Ellen Leonida
- Lisa Miller

2:15-3:30 TBD

The remaining time in the afternoon will be devoted as determined by the Committee Chair in light of the discussion.

II. Participant biographies

MICHAEL CARTER

Michael Carter is the Executive Director of the Federal Community Defenders Office for the Eastern District of Michigan. Prior to becoming the Executive Director of the FCDO, Michael worked as a supervising attorney for the Neighborhood Defender Service (NDS) Office in Detroit, Michigan. While at NDS, Michael supervised a team of advocates, including attorneys and social workers, and oversaw the training program for court appointed lawyers in Wayne County. Michael previously spent four years as a staff attorney at the Public Defender Service of the District of Columbia office where he represented indigent clients in serious felony cases. Michael is a graduate Wayne State University Law School in Detroit, and the University of Michigan.

ROBERT M. CARY

Rob Cary has practiced at Williams & Connolly in Washington, DC, for 31 years. He is a Fellow of the American College of Trial Lawyers and has tried cases in 10 states in addition to the District of Columbia. He has taught "Trial Practice" and "Federal White Collar Crime" at Georgetown University Law Center, and has co-taught "Defending a Criminal Case" at Vanderbilt Law School with former District Judge and current Circuit Judge Amul Thapar. He is the co-author of *Federal Criminal Discovery* published by the American Bar Association, which has a chapter devoted to Rule 17(c) subpoenas.

MARY ELLEN COLEMAN

Mary Ellen Coleman is an Assistant Federal Public Defender and Branch Supervisor for the Federal Public Defender for the Western District of North Carolina in the Asheville Office. She has been a criminal defense attorney, and more specifically a public defender, for over 22 years. She began her state criminal defense career in the Knox County Public Defender Community Law Office in 2000 and her federal career as an Assistant Federal Defender with Federal Defender Services of Eastern Tennessee in 2006. In 2012, she joined the office of the Federal Public Defender for the Western District of North Carolina, where she is a trial attorney, team leader, and supervisor of the Asheville office. She has represented criminal defendants at every stage of criminal proceedings and has utilized Rule 17 subpoenas for third party documents for plea negotiations, trial, and for sentencing.

DONNA LEE ELM

Donna Lee Elm started her criminal defense practice in Maricopa County Public Defender's Office in 1990 as a trial lawyer. She rose to their Chief Trial Deputy and stayed there until 2002 when she joined the Federal Defender Office in Phoenix as an AFPD. In 2008, the 11th Circuit appointed her the Federal Defender of the Middle District of Florida, where she served until she retired in 2020 and returned to Arizona. She was appointed to the Joint Electronic and Technology Working Group (which developed the ESI Protocol), and she joined, later chaired, the Defense Automation Working Group that advises on defender office technology. The Chief Justice

appointed her to the Federal Rules Committee, and she was also appointed to the steering committee for President Obama's Clemency Initiative. She has had three U.S. Supreme Court cases. She taught as an Adjunct Professor of Law at ASU and Stetson law schools, and publishes and teaches widely. She presently serves as a CJA attorney representing indigent defendants in appeals and habeas cases for the District of Arizona, the Middle District of Florida, and the 9th and 11th Circuits.

JAMES "JIM" FELMAN

James E. Felman is a partner in the Tampa Bay law firm of Kynes, Markman & Felman, P.A., where he has concentrated his practice of law in the defense of complex criminal matters and related civil litigation for over 30 years. He has represented clients in a wide range of matters, including allegations of bank fraud, health care fraud, mail and wire fraud, securities fraud, public corruption, environmental crimes, antitrust violations, synthetic/illegal drugs, illegal gambling, child abuse/pornography, and murder. Mr. Felman has also devoted a significant portion of his professional efforts to legal reform and policy work. He has testified on an array of topics before the United States Senate, House of Representatives, and Sentencing Commission, and frequently writes and speaks on criminal justice policy issues. He currently serves as a member of the Board of Directors of the National Association of Criminal Defense Lawyers and serves as Chair of the National Association of Criminal Defense Lawyers Task Force on First Step Act Implementation. He also serves as Chair of the American Bar Association Criminal Justice Section's Task Force on First Step Act Implementation. He is a Past Chair of the Criminal Justice Section of the American Bar Association and is the ABA's Past Liaison to the United States Sentencing Commission. He was a founding member of the Steering Committee of Clemency Project 2014 and is former Co-Chair of the Practitioners' Advisory Group to the United States Sentencing Commission. Mr. Felman is a graduate of Wake Forest University, B.A. cum laude, 1984, and Duke University, M.A. Phil. and J.D. with high honors (Order of the Coif), 1987. Following law school, he was a law clerk to Judge Theodore McMillian of the United States Court of Appeals for the Eighth Circuit.

MIKE GILL

Mike Gill has served as the Eastern District of Virginia's (EDVA) Criminal Chief since late 2018, and was recently selected as the Chair for the Criminal Chiefs Working Group. He graduated from Texas Christian University and earned his law degree from the University of Virginia. From 2000 up through 2015, Mike served as a federal prosecutor in EDVA and the Northern District of Texas. He left EDVA in 2015, when DEA's Acting Administrator Chuck Rosenberg selected Mike to serve as DEA's Chief of Staff. In late 2016, he left DEA and joined a Virginia-based law firm where he started a white-collar criminal defense practice, providing him with a clear view from the defense perspective. In late 2018, Mike rejoined the U.S. Attorney's Office. Over the years, he has supervised and handled almost every kind of federal case and tried 52 federal criminal trials to verdict in Texas and Virginia.

ANGIE HALIM

Angie Halim is an experienced federal criminal defense trial attorney. Ms. Halim began her career in 2004 as an associate in the white collar litigation departments of large law firms in

Philadelphia. After five years, she left big law and began building her own federal criminal defense trial practice, representing private and court appointed clients pursuant to the Criminal Justice Act. In 2018, she became an Assistant Federal Defender for the Federal Community Defender Office for the Eastern District of Pennsylvania. Ms. Halim recently left the Defender's office with the goal of building a federal criminal defense non-profit practice. She is currently a solo practitioner, only accepting court appointments to represent indigent federal criminal defendants.

ELLEN LEONIDA

Ellen Leonida is a partner at BraunHagey & Borden. Her practice focuses on leading a broad range of impact litigation in state and federal courts. She also heads the firm's white collar practice. Ellen has conducted over 80 jury trials in federal courts in the Northern District of California and California state courts. Ellen served as the forensic staff attorney for the Northern District of California Federal Defender's Office between 2010 and 2020, where she developed an annual DNA boot camp and offered training and guidance to criminal defense attorneys throughout the country on forensic issues. She has lectured nationally on topics including DNA, digital forensics, and trial skills. Ellen is currently an adjunct professor at USF School of Law and has taught at the University of California, Berkeley School of Law. She served as a judicial representative for the Northern District of California Judicial Conference in 2016, 2017, and 2018.

LISA MILLER

Lisa Miller is a Deputy Assistant Attorney General in the U.S. Department of Justice's Criminal Division with responsibility for the Criminal Fraud and Appellate Sections. The Fraud Section consists of more than 180 prosecutors who investigate and prosecute a wide range of white-collar crimes, including, in particular, health care fraud, Foreign Corrupt Practices Act (FCPA) violations, and securities, commodities, investment, procurement, and corporate fraud matters. The Fraud Section litigates complex white-collar criminal cases independently as well as in partnership with U.S. Attorney's Offices across the country. The Appellate Section, a group of approximately 30 attorneys, assists U.S. Attorneys' Offices and Department of Justice components with handling appellate issues, briefing and arguing appeals, and promulgating Department-wide guidance. Prior to her current role, Lisa held two managerial positions within the Fraud Section (Chief of the Market Integrity & Major Frauds Unit and Principal Assistant Chief in the Health Care Fraud Unit), served as a Trial Attorney in the Fraud Section, and served as an Assistant United States Attorney for the Southern District of Florida in that Office's Appellate, Major Crimes, and Economic Crimes Sections. She has tried fifteen federal criminal cases. She is a graduate of the University of Virginia School of Law and Cornell University.

DIMITRA SAMPSON

Dimitra Sampson has been an Assistant United States Attorney in the District of Arizona since 2008. She has served as a Criminal Division Chief from 2019 - 2021, and the Executive Assistant United States Attorney (EAUSA) from 2021 - 2022. Other than those years mentioned, she has spent the remainder of her career as an AUSA working in the Violent Crimes Section, prosecuting violent crimes cases, primarily occurring in Indian Country. In fact, she was the

Section Chief for Violent Crimes from 2014 - 2019, and served as a Tribal Liaison before that from 2013 - 2014. It is through her trial work as an AUSA prosecuting violent crimes that she has encountered experience in dealing with Rule 17(c) subpoenas.

STEPHEN WALLIN

Steve Wallin graduated from Wake Forest University in 1981 with a BS in business and from the University of North Carolina in 1985 with a JD and MBA. Steve served as a US Army JAG from 1985-1992, an associate at Taylor and Cawthorne in Tucson from 1992-1997, and a deputy public defender in Mohave County, AZ from 1997-2000. He then worked as an associate at Goldberg and Osborne in Phoenix from 2000-2002 and a deputy public defender in Maricopa County, AZ from 2002-2005. Steve has been a sole practitioner since 2005, and a CJA panel member since 2010. His experience with Rule 17 subpoenas has been entirely on the CJA panel, but he has also had experience with the Arizona analogue during his entire post-military career.