ADVISORY COMMITTEE
ON
CIVIL RULES

April 1, 2025

AGENDA
Meeting of the Advisory Committee on Civil Rules
April 1, 2025

OPENING BUSINESS

ACTION ITEMS

INFORMATION ITEMS

Intercommittee Reports

Subcommittee Reports

Other Information Items

RULES COMMITTEES — CHAIRS AND REPORTERS

Committee on Rules of Practice and Procedure
(Standing Committee)

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

Advisory Committee on Appellate Rules

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

Advisory Committee on Bankruptcy Rules

Chair	Reporter	Associate Reporter
Honorable Rebecca B. Connelly United States Bankruptcy Court Harrisonburg, VA	Professor S. Elizabeth Gibson University of North Carolina at Chapel Hill Chapel Hill, NC	Professor Laura B. Bartell Wayne State University Law School Detroit, MI

Advisory Committee on Civil Rules

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

Advisory Committee on Criminal Rules

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

Advisory Committee on Evidence Rules

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

ADVISORY COMMITTEE ON CIVIL RULES

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

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Pittsburgh, PA

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Seattle, WA

Professor Zachary Clopton
Northwestern University
Pritzker School of Law
Chicago, IL

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Impact Fund
Berkeley, CA

Honorable R. David Proctor
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Acting Assistant Attorney General (ex officio)
United States Department of Justice
Washington, DC

Honorable Jane Bland
Supreme Court of Texas
Austin, Texas

Honorable Annie Christoff
United States District Court
Memphis, TN

Honorable David C. Godbey
United States District Court
Dallas, TX

Honorable M. Hannah Lauck
United States District Court
Richmond, VA

Honorable Marvin Quattlebaum, Jr.
United States Court of Appeals
Greenville, SC

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Chicago, IL

ADVISORY COMMITTEE ON CIVIL RULES

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

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

ADVISORY COMMITTEE ON CIVIL RULES
SUBCOMMITTEES
(2025)

Cross-Border Discovery Subcommittee Judge Manish S. Shah, Chair Professor Zachary Clopton Joshua Gardner, Esq. (DOJ) Judge Catherine P. McEwen (Liaison)	**Discovery Subcommittee** Judge David Godbey, Chair Judge Annie Christoff David Burman, Esq. Joe Sellers, Esq. David Wright, Esq. Thomas Bruton, Clerk Rep
Rule 7.1 Subcommittee Justice Jane N. Bland, Chair Judge Manish S. Shah David Burman, Esq.	**Rule 41 Subcommittee** Judge Cathy Bissoon, Chair Professor Zachary Clopton David Burman, Esq.
Rule 43/45 Subcommittee Judge M. Hannah Lauck, Chair Justice Jane Bland David Burman, Esq. Jocelyn Larkin, Esq. Joe Sellers, Esq. Judge Benjamin Kahn (Liaison)	**Third-Party Litigation Funding (TPLF) Subcommittee** Judge R. David Proctor, Chair Professor Zachary Clopton Jocelyn Larkin, Esq. Joe Sellers, Esq. David Wright, Esq. Judge A. Marvin Quattlebaum

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Dr. Elizabeth Wiggins, Esq.
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(Criminal)

Dr. Emery G. Lee, Esq.
Senior Research Associate
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Dr. Tim Reagan, Esq.
Senior Research Associate
(Standing)

TAB 1

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

January 7, 2025

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

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

The following attended on behalf of the Advisory Committees:

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

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

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

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

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

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

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

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OPENING BUSINESS

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

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

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

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

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

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

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

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

JOINT COMMITTEE BUSINESS

Electronic Filing by Self-Represented Litigants

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Joint Subcommittee on Attorney Admission

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Judge Bates thanked the Subcommittee and reporters for their work.

Potential Issues Related to the Privacy Rules

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

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

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

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

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

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

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

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

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

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

Information Items

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

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

Information Items

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

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

Action Items

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

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

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

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

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

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

Information Items

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

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

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

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

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

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

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

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

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

Judge Bates thanked Judge Connelly and the Advisory Committee.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

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

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

Action Items

Publication of Proposed Amendment to Rule 81(c) Concerning Jury-Trial Demands in Removed Actions. Judge Rosenberg reported on this item. The text of the proposed amendment begins on page 292 of the agenda book, and the written report begins on page 271. Before 2007, Rule 81(c) said: "If state law does not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time." This excused a jury demand only when the case was removed from a state court that never requires a jury demand. But in the 2007 restyling, the verb "does" was changed to "did." This restyling could produce confusion when a case is removed from a state court that has a jury demand requirement but permits that demand later in the litigation. Accordingly, the Advisory Committee considered amendment to remove any uncertainty about whether and when a jury demand must be made after removal.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Information Items

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

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

Information Items

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Judge Bates thanked Judge Dever for the report.

OTHER COMMITTEE BUSINESS

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

Action Item

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

CONCLUDING REMARKS

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

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TAB 2

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Committee or Standing Committee) met on January 7, 2025. New member Judge Joan N. Ericksen was unable to participate.

Representing the advisory committees were Judge Allison H. Eid (10th Cir.), Chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Rebecca Buehler Connelly, chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robin L. Rosenberg, Chair, Professor Richard L. Marcus, Reporter, Professor Andrew Bradt, Associate Reporter, and Professor Edward Cooper, consultant, Advisory Committee on Civil Rules; Judge James C. Dever III, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Jesse M. Furman, Chair and Professor Daniel Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; H. Thomas Byron III, the Standing Committee's Secretary; Bridget M. Healy and Scott Myers, Rules Committee Staff Counsel; Kyle Brinker, Law Clerk to the Standing Committee; John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, Federal Judicial Center; and Elizabeth J. Shapiro,

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

Deputy Director, Federal Programs Branch, Civil Division, Department of Justice, on behalf of Deputy Attorney General Lisa O. Monaco.

In addition to its general business, including a review of the status of pending rule amendments in different stages of the Rules Enabling Act process, the Standing Committee received and responded to reports from the five advisory committees. The Committee also received updates on joint committee business that involve ongoing and coordinated efforts in response to suggestions on: (1) expanding access to electronic filing by self-represented litigants, (2) adopting nationwide rules governing admission to practice before the U.S. district courts, and (3) requiring complete redaction of Social Security numbers (SSNs).

FEDERAL RULES OF APPELLATE PROCEDURE

Information Items

The Advisory Committee on Appellate Rules met on October 9, 2024. The Advisory Committee is considering several issues, including possible amendments to Rule 15 (Review or Enforcement of an Agency Order—How Obtained; Intervention) to address the "incurably premature" doctrine regarding review of agency action, Rule 4 (Appeal as of Right—When Taken) concerning reopening of the time to take a civil appeal, and Rule 8 (Stay or Injunction Pending Appeal) to address the purpose and length of administrative stays, and suggestions for a new rule governing intervention on appeal. The Advisory Committee removed from its agenda suggestions regarding standards of review, use of capital letters and diacritical marks in case captions, incorporation of widely adopted local rules into the national rules, and standardizing page equivalents for word limits. The Advisory Committee will hold a February 2025 hearing on its two proposals that are out for public comment; one proposal concerns Rule 29's amicus brief requirements and the other concerns the information required on Form 4 for seeking in forma pauperis status.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Form Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rule 2002 (Notices) and Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy) with a recommendation that they be published for public comment in August 2025. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 2002 (Notices)

The proposed amendment to Rule 2002(o) would simplify the caption of most notices given under Rule 2002 by requiring that they include only the court's name, the debtor's name, the case number, the chapter under which the case was filed, and a brief description of the document's character. Notably, most Rule 2002 notices would no longer be required to include the last four digits of the debtor's SSN or individual taxpayer identification number.

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

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

Information Items

The Advisory Committee on Bankruptcy Rules met on September 12, 2024. In addition to the recommendation discussed above, the Advisory Committee considered suggestions for an amendment to allow appointment of masters in bankruptcy cases and proceedings and for a new rule concerning random assignment of mega bankruptcy cases within a district, which the

Advisory Committee will revisit after the Committee on the Administration of the Bankruptcy System has concluded its consideration of potential related policy (*see* Report of the Committee on the Administration of the Bankruptcy System, at Agenda E-3). The Advisory Committee removed from its agenda a suggestion to add language concerning the possibility of unclaimed funds to the forms for orders of discharge in cases under chapters 7 and 13. After careful study of a suggestion to require complete redaction of SSNs (rather than redaction of all but the last four digits, as currently required by the national rules), and after considering bankruptcy stakeholders' expressed need for the last four digits of the SSN, the Advisory Committee decided to take no action on the suggestion at this time; however, the Advisory Committee will continue to monitor discussions of this suggestion in the other advisory committees.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Approved for Publication and Comment

The Advisory Committee on Civil Rules submitted proposed amendments to Rule 81 (Applicability of the Rules in General; Removed Actions) and Rule 41 (Dismissal of Actions) with a recommendation that they be published for public comment in August 2025. The Standing Committee unanimously approved the Advisory Committee's recommendation concerning Rule 81 (with a stylistic change) and offered feedback on the language of the proposed amendment to Rule 41. The Advisory Committee will bring the Rule 41 proposal back for approval at the Standing Committee's June 2025 meeting.

The proposed amendment to Rule 81(c) would provide that a jury demand must always be made after removal if no such demand was made before removal and a party desires a jury trial, and the Rule 41 proposal would clarify that Rule 41(a) is not limited to authorizing dismissal only of an entire action but also permits the dismissal of one or more claims in a multi-

claim case and that a stipulation of dismissal must be signed by only all parties who have appeared and remain in the action.

Information Items

The Advisory Committee on Civil Rules met on October 10, 2024. In addition to the recommendations discussed above, the Advisory Committee continued to discuss proposals to amend Rule 45 (Subpoena) regarding the manner of service of subpoenas and the tendering of witness fees at time of service. The Advisory Committee is also studying possible amendments concerning remote testimony; one possible amendment to Rule 45 would clarify the court's subpoena authority with respect to remote trial testimony, while a different possible amendment to Rule 43 (Taking Testimony) would relax the standards governing permission for remote trial testimony. The Advisory Committee heard updates from its subcommittee on Rule 7.1 (Disclosure Statement). The Advisory Committee also continues to study suggestions on Rule 55 (Default; Default Judgment), cross-border discovery, and the use of the term "master" in the Civil Rules, and has commenced a renewed study of the topic of third-party litigation funding. On the random assignment of cases, the Advisory Committee noted the Judicial Conference's March 2024 adoption of policy on this topic (JCUS-MAR 2024, p. 8) and will continue to study the districts' response to this policy.

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Items

The Advisory Committee on Criminal Rules met on November 6-7, 2024. The Advisory Committee continued to discuss a proposal to expand the availability of pretrial subpoenas under Rule 17 (Subpoena) and heard the views of 12 invited speakers who provided comments on a possible draft amendment. In addition, the Advisory Committee established two new subcommittees to consider proposals for amendments to clarify Rule 40 (Arrest for Failing to

Appear in Another District or for Violating Conditions of Release Set in Another District) and for amendments to Rule 43 (Defendant's Presence) to extend the district courts' authority to use videoconferencing with the defendant's consent.

The Advisory Committee is actively considering proposals to amend Rule 49.1 (Privacy Protection for Filings Made with the Court) to protect minors' privacy by requiring the use of pseudonyms and to require complete redaction of SSNs (rather than redaction of all but the last four digits).

The Advisory Committee decided to remove from its agenda a proposal to amend Rule 53 (Courtroom Photographing and Broadcasting Prohibited) to allow broadcasting of criminal proceedings under some circumstances and a proposal to revise the procedures for contempt proceedings under Rule 42 (Criminal Contempt).

FEDERAL RULES OF EVIDENCE

Information Items

The Advisory Committee on Evidence Rules met on November 8, 2024. The Advisory Committee discussed possible amendments relating to the admissibility of evidence generated by artificial intelligence. The discussion focused on two areas: the admissibility of machine-learning evidence offered without the accompanying testimony of an expert, and challenges to the admissibility of asserted "deepfakes" (that is, fake audio and/or visual recordings created through the use of artificial intelligence). To address the first topic, the Advisory Committee is developing a proposed new Rule 707 that would apply to machine-generated evidence standards akin to those in Rule 702 (Testimony by Expert Witnesses); the Advisory Committee will recommend to the Civil and Criminal Rules Committees that they consider any associated issues concerning disclosures relating to machine-learning evidence. The Committee is not currently intending to bring forward for

publication a proposal addressing the second topic (deepfakes) but will work on a possible amendment to Rule 901 (Authenticating or Identifying Evidence) that could be brought forward in the event that developments warrant rulemaking on the topic.

The Advisory Committee is considering a possible amendment to Rule 609 (Impeachment by Evidence of a Criminal Conviction) to tighten the standard for admission in criminal cases of evidence of a defendant's prior felony conviction. It has also begun to study a proposal to amend Rule 902 (Evidence That Is Self-Authenticating) to add federally recognized Indian tribes to Rule 902(1)'s list of governments the public documents of which are self-authenticating.

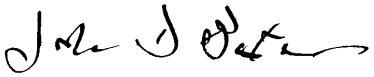
The Advisory Committee decided to remove from its agenda a proposal to amend Rule 702 (Testimony by Expert Witnesses) regarding peer review and a suggestion regarding a possible amendment or new rule to address allegations of prior false accusations of sexual misconduct. In addition, the Advisory Committee decided to table a suggestion for a proposed amendment to Rule 404 (Character Evidence, Other Crimes, Wrongs, or Acts) concerning evidence of other crimes, wrongs, or acts the relevance of which depends upon inferences about propensity. Finally, the Advisory Committee determined that the decisions in *Smith v. Arizona*, 602 U.S. 779 (2024), and *Diaz v. United States*, 602 U.S. 526 (2024), do not currently require any amendments to Rule 703 (Bases of an Expert's Opinion Testimony) or Rule 704 (Opinion on an Ultimate Issue), but it will monitor the lower court caselaw applying those decisions.

JUDICIARY STRATEGIC PLANNING

The Committee was asked by Chief Judge Michael A. Chagares (3d Cir.), the judiciary's planning coordinator, to identify any changes it believes should be considered in updating the *Strategic Plan for the Federal Judiciary* in 2025. Recommendations on behalf of the Committee

regarding the judicial workforce and preserving public trust in the judiciary were communicated to Chief Judge Chagares by letter dated January 15, 2025.

Respectfully submitted,



John D. Bates, Chair

Paul J. Barbadoro
Elizabeth J. Cabraser
Louis A. Chaiten
Joan N. Ericksen
Stephen A. Higginson
Edward M. Mansfield
Troy A. McKenzie
Patricia Ann Millett
Lisa O. Monaco
Andrew J. Pincus
D. Brooks Smith
Kosta Stojilkovic
Jennifer G. Zipps

TAB 3

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Effective December 1, 2024

REA History:

- Transmitted to Congress (Apr 2024)
- Transmitted to Supreme Court (Oct 2023)
- Approved by Standing Committee (June 2023 unless otherwise noted)
- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 32	Conforming proposed amendment to subdivision (g) to reflect the proposed consolidation of Rules 35 and 40.	AP 35, 40
AP 35	The proposed amendment would transfer the contents of the rule to Rule 40 to consolidate the rules for panel rehearings and rehearings en banc together in a single rule.	AP 40
AP 40	The proposed amendments address panel rehearings and rehearings en banc together in a single rule, consolidating what had been separate provisions in Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 would be transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination.	AP 35
Appendix: Length Limits	Conforming proposed amendments would reflect the proposed consolidation of Rules 35 and 40 and specify that the limits apply to a petition for initial hearing en banc and any response, if requested by the court.	AP 35, 40
BK 1007(b)(7) and related amendments	The proposed amendment to Rule 1007(b)(7) would require a debtor to submit the course certificate from the debtor education requirement in the Bankruptcy Code. Conforming amendments would be made to the following rules by replacing the word "statement" with "certificate": Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3) and 9006(c)(2).	
BK 7001	The proposed amendment would exempt from the list of adversary proceedings in Rule 7001, "a proceeding by an individual debtor to recover tangible personal property under § 542(a)."	
BK 8023.1 (new)	This would be a new rule on the substitution of parties modeled on FRAP 43. Neither FRAP 43 nor Fed. R. Civ. P. 25 is applicable to parties in bankruptcy appeals to the district court or bankruptcy appellate panel, and this new rule is intended to fill that gap.	AP 43
BK Restyled Rules	The third and final set of current Bankruptcy Rules, consisting of Parts VII-IX, are restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The first set of restyled rules (Parts I & II) were published in 2020, and the second set (Parts III-VI) were published in 2021. The full set of restyled rules is expected to go into effect no earlier than December 1, 2024.	
CV 12	The proposed amendment would clarify that a federal statute setting a different time should govern as to the entire rule, not just to subdivision (a).	

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Effective December 1, 2024

REA History:

- Transmitted to Congress (Apr 2024)
- Transmitted to Supreme Court (Oct 2023)
- Approved by Standing Committee (June 2023 unless otherwise noted)
- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
EV 107	The proposed amendment was published for public comment as new Rule 611(d), but is now new Rule 107.	EV 1006
EV 613	The proposed amendment would require that, prior to the introduction of extrinsic evidence of a witness's prior inconsistent statement, the witness receive an opportunity to explain or deny the statement.	
EV 801	The proposed amendment to paragraph (d)(2) would provide that when a party stands in the shoes of a declarant or declarant's principal, hearsay statements made by the declarant or declarant's principal are admissible against the party.	
EV 804	The proposed amendment to subparagraph (b)(3)(B) would provide that when assessing whether a statement is supported by corroborating circumstances that clearly indicate its trustworthiness, the court must consider the totality of the circumstances and evidence, if any, corroborating the statement.	
EV 1006	The proposed changes would permit a properly supported summary to be admitted into evidence whether or not the underlying voluminous materials have been admitted. The proposed changes would also clarify that illustrative aids not admitted under Rule 1006 are governed by proposed new Rule 107.	EV 107

Effective (no earlier than) December 1, 2025, unless otherwise noted

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2024)

REA History:

- Approved by Standing Committee (June 2024 unless otherwise noted)
- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 6	The proposed amendments would address resetting the time to appeal in cases where a district court is exercising original jurisdiction in a bankruptcy case by adding a sentence to Appellate Rule 6(a) to provide that the reference in Rule 4(a)(4)(A) to the time allowed for motions under certain Federal Rules of Civil Procedure must be read as a reference to the time allowed for the equivalent motions under the applicable Federal Rule of Bankruptcy Procedure. In addition, the proposed amendments would make Rule 6(c) largely self-contained rather than relying on Rule 5 and would provide more detail on how parties should handle procedural steps in the court of appeals.	BK 8006
AP 39	The proposed amendments would provide that the allocation of costs by the court of appeals applies to both the costs taxable in the court of appeals and the costs taxable in the district court. In addition, the proposed amendments would provide a clearer procedure that a party should follow if it wants to request that the court of appeals to reconsider the allocation of costs.	
BK 3002.1 and Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R	Previously published in 2021. Like the prior publication, the 2023 republished amendments to the rule are intended to encourage a greater degree of compliance with the rule's provisions. A proposed midcase assessment of the mortgage status would no longer be mandatory notice process brought by the trustee but can instead be initiated by motion at any time, and more than once, by the debtor or the trustee. A proposed provision for giving only annual notices HELOC changes was also made optional. Also, the proposed end-of-case review procedures were changed in response to comments from a motion to notice procedure. Finally, proposed changes to 3002.1(i), redesignated as 3002.1(i) are meant to clarify the scope of relief that a court may grant if a claimholder fails to provide any of the information required under the rule. Six new Official Forms would implement aspect of the rule.	
BK 8006	The proposed amendment to Rule 8006(g) would clarify that any party to an appeal from a bankruptcy court (not merely the appellant) may request that a court of appeals authorize a direct appeal (if the requirements for such an appeal have otherwise been met). There is no obligation to file such a request if no party wants the court of appeals to authorize a direct appeal.	AP 6
Official Form 410	The proposed amendment would change the last line of Part 1, Box 3 to permit use of the uniform claim identifier for all payments in cases filed under all chapters of the Code, not merely electronic payments in chapter 13 cases. The amended form went into effect December 1, 2024.	

Effective (no earlier than) December 1, 2025, unless otherwise noted

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2024)

REA History:

- Approved by Standing Committee (June 2024 unless otherwise noted)
- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
CV 16	The proposed amendments to Civil Rule 16(b) and 26(f) would address the "privilege log" problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials.	CV 26
CV 16.1 (new)	The proposed new rule would provide the framework for the initial management of an MDL proceeding by the transferee judge. Proposed new Rule 16.1 would provide a process for an initial MDL management conference, submission of an initial MDL conference report, and entry of an initial MDL management order.	
CV 26	The proposed amendments to Civil Rule 16(b) and 26(f) would address the "privilege log" problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials.	CV 16

Effective (no earlier than) December 1, 2026

Current Step in REA Process:

- Published for public comment (Aug 2024 – Feb 2025 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2024 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 29	The proposed amendments to Rule 29 relate to amicus curiae briefs. The proposed amendments, among other things, would require all amicus briefs to include a concise description of the identity, history, experience, and interests of the amicus curiae, together with an explanation of how the brief and the perspective of the amicus will help the court. In addition, they would require an amicus that has existed for less than 12 months to state the date the amicus was created. With regard to the relationship between a party and an amicus, two new disclosure requirements would be added. Also, the proposed amendments would retain the member exception in the current rule, but limit the exception to those who have been members for the prior 12 months. Finally, the proposed amendments would require leave of court for all amicus briefs, not just those at the rehearing stage.	Rule 32; Appendix
AP 32	The proposed amendments to Rule 32 would conform to the proposed amendments to Rule 29.	Rule 29
AP Appendix	The proposed amendments to the Appendix would conform to the proposed amendments to Rule 29.	Rule 29
AP Form 4	The proposed amendments to Form 4 would simplify Form 4, with the goal of reducing the burden on individuals seeking in forma pauperis status (IFP) while providing the information that courts of appeals need and find useful when deciding whether to grant IFP status.	
BK 1007	The proposed amendments to Rule 1007(c)(4) eliminate the deadlines for filing certificates of completion of a course in personal financial management. The proposed amendments to Rule 1007(h) clarify that a court may require a debtor to file a supplemental schedule to report postpetition property or income that comes into the estate under § 115, 1207, or 1306 of the Bankruptcy Code.	
BK 3018	The proposed amendment to subdivision (c) would allow for more flexibility in how a creditor or equity security holder may indicate acceptance of a plan in a chapter 9 or chapter 11 case.	
BK 5009	The proposed amendments to Rule 5009(b) would provide an additional reminder notice to the debtors that the case may be closed without a discharge if the debtor's certificate of completion of a personal financial management course has not been filed.	
BK 9006	The proposed amendments conform to the proposed amendments to Rule 1007.	
BK 9014	The proposed amendment to Rule 9014(d) relaxes the standard for allowing remote testimony in contested matters to "cause and with appropriate safeguards." The current standard, imported from the trial standard in Civil Rule	

Effective (no earlier than) December 1, 2026

Current Step in REA Process:

- Published for public comment (Aug 2024 – Feb 2025 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2024 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
	43(a), which is applicable across bankruptcy (in both contested matters and adversary proceedings) is cause "in compelling circumstances and with appropriate safeguards."	
BK 9017	The proposed amendment to Rule 9017 removes the reference to Civil Rule 43 leaving the proposed amendment to Rule 9014(d) to govern the standard for allowing remote testimony in contested matters, and Rule 7043 to govern the standard for allowing remote testimony in adversary proceedings.	
BK 7043	Rule 7043 is new and works with proposed amendments to Rules 9014 and 9017. It would make Civil Rule 43 applicable to adversary proceedings (though not to contested matters	
BK Official Form 410S1	The proposed changes would conform the form the pending amendments to Rule 3002.1 that are on track to go into effect on **December 1, 2025,** and would go into effect on the same date as the rule change.	
EV 801	The proposed amendment to Rule 801(d)(1)(A) would provide that all prior inconsistent statements admissible for impeachment are also admissible as substantive evidence, subject to Rule 403.	

TAB 4

Legislation That Directly or Effectively Amends the Federal Rules
119th Congress
(January 3, 2025–January 3, 2027)

Ordered by most recent legislative action; most recent first

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Litigation Transparency Act of 2025	**H.R. 1109** *Sponsor:* Issa (R-CA) *Cosponsors:* Collins (R-GA) Fitzgerald (R-WI)	CV 5, 26	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr1109/BILLS-119hr1109ih.pdf **Summary:** Would require a party or record of counsel in a civil action to disclose to the court and other parties the identity of any person that has a right to receive a payment or thing of value that is contingent on the outcome of the action or group of actions and to product to the court and other parties any such agreement.	• 02/07/2025: H.R. 1109 introduced in House; referred to Judiciary Committee
Alexandra's Law Act of 2025	**H.R. 780** *Sponsor:* Issa (R-CA) *Cosponsors:* Kiley (R-CA) Obernolte (R-CA)	EV 410	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr780/BILLS-119hr780ih.pdf **Summary:** Would permit a previous nolo contendere plea in a case involving death resulting from the sale of fentanyl to be used as evidence to prove in an 18 U.S.C. § 1111 or § 1112 case that the defendant had knowledge that the substance provided to the decedent contained fentanyl.	• 01/28/2025 introduced in House; referred to Judiciary and Energy & Commerce Committees
Protect the Gig Economy Act of 2025	**H.R. 100** *Sponsor:* Biggs (R-AZ)	CV 23	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr100/BILLS-119hr100ih.pdf **Summary:** Would add a requirement to Civil Rule 23(a) that a member of a class may sue or be sued as representative parties only if "the claim does not allege the misclassification of employees as independent contractors."	• 01/03/2025 introduced in House; referred to Judiciary Committee

Legislation Requiring Only Technical or Conforming Changes
118th Congress
(January 3, 2023–January 3, 2025)

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Rosa Parks Day Act	**H.R. 964** *Sponsor:* Sewell (D-AL) *Cosponsors:* 62 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/bill/119th-congress/house-bill/964/text?s=3&r=2&q=%7B%22search%22%3A%22federal+holiday%22%7D **Summary:** Would make Rosa Parks Day a federal holiday.	• 02/04/2025: Introduced in House; referred to Committee on Oversight & Government Reform
Lunar New Year Day Act	**H.R. 794** *Sponsor:* Meng (D-NY) *Cosponsors:* 39 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr794/BILLS-119hr794ih.pdf **Summary:** Would make Lunar New Year Day a federal holiday.	• 01/28/2025: Introduced in House; referred to Committee on Oversight & Government Reform
Election Day Act	**H.R. 6267** *Sponsor:* Fitzpatrick (R-PA) *Cosponsor:* Dingell (D-MI)	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr154/BILLS-119hr154ih.pdf **Summary:** Would make Election Day a federal holiday.	• 01/03/2025: Introduced in House; referred to Committee on Oversight & Government Reform

TAB 5

MINUTES
CIVIL RULES ADVISORY COMMITTEE
Washington, DC
October 10, 2024

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts in Washington, DC, on October 10, 2024. The meeting was open to the public. Participants included Judge Robin L. Rosenberg, Advisory Committee Chair, and Advisory Committee members Judge Cathy Bissoon, Justice Jane Bland, David Burman, Judge Annie Christoff, Professor Zachary Clopton, Chief Judge David Godbey, Jocelyn Larkin, Judge M. Hannah Lauck, Chief Judge R. David Proctor, Judge Marvin Quattlebaum, Joseph Sellers, Judge Manish Shah, and David Wright. Professor Richard L. Marcus participated as Reporter, Professor Andrew D. Bradt as Associate Reporter, and Professor Edward H. Cooper (remotely) as Consultant. Judge John D. Bates, Chair, Judge D. Brooks Smith, Liaison, Professor Catherine T. Struve, Reporter, and Professor Daniel R. Coquillette, Consultant (remotely) represented the Standing Committee. Judge Catherine P. McEwen participated remotely as Liaison from the Bankruptcy Rules Committee. Clerk Liaison Thomas Bruton also participated**.** The Department of Justice was represented by Joshua Gardner in lieu of committee member Brian Boynton, who could not attend due to a court appearance. The Administrative Office was represented by H. Thomas Byron III, Scott Myers (remotely), Rakita Johnson, Shelly Cox (remotely), and law clerk Kyle Brinker. The Federal Judicial Center was represented by Dr. Emery Lee and Dr. Tim Reagan (remotely). Members of the public who joined the meeting remotely or in person are identified in the attached attendance list.

Judge Rosenberg opened the meeting by welcoming all observers with appreciation for their participation and interest in the rulemaking process. She then thanked the committee members who have been reappointed: Judges Bissoon and Proctor, whose terms have been extended for three years, and Joseph Sellers, whose term has been extended for one year. She also welcomed new committee members: Judges Marvin Quattlebaum and Annie Christoff, Jocelyn Larkin, and David Wright. Judge Rosenberg also welcomed with gratitude the new Clerk Liaison to the Committee, Thomas Bruton of the Northern District of Illinois. She also noted, with thanks, the attendance of the new Rules Law Clerk, Kyle Brinker. Judge Rosenberg also expressed her and the Advisory Committee's appreciation for the contributions of former Counsel Allison Bruff, who has left the Administrative Office for private practice.

Prior to beginning the day's agenda items, Judge Rosenberg expressed special appreciation to subcommittee Chairs Judge Shah (Cross-Border Discovery), Chief Judge Godbey (Discovery), Chief Judge Proctor (Multidistrict Litigation), Justice Bland (Rule 7.1), Judge Bissoon (Rule 41), Judge Lauck (Rules 43 & 45), and Judge Oetken (Joint Committee on Attorney Admissions). Judge Rosenberg also expressed gratitude to the members of the public in attendance and thanked them for their ongoing interest in the work of the Advisory Committee.

Judge Rosenberg then gave a brief report on the September 2024 meeting of the Judicial Conference of the United States. She reported that the Conference had approved the proposed amendments to Rules 16 and 26, and new Rule 16.1. She indicated that these proposals would be sent to the U.S. Supreme Court by the end of the month. If the Court approves the proposals, it will issue an order that will be transmitted to both houses of Congress by May 1, 2025, and

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barring action by Congress the amendments will hopefully then go into effect on December 1, 2025. Judge Rosenberg congratulated the Advisory Committee on the progress of these proposals, each of which was the product of much effort. With respect to pending legislation that would affect the Federal Rules, Judge Rosenberg referred members to the materials in the agenda book.

Action Items

Review of Minutes

Judge Rosenberg then turned to the first action item: approval of the minutes of the April 9, 2024, Advisory Committee meeting, held in Denver, CO. The draft minutes included in the agenda book were unanimously approved, subject to corrections by the Reporter as needed.

Rule 81(c)(3)(A)

The next action item involved the process for making a jury demand after removal in Rule 81(c)(3)(A), which the Advisory Committee had discussed at its April 2024 meeting without reaching consensus on a final action. The current version of the Rule, as restyled in 2007, provides, in pertinent part:

> A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law **did** not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. (Emphasis added).

Prior to restyling, the verb "did" (bolded above) was "does." Professor Marcus explained that this change, for which no one involved could remember a specific reason, has introduced some ambiguity into the rule. In at least one instance, a lawyer who had not demanded a jury trial in state court prior to removal (because the deadline to do so under state law had not yet arrived) failed to do so after removal and accidentally waived his client's right to a jury trial. Reverting to "does" would arguably make it clearer that the rule requires a timely post-removal jury demand unless the state court in which the case was filed would *never* require a jury demand, as opposed to cases in which a state-court jury demand would have eventually been required but the deadline had not yet arrived. Based on research by Rules Law Clerk Zachary Hawari, while all states' laws are not entirely clear, it appears that at least 8-9 states never require a jury demand.

Professor Marcus noted three alternatives, originally laid out at pp. 99-103 of the agenda book. The Advisory Committee could, of course, leave the current rule as it is. Alternatively, it could simply change the rule back to its pre-2007 text, replacing "did" with "does" (Alternative 1.) Or, the rule could be more extensively redrafted to make explicit that the deadlines in Rule 38(b) govern jury demands in all removed cases in which the demand has not been made before removal. (Alternative 2, as restyled and presented in a handout that is now included at the end of the agenda book materials posted on uscourts.gov.) One potential virtue of Alternative 2 is to eliminate uncertainty in that it makes clear that parties must always make a timely jury demand under Rule 38(b) if they had not done so in state court prior to removal.

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Judge Rosenberg then indicated that all necessary work had been completed on this issue, and the question of whether to move forward was ripe for Advisory Committee consideration. One lawyer committee member favored Alternative 2 because it makes clear that a federal jury demand is necessary regardless of state law. A judge member also expressed support for Alternative 2 because it removes any ambiguity regarding timing. Professor Struve, however, expressed concern that many lawyers will be unaware of Rule 81(c)(3) and their clients may need to be protected from inadvertently losing their jury-trial rights. Alternative 1 may provide better protection for clients under these circumstances since failure to make a post-removal jury demand under Rule 38 will be excused in states that never require such a demand. Professor Coquillette added that this concern may be especially relevant to pro se litigants who may be relying on the law of the state in which they filed. Professor Clopton suggested that the rule make explicit that a judge has discretion in removed cases to allow a jury demand that would otherwise be untimely, as in Rule 39(b).

Professor Marcus, however, suggested that in states where a jury demand is not required, word would get out that such a demand is necessary after removal. A judge member added that Rule 39(b) also always allows a judge to order a jury trial if it is not timely demanded, and perhaps a reference to Rule 39(b) in the rule, or in the Committee Note, would remind judges that they have such discretion in removed cases, as well. Another judge member then asked the Reporters whether they had a preference for whether such a reference to Rule 39 should be in the text of the rule or the Committee Note. Professor Marcus indicated that such a reference to Rule 39(b) would fit well in the Committee Note, and Professor Struve agreed that would be helpful. At that point, Judge Rosenberg suggested that the Reporters work on drafting an amended Committee Note including a reference to Rule 39 during the lunch break, and that the Advisory Committee could subsequently return to the matter.

After the lunch break, the Advisory Committee considered the following additional language to the Committee Note, to be added as a new second paragraph: "When no demand has been made either before removal or in compliance with Rule 38(b), the court has discretion under Rule 39(b), on motion, to order a jury trial on any issue for which a jury trial might have been demanded."

The Advisory Committee subsequently approved unanimously for publication "Alternative 2," as drafted in the handout provided to committee members and now at the end of the posted agenda book (including the bracketed word, "necessary") with the above-noted addition to the Committee Note.

Rule 55

Judge Rosenberg then introduced the next action item, which has been on the Advisory Committee's agenda for some time: the language in Rule 55 mandating that the clerk enter a party's default under Rule 55(a), and a default judgment under Rule 55(b). Concerns have been raised that the mandatory language (i.e. "must") in Rule 55 requires clerks to take actions they might not be comfortable with. As such, the Reporters have drafted potential amended language replacing the mandatory "must" with "may," as reflected at p. 125 of the agenda book. Aided by a comprehensive report by the Federal Judicial Center, included in the agenda materials, it may be ripe for the Advisory Committee to consider whether Rule 55 as presently written presents a

real-world problem. The FJC report indicates that there is some diversity of practice among the districts regarding judicial involvement in the entry of defaults and default judgments, but the rule does not appear to be causing many difficulties in many actual cases. Given the wealth of information in the FJC report, Judge Rosenberg sought feedback on whether to continue to pursue amendments to Rule 55 or to drop the item from the agenda.

The Clerk Liaison indicated that he would prefer an amended rule to change "must" to "may," since most clerks would prefer not to enter defaults or default judgments without judicial sign-off. In his view, it would be better for districts to decide how to handle this on their own. An attorney member added that the rule should conform to practice so as not to mislead even if the rule does not appear to present much real-world confusion. Another attorney member added that the rule should be clear if judicial sign-off is required before the clerk enters the default, so a party seeking a default will know to address the judge. A judge member agreed, noting that the word "may" signals to the parties that the entry of default is not purely mechanical, and that the judge might be involved. Judge Rosenberg suggested that such a signal could be sent by adding language indicating that the clerk must enter a default "unless ordered by the court." Another judge member suggested language reflecting that the clerk should ordinarily enter defaults, but "may defer to the court." Such language would be capacious enough to reflect the diversity of practice among the districts.

Professor Marcus responded, however, that Rule 55 has remained unchanged for a long time, and that if a clerk's office does not enter a default or default judgment for some reason, a party may always make a motion under Rule 7(a) for an order. Although it is debatable whether the rule accurately reflects current practice, a change might add unnecessary confusion to a process that seems to be working relatively well. Professor Cooper suggested that perhaps the rule would be more precise if it were amended to provide that the clerk or the court must enter a default or default judgment unless directed by the court, since "may" might indicate a rather imprecise element of discretion beyond what really occurs. Professor Cooper suggested, however, that unless the rule appears to cause real confusion, perhaps it is better to leave it alone.

An attorney member raised a concern that while Rule 55(b)(1) requires that the clerk enter a default judgment in cases where the plaintiff's claim is for a sum certain without notice to the defendant, Rule 55(b)(2) requires an application to the court for all other default judgments and that notice of such an application must be served on the defendant. Professor Marcus agreed that the notice requirement does raise interesting issues, but there appear to be few real-world problems in federal cases.

Judge Rosenberg then turned to the Clerk Liaison to ask whether, in his experience, there is a real-world problem. He responded that there does not appear to be one; the rule is working. On the other hand, it's also not clear to attorneys that in many courts clerks actually seek judicial approval before entering defaults. A judge member added that in her district defaults in pro se cases are typically handled in chambers, and it may create suspicion that the court is doing something contrary to the language in the rule. As a result, she prefers changing "must" to "may" in order to reflect that in some cases the clerk will not enter a default without judicial involvement. A pro se litigant seeking entry of default might be rebuffed by the clerk's office and told to seek an order from the judge. The Clerk Liaison indicated that in such circumstances,

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given the mandatory text in the rule, a litigant might be tempted to embrace a "conspiracy theory."

An attorney member took a different tack. In his view, the rule is appropriately drafted. In a case where a default or default judgement is warranted, there should not be discretion. The rules are clear as to the requirements of litigants, and a party entitled to a default should be able to get one mechanically without discretion injected into the process.

A judge member then opined that the problem was fascinating because, despite the clear language of the rule, districts handle defaults differently. One benefit of the rule as drafted is that it protects clerks who enter defaults because they are not provided any discretion to refuse. "May" indicates a kind of discretion that clerks are unlikely to substantively exercise. If the real issue is that clerks sometimes seek judicial involvement, perhaps Professor Cooper's suggestion that either the clerk or the court must enter a default judgment when the requirements are met is preferable. This would make clear that it isn't always the clerk's decision to make, but it would not indicate that there is more discretion than the rule contemplates.

An attorney member, however, indicated that judges do appear to exercise some discretion, so perhaps an alternative that would direct parties to seek a default from the clerk in the first instance, but that the clerk may defer to the court, would more accurately reflect current practice.

At this point, Judge Bates suggested that the discussion reflected some complexities here that might benefit from additional study. Professor Marcus agreed and added his view that the Advisory Committee should return to this question at its spring meeting. Judge Rosenberg concurred and thanked the committee for its input. In her view, the discussion indicated that the rule does not reflect current practice and that ideally there should not be ambiguity for litigants, clerks' offices, or courts. The Reporters will draft potential amendments for consideration as an action item at the April 2025 meeting. As a coda, Dr. Lee added that his research revealed that this is indeed a confusing rule and thanked the Rules Committee Staff for their assistance with this project.

Rule 41

The Rule 41 Subcommittee, chaired by Judge Cathy Bissoon, presented several amendments for approval for publication. This subcommittee was created at the March 2022 Advisory Committee meeting in response to two proposals that revealed significant variation among the districts and circuits regarding interpretation of the rule. In sum, although the rule speaks only of voluntary dismissal of "actions," most courts use it to dismiss less than an entire action. That is, most courts interpret the rule to permit dismissal of one or more claims in a multi-claim case. As detailed in the agenda book, after a lengthy period of study and outreach, the subcommittee reached consensus that the rule should be amended to explicitly permit voluntary dismissal of one or more claims. The subcommittee also reached a consensus that the rule should be amended to make clear that a stipulation of dismissal need be signed only by current parties to the case and not those who were once parties but no longer are.

Judge Bissoon noted that she had struggled with whether a rule amendment was necessary, but she concluded that there was a need for clarity, and that amending the rule to explicitly allow dismissal of one or more claims, rather than only the entire action, would not only better conform to practice but would also further the rules' general policy in favor of narrowing and simplifying the issues in cases prior to trial. Ultimately, the subcommittee concluded that this would make the rule more practical, especially in complex, multi-party, multi-claim cases, which are now far more common than they were in 1938.

Professor Bradt noted the extensive research and outreach done by the subcommittee and agreed that these amendments were consistent with what most judges and lawyers already thought the rule permitted. Moreover, he cited historical materials contemporaneous to the drafting of the rule that indicated that even in 1938 the rulemakers intended the rule to be construed to permit dismissal of one of multiple "causes of action" pleaded in a complaint.

Professor Bradt also noted that the changes to Rule 41(a) necessitate a conforming amendment to Rule 41(d) to reflect that costs may be imposed against a plaintiff who files an action based on or including a previously dismissed claim. At Professor Struve's suggestion, the proposed last sentence of the first paragraph of the committee note was expanded to read: "Rule 41(d) is amended to reflect the change to 41(a) but is not intended to suggest that costs should be imposed as a matter of course when a previously dismissed claim is refiled. If a court believes an award of costs is appropriate, the award should ordinarily be limited to costs associated with only the voluntarily dismissed claim or claims." No Advisory Committee member expressed disagreement with this change.

An attorney member applauded the work done by the subcommittee and agreed that the proposed amendments better reflect current practice and serve the goal of efficiency. This member questioned, however, whether the amendment requiring signatures on a stipulation of dismissal of current parties to a case might be narrowed to require only the signatures of the parties to the claim to be dismissed. Judge Bissoon responded that the subcommittee had considered this alternative but ultimately concluded that it would be better to ensure that all extant parties receive notice of a dismissal of a claim. Should a party refuse to sign such a stipulation, the court could still order a dismissal. If nothing else, in such a situation, the rule as amended would at least notify the judge of a potential dispute.

Professor Coquillette also applauded the subcommittee's work, particularly its historical research revealing that this amendment is more consistent with the rulemakers' overall approach in 1938, drawn largely from English courts of equity.

Some additional wordsmithing ensued and resulted in adoption of language in the rule referring to "a claim or claims" and ensuring appropriate references to "a plaintiff" as opposed to "the plaintiff" in the rule. There was also some discussion of refining the use of the term "opposing party" in Rule 41(a)(1)(A)(i), but the committee ultimately concluded that the term was used appropriately.

Subsequently, the advisory committee voted unanimously in favor of sending the proposed amendments to the Standing Committee to consider publication.

Almost-Action Items

The Action Items having been completed, Judge Rosenberg turned to the next category of items on the agenda, "almost-action items," or matters further along in consideration or that would benefit from Advisory Committee feedback on next steps.

Remote Testimony Under Rules 43 & 45

Judge Rosenberg began the discussion by referring to the various proposals and extensive materials in the agenda book. She noted that the subcommittee has already spent a lot of time on these issues and has met three times, including with the Discovery subcommittee to elicit its members' views. She then turned the discussion over to the subcommittee's Chair, Judge Lauck.

Judge Lauck noted that the subcommittee was created in part to investigate a possible response to the Ninth Circuit's decision in *In re Kirkland*, but also the proposals that Judge Rosenberg had referenced to relax the standards for using remote testimony at trial. Because both issues implicate overlapping questions of the increased use of remote testimony in the post-pandemic era, when there is now widespread familiarity with remote-meeting software like Zoom and Teams, the subcommittee has been considering changes to both Rule 43 and Rule 45. Rules 43 and 45 are not "apples to apples" in the sense that they address remote testimony in different contexts, but the overarching issues are related.

Judge Lauck explained that remote testimony has become increasingly common at depositions, motion hearings, and trials due to positive experiences with improved technology in the Covid era. Typically, the use of remote testimony in each of these contexts is by stipulation of the parties -- for instance, Rule 77(a) requires that all trials "must be conducted in open court and, so far as convenient, in a regular courtroom," but the parties may consent to remote testimony. Nevertheless, despite the increased acceptance of remote testimony, the Rules must contemplate what to do when a party contests its use.

Judge Lauck explained that currently the standard under Rule 43 for using contemporaneous remote testimony at trial is quite strict, requiring compelling circumstances, good cause, and adequate safeguards. One proposal suggests removing the compelling-circumstances requirement and essentially maintains that the best alternative to in-court testimony is contemporaneous remote testimony and not a deposition transcript.

One question the subcommittee has considered is whether a response to *In re Kirkland* could be handled as a discrete issue, separate from the more multifaceted topic of remote testimony generally. As Judge Lauck explained, in *Kirkland*, the Ninth Circuit held that Rule 45(c)(1)(A) authorizes a subpoena for trial testimony only in 100 miles of where the recipient "resides, is employed, or regularly transacts business in person," regardless of whether that testimony is to be given in person in the courtroom or remotely and transmitted to the courtroom. That is, even when a witness may testify remotely under the terms of Rule 43(a), a subpoena can only command that testimony if the live trial is held within the 100-mile window in Rule 45(c)(1)(A). In other words, a subpoena cannot command a witness to testify remotely from a location within 100 miles of *his* residence, if it will be transmitted to a trial occurring beyond that radius. Although the Committee Note to the 2013 amendment to Rule 45(c) seems to indicate

that the Committee's intent was to permit subpoenas for remote testimony compelling the witness to appear at a location within 100 miles of his home, the Ninth Circuit panel concluded that the note was inconsistent with the plain text of the Rule. The Ninth Circuit suggested that the Rules Committee address the text of the rule to address the issue.

Judge Lauck noted that, *Kirkland* aside, it is uncontroversial that the Advisory Committee's Rule 45 project, which culminated in the 2013 amendments to the rule, was intended to expand the trial court's subpoena power to allow orders that remote testimony be given within 100 miles of the witness's residence, place of employment, or regular business. In light of the Ninth Circuit's decision, one avenue for the subcommittee is to propose an amendment to Rule 45 that would say that a court may require a witness to appear within 100 miles for testimony that will be transmitted live to the trial. One question that arises, however, relates to the mechanics of how one might obtain an order for remote testimony under Rule 43(a), the circumstances of serving such an order along with the subpoena, and identifying the location of the remote testimony. Judge Lauck noted that some subcommittee members had expressed concerns that this would create another opportunity for additional time-consuming satellite litigation over a Rule 43(a) motion. Judge Lauck explained that this is just one example of how Rules 43 and 45 (and perhaps others) interact, so dealing exclusively with the problem raised by *Kirkland* may be tricky, and perhaps the entire set of issues should be handled at once.

Judge Lauck also noted the Bankruptcy Rules Advisory Committee's consideration of rule amendments that ease the requirements for remote testimony in various proceedings, including a blanket permission for remote testimony in "contested matters." Those amendments are out for public comment, and the subcommittee will surely benefit from what the Bankruptcy Committee hears.

Professor Marcus added that the subcommittee faces an array of complications, including: whether the requirements for allowing remote testimony should differ for depositions, hearings, and trials; how to go about getting an order under Rule 43(a) and whether to require that the order be served; and what to do about the requirement of tendering fees for attendance. There is, however, significant appeal to addressing *Kirkland* by making it clear that the judge can command appearance for remote testimony within 100 miles of the witness's residence even if the trial is occurring farther away. If the judge thinks remote testimony should be allowed, and it isn't unreasonably inconvenient for the witness, the witness should be required to appear. This was the intent in 2013 and that intent is reflected in the Committee Note the Ninth Circuit found unclear.

Judge Bates suggested looking at the process from a "20,000-foot perspective." In his view, the process might require getting an order from the judge permitting remote testimony under the strict requirements of Rule 43(a), likely with participation from the other parties as opposed to *ex parte*, followed by service of both the Rule 43(a) order and the subpoena on the witness. This is a change in subpoena practice because often other parties are not currently informed of all subpoenas that issue, so this will create an added piece of litigation for subpoenas commanding remote testimony.

One judge member opined that the problems of Rules 43 and 45 seem to be discrete. That is, the *Kirkland* decision doesn't say that remote testimony is inconsistent with Rule 77 because

it is not in "open court." This member did not see a problem with the requirements in Rule 43(a) and noted that it seems like a significant step to lower those standards. This member would prefer that the rule be amended to state only that remote testimony can be commanded at a location within 100 miles of the witness's residence et al.

Another judge member agreed, noting that when it comes to hearings and depositions the requirements for remote testimony might be relaxed, but for trial, the Rule 43(a) requirements continue to seem appropriate. With respect to trial testimony, the logistics, such as the software used and safeguards against improper communication with the witness, have to be fleshed out by the court and parties well in advance, so a court order specifying those matters seems inevitable and uncomplicated to serve on the witness.

A judge member of the Committee then stated that although there is a consensus that in-person testimony is preferred, in Texas there have been at least 5 million remote proceedings since the pandemic. Due to the massive size of the state, Texas has embraced remote proceedings and they have worked well. Lowering the bar for remote testimony, perhaps by eliminating the compelling circumstances language from Rule 43(a), signals to judges that they have the ability to experiment. This Committee member posited that the world has changed since the pandemic, and that the Committee should consider giving judges more flexibility to allow remote testimony for good cause and with adequate safeguards.

Another judge liaison agreed with these sentiments in favor of increased flexibility. Courts should be able to easily handle whether to allow remote trial testimony on a motion in limine. This judge also noted that the proposed amendments to the bankruptcy rules would allow increased use of remote testimony on both simple and very complex matters.

A judge member then prompted a discussion on whether the standard for allowing remote testimony should vary depending on whether that testimony is at a deposition, hearing, or trial. Rule 43(c) for instance does not have an explicit textual reference to the use of remote testimony at a hearing on a motion. Professor Marcus wondered whether the provision for remote testimony at trial in 43(a) also implicitly allowed the use of such testimony at hearings but agreed that the text of the rules doesn't resolve the question. Both Professor Marcus and the judge member wondered whether the *Kirkland* problem could be addressed for hearings without modifying Rule 43. An attorney member followed up by noting that for both hearings and motions, the judge can address these issues at a pretrial conference under Rule 16, and usually the parties are able to agree. So perhaps the *Kirkland* matter can be addressed via a rule amendment without creating many on-the-ground problems while the subcommittee deals with the broader questions about the use of remote testimony.

Judge Rosenberg then suggested that this productive conversation demonstrated that there are several issues on the table.

First, in light of *Kirkland*, is Rule 45 ripe for an amendment? There appears to be consensus that such an amendment should be developed, and no committee members objected.

Second, how should such an amendment be accomplished?

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One judge member prefers explicitly referencing authorization for remote testimony under Rule 43(a) in Rule 45(c), as suggested in the agenda book at page 195, line 602 (i.e., make Rule 45(c) read: "A subpoena may command a person to attend a trial, hearing, or deposition, or to provide trial testimony from a remote location when authorized under Rule 43(a) . . . "). Another judge member expressed a desire for an accompanying amendment to Rule 45(a)(1) to provide explicit authority for remote testimony at a hearing in order to address the lack of text authorizing such testimony in Rule 43(c). This approach is in the agenda book, at page 196, line 631: ((D) **Remote Testimony on a Motion Under Rule 43(c).** A subpoena may command a person to attend a hearing on a motion by remote means.). An attorney member agreed and contended that if remote testimony is allowed for a trial, it should also be allowed for hearings. He noted that often live testimony is necessary for a hearing on a motion for a preliminary injunction, since there is not yet any deposition testimony. There are also myriad other motions for which live testimony is necessary because the outcome may turn on the credibility of a witness. This attorney member suggested that making it clear that remote testimony can be used would be beneficial since many attorneys might read the text of the current rule and think that it cannot be used in those circumstances.

Another judge member, however, expressed that the Committee should deal only with *trial* testimony first, in order to address *Kirkland* promptly, while leaving the question of hearings for later analysis. That is, the Committee should just "tweak" Rule 45(c) now to make clear that a person may be subpoenaed to appear within a hundred miles to testify remotely at trial, and defer other contexts for later. An attorney member agreed. Although Rule 43 contains some matters that need "cleaning up," the best course is to deal with the *Kirkland* problem first by amending only Rule 45(c) while continuing work on Rule 43. Another judge member agreed with this approach.

Professor Cooper also agreed with the sentiment that *Kirkland* should be addressed with a change to Rule 45(c) along the lines of what is suggested at page 195, line 594, of the agenda book, without the bracketed language. That is, amend Rule 45(c)(1) to add the language "or to provide trial testimony from a remote location." Additional questions could be addressed separately.

Judge Lauck thanked the Committee for its feedback and said that the subcommittee would continue its work.

Rule 45(b)(1) Service of Subpoenas

Judge Rosenberg then introduced the Discovery Subcommittee's ongoing project on service of subpoenas under Rule 45(b)(1). The subcommittee's Chair, Chief Judge Godbey, noted that the subcommittee had devoted substantial effort to this question. Earlier efforts had focused on revising the rule to include a "cafeteria plan" with a list of options drawn from Rule 4, but the subcommittee has instead turned toward a simpler approach on which the subcommittee would benefit from feedback.

Professor Marcus then directed the Committee's attention to two alternatives detailed at pages 289-90 of the agenda book. Both alternatives essentially authorize personal service and permit that: "For good cause, the court may by order authorize serving a subpoena in another

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manner reasonably calculated to give notice." In essence, the rule requires that the first effort at service be by hand, but then allows the serving party to seek an order from the court authorizing another method likely to be more successful if the recipient is ducking service.

Professor Marcus then noted that there are two other questions addressed in the alternative amendment proposals: (1) whether there should be a requirement that the recipient be served at least 14 days before the required attendance; and (2) how to handle the current requirement of tendering fees for attendance and mileage if the subpoena is served electronically. To some degree, the requirement of tendering fees seems anachronistic and perhaps could be deleted. Alternatively, if the requirement should be retained, perhaps the fees could be tendered when the subpoenaed person shows up, rather than when serving the subpoena.

One attorney member confirmed that the requirement to tender fees is a nuisance, but it exists to ensure that those who are subpoenaed but may not have car fare can get to court. It would be odd for someone in such circumstances to be subject to penalties for non-compliance while not being provided the means to appear. Another attorney member suggested that perhaps the rule should state that fees should presumptively be tendered with the subpoena, unless there is good cause to use other means of service.

A judge member then asked whether the rule should explicitly allow for service by mail to the recipient's last known address, as suggested by Professor Cooper (and laid out in footnote 13 at page 289 of the agenda book). Professor Marcus indicated that the subcommittee had concluded that the rule should be simpler and not identify any other methods for service other than the presumption in favor of personal service. Moreover, a prior attorney member had asserted that young people do not typically look at U.S. Mail, so explicitly endorsing mail as a presumptively proper means of service might be inapt. A liaison member affirmed this view, saying that mail is "worthless," and that email is better.

Professor Cooper noted that he takes seriously the qualms about service by mail, but noted that some courts, including the Seventh Circuit, have held that the current rule permits service by mail, so the suggested amendment would change practice in those courts. Ultimately, Professor Cooper said that the practical question is: whether U.S. Mail is sufficiently unreliable or so commonly ignored that it is better to default to personal in hand service or at home.

One judge expressed the concern that, as she read the amended rule, mail was not permitted even as an alternative method of service and perhaps it should be included. Professor Bradt suggested that perhaps the committee note could make clear that service by mail is among the options the court has in ordering an alternative means of service.

An attorney member expressed the concern that lawyers might seek a case-management order authorizing an alternative method of service applying to all subpoenas in a case. Judge Bates suggested that perhaps the committee note should indicate that this would be inappropriate and that approval of alternative means should be on a subpoena-by-subpoena basis.

Professor Marcus then sought the Committee's views on the 14-day period between service and attendance. Two judge members endorsed this proposal on the ground that subpoenas with a shorter window for compliance or attendance are often unreasonable or difficult to

enforce. An attorney member added that the 14-day period conforms to normal practice, and that if an adjustment to the period is needed the court can adjust. One judge member indicated that she had seen subpoenas issued that require action beyond the close of discovery. Professor Marcus responded that the subcommittee had not yet considered the possibility of a subpoena that conflicts with the close of discovery mandated in a Rule 16(b) scheduling order. In such cases, a 14-day period of compliance should likely not override the scheduling order, but the subcommittee will consider this issue in further discussions.

Use of the Term "Master" in Rule 53 and Elsewhere

Judge Rosenberg then invited discussion on the proposal from the American Bar Association to replace the term "master" in Rule 53 and several other rules where the term appears with "court-appointed neutral." She noted that the proposal had also been endorsed by the Academy of Court-Appointed Neutrals and the American Association for Justice. That said, this would be a potentially extensive change since the word appears in many rules (both civil and otherwise) and there does not appear to be a broad consensus about the appropriate replacement. The current language does not present the kind of problem the Rules Committee usually confronts in that it does not create an ambiguity or procedural obstacle. Indeed, a change in the nomenclature would not be intended to cause any substantive change in practice. The question on the table is whether to proceed with a proposed set of rules changes.

Professor Marcus elaborated. Ultimately, the question is whether this would be a desirable thing to do, but that assessment is different from the problems we normally encounter. The term appears in many places in the law beyond Rule 53: other civil rules, Supreme Court rules and orders, and other court orders issued outside Rule 53. Professor Marcus also sought feedback on whether substituting the term master in all of the areas it appears is an urgent matter or should await further reflection. If the Committee believes the term should be replaced, the next question is what should replace it. There are reasons why "court-appointed neutral" may be inapt, largely because masters can be appointed to do things that are not quite "neutral" as between the parties. Moreover, the term does not capture the likelihood that a court has appointed a person due to her "mastery" of the subject matter or the tasks she has been appointed to perform. This is a "charged topic" about which academic proceduralists have little expertise to add, so the Reporters could benefit from Committee members' feedback.

Professor Coquillette sounded a word of caution about changing the language, unrelated to ideological issues. He explained that many treatises and other research aids now work on word-retrieval systems with keywords, so when the words of a rule are changed it becomes very difficult to access historical records. This creates a real challenge and increases costs for practitioners and students researching the law.

A judge liaison to the committee noted that he had recently been appointed a special master in a case by the Supreme Court, and the Committee should be attentive to any differences between "special masters" and "masters." The role of "special master" is one that exists and is set forth in the Supreme Court's rules. He would not describe his work as a special master as neutral in the way that word might apply to one doing early neutral case evaluation. Another judge member agreed that a "master" is not equivalent to the "neutral," and that this does not seem like a promising avenue for the Committee. A different judge member agreed that the term

neutral seems inapt because it implies a mediator without power to order the parties to act, which is not true of a master in many cases.

Judge Rosenberg then asked whether there was opposition to keeping the matter on the agenda for future study and observation. The Committee may revisit the issue as it learns new information. No members expressed opposition.

Information Items

Rule 7.1 Subcommittee

Justice Bland, Chair of the Rule 7.1 Subcommittee, reported its ongoing efforts to amend the corporate-disclosure requirement to make judges more aware of potential financial interests in a party that would trigger the statutory duty to recuse. She explained that, as laid out in detail in the agenda materials, the Judicial Conference Codes of Conduct Committee had issued recent revised guidance regarding the recusal requirement. This revised guidance, which came out shortly before the April Advisory Committee meeting, can essentially be boiled down to the concept of "control," that is, if a judge holds a financial interest in an entity that "controls" a party, she must recuse. Borrowing from the current version of Rule 7.1, the guidance uses 10% ownership as a benchmark for control. But the guidance also states that irrelevant of control, if the price of stock a judge owns is likely to be substantially affected by the result of a case, the judge should recuse.

From its inception, this subcommittee has been focused on revealing to judges whether entities in which they hold investments own or control a party. The rule currently requires disclosure of "any parent corporation and any publicly held corporation owning 10% or more of its stock," but this requirement may not trigger disclosure of a publicly traded corporate "grandparent" of a party in which the judge may hold an interest.

The agenda materials include preliminary proposed rule language that attempts to effectuate the Codes of Conduct Committee's guidance by requiring disclosure of any parent corporation (or business organization), any publicly held corporation (or business organization) owning 10% or more of a party's stock, and "any publicly held business organization that directly or indirectly controls a party."

Professor Bradt then explained that the subcommittee's outreach had demonstrated that a rule providing a "laundry list" of all corporate connections or affiliations that must be disclosed would be unworkable. Not only does the business landscape change too rapidly to keep such a list up to date, but it can also result in overly onerous requirements that are costly to comply with and risk swamping the judge with unnecessary information. More capacious language is therefore preferable, but of course the broader such language is, the more difficult it becomes to define. The subcommittee's effort here was to use the language of the Judicial Conference guidance, and the subcommittee was eager to hear committee members' reactions.

One judge member voiced a concern that the rule is limited to disclosure of publicly held corporations that are not "parents" but own more than 10% of the party stock or control a party. This judge suggested that there may be non-profits that own parties with which judges might have affiliations, such as churches that own hospitals. Another judge member expressed concern

that the term "control" might not adequately communicate to a party what must be disclosed. Another judge member suggested that feedback would be especially useful on this point. Although "control" may be a vague concept, it might also be clear in most cases, and in any event federal judges have been directed to determine whether a party is "controlled" by another entity in order to decide whether to recuse.

Justice Bland and Professor Bradt noted that the subcommittee's next step is to seek feedback on these questions from knowledgeable parties. One judge member suggested that some professional organizations might be especially knowledgeable, particularly organizations of corporate counsel or the SEC. The Clerk Liaison noted that any such amendment would need to take into account the limitations of the conflicts software embedded in CM/ECF to ensure that reports will be effectively screened.

The subcommittee will next report on its progress in the spring advisory committee meeting.

Filing Under Seal

Chief Judge Godbey, Chair of the Discovery Subcommittee, delivered a brief report about proposals regarding rulemaking on filing under seal. Chief Judge Godbey noted that this issue had been before the subcommittee for some time but was on hold while an Administrative Office project addressed the same issue. Rulemaking on filing under seal has the potential to be very complex because the processes for doing so in different contexts are diverse and detailed. Beyond a minimalist approach drawing lawyers' attention to the distinction between filing under seal and seeking a protective order, it's not clear where such a rule would stop.

Professor Marcus then added that the subcommittee's further work on this subject would rely heavily on information provided by the Clerk Liaison because clerks' offices are on the front lines. There are many specific elements of a possible rule that are laid out in the agenda materials, but they may not all fit together coherently. Moreover, different districts have different practices, and what might work for one district might not work for another. As investigation proceeds, the subcommittee will seek feedback from judges and attorneys, but clerks' offices are also vitally important in learning what is feasible in practice.

Cross-Border Discovery Subcommittee

Judge Shah, Chair of the Cross-Border Discovery Subcommittee, reported that members had been on a listening tour in order to seek feedback on whether the Federal Rules should address cross-border discovery, as had been urged by Judge Baylson and Professor Gensler. The subcommittee first reached out to the Department of Justice, which expressed the view that rulemaking is not necessary in this area, and that judicial education and case management are sufficient to head off potential problems. Judge Shah also noted that former committee member Judge Boal had reached out to magistrate judges, who often address cross-border-discovery issues in the first instance, and they, too, did not see a strong case for rulemaking.

Subcommittee members have also participated in panels on cross-border discovery at meetings held by Lawyers for Civil Justice (LCJ) and the American Association for Justice (AAJ) and an online session put on by the Sedona Conference. Professor Clopton reached out to

the American Bar Association, and Judge McEwen has reached out to bankruptcy judges and lawyers. The feedback from these groups has been uniform that there is not an outcry for rulemaking in this space. Although cross-border discovery is inherently complex and challenging, there is skepticism that rulemaking will provide much improvement. The primary concern that has been raised is when parties are called upon to produce materials in discovery when such disclosure would be illegal under the local law where the materials are held. But those who have faced this issue report that they are often able to develop accommodations tailored to the needs of specific cases, making a uniform rule undesirable. Some attorneys have also expressed skepticism about a rule that would require cross-border discovery to be addressed early in the case at a pretrial conference. These attorneys noted that many problems can be resolved by the parties and those subpoenaed without involvement from the judge, and especially challenging issues are best resolved as they arise.

Professor Clopton confirmed that his conversations with ABA members who specialize in international civil litigation were consistent with Judge Shah's report. Although some lawyers think early attention to cross-border discovery might be beneficial, others thought that accelerating consideration of the issues to an early moment in the litigation would be counterproductive. Often potential problems do not materialize. Moreover, there are other ongoing efforts to simplify this process, such as exchanges between the U.S. and E.U. aimed to simplify the exchange of information. The Chinese government is also considering regulations that may be salutary. Professor Marcus confirmed that the message to the subcommittee from the meeting with attorneys from AAJ in Nashville was that forcing upfront consideration of cross-border discovery was unnecessary. Professor Bradt added that this was consistent with what he and Judge Shah had learned from their meeting with LCJ.

Judge Rosenberg thanked the subcommittee for their extensive outreach. This issue remains on the agenda, and subcommittee members and reporters will continue to attend conferences and seek feedback. The Advisory Committee will revisit the issue in the spring.

Disclosure of Third-Party Litigation Funding

Judge Rosenberg began this discussion by noting that the issue of third-party litigation funding (TPLF) has been on the Advisory Committee's agenda since 2014, since which time it has been monitored by the reporters. Professor Marcus noted that proposals for rules requiring disclosure of TPLF have come before the Advisory Committee several times and that perhaps the time had come to see if a such a rule would be worthwhile. The landscape of TPLF is highly dynamic, making rulemaking a challenge, but perhaps the time was ripe to take that challenge on. Judge Rosenberg noted that TPLF was considered early on as part of the MDL Subcommittee work, which culminated in proposed new Rule 16.1. Rule 16.1 ultimately did not address TPLF, but the MDL Subcommittee received substantial feedback.

One attorney member then noted that her organization has been a third-party litigation funder, in that her organization provides small grants to those bringing public-interest cases. If the case is successful, the organization gets 7% interest on its investment. To her, the biggest concern might be opening the door to discovery, which would be an enormous problem. But a rule that requires only disclosure of TPLF might not present those concerns.

Several other committee members noted limited experience with TPLF but would be interested to see what a subcommittee might learn, especially since they all agreed that TPLF would only become more prominent. For instance, one judge noted her concern about who is calling the shots in settlement discussions, especially in light of the requirement in Rule 16(c)(1) that someone with authority to consider settlement be available at pretrial conferences.

One judge member then added that he is asked often whether TPLF is "good or bad," and there do seem to be some good effects, including creating possibilities for lawyers without a lot of capital to "break in" to leadership structures in MDL. Other lawyers contend that TPLF presents mostly a threat. In this judge's view, now is the appropriate time to take the issue on and study it closely, if for no other reason than "we don't know what we don't know." The landscape is changing drastically, and the mechanisms for funding are diverse. One example is plaintiffs in the NFL concussion litigation who received TPLF from a firm that brought their claims. This judge contended that it would be wise to "peek under the covers" and do as much homework as we can to determine whether there is a problem amenable to a rules-based solution. Since the Advisory Committee has been asked to take this subject on for a while, it would be good to take a close look with an open mind and open eyes.

An attorney member who had been a member of the MDL Subcommittee sounded a note of caution. There are an infinite number of ways to get what might be called "TPLF," including from an uncle, a non-profit, and of course for-profit investors, although in his experience contracts with such investors were carefully drafted to limit the investors' influence. The MDL Subcommittee concluded that the area was not susceptible to a rule. Although this member was not opposed to further study, he cautioned that it was unclear whether there would be a promising rule that would come out of the process.

Judge Bates explained that, in his tenure as Advisory Committee Chair, he had originally assigned this issue to the MDL Subcommittee, although he understood why that subcommittee ultimately decided to leave it to the side when developing Rule 16.1. In his view, the Advisory Committee's usual approach (i.e., identifying a real-world problem and then assessing whether the problem is amenable to a rules-based solution and what the consequences of such a solution might be) applies here. As such, the Advisory Committee should determine whether nondisclosure of TPLF creates a real-world problem, or just a theoretical one.

Judge Rosenberg noted that the MDL Subcommittee had asked the Judicial Panel on Multidistrict Litigation to survey MDL transferee judges to take their pulse on whether TPLF was presenting a practical problem. Those judges had not seen such a problem, but that outreach was several years ago, so there is likely significant new information. It may be time to really focus and try to get as much information as possible from knowledgeable parties. In order to do so, Judge Rosenberg asked Chief Judge Proctor if he would chair a new subcommittee on TPLF. Chief Judge Proctor agreed to do so, and Judge Rosenberg agreed to appoint members to this subcommittee in due course.

Social Security Numbers

Rules Committee Chief Counsel Thomas Byron reported on recent developments concerning the redaction of Social Security numbers (SSN). As detailed in the agenda book at

page 362, the Privacy Rules Reporters Working Group has continued its work on this issue. Three Advisory Committees (Bankruptcy, Civil, and Criminal) have received proposals specific to their rules, all of which remain under consideration. The Working Group's focus has been on issues common to all the committees, including: (1) ambiguity and overlap in exemptions from redaction requirements; (2) the scope of the waiver provisions in the privacy rules; (3) potential expansion of information subject to redaction; and (4) protection of other sensitive information, addressed in part by a submission from Lawyers for Civil Justice (23-CV-W) that remains on this Advisory Committee's agenda. The recommendation of the Working Group is that these cross-cutting issues do not present a real-world problem amenable to a rules-based solution applicable to all of the rule sets. This conclusion is not in any way preclusive of each Advisory Committee taking up new issues related to privacy specific to their rule sets. Although the Advisory Committee on Bankruptcy Rules was comfortable with this conclusion, some members of the Advisory Committee on Appellate Rules expressed a view that the committees should be more proactive before a data breach occurs.

This issue will continue to be raised at all upcoming advisory committee meetings, alongside consideration by the committees of specific proposals addressed to them.

E-filing by Pro Se Litigants

Professor Struve then reported on ongoing efforts by the joint working group considering whether to increase access to electronic filing systems. One possibility is to reduce the burden on pro se litigants by relieving them of the requirement to serve opposing parties by traditional means. One question on which Professor Struve sought input from the Advisory Committee was whether there might be support for allowing pro se litigants to serve by email. Although such a proposal might present particular problems in the bankruptcy courts, it is not clear that it would present any problems for the district courts. The Clerk Liaison, who is a member of the joint working group, described his outreach to colleagues from a diverse array of district courts, all of whom supported such a change as a reasonable step forward that would speed up litigation.

Professor Struve then sought feedback on a "more adventurous" proposal that would provide pro se litigants access to CM/ECF. FJC research has revealed that current approaches vary widely among the federal courts. The courts of appeals all allow access for pro se litigants, whether by default or permission (except for one, which allows service by email). Conversely, the bankruptcy courts do not allow any CM/ECF access to self-represented debtors. Among the district courts, there is a wide spectrum: 10% allow access by default, 15% bar access, while the others are somewhere in the middle, most typically allowing access with permission. The proposal laid out in the agenda materials essentially would presumptively provide access to pro se litigants but allow districts to opt out or create exceptions. The Bankruptcy Rules committee was wary of this proposal, while the Appellate Rules committee was more sanguine.

The Clerk Liaison offered support for such a proposal, noting that electronic filing is more efficient and paper filing eats up dwindling resources. Professor Clopton also voiced support for the proposal, noting that the opt-out possibility would provide opportunities for district variation if needed. An attorney member of the committee also expressed support for the idea and that the rule would not be one size fits all. A judge member, however, cautioned that for some districts this would be a major shift that would require significant adjustment.

Professor Struve thanked the committee for its feedback. She will report developments at the spring meeting.

Unified District Court Bar Admission

Professor Struve reported on the activities of the joint subcommittee formed to consider several proposals spearheaded by Professor Alan Morrison of George Washington University Law School regarding admission to practice in the district courts. These proposals all address the concern that the barriers to district court bar admission are too high. As a condition for membership in a district court bar, most districts require membership in their state's bar, while a small minority require passage of their state's bar exam. These requirements create serious barriers for lawyers, especially those who work for public-interest organizations whose practices are nationwide. Such lawyers often cannot get membership in various districts and have to resort to admission pro hac vice, associating with expensive local counsel, or both.

The subcommittee is most strongly considering a proposal modeled on Federal Rule of Appellate Procedure 46, which conditions eligibility for circuit-court bar membership on membership in good standing of a state bar. The subcommittee is hard at work thinking about costs and benefits of such a rule. It continues to seek feedback from members of the various advisory committees, state bars, and circuit courts, and will report back on further developments at the spring advisory committee meetings.

Random Case Assignment

Judge Rosenberg began the discussion of various proposals seeking random assignment of district judges in certain types of cases by noting that the Judicial Conference had issued guidance to all districts earlier this year recommending that they take this action as a matter of local rules and policy. At its April 2024 meeting, the Advisory Committee decided to defer immediate action to observe the districts' response to this guidance. The Reporters are closely following uptake of the guidance in the district courts, which is still in its early stages. Professor Bradt noted that some districts have already decided to follow the JCUS guidance, while others have not yet decided whether they will; things are changing almost daily. One judge member cautioned that this is a volatile and important issue that raises significant separation-of-powers concerns. Judge Rosenberg noted that these concerns are important, and the Reporters are monitoring the situation and continuing research. This issue will remain on the agenda for the spring meeting.

Privacy and Cybersecurity

Judge Rosenberg noted that the Advisory Committee had received an extensive proposal from Lawyers for Civil Justice regarding privacy and cybersecurity (23-CV-W). The Judicial Conference is actively looking into these issues and developing a judiciary cybersecurity strategy. The Advisory Committee is mindful of the seriousness of these issues and seeks input. But it would be especially helpful to target attention to specific and discrete proposals, because this issue is so complex that it could easily become overwhelming. Judge Rosenberg invited any person or organization to propose a targeted and specific focus for the committee to pay close attention to.

Draft

Items to be Dropped from the Agenda

Professor Marcus introduced three issues reviewed by the chair and reporters that did not seem promising and that he recommended be dropped from the agenda:

- A proposal to clarify the requirement in Rule 16(b)(4) of "good cause" to modify a scheduling order (24-CV-K). Although this proposal is backed by strong research that demonstrates that this requirement is interpreted differently in different jurisdictions, there are dangers in providing a specific definition of "good cause," language which is intentionally flexible and used throughout the rules in different contexts. Going down the road of defining good cause precisely in every such context could quickly become a slippery slope.

- A proposal to replace the word "issue" with "factual dispute" in Rules 50(a) and (c), and Rule 52(c). Professor Marcus noted that there are many rules that might benefit from the kind of "disambiguation" the proponent seeks. But this particular use of the word issue does not appear to present a pressing real-world problem that demands Advisory Committee attention.

- A proposal to provide additional time to file an answer after filing a motion to strike under Rule 12(f), similar to the additional time provided after filing a motion to dismiss under Rule 12(b) or for a more definite statement under Rule 12(e). It is unclear, however, that this presents a real-world problem such that those filing a motion to strike impertinent information from a complaint need any additional time to file an answer.

The Advisory Committee unanimously voted to drop these three items from the agenda.

FJC Research Projects

Dr. Emery Lee and Dr. Tim Reagan (remotely) presented on current research, history, and education projects of the Federal Judicial Center, as reflected in a memo in the agenda book at p. 553. Judge Rosenberg noted the importance and reliability of the work of the FJC, including on the ongoing revision of the Manual for Complex Litigation, on whose board of editors Judge Rosenberg serves. The FJC is working tirelessly on that complex project, alongside the valuable work it does for the rules committees.

Conclusion

Judge Rosenberg thanked the Administrative Office staff for its tireless work and responsiveness in support of the Advisory Committee. She then adjourned the meeting.

Draft

TAB 6

6. Rule 41 – Voluntary Dismissal

At the October Advisory Committee meeting, the Committee voted in favor of several proposed amendments to Rule 41. The aims of the proposed amendments to Rule 41(a) are to clarify: (1) that the rule may be used to dismiss one or more claims, rather than only an entire action, and (2) that only parties currently engaged in the litigation must sign a stipulation to dismiss one or more claims, rather than "all parties who have appeared," including parties who have been previously dismissed from the action. In October, the Advisory Committee also voted in favor of an amendment to Rule 41(d) that permitted a district judge to award costs of litigating a refiled claim that had been voluntarily dismissed in a previous action. The style consultants were apprised of our plans and made minor changes to the text that the Advisory Committee and Subcommittee Chairs endorsed.[1]

At the January Standing Committee meeting, some committee members asked us to give a few aspects of the proposed amendments a second look. Since proposed amendments are published only after the June Standing Committee meeting, re-examining these issues does not delay the comment period. During the intervening months since the Standing Committee meeting, the Rule 41 Subcommittee has carefully considered the issues the Standing Committee raised and has decided to continue to seek publication of the proposed amendments to Rule 41(a) and abandon the proposed amendments to Rule 41(d), for the reasons described below.

Here, we briefly review the impetus for the Subcommittee's project and how it settled on the amendments to Rule 41(a), followed by a review of the Standing Committee's concerns and the Subcommittee's responses to those concerns.

Background

This Subcommittee, chaired by Judge Bissoon, was formed at the March 2022 Advisory Committee meeting to address what appeared to be a mismatch between the language of the rule and courts' use of it, prompted by submissions from Judges Furman and Halpern (21-CV-O) and Messrs. Wenthold and Reynolds (22-CV-J). In sum, the Rule is entitled "Dismissal of Actions," and describes the circumstances under which a plaintiff may dismiss an "action," unilaterally prior to service of an answer or a motion for summary judgment, by stipulation, or by request for a court order. Research revealed, however, that while some circuits allow the rule to be used only to dismiss an entire action, in most district courts, parties and judges use the rule to dismiss something *less* than the entire action, such as all claims against one of multiple defendants, or one or more claims while others remain pending in the case. In sum, in the majority of circuits the Rule is not used to dismiss only entire "actions," but rather is used to dismiss some but not all claims in the action.

After a lengthy period of study, research, outreach, and deliberation, the Rule 41 Subcommittee reached consensus that the rule should be amended to permit dismissal of individual claims. Not only would the rule then be consistent with the practice of the majority of federal courts, such an amendment would also further the general policy in the rules of narrowing the issues in a case during pretrial proceedings. The language referring to "actions" has been

[1] The Style Consultants preferred the language "one or more claims," to "a claim or claims" in Rule 41(a).

unchanged since the rule was promulgated in 1938. But even at the time of the Rule's promulgation, one of its drafters indicated that the rule could be used to dismiss one of several "causes of action" asserted in a complaint.[2] Also, the prevalence of multiparty, multiclaim litigation has grown exponentially since 1938, as has the centrality of judicial case management, reflected in Rule 16 among other rules. A more flexible rule that permits dismissal of individual claims would further support the goal of simplifying complex cases.

Since beginning this project, the Subcommittee has conducted extensive outreach, meeting with representatives from Lawyers for Civil Justice, the American Association for Justice, and the National Employment Lawyers Association. The Subcommittee also sought feedback from federal judges, via a letter to the Federal Judges Association. The consistent message that emerged from this outreach was that most district judges are far more flexible about dismissing individual claims than the text of the rule suggests, and that such dismissals are helpful in narrowing and clarifying the contested issues during pretrial proceedings. No party we reached out to voiced opposition to making the rule more flexible.

The Subcommittee also reached consensus around a second amendment to the rule regarding those who must sign a stipulation of dismissal of a claim. Currently, the rule states that "all parties who have appeared" must sign such a stipulation. In the majority of federal courts, judges interpret this rule to require signatures only of parties currently prosecuting or defending against remaining claims. The Eleventh Circuit, however, recently held that the plain text of the rule demands signatures not only from the parties currently involved in the litigation, but also parties who originally were involved in the litigation but are no longer actively involved in the case. The Subcommittee concluded that such a requirement presents an unnecessary obstacle to dismissal of claims and narrowing of the action, and that the text of the rule should be clarified to require that only *current* parties to the litigation must sign a stipulation of dismissal of a claim.

The Subcommittee considered narrowing this requirement further to require signatures only by the parties to the claim to be dismissed (leaving out other actively participating parties to the case) but concluded that this would potentially sacrifice notice of the dismissal to all active parties, who might have urgent reasons to oppose dismissal. In a case in which dismissing a claim may affect other actively participating parties, the Subcommittee concluded that seeking the signatures of all parties remaining in the litigation, regardless of whether they are a party to the claim sought to be dismissed served important purposes of notifying both the court and all parties of the potential dismissal. Should one or more parties in the case refuse to sign a stipulation of dismissal, the judge would be informed of any dispute and could decide whether to order that dismissal under Rule 41(a)(2). Parties who are not actively prosecuting or opposing a claim in the case are far less likely to have a pressing reason to oppose such a stipulation. Such parties are, however, highly likely to receive notice of the dismissal via CM/ECF.

[2] Remarks of Edgar B. Tolman, *Proceedings of the Institute on Federal Rules, Cleveland, Ohio, July 21-23, 1938* at 348-350.

Standing Committee Concerns and the Subcommittee's Response

The Standing Committee raised several helpful concerns about the proposed amendments that the Subcommittee considered closely.

(1) Rule 41(d)

Under Rule 41(d): "If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court: (1) may order the plaintiff to pay all or part of the costs of that previous action[.]" None of the groups that the Subcommittee reached out to raised concerns about Rule 41(d). Moreover, the rule appears to be somewhat rarely used, except in cases where a plaintiff has dismissed a previous action and refiled it in apparent efforts at forum shopping. The Subcommittee, however, endorsed a change to the rule that would permit a judge to award costs associated with litigating a refiled claim that was voluntarily dismissed in a previous action. The Subcommittee's goal was to make changes to 41(d) to parallel the proposed changes to Rule 41(a). At the October Advisory Committee meeting, there was discussion of whether a judge ought to, in some cases, be able to award costs of litigating an entire previous action when only part of it was dismissed and refiled. The Advisory Committee believed that there might be rare instances when such an award is appropriate, but added a sentence to the committee note stating that under normal circumstances any costs awarded should be limited to those incurred from litigating the dismissed claim(s) in the prior action.

Although the Advisory Committee approved the change, Standing Committee members expressed these same concerns and asked us to reconsider the amendment. After significant deliberation, the Subcommittee has decided not to amend Rule 41(d) and to leave the text of the rule as it currently stands, for several reasons. First, although it is unlikely that a district judge (whose rulings are reviewable for abuse of discretion) will use this rule to disproportionately punish a plaintiff who refiles a previously dismissed claim, concerns over this provision should not impede the other proposed amendments' aims, which have driven the Subcommittee's efforts. Second, this rule is most apt in situations when a plaintiff has dismissed an entire action and refiled it to seek a friendlier forum. That is when the rule is most often deployed, and little is lost if its application is limited to situations where only a previously dismissed claim or claims have been refiled. Moreover, should a judge believe that such costs should be imposed, she may do so under 28 U.S.C. § 1927 or her inherent powers. Third, no one we have spoken with has raised Rule 41(d) as a source of concern. The Subcommittee has therefore concluded that Rule 41(d) is best left alone.

(2) "Opposing Party"

Rule 41(a)(1)(A)(i) always has permitted voluntary dismissal without a court order of an action without a court order by filing a notice of dismissal before the "opposing party" serves an answer or (since 1946) a motion for summary judgment. At the October Advisory Committee meetings, some raised concerns that this language was too vague and should be supplemented by adding "to the claim or claims to be dismissed," to ensure against parties other than those opposing the claim to be dismissed to keep the plaintiff from dismissing claims against other defendants by filing an answer or motion for summary judgment. Ultimately, after discussion, the Advisory Committee concluded that the language was sufficiently clear as drafted.

At the Standing Committee, however, these concerns were raised, so the Subcommittee reconsidered the matter closely and has decided to adhere to the proposed amendment as drafted. First, as noted by Prof. Cooper at the Advisory Committee meeting, the term "opposing party" is used throughout the rules and refers to the party opposing a particular claim or claims, so adding that language to the rule here might cast doubt on its meaning elsewhere (a view affirmed by the Style Consultants at the Standing Committee meeting). Second, as Prof. Kimble noted in January, the sentence as structured makes it clear that "opposing party" refers to the "one or more claims" the plaintiff seeks to dismiss. Third, adding an additional phrase to the rule seems clunky. At the Standing Committee meeting, Judge Bates suggested that perhaps clarification could be provided in the note, and the Subcommittee readily took that suggestion. Below, however, in the footnote to that language there is suggested additional text should the Committee prefer it. Adding the text doesn't affect the meaning of the amendments to the rule.

(3) "Remain in the Action"

As noted above, the Advisory Committee voted to propose an amendment to Rule 41(a)(1)(ii) to clarify that only parties actively participating in the litigation need to sign a stipulation of dismissal of one or more claims. Indeed, this is how most courts have long interpreted the rule, without any apparent confusion or difficulty. But the Eleventh Circuit recently held that the clear text of the rule demands a signature of all parties who have appeared, even if as a practical matter they are long gone. This is indeed what the text says, but the Subcommittee was strongly of the view that such a rule creates more problems than it prevents. As explained above, the Subcommittee concluded that the balance of interests involved favored a rule requiring dismissal of only active parties in the case. No one the Subcommittee reached out to expressed any opposition to this change.

At the Standing Committee, however, a concern was raised that the proposed language, requiring signatures of "all parties who have appeared and remain in the action" was confusing in light of Rule 54(b), which provides that unless the court states otherwise, "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties[.]" In a sense then, the language referring to parties that "remain" is imprecise; under Rule 54(b) all parties typically "remain" in the action until there is a final judgment. Moreover, because a party who has been dismissed from an action cannot appeal until after final judgment, that party might not be timely notified of a stipulation that dismisses all remaining claims (and triggers the right to appeal) unless they are required to sign it.

This issue had not been raised before January and the Subcommittee has since given it considerable attention. Ultimately, the Subcommittee concluded that the proposed language was sufficiently clear, and that any alternative that sought greater provision was likely to be so clunky as to not be worth the confusion it might generate. Additions to the committee note have been made to clarify the amendment's purpose. Moreover, there are numerous instances in the rules that apply to parties actively litigating and not to those who are no longer in the case. One example is Rule 33, which permits service of interrogatories on "a party." It seems unlikely that anyone would interpret that rule to permit service of interrogatories on a party that is no longer prosecuting or defending against a live claim, Rule 54(b) notwithstanding. With respect to concerns that a party might not receive adequate notice, the Subcommittee was satisfied that current safeguards make

that unlikely, including that such a party (typically denominated in CM/ECF as "terminated") will continue to receive notice of docket entries. Moreover, Rule 60(b) and Fed. R. App. P. 4(a)(5)(a)(ii) provide additional backstops by permitting an appeal upon a finding of excusable neglect. Finally, the proposed amendment appears unlikely to make the situation worse. If a party that is neither actively prosecuting or defending against a claim cannot be found, the active parties will surely seek a court order of dismissal, which, if granted will be docketed. A departed party will therefore receive the same notice as he would from a docketed stipulation that he did not sign. As above, however, the Subcommittee has added additional language to the committee note in an effort to provide greater clarity, and has suggested alternative language, should the Committee prefer it, as printed in the footnote to the rule.

Given the extent of outreach and deliberation, including consideration of the helpful suggestions raised by the Standing Committee, the Subcommittee is of the view that the rule and note are ready for public comment.

Rule 41. Dismissal of Actions or Claims

(a) Voluntary Dismissal.

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

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

(i) a notice of dismissal before the opposing party[3] serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared **and remain in the action**.[4]

* * * * *

(2) ***By Court Order; Effect.*** Except as provided in Rule 41(a)(1), ~~an action~~ **one or more claims** may be dismissed at ~~the~~ **a** plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the ~~action~~ **claim or claims** may be dismissed over the defendant's objection only if the counterclaim

[3] Some concerns have been raised that "opposing party" is vague. For the reasons described in this memorandum, the subcommittee considered the question and concluded that the rule as proposed is sufficiently clear. Additional language in the note has been added to provide additional guidance. But alternative language might be "the party opposing the claim or claims."

[4] Some have raised concerns about the language "remain in the action." The subcommittee considered these issues, detailed in the agenda book, and concluded that the language was sufficiently clear and practical problems are unlikely to emerge. Additional language in the note has been added to provide additional guidance. Alternative language might be "and have not been dismissed from the action."

can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

* * * * *

COMMITTEE NOTE

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

Second, Rule 41(a)(1)(A)(ii) is amended to clarify that a stipulation of dismissal need be signed only by all parties who have appeared and remain in the action. Some courts had interpreted the prior language to require all parties who had ever appeared in a case to sign a stipulation of dismissal, including those who have dismissed all claims, or had all claims against them dismissed. Such a requirement in most cases is overly burdensome and an unnecessary obstacle to narrowing the scope of a case; signatures of the parties currently litigating claims at the time of the stipulation provide both sufficient notice to those actively involved in the case and better facilitate formulating and simplifying the issues and eliminating claims that the parties agree to resolve.

Rule 41 Subcommittee
Meeting Notes
March 4, 2025

The Rule 41 Subcommittee and associated teammates (Judge Bissoon (Chair), Judge Rosenberg, Dave Burman, Zach Clopton, Ed Cooper, Rick Marcus, and Andrew Bradt) met via Zoom on March 4, 2025. The purpose of the meeting was to take a look at several issues the Standing Committee raised at the January 2025 meeting. The subcommittee discussed these issues and reached consensus on how to respond. The proposed amendments will therefore be an action item at the April Advisory Committee meeting. A brief summary of the issues and resolutions follows.

First, there has been discussion about whether the words "opposing party" are sufficient in 41(a)(1)(A)(i) or whether they need further elaboration (such as "party opposing the claim or claims" or some other locution. After discussion the subcommittee concluded that "opposing party" was sufficient for several reasons, including that the sentence, read as a whole is sufficiently clear. Moreover, at the Standing Committee meeting, the style consultants were in agreement, in part because opposing party has this definition elsewhere in the rules, the rule is clear as written, and additional words are clunky. In order to hopefully assuage any concerns, the subcommittee agreed that an additional sentence to the note should be added, and the rule should be presented with a footnote offering alternative language in case the Advisory Committee prefers it.

Second, the subcommittee turned to Rule 41(d) and was persuaded by Professor Marcus's suggestion that we abandon any amendment to the rule and leave the text as is. As he noted, 41(d) is most appropriately used when the plaintiff dismisses and entire action and refiles it before a judge who espies naked forum shopping or bad faith. Such circumstances are less likely when only a claim or claims were dismissed in the previous action. Given the Standing Committee's concerns about an overzealous judge, there doesn't seem to be a strong reason to suggest an amendment to the rule. Professor Marcus also suggested a sentence in the note explaining that the committee considered changing Rule 41(d) but opted against it.

Third, the subcommittee addressed the concerns raised by Profs. Struve and Hartnett about the language "remain in the action" in 41(a)(1)(A)(ii). The subcommittee examined these concerns (detailed in my memo to the subcommittee dated March 1) and concluded that the proposed rule text is sufficiently clear. As a practical matter, a party whose claims have been dismissed (or against whom claims have been dismissed) will receive further notice of any dismissals via CM/ECF so long as his attorney has a working email address, and even in cases where notice has not been achieved, Rule 60(b) and Fed. R. App. P. 4(a) are available as backstops. With respect to the concern that the language "remain in the action" is confusing in light of Rule 54(b), the Reporters noted numerous instances in which a party is dismissed from an action and therefore no longer participating (e.g., as a possible recipient of interrogatories) despite 54(b). In light of the stated purpose of the amendment (avoiding a disappeared party's ability to thwart a stipulation of dismissal), the rule seems clear enough, and the likely problems sufficiently unlikely, that the rule text seems fine as proposed. Perhaps the comment period will reveal confusion or wrinkles we have not considered, but these issues should not hold up publication. As with "opposing party," we will add a footnote with an alternative in case the Advisory Committee is unpersuaded.

Judge Rosenberg then suggested that the heading to the rule be revised to "Dismissal of Actions or Claims," which is now a more accurate description of the rule. The subcommittee readily agreed.

With that, Professor Bradt, agreed to draft and circulate revisions to the subcommittee.

TAB 7

7. Rule 45(c) – Subpoena for Remote Testimony

The Rule 43/45 Subcommittee has been very busy, as evidenced by the notes on its four meetings since the full Committee's October meeting. After much effort, it brings to the full Committee a proposal to amend Rule 45(c) to remove the difficulty presented by the decision in *In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023), holding that, despite the 2013 revision of Rule 45 that permits the court presiding over an action to issue a subpoena commanding witnesses to testify that can be served anywhere in the United States, for trial testimony that authority extends only within the "subpoena power" of the court and does not permit the court to command a distant witness to provide remote trial testimony.

There have been disagreements among district courts about whether they have such power as to distant trial witnesses. The *Kirkland* decision seems to be the first court of appeals decision finding that the district court lacked such authority. The court reached this result even though the Committee Note accompanying the 2013 amendment to Rule 45 clearly said that such authority existed. But it also recognized that a rule amendment could solve the problem. The Subcommittee proposes that the full Committee recommend that the Standing Committee publish this proposed amendment for public comment.

The *Kirkland* decision is on the books and seems to be having some ripple effects, even in cases involving only discovery rather than trial testimony. So the Subcommittee is bringing this amendment proposal forward now even though it has another (and possibly more important) topic on its agenda – whether to relax the criteria for remote trial testimony under Rule 43(a). That topic is dealt with later in this agenda book under the heading Subcommittee Reports.

In addition, the Subcommittee is proposing a slight clarification for Rule 26(a)(3)(A)(i). Background on the evolution of these proposals can be gleaned from the notes of the Subcommittee's four meetings, included in this agenda book.

The Subcommittee has received suggestions for revisions from the Standing Committee Style Consultants and adopted many of those suggestions. As to some, however, it has not adopted the proposed changes on the ground that they would alter the substance of the proposed amendments.

Here are the proposed amendments and Committee Notes:

Rule 45(c) amendment proposal

Rule 45. Subpoena

* * * * *

(c) Place of Compliance.

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

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

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

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

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

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

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

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

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

* * * * *

COMMITTEE NOTE

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

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

This amendment clarifies that the court's subpoena power for in-court testimony or to provide discovery extends nationwide so long as a subpoena does not command the witness to travel farther than the distance authorized under Rule 45(c), which provides protections against undue burdens on persons subject to subpoenas. It specifies that, for purposes of Rule 45(c), the witness "attends" at the place where the person must appear to provide the remote testimony. For purposes of Rule 43 and Rule 77(b), such remote testimony occurs in the court where the trial or hearing is conducted.

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

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

This amendment does not affect application of the unavailability criterion for admissibility of deposition testimony under Rule 32(a)(4)(D) or of prior testimony under Fed. Rule Evid. 804(a).

Style Suggestion Not Adopted

The Subcommittee did not adopt one suggestion made by the Style Consultants. The Consultants proposed deleting the introductory phrase "Under Rule 45(c)" on the ground that it was an unnecessary cross-reference. But as the Committee Note explains, this is not an unnecessary cross reference. Rather, it is necessary to avoid potential conflict with other rules:

> It [the amendment] specifies that, for purposes of Rule 45(c), the witness "attends" at the place where the person must appear to provide the remote testimony. For purposes of Rule 43 and Rule 77(b), such remote testimony occurs in the court where the trial or hearing is conducted.

The Subcommittee believes that this is a substantive reason to retain the phrase. In *Kirkland*, the court of appeals cited both Rule 43(a) and Rule 77(b). See 75 F.4th at 1043 & 1045. Of particular significance, the court reasoned (id. at 1045):

> [I]nterpreting "place of compliance" as the witness's location when the witness testifies remotely is contrary to Rule 45(c)'s plain language that trial subpoenas command a witness to "attend *a trial*." Fed. R. Civ. Pro. 45(c)(1). A trial is a specific event that occurs in a specific place: where the court is located. See Fed. R. Civ. P. 77(b) ("Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom."). No matter where the witness is located, how the witness "appears," or even the location of the other participants, *trials* occur in a court.

Then the court followed up in a footnote (id. at 1045 n.4):

> It is nonsensical to say that a trial is occurring in a witness's living room when a witness is allowed to appear "by contemporaneous transmission," but a trial is occurring in a courtroom the rest of the time. *See* Fed. R. Civ. P. 43(a).

In the Subcommittee's view, it is important to specify that new Rule 45(c)(2) concerning the witness's place of attendance is not inconsistent with Rules 43(a) and 77(b). Actually, that

clarification shows that a subpoena can call for remote testimony from a witness located within 100 miles of the courthouse but not in the courtroom where the trial is proceeding.

Rule 26(a) amendment proposal

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

* * * * *

(3) Pretrial Disclosures.

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

(i) the name and, if not previously provided, the address and telephone number of each witness the party expects to present – separately identifying those the party expects to present and those it may call if the need arises, and whether the testimony will be in person or remote;

* * * * *

COMMITTEE NOTE

Under Rule 43, the court may permit remote testimony at trial. Because the rule presently requires disclosure of witnesses a party "expects to present," it should be understood to include witnesses who will testify remotely. This amendment clarifies that the disclosure requirement applies whether or not the witness is testifying in person or remotely and alerts the parties and the court that a party expects to present one or more witnesses remotely.

Style Suggestions Not Adopted

The draft Rule 26(a) amendment above reflects changes proposed by the Standing Committee Style Consultants. But the Consultants also recommended changes to the current rule regarding matters unaffected by the proposed amendment. The rule has been in place since 1993, and was restyled in 2007 as part of the restyling of all the Civil Rules. This small clarification does not seem to warrant changing rule provisions that have been in place for decades, perhaps suggesting a change in the meaning of the existing rule. Indeed, one can say the amendment clarifies what should have been apparent anyway. As explained in the draft Committee Note to the Rule 45(c) amendment above:

> Rule 26(a)(3)(A)(i) requires that the parties disclose the identities of witnesses whose testimony will be presented, without distinguishing between in-person and remote testimony.

Notes of Zoom meeting
Rule 43/45 Subcommittee
March 3, 2025

On March 3, 2025, the Rule 43/45 Subcommittee held a meeting via Zoom. Participants included Judge Hannah Lauck (Chair of Subcommittee), Judge Robin Rosenberg (Chair of Advisory Committee), Justice Jane Bland, Joseph Sellers, David Burman and Jocelyn Larkin. Also participating were Emery Lee of FJC Research, and Professors Richard Marcus, Andrew Bradt, and Edward Cooper.

The meeting was introduced as designed to determine whether further revisions needed to be made in the redraft circulated on March 2 of the Subcommittee's Rule 45(c) proposal and the new added Rule 26(a)(3) proposal.

Rule 45(c)

"clarifies" v. "establishes": The draft Note states that courts have disagreed about whether the court has authority to issue a subpoena nationwide for in-court testimony. After discussion (including consideration of some other alternative words), the consensus was to use "clarifies," since the goal is to do what the Committee Note to the 2013 Rule 45 amendment said: "This amendment clarifies that the court's subpoena power extends nationwide . . . ."

"under these rules" In line 86 of the Committee note, the term "under these rules" appears even though it has been removed from the rule. It should be deleted from the Note as well: " . . . it applies to any subpoena for witness testimony ~~"under these rules."~~.

"remote": In line 88 of the Note, the word "remote" should be added: "Rule 43, for example, authorizes remote testimony in trials and hearings . . . ."

Rule 26(a)(3)(A)

The draft amendment to Rule 26(a)(3)(A)(i) was revised so that it would read as follows:

> **(i)** the name and, if not previously provided, the address and telephone number of each witness the party expects to present – and whether in person or remotely – separately identifying those the party expects to present and those it may call if the need arises;

This revision clarifies that the disclosure must be not only of the identity of the witness but also whether the witness will appear in person or remotely. That disclosure would alert the parties and the court to the need to determine whether remote testimony should be authorized under Rule 43. The draft Committee Note should be reviewed to ensure that it makes this point.

Note's reference to Rule 43: A footnote asked whether it would be sensible to refer only to Rule 43(a) in the first sentence of the Note. Since pretrial disclosure only applies before the trial, not with regard to a motion under Rule 43(c), the initial reaction was that limiting the first sentence to Rule 43(a) would be safe.

But it was then noted that the Subcommittee continues to consider possible revisions of Rule 43. One sort of change that might affect this choice of wording is that there would be a more aggressive rearrangement of Rule 43 so that what's now in Rule 43(a) would instead appear elsewhere in the rule. [Such a rearrangement occurred with Rule 56 about a decade ago.] The consensus was to refer generically to Rule 43 without specifying which part of that rule.

The Reporter will revisit the draft Committee Note to determine whether or how it should be revised to take account of this change. As revised, the Note could be as follows:

> Under Rule 43, the court may permit remote testimony at trial. Because the rule presently requires disclosure of witnesses a party "expects to present," it should be understood to include witnesses who will testify remotely. ~~To avoid possible questions about whether disclosure is required for witnesses who will testify remotely,~~ T~~t~~his amendment clarifies that the disclosure requirement applies whether or not the witness is testifying in person or remotely and also alerts the parties and the court that a party expects to present one or more witnesses remotely ~~from a remote location~~.

It was noted that this revision of the pretrial disclosure rule should reassure those who are uneasy about the surprise use of remote witnesses. But it should also be flexible enough in unforeseeable emergency circumstances to permit the court to authorize remote testimony from a witness who was originally expected to be able to testify in person.

Rule 43 Report to full Committee

It was also agreed that the Subcommittee's consideration of a possible amendment to remove the "compelling circumstances" requirement from Rule 43(a) should be presented (as in the introductory material for the Feb. 24 Subcommittee meeting) in the full Committee agenda book for the April meeting. The presentation should make clear that this is only a possibility under initial consideration, but that the Subcommittee would benefit from the views of the full Committee on the topic. At present, it is hoped that there will be mini-conference on remote testimony later this year.

Notes of Teams meeting
Rule 43/45 Subcommittee
Feb. 24, 2025

On Feb. 24, 2025, the Rule 43/45 Subcommittee held a meeting via Teams. Participants included Judge Hannah Lauck (Chair of Subcommittee), Judge Robin Rosenberg (Chair of Advisory Committee), Justice Jane Bland, Joseph Sellers, David Burman and Jocelyn Larkin. Also participating were Emery Lee of FJC Research, and Professors Richard Marcus, Andrew Bradt, and Edward Cooper.

The meeting was introduced as designed to determine whether the Subcommittee could present a proposal at the Advisory Committee's April 1 meeting for publishing a draft amendment to Rule 45(c). In addition, the materials for the meeting provided current thinking on a possible change to Rules 43(a) and 43(c).

Rule 45(c)

Representatives of the Subcommittee have met with the Lawyers for Civil Justice and, quite recently, with representatives of the American Association for Justice during AAJ's winter meeting in Miami. This discussion builds on the learning from those events. In addition, during the AAJ meeting in Miami, Mr. Sobol (who submitted the original amendment proposal) submitted 25-CV-C, containing responses to the questions the Subcommittee had directed to LCJ and AAJ in advance of meeting with those organizations.

An initial question was whether the changes proposed by the Style Consultants raised difficulties or were merely matters of style. The shift to active voice seemed to work no change, but the proposed omission of the phrase "in accordance with these rules" risked leaving out something the Subcommittee wanted to include in the rule – that there be a prior ruling under the rules that remote testimony would be allowed. In the view of the Style Consultants, this phrase provides "unnecessary information" and should be removed.

A question was asked: Does this amendment also apply to deposition testimony? Rule 43 does not seem to bear on whether such testimony may be taken by remote means. On the other hand, under Rule 30(b)(4), unless the parties agree that a deposition may be taken remotely a court order is necessary, so in a significant sense prior judicial authorization is required unless the parties agree to that mode of taking the deposition. Rule 45, of course, may be used to compel the witness to appear for a deposition within the geographical limits of Rule 45(c). So the prior order provision seems pertinent to depositions as well.

But this led to a more basic question: Why is there a prior order requirement at all? Current Rule 45 does not contain such a requirement; parties may serve subpoenas for witnesses to appear at trial or for a remote deposition without first obtaining the court's authorization, and under Rule 43(c) a subpoena may be used to compel remote testimony during a motion hearing. Rule 45(c)(1) says so. Why should we be adding this requirement? Without such a requirement, new (C) could be simplified along the following lines:

> The place of attendance for remote testimony under these rules is where the witness is commanded to appear in person.

It may be important to clarify that new (C) is only about the geographical limits of Rule 45(c), not other rules that address where the witness is testifying, such as Rules 43(a) and 77(b).

Another question was raised: How would that work with a deposition taken by remote means? We have been thinking about live remote testimony shown in the courtroom. Would this provision apply also to remote deposition testimony? A response to that question was that we are talking about contemporaneous remote testimony, not "canned" remote testimony.

Another scenario was mentioned, though likely to be rare in federal court: In family court matters the witness may be in the building but in a different room. Of course, that would not be affected by the *Kirkland* ruling at all unless the witness had to be compelled to attend by a subpoena, and in any event the *Kirkland* ruling was keyed to the supposed geographical limits on the subpoena power.

A question of terminology was raised: Should we be saying "remote testimony" or "transmission from a remote location"? Rule 43(a) says "contemporaneous transmission from different location." But that phrase was from 1996, when that rule was revised, and "remote testimony" is now in common use.

Returning to the question whether Rule 45 itself should require a court order before service of a subpoena, the point was made that the need for judicial authorization could come from many sources in the rules, and need not be included in Rule 45 as well. That rule is designed to enable lawyers to compel witnesses to attend and testify.

An added point was made: As amended in 1996, Rule 43(a) says the court "may permit" remote testimony. It does not say when judicial authorization must be obtained. Indeed, the paradigm example of "compelling circumstances" under the 1996 Committee Note was the last-minute emergency, such as a missed flight or sudden ailment requiring hospitalization. It may be that a subpoena would not usually be needed in such circumstances, but the point is that getting a court order in advance could not work in that paradigm situation. The court was not required to authorize remote trial testimony, but the last-minute nature of the request would not be a per se reason to deny it.

Orderly pretrial preparation should ordinarily ensure that timely permission is sought from the court in most instances. But the current rules do not precisely address that point. Perhaps most pertinent is Rule 26(a)(3)(A)(ii), which directs that a party disclose when it intends to present testimony at trial by deposition. It may be that Rule 26(a)(3) should be amended to add a requirement to disclose when remote witness testimony is contemplated at trial.

The point was made that the "in accordance with these rules" language in our draft was capacious enough to accommodate all these possible variations. Probably the Style Consultants did not appreciate that point when they reviewed the draft we sent them. The point could be made in the Committee Note by invoking the variety of rules that may come into play and noting that the suspect phrase is designed to recognize that authority for remote testimony pursuant to a subpoena may be derived from a multitude of rules. Another relevant rule would be Rule 16(e), which speaks of "a plan to facilitate the admission of evidence."

The consensus was that as a practical matter one seeking to present witness testimony in some other manner than with a live witness in the courtroom must get advance court approval. True, if an emergency at the last minute prevents the witness from showing up in court the order may be granted very soon before the testimony is offered. But the basic point is that judicial approval is essential without a requirement in Rule 45 that it be obtained before service of the subpoena.

Under the circumstances, the plan is to circulate revised language promptly. The likely deadline for submission of agenda book material to the A.O. is around March 10. Ideally, Prof. Marcus can circulate revised amendment language in a day or two. For present purposes, the Subcommittee will schedule a further meeting on **Monday, March 3, at 2:00 p.m. Eastern**.

Rules 43(a) and 43(c)

The materials for the meeting also included a discussion of evolving thoughts about how to approach possible amendments to Rule 43(a). After the AAJ meeting in Miami, it seemed that removing the "compelling circumstances" standard from the rule would be warranted so long as the "good cause and adequate safeguards" standard could be given sufficient teeth.

This approach was endorsed as reflecting major changes since the current rule was written 30 years ago. Technology has evolved hugely, particularly in ways to facilitate remote testimony. In 1996, one might have been focused on testimony by telephone hookup. Certainly there was nothing like the sort of "presence" now made possible by Zoom or Teams or similar services.

On top of that, the judicial experience during the pandemic proved that this new technology can be very effective, as evidenced by this meeting via Teams.

As introduced in the materials for this meeting, a Committee Note to an amended rule omitting the "compelling circumstances" requirement could stress a number of things listed in the materials for the meeting. A few might be addressed at this meeting. One is whether a video deposition might be superior to contemporaneous remote testimony. The 1996 Committee Note suggested such a preference, but perhaps partly in the context of the alternative of testimony by telephone.

The question whether a Committee Note to an amended rule should express a preference for live remote testimony or a videotaped deposition was discussed. The initial consensus was that a Note probably ought not express a preference either way. For one thing, if the deposition was taken long before trial there might be many things that have emerged since the deposition was taken that could not then have been considered. On the other hand, the need for "adequate safeguards" in a revised Rule 43(a) would stress the need for caution in remote testimony; there have been instances of improper prompting of remote witnesses that would not be possible with in-person deposition testimony. At the same time, it may be that the 1996 Committee Note has become something of a relic of a bygone age of litigation.

These issues should be introduced in the agenda book for the April meeting. For one thing, that will permit us to present them to the Standing Committee. For another, organizations like LCJ and AAJ that attend our meetings and follow our work can be aware of what we are considering. These things should first be presented to the Advisory Committee.

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February 15, 2025

Advisory Committee on Civil Rules
Rule 43/45 Subcommittee
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Comments on Proposed Amendments to Rules 43 and 45 of the Federal Rules of Civil Procedure (24-CV-B)

Dear Subcommittee Members:

We respectfully submit the enclosed remarks to address (i) issues raised by the Rule 43/45 Subcommittee as reflected in the February 7, 2025 List of Questions on Remote Testimony,[1] and (ii) other issues raised by interested stakeholders since we proposed the amendments to Rules 43 and 45 in what is now designated as 24-CV-B.

We appreciate the diligence and hard work of the Subcommittee over the past months. The questions the Subcommittee has posed, and the alternative approaches it has articulated, demonstrate the significant thought and attention it has given to these important matters.

As the Subcommittee knows, the proposed changes in 24-CV-B seek both (i) to clarify the ability of courts to issue subpoenas compelling a witness to testify via live contemporaneous transmission from any location within the geographic limitations of Rule 45(c), i.e., that the 100-mile limit applies to the location where the witness will sit for the contemporaneous transmission, not the courthouse where the trial is held, and (ii) to make live trial testimony via contemporaneous transmission under Rule 43(a)—not deposition video—the preferred alternative for witnesses whose in-person attendance at trial cannot be secured.

We understand the Subcommittee has "concluded that immediate action on the Rule 43(a) issues [is] not possible, but also that the Rule 45 issues deserve immediate attention and, if possible, a prompt rule-amendment proposal to resolve the existing divergence" on the Rule

[1] Most of these questions are variations of those posed to the Advisory Committee during its October 10, 2024 meeting. *See* Agenda Book for Oct. 10, 2024 Meeting of Advisory Committee on Civil Rules at 203-04, https://www.uscourts.gov/sites/default/files/2024-10_civil_rules_agenda_book_final_10-6.pdf.

45(c) issue.[2] With this in mind, the Subcommittee has focused on "how best to fashion a rule change that would make it clear that a subpoena may command a distant witness to provide remote testimony when the demanding standard of Rule 43(a) is met."[3] We assume, therefore, that the Subcommittee's questions presuppose no change at this time to the "good cause in compelling circumstances" requirement for remote trial testimony under Rule 43(a).

As the proponents of 24-CV-B, we remain strongly of the view that amendments to Rule 43(a) are necessary to make live trial testimony via contemporaneous transmission—not deposition video—the preferred alternative for witnesses whose in-person attendance at trial cannot be secured. But we recognize that the Subcommittee may be committed to the sequence in which it will address these matters.

Therefore, our comments first respond to the Subcommittee's questions as to how best to amend Rule 45 while leaving intact (for now) Rule 43(a)'s "good cause in compelling circumstances" standard. We then turn to addressing the Rule 43 issue itself, i.e., regarding whether and how to remedy the undesirable and clearly antiquated preference for pre-recorded deposition video over trial testimony that occurs in real time, albeit remotely, before the Court and the jury.

A. Questions on Remote Testimony from Subcommittee on Rules 43/45

We respond below to the Subcommittee's February 7, 2025 questions.

1. *Would an amendment to Rule 45(c) effectively clarify that once a court rules under Rule 43 that remote testimony may be used, the court presiding over the action may [under Rule 45(b)(1)] command the remote witness to attend and provide testimony from a remote location so long as that location does not require the witness to travel farther than a subpoena can require under Rule 45(c)? Possible language to accomplish that result might be along the following lines:*

> ***Place of attendance.*** *If oral testimony by contemporaneous transmission from a different location is authorized by the court in accordance with these rules, the place of attendance is the place the person is commanded to [physically appear] {appear in person}.*

Yes, an amendment to Rule 45(c) would clarify that remote testimony subpoenas can issue and command a witness to testify at trial from a location within 100 miles of the witness's location. The language suggested in the question, however, raises certain concerns.

In the October 10, 2024 Agenda Book, the Subcommittee set forth two possible approaches to amending Rule 45(c) to clarify that a court can command remote trial testimony

[2] *Id.* at 191–92.

[3] *Id.* at 192.

from any location within 100 miles of a witness's home or workplace:

ALTERNATIVE 1

(1) **For a Trial, Hearing, or Deposition.** A subpoena may command a person to attend a trial, hearing, or deposition—in person or by contemporaneous transmission from a different location—only as follows:

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

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

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

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

ALTERNATIVE 2

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

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

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

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

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

(C) by contemporaneous transmission from anywhere within the United States, provided the location commanded for transmission complies with 45(c)(1)(A) or (B).[4]

Either of these proposed amendments should resolve the ambiguity of the current rule, correct

[4] *Id.* at 193–94.

Kirkland's misreading of Rule 45,[5] and align the rules with the decade-long intent of the Advisory Committee to permit a Rule 43 subpoena to command a witness to appear and testify remotely from any location within 100 miles of the witness's home or workplace.[6]

While the language of either version is sufficient to accomplish this goal, Alternative 2 more explicitly does so. Including a subsection stating unequivocally that a subpoena can compel testimony from any location within the geographic limitations of 45(c)(1)(A) or (B) provides courts with a clear mandate on the scope of the subpoena power.

The Subcommittee's February 7, 2024 question appears to contemplate a third option. We disagree with this approach.

First, the prefatory clause—*"[i]f oral testimony by contemporaneous transmission from a different location is authorized by the court in accordance with these rules"*—needlessly grafts the requirements of Rule 43 onto Rule 45, when those requirements ought to be distinct. Since this Subcommittee may alter the Rule 43 requirements through later amendments, Rule 45 should not now adopt those requirements by reference.

Second, the phrase "*the place of attendance is the place the person is commanded to [physically appear] {appear in person}*" is confusing and arguably vulnerable to the kind of reasoning in *Kirkland* that gave rise to the current problem. Why "place of *attendance*" versus "place of *compliance*," which is more consistent with the rest of the language in the rule, accompanying notes, and case law?

As noted in our original proposal (24-CV-B), some of the district courts that have found that Rule 45(c)'s geographic limits prohibit them from issuing subpoenas for testimony via contemporaneous transmission to anyone located more than 100 miles from the trial court did so by relying exclusively on the anachronistic 1996 Advisory Committee notes to Rule 43 providing that depositions are the preferred means of securing trial testimony from a witness who cannot be subpoenaed to testify in person. For example, in *Black Card LLC v. Visa USA Inc.*, the District of Wyoming concluded that Rule 43(a) cannot circumvent Rule 45 based on the Rule 43 notes stating (i) that in-person testimony is preferred, (ii) that the most persuasive showing of good cause in compelling circumstances occurs when a witness cannot attend trial for unexpected reasons, and, "most significantly," (iii) that depositions are the better means of

[5] *See In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023).

[6] *See* Minutes of Civil Rules Advisory Committee Meeting at 13 (Mar. 22–23, 2012), https://www.uscourts.gov/file/15074/download (stating, in response to comment from a lawyer in Hawaii on the persistent difficulty he faced in persuading courts to enforce subpoenas for witnesses to testify at trials in Hawaii from the mainland by means of contemporaneous transmission under Rule 43(a), that a Rule 45 subpoena "is properly issued for this [very] purpose"—to compel a witness outside the trial court's subpoena power to testify at trial via Rule 43 contemporaneous transmission from "a place within the limits imposed by Rule 45," i.e., within 100 miles of the witness's location).

securing the testimony of a witness beyond the reach of a trial subpoena.[7] Based on "a full reading of Rule 43 and the committee notes"—and nothing else—the *Black Card* court concluded that subpoenas for live video testimony under Rule 43 are subject to Rule 45's geographic limits.[8] Similarly, in *Moreno v. Specialized Bicycle Components Inc.*, the District of Colorado found the Advisory Committee's notes to Rule 43(a) alone "highly persuasive on this issue." Citing the notes' instruction that depositions "provide a superior means of securing the testimony of *a witness who is beyond the reach of a trial subpoena*," the court concluded that "[t]here is nothing in the language of Rule 43(a) that permits this court to compel the testimony of an individual who is indisputably outside the reach of its subpoena power."[9] To prevent courts from seeking guidance on Rule 45 from the Rule 43 notes, any amendment to Rule 45 must make unambiguously clear that subpoenas for remote testimony can command a witness to testify via contemporaneous transmission from any location within Rule 45's geographic limits. This goal is best accomplished through Alternative 2.

2. *If such a change were made to Rule 45, should the rule also require that the party seeking remote testimony first obtain an order permitting such testimony under Rule 43 before serving a subpoena? If so, should the party serving the subpoena also be required to serve the witness with the order authorizing remote testimony?*

The answer to both questions is no. The Subcommittee should not recommend a requirement that the party serving the subpoena first obtain a Rule 43(a) order before serving the subpoena or that the order be served on the witness with the subpoena.

First, making the proposed change to Rule 45 (under Alternative 1 or 2)—but without the bracketed portions of subpart (C)—is sufficiently to correct *Kirkland*'s interpretation and aligns the rules with the intent of the 2013 amendments. When the Committee provided for nationwide subpoena power in these amendments, no such pre-authorization requirement was imposed, and there is no compelling reason to do so now.

Second, practical considerations militate against both requirements. In most circumstances, counsel will in any event find it best to first obtain the Rule 43(a) order; the issuance of such an order will have practical effect of maximizing enforcement of the order by the court for the district where compliance is required. But there are situations where Rule 43(a) proceedings and subpoena enforcement proceedings are not capable of being so sequenced. In such situations, parallel proceedings may be the more efficient, if not the only, practical option. And since the party seeking to compel remote testimony at trial will need to satisfy Rule 43(a) in any event, regardless of whether the subpoena issues before or after the Rule 43 adjudication, there is no concern for abuse; indeed, when the Rule 43(a) determination follows service of the

[7] No. 15-cv-27, 2020 WL 9812009, at *2 (D. Wyo. Dec. 2, 2020).

[8] *Id.*

[9] No. 19-cv-1750, 2022 WL 1211582, at *1–2 (D. Colo. Apr. 25, 2022).

subpoena, the subpoena recipient may then, as a practical matter, point to the absence of the Rule 43(a) as a basis for non-enforcement of the subpoena (or may even seek to weigh in on the Rule 43(a) proceeding itself). A subpoena recipient already has the powers granted under Rule 45(d) for protecting a person subject to a subpoena. A rule that requires attaching the Rule 43(a) order might itself (incorrectly) be interpreted as granting the subpoena recipient rights to attack that Rule 43(a) order, leading to two Rule 43(a) proceedings (one to first obtain the order that needs to be attached to the subpoena, and a second when the recipient wishes to revisit the providence of that Rule 43(a) order's issuance).

Finally, the mere service of a subpoena authorized under Rule 45 does not make that subpoena valid or enforceable. There is no reason to treat the requirements of Rule 43(a) any differently than the substantive requirements applicable to any other kind of Rule 45 subpoena.[10] To require otherwise could obstruct the ability of parties to obtain such testimony by forcing them to litigate a Rule 43(a) motion and a remote witness's motion to quash sequentially, rather than concurrently, during a short period before (or, possibly, during) trial, when time is of the essence. The sequencing requirement would also hinder the district court's exercise of discretion to manage its trial proceedings as appropriate in evolving circumstances.

3. *If Rule 45 is changed to address remote testimony in this manner, should it also provide a minimum notice period (say 14 days) unless the court orders otherwise?*

No. With Alternative 2, the rule would be clear that compliance with a subpoena issued for remote testimony would occur at a location for transmission that "complies with 45(c)(1)(A) or (B)." There is also no such notice requirement that presently applies to a subpoena for in-person trial testimony, and there is no reason to treat subpoenas for remote testimony any differently. There is simply no meaningful distinction between the burden on a subpoena recipient that is compelled to testify live in-person versus one commanded to testify live by remote transmission.

4. *Rule 45 of the Washington Rules of Civil Procedure (regarding remote deposition testimony) now includes the following provision:*

> *If the person commanded to appear by remote means does not have adequate access to the necessary technology, they shall notify the issuing officer in writing within 5 days of receiving the subpoena. The issuing officer or commanding attorney must thereafter arrange access to the necessary technology for the witness, or issue an amended subpoena to conduct the deposition in person.*

[10] For example, Rule 26 governs the substantive scope of all discovery subpoenas, *see, e.g.*, 9A Charles A. Wright et al., *Federal Practice and Procedure* § 2452 (3d ed. 2002) ("Today, despite the elimination of specific references within the amended text of Rule 45, Rule 26 still governs the scope of discovery."), but there is no requirement in Rule 45 for the issuing court to adjudicate the propriety of the discovery demanded prior to the subpoena's issuance.

If Rule 45 is amended to authorize a subpoena for remote testimony at a trial or hearing, should a provision along these lines be added to Rule 45?

No. The proposed amendments to Rule 45(c) (under either Alternative 1 or 2) are sufficient to correct *Kirkland*'s misreading of Rule 45 and align the rules with the decade-long intent of the Advisory Committee. There is no good reason to add these other requirements.

First, the Advisory Committee's intent to allow for nationwide subpoena power has been the case for many years and has been so without the need for special notice periods and other logistical hurdles.

Second, just like the commonplace in-person deposition, the now equally commonplace "Zoom" deposition occurs every working day. For deposition practice, the parties typically agree on logistics, and, generally, the proponent of the testimony makes the appropriate logistical arrangements (e.g., location, court reporter, videography, etc.). No civil rule requires these provisions, nor is such a rule necessary. For hearings or a trial that includes remote transmission under the current rules, the same in-court practice occurs, i.e., the parties jointly, or the proponent of the testimony, handles logistical arrangements. And, post-COVID, district courts are now better equipped than ever to accommodate live testimony via contemporaneous transmission.

Technological issues also do not impel any procedural or sequencing requirement for Rule 45 remote testimony subpoenas. Our research and experience show that rarely, if ever, do parties clash over the "appropriate safeguards" required under Rule 43(a). We have found that proponents of remote testimony can easily work with court staff and furnish remote witnesses with whatever technology is required, including (as has sometimes been the case) by overnighting to the remote witness a testimony-ready laptop or other transmission device—all without any involvement of the trial judge. Indeed, we have all seen how quickly federal courthouses across the country seamlessly adapted to conduct remote proceedings during the pandemic. The technology issues should therefore not be a significant concern or serve to complicate the rules governing any of the remote testimony options.

5. *Rule 43(a) provides for remote testimony during a trial, and Rule 43(c) authorizes the court, during a motion hearing, to "hear it wholly or partly on oral testimony." Should the criteria for remote testimony during a trial and a hearing be different? Should an advance court order authorizing remote testimony be required before service of a subpoena commanding remote testimony at a hearing?*

Trial versus hearing. If the Subcommittee is not now addressing the "exceptional circumstances" requirement in Rule 43(a), then we are of the view that there is no reason to address other aspects of Rule 43 currently, including the ostensible difference between Rule 43(a) and 43(c).

As the Subcommittee has observed, the text of Rule 43 is drafted in a way that draws a

distinction between two types of proceedings, i.e., between a "trial" and a "motion." Under Rule 43(a), the first sentence provides that, "[a]t trial, the witnesses' testimony must be taken in open court," and the second sentence states that, "[f]or good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." Presumably, both sentences of Rule 45(a) apply only to trials. Under Rule 43(c), "When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions."

While this distinction appears in Rule 43, there is no reason to think that changes to Rule 45 need to be tailored around this distinction, at least not until the Subcommittee takes up proposed changes to Rule 43. Making the proposed change to Rule 45 (under Alternative 1 or 2) sufficiently corrects for *Kirkland* and aligns the rules with the decade-long intent of the Committee. As with trials, it is often the case that for pretrial matters courts often hear live testimony by witnesses (e.g., on motions for preliminary injunctive relief or for prejudgment security, to address *Markman* issues, etc.), and use of the subpoena power can be quite important, particularly since the relief is often provisional in nature with a need to "get it right." There ought not be a suggestion in the rules that the powers of the court in securing attendance of needed witnesses depends categorically on the type of proceeding.

The proposed amendments to Rule 45 (under either Alternative 1 or 2) are, and should be, agnostic as to the type of proceeding (e.g., trial, hearing, deposition). No such distinction was contemplated when, in 2013, the Advisory Committee's notes to the 2013 amendments to Rule 45 stated, "When an order under Rule 43(a) authorizes testimony from a remote location, the witness can be commanded to testify from any place described in Rule 45(c)(1)." There is no reason to do so now.

Advance court order. For the reasons stated in the answer to Question 2, the amendments to Rule 45 should not add a requirement for an advance Rule 43 court order before issuance of a subpoena for remote testimony.

6. *Rule 32(a)(4) provides that the deposition of an "unavailable witness" may be used at trial. Fed. R. Evid. 804(a)(5) provides that certain statements of an "unavailable" declarant are admissible over a hearsay objection. Should there be a concern that a change to Rule 45(c) would affect the application of Rule 32(a)(4) or Evidence Rule 804(a)(5)?*

The changes contemplated to Rule 45 (under either Alternative 1 or 2) do not implicate problems for the application of either Rule 32(a)(4) or Federal Rule of Evidence 804(a)(5).

Rule 32(a)(4) addresses the use of a deposition for any purpose when the witness is unavailable. Among the findings a court may make regarding unavailability include "that the witness is more than 100 miles from the place of hearing or trial or is outside the United States" or "that the party offering the deposition could not procure the witness's attendance by subpoena." In current practice (i.e., before a change to Rule 45 of the type considered here), if

the proponent of the testimony obtains a Rule 43(a) "compelling circumstances" order and compels attendance of remote testimony through a properly issued and served Rule 45 subpoena, then the court may consider those facts in determining whether one or more of the "unavailable" findings may be made. In short, the current rules do not have "Rule 45(c) . . . affect[ing] the application of Rule 32(a)(4)." Nor would the proposed amendments.

Federal Rule of Evidence 804(a)(5) says that former testimony is admissible over a hearsay objection if the proponent of the evidence could not obtain "the declarant's attendance." In current practice (with or without the proposed amendments), one could argue under that rule that remote testimony authorized under Rule 43(a) and commanded under Rule 45 constitutes the declarant's "attendance" and, therefore, prior deposition testimony is inadmissible hearsay. As this Subcommittee has noted, "it seems that hair-splitting difference would not matter much to a jury, though it might matter to a Rule 50(a) or (b) motion." In any event, the proposed changes to Rule 45 will neither expand nor contract the operation of Rule 804(a)(5).

7. *Amendments to Rule 43(a) have been proposed that appear to require extended study. Also, proposed changes to Fed. R. Bankr. P. 7043, 9014, and 9017 stating that Rule 43 applies (under a different standard) in adversary proceedings, but not contested matters, is open for public comment until February 17, 2025. Is there a reason to defer examining Rule 45 for possible amendment until the decision is made whether Rule 43 should also be refined, or until the Public Comment period on the Bankruptcy Rules expires?*

For purposes of Rule 45, there is no real difference between trials and motion hearings (or depositions, for that matter). Each can require the attendance of witnesses, and Rule 45 provides the circumstances in which testimony and documents may be commanded. The proposed change to Rule 45 (under Alternative 1 or 2)—but without the bracketed portions for (C) to address first obtaining and/or serving a Rule 43(a) order—sufficiently corrects for *Kirkland* and aligns the rules with the decade-long intent of the Committee. Back in 2013, when the Committee first provided for the nationwide subpoena power, there was no need to take up Rule 43 issues, and if the Subcommittee is not addressing the Rule 43(a) "good cause in compelling circumstances" requirement at this time, there is no reason to address these other Rule 43 issues.

For purposes of Rule 43, there is currently a difference between trials and motion hearings in the text of the rule. That distinction appears intended to be drawn more for the purpose of describing when proceedings must be in "open court" under Rule 43(a) (when "[a]t trial") as opposed to when the proceedings fall outside that requirement under Rule 43(c) (for "a motion"). We address proposed changes to Rule 43 later.

8. *Concerns about a clarifying amendment to Rule 45 regarding remote trial testimony have been raised, claiming that expanded subpoena power may be used tactically to put pressure on defendants. The concerns expressed by organizational defendants include (a) that subpoenas compelling remote testimony may require "apex" witnesses, such as CEOs, to testify at trial by remote means; (b) that they may be used to coerce defendants to bring their witnesses to court from long distances to avoid jury antipathy toward a party that insists on remote testimony; and (c) that they may be used to present testimony from "weaker" witnesses than the ones defendants might bring to testify at trial. How do you respond to these concerns? Do you have any concerns about tactical use of a potential amendment by defendants?*

The current rules provide ample protections from abuse of subpoenas for testimony via contemporaneous transmission. Rule 45(d)(3) requires a court to quash or modify a subpoena that subjects a person to undue burden, which includes, for example, "compel[ling] an adversary to attend trial as a witness if the adversary is known to have no personal knowledge of matters in dispute . . . ."[11] Federal Rule of Evidence 601 grants courts broad discretion "over the mode and order of examining witnesses and presenting evidence," including for the purpose of "protect[ing] witnesses from harassment or undue embarrassment," and Rule 403 permits courts to exclude relevant evidence that is needlessly cumulative. As the Northern District of Illinois recently noted, the existing rules already serve as "guardrails against willy-nilly compulsion of nationwide remote testimony" and ensure that "[n]ationwide remote testimony will be neither the norm nor unbounded in application."[12]

B. Further Comments on the Rule 43 Issues

As the Subcommittee has observed, the discussions regarding Rule 45 powers, and the interrelationship of them to Rule 43, invites further attention to Rule 43 in the future. We make the following few remarks (in addition to those made in the original proposal, 24-CV-B).

In any discussion of the Rule 43, it is fundamentally important to point out that a major purpose of the rule is to ensure that witness trial testimony is taken in open court. Rule 43(a) states that, "[a]t trial, the witnesses' testimony must be taken in open court" unless otherwise provided by law or court rule. The rule then provides that, "For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location."

Accordingly, the "good cause in compelling circumstances" requirement is a stringent standard because it seeks to preserve the "open court" requirement for trials, i.e., when there is a choice between live, in-person testimony rather than live, remote testimony. Therefore, the "most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but

[11] Fed. R. Civ. P. 45 advisory committee's notes to 1991 amendment.

[12] *Gray v. City of Chi.*, No. 18-cv-2624, 2023 WL 7092992, at *9 (N.D. Ill. May 8, 2023).

remains able to testify from a different place" such that "[c]ontemporaneous transmission may be better than an attempt to reschedule the trial."[13]

In short, the Rule 43(a) "good cause in compelling circumstances" test serves only to ensure live, in-person testimony when such testimony can be secured. The proposed amendments to Rule 43 made in 24-CV-B do not, in any way, seek to undermine the longstanding preference for live, in-person testimony when the alternative is live, remote testimony.

But what about when there will be no live, in-person testimony at the trial? (This is, of course, a common circumstance for fact witnesses in federal court trials because witnesses often live distant from the trial courtroom). What if, instead, the choice is between live testimony via contemporaneous transmission in open court before the judge and the jury, where the witness answers questions under oath in real time, including any spontaneous and clarifying questions the judge might pose, verses playing previously recorded testimony taken outside the presence of the judge and the jury, i.e., deposition video, which is inherently static and cannot be adapted to address emerging trial issues, questions, and nuances?

The first observation is that Rule 43 (or at least a commonplace reading of it) is flawed because the language of Rule 43(a) suggests that the "good cause in compelling circumstances" requirement applies *both* to (a) the in-person-or-remote question and (b) the remote-or-deposition question. While the "good cause in compelling circumstances" requirement could remain for the former, it makes no sense for the latter. There is no such strong preference for deposition testimony taped during discovery and taken outside the presence of the judge and jury. When deciding whether trial testimony should happen in real time before the judge and the jury (live but remote), or through a previously taped deposition, it should not be the case that the proponent of a live but remote presentation first must show that doing so is "for good cause in compelling circumstances."[14]

Other comments in the rule would support this. As the Advisory Committee's notes observe, the "importance of presenting live testimony in court cannot be forgotten" and the "very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling."[15] Both these circumstances apply to live remote testimony but are inapplicable to

[13] Fed. R. Civ. P. 43 advisory committee's note to 1996 amendment.

[14] Statements made about the Rule 43(a) requirement should be interpreted as directed only to the need to preserve live in-court testimony when available. *See* Agenda for Apr. 9, 2024 Meeting of Advisory Committee on Civil Rules at 590 (questioning need for "stringent standard" of Rule 43(a)); *id.* at 612 ("the high standard set forth in Rule 43"); Agenda for Oct. 10, 2024 Meeting of Advisory Committee on Civil Rules at 189 ("the demanding requirements of Rule 43(a)"); *id.* at 192 ("the demanding standard of Rule 43(a)"); *id.* at 203 ("the demanding 'compelling circumstances' requirements"); *id.* at 194 ("the rigorous 'compelling circumstances' standard"); *id.* at 206 ("very demanding requirements"); *id.* ("exacting requirements"); *id.* at 207 ("stringent requirements to protect the trial process."); *id.* ("the exacting standards"); 215 ("[t]hese exacting requirements"); *id.* at 233 ("the compelling circumstances requirement sets a higher bar").

[15] Fed. R. Civ. P. 43 advisory committee's note to 1996 amendment.

pre-recorded deposition testimony. Indeed, the "opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition" such that "[t]ransmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial."[16] But, with deposition video, assessing a witness's demeanor is far more difficult.

The current comments to Rule 43 should not be interpreted, as they have been, as preferring pre-recorded deposition video over live contemporaneous transmission. The comments state only that "[o]rdinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena, or of resolving difficulties in scheduling a trial that can be attended by all witnesses."[17] This statement does not apply in circumstances where the remote attendance of a witness may be secured.

1. *Are juries able to assess the credibility of a witness who testifies via contemporaneous transmission as well as one who testifies in-person?*

Whether jurors can better evaluate the credibility of a witness who testifies live in person versus one who testifies live via contemporaneous transmission is the wrong question. The proposal is not seeking to alter the rules' longstanding preference for live, *in-person* testimony, which remains the gold standard; rather, the proposed amendments seek to ensure that key witnesses who *cannot* be compelled to testify in person are able to testify live via remote means rather than by deposition video. Courts and litigants resoundingly agree that live testimony by contemporaneous transmission offers the jury better quality evidence than spliced video from years-old depositions,[18] which creates an "unavoidable esthetic distance"[19] that reduces jurors' comprehension, engagement, and interest. As one court aptly commented, "the deposition, whether read into the record or played by video . . . is a sedative prone to slowly

[16] *Id.*

[17] *Id.*

[18] *See, e.g.*, *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 19-md-2885, 2021 WL 2605957, at *5 (N.D. Fla. May 28, 2021) ("[T]here is little doubt that live testimony by contemporaneous transmission offers the jury better quality evidence than a videotaped deposition."); *In re Xarelto (Rivaroxaban) Prods. Liab. Litig.*, MDL No. 2592, 2017 WL 2311719, at *4 (E.D. La. May 26, 2017) (finding live testimony by video "preferable to a year-old video deposition"); *In re Actos (Pioglitazone) Prods. Liab. Litig.*, No. 11-md-2299, 2014 WL 107153, at *8 (W.D. La. Jan. 8, 2014) (concluding that live witness testimony via contemporaneous transmission "more fully and better satisfy the goals of live, in-person testimony" than deposition video); *FTC v. Swedish Match N. Am., Inc.*, 197 F.R.D. 1, 2 (D.D.C. 2000) ("The court will have a greater opportunity through the use of live video transmission to assess the credibility of the witness than through the use of deposition testimony. . . . I am mystified as to why anyone would think that forcing a person to travel across the continent is reasonable when his testimony can be secured by means which are . . . preferable to reading his deposition into evidence."); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, MDL No. 551, 1988 WL 525314, at *2 (W.D. Wash. Aug. 9, 1988) ("Presentation of witnesses under Court-controlled visual electronic methods provides a better basis for jurors to judge credibility and content than does use of written depositions."); *In re San Juan Dupont Plaza Hotel Fire Litig.*, 129 F.R.D. 424, 425–26 (D.P.R. 1989) (finding trial testimony via contemporaneous transmission a "viable, and even refreshing, alternative" to the "droning recitation of countless transcript pages of deposition testimony read by stand-in readers in a boring monotone").

[19] *Actos*, 2014 WL 107153, at *8.

erode the jury's consciousness until truth takes a back seat to apathy and boredom."[20]

That said, numerous courts have noted that, given the speed and quality of modern videoconferencing technology, there is no meaningful difference between in-person versus remote testimony.[21] One study of remote jury trials found that some mock jurors "felt it was easier to judge witness credibility" when the witness testified remotely "because they had a closer view of the witness rather than looking across a courtroom."[22] A similar UK pilot study likewise found that virtual trials "had a positive impact on sightlines in the courtroom" and observed that "the presence of all key participants in the trial on a screen just a few centimetres away from others generated a sense of close engagement with" and "facilitated participation" in the trial process.[23]

Respectfully submitted,

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[20] *In re Vioxx Prods. Liab. Litig.*, 438 F. Supp. 2d 664, 668 (E.D. La. 2006).

[21] *See Liu v. State Farm Mut. Auto. Ins. Co.*, 507 F. Supp. 3d 1262, 1266 (W.D. Wash. 2020) ("[G]iven the clarity and speed of modern videoconference technology, there will be no discernable difference between witnesses' 'live' versus 'livestreamed' testimony . . . ."); *Lopez v. NTI, LLC*, 748 F. Supp. 2d 471, 480 (D. Md. 2010) ("With videoconferencing, a jury will . . . be able to observe the witness's demeanor and evaluate his credibility in the same manner as traditional live testimony."); *Swedish Match*, 197 F.R.D. at 2 ("[T]o prefer live testimony over testimony by contemporaneous video transmission is to prefer irrationally one means of securing the witness's testimony which is exactly equal to the other."); Suppl. Order Answering Pet. for Writ of Mandamus at 4–5, *In re Kirkland*, No. 22-70092 (9th Cir. June 29, 2022), Dkt. No. 9 ("Technology has advanced to the point where the Court can discern no meaningful difference between taking testimony in-person versus taking testimony by videoconference.").

[22] Online Courtroom Project, *Online Jury Trials: Summary and Recommendations* at 8 (2020).

[23] Linda Mulcahy, Emma Rowden & Wend Teeder, *Testing the Case for a Virtual Courtroom with a Physical Jury Hub: Second Evaluation of a Virtual Trial Pilot Study Conducted by JUSTICE* at 11 (2020), https://files.justice.org.uk/wp-content/uploads/2020/06/06165935/Mulcahy-Rowden-second-evaluation-report-JUSTICE-virtual-trial.pdf.

NOTES ON TEAMS MEETING
RULE 43/45 SUBCOMMITTEE
Jan. 14, 2025

On Jan. 14, 2025, the Rule 43/45 Subcommittee held a meeting via Teams. Participants included Judge Hannah Lauck (Chair, 43/45 Subcommittee), Judge Robin Rosenberg (Chair, Advisory Committee), Judge Benjamin Kahn (Subcommittee liaison to Bankruptcy Rules Committee), Justice Jane Bland, Joseph Sellers, David Burman, and Jocelyn Larkin. Also participating were Emery Lee of FJC Research, Kyle Brinker of the A.O., and Professors Richard Marcus and Andrew Bradt, as Reporters.

Before the meeting, Judge Lauck had circulated the notes of the Nov. 21, 2024 Subcommittee meeting and the initial draft list of questions to focus the LCJ and AAJ discussion at meetings in December 2024 and February 2025, along with a tentative agenda for this meeting. In addition, Justice Bland and Judge Kahn had circulated comments earlier on the day of the meeting.

The meeting began with a report on the January 7 Standing Committee meeting, during which there was brief discussion of the work being done on Rule 43 and on Rule 45(c) by this Subcommittee. One member of the Standing Committee emphasized that the issues raised by remote testimony seem the more important questions than the subpoena question, and urged consideration of how remote proceedings are used in a variety of contexts, including immigration hearings and some criminal proceedings in relation to federal-court litigation, and also in state courts. The point was not so much to slow progress on the Rule 45 issues as to emphasize that work should also go forward on the Rule 43 issues, which are more complicated.

On the Rule 43 topic, it was noted that the original submission regarding remote testimony (24-CV-B) had prompted strong opposition in some quarters. One could say that the proposed changes would make remote testimony the default in the rules. That met with substantial push-back. Some of that push-back may be tactical, but at present it seems that a significant number of judges are uneasy with broadening the use of remote testimony, at least at trials. Meanwhile, the Bankruptcy Rule amendment proposals to remove the "compelling circumstances" requirement for "contested matters" – but not for adversary proceedings – are out for public comment through mid-February. To date, it seems those proposals have not received much comment.

For the present, a primary objective for today's meeting is to button up our preferred Rule 45 approach, if possible, so that the Subcommittee can be in a position to propose a draft for publication for public comment during the April 1 Advisory Committee meeting. Ideally, the Subcommittee can be poised to make that decision during its next meeting on Feb. 24.

In terms of input thus far from the bar, there is little indication that amending Rule 45 to overcome the difficulty identified in *Kirkland* causes intense heartburn (though some on the defense side have expressed misgivings about this amendment idea); the main misgivings are about the proposed changes to Rule 43.

Rule 45 draft

As reflected in the notes for the Nov. 21, 2024, meeting, essentially the same Rule 45 language could be put in one of two places – as a new Rule 45(c)(3) or as a new Rule 45(c)(1)(C). That draft language was included in the list of questions sent to LCJ and to AAJ for discussion at the meetings of the groups.

Concerns aired so far about the subpoena provision from what might be called the defense side include the worry that plaintiffs might use this opportunity to force defendant corporations to bring witnesses to trial for live testimony because they don't want to have their witnesses testifying remotely and thereby antagonize jurors. In addition, there are concerns about apex witnesses; having to bring the CEO across the country in many cases in which the company's products are the focal point of the suit could place an unfair burden on defendant companies.

On that score, one suggestion that has been made is that there should be a distinction between jury trials and bench trials. Concerns about antagonizing the finder of fact with remote testimony probably loom larger with jury trials, since the jurors do have to travel to the court for the trial.

A comparison issue that was addressed in the Rule 45 project a dozen years ago was whether the court should have authority to summon witnesses to trial from more than 100 miles away. The desire to do that might be particularly pressing in MDL litigation; a pharmaceutical company from New Jersey might be defending an MDL proceeding about one of its products in New Orleans. One might say that it could pick and choose which of its witnesses it would bring to trial in New Orleans, and that plaintiffs should be permitted to compel other company employees to show up for trial. The eventual conclusion in the 2013 amendments was not to enlarge the subpoena power in terms of how far the witness had to travel, which is what Rule 45(c) now collects in one place in the rule. As presently written, Rule 45 does not support using a subpoena to compel a distant party witness to testify in person at trial. Remote testimony might sometimes (when Rule 43(a) is satisfied) enable plaintiffs to require distant employees of a defendant to testify remotely at trial.

Against that background, the discussion turned to the draft before the Subcommittee. The materials for the meeting offered two locations for the amendment, and after discussion the resolution was to favor focusing on the Rule 45(c)(1)(C) approach, which was as follow:

Rule 45. Subpoena

* * * * *

(c) Place of Compliance.

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

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

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

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

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

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

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

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

(3) ***Place of attendance.*** If oral testimony by contemporaneous transmission from a different location is authorized by the court in accordance with these rules, the place of attendance is the place the person is commanded to [physically appear] {appear in person}.

Two ideas not included in the draft above could be raised. One is including a notice period. There has been some discussion about whether, absent a court order to the contrary, a 14-day advance notice requirement would be appropriate for subpoenas for deposition testimony. This issue is before the Discovery Subcommittee. If so, it may be that a similar notice requirement should be adopted for subpoenas for testimony in court. Indeed, that may connect to another topic before the Discovery Subcommittee – whether to retain the current requirement in Rule 45(b)(1) that the party serving the subpoena also tender the witness fee at the time of service.

A second issue is addressing the possibility that the witness does not have available transmission facilities sufficient to support testimony at the trial. That idea is included in the recently-adopted Washington state court provision on remote depositions. The materials for the meeting included in footnotes a draft amendment approach for either Rule 45(a)(1)(A) or Rule 45(d)(1) that would add the following language:

> If the subpoena commands a person to appear by remote means and the person does not have adequate access to the necessary technology, the witness may notify the issuing officer in writing within 5 days of receiving the subpoena. The issuing officer or commanding attorney must thereafter arrange access to the necessary technology.

Whether including this provision in the rule is important is unclear. It was noted that, under current Rule 45, a party may use a subpoena to require a witness to show up for a deposition within the range permitted under Rule 45(c), but it's not the witness's problem to arrange to have a court reporter present. Under Rule 30(b)(3)(B), another party may – with prior notice – designate another method for recording the testimony. But that's not the responsibility of the witness. Probably the party serving the subpoena has a strong incentive to make certain that there are effective methods of recording or transmitting the testimony. As a comparison, Rule 30(g)(2) provides that if the witness does not show up for the deposition because the noticing party did not serve a subpoena,

the noticing party can be required to pay the costs and attorney's fees incurred by other parties who showed up for the failed deposition.

Another reaction to this possible rule provision was that it imposes on the witness an obligation to give notice within five days. It seems better to leave the responsibility on the party that served the subpoena. Including this sort of provision in the rule could be counterproductive. On the other hand, addressing this concern in the Committee Note seems warranted, in the context of the serving party's responsibility.

Another member was agnostic where this detail should be mentioned, but supported the "place of attendance" method of surmounting the *Kirkland* hurdle. The draft under consideration will work well with whatever may later seem a desirable change to Rule 43. It is important that any change to Rule 45 not complicate possible changes (later) to Rule 43.

A question was raised: is it clear that the subpoena must specify a place to show up to testify? The answer was that Rule 45(a)(1)(A)(iii) does indeed say the subpoena must so specify. The parties may negotiate about where a deposition should occur. Under the current rule, that may (for some witnesses) be anywhere in the state, which could be more than 100 miles from the residence of the witness.

In Rule 43 terms, it was noted, the location of the remote testimony may be among the topics addressed when a party seeks court approval under Rule 43(a) for remote trial testimony. Along these lines, a prediction was made: court reporters will (if necessary) rent rooms for such remote testimony within the Rule 45(c) geographical limits.

The consensus was that including something like the Washington deposition provision in the rule is not warranted, but that some comment should appear in the Committee Note to call attention to the responsibility of the party serving the subpoena to ensure that effective transmission facilities exist at the place the witness is directed to report for the remote testimony.

Turning to the specific language of the proposed addition to Rule 45(c), it was suggested that the word "place" might be replaced by the word "location" in the draft amendment. At least the second use of "place" might be changed – "the location the person commanded to [appear]." On this point, it was noted that Rule 30(b)(4) on depositions by remote means says that "the deposition takes place where the deponent answers the questions."

It was noted that the draft Rule 45(c)(3) is itself entitled "Place of compliance." Whether that should be changed if the word is changed in the proposed amendment is uncertain. One possibility is to get an early read from the Standing Committee Style Consultants, while being clear that this language is still evolving.

List of questions for AAJ meeting

The list of questions that were submitted to the LCJ meeting were also provided to AAJ. But it may well be sensible to augment the list. In particular, it might be useful to call attention to concerns about (a) undue pressure to bring distant witnesses to the trial court, either due to worries about offending the jury or worries about transmission difficulties and (b) apex witness concerns

that would not exist for trial testimony (v. depositions) unless remote trial testimony could be compelled by subpoena.

In terms of recurrent disputes between those seeking discovery and those required to provide information, there is regularly some finger-pointing. For purposes of augmenting the Subcommittee's list of questions, it would be best to avoid finger-pointing, perhaps by saying phrases like "concerns have been raised about . . ." The AAJ meeting is not for a month, but drafting additional questions should be undertaken promptly (and they should be provided to LCJ also, as a courtesy).

Prior judicial authorization for remote testimony

The Subcommittee had grappled with the difference between Rule 43(a) (regarding trial testimony) and Rule 43(c) (regarding "oral testimony" at a motion hearing. It is clear that remote trial testimony is proper only if the court authorizes it under the demanding standards of Rule 43(a). The rules do not specify any particular standard to guide the court on whether to authorize such testimony during a motion hearing, but Rule 45(c)(1) does apply to a hearing as well as a deposition or trial. Though Rule 30(b)(4) addresses remote depositions and Rule 43(a) addresses remote trial testimony, no rule provision elaborates about remote testimony during a motion hearing.

As noted earlier in the meeting, one goal under Rule 45 is to avoid anything that would complicate later revision, if it later seems warranted, to Rule 43. The method proposed in the draft is to say that the place of attendance is governed by the new provision if that is "authorized by the court in accordance with these rules." That avoids trying to make the sometimes-tricky distinction between a "trial" and a "motion hearing," and also avoids determining whether some advance court authorization is required. In that way, this amendment should not interfere with later consideration of changes to Rule 43.

Another feature of this locution is that it is conditioned on court authorization "under these rules." At least as to Rule 43(a), then, that means that court approval must be sought before the subpoena is served. Concerns have been raised about whether this would impose additional burdens on courts. But since the authorization must be obtained under Rule 43(a), it seems unlikely to add to burdens. And the amendment's locution should make it clear (as the Committee Note should state) that court authorization must be obtained before the subpoena is served on the witness.

Next steps for Rule 45

For present purposes, it seems that the next steps are (a) to use the Rule 45(c)(3) approach, somewhat revised in light of the discussion during the meeting; (b) to seek early guidance from the Style Consultants about some of the wording choices before the Subcommittee; and (c) to prepare a Draft Committee Note. In addition, possible additional questions for the AAJ meeting should be considered.

Rule 43 amendment ideas

There is a consensus that the remote testimony issues are more challenging than the Rule 45 issues. In 1996, when the remote trial testimony was added to Rule 43(a), there was great uneasiness about it. It may be that technological advances since then and the pandemic experience

have shown that the 1996 constraints can be relaxed. In Texas there is a list of factors that inform the decision whether to authorize remote testimony. That does not mean that it should routinely be substituted for traditional in-person testimony, but these factors might be considered if the demanding "compelling circumstances" requirement is removed from Rule 43(a).

One obvious possibility is party agreement. Even remote jury trials may be done with party agreement; party agreement probably should not be binding on the court in terms of the manner of conducting the trial. Whether that would accord with current Rule 43(a) could be debated. The present goal is to avoid complicating the Rule 43 study in any changes to Rule 45(c), and the present consensus on how to proceed with Rule 45(c) seems to achieve that goal.

At the Subcommittee's next meeting, it will be desirable to devote more attention to Rule 43 issues. The initial focus will be on gathering information about experience with remote testimony.

One possibility is to try to convene some sort of mini-conference. That method has been very informative on other issues considered by the Advisory Committee in the past. Several possibilities were mentioned. Both Duke's Bolch Judicial Institute and Berkeley's Judicial Institute might be suitable venues. Whether this should be something handled under the auspices of the Advisory Committee or organized by the hosting institution would need to be considered. Either way, thought should be given to who might be invited and to what introductory materials should be provided. And at least a skeletal outline would be needed.

It will be important during the Subcommittee's February meeting to flesh out these ideas. Then the Subcommittee can report on its plans during the April full Committee meeting, and also inform the Standing Committee about how the Subcommittee is getting oriented to address remote testimony questions.

* * * * *

The next steps are:

(1) Prepare a draft Committee Note;

(2) Seek an initial Style Consultant reaction to language choices for draft Rule 45(c)(3).

(3) Determine whether to add questions to our list for the AAJ meeting, and draft them.

(4) Begin to sketch the method the Subcommittee will use to address remote testimony.

(5) Attend and learn from the Feb. 15 AAJ discussion of Rules 43 and 45.

(6) Next Subcommittee Zoom meeting **Feb. 24, 2025**.

NOTES ON TEAMS MEETING
RULE 43/45 SUBCOMMITTEE
Nov. 21, 2024

On Nov. 21, 2024, the Rule 43/45 Subcommittee held a meeting via Teams. Participants included Judge Hannah Lauck (Chair, 43/45 Subcommittee), Judge Robin Rosenberg (Chair, Advisory Committee), Judge Benjamin Kahn (liaison to Bankruptcy Rules Committee), Joseph Sellers, David Burman, and Jocelyn Larkin. Also participating were Emery Lee of FJC Research, Kyle Brinker of the A.O., and Professors Richard Marcus and Edward Cooper.

Before the meeting, Judge Lauck had circulated a discussion draft reflecting the discussion at the Oct. 10 Advisory Committee meeting, proposing the addition to Rule 45(c) of something along the following lines:

Rule 45. Subpoena

* * * * *

(c) Place of Compliance.

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

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

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

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

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

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

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

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

(3) ***Place of attendance.*** If oral testimony by contemporaneous transmission from a different location is authorized by the court in accordance with these rules, the place

of attendance is the place the person is commanded to [physically appear] {appear in person}.[1]

An introductory comment regarding the issues before the Subcommittee was that it seemed that the Advisory Committee favored what might be called a "rifle shot" amendment to Rule 45 to address the problem created by the Ninth Circuit's *In re Kirkland* decision. There is a relatively urgent need to respond to that and other court decisions that conclude that the current rule does not permit a subpoena to compel remote testimony, at least if it is for trial testimony and the witness is located far enough from the court that a subpoena could not, under Rule 45(c), compel the witness to attend in person due to distance.

As a goal for the meeting, it was suggested that reaching agreement on what should be done with Rule 45 promptly is important. For one thing, the *In re Kirkland* decision seems already to be having some ripple effects. For another, Subcommittee members are scheduled to meet with representatives of at least two bar groups – Lawyers for Civil Justice and the American Association for Justice – in the near future. Indeed, the LCJ meeting is to occur in the first week of December. It would be good for the Subcommittee to invite feedback from members of these groups about its current thinking. The agenda book for the October meeting identified a variety of possible measures, and the Subcommittee is moving beyond those.

An attorney member supported the idea of a simple Rule 45 amendment to make clear that the *In re Kirkland* interpretation of the rule is being changed – perhaps presented as a "clarification" that the court does have authority to order remote witnesses to travel up to the limits specified in Rule 45(c). It might be desirable in the Committee Note to cite the Ninth Circuit decision and state that the rule amendment changes the result the court reached (as it recognized the Advisory Committee could do).

[1] Perhaps an alternative placement for such a new provision might be as follows:

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

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

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

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

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

(C) ***Place of attendance.*** If oral testimony by contemporaneous transmission from a different location is authorized by the court in accordance with these rules, the place of attendance is the place the person is commanded to [physically appear] {appear in person}.

This attorney also favored including something like a provision included in the Washington state court rule regarding remote depositions:

> If the person commanded to appear by remote means does not have adequate access to the necessary technology, they shall notify the issuing officer in writing within 5 days of receiving the subpoena. The issuing officer or commanding attorney must thereafter arrange access to the necessary technology for the witness, or issue an amended subpoena to conduct the deposition of the person.

This sort of provision was endorsed as ensuring that access to justice issues are considered. But it was also observed that probably the noticing party would want to make certain that the deposition is to occur in a place suited to providing the necessary recording capacities (e.g., not the living room of the witness). Perhaps in large western states the availability of nearby transmission facilities could sometimes be in issue, but particularly with testimony at trial this sort of thing might be presumed to be addressed by the party that served the subpoena without a specific provision in the rule.

In addition, this attorney likes the provision in the Washington rule that the subpoena must state whether the testimony will be taken by remote means. But it is not clear whether that provision (which can be very important in depositions) is also important for remote testimony in trials or hearings. Somewhat by definition, that is *remote* testimony. So giving separate notice to that effect for remote testimony at a trial or hearing may not be needed. Indeed, the sketch above is limited to situations in which "oral testimony by contemporaneous transmission" is authorized by the court.

It is not clear that advance court authorization should be required for remote deposition testimony. Rule 30(b)(4) authorizes the court to order remote deposition testimony, but also permits the parties to stipulate to remote testimony. Rule 30(b)(3) directs that the notice of deposition state the proposed manner of recording, and also that (with notice) any other party may designate another method of recording the testimony. Rule 45(a)(1)(B) similarly requires that a subpoena state the method intended to be used for recording the testimony so the witness knows that. For remote testimony at a trial or hearing, it may be important that the subpoena contain that information as well. But it is not clear that the *In re Kirkland* decision significantly bears on giving notice to the witness that this will be remote testimony. Indeed, since the subpoena will likely tell the witness to report to some specific location (not the presiding court, but also not the witness's living room), providing such notice may not be useful to the witness.

Finally, this attorney urged that even though the most immediate objective is an antidote to the Rule 45 *In re Kirkland* problem the Subcommittee should also continue to study the more general question of remote testimony and possible revisions to the standard in Rule 43(a). That is not currently ready, but should not be forgotten.

A judge agreed that it would be desirable to include a provision for witnesses who lack the necessary technology.

Another point about the Washington rule on remote trial testimony is the following provision: "Advance notice of a party's intention to use remote testimony must be given no less

than 10 days prior to trial, absent good cause shown." This requirement produced some controversy in Washington. The Subcommittee has on occasion discussed adopting a minimum notice provision.

One point about such a directive might relate to a point made during the Advisory Committee's October meeting – we should be careful about burdening the court with additional advance duties in relation to witness testimony.

That concern drew responses. For one thing, Rule 43(a) now says that the court's approval is required for remote trial testimony, and we have discussed whether it would be desirable to insist that the court's approval be obtained before the subpoena is served. The draft language above addresses that by saying that a subpoena for remote testimony at a trial or hearing may be served only when remote testimony is authorized by the court. It would seem that, by definition, that would occur before service of the subpoena.

For another, with regard to trial testimony, that subject always or almost always is the subject of the final pretrial hearing. So dealing with this issue during that pretrial hearing ought not impose significant additional burdens on the court.

But what if there is no pretrial conference, it was asked. A reaction was that it will be important to be explicit about how and when advance court approval is required.

Another point was that these uncertainties exist now; nothing in current Rule 43 explicitly says that the party intending – as permitted by Rule 43(c) – to use remote witness testimony at a hearing must first go to the court.

Another judge agreed with this point. The goal is a rifle shot fix for *In re Kirkland*. We should not lose sight of that. There may indeed be lots of other things that could be cleared up, but *In re Kirkland* did not cause them. "People issue abusive subpoenas right now. We can't take on all possible abuse of the subpoena power."

This judge also thinks that the Rule 43 issues should be addressed promptly, but in a different time frame from the Rule 45 issues.

It was noted that Subcommittee members will be discussing these issues with LCJ in early December and with AAJ in February. There was support for trying to present both organizations with a focus for their discussions. We can benefit greatly from learning their views on specific proposals.

At the same time, it's important to be cautious about releasing interim Subcommittee drafts, particularly before the Advisory Committee has seen them. Perhaps the solution is to try to devise a series of questions for our interlocutors. The agenda book had a series of questions for the Advisory Committee at pp. 203-04, but we have moved beyond those by now. Would there be a way to devise a "next generation" set of questions for discussion in December and February?

One question that was raised was whether there is uneasiness about being clear in a Committee Note to a Rule 45 amendment that it does not relax or alter the standards in Rule 43(a) for remote testimony. That drew the point that mentioning only Rule 43(a) might be undesirable,

since Rule 43(c) testimony at a motion hearing should not be excluded. On the other hand, it's not clear that any advance judicial action is needed before such remote testimony is offered under Rule 43(c).

Strong support for being as forthright as possible came on the basis of the experience of the MDL Subcommittee as it worked on Rule 16.1. The more we can get the insights of experienced lawyers on the words and placement of provisions the better off we will be. It would be unfortunate to have to come back for a second dose of commentary. It probably would be sufficient to call the draft of a possible approach to Rule 45 outlined above a "sketch" for these purposes. Sometimes the Committee has even called such things "cartoons."

Attention returned to the Washington rule provision that directs that – at least with regard to depositions – the subpoena must state that the testimony will be taken in a remote manner.

Discussion turned to where one could include something like the Washington directive that the witness be empowered to seek help in obtaining technological equipment for remote testimony.

One question is whether this is really a problem, particularly with testimony at a trial or hearing. One would think that the party seeking such testimony would have a strong incentive to make sure the necessary technology would be available and reliable. Can we not assume that parties will be responsible in that way? A distant analogy is Rule 30(g), which authorizes recovery of expenses for attending a deposition that does not go forward because the noticing party did not serve a subpoena. To some extent, it's up to the noticing party to realize that nonparty witnesses must be subpoenaed to ensure that they show up.

Discussion turned to where such a provision about providing the witness with technological assistance should appear. One place might be in Rule 45(a)(1), which presently requires that the subpoena set out the text of Rule 45(d) and (e), which themselves contain provisions to protect the witness against burdens.[2]

[2] Placement in Rule 45(a)(1) might look like this:

(1) ***Form and Contents.***

(A) *Requirements – In General.* Every subpoena must:

(i) state the court from which it issued;
(ii) state the title of the action and its civil-action number;
(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; product designated documents, electronically stored information, or tangible things in that person's possession, custody or control; or permit the inspection of premises; and
(iv) set out the text of Rule 45(d) and (e). <u>If the subpoena commands a person to appear by remote means and the person does not have adequate access to the necessary technology, the witness may notify the issuing officer in writing within 5 days of receiving the subpoena. The issuing officer or commanding attorney must thereafter arrange access to the necessary technology.</u>

Another place might be in Rule 45(d)(1) itself.[3]

Returning to the question how the upcoming meetings with bar groups can be most productive, the consensus was that Prof. Marcus could try to draft something that Subcommittee members could use to devise a list of questions or bullet points for discussion with the bar groups.

Some of the questions on pp. 202-03 of the Oct. 10 agenda book might be useful. For example, these practicing lawyers might be asked whether they think changing the subpoena rule could have an adverse effect on the unavailability criterion under Rule 32 or Evidence Rule 804. One reaction to that was that somebody who wanted to oppose use of deposition or prior testimony on the ground the proponent should have sought advance judicial authorization for remote testimony would be taking a very big risk. This may well be an unrealistic concern.

Probably the most efficient way to accomplish this is to have Subcommittee members exchange ideas by email using the "reply all" function. Next week is Thanksgiving week, and the LCJ event is the following week. It would be very valuable were members able to circulate their questions or ideas for the bar group outreach by **Monday, Dec. 2**.

[3] Such a Rule 45(d)(1) amendment might look as follows:

(1) ***Avoiding Undue Burden or Expense; Sanctions.***

(A) A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction – which may include lost earnings and reasonable attorney's fees – on a party or attorney who fails to comply.

(B) If the subpoena commands a person to appear by remote means and the person does not have adequate access to the necessary technology, the witness may notify the issuing officer in writing within 5 days of receiving the subpoena. The issuing officer or commanding attorney must thereafter arrange access to the necessary technology.

TAB 8

8. Rule 45(b) – Service of Subpoena

The Discovery Subcommittee has two topics on its agenda. It has completed its work on one of those topics and brings that to the full Committee with a proposal that it be published for public comment. It is another change to Rule 45, and ideally should be put out for public comment with the proposal for public comment on Rule 45(c) presented by the Rule 43/45 Subcommittee.

This rule change is designed to respond to a problem that has been brought up repeatedly in submissions to the Committee over the last two decades or so – the ambiguity of the requirement in Rule 45(b)(1) of "serving" the witness with the summons and also (at the time of service) tendering the witness fee to the witness. For the majority of subpoenas, service is not problematical. But problems have emerged with sufficient frequency to justify a rule change.

After considerable discussion, the Subcommittee has drafted the proposed amendment presented below to achieve three basic objectives:

(1) Borrow from Rule 4 some well-recognized methods of service – personal delivery or leaving at the abode of the person with a person "of suitable age and discretion who resides there" (not the plumber who is fixing the sink in the absence of the homeowners), and adding service by mail or commercial carrier if that includes confirmation of receipt;

(2) Adding a notice period – 14 days in the draft – unless the court authorizes a shorter period: and

(3) Providing that the tender of witness fees is not required to effect service of the subpoena, providing that the statutory fees are tendered upon service if that is practicable or, in the alternative, tendered when the witness appears as commanded by the subpoena.

This amendment proposal is designed to address practical problems that have sometimes resulted from the ambiguity of Rule 45(b)(1)'s current use of the term "delivering a copy to the named person" without being more specific about how that is to be done.

On the witness fee tender item (no. (3) above), the Subcommittee considered that the rule provide that the fees be tendered "at the time of service <u>if practicable</u>, or at the time and place the person is commanded to appear." But it is not proposing the underlined phrase, which seems to invite disputes about whether tender of the witness fees would be practicable.

There has been at least one recent reported decision in which multiple attempts at service were deemed ineffective because the witness fee had not also been tendered. And in another recent case, the server did not initially deliver the witness fee check because it had the server's information on it and the server worried for his personal safety if that were revealed to the witness. If the Committee believes this phrase should be included in the draft published for public comment, it can be added. But several members of the Subcommittee worried that it would invite disputes, and that the party serving the subpoena would usually want to ensure the witness would readily be able to attend as commanded.

Separately, the Subcommittee has for some time been considering what rule changes (if any) would be desirable to address filing under seal. That matter will be presented later in this

agenda book in the Subcommittee Reports section. It is not ready for action, and the Subcommittee invites reactions from the full Committee on whether action is warranted.

Rule 45. Subpoena

* * * * *

(b) Service.

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

(A) Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person by:

(i) delivering a copy to the individual personally;

(ii) leaving a copy at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(iii) sending a copy to the person's last known address by a form of United States mail or commercial carrier delivery that provides confirmation of receipt; or

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

(B) ~~and, i~~If the subpoena requires that the named person~~'s~~ attend~~ance,~~ a trial, hearing, or deposition, unless the court orders otherwise, the subpoena must be served at least 14 days before the date on which the person is commanded to attend. In addition, the party serving the subpoena requiring the person to attend must tender~~ing~~ the fees for 1 day's attendance and the mileage allowed by law at the time of service, or at the time and place the person is commanded to appear. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies.

COMMITTEE NOTE

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

The amendment removes that ambiguity by providing that methods authorized under Rule 4(e)(2)(A) and (B) for service of a summons and complaint constitute "delivery" of a subpoena. Though the issues involved with service of a summons are not identical with service of a subpoena, the basic goal is to give notice and the authorized methods should assure notice. In place of the

current rule's use of "delivering," these methods of service also are familiar methods that ought easily adapt to the subpoena context.

The amendment also adds another option – service by United States mail or commercial carrier to the person's last known address, providing confirmation of receipt is provided. The rule does not prescribe the exact means of confirmation, but courts should be alert to ensuring that there is reliable confirmation of receipt. Experience has shown that this method regularly works and is reliable.

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

The amendment adds a requirement that the person served be given at least 14 days' notice if the subpoena commands attendance at a trial, hearing, or deposition. Rule 45(a)(4) requires the party serving the subpoena to give notice to the other parties before serving it, but the rule does not presently require any advance notice to the person commanded to appear. Compliance may be difficult without reasonable notice. Providing 14-day notice is a method of avoiding possible burdens on the person served. In addition, emergency motions for relief from a subpoena can burden courts. For good cause, the court may shorten the notice period on application by the serving party.

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

NOTES OF TEAMS MEETING
DISCOVERY SUBCOMMITTEE
Feb. 28, 2025

The Discovery Subcommittee met by Teams on Feb. 28, 2025. Those participating included Judge David Godbey (Chair, Subcommittee), Judge Robin Rosenberg (Chair, Advisory Committee) Judge Annie Christoff, David Burman, Joseph Sellers, David Wright, Clerk Liaison Thomas Bruton, Emery Lee of the FJC and Professors Richard Marcus, Andrew Bradt, and Edward Cooper.

As introduced in the materials for the meeting, there were two major topics – refining the amendment proposal for Rule 45(b)(1) regarding service of the subpoena and determining how to proceed regarding motions to file under seal.

Rule 45(b)(1) – service of subpoena

The Subcommittee has spent a substantial amount of time on this topic. Today's discussion focuses on three things: (1) whether to expand on the Rule 4 methods borrowed in the draft for service of initial process and apply them also for service of a subpoena; (2) whether to add a 14-day notice period; and (3) how to handle the tendering of the witness fees – as a required feature of service or otherwise.

(1) Methods of service

The draft borrowed from Rule 4(c)(2)(A) and (B), and provides that only those "traditional" methods of service constitute "delivery" under Rule 45(b)(1). Additional methods may be authorized by court order but are not per se sufficient.

An immediate question arose: Rule 4(e)(2)(B) authorizes service of original process by leaving a copy at the defendant's place of abode "with someone of suitable age and discretion who resides there." But the underlined words do not appear in the draft. Was it intended to leave them out?

The answer was that this was an oversight, and the additional phrase should be included.

Discussion then shifted to another possible method of serving a subpoena – by U.S. mail or commercial carrier. At least some circuits have recognized this method as sufficient under Rule 45(b)(1), at least when there is some reliable method of confirming receipt.

One reaction was that Rule 4 does not authorize such service for initial process, though Rule 4(d) does provide a method for a party to waive service. But that depends on the recipient actually waiving service; if the recipient does not do so, service is still required. And it gives the recipient at least 30 days to decide whether to waive service, something that might not be workable in some instances when the subpoena calls for testimony before the expiration of 30 days or other actions within that time period. [Note that another topic is whether to add a 14-day notice period to the rule, so if the amendments were adopted immediate compliance would not usually follow. But even with the 14-day notice provision, the service itself would be effective without further action by the witness.]

Another participant reported that either U.S. mail or a commercial carrier is routinely used to serve subpoenas. Good practice with nonparty witnesses usually prompts the lawyer serving the subpoena to contact the witness before service and alert the witness to what's coming, perhaps emphasizing that this does not mean the witness has been sued.

Another participant reported that commercial carriers are routinely used for service of subpoenas, and often prove more reliable than U.S. mail. But a signature confirming receipt is customarily required to effect service.

Another participant confirmed that service of subpoenas by mail or commercial carrier is commonplace and accepted, provided there is some sort of signed confirmation of delivery.

The emerging consensus was that this method of service should be added, requiring that there be written or signed confirmation of receipt to complete service in this manner. The draft can be revised along these lines.

Notice period

Rule 45 does not now have any notice period requirement. But participants reported that 14 days is the normal amount of notice that is expected. A judge reported that when subpoenas require responses sooner than 14 days after service, that often results in an application to the court for relief. So adding that to the rule seems a good thing. It should be retained.

And the draft permits the court to shorten time. For example, if the need for testimony of an additional witness came up during trial the court could easily grant leave to require response in a shorter period. And the bracketed phrase "for good cause" seems unnecessary; the point is that the court may shorten the period. Judges can be trusted to make sensible decisions about whether to do so without being told that "good cause" is necessary.

Tendering fees

The current rule has sometimes been interpreted as making service ineffective unless witness fees are simultaneously tendered. The materials for the meeting offered two possible changes to that rule in those instances where the statutory witness fee requirement applies (when the witness is commanded to attend a trial, hearing, or deposition).

The first (Alternative 1) would provide that the fees should be tendered "at the time of service, or at the commencement of the trial, hearing, or deposition."

A concern has been expressed in the past that some witnesses may lack the necessary resources to travel to the place where they are to testify. The suggestion was that the phrase "whenever practicable" be added after "at the time of service."

It was asked whether the participants in the meeting remembered an instance in which the witness could not show up without being paid the fee up front. A judge reported that over decades there had been no instance of a witness reporting inability to attend due to the cost of travel. In terms of difficulties resulting from the current provision calling for simultaneous tender of the witness fees, it is likely true that the requirement to tender the fees creates service difficulties more

often than the failure to tender the fee creates an attendance obstacle. [It might be noted that 28 U.S.C. § 1821 provides for a witness fee of $40 per day plus actual cost of travel to the place the witness is commanded to appear. For travel expenses, § 1821(c)(1) requires a receipt for reimbursement for travel costs.]

A different issue was raised: Sometimes a witness is commanded to appear at a trial that may go on for many days or even weeks. Yet the draft says the fees must be tendered at "the commencement of the trial." Would it not be better to say something like "at the date and time the witness is commanded to appear"? The consensus was that – given the possibility of lengthy trials, requiring the witness to appear at the commencement to claim the witness fee would not make sense.

Based on this discussion, the consensus was that the draft should be revised (and the Note suitably revised) to (1) add service by U.S. mail or common carrier with confirmation; (2) to retain the 14-day notice period; and (3) to adopt Alternative 1 on tendering fees, adding "whenever practicable" to qualify tender with service of the subpoena and specifying the alternative time for tendering the fee is when the witness appears as commanded by the subpoena.

Sealed filings

Little time was left for this topic. The goal will be to present the issues to the Advisory Committee at the April meeting. The materials for the meeting set out a variety of issues.

A starting question was whether Rule 5 presently has anything about filing under seal in it. The answer was no, though a number of other rules identified in the materials for the meeting (including Rule 5.2) do call for filing under seal, as do some statutory provisions.

When the issue first arose the Subcommittee drafted amendments to Rule 5(d), adding a provision specifying what the courts reportedly now hold – that the standard for filing under seal is much more demanding than the one for issuance of a protective order regarding materials exchanged through discovery – and Rule 26(c) stating the filing under seal must be made under the new Rule 5 provision.

Whether making this change as a stand-alone amendment would be useful is uncertain. It does seem that various circuits use slightly different locutions to describe the common law and First Amendment limits on sealing court records. At least some feedback several years ago suggested that experienced magistrate judges did not think there would really be any value in making such a change.

But some of those judges did think the national rules regarding procedures on motions to seal could be helpful because various districts have widely diverging practices on motions to seal.

The original proposal for a sealing rule prescribed a lot of procedural requirements. For example, it provided that the court would be forbidden to grant a motion to seal sooner than seven days after the motion to seal was filed, and that the motion itself would have to be publicly available in the court's files.

Earlier work on the sealing question also revealed that there seem to be different degrees (one might say "flavors") of sealing. One is that there are "restricted documents" which are not on PACER but can be reviewed at the clerk's office. Another question is whether there is an entry on the court's docket for the sealed document. For at least some such documents (on the "silent" docket) the docket displays no information about them. Beyond that, there are "highly sensitive documents" (HSDs) which are not housed anywhere among the conventional court filings and instead reside on an independent computer system separate from CM/ECF. These sorts of material may have national security implications.

The Solar Winds hack several years ago has reinforced existing concerns about access to some highly sensitive materials.

Meanwhile, the Case Management Modernization (CMM) project is ongoing and may supplant CM/ECF. If so, that may introduce more national uniformity than currently exists; various districts reportedly use CM/ECF in different ways.

For purposes of this meeting, the bottom line was that the full Committee should be presented with two basic questions at the April meeting:

(1) Given the variety of local practices, should an effort be made to develop at least some procedures for motions to file under seal that apply nationally? It may be that local regulation prompted by local circumstances would be superior. If not, it is apparent that all the sorts of things that have been identified as possible provisions in a national rule cannot co-exist.

(2) If an amendment to adopt national procedures for motions to seal is not a worthwhile goal, would there be a value to add a new stand-alone Rule 5(d)(5) along the lines the Subcommittee identified years ago? Given the seeming judicial unanimity that there is a higher standard for filing under seal than for granting a protective order, there may be no need to add that point to the rules. And given the somewhat different articulation of the governing standard for sealing in various circuits, it might be that a new rule provision would be taken to alter some of those standards.

One point about the various issues identified in the materials was made forcefully, however: in the 21st century world of digital court records as in CM/ECF, there is no way to remove or "return" something filed under a "provisional" sealing order.

TAB 9

9. Rule 7.1 – Disclosures by Business Organizations

The Rule 7.1 Subcommittee, chaired by Justice Jane Bland, proposes several amendments to Rule 7.1(a) for publication. Currently, Rule 7.1(a) requires that a nongovernmental corporate party disclose "any parent corporation and any publicly held corporation owning 10% or more of its stock." This Subcommittee, created in spring 2023, was formed to consider rule changes to better inform judges of any financial interest "in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding." 28 U.S.C. § 455(b)(4).[1]

More specifically, this project was sparked by concerns that judges are not sufficiently informed in situations in which they might hold an interest in a business organization that is a "grandparent" or "great-grandparent" of a party. For instance, a judge might hold an interest in a "grandparent" corporation that wholly owns a subsidiary that, in turn, owns a party. Under such circumstances, that judge likely has a financial interest requiring her to recuse. But because the rule requires disclosure of only a "parent corporation and any publicly held corporation owning 10% of more of [a corporate party's] stock," the judge will remain in the dark.

Although there do not appear to be serious concerns that judges have acted in a biased manner due to this lack of information, it is also the case that whenever a judge presides over a case when she has a financial interest in the outcome there is a threat to perceptions of the court's legitimacy and impartiality. As a result, over the last two years, the Subcommittee has considered several possible revisions to the rule that would make it more likely that "grandparents" and other entities up the corporate chain of ownership of a party, in which a judge is reasonably likely to hold an interest, will be disclosed without imposing unnecessarily onerous requirements on litigants.

Notably, the committee note to Fed. R. App. P. 26.1, whose relevant language is identical to Rule 7.1, has since 1998 provided that:

> Disclosure of a party's parent corporation is necessary because a judgment against a subsidiary can negatively impact the parent. A judge who owns stock in the parent corporation, therefore, has an interest in litigation involving the subsidiary. **The rule requires disclosure of all of a party's parent corporations meaning grandparent and great grandparent corporations as well.** For example, if a party is a closely held corporation, the majority shareholder of which is a corporation formed by a publicly traded corporation for the purpose of acquiring and holding the shares of the party, the publicly traded grandparent corporation should be disclosed. (Emphasis added.)[2]

[1] The submissions that prompted this effort were 22-CV-H, from Judge Ralph Erickson (8th Cir.), and 22-CV-F, from Magistrate Judge Patricia Barksdale (M.D. Fla.).

[2] This language was added to the note in response to a public comment that disclosure of only a "parent" was too narrow. Review of the minutes and agenda books of the Appellate Rules Committee and the Standing Committee reveal no opposition, or even discussion, of this addition to the note. The amended rule was subsequently approved by the various bodies up the chain of command and went into effect in December 1998.

This requirement does not appear to have spawned litigation, confusion, or controversy. Despite using the same language, though, Rule 7.1 has by and large been interpreted to require disclosure of only "parents," and not grandparents or other corporate relatives.

In the early days of this project, the Rules Law Clerk and Reporters canvassed a wide swath of disclosure requirements, including districts' local rules and various state rules, to develop an array of options. Among state and local rules, the two dominant approaches were to either use a very broad catch-all term (such as to require disclosure of all "affiliates" of a party) or a lengthy "laundry list" of various specific business relationships. Subcommittee deliberation and extensive, albeit informal, outreach revealed that both approaches had problems. Broad catch-all provisions requiring disclosure of "affiliates" (or some such term) sweep in a wave of entities that the judge is unlikely to hold, or lead to vast disclosures in which any pertinent information might be buried. On the other hand, the "laundry list" approach seemed to encounter the ever-present danger of lists, that they are over and underinclusive and require constant maintenance to account for the constantly evolving variety of business relationships. Recognizing (as Rule 7.1's committee note does) that no rule can reveal all instances when recusal might be required by the statute's demand that a judge disqualify on the basis of any interest "however small," 28 U.S.C. § 455(d)(4), the Subcommittee's effort has been focused on threading the needle between a rule that is too capacious and one that is too specific. So, after much study, the Subcommittee returned to where it began: an effort to ensure disclosure of corporate "grandparents" and such, as Fed. R. App. P. 26.1 does now, albeit in the note.

In the midst of the Subcommittee's work, in February 2024, the Codes of Conduct Committee issued new guidance to judges: Committee on Codes of Conduct Advisory Opinion No. 57: Disqualification Based on a Parent-Subsidiary Relationship. This guidance directs a judge to focus on whether a parent corporation that does not wholly own a party "has control of a party." The guidance does not define "control" but instead "advises that the 10% disclosure requirement in the Federal Rules (e.g., Fed. R. App. P. 26.1, Fed. R. Civ. P. 7.1, Fed. R. Bankr. P. 7007.1, and Fed. R. Bankr. P. 8012) creates a threshold rebuttable presumption of control for recusal purposes." Should a party disclose an owner of 10% of more of a party, the guidance advises that "a judge may exercise his or her discretion to seek information from the parties or their attorneys; a judge may also review publicly available sources, such as Securities and Exchange Commission filings."

In light of this guidance, the Subcommittee also considered amending Rule 7.1 to require corporate parties to disclose any entity that has control over it. This move would, however, beg the question (as does the Codes of Conduct Committee guidance) as to what constitutes "control." The guidance does not attempt such a definition, so it refers back to 10% ownership as a proxy for control, as exemplified in the various Federal Rules. Moreover, the recent controversy surrounding the Corporate Transparency Act (CTA), 31 U.S.C. § 5336, an anti-money-laundering statute passed in 2021 requiring business to disclose all "beneficial owners," defined as those who "exercise substantial control," further counsels steering clear of "control" as the relevant standard for disclosure. This statute has met significant resistance from affected businesses and has been held unconstitutional by three district courts for being beyond the scope of Congress's

constitutional powers and in conflict with the right to freedom of association.[3] The House recently passed a bill, H.R. 736, by a vote of 408-0, to delay enforcement of the CTA, and a similar bill, S.505, has been introduced in the Senate. Although Rule 7.1 is distinguishable from the CTA in important respects, the significant resistance to requiring disclosure of controlling entities is informative and perhaps counsels caution.

Based on the Codes of Conduct Committee guidance and the litigation over the CTA, the Subcommittee concluded that a rule that continues to mandate disclosure of *ownership* of a party is the most promising avenue toward disclosure of grandparents et al. The goal is to better equip judges to comply with the Codes of Conduct guidance, and therefore their statutory and ethical obligations. This is, and always has been, a tricky exercise. Although the appellate rule has not caused controversy, a rule cannot be amended by amending only the committee note, so the challenge has been to draft rule language that will best meet our goals without being over or underinclusive.

As a result, the Subcommittee has settled on two proposed changes to the rule, as reflected in the draft below:

(1) Replace references to "a corporate party" with the broader term "business organizations."

(2) Require disclosure of "a parent business organization" and "any publicly held business organization that directly or indirectly owns 10% or more of" a party.

The Subcommittee's rationale for each of these changes follows.

Business Organizations

The Subcommittee was concerned that references to "corporations" in the rule is too narrow since there are many business organizations other than corporations whose disclosure would assist judges in complying with their recusal obligations. For instance, "LLCs" are not necessarily defined as corporations under some state laws. Having concluded that the term corporation now feels too narrow, the next question becomes what to replace it with. The Subcommittee considered several possibilities, but "business organizations" quickly emerged as the most apt. Although there may be some marginal cases (and if committee members think there are examples of entities that present a recurring question the Subcommittee would be eager to hear them), "business organizations" is a common and generally understood term. For instance, the National Conference of Commissioners on Uniform State Laws and the American Bar Association have long authored the "Uniform Business Organizations Code." Texas also has a "Business Organizations Code." Moreover, while some schools have stuck with the traditional name

[3] Smith v. U.S. Dep't of Treasury, No. 6:24-cv-336, 2025 WL 41924 (E.D. Tex. Jan. 7, 2025); Texas Top Cop Shop, Inc. v. Garland, No. 4:24-CV-478, 2024 WL 5049220 (E.D. Tex. Dec. 5, 2024); Nat'l Small Business United v. Yellen, 721 F. Supp. 3d. 1260 (N.D. Ala. 2024).

"Corporations," most leading law schools' introductory corporate law courses are now called "Business Organizations" or "Business Associations."[4]

Direct or Indirect Ownership

As explained above, and as the draft committee note reflects, the Subcommittee's primary goal is to better inform judges of the possibility that the value of interests they hold in "grandparents" and others up the chain of ownership from parties might be affected by the outcome of cases before them. Although this requirement does not seem controversial, as evidenced by the lack of controversy that has emerged from 27 years of experience with the appellate rule's committee note, drafting language to capture this goal has proven challenging. But once the Subcommittee settled on a lodestar of consistency with the Codes of Conduct Committee's guidance, its focus turned to ensuring disclosure of owners of 10% or more of a party.[5] Candidly, absolute precision has proven elusive, so the Subcommittee eventually converged on rule language that reflects the intent of the amendment and will hopefully prompt parties to reveal owners and part owners in which judges are likely to hold investments and whose value may be affected by the outcome of the litigation.

First, the Subcommittee decided to retain the requirement that a "parent business organization" be disclosed. "Parent" is to some degree an elusive term that might be defined in numerous ways. Nevertheless, it has been part of the various federal disclosure rules since their inception, and it does not seem to have caused significant problems. The Subcommittee considered eliminating the requirement of disclosing a parent altogether (that is, requiring only disclosure of publicly held direct or indirect owners of 10% or more) but ultimately concluded that there was no good reason to eliminate it, and that there may very well be occasions when a judge holds an interest in a privately held entity that is a parent of a party, but the judge is unaware.

Second, the Subcommittee landed on language requiring disclosure of direct or indirect owners of 10% or more of a party. As the committee note explains, this is a pragmatic concept intended to prompt disclosure of grandparents or others who may own a significant share of a party via ownership of another intermediate entity. Such disclosure would trigger the suggestion in the Codes of Conduct Committee advisory opinion that a judge investigate further whether recusal is necessary. As was the case when the words "parent corporation" were discussed in the 1990s, there is a certain inherent imprecision to the language, but parties have long been trusted to meet their disclosure obligations faithfully and pragmatically based on the purpose of those obligations. The Subcommittee labored over whether to prescribe a mathematical formula for indirect ownership, or to lay out a series of examples of indirect ownership (or lack thereof) in the note but ultimately opted against it, in favor of a more general standard informed by a purpose defined in the committee note.

Of course, the Committee should always be wary of imposing vague requirements on litigants. At the same time, however, this is not a rule that governs how parties conduct litigation

[4] Among the schools that refer to their introductory corporate law classes Business Organizations or Business Associations are: Berkeley, Case Western, Chicago, Cornell, Duke, Maryland, Northwestern, UC Law SF, UCLA, Texas, Tennessee, and Yale. Michigan calls its course "Enterprise Organization."

[5] As reflected in the draft amendment, the proposed rule abandons the term "stock" to define ownership, since ownership interests may have many different labels.

or interact with one another. Nor is it a rule that is related to the law, facts, and merits of a case. Rather, it is a rule that attempts to help judges comply with a mandate that itself is rather vague. To borrow from math, the Rule's relationship to the recusal standard is something like an asymptote--a line that a curve approaches but never touches. The Subcommittee is of course eager to hear your reactions and any suggestions. But the Subcommittee is also eager to hear the reactions of those potentially affected by the rule in the public-comment period. If in fact, what is proposed is too vague or onerous compared to the potential benefits, we will surely learn that then.

The proposed amendment and committee note appears below.

Rule 7.1. Disclosure Statement

(a) Who Must File; Contents.

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

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

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

* * * * *

COMMITTEE NOTE

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

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

Second, the rule is amended to require disclosure of business organizations that "directly or indirectly own 10% or more of" a party, whether or not that ownership interest is formally denominated as stock. Such a direct or indirect owner is presumed to hold a sufficient interest in a party to raise a rebuttable presumption that a judge's financial interest in the owner extends to the party, warranting recusal. *See* U.S. Judicial Conference, Guide to Judiciary Policy § 220, Committees on Codes of Conduct, Advisory Opinion No. 57: Disqualification Based on a Parent-Subsidiary Relationship (Feb. 2024). Under the amended rule, a party must disclose not only a parent business organization but also any publicly held grandparent or great-grandparent business

organization. This requirement to disclose "indirect" owners of 10% or more of a party is a pragmatic effort to better inform judges of circumstances when their financial interests may be affected by a litigation or when further inquiry into the ownership interests in a party is appropriate.

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

Committee on Codes of Conduct Advisory Opinion
No. 57: Disqualification Based on a Parent-Subsidiary Relationship

This opinion considers recusal issues arising out of parent-subsidiary relationships between corporations.

Canon 3C(1) of the Code of Conduct for United States Judges provides that:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:
>
> * * *
>
> (c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding.

Canon 3C(3)(c) defines a "financial interest" as "ownership of a legal or equitable interest, however small." The provision enumerates exceptions to the definition, including ownership in a mutual or common investment fund; the proprietary interest of a policy-holder in a mutual insurance company, or a similar proprietary interest, where the outcome of the proceeding could not substantially affect the value of the interest; and ownership of government securities, where the outcome of the proceeding could not substantially affect the value of the securities. None of these exceptions are applicable to parent-subsidiary relationships, which present materially different issues.

If a parent corporation owns all or a majority of stock in a subsidiary that is a party, the Committee advises that a judge who owns stock in the parent then has a financial interest in the subsidiary, requiring recusal.

The issue is less clear where the parent holds less than a majority interest. The Committee concludes that under the Code the owner of stock in a parent corporation has a financial interest in a subsidiary that the parent controls. Therefore, when a corporation does not own all or a majority of stock in a party, the judge should determine whether the corporation has control of the party. *See* Black's Law Dictionary (11th ed. 2019) (defining "parent corporation" as "[a] corporation that has a controlling interest in another corporation"). The Committee advises that the 10% disclosure requirement in the Federal Rules (e.g., Fed. R. App. P. 26.1, Fed R. Civ. P. 7.1, Fed. R. Bankr. P. 7007.1, and Fed. R. Bankr. P. 8012) creates a threshold rebuttable presumption of control for recusal purposes. Whether that presumption may be rebutted or not depends on other indicia of control, such as board representation or wide dispersion of the remainder of the stock, which are relevant to the influence

wielded by a 10% interest. To determine if one entity controls another, a judge may exercise his or her discretion to seek information from the parties or their attorneys; a judge also may review publicly available sources, such as Securities and Exchange Commission filings. When a judge concludes that a party is controlled by a corporation in which the judge owns stock, the judge must recuse.

Whether recusal is necessary when a party discloses that a mutual fund company or holding company owns 10% or more of its stock warrants additional elaboration. Ordinarily, because a judge who invests in a mutual fund does not have a financial interest in the mutual fund management company, or the securities held in the fund, unless the judge participates in the fund's management, the judge does not have a financial interest in a subsidiary and there is no need for the judge to determine whether the mutual fund company exercises control. *See* Canon 3C(3)(c)(i); Advisory Opinion No. 106 ("Mutual or Common Investment Funds"); *see also* Black's Law Dictionary (11th ed. 2019) (defining "mutual fund" as "[a]n investment company that invests its shareholders' money in a usu[ally] diversified selection of securities"). In the case of holding companies, the necessary inquiry is once again the percentage of ownership interest, with 10% the relevant threshold. But, as explained above, this threshold creates a rebuttable presumption and is not an absolute line, because in practical terms the specific percentage of ownership may fluctuate over time based simply on market conditions without affecting whether the holding company has control over the party. *See* Black's Law Dictionary (11th ed. 2019) (holding company is a "company formed to control other companies, usu[ally] confining its role to owning stock and supervising management").

Regardless of control, a judge must recuse if the company in which the judge owns stock could be substantially affected by the outcome of the proceeding. For example, recusal would be required if the value of the party's stock is likely to be affected by the outcome of the proceeding, and the value of the company in which the judge owns stock would in turn be affected substantially by the change in the party's stock price. The Committee notes that the 10% disclosure requirement in the Federal Rules "assumes that if a judge owns stock in a publicly held corporation which in turn owns 10% or more of the stock in the party, the judge may have sufficient interest in the litigation to require recusal." Fed. R. App. P. 26.1, 1998 Advisory Committee Note. But although a 10% ownership interest in a party may raise a threshold presumption that a company could be substantially affected by litigation, in the case of large holding companies invested in a wide range of corporations, a share greater than 10% in a single enterprise may not represent a significant portion of its overall portfolio.

Even in the case of mutual funds, a judge may, in rare circumstances, be required to recuse based on ownership of a mutual fund that owns 10% or more of a party's stock if the judge's interest in the mutual fund could be affected substantially by the outcome of the proceeding. While a judge is not required to monitor the underlying investments in a mutual fund, Canon 3C(1)(c) requires a judge to recuse if the judge knows that his or her interest in a mutual fund could be substantially affected by the

outcome of a case. *See* Advisory Opinion No. 106. A judge who invests in a "sector" or "industry" fund, for example, must recuse from a case involving that particular sector or industry if the outcome of the proceeding could substantially affect the value of the judge's interest in the fund. *Id.*

If a judge owns stock in the subsidiary rather than the parent corporation, and the parent corporation appears as a party in a proceeding, the judge must recuse if the value of the judge's interest in the subsidiary could be substantially affected by the proceeding. As the Committee has explained in other contexts, it is not the size of the judge's interest that matters, but rather whether the interest could be substantially affected.

In closing, the Committee notes that recusal decisions are also governed by the recusal statutes, 28 U.S.C. §§ 455 and 144, and the case law interpreting them. Although the Committee is not authorized to render advisory opinions interpreting §§ 455 and 144, Canon 3C of the Code closely tracks the language of § 455, and the Committee is authorized to provide advice regarding the application of the Code.

February 2024

TAB 10

MEMORANDUM

DATE: March 10, 2025

TO: Advisory Committee on Civil Rules

FROM: Catherine T. Struve

RE: Potential amendments to Civil Rule 5.2 and the other privacy rules

Since their adoption in 2007, the privacy rules[1] have set certain privacy protections concerning federal-court filings. Subject to specified exemptions,[2] Civil Rule 5.2 currently sets this general redaction requirement for filings:

> (a) Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:
>
> (1) the last four digits of the social-security number and taxpayer-identification number;
> (2) the year of the individual's birth;
> (3) the minor's initials; and
> (4) the last four digits of the financial-account number.

1 In addition to Civil Rule 5.2, the other primary privacy rules at this time are Criminal Rule 49.1 and Bankruptcy Rule 9037. Appellate Rule 25(a)(5) currently consists largely of a provision that adopts for application on appeal whatever privacy rule applied below.

2 Civil Rule 5.2(b) provides that "[t]he redaction requirement does not apply to the following:"

> (1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;
> (2) the record of an administrative or agency proceeding;
> (3) the official record of a state-court proceeding;
> (4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;
> (5) a filing covered by Rule 5.2(c) or (d); and
> (6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255.

This memo reports on the status of discussions on possible amendments to the privacy rules to address concerns relating to (1) social-security numbers (SSNs) and (2) minor children. Those discussions are still in the conceptual stages, with a number of questions yet to be fully explored.

At the advisory committees' fall 2024 meetings, Tom Byron reported on the discussions of the Reporters' Privacy Rules Working Group. That group had considered a number of possible changes to the privacy rules but had concluded that the suggestions on which to focus should be those concerning SSNs and minor children. Accordingly, I will focus this memo on those topics, with one principal addition: In discussions of potential amendments relating to SSNs, the question has arisen whether to also require complete redaction of individual taxpayer identification numbers (ITINs). Part I below reviews the suggestion concerning SSNs; Part II discusses the potentially related topic of ITINs; and Part III discusses the proposal concerning identification of minor children.

I. SSNs

This item stems from a suggestion by Senator Ron Wyden that the Rules Committees reconsider whether to require complete redaction of social-security numbers (SSNs) in federal-court filings.[3] The basic concept is that redaction of the first five digits of the SSN does not suffice to protect the SSN holder's privacy interests. It seems likely that this suggestion will give rise to discussions of potential amendments to the Civil, Criminal, and perhaps Appellate Rules. The Bankruptcy Rules Committee, by contrast, has determined that the truncated SSN is still necessary for many filings in the bankruptcy courts, so it does not propose to amend Bankruptcy Rule 9037's redaction requirement for SSNs; but that Committee is proceeding with a proposed amendment that will decrease the instances when a truncated SSN appears in the caption of a bankruptcy document.[4]

Civil Rule 5.2(a), like the other privacy rules, currently requires the redaction of all but the last four digits of an individual's SSN. Proponents of changing the rule to require redaction of the full SSN argue that the last four digits of the SSN can be combined with other information in ways that can facilitate identity theft and fraud. The last four digits of the SSN are widely used to verify an account holder's identity; and a malign actor who has other information about the person (such as their birth date, address, and/or phone or email information) will be better able to impersonate them if the actor also possesses the last four digits of their SSN. Malign actors might also use the last four digits against the individual directly, by mentioning them in phishing attacks as a way of making the phishing communication seem more credible. Additionally, studies indicate that in at least some instances a malign actor who possesses the last four digits

3 See Rules Suggestion 22-CV-S.

4 The proposed amendment to Bankruptcy Rule 2002(o) would change that rule so that the captions on notices sent by the clerk under Rule 2002 will no longer include any part of the debtor's SSN or taxpayer-identification number.

could deduce an individual's full SSN from surrounding contextual information.

Of course, these risks must be balanced against any need for SSNs to be included in court filings. But in most cases that need seems slight: It may not be necessary, in contexts outside of bankruptcy proceedings, to include any portion of an SSN in an unsealed federal-court filing.

Here some special mention should be made of the fact that Civil Rule 5.2(a) applies to, among other types of cases, proceedings for review of agency determinations. But Civil Rule 5.2(b)(2) exempts the records of agency proceedings from Rule 5.2(a)'s redaction requirements.[5] At the same time, Civil Rule 5.2(c) limits electronic access "in an action for benefits under the Social Security Act, and in an action or proceeding relating to an order of removal, to relief from removal, or to immigration benefits or detention."[6]

As the last-quoted provision suggests, a particularly common type of agency record that is worth considering in this connection is the administrative record that is filed in district-court proceedings under 42 U.S.C. § 405(g) to review a benefits determination by the Social Security Administration (SSA). In such proceedings, the administrative record obviously plays a central role. That record is now less likely to include references to an individual's SSN, because the SSA now uses a different identifier – the Beneficiary Notice Control Number (BNCN) – as the identifier on its notices to and correspondence with claimants. Given that the SSA also encourages claimants to reference their BNCN instead of their SSN when communicating with it, one can conclude that the record could be much less likely to include SSNs than it previously might have been. On the other hand, it might be the case that some claimants mistakenly include their SSN in communications with the SSA.

Supplemental Social Security (SSS) Rule 1(a) states that the SSS Rules "govern an action

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5 See Civil Rule 5.2(b)(2) ("Exemptions from the Redaction Requirement. The redaction requirement does not apply to the following: … (2) the record of an administrative or agency proceeding….").

6 Civil Rule 5.2(c) provides:

> Limitations on Remote Access to Electronic Files; Social-Security Appeals and Immigration Cases. Unless the court orders otherwise, in an action for benefits under the Social Security Act, and in an action or proceeding relating to an order of removal, to relief from removal, or to immigration benefits or detention, access to an electronic file is authorized as follows:
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> > (1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record;
> > (2) any other person may have electronic access to the full record at the courthouse, but may have remote electronic access only to:
> >
> > > (A) the docket maintained by the court; and
> > > (B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.

under 42 U.S.C. § 405(g) for review on the record of a final decision of the Commissioner of Social Security that presents only an individual claim." SSS Rule 1(b) states that, in addition to the SSS Rules, "[t]he Federal Rules of Civil Procedure also apply to a proceeding under these rules, except to the extent that they are inconsistent with these rules." It thus appears that Civil Rule 5.2 applies to the benefits review proceedings governed by the SSS Rules (except to any extent that Civil Rule 5.2 is inconsistent with those Rules). SSS Rule 2(b)(1)(B) requires the complaint to "identify the final decision to be reviewed, including any identifying designation provided by the Commissioner with the final decision." The Committee Note to SSS Rule 2 explains that "[t]he Social Security Administration can ensure that the plaintiff is able to identify the administrative proceeding and record in a way that enables prompt response by providing an identifying designation with the final decision. In current practice, this designation is called the Beneficiary Notice Control Number."

So the current state of play in actions governed by the SSS Rules appears to be that SSS Rule 2(b)(1)(B) requires the complaint to "includ[e] any identifying designation provided by the Commissioner with the final decision"; that Civil Rule 5.2(a) requires redaction of all but the last four digits of the SSN from any court filings other than the record of the SSA proceeding; that Civil Rule 5.2(a) does not require redactions of the SSA record; and that Civil Rule 5.2(c) limits electronic access to the filings in the case.

With this baseline in mind, it can be seen that revising Civil Rule 5.2(a) to require full redaction of the SSN should be compatible with the way that the Civil and SSS Rules currently treat filings in a benefits-review case. Given our understanding that the SSA uses the BNCN as the identifier on final decisions, SSS Rule 2(b)(1)(B) would not require inclusion of any part of the SSN in the complaint.[7]

Another genre of case in which SSNs might be implicated is a tax refund case brought in the district court. Obviously, SSNs appear on tax records. Here it may be of interest to consider the approach taken by the U.S. Tax Court's rules. When commencing a case in the Tax Court, the petitioner must file a statement of its taxpayer identification number;[8] it appears that the

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7 I note that the uscourts.gov website offers forms for use by self-represented litigants. See https://www.uscourts.gov/forms-rules/forms/civil-pro-se-forms . Form 13 in the collection is Complaint for Review of Social Security Decision, available here: https://www.uscourts.gov/forms-rules/forms/complaint-review-social-security-decision . That form (which the website states became effective on December 1, 2016), needs some updating. It directs inclusion of the last four digits of the claimant's SSN; it doesn't mention the BNCN; and it doesn't mention the SSS Rules. It also seeks a good deal more information than SSS Rule 2 seems to require. Perhaps the Civil Rules Committee might consider suggesting that the appropriate Judicial Conference or AO entity undertake a review of Form 13 in light of the 2022 adoption of the SSS Rules.

8 See Tax Court Rule 20(b).

court provides that statement to the IRS but doesn't file it in the docket.[9] And as to filings in the case, Tax Court Rule 27(a) states: "[u]nless these Rules provide otherwise or the Court orders otherwise, in an electronic or paper filing with the Court, a party or nonparty making the filing must refrain from including or must take appropriate steps to redact the following information: (1) Taxpayer Identification Numbers: These include, for example, Social Security numbers and employer identification numbers…." So the Tax Court takes the approach of requiring full, not partial, redaction of the SSN in court filings.

II. ITINs

In addition to requiring redaction of SSNs, Civil Rule 5.2(a)(1) also currently requires the redaction of all but the last four digits of an individual's taxpayer-identification number. If the privacy rules are amended to require full redaction of SSNs, should they also be amended to require full redaction of ITINs?

Here I should pause to note a potential ambiguity in the current privacy rules. They refer to "an individual's … taxpayer-identification number." Does this mean any number assigned to an individual for purposes of identifying them as a taxpayer? (If so, this could include, in addition to ITINs, other numbers such as an employer identification number assigned to an individual who is an employer.) Or does it specifically refer to the "individual taxpayer identification number" as that term is used by the IRS (see below)? A quick search in the minutes of the rules committees did not disclose discussion of this question, but further research could be done to determine how courts have been interpreting the term. If the term used by the current rules encompasses more than ITINs, that should be taken into account in drafting any proposed revisions to the privacy rules.

ITINs are numbers issued to certain noncitizens for a relatively narrow range of purposes. "An ITIN is a 9-digit number the IRS issues if you need a U.S. taxpayer identification number for federal tax purposes, but you aren't eligible for a Social Security number (SSN)."[10] Typical situations in which a person would need an ITIN include instances when the person is a:

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9 The 2008 Explanation to Rule 20 states in part:

> New paragraph (b) of Rule 21 [sic] is adopted to require the taxpayer to submit with a petition a Form 4, Statement of Taxpayer Identification Number. The statement is similar to the Statement of Social Security Number used in the bankruptcy courts and to the civil cover sheets used in other Federal courts and should be a familiar concept to practitioners. The Court will provide the Statement of Taxpayer Identification Number to the Service with the copy of the petition served on the Service but will not file the statement or make it a part of the Court's file in the case.

10 Internal Revenue Service, Individual taxpayer identification number (ITIN) ("IRS ITIN Explanation"), available at https://www.irs.gov/tin/itin/individual-taxpayer-identification-number-itin (last visited March 4, 2025).

- Nonresident alien claiming a tax treaty benefit
- Nonresident alien filing a U.S. federal tax return
- Resident alien filing a U.S. federal tax return
- Dependent or spouse of a U.S. citizen/resident alien
- Nonresident alien student, professor or researcher filing a U.S. federal tax return or claiming an exception
- Dependent or spouse of a nonresident alien U.S. visa holder.[11]

Although the IRS states that the ITIN is to be used purely for tax purposes,[12] the National Immigration Law Center states that "ITINs may sometimes be accepted for other purposes, such as for opening an interest-bearing bank account, in employment dispute settlements, or for obtaining a mortgage."[13] Even if such non-tax uses are rare (a question on which I do not have information), the fact that ITINs are used for filing tax returns presumably means that learning a person's ITIN could enable a malign actor to commit fraud by, for example, applying for the person's tax refund.

However, because the rules currently require redaction of all but the last four digits of the ITIN, a related question is whether the full ITIN (like some SSNs) can be guessed by a person who has access to the last four digits. My quick look at this question suggests that there is some risk of guessing the full ITIN, though the predictability of ITINs is more limited than that of SSNs; so, my not-yet-informed impression is that a malign actor might be able to narrow down the possible numbers in a person's ITIN but not necessarily to guess the full ITIN with precision on a first try.

At any rate, it is suggestive that the IRS thinks it is worthwhile to mask the first five digits of ITINs, not only of SSNs. It instructs entities filling out the payee copy of certain federal tax reporting forms such as Forms 1099 that they

> may replace the first five digits of the nine-digit number with an asterisk (*) or X on most payee statements:

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11 Id.

12 The IRS ITIN Explanation, supra note 10, states:

> An ITIN is issued by the IRS for federal tax purposes only.
> An ITIN doesn't:
> - Qualify you for Social Security benefits or the Earned Income Tax Credit
> - Provide or change immigration status
> - Authorize you to work legally in the U.S.
> - Serve as identification outside the federal tax system

13 See National Immigration Law Center, FAQ: Individual Taxpayer Identification Number (ITIN): A Powerful Tool for Immigrant Taxpayers, available at https://www.nilc.org/resources/itinfaq/ (last visited March 4, 2025).

- Payee's Social Security number (SSN)
- Individual taxpayer identification number (ITIN)
- Employer identification number (EIN)
- Adoption taxpayer identification number (ATIN)[14]

And – for purposes of comparison – an ITIN presumably counts as a "Taxpayer Identification Number" that Tax Court Rule 27(a)(1) requires to be fully redacted in Tax Court filings.

III. Minor children

The Department of Justice (DOJ) proposes that the rulemakers amend Criminal Rule 49.1(a)(3), which currently requires including in a filing only the initials of a known minor, to require instead the use of a pseudonym in order to better protect the privacy interests of minors who are victims or witnesses.[15] Although the DOJ's initial letter on this topic was directed toward the Criminal Rules specifically, the suggestion has been placed in the docket of all four relevant advisory committees.

The American Association for Justice and the National Crime Victim Bar Association submitted a joint comment on the DOJ's proposal. They support the proposal, and also suggest one modification – namely, they

> strongly urge the Advisory Committees to consider the use of gender-neutral pseudonyms and pronouns as an important safety protection for minors escaping unfathomable abuse and violence. While the use of a pseudonym is clearly preferable over a minor's initials, the use of gender, especially when combined with the identification of adults by name or initials around the minor, makes the true identity of minors easier to uncover.[16]

For reasons explained in the enclosed October 9, 2024 memorandum by Professors Beale and King, the Criminal Rules Committee's Rule 49.1 Subcommittee recommends adoption of the pseudonym requirement but not of the AAJ / NCVBA proposal for requiring gender neutral references. On the latter point, the Subcommittee recommends mentioning the issue in the Committee Note but not imposing a requirement in the text of the rule.

Assuming – as seems likely – that the Criminal Rules Committee decides to proceed with the suggested amendment, it would make sense to consider making the same amendment to Civil

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14 See IRS, Truncated Taxpayer Identification Numbers (TTIN), available at https://www.irs.gov/government-entities/federal-state-local-governments/truncated-taxpayer-identification-numbers (last visited March 4, 2025).
15 See Rules Suggestion 24-CV-C (enclosed).
16 Rules Suggestion 24-CV-F.

Rule 5.2. Admittedly, in many types of civil cases in which a child is named, the circumstances may be less fraught than in a typical criminal case in which a child is named. But even in cases where that is true, there is a value to keeping the privacy rules uniform where possible. So unless a downside is identified with requiring pseudonyms instead of initials to refer to children in civil cases, amending Civil Rule 5.2(a) in tandem with Criminal Rule 49.1 would make sense.

Moreover, the application of the Civil Rules in habeas and Section 2255 proceedings makes it particularly important for the Civil Rules to track the approach of the Criminal Rules in terms of privacy protections for minors. Rule 12 of the Rules Governing § 2254 Cases provides that "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." Meanwhile, Rule 12 of the Rules Governing § 2255 Proceedings provides that "[t]he Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." Though statutory provisions may exist that would require more in the way of privacy protections than the privacy rules do,[17] it is important for the privacy rules that potentially apply to habeas and Section 2255 proceedings to speak with a consistent voice on the subject of protections for children.

One other issue that might be worth consideration is the provision in Civil Rule 5.2(b) and Criminal Rule 49.1(b) stating that "[t]he redaction requirement does not apply to … a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255." Civil Rule 5.2(b)(6) and Criminal Rule 49.1(b)(6). I have not tried to unearth the reasons for this exemption, but I wonder whether it makes sense to apply the (b)(6) exemption when it comes to naming minor children in a habeas or Section 2255 proceeding.

IV. Conclusion

As can be seen from the discussion in this memo, there remain a number of questions to be investigated before proposals to amend the privacy rules are ready for publication. The goal of this memo is to update the Committee on the ongoing project and to solicit input on it.

Encls.

17 I have not attempted to explore the relevance, in this regard, of 18 U.S.C. § 3509(d).

U.S. Department of Justice

Criminal Division

Acting Assistant Attorney General *Washington, DC 20530*

March 7, 2024

The Honorable James C. Dever III
Chair, Advisory Committee on Criminal Rules
United States Courthouse
310 New Bern Ave.
Raleigh, NC 27601

The Department of Justice (the Department) proposes an amendment to Rule 49.1 of the Federal Rules of Criminal Procedure to require that in all publicly available court filings, the parties refer to minors by pseudonyms.

1. Federal Rule of Criminal Procedure 49.1, titled "Privacy Protection for Filings Made with the Court," provides in relevant part that "[u]nless the court orders otherwise," court filings "that contain[] … the name of an individual known to be a minor … may include only … the minor's initials." Fed. R. Crim. P. 49.1(a)(3). It has become clear in recent years, however, that referring to child victims and child witnesses by their initials—especially in crimes involving the sexual exploitation of a child—is insufficient to ensure the child's privacy and safety. Project Safe Childhood prosecutors and victim witness personnel, for example, know that child-exploitation offenders sometimes track federal criminal filings and take other measures in an effort to uncover the identity of child victims and contact and harass—and thereby further victimize—the minors. And this is to say nothing of the increased shame, embarrassment, and fear that a child victim or witness may face if their identity as a victim or witness were to become publicly known.

In 2022, the Department of Justice issued The Attorney General Guidelines for Victim and Witness Assistance (the AG Guidelines). As most relevant here, the AG Guidelines state that "Department personnel should scrupulously protect children's privacy in accordance with 18 U.S.C. § 3509(d), the AG Guidelines, and other Department policies." 2022 AG Guidelines, Article III.L.1.d. Although the prior version of the Guidelines had permitted use of initials or an alias to identify children,[1] the 2022 AG Guidelines direct that

[1] The 2011 Attorney General Guidelines for Victim and Witness Assistance provided that "[a] child's name or other identifying information (other than *initials or an alias*) should not be

"[a] child's name or other identifying information (*other than a pseudonym*) should not be reflected in court documents or other public records unless otherwise required by law." 2022 AG Guidelines, Article III.L.1.d. (emphasis added). The 2022 AG Guidelines also caution that "Department personnel should be aware that information in multiple sources can be put together to trace the identity of victims or witnesses." *Id.* at Art. II.D.1.

Federal courts have referred to minors by pseudonyms. *See, e.g.*, *Paroline v. United States*, 572 U.S. 434, 439 (2014) (noting that the child victim "goes by the pseudonym 'Amy' for this litigation"); *United States v. Viarrial*, 730 F. App'x 694, 695 n.1 (10th Cir. 2018) (unpublished) ("To protect the privacy of those involved, this opinion refers to Mr. Viarrial's child victims and his former partner with the pseudonyms [*e.g.*, Jane Doe] used in the indictment, jury instructions, and verdict form."); *Brodit v. Cambra*, 350 F.3d 985, 995 n.1 (9th Cir. 2003) (Berzon, J., dissenting) ("The charging documents and much of the trial transcript refer to the child in this case by the pseudonym 'Jane Doe.' Accordingly, I will also use this pseudonym."); *Collmorgen v. Lumpkin*, 2023 WL 6388551, at *5 (S.D. Tex. 2023) ("To protect the child victim's privacy, the [state] appellate court used pseudonyms to refer to him and his family members. This Court will do the same—referring to the child victim as Maxwell and referring to the State's rebuttal witness as Kaitlyn."); *Doe v. Avon Old Farms School, Inc.*, 2023 WL 2742330, at *1 n.1 (D. Conn. 2023) ("I refer to the … daughters with the 'Jane Doe' pseudonym throughout this opinion—as the parties do in their filings—because the girls are minors and this case includes sexual harassment and assault allegations."); *United States v. Stivers*, 2020 WL 2804074, at *1 n.1 (S.D. Ind. 2020) ("'Vicky' is a pseudonym for the actual minor victim depicted in the series, which the Court will adopt to refer to the victim in this Order. All of the references to 'Vicky' in this Order and in the other criminal cases discussed herein refer to the same person."). These cases support the Department's policy and practice as well as the Department's recommendation to amend Rule 49.1.

Finally, amending Rule 49.1(a)(3) to change "the minor's initials" to "a pseudonym" will not prejudice criminal defendants. To the extent that a defendant has the right to know the actual identity (*e.g.*, name) of a minor, that right can be protected through sealed filings that identify the child while making sure that publicly available filings use only the pseudonym. *See generally* 18 U.S.C. § 3509(d)(2); *see also* 2022 AG Guidelines, Art. II.D.1. In addition, and where appropriate, a party can seek a protective order to help ensure that information that should not be released publicly is in fact not released publicly. *See* 18 U.S.C. § 3509(d)(3); Fed. R. Crim. P. 49.1(e); 2022 AG Guidelines, Art. II.D.1.

2. For the reasons set forth above, the Department proposes to amend Rule 49.1(a) as follows (stricken text in red; proposed new text in blue):

> **(a) Redacted Filings.** Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number,

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reflected in court documents or other public records unless otherwise required by law." 2011 AG Guidelines, Article III.L.1.d (emphasis added).

taxpayer-identification number, or birth date, the name of an individual known to be a minor, a financial-account number, or the home address of an individual, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) ~~the minor's initials~~ in reference to a minor, a pseudonym;

(4) the last four digits of the financial-account number; and

(5) the city and state of the home address.

* * *

We appreciate your assistance with this proposal, and we look forward to working with the Committee on this issue.

Sincerely,

NICOLE ARGENTIERI
Digitally signed by NICOLE ARGENTIERI
Date: 2024.03.07 10:41:35 -05'00'

Nicole M. Argentieri
Acting Assistant Attorney General

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professors Sara Sun Beale and Nancy King, Reporters**

RE: **Reference to Minors by Pseudonyms, Rule 49.1 (24-CR-A and 24-CR-C)**

DATE: **October 9, 2024**

The Rule 49.1 Subcommittee, chaired by Judge Michael Harvey, held a Teams meeting to discuss the following items, which are included at the end of this report:

- The Department of Justice proposal (24-CR-A) to revise Rule 49.1 to require use of pseudonyms rather than initials to refer to minors;
- A supporting letter from the American Association for Justice (AAJ) and the National Crime Victim's Bar Association (NCVBA) (24-CR-C) ;
- Senator Wyden's proposal (22-CR-B) to revise Rule 49.1 to redact the entire social security number; and
- Mr. Byron's summary of the privacy working group's recommendation that our deliberations should not be expanded to include other clarifying amendments to the privacy rules.

This memorandum summarizes the Subcommittee's discussion and its recommendations.

I. The use of pseudonyms to refer to minors

As explained in the Department's suggestion (24-CR-S), referring to child victims and child witnesses by their initials—especially in crimes involving the sexual exploitation of a child—may be insufficient to ensure the child's privacy and safety. The Department's prosecutors and victim witness personnel point out that child victims and witnesses may face increased shame, embarrassment, and fear if their identity as a victim or witness becomes publicly known, and they assert that child-exploitation offenders sometimes track federal criminal filings and take other measures in an effort to uncover the identity of child victims and contact and harass the minors. Accordingly, the Department proposes that Rule 49.1(a) be amended as follows:

> **(a) Redacted Filings.** Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, a financial-account number, or the home address of an individual, a party or nonparty making the filing may include only:
>
> (1) the last four digits of the social-security number and taxpayer-identification number;
> (2) the year of the individual's birth;
> (3) ~~the minor's initials~~ in reference to a minor, a pseudonym;

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(4) the last four digits of the financial-account number; and
(5) the city and state of the home address.

* * * * *

The AAJ and NCVBA (24-CR-C) support the Department's proposal, but they add the suggestion that the Advisory Committees "consider the use of gender-neutral pseudonyms and pronouns as an important safety protection for minors escaping unfathomable abuse and violence." They state "the use of gender, especially when combined with the identification of adults by name or initials around the minor, makes the true identity of minors easier to uncover."

The Subcommittee unanimously supports the proposed revision requiring the use of pseudonyms, rather than initials, in public filings. This practice is already well established among federal prosecutors,[1] and Subcommittee members stated that neither defenders nor the courts have experienced any problems. Moreover, Subcommittee members agreed that minor victims are very fearful of being identified, and a change to address this issue would be important.

The Subcommittee found the suggestion of amending the text to require gender-neutral names to be more problematic (though members were more open to encouraging the use of gender-neutral names, where possible, in the Committee Note). Ms. Tessier explained the Department's practice is to use as little identifying information as possible in public documents, so federal prosecutors already use gender-neutral terminology where possible. But the Department was concerned that having this requirement in the text of Rule 49.1 would prove difficult in cases where gender is central to the operative facts of the case. Another member agreed that in some cases the evidence is graphic and not gender neutral. Ms. Tessier noted that the Department would have considerably less concern about adding language to the Advisory Committee notes indicating that gender neutral or other non-identifying terms should be considered where possible.

The Subcommittee discussed whether using gender-neutral pronouns would make restitution to victims more difficult. The Committee's clerk liaison, Ms. Noble, explained that using gender-neutral pronouns would not create new difficulties for restitution, since the victim's name is generally on a sealed page of the docket.

The Subcommittee concluded that there was no need for the rule to require consistent pseudonyms across cases to enable tracking of victims across cases for the purpose of restitution. (If restitution applies jointly and severally to multiple defendants, restitution received in one case should offset restitution owed in another case.)

[1] The public Attorney General Guidelines from 2022 reflect the Department's policy of not including any identifying information in public records. The most relevant language is on p. 29: "Department personnel should scrupulously protect children's privacy in accordance with 18 U.S.C. § 3509(d), the AG Guidelines, and other Department policies. A child's name or other identifying information (other than a pseudonym) should not be reflected in court documents or other public records unless otherwise required by law." See also 2022 AG Guidelines at 5.

At the Subcommittee's request, Ms. Tessier discussed this issue with her colleagues after the meeting. She did so, and she commented that the proposed rule would assist traceability across jurisdictions only if the rule required unique pseudonyms, which would be practically difficult and prevent prosecutors from using such pseudonyms as "Minor Victim 1" and "Minor Victim 2." And it is not clear that requiring unique pseudonyms would resolve the traceability concerns identified during the Subcommittee's meeting. A member had observed that tracing difficulties arise when courts have incomplete information about what restitution payments have gone to (or should go to) which victims. But any solution to this problem requires coordination with the Administrative Office of U.S. Courts and clerks of court and is likely better suited to an informal, collaborative, iterative process addressing collection and distribution of restitution payments, rather than a rigid change to Rule 49.1. Finally, Ms. Tessier noted that the proposed amendment would not be limited to victims who are receiving restitution across multiple jurisdictions. It would apply to all minor participants, regardless of whether there is any need for a uniform pseudonym for that minor. In some circumstances, a uniform pseudonym could inadvertently negatively affect their privacy interests, because individuals seeking to identify minors might be able to piece together identifying information across jurisdictions to identify the minor's real name.

II. Senator Wyden's proposal (22-CR-B) to redact the entire social security number

Senator Ron Wyden has expressed concern that the privacy rules, including Rule 49.1, do not fully protect privacy and security of Americans whose information is contained in public court records because Rule 49.1(a)(1)—and parallel provisions in the Civil, Bankruptcy, and Appellate Rules—permit filings to include "the last four digits of the social-security number and taxpayer-identification number."

The Subcommittee discussed the rationale for the current rule, and the three most important issues raised by the proposal to require full redaction: (1) the need, if any, for the last four digits in criminal cases, (2) the value of uniformity if Bankruptcy still needs the last four digits, and (3) the need for full redaction when possible.

A. The rationale for the current rule: usefulness in bankruptcy proceedings

The principal reason for allowing the last four digits of social security numbers in public court records was their usefulness in bankruptcy proceedings, and the other Advisory Committees agreed that Bankruptcy should take the lead in assessing whether that information is still useful in bankruptcy proceedings. A bankruptcy subcommittee studied that question with the assistance of the FJC. It concluded that the last four digits remain important at various stages in bankruptcy proceedings and recommended no change in Bankruptcy Rule 9037. The Bankruptcy Committee agreed with the subcommittee, subject to reconsidering if persuaded by the reasoning of the other advisory committees.

B. The need for the last four digits in criminal cases

Although full social security numbers are often relevant in certain kinds of prosecutions (such as those for various forms of fraud), members were unable to identify any reason that the

last four digits were needed in public filings. Indeed, some thought that full redaction was likely easier in cases in which social security numbers were included in sealed filings or covered by protective orders. Ms. Tessier said that the fraud division attorneys she had consulted had not raised any concerns about full redaction from public filings.

C. The value of uniformity

Uniformity was a cardinal value during the drafting of the privacy rules, including Rule 49.1, though certain features of Rule 49.1 are unique. The exemptions from redaction in (b)(1) include the following:

> (7) a court filing that is related to a criminal matter or investigation and that is prepared before the filing of a criminal charge or is not filed as part of any docketed criminal case;
> (8) an arrest or search warrant; and
> (9) a charging document and an affidavit filed in support of any charging document.

The Bankruptcy Committee's conclusion that the last four digits of social security numbers continue to be useful for certain purposes in bankruptcy proceedings raises the question whether it is important that the criminal rule concerning social-security numbers to include the same text as the rule for bankruptcy cases—or civil cases and appeals?

The Subcommittee was not sure how to assess the value of uniformity in this context, and it would like input from the full Criminal Rules Committee (and its sister committees) on this point.

D. The value of full redaction

Before making a recommendation on full redaction, the Subcommittee would also like to have additional research on the potential for harm as a result of allowing public filings to include the last four digits of social security numbers, as well as the current best practices. This research would aid not only the Criminal Rules Committee, but also its sister committees.

Although we have not researched this question, we note, for example, that the Consumer Financial Protection Bureau urges that individuals be especially cautious in giving out the last four digits of their number, because

> [T]hey're unique to you. Dishonest people can find out the other numbers in your Social Security number, but not the last four.

https://pueblo.gpo.gov/Publications/pdfs/CFPB466.pdf. So it appears that even if social security numbers are truncated, there is a risk that the truncated numbers together with names can be matched with other available data to reveal full social security numbers.

III. The privacy working group recommendation

Finally, the Subcommittee discussed the privacy working group's recommendation that our deliberations should not be expanded to include other clarifying amendments to the privacy rules. The Subcommittee agreed that none of the other issues identified in that report warranted further action at this time.

TAB 11

MEMORANDUM

DATE: March 7, 2025

TO: Advisory Committees on Civil, Criminal, and Appellate Rules

FROM: Catherine T. Struve

RE: Project on service and electronic filing by self-represented litigants

As the Committees know, the project on service and electronic filing by self-represented litigants ("SRLs") has two basic goals. As to service, the goal is to eliminate the requirement of separate (paper) service (of documents after the case's initial filing) on a litigant who receives a Notice of Filing through the court's electronic-filing system or a court-based electronic-noticing program. As to filing, the idea is to make two changes compared with current practice: (1) to presumptively permit SRLs to file electronically (unless a court order or local rule bars them from doing so) and (2) to provide that a local rule or general court order that bars SRLs from using the court's electronic-filing system must include reasonable exceptions or must permit the use of another electronic method for filing documents and receiving electronic notice of activity in the case.

This memo sets out sketches for how those goals might be implemented in the Civil, Criminal, and Appellate Rules. During the fall 2024 advisory committee discussions, the Bankruptcy Rules Committee decided that it was not ready to endorse either aspect of this program for adoption as part of the Bankruptcy Rules. By contrast, the Civil, Appellate, and Criminal Rules Committees – which met subsequently – indicated willingness to proceed with the proposed amendments. At its January 2025 meeting, the Standing Committee discussed whether it would be justifiable to proceed with proposed amendments to the Civil, Appellate, and Criminal Rules if the Bankruptcy Rules were not correspondingly amended. The Standing Committee did not express opposition to such an approach.

At its upcoming spring meeting, the Bankruptcy Rules Committee will assess whether the decision of the other three advisory committees might provide a reason to reconsider its skepticism about the proposed amendments. In a separate memo[1] I discuss two different packages of amendments to the Bankruptcy Rules – one that would parallel the proposed

1 The copy of this memo submitted for potential inclusion in the agenda books of the Appellate and Civil Rules Committees will enclose that memo.

amendments that will be considered by the Civil, Appellate, and Criminal Rules Committees, and an alternative that could be adopted if the Bankruptcy Rules Committee instead adheres to its decision not to implement the proposed filing and service changes at this time. Because of the uncertainty surrounding what the Bankruptcy Rules Committee will decide, this memo assumes that the Bankruptcy Rules Committee might decide to adhere to its prior decision, and offers suggestions for consideration by the Appellate Rules Committee in case that occurs.

This memo sketches possible amendments to the Civil, Criminal, and Appellate Rules that would achieve the twin goals of the project. As participants in this project are aware, the service and filing rules in those sets of rules are very similar but not identical. As discussed during the Standing Committee's January 2025 meeting, this project does not seek to eliminate existing variations among the sets of service and filing rules. In a number of instances those variations likely reflect salient differences among the contexts of the different rule sets. Rather, the sketches in this memo attempt to transpose into each rule set the key features of the SRL service and e-filing project.

As an update on relevant recent work by the Federal Judicial Center, I also wanted to mention that Tim Reagan has prepared a new report, "United States District Courts' Local Rules and Procedures on Electronic Filing by Self-Represented Litigants,"[2] which discusses relevant local rules and procedures in all of the 94 district courts. And he reports that the FJC's Education Division is planning an episode of its documentary program, "Court to Court," on self-represented litigants' use of CM/ECF. The focus of the episode will be showing how a district court can successfully allow self-represented litigants access to electronic filing. That development helpfully responds to suggestions made in the fall 2024 meetings concerning the benefits of court education on this topic.

Because this memo is lengthy, here is a table of contents:

2 The report is available at https://www.fjc.gov/content/391989/united-states-district-courts-local-rules-and-procedures-electronic-filing-self .

I. Changes made since the prior draft of Civil Rule 5

This section briefly notes substantive differences between the Civil Rule 5 draft set out in Part II.A and the Civil Rule 5 draft that was included in the fall 2024 agenda books. (I am not specifically noting style changes, but I thank the style consultants for their excellent guidance.)

The fall 2024 draft included – as an option for making service – sending a paper "by email to the address that the court uses to email Notices of Filing – so long as the sender has designated in advance the email address from which such service will be made." This option came in for some criticism during the fall advisory committee meetings. A judge member of the Bankruptcy Rules Committee stated that the provision was confusing. In the Appellate Rules Committee meeting, the Committee's Clerk of Court representative also expressed reservations about the provision's workability in practice. In addition, the style consultants proposed changes that indicated they, too, found the provision confusing as drafted. To streamline the proposal and avoid distracting from the needed innovations that the core proposals will accomplish, I propose that we delete this provision from the drafts.

In the fall agenda book, proposed Civil Rule 5(d)(3)(B)(ii) referred to a "general court order." The style consultants pointed out that "general court order" doesn't appear elsewhere in the rules. I've tentatively changed it to "a local rule – or any other local court provision that extends beyond a particular litigant or case –" (see Part II.A, lines 85-87). This phrasing is intended to capture the fact Rule 5(d)(3)(B)(ii) is talking about court orders or rules that are not specific to a given litigant or case.

In the prior draft of Civil Rule 5, as in the draft set out here, subdivision (b)(3)(E) carries forward – for service by other electronic means – the prior rule's provision that such service is not effective if the sender "learns that it did not reach the person to be served," but no such proviso is included in new subdivision (b)(2). I have added a paragraph to the Committee Note to Rule 5(b)(3)(E) to explain this difference.

II. Civil Rules: Amendments to Civil Rule 5 (plus a conforming amendment)

Part II.A sets out the sketch of Civil Rule 5, revised in light of guidance from the style consultants. Part II.B sets out the conforming amendment to Civil Rule 6.

A. Civil Rule 5

Here is the sketch of the Civil Rule 5 amendments:

Rule 5. Serving and Filing Pleadings and Other Papers

(a) Service: When Required.

(1) In General. Unless these rules provide otherwise, each of the following papers must be served on every party:

(A) an order stating that service is required;

(B) a pleading filed after the original complaint, unless the court orders otherwise under Rule 5(c) because there are numerous defendants;

(C) a discovery paper required to be served on a party, unless the court orders otherwise;

(D) a written motion, except one that may be heard ex parte; and

(E) a written notice, appearance, demand, or offer of judgment, or any similar paper.

* * *

(b) Service: How Made.

(1) Serving an Attorney. If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) <u>Service by a Notice of Filing Sent Through the Court's Electronic-Filing System.</u> <u>A notice of filing sent to a person registered to receive it through the court's electronic-filing system constitutes service on that person as of the notice's date. But a court may provide by local rule that if a paper is filed under seal, it must be</u>

served by other means.

(3) Service by Other Means ~~in General~~. A paper ~~is~~ may also be served under this rule 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 has 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 has consented to in writing – in which event service is complete when the person making service delivers it to the agency designated to make delivery.

~~**(3) Using Court Facilities.** [Abrogated (Apr. 26, 2018, eff. Dec. 1, 2018.]~~ **(4) Serving**

Papers That Are Not Filed. Rule 5(b)(3) governs service of a paper that is not filed.

(5) Definition of "Notice of Filing." The term "notice of filing" in this rule includes a notice of docket activity, a notice of electronic filing, and any other similar electronic notice provided to case participants through the court's electronic-filing system to inform them of activity on the docket.

* * *

(d) Filing.

(1) Required Filings; Certificate of Service.

(A) Papers ~~after~~ After the Complaint. Any paper after the complaint that is required to be served must be filed no later than[3] a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission.

(B) Certificate of Service. No certificate of service is required when a paper is served under Rule 5(b)(2)~~by filing it with the court's electronic-filing~~

3 The style consultants had suggested changing "no later than" to "within." However, it subsequently occurred to me that "within" would not work. Typically service occurs simultaneously with filing (because both occur at the same moment through the court's electronic-filing system). In such typical instances, I don't think that a simultaneous service would occur "within" any amount of time "*after*" service. Cf. the 2023 amendment to Civil Rule 15(a)(1).

~~system~~. When a paper that is required to be served is served by other means:

(i) if ~~the paper~~ it is filed, a certificate of service must be filed with it or within a reasonable time after service; and

(ii) if ~~the paper~~ it is not filed, a certificate of service need not be filed, unless filing is required by court order or by local rule.

(2) ~~Nonelectronic Filing.~~ ~~A paper not filed electronically is filed by delivering it:~~

~~(A) to the clerk; or~~

~~(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.~~

~~(3)~~ Electronic Filing and Signing.

(A) By a Represented Person—Generally Required; Exceptions. A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(B) By ~~an Unrepresented~~ a Self-Represented[4] Person—When Allowed or

4 The current rules use "unrepresented" to refer to a litigant who does not have a lawyer. With the concurrence of the style consultants, I propose that we instead use "self-represented." "Self-represented" recognizes that the litigant is advocating on the litigant's own behalf. The Latin term "pro se" means "for oneself," which is closer to "self-represented" than "unrepresented." Courts and legal organizations increasingly use "self-represented" to describe pro se litigants. See, e.g., https://www.ncsc.org/consulting-and-research/areas-of-expertise/access-to-justice/self-represented-litigants. And the entry in Black's Law Dictionary for "pro se litigant" includes "self-represented" but not "unrepresented": "pro se litigant (1857) One who represents oneself in a court proceeding without the assistance of a lawyer <the third case on the court's docket

Required.

(i) **In General.** A self-represented person ~~not represented by an attorney: (i)~~ may ~~file electronically only if allowed by~~ use the court's electronic-filing system [to file papers[5] and receive notice of activity in the case],[6] unless a court order or ~~by~~ local rule prohibits the person from doing so.~~; and (ii)~~ A self-represented person may be required to file electronically only by ~~court~~ order in a case~~,~~ or by a local rule that includes reasonable exceptions.

(ii) **Local Provisions Prohibiting Access.** If a local rule – or any other local court provision that extends beyond a particular litigant or

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involving a pro se>. — Often shortened to pro se, n. — Also termed pro per; self-represented litigant; litigant in propria persona; litigant pro persona; litigant pro per; litigant in person; (rarely) pro se-er." Black's Law Dictionary (12th ed. 2024) (Bryan A. Garner, Ed. in Chief).

5 Previous drafts have used "document," but it came to my attention that the rules we are thinking of amending take two different approaches. Bankruptcy Rule 5005, Civil Rule 5, Criminal Rule 49, and (in the main) Appellate Rule 25 use the word "paper," while Bankruptcy Rules 8011 and 9036 use the word "document." On the theory that internal consistency within a rule may be more valuable on this point than consistency across rules, this memo and my companion memo on the Bankruptcy Rules use "paper" when sketching amendments to Bankruptcy Rule 5005, Civil Rule 5, Criminal Rule 49, and Appellate Rule 25, but use "document" when sketching amendments to Bankruptcy Rules 8011 and 9036. Of course, the style consultants will be key guides on this issue.

6 The previous draft of (B)(i) said "may file electronically." The style consultants pointed out that a reader might think there is a lack of parallelism between this phrase in (B)(i) and the reference in (B)(ii) to the requirement for providing alternatives to CM/ECF access – namely "another electronic method for filing documents and receiving electronic notice of activity in the case." Substantively, one could argue the two are in parallel, because one who is allowed to use the court's electronic-filing system will also receive electronic notices from the court's electronic-filing system. So one could say in (B)(i) simply "use the court's electronic-filing system" (lines 78-79) and it would be implicit that this would also encompass electronic noticing. But it could be useful to also include the bracketed language on lines 79-80, especially since spelling things out may assist SRLs.

case – prohibits self-represented persons from using the court's electronic-filing system, the provision must include reasonable exceptions or must permit the use of another electronic method for filing [papers] and for receiving electronic notice [of activity in the case].[7]

(iii) **Conditions and Restrictions[8] on Access.** A court may set reasonable conditions and restrictions on self-represented persons' access to the court's electronic-filing system.

(iv) **Restrictions on a Particular Person.** A court may deny a particular person access to the court's electronic-filing system and may revoke a person's previously granted access for not complying with the conditions authorized in (iii).

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7 On lines 89-90, the style consultants suggest that the bracketed language could be deleted if the bracketed language in (i) is included.

8 The style consultants question whether "conditions and restrictions" is redundant. My initial reason for including both terms is that "conditions" on access occur when the court says that SRLs can only use the system on certain conditions (e.g., on condition that they first take a course), while "restrictions" on access occur when the court says that certain types of SRLs can't use the system (like SRLs who are incarcerated). Professor Kimble suggests, though, that "if you say that X can't use the system, then you're saying that a condition of using the system is that you're not X." He wonders whether there are "other instances in the rules of using 'conditions' without 'restrictions.'"

Two responses to this style suggestion occur to me – one semantic and one practical. The semantic response is that there are examples of existing rules that use a similar distinction. See, e.g., Bankruptcy Rule 4001 (distinguishing between prohibitions and conditions with respect to use, sale, or lease of property). More importantly, the practical response is that this provision is designed to speak not only to clerk's offices but also to self-represented litigants. Using both terms will help to head off arguments by a self-represented litigant that a particular condition or restriction is not authorized under the rules.

(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.

(3) Nonelectronic Filing.[9] A paper not filed electronically is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(4) Acceptance by the Clerk. The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice.

Committee Note

Rule 5 is amended to address two topics concerning self-represented litigants. (Concurrent amendments are made to [add cites to Bankruptcy Rules],[10] Criminal Rule 49, and Appellate Rule 25.) Rule 5(b) is amended to address service of documents (subsequent to the complaint) filed by a self-represented litigant in paper form. Because all such paper filings are uploaded by court staff into the court's electronic-filing system, there is no need to require separate paper service by the filer on case participants who receive an electronic notice of the filing from the court's electronic-filing system. Rule 5(b)'s treatment of service is also reorganized to reflect the primacy of service by means of the electronic notice. Rule 5(d) is amended to expand the availability of electronic modes by which self-represented litigants can file documents with the court and receive notice of filings that others make in the case. Also, the order of what had been Rules 5(d)(2) ("Nonelectronic Filing") and 5(d)(3) ("Electronic Filing and Signing") is reversed – with (d)(2) becoming (d)(3) and vice versa – to reflect the modern primacy of electronic filing.

9 This provision is currently Rule 5(d)(2) and is being relocated pursuant to the style consultants' guidance and to accord with the ordering in Criminal Rule 49 and with the modern primacy of electronic filing.

10 The cites to the Bankruptcy Rules will depend on the option selected by the Bankruptcy Rules Committee.

Subdivision (b). Rule 5(b) is restructured so that the primary means of service – that is, service by means of the court's electronic-filing system – is addressed first, in subdivision 5(b)(2). Existing Rule 5(b)(2) becomes new Rule 5(b)(3), which continues to address alternative means of service. New Rule 5(b)(4) addresses service of papers not filed with the court, and new Rule 5(b)(5) defines the term "notice of filing" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket.

Subdivision (b)(2). Amended Rule 5(b)(2) eliminates the requirement of separate (paper) service (of documents after the complaint) on a litigant who is registered to receive a notice of filing from the court's electronic-filing system. Litigants who are registered to receive a notice of filing include those litigants who are participating in the court's electronic-filing system with respect to the case in question and also include those litigants who receive the notice because they have registered for a court-based electronic-noticing program. (Current Rule 5(b)(2)(E)'s provision for service by "sending [a paper] to a registered user by filing it with the court's electronic-filing system" had already eliminated the requirement of paper service on registered users of the court's electronic-filing system by other registered users of the system; the amendment extends this exemption from paper service to those who file by a means other than through the court's electronic-filing system.)

The last sentence of amended Rule 5(b)(2) states that a court may provide by local rule that if a paper is filed under seal, it must be served by other means. This sentence is designed to account for districts in which parties in the case cannot access other participants' sealed filings via the court's electronic-filing system.

Subdivision (b)(3). Subdivision (b)(3) carries forward the contents of current Rule 5(b)(2), with two changes.

The subdivision's introductory phrase ("A paper is served under this rule by") is amended to read "A paper may also be served under this rule by." This locution ensures that what will become Rule 5(b)(3) remains an option for serving any litigant, even one who receives notices of filing. This option might be useful to a litigant who will be filing non-electronically but who wishes to effect service on their opponent before the time when the court will have uploaded the filing into the court's system (thus generating the notice of filing).

Subdivision (b)(3)(E). The prior reference to "sending [a paper] to a registered user by filing it with the court's electronic-filing system" is deleted, because this is now covered by new Rule 5(b)(2).

Although subdivision (b)(3)(E) carries forward – for service by other electronic means – the prior rule's provision that such service is not effective if the sender "learns that it did not reach the person to be served," no such proviso is included in new subdivision (b)(2). This is

because experience has demonstrated the general reliability of notice and service through the court's electronic-filing system on those registered to receive notices of electronic filing from that system.

Subdivision (b)(4). New Rule 5(b)(4) addresses service of papers not filed with the court. It makes explicit what is arguably implicit in new Rule 5(b)(2): If a paper is not filed with the court, then the court's electronic system will never generate a notice of filing, so the sender cannot use Rule 5(b)(2) for service and thus must use Rule 5(b)(3).

Subdivision (b)(5). New Rule 5(b)(5) defines the term "notice of filing" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket. There are two equivalent terms currently in use: Notice of Electronic Filing and Notice of Docket Activity. "Notice of filing" is intended to encompass both of those terms, as well as any equivalent terms that may come into use in future. The word "electronic" is deleted as superfluous now that electronic filing is the default method.

Subdivision (d)(1)(B). Subdivision (d)(1)(B) previously provided that no certificate of service was required when a paper was served "by filing it with the court's electronic-filing system." This phrase is replaced by "under Rule 5(b)(2)" in order to conform to the change to subdivision (b)(2).

Subdivision (d)(2)(B). Under new Rule 5(d)(2)(B)(i), the presumption is the opposite of the presumption set by the prior Rule 5(d)(3)(B). That is, under new Rule 5(d)(2)(B)(i), self-represented litigants are presumptively authorized to use the court's electronic-filing system to file documents in their case subsequent to the case's commencement. If a district wishes to restrict self-represented litigants' access to the court's electronic-filing system, it must adopt an order or local rule to impose that restriction.

Under Rule 5(d)(2)(B)(ii), a local rule or general court order that bars persons not represented by an attorney from using the court's electronic-filing system must include reasonable exceptions, unless that court permits the use of another electronic method for filing documents and receiving electronic notice of activity in the case. But Rule 5(d)(2)(B)(iii) makes clear that the court may set reasonable conditions on access to the court's electronic-filing system.

A court can comply with Rules 5(d)(2)(B)(ii) and (iii) by doing either of the following: (1) Allowing reasonable access for self-represented litigants to the court's electronic-filing system, or (2) providing self-represented litigants with an alternative electronic means for filing (such as by email or by upload through an electronic document submission system) and an alternative electronic means for receiving notice of court filings and orders (such as an electronic noticing program).

For a court that adopts the option of allowing reasonable access to the court's electronic-

filing system, the concept of "reasonable access" encompasses the idea of reasonable conditions and restrictions. Thus, for example, access to electronic filing could be restricted to non-incarcerated litigants and could be restricted to those persons who satisfactorily complete required training and/or certifications and comply with reasonable conditions on access. Also, a court could adopt a local provision stating that certain types of filings – for example, notices of appeal – cannot be filed by means of the court's electronic-filing system. Rule 5(d)(2)(B)(ii) refers to "a local rule – or any other local court provision that extends beyond a particular litigant or case" to make clear that Rule 5(d)(2)(B)(ii) does not restrict a court from entering an order barring a specific self-represented litigant from accessing the court's electronic-filing system.

Rule 5(d)(2)(B)(iv) provides that the court may deny a specific self-represented litigant access to the court's electronic-filing system, and that the court may revoke a self-represented litigant's access to the court's electronic-filing system.

B. Civil Rule 6

As you know, a conforming change to Civil Rule 6 would be necessary in order to update cross-references. That draft has not changed since the version shown in the fall 2024 agenda books:

Rule 6. Computing and Extending Time; Time for Motion Papers

* * *

(d) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after being served and service is made under Rule 5(b)(~~2~~3)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

Committee Note

Subdivision (d) is amended to conform to the renumbering of Civil Rule 5(b)(2) as Rule 5(b)(3).

III. Criminal Rules: Amendments to Criminal Rule 49 (plus a conforming amendment)

Criminal Rule 49 contains the filing and service provisions for the Criminal Rules. In

transposing the Civil Rule 5 draft into Criminal Rule 49, a few questions arise about the degree of parallelism that we seek to attain. On the whole, it seems wise not to attempt to bring the two rules into complete parallel. Existing differences between the rules were not eliminated during the prior joint projects concerning e-filing rules, and attempting to eliminate all such differences in the context of this project may create a distraction from the project's goals.

A. Criminal Rule 49

Rule 49. Serving and Filing Papers

(a) Service on a Party.

(1) What is Required. 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.

(2) Serving a Party's Attorney. Unless the court orders otherwise, when these rules or a court order requires or permits service on a party represented by an attorney, service must be made on the attorney instead of the party.

(3) Service by ~~Electronic Means~~ a Notice of Filing Sent Through the Court's Electronic-Filing System. A notice of filing sent to a person registered to receive it through the court's electronic-filing system constitutes service on that person as of the notice's date. But a court may provide by local rule that if a paper is filed under seal, it must be served by other 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) Using Other Electronic Means.** A paper may be served by any other electronic means that the person consented to in writing. Service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served.~~

(4) Service by ~~Nonelectronic~~ Other Means. A paper may also be served 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; ~~or~~

(E) sending it by electronic means that the person has consented to in writing – in which event service is complete upon sending, but is not effective if the sender learns that it did not reach the person to be served; or

~~(E)~~ (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.

[(5) Serving Papers That Are Not Filed. Rule 49(a)(4) governs service of a paper that is not filed.[11]]

(6) Definition of "Notice of Filing." The term "notice of filing" in this rule includes a notice of docket activity, a notice of electronic filing, and any other similar electronic notice provided to case participants through the court's electronic-filing system to inform them of activity on the docket.

(b) Filing.

(1) When Required; Certificate of Service. Any paper that is required to be served must be filed no later than a reasonable time after service. No certificate of service is required when a paper is served ~~by filing it with the court's electronic-~~

11 The Civil and Criminal Rules take different approaches as to papers that are served but not filed. The Civil Rules take the view that, for example, discovery responses are papers that are served, and so when Civil Rule 5(d)(1) directs that papers after the complaint that must be served must also be filed, it includes an additional sentence listing out items (disclosures, discovery requests, and discovery responses) that mustn't be filed as an initial matter.

Criminal Rule 49, by contrast, does not discuss in explicit terms service of, for example, disclosures under Criminal Rule 16 or production of witness statements under Criminal Rule 26.2. It may be that Criminal Rule 49, unlike Civil Rule 5, simply regards such papers as falling outside its ambit. Rule 49(a)(1)'s list of papers that must be served is: "any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper." By contrast, Civil Rule 5(a)(1)'s list of papers that must be served explicitly includes "discovery paper[s] required to be served on a party, unless the court orders otherwise," Civil Rule 5(a)(1)(C).

This difference might lead to a difference concerning what is shown here as proposed Rule 49(a)(5). Even in Civil Rule 5, it's not clear to me that we really need that provision; it simply makes explicit what is already implicit, namely, that if a document is not filed, then it won't be served on anyone via the court's electronic-filing system. Given the different treatment of the topic of served-but-not-filed documents in the Criminal Rules, I wonder if this provision might be less useful in the context of the Criminal Rules.

~~filing system~~ under Rule 49(a)(3). When a paper is served by other means, a certificate of service must be filed with it or within a reasonable time after service or filing.

(2) ~~Means of~~ Electronic Filing and Signing.

(A) By a Represented Person – Generally Required; Exceptions. 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.[12]

(B) By a Self-Represented Person – When Allowed or Required.

(i) In General. A self-represented person may use the court's electronic-filing system [to file papers and receive notice of activity in the case], unless a court order or local rule prohibits the person from doing so.[13]

(ii) Local Provisions Prohibiting Access. If a local rule – or any other local court provision that extends beyond a particular litigant or case – prohibits self-represented persons from using the court's electronic-filing system, the provision must include reasonable exceptions or must permit the use of another electronic method for filing [papers] and for receiving electronic notice [of activity in the

12 This is currently in Rule 49(b)(3)(A). It is moved here to conform with the goal of the project to foreground e-filing as the primary filing method.

13 This provision carries forward a feature of current Rule 49(b)(3)(B) – namely, the absence of any reference to local provisions requiring a self-represented person to e-file.

case].

(iii) Conditions and Restrictions on Access. A court may set reasonable conditions and restrictions on self-represented persons' access to the court's electronic-filing system.

(iv) Restrictions on a Particular Person. A court may deny a particular person access to the court's electronic-filing system and may revoke a person's previously granted access for not complying with the conditions authorized in (iii).

(C) Means of Filing. ~~**Electronically.**~~ A paper is filed electronically by filing it with the court's electronic-filing system.

(D) Signature. A filing made through a person's electronic-filing account and authorized by that person, together with the person's name on a signature block, constitutes the person's signature.[14]

(E) Qualifies as Written Paper. A paper filed electronically is written or in writing under these rules.

~~**(B)**~~ **(3) Nonelectronic~~ally~~ Filing.** A paper not filed electronically is filed by delivering it:

(i) to the clerk; or

(ii) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

14 Professor Kimble asks how Rule 49(b)(2)(D) relates to Rule 49(b)(4). That thoughtful question seems to me to lie outside the scope of the SRL service and e-filing project. I of course defer to the Criminal Rules Committee as to whether or not it wishes to consider a change in this regard while it is considering the amendments to Rule 49 sketched in this memo.

~~**(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.~~

(4) Signature. Every written motion and other paper must be signed by at least one attorney of record in the attorney's name--or by a person filing a paper if the person is not represented by an attorney. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or person's attention.

(5) Acceptance by the Clerk. The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice.

(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) Notice of a Court Order. When the court issues an order on any post-arraignment motion, the clerk must serve notice of the entry on each party as required by Rule

49(a). A party also may serve notice of the entry by the same means. Except as Federal Rule of Appellate Procedure 4(b) provides otherwise, the clerk's failure to give notice does not affect the time to appeal, or relieve--or authorize the court to relieve--a party's failure to appeal within the allowed time.

Committee Note

Rule 49 is amended to address two topics concerning self-represented litigants. (Concurrent amendments are made to [add cites to Bankruptcy Rules],[15] Civil Rule 5, and Appellate Rule 25.) Rule 49(a) is amended to address service of documents filed by a self-represented litigant in paper form. Because all such paper filings are uploaded by court staff into the court's electronic-filing system, there is no need to require separate paper service by the filer on case participants who receive an electronic notice of the filing from the court's electronic-filing system. Rule 49(b) is amended to expand the availability of electronic modes by which self-represented litigants can file documents with the court and receive notice of filings that others make in the case.

Subdivision (a)(3). Rule 49(a)(3) is revised so that it focuses solely on the service of notice by means of the court's electronic-filing system. What had been Rule 49(a)(3)(B) (concerning "other electronic means" of service) is relocated, as revised, to a new Rule 49(a)(4)(E).

Amended Rule 49(a)(3) eliminates the requirement of separate (paper) service on a litigant who is registered to receive a notice of filing from the court's electronic-filing system. Litigants who are registered to receive a notice of filing include those litigants who are participating in the court's electronic-filing system with respect to the case in question and also include those litigants who receive the notice because they have registered for a court-based electronic-noticing program. (Current Rule 49(a)(3)(A)'s provision for service by "on a registered user by filing [the paper] with the court's electronic-filing system" had already eliminated the requirement of paper service on registered users of the court's electronic-filing system by other registered users of the system; the amendment extends this exemption from paper service to those who file by a means other than through the court's electronic-filing system.)

The last sentence of amended Rule 49(a)(3) states that a court may provide by local rule that if a paper is filed under seal, it must be served by other means. This sentence is designed to account for districts in which parties in the case cannot access other participants' sealed filings

15 The cites to the Bankruptcy Rules will depend on the option selected by the Bankruptcy Rules Committee.

via the court's electronic-filing system.

Subdivision (a)(4). Rule 49(a)(4) is retitled "Service by Other Means" to reflect the relocation into that subdivision – as new Rule 49(a)(4)(E) – what was previously Rule 49(a)(3)(B). The subdivision's introductory phrase ("A paper may be served by") is amended to read "A paper may also be served by." This locution ensures that Rule 49(a)(4) remains an option for serving any litigant, even one who receives notices of filing. This option might be useful to a litigant who will be filing non-electronically but who wishes to effect service on their opponent before the time when the court will have uploaded the filing into the court's system (thus generating the notice of filing).

Although new subdivision (a)(4)(E) carries forward – for service by other electronic means – the prior rule's provision that such service is not effective if the sender "learns that it did not reach the person to be served," no such proviso is included in new subdivision (a)(3). This is because experience has demonstrated the general reliability of notice and service through the court's electronic-filing system on those registered to receive notices of electronic filing from that system.

[Subdivision (a)(5). New Rule 49(a)(5) addresses service of papers not filed with the court. It makes explicit what is arguably implicit in new Rule 49(a)(3): If a paper is not filed with the court, then the court's electronic system will never generate a notice of filing, so the sender cannot use Rule 49(a)(3) for service and thus must use Rule 49(a)(4).]

Subdivision (a)(6). New Rule 49(a)(6) defines the term "notice of filing" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket. There are two equivalent terms currently in use: Notice of Electronic Filing and Notice of Docket Activity. "Notice of filing" is intended to encompass both of those terms, as well as any equivalent terms that may come into use in future. The word "electronic" is deleted as superfluous now that electronic filing is the default method.

Subdivision (b)(1). Subdivision (b)(1) previously provided that no certificate of service was required when a paper was served "by filing it with the court's electronic-filing system." This phrase is replaced by "under Rule 49(a)(3)" in order to conform to the change to subdivision (a)(3).

Subdivision (b)(2). Amended Rule 49(b)(2) governs electronic filing and signing. New Rules 49(b)(2)(A) and (B) replace what had been Rule 49(b)(3). Under new Rule 49(b)(2)(B)(i), the presumption is the opposite of the presumption set by the prior Rule 49(b)(3)(B). That is, under new Rule 49(b)(2)(B)(i), self-represented litigants are presumptively authorized to use the court's electronic-filing system to file documents in their case subsequent to the case's commencement. If a district wishes to restrict self-represented litigants' access to the court's electronic-filing system, it must adopt an order or local rule to impose that restriction.

Under Rule 49(b)(2)(B)(ii), a local rule or general court order that bars persons not represented by an attorney from using the court's electronic-filing system must include reasonable exceptions, unless that court permits the use of another electronic method for filing documents and receiving electronic notice of activity in the case. But Rule 49(b)(2)(B)(iii) makes clear that the court may set reasonable conditions on access to the court's electronic-filing system.

A court can comply with Rules 49(b)(2)(B)(ii) and (iii) by doing either of the following: (1) Allowing reasonable access for self-represented litigants to the court's electronic-filing system, or (2) providing self-represented litigants with an alternative electronic means for filing (such as by email or by upload through an electronic document submission system) and an alternative electronic means for receiving notice of court filings and orders (such as an electronic noticing program).

For a court that adopts the option of allowing reasonable access to the court's electronic-filing system, the concept of "reasonable access" encompasses the idea of reasonable conditions and restrictions. Thus, for example, access to electronic filing could be restricted to non-incarcerated litigants and could be restricted to those persons who satisfactorily complete required training and/or certifications and comply with reasonable conditions on access. Also, a court could adopt a local provision stating that certain types of filings – for example, notices of appeal – cannot be filed by means of the court's electronic-filing system. Rule 49(b)(2)(B)(ii) refers to "a local rule – or any other local court provision that extends beyond a particular litigant or case" to make clear that Rule 49(b)(2)(B)(ii) does not restrict a court from entering an order barring a specific self-represented litigant from accessing the court's electronic-filing system.

Rule 49(b)(2)(B)(iv) provides that the court may deny a specific self-represented litigant access to the court's electronic-filing system, and that the court may revoke a self-represented litigant's access to the court's electronic-filing system.

Subdivision (b)(3). What had been Rule 49(b)(2)(B) (concerning nonelectronic means of filing) is carried forward as new Rule 49(b)(3).

B. Criminal Rule 45

A conforming amendment would be necessary in order to update a cross-reference in Criminal Rule 45(c):

Rule 45. Computing and Extending Time

* * *

(c) Additional Time After Certain Kinds of Service. Whenever a party must or may act within

a specified time after being served and service is made under Rule 49(a)(4)(C), (D), and ~~(E)~~ (F), 3 days are added after the period would otherwise expire under subdivision (a).

Committee Note

Subdivision (c) is amended to conform to the renumbering of Criminal Rule 49(a)(4)(E) as Rule 49(a)(4)(F).

IV. Appellate Rules: Amendments to Appellate Rule 25

This section first discusses (in Part IV.A) a suggestion for implementing the project's goals through amendments to Appellate Rule 25. It then turns (in Part IV.B) to a brief discussion of options that might be considered for dovetailing the Appellate Rules with whichever approach the Bankruptcy Rules Committee selects for the Bankruptcy Rules.

A. Implementation: Amendments to Appellate Rule 25

To implement the project's twin goals in Appellate Rule 25, the following amendments could be considered. You will note that I am not suggesting the inclusion of the new provision about service of documents not filed with the court.[16] That is because I could not think of documents that would meet that description in the context of a proceeding in the court of appeals.

Rule 25. Filing and Service

(a) Filing.

(1) Filing with the Clerk. A paper required or permitted to be filed in a court of appeals must be filed with the clerk.

(2) Filing: Method and Timeliness.

(A) Nonelectronic Filing.

(i) In General. For a paper not filed electronically, filing may be accomplished by mail addressed to the clerk, but filing is not

16 Cf. proposed Civil Rule 5(b)(4).

timely unless the clerk receives the papers within the time fixed for filing.

(ii) A Brief or Appendix. A brief or appendix not filed electronically is timely filed, however, if on or before the last day for filing, it is:

- mailed to the clerk by first-class mail, or other class of mail that is at least as expeditious, postage prepaid; or
- dispatched to a third-party commercial carrier for delivery to the clerk within 3 days.

(iii) Inmate Filing. If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 25(a)(2)(A)(iii). A paper not filed electronically[17] by an inmate is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

- it is accompanied by: a declaration in compliance with 28 U.S.C. § 1746--or a notarized statement--setting out the date of deposit and stating that first-class postage is being prepaid; or evidence (such as a postmark or date stamp) showing

17 Some participants have noted that it would be useful to consider updating the inmate filing rule to address timeliness of documents filed pursuant to an electronic filing program within the institution. This project does not encompass such a proposal, but if this project extends into another rulemaking cycle, it might be worthwhile to expand it to include inmate-filing provisions, including this one and the one in Appellate Rule 4(c)(1).

that the paper was so deposited and that postage was prepaid; or

• the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 25(a)(2)(A)(iii).

(B) Electronic Filing ~~and Signing. (i) By~~ 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.

~~(ii)~~ (C) Electronic Filing by ~~By an Unrepresented~~ a Self-Represented Person--When Allowed or Required.

(i) In General. A self-represented person ~~not represented by an attorney: •~~ may ~~file electronically only if allowed by~~ use the court's electronic-filing system [to file papers and receive notice of activity in the case], unless a court order or ~~by~~ local rule prohibits the person from doing so.~~; and •~~ A self-represented person may be required to file electronically only by ~~court~~ order in a case~~,~~ or by a local rule that includes reasonable exceptions.

(ii) Local Provisions Prohibiting Access. If a local rule – or any other local court provision that extends beyond a particular litigant or case – prohibits self-represented persons from using the court's electronic-filing system, the provision must include reasonable

exceptions or must permit the use of another electronic method for filing [papers] and for receiving electronic notice [of activity in the case].

(iii) Conditions and Restrictions on Access. A court may set reasonable conditions and restrictions on self-represented persons' access to the court's electronic-filing system.

(iv) Restrictions on a Particular Person. A court may deny a particular person access to the court's electronic-filing system and may revoke a person's previously granted access for not complying with the conditions authorized in (iii).

~~**(iii)**~~ **(D) 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.

~~**(iv)**~~ **(E) Same as a Written Paper.** A paper filed electronically is a written paper for purposes of these rules.

(3) Filing a Motion with a Judge. *[Not shown in this draft, for brevity.]*

(4) Clerk's Refusal of Documents. *[Not shown in this draft, for brevity.]*

(5) Privacy Protection. *[Not shown in this draft, for brevity.]*

(b) Service of All Papers Required. Unless a rule requires service by the clerk or the paper will be served under Rule 25(c)(1), a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.

(c) Manner of Service.

(1) Service by a Notice of Filing Sent Through the Court's Electronic-Filing System. A notice of filing sent to a person registered to receive it through the court's electronic-filing system constitutes service on that person as of the notice's date. But a court may provide by local rule that if a paper is filed under seal, it must be served by other means.

(2) Service by Other Means. A paper may also be served under this rule by:

~~Nonelectronic service may be any of the following:~~

(A) personal delivery, including delivery to a responsible person at the office of counsel;

(B) ~~by~~ mail; ~~or~~

(C) ~~by~~ third-party commercial carrier for delivery within 3 days; or

(D) ~~. (2) Electronic service of a paper may be made (A) by sending it to a registered user by filing it with the court's electronic-filing system or (B) by~~ sending it by ~~other~~ electronic means that the person to be served consented to in writing.

(3) **Considerations in Choosing Other Means.** When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.

(4) **When Service Is Complete.** Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by a notice from the court's electronic-

filing system is complete as of the notice's date.[18] Service by other electronic means is complete on filing or sending, unless the party making service is notified that the paper was not received by the party served.

(5) Definition of "Notice of Filing." The term "notice of filing" in this rule includes a notice of docket activity, a notice of electronic filing, and any other similar electronic notice provided to case participants through the court's electronic-filing system to inform them of activity on the docket.

(d) Proof of Service.

(1) A paper presented for filing must contain either of the following if it was served other than through the court's electronic-filing system:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

18 This provision will take care of the issue of periods that are timed from service. Appellate Rule 26(c) provides: "(c) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after being served, and the paper is not served electronically on the party or delivered to the party on the date stated in the proof of service, 3 days are added after the period would otherwise expire under Rule 26(a)." Under Rule 26(c), the "three-day rule" doesn't apply when a paper is served electronically. When electronic service of a paper filing occurs by means of the court's electronic-filing system, there may be a (generally brief) time lag between the submission of the paper filing to the court and the clerk's upload of the paper into the electronic-filing system. By providing that such service is complete as of the date of the notice of filing, amended Rule 25(c)(4) will ensure that the recipient's response time is not cut short.

(iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

(2) When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)(2)(A)(ii), the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

(3) Proof of service may appear on or be affixed to the papers filed.

(e) Number of Copies. *[Not shown in this draft, for brevity.]*

Committee Note

Rule 25 is amended to address two topics concerning self-represented litigants. (Concurrent amendments are made to [add cites to Bankruptcy Rules],[19] Civil Rule 5, and Criminal Rule 49.) Rule 25(a)(2) is amended to expand the availability of electronic modes by which self-represented litigants can file documents with the court and receive notice of filings that others make in the case. Rule 25(c) is amended to address service of documents filed by a self-represented litigant in paper form. Because all such paper filings are uploaded by court staff into the court's electronic-filing system, there is no need to require separate paper service by the filer on case participants who receive an electronic notice of the filing from the court's electronic-filing system. Rule 25(c)'s treatment of service is also reorganized to reflect the primacy of service by means of the electronic notice.

Subdivision (a)(2)(C). Under new Rule 25(a)(2)(C)(i), the presumption is the opposite of the presumption set by the prior Rule 25(a)(2)(B)(ii). That is, under new Rule 25(a)(2)(C)(i), self-represented litigants are presumptively authorized to use the court's electronic-filing system to file documents in their case. If a district wishes to restrict self-represented litigants' access to the court's electronic-filing system, it must adopt an order or local rule to impose that restriction.

Under Rule 25(a)(2)(C)(ii), a local rule or general court order that bars persons not represented by an attorney from using the court's electronic-filing system must include reasonable exceptions, unless that court permits the use of another electronic method for filing documents and receiving electronic notice of activity in the case. But Rule 25(a)(2)(C)(iii) makes clear that the court may set reasonable conditions on access to the court's electronic-filing system.

19 The cites to the Bankruptcy Rules will depend on the option selected by the Bankruptcy Rules Committee.

A court can comply with Rules 25(a)(2)(C)(ii) and (iii) by doing either of the following: (1) Allowing reasonable access for self-represented litigants to the court's electronic-filing system, or (2) providing self-represented litigants with an alternative electronic means for filing (such as by email or by upload through an electronic document submission system) and an alternative electronic means for receiving notice of court filings and orders (such as an electronic noticing program).

For a court that adopts the option of allowing reasonable access to the court's electronic-filing system, the concept of "reasonable access" encompasses the idea of reasonable conditions and restrictions. Thus, for example, access to electronic filing could be restricted to non-incarcerated litigants and could be restricted to those persons who satisfactorily complete required training and/or certifications and comply with reasonable conditions on access. Also, a court could adopt a local provision stating that certain types of filings – for example, filings that commence a proceeding in the court of appeals – cannot be filed by means of the court's electronic-filing system. Rule 25(a)(2)(C)(ii) refers to "a local rule – or any other local court provision that extends beyond a particular litigant or case" to make clear that Rule 25(a)(2)(C)(ii) does not restrict a court from entering an order barring a specific self-represented litigant from accessing the court's electronic-filing system.

Rule 25(a)(2)(C)(iv) provides that the court may deny a specific self-represented litigant access to the court's electronic-filing system, and that the court may revoke a self-represented litigant's access to the court's electronic-filing system.

Former Rules 25(a)(2)(B)(iii) and (iv) are carried forward but renumbered as Rules 25(a)(2)(D) and (E).

Subdivision (b). Existing Rule 25(b) generally requires that a party, "at or before the time of filing a paper, [must] serve a copy on the other parties to the appeal or review." The existing rule exempts from this requirement instances when "a rule requires service by the clerk." The rule is amended to add a second exemption, for instances when "the paper will be served under Rule 25(c)(1)." This amendment is necessary because new Rule 25(c)(1) encompasses service by the notice of filing that results from the clerk's uploading into the system a paper filing by a self-represented litigant. In those circumstances, service will not occur "at or before the time of filing a paper," but it will occur when the court's electronic-filing system sends the notice to the litigants registered to receive it.

Subdivision (c). Rule 25(c) is restructured so that the primary means of service – that is, service by means of the court's electronic-filing system – is addressed first, in Rule 25(c)(1). Existing Rule 25(c)(1) becomes new Rule 25(c)(2), which continues to address alternative means of service. New Rule 25(c)(5) defines the term "notice of filing" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket.

Subdivision (c)(1). Amended Rule 25(c)(1) eliminates the requirement of separate (paper) service on a litigant who is registered to receive a notice of filing from the court's electronic-filing system. Litigants who are registered to receive a notice of filing include those litigants who are participating in the court's electronic-filing system with respect to the case in question and also include those litigants who receive the notice because they have registered for a court-based electronic-noticing program. (Current Rule 25(c)(2)'s provision for service by "sending [a paper] to a registered user by filing it with the court's electronic-filing system" had already eliminated the requirement of paper service on registered users of the court's electronic-filing system by other registered users of the system; the amendment extends this exemption from paper service to those who file by a means other than through the court's electronic-filing system.)

The last sentence of amended Rule 25(c)(1) states that a court may provide by local rule that if a paper is filed under seal, it must be served by other means. This sentence is designed to account for circuits (if any) in which parties in the case cannot access other participants' sealed filings via the court's electronic-filing system.

Subdivision (c)(2). Subdivision (c)(2) carries forward the contents of current Rule 25(c)(1), with two changes.

The subdivision's introductory phrase ("Nonelectronic service may be any of the following") is amended to read "A paper may also be served under this rule by." This locution reflects the inclusion of other electronic means (apart from service through the court's electronic-filing system) in new Rule 25(c)(2)(D) and also ensures that what will become Rule 25(c)(2) remains an option for serving any litigant, even one who receives notices of filing. This option might be useful to a litigant who will be filing non-electronically but who wishes to effect service on their opponent before the time when the court will have uploaded the filing into the court's system (thus generating the notice of filing).

The prior reference to "sending [a paper] to a registered user by filing it with the court's electronic-filing system" is deleted, because this is now covered by new Rule 25(c)(1).

Subdivision (c)(4). Amended subdivision (c)(4) carries forward the prior rule's provisions that service by electronic means other than through the court's electronic-filing system is complete on sending unless the party making service is notified that the paper was not received by the party served, and that service by mail or by commercial carrier is complete on mailing or delivery to the carrier.

As to service through the court's electronic-filing system, the amendments make two changes. First, the amended rule provides that such service "is complete as of the notice's date." Under new subdivision (c)(1), when a litigant files a paper other than through the court's electronic-filing system, service on a litigant who is registered to receive a notice of filing

through the court's electronic-filing system occurs by means of the notice of filing. But that service does not occur "on filing" when the filing is made other than through the court's electronic-filing system. There can be a short time lag between the date the litigant files the document with the court and the date that the clerk's office uploads it into the court's electronic-filing system. Thus, new subdivision (c)(1) and amended subdivision (c)(4) provide that service by a notice of filing sent to a person registered to receive it through the court's electronic-filing system is complete as of the date of the notice of filing.

Second, although subdivision (c)(4) carries forward – for service by other electronic means – the prior rule's provision that such service is not effective if the sender "is notified that the paper was not received by the party served," no such proviso is included as to service by a notice of filing sent to a person registered to receive it through the court's electronic-filing system. This is because experience has demonstrated the general reliability of notice and service through the court's electronic-filing system on those registered to receive notices of electronic filing from that system.

Subdivision (c)(5). New Rule 25(c)(5) defines the term "notice of filing" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket. There are two equivalent terms currently in use: Notice of Electronic Filing and Notice of Docket Activity. "Notice of filing" is intended to encompass both of those terms, as well as any equivalent terms that may come into use in future. The word "electronic" is deleted as superfluous now that electronic filing is the default method.

B. Dovetailing the Appellate Rules with the Bankruptcy Rules

Because the Appellate Rules address bankruptcy appeals as well as other types of proceedings in the courts of appeals, it will be necessary to ensure that the Bankruptcy and Appellate Rules work seamlessly together. This topic is discussed at greater length in Part II.B of the separate memorandum to the Bankruptcy Rules Committee. In brief, if the Bankruptcy Rules Committee were to change its decision and were to propose adoption for the Bankruptcy Rules of the twin goals of the SRL project, then the proposed amended Bankruptcy and Appellate Rules would work smoothly together because the approach taken in the originating court would be the same as that taken in the court of appeals. If, instead, the Bankruptcy Rules Committee adheres to its fall 2024 decision not to propose adoption of the SRL project's changes in the Bankruptcy Rules, then it will be necessary to determine how to handle bankruptcy appeals.

The memorandum to the Bankruptcy Rules Committee suggests that the best solution might be to have the procedures in bankruptcy appeals track the new procedures that will generally apply in the district courts and the courts of appeals. If that approach is adopted, it would necessitate a change to Bankruptcy Rule 8011 but no particular change to the Appellate Rules.

If instead the decision were made that the procedures in the court of appeals should track those in the bankruptcy court, this would entail amending a couple of relevant rules. I am not sketching such amendments here, because I surmise that the committees will prefer to keep the practice in the courts of appeals uniform across types of appeal rather than exempting bankruptcy appeals from the new SRL service and e-filing approach in the courts of appeals. But one could tentatively say that the change, if it were deemed advisable, could be accomplished by amending Rule 8011 and also Appellate Rule 6 (Appeal in a Bankruptcy Case).

III. Conclusion

The project on SRL service and e-filing will entail implementing amendments to the Civil, Criminal, and Appellate Rules, and either implementing or conforming amendments to the Bankruptcy Rules.

With enclosure (for the copies of this memorandum submitted to the Civil and Appellate Rules Committees)
Without enclosure (for the copy of this memorandum submitted to the Criminal Rules Committee)

MEMORANDUM

DATE: March 7, 2025

TO: Advisory Committee on Bankruptcy Rules

FROM: Catherine T. Struve

RE: Project on service and electronic filing by self-represented litigants

As the Committee knows, the project on service and electronic filing by self-represented litigants ("SRLs") has two basic goals. As to service, the goal is to eliminate the requirement of separate (paper) service (of documents after the case's initial filing) on a litigant who receives a notice of filing through the court's electronic-filing system or a court-based electronic-noticing program. As to filing, the idea is to make two changes compared with current practice: (1) to presumptively permit SRLs to file electronically (unless a court order or local rule bars them from doing so) and (2) to provide that a local rule or general court order that bars SRLs from using the court's electronic-filing system must include reasonable exceptions or must permit the use of another electronic method for filing documents and receiving electronic notice of activity in the case.

During the fall 2024 advisory committee discussions, the Bankruptcy Rules Committee decided that it was not ready to endorse either aspect of this program for adoption as part of the Bankruptcy Rules. By contrast, the Civil, Appellate, and Criminal Rules Committees – which met subsequently – indicated willingness to proceed with the proposed amendments. At its January 2025 meeting, the Standing Committee discussed whether it would be justifiable to proceed with proposed amendments to the Civil, Appellate, and Criminal Rules if the Bankruptcy Rules were not correspondingly amended. The Standing Committee did not express opposition to such an approach.

However, it has been suggested that it may be worthwhile for the Bankruptcy Rules Committee to assess whether the decisions of the other three advisory committees might provide a reason to reconsider its skepticism about the proposed amendments. Given that the Bankruptcy Rules Committee did not know of the other committees' views at the time of its fall 2024 discussion, the spring 2025 meeting provides an opportunity revisit and re-weigh the costs and benefits of proceeding with the proposals. In the event that the Committee were to change its view and propose amending the Bankruptcy Rules in tandem with the other sets of rules, it would need to consider amendments to Bankruptcy Rules 5005, 8011, and 9036. In the event that

the Committee were to adhere to its fall 2024 view, it would need to consider how best to dovetail the (unchanged) approach of the Bankruptcy Rules with the (changed) approach of the Civil and Appellate Rules. Such dovetailing would entail an amendment to Rule 7005 and perhaps an amendment to Rule 8011.

To illustrate the choices, I sketch below two different packages of amendments to the Bankruptcy Rules. Part I sets out a package of amendments that would parallel the proposed amendments that will be considered by the Civil, Appellate, and Criminal Rules Committees.[1] Part I thus illustrates what the Bankruptcy Rules proposal might look like if the Bankruptcy Rules Committee were to change its position and decide to participate in the proposed filing and service changes. Part II discusses a package of amendments that would be necessary or advisable in the event that the Bankruptcy Rules Committee instead adheres to its decision not to implement the proposed filing and service changes at this time. As Part II illustrates, the linkages between the Bankruptcy Rules and the Civil and Appellate Rules mean that some amendments to the Bankruptcy Rules will be necessary either way.

Because this memo is lengthy, here is a table of contents:

1 I enclose my memorandum to those Committees, which sets out sketches of those proposed rules.

I. Option One: Changing the filing and service rules for SRLs in the bankruptcy courts

If the Bankruptcy Rules Committee were to change its decision and opt to participate in the proposed package of filing and service changes, this would entail amendments to Bankruptcy Rules 5005, 8011, and 9036 (but not Bankruptcy Rule 7005).[2] Sketches of those amendments follow.

A. Rule 5005

Bankruptcy Rule 5005 is a general provision that applies across different types of bankruptcy cases. To bring the Bankruptcy Rules into accord with the goals of the pro se e-filing and service project, the following amendments to Rule 5005 could be considered:

Rule 5005. Filing Papers and Sending Copies to the United States Trustee

(a) Filing Papers.

* * *

2 In the interest of completeness, I note that Rule 8001(c) also arguably implicates some of the issues addressed by this project. Rule 8001(c) provides: "**(c) Requirement to Send Documents Electronically.** Under these Part VIII rules, a document must be sent electronically, unless: (1) it is sent by or to an individual who is not represented by counsel; or (2) the court's local rules permit or require mailing or delivery by other means."

One might at first glance wonder why Rule 8001(c) exists. It requires that documents be sent electronically, and one might wonder whether this requirement needs explicit inclusion in the Rules. All attorneys are required to use the court's electronic-filing system, and the court sends notices via that system to all who are registered to receive such notices, so nearly all documents in a case will be sent electronically simply by the operation of that system. But perhaps bankruptcy appeals feature situations in which a litigant must send a document without filing it, in which event the directive to send the document electronically would still serve some independent purpose.

Rule 8001(c) also distinguishes between service on SRLs and service on others. Perhaps the idea is that attorneys will always be able to use email and receive email, while self-represented litigants might or might not be reliable users of email. Perhaps that justifies maintaining current Rule 8001(c) as drafted.

Thus, this footnote is included for completeness rather than to suggest that Rule 8001(c) should necessarily be considered for amendment.

(3) Electronic Filing and Signing.

(A) By a Represented Entity--Generally Required; Exceptions.

An entity represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for cause or is allowed or required by local rule.

(B) By ~~an Unrepresented~~ a Self-Represented[3] Individual[4]--When Allowed or Required.

(i) In General. ~~An~~ A self-represented individual ~~not represented by an attorney: (i)~~ may ~~file electronically only if allowed by~~ use the court's electronic-filing system [to file papers[5] and receive

3 The current rules use "unrepresented" to refer to a litigant who does not have a lawyer. With the concurrence of the style consultants, I propose that we instead use "self-represented." "Self-represented" recognizes that the litigant is advocating on the litigant's own behalf. The Latin term "pro se" means "for oneself," which is closer to "self-represented" than "unrepresented." Courts and legal organizations increasingly use "self-represented" to describe pro se litigants. See, e.g., https://www.ncsc.org/consulting-and-research/areas-of-expertise/access-to-justice/self-represented-litigants. And the entry in Black's Law Dictionary for "pro se litigant" includes "self-represented" but not "unrepresented": "pro se litigant (1857) One who represents oneself in a court proceeding without the assistance of a lawyer <the third case on the court's docket involving a pro se>. — Often shortened to pro se, n. — Also termed pro per; self-represented litigant; litigant in propria persona; litigant pro persona; litigant pro per; litigant in person; (rarely) pro se-er." Black's Law Dictionary (12th ed. 2024) (Bryan A. Garner, Ed. in Chief).

4 The Bankruptcy Rules use the word "individual" in a number of places – presumably because the Bankruptcy Code uses "individual" – and I follow that convention in this memo. I note, however, that Civil Rule 5 uses "person."

5 Previous drafts have used "document," but it came to my attention that the rules we are thinking of amending take two different approaches. Bankruptcy Rule 5005, Civil Rule 5, Criminal Rule 49, and (in the main) Appellate Rule 25 use the word "paper," while Bankruptcy Rules 8011 and 9036 use the word "document." On the theory that internal consistency within a

notice of activity in the case][6] unless a court order or local rule~~; and~~ prohibits the person from doing so. A self-represented individual ~~(ii)~~ may be required to file electronically only by ~~court~~ order in a case~~,~~ or by a local rule that includes reasonable exceptions.

(ii) Local Provisions Prohibiting Access. If a local rule – or any other local court provision that extends beyond a particular litigant or case – prohibits self-represented [individuals] from using the court's electronic-filing system, the provision must include reasonable exceptions or must permit the use of

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rule may be more valuable on this point than consistency across rules, this memo and my companion memo on the Civil, Criminal, and Appellate Rules use "paper" when sketching amendments to Bankruptcy Rule 5005, Civil Rule 5, Criminal Rule 49, and Appellate Rule 25, but use "document" when sketching amendments to Bankruptcy Rules 8011 and 9036. Of course, the style consultants will be key guides on this issue.

6 The previous draft of (B)(i) (in the sketch of Civil Rule 5) said "may file electronically." The style consultants pointed out that a reader might think there is a lack of parallelism between this phrase in (B)(i) and the reference in (B)(ii) to the requirement for providing alternatives to CM/ECF access – namely "another electronic method for filing documents and receiving electronic notice of activity in the case." Substantively, one could argue the two are in parallel, because one who is allowed to use the court's electronic-filing system will also receive electronic notices from the court's electronic-filing system. So in (B)(i) one could simply say "use the court's electronic-filing system" (line 13) and it would be implicit that this would also encompass electronic noticing. But it could be useful to also include the bracketed language on lines 13-14, especially since spelling things out may assist SRLs. Moreover, including the language will help clarify to a court that the default is to allow an SRL to receive electronic notice of all filings in the case (not merely the orders issued by the court).

another electronic method for filing [papers] and for receiving electronic notice [of activity in the case].[7]

(iii) Conditions and Restrictions[8] on Access. A court may set reasonable conditions and restrictions on self-represented [individuals'] access to the court's electronic-filing system.

(iv) Restrictions on a Particular [Individual]. A court may deny a particular [individual] access to the court's electronic-filing system and may revoke an

7 On lines 26-27, the style consultants suggest that the bracketed language could be deleted. However, it has been pointed out that there are substantive values served by retaining the language. As to the phrase "filing papers," retaining the word "papers" may help satisfy the concerns of some that the new rules are opening up the process to allow debtors to file inappropriate materials. As to the phrase "notice of activity in the case," including it may be useful at this time because currently some courts allow a self-represented debtor to receive notice electronically of items served from the clerk of court but will not allow the same unrepresented debtor to receive notice of items filed electronically by parties.

8 The style consultants question whether "conditions and restrictions" is redundant. My initial reason for including both terms is that "conditions" on access occur when the court says that SRLs can only use the system on certain conditions (e.g., on condition that they first take a course), while "restrictions" on access occur when the court says that certain types of SRLs can't use the system (like SRLs who are incarcerated). Professor Kimble suggests, though, that "if you say that X can't use the system, then you're saying that a condition of using the system is that you're not X." He wonders whether there are "other instances in the rules of using 'conditions' without 'restrictions.'"

Two responses to this style suggestion occur to me – one semantic and one practical. The semantic response is that there are examples of existing rules that use a similar distinction. See, e.g., Bankruptcy Rule 4001 (distinguishing between prohibitions and conditions with respect to use, sale, or lease of property). More importantly, the practical response is that this provision is designed to speak not only to clerk's offices but also to self-represented litigants. Using both terms will help to head off arguments by a self-represented litigant that a particular condition or restriction is not authorized under the rules.

[individual]'s previously granted access for not complying with the conditions authorized in (iii).

(C) Signing. A filing made through a person's electronic-filing account and authorized by that person, together with the 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, the Federal Rules of Civil Procedure made applicable by these rules, and § 107.

(b) Sending Copies to the United States Trustee.

(1) Papers Sent Electronically. All papers required to be sent to the United States trustee may be sent by using the court's electronic-filing system in accordance with Rule 9036,[9] unless a court order or local rule provides otherwise.

(2) Papers Not Sent Electronically. If an entity other than the clerk sends a paper to the United States trustee without using the court's electronic-filing system, the entity must promptly file a statement identifying the paper and stating the manner by which and the date

9 I do not think any change is needed to Rule 5005(b)(1), because the phrase "using the court's electronic-filing system in accordance with Rule 9036" – when taken in conjunction the changes to Rule 9036 discussed below – will encompass situations where the self-represented litigant makes a paper filing that is then uploaded into the court's electronic-filing system by the clerk.

it was sent. The clerk need not send a copy of a paper to a United States trustee who requests in writing that it not be sent.

* * *

Committee Note

Rule 5005(a)(3)(B) is amended to address electronic filing by self-represented litigants. (Concurrent amendments are made to Rules 8011 and 9036 and to Civil Rule 5, Criminal Rule 49, and Appellate Rule 25.) The amendments expand the availability of electronic modes by which self-represented litigants can file documents with the court and receive notice of filings that others make in the case.

Under amended Rule 5005(a)(3)(B)(i), the presumption is the opposite of the presumption set by the prior rule. That is, under the amended rule, self-represented litigants are presumptively authorized to use the court's electronic-filing system to file documents in their case subsequent to the case's commencement. If a district court or BAP wishes to restrict self-represented litigants' access to the court's electronic-filing system, it must adopt an order or local rule to impose that restriction.

Under Rule 5005(a)(3)(B)(ii), a local rule or general court order that bars persons not represented by an attorney from using the court's electronic-filing system must include reasonable exceptions, unless that court permits the use of another electronic method for filing documents and receiving electronic notice of activity in the case. But Rule 5005(a)(3)(B)(iii) makes clear that the court may set reasonable conditions on access to the court's electronic-filing system.

A court can comply with Rules 5005(a)(3)(B)(ii) and (iii) by doing either of the following: (1) Allowing reasonable access for self-represented litigants to the court's electronic-filing system, or (2) providing self-represented litigants with an alternative electronic means for filing (such as by email or by upload through an electronic document submission system) and an alternative electronic means for receiving notice of court filings and orders (such as an electronic noticing program).

For a court that adopts the option of allowing reasonable access to the court's electronic-filing system, the concept of "reasonable access" encompasses the idea of reasonable conditions and restrictions. Thus, for example, access to electronic filing could be restricted to non-incarcerated litigants and could be restricted to those persons who satisfactorily complete required training and/or certifications and comply with reasonable conditions on access. Also, a court could adopt a local provision stating that certain types of filings – for example, notices of appeal – cannot be filed by means of the court's electronic-filing system. Rule 5005(a)(3)(B)(ii) refers to "a local rule – or any other local court provision that extends beyond a particular litigant

or case" to make clear that 5005(a)(3)(B)(ii) does not restrict a court from entering an order barring a specific self-represented litigant from accessing the court's electronic-filing system.

Rule 5005(a)(3)(B)(iv) provides that the court may deny a specific self-represented litigant access to the court's electronic-filing system, and that the court may revoke a self-represented litigant's access to the court's electronic-filing system.

B. Rule 8011

Bankruptcy Rule 8011's provisions on filing and service govern in appeals to the district court or Bankruptcy Appellate Panel (BAP). To bring the Bankruptcy Rules into accord with the goals of the SRL e-filing and service project, the following amendments to Rule 8011 could be considered. You will note that I am not suggesting the inclusion of the new provision about service of documents not filed with the court.[10] That is because I could not think of documents that would meet that description in the context of a bankruptcy appeal.

Rule 8011. Filing and Service; Signature

(a) Filing.

(1) With the Clerk. A document required or permitted to be filed in a district court or BAP must be filed with the clerk of that court.

(2) Method and Timeliness.

(A) Nonelectronic Filing.

* * *

(B) Electronic Filing~~.(i)~~[11] By a Represented Person--Generally Required; Exceptions. An entity represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for cause or is allowed or required by local rule.

10 Cf. proposed Civil Rule 5(b)(4).

11 I suggest this re-numbering in order to avoid running out of levels of numbering and lettering.

~~(ii)~~ **(C) Electronic Filing By ~~an Unrepresented~~ a Self-Represented Individual--When Allowed or Required.**

(i) In General. ~~An~~ A self-represented individual ~~not represented by an attorney: •~~ may ~~file electronically only if allowed by~~ use the court's electronic-filing system [to file documents and receive notice of activity in the case] unless a court order or ~~by~~ local rule prohibits the individual from doing so.~~; and~~ A self-represented individual ~~•~~ may be required to file electronically only by ~~court~~ order in a case~~,~~ or by a local rule that includes reasonable exceptions.

(ii) Local Provisions Prohibiting Access. If a local rule – or any other local court provision that extends beyond a particular litigant or case – prohibits self-represented [individuals] from using the court's electronic-filing system, the provision must include reasonable exceptions or must permit the use of another electronic method for filing [documents] and for receiving electronic notice [of activity in the case].

(iii) Conditions and Restrictions on Access. A court may set reasonable conditions and restrictions on self-represented [individuals'] access to the court's electronic-filing system.

(iv) Restrictions on a Particular [Individual]. A court may deny a particular [individual] access to the court's electronic-filing system

and may revoke an [individual]'s previously granted access for not complying with the conditions authorized in (iii).

~~(iii)~~ **(D) Electronically Filed Same as a Written Paper.** A document filed electronically is a written paper for purposes of these rules.

~~(C)~~ (E) **When Paper Copies Are Required.** No paper copies are required when a document is filed electronically. If a document is filed by mail or by delivery to the district court or BAP, no additional copies are required. But the district court or BAP may, by local rule or order in a particular case, require that a specific number of paper copies be filed or furnished.

(3) Clerk's Refusal of Documents. The court clerk must not refuse to accept for filing any document solely because it is not presented in proper form as required by these rules or by any local rule or practice.

(b) Service of All Documents Required. Unless a rule requires service by the clerk or the document will be served under (c)(1), a party must, at or before the time of the filing of a document, serve it on the other parties to the appeal. Service on a party represented by counsel must be made on the party's counsel.

(c) Manner of Service.

(1) Service by a Notice of Filing Sent Through the Court's Electronic-Filing System. A notice of filing sent to a person registered to receive it through the court's electronic-filing system constitutes service on that person as of the notice's date. But a court may provide by local rule that if a paper is filed under seal, it must be served by other means.

~~(1) Nonelectronic~~ **(2) Service by Other Means.** ~~Nonelectronic service~~ A paper may also be served under this rule by ~~any of the following~~:

(A) personal delivery;

(B) mail; ~~or~~

(C) third-party commercial carrier for delivery within 3 days~~.~~; or

~~(2) Service By Electronic Means. Electronic service may be made by:~~

~~(A) sending a document to a registered user by filing it with the court's electronic-filing system; or~~

~~(B) using other~~ (D) electronic means that the person served has consented to in writing.

(3) When Service Is Complete.

(A) Service under (c)(1) is complete as of the date of the notice of filing.

(B) Service by other electronic means is complete on sending, unless the person making service receives notice that the document was not received by the person served.

(C) Service by mail or by third-party commercial carrier is complete on mailing or delivery to the carrier. ~~Service by electronic means is complete on filing or sending, unless the person making service receives notice that the document was not received by the person served.~~

(4) Definition of "Notice of Filing." The term "notice of filing" in this rule includes a notice of docket activity, a notice of electronic filing, and any other similar electronic notice provided to case participants through the court's electronic-filing

system to inform them of activity on the docket.

(d) Proof of Service.

(1) Requirements. A document presented for filing must contain either of the following if it was served other than through the court's electronic-filing system:

(A) an acknowledgement of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) the mail or electronic address, the fax number, or the address of the place of delivery--as appropriate for the manner of service--for each person served.

(2) Delayed Proof of Service. A district or BAP clerk may accept a document for filing without an acknowledgement or proof of service, but must require the acknowledgment or proof of service to be filed promptly thereafter.

(3) For a Brief or Appendix. When a brief or appendix is filed, the proof of service must also state the date and manner by which it was filed.

(e) Signature Always Required.

(1) Electronic Filing. Every document filed electronically must include the electronic signature of the person filing it or, if the person is represented, the counsel's electronic signature. 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.

(2) Paper Filing. Every document filed in paper form must be signed by the person filing it or, if the person is represented, by the person's counsel.

Committee Note

Rule 8011 is amended to address two topics concerning self-represented litigants. (Concurrent amendments are made to Rules 5005 and 9036 and to Civil Rule 5, Criminal Rule 49, and Appellate Rule 25.) Rule 8011(a) is amended to expand the availability of electronic modes by which self-represented litigants can file documents with the court and receive notice of filings that others make in the case. Rule 8011(c) is amended to address service of documents filed by a self-represented litigant in paper form. Because all such paper filings are uploaded by court staff into the court's electronic-filing system, there is no need to require separate paper service by the filer on case participants who receive an electronic notice of the filing from the court's electronic-filing system. Rule 8011(c)'s treatment of service is also reorganized to reflect the primacy of service by means of the electronic notice.

Subdivision (a)(2)(C). Under new Rule 8011(a)(2)(C)(i), the presumption is the opposite of the presumption set by the prior Rule 8011(a)(2)(B)(ii). That is, under new Rule 8011(a)(2)(C)(i), self-represented litigants are presumptively authorized to use the court's electronic-filing system to file documents in their case subsequent to the case's commencement. If a district court or BAP wishes to restrict self-represented litigants' access to the court's electronic-filing system, it must adopt an order or local rule to impose that restriction.

Under Rule 8011(a)(2)(C)(ii), a local rule or general court order that bars persons not represented by an attorney from using the court's electronic-filing system must include reasonable exceptions, unless that court permits the use of another electronic method for filing documents and receiving electronic notice of activity in the case. But Rule 8011(a)(2)(C)(iii) makes clear that the court may set reasonable conditions on access to the court's electronic-filing system.

A court can comply with Rules 8011(a)(2)(C)(ii) and (iii) by doing either of the following: (1) Allowing reasonable access for self-represented litigants to the court's electronic-filing system, or (2) providing self-represented litigants with an alternative electronic means for filing (such as by email or by upload through an electronic document submission system) and an alternative electronic means for receiving notice of court filings and orders (such as an electronic noticing program).

For a court that adopts the option of allowing reasonable access to the court's electronic-filing system, the concept of "reasonable access" encompasses the idea of reasonable conditions and restrictions. Thus, for example, access to electronic filing could be restricted to non-

incarcerated litigants and could be restricted to those persons who satisfactorily complete required training and/or certifications and comply with reasonable conditions on access. Also, a court could adopt a local provision stating that certain types of filings – for example, notices of appeal – cannot be filed by means of the court's electronic-filing system. Rule 8011(a)(2)(C)(ii) refers to "a local rule – or any other local court provision that extends beyond a particular litigant or case" to make clear that Rule 8011(a)(2)(C)(ii) does not restrict a court from entering an order barring a specific self-represented litigant from accessing the court's electronic-filing system.

Rule 8011(a)(2)(C)(iv) provides that the court may deny a specific self-represented litigant access to the court's electronic-filing system, and that the court may revoke a self-represented litigant's access to the court's electronic-filing system.

Subdivision (b). Existing Rule 8011(b) generally requires that a party, "at or before the time of filing a document, [must] serve it on the other parties to the appeal." The existing rule exempts from this requirement instances when "a rule requires service by the clerk." The rule is amended to add a second exemption, for instances when "the document will be served under (c)(1)." This amendment is necessary because new Rule 8011(c)(1) encompasses service by the notice of filing that results from the clerk's uploading into the system a paper filing by a self-represented litigant. In those circumstances, service will not occur "at or before the time of filing a document," but it will occur when the court's electronic-filing system sends the notice to the litigants registered to receive it.

Subdivision (c). Rule 8011(c) is restructured so that the primary means of service – that is, service by means of the court's electronic-filing system – is addressed first, in subdivision (c)(1). Existing Rule 8011(c)(1) becomes new Rule 8011(c)(2), which continues to address alternative means of service. New Rule 8011(c)(4) defines the term "notice of filing" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket.

Subdivision (c)(1). Amended Rule 8011(c)(1) eliminates the requirement of separate (paper) service on a litigant who is registered to receive a notice of filing from the court's electronic-filing system. Litigants who are registered to receive a notice of filing include those litigants who are participating in the court's electronic-filing system with respect to the case in question and also include those litigants who receive the notice because they have registered for a court-based electronic-noticing program. (Current Rule 8011(c)(2)(A)'s provision for service by "sending a document to a registered user by filing it with the court's electronic-filing system" had already eliminated the requirement of paper service on registered users of the court's electronic-filing system by other registered users of the system; the amendment extends this exemption from paper service to those who file by a means other than through the court's electronic-filing system.)

The last sentence of amended Rule 8011(c)(1) states that a court may provide by local rule that if a paper is filed under seal, it must be served by other means. This sentence is

designed to account for districts or BAPs in which parties in the case cannot access other participants' sealed filings via the court's electronic-filing system.

Subdivision (c)(2). Subdivision (c)(2) carries forward the contents of current Rules 8011(c)(1) and (2), with two changes.

The subdivision's introductory phrase ("Nonelectronic service may be by any of the following") is amended to read "A paper may also be served under this rule by." This locution ensures that what will become Rule 8011(c)(2) remains an option for serving any litigant, even one who receives notices of filing. This option might be useful to a litigant who will be filing non-electronically but who wishes to effect service on their opponent before the time when the court will have uploaded the filing into the court's system (thus generating the notice of filing).

Prior Rule 8011(c)(2)(A)'s reference to "sending a document to a registered user by filing it with the court's electronic-filing system" is deleted, because this is now covered by new Rule 8011(c)(1).

Subdivision (c)(3). Rule 8011(c)(3) ("When Service is Complete") is amended to distinguish between service under new Rule 8011(c)(1) – that is, service by means of the notice of electronic filing, which is complete as of the notice's date – and service by "other electronic means," which continues to be complete on "sending, unless the person making service receives notice that the document was not received by the person served." Experience has demonstrated the general reliability of notice and service through the court's electronic-filing system on those registered to receive notices of electronic filing from that system.

Subdivision (c)(4). New Rule 8011(c)(4) defines the term "notice of filing" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket. There are two equivalent terms currently in use: Notice of Electronic Filing and Notice of Docket Activity. "Notice of filing" is intended to encompass both of those terms, as well as any equivalent terms that may come into use in future. The word "electronic" is deleted as superfluous now that electronic filing is the default method.

C. Rule 9036

Bankruptcy Rule 9036 governs the electronic transmission of notices and documents by the bankruptcy court or other parties. To bring the Bankruptcy Rules into accord with the goals of the pro se e-filing and service project, the following amendments to Rule 9036 could be considered:

Rule 9036. Electronic Notice and Service

(a) In General. This rule applies whenever these rules require or permit sending a notice or serving a document by mail or other means.

(b) Notices from and Service by the Court.

(1) To Registered Users. The clerk may send notice to or serve a registered user by filing the notice or document with the court's electronic-filing system.

(2) To All Recipients. For any recipient, the clerk may send notice or serve a document by electronic means that the recipient consented to in writing, including by designating an electronic address for receiving notices. But these exceptions apply:

(A) if the recipient has registered an electronic address with the Administrative Office of the United States Courts' bankruptcy-noticing program, the clerk must use that address;[12] and

(B) if an entity has been designated by the Director of the Administrative Office of the United States Courts as a high-volume paper-notice recipient, the clerk may send the

12 As shown in the text, under both the current Rule 9036 and this sketch of an amended Rule 9036, the clerk is directed to use the BNC address for all notices. At some point, the Committee may wish to address what happens when the address designated on the proof of claim differs from the BNC address. That issue appears to be beyond the scope of the SRL project, but of course I defer to the Committee as to whether it may wish to fold consideration of that question into the project in the event that it selects the Option One discussed in this memo (which as sketched here would entail amendments to Rule 9036).

notice to or serve the document electronically at an address designated by the Director, unless the entity has designated an address under § 342(e) or (f).

(c) Notices from and Service by an Entity. ~~An entity may send notice or serve a document in the same manner that the clerk does under (b), excluding (b)(2)(A) and (B).~~

(1) Notice of Filing Sent Through the Court's Electronic-Filing System. A notice of filing sent to a person registered to receive it through the court's electronic-filing system constitutes notice or service on that person as of the date of the notice of filing. But a court may provide by local rule that if a paper is filed under seal, neither service nor notice occurs under this Rule 9036(c)(1).[13]

(2) Electronic Means Consented To. An entity may also send notice or serve a document by electronic means that the recipient consented to in writing, including by designating an electronic address for receiving notices.

(3) Definition of "Notice of Filing." The term "notice of filing" in this rule includes a notice of docket activity, a notice of electronic filing, and any other similar electronic notice provided to case

13 This formulation ("neither service nor notice occurs") differs from the language currently proposed for the other rules. See, e.g., proposed Rule 8011(c)(1) ("But a court may provide by local rule that if a paper is filed under seal, it must be served by other means."). The difference arises because it seems awkward to say "it must be served or noticed by other means." The style consultants may have guidance to share on this point.

participants through the court's electronic-filing system to inform them of activity on the docket.

(d) When Notice or Service Is Complete; Keeping an Address Current.

(1) Notice of Filing Sent Through the Court's Electronic-Filing System. Notice – or service – by a notice of filing sent to a person registered to receive it through the court's electronic-filing system is complete as of the date of the notice of filing.

(2) Other Electronic Means. Electronic notice or service by other electronic means is complete upon ~~filing or~~ sending but is not effective if the filer or sender receives notice that it did not reach the person to be notified or served.

(3) Keeping an Address Current. The recipient must keep its electronic address current with the clerk.

(e) Inapplicability. This rule does not apply to any document required to be served in accordance with Rule 7004.

Committee Note

Rule 9036 is amended to address service by self-represented litigants. (Concurrent amendments are made to Rules 5005 and 8011 and to Civil Rule 5, Criminal Rule 49, and Appellate Rule 25.) Rule 9036(c) is amended to address service of documents filed by a self-represented litigant in paper form. Because all such paper filings are uploaded by court staff into the court's electronic-filing system, there is no need to require separate paper service by the filer on case participants who receive an electronic notice of the filing from the court's electronic-filing system. Conforming amendments are made to Rule 9036(d).

Subdivision (c). Rule 9036(c) previously stated simply that "[a]n entity may send notice or serve a document in the same manner that the clerk does under (b), excluding (b)(2)(A) and (B)." That provision could be read to exclude instances when a self-represented litigant files a

document in paper form and the clerk's office scans the document and uploads it into the court's electronic-filing system. Thus read, the previous rules required separate (paper) service in such instances, even on litigants who were registered to receive a notice of filing from the court's electronic-filing system. New Rule 9036(c) restates the substance of the service options previously incorporated by reference to Rule 9036(b), but does so in a way that changes the rule concerning service by a litigant who makes a filing other than through the court's electronic-filing system.

New Rule 9036(c)(1) eliminates the requirement of separate (paper) service on a litigant who is registered to receive a notice of filing from the court's electronic-filing system. Litigants who are registered to receive a notice of filing include those litigants who are participating in the court's electronic-filing system with respect to the case in question and also include those litigants who receive the notice because they have registered for a court-based electronic-noticing program. (Prior Rule 9036(c)'s provision for notice or service "in the same manner that the clerk does under" Rule 9036(b)(1) had already eliminated the requirement of paper service on registered users of the court's electronic-filing system by other registered users of the system; the amendment extends this exemption from paper service to those who file a document with the court by a means other than through the court's electronic-filing system.) The last sentence of amended Rule 9036(c)(1) states that a court may provide by local rule that if a paper is filed under seal, notice or service must occur by other means. This sentence is designed to account for districts or BAPs in which parties in the case cannot access other participants' sealed filings via the court's electronic-filing system.

What is now Rule 9036(c)(2) carries forward the prior option to effect notice or service by consented-to electronic means.

New Rule 9036(c)(3) defines the term "notice of filing" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket. There are two equivalent terms currently in use: Notice of Electronic Filing and Notice of Docket Activity. "Notice of filing" is intended to encompass both of those terms, as well as any equivalent terms that may come into use in future. The word "electronic" is deleted as superfluous now that electronic filing is the default method.

Subdivision (d). New subdivision (d)(2) carries forward the rule's prior treatment of the timing of notice or service by electronic means other than the court's electronic-filing system. New subdivision (d)(1) addresses the timing of notice or service through the court's electronic-filing system.

Previously, Rule 9036(d) provided simply that "Electronic notice or service is complete upon filing or sending but is not effective if the filer or sender receives notice that it did not reach the person to be notified or served." The adoption of new Rule 9036(c)(1) requires a change to Rule 9036(d): Under new subdivision (c)(1), when a litigant files a paper other than through the court's electronic-filing system, service on a litigant who is registered to receive a

notice of filing through the court's electronic-filing system occurs by means of the notice of filing. But that service does not occur "upon filing" when the filing is made other than through the court's electronic-filing system. There can be a short time lag between the date the litigant files the document with the court and the date that the clerk's office uploads it into the court's electronic-filing system. Thus, new subdivision (d)(1) provides that notice – or service – by a notice of filing sent to a person registered to receive it through the court's electronic-filing system is complete as of the date of the notice of filing.

Although new subdivision (d)(2) carries forward – for notice or service by other electronic means – the prior rule's provision that such notice or service is not effective if the sender "receives notice that it did not reach the person to be notified or served," no such proviso is included in new subdivision (d)(1). This is because experience has demonstrated the general reliability of notice and service through the court's electronic-filing system on those registered to receive notices of electronic filing from that system.

II. Option Two: Maintaining the current filing and service rules for SRLs in the bankruptcy courts

If the Bankruptcy Rules Committee were to adhere to its decision not to participate in the proposed package of filing and service changes, this would require an amendment to Bankruptcy Rule 7005 and might also make an amendment to Bankruptcy Rule 8011 advisable. But no amendments would be needed to Bankruptcy Rule 5005 or 9036.

Part II.A sketches a possible amendment to Rule 7005. Part II.B.1 considers how to treat bankruptcy appeals. Part II.B.2 discusses possible amendments to Rule 8011 that would treat bankruptcy appeals the same as other matters in the district court, while Part II.B.3 suggests that, if instead the decision is made to treat bankruptcy appeals the same as proceedings in the bankruptcy court, this could be accomplished by means of amendments to Rule 8011 and Appellate Rule 6.

A. Rule 7005

Rule 7005 currently incorporates by reference the provisions of Civil Rule 5. To avoid incorporating into the Bankruptcy Rules the new features of proposed amended Civil Rule 5, something like the following amendment to Bankruptcy Rule 7005 should be considered:

Rule 7005. Serving and Filing Pleadings and Other Papers

Fed. R. Civ. P. 5 applies in an adversary proceeding<u>, except that:</u>

<u>(1) Rule 5005(a)(3)(B) – not Fed. R. Civ. P. 5(d)(3)(B) – governs</u>

electronic filing by a self-represented individual; and

(2) The reference in Fed. R. Civ. P. 5(d)(1)(B) to service "under Rule 5(b)(2)" – and the reference in Fed. R. Civ. P. 5(b)(2) to "A notice of filing sent to a person registered to receive it through the court's electronic-filing system" – mean service by sending a paper to a registered user by filing it with the court's electronic-filing system.

Committee Note

For adversary proceedings in bankruptcy, Rule 7005 incorporates by reference Civil Rule 5, including the latter's provisions on filing and service. Changes to Civil Rule 5 necessitate some adjustment to this incorporation by reference.

The concurrent amendments to Civil Rule 5 address two topics concerning self-represented litigants. Civil Rule 5(b) is amended to address service of documents (subsequent to the complaint) filed by a self-represented litigant in paper form. Because all such paper filings are uploaded by court staff into the court's electronic-filing system, Civil Rule 5(b) is amended so that it no longer requires separate paper service by the filer on case participants who receive an electronic notice of the filing from the court's electronic-filing system. Civil Rule 5(d) is amended to expand the availability of electronic modes by which self-represented litigants can file documents with the court and receive notice of filings that others make in the case.

These changes to Civil Rule 5 are not yet appropriate for adoption as mandates for the bankruptcy courts. It currently appears to be rare for bankruptcy courts to permit self-represented litigants to use the court's electronic-filing system; thus, a rule requiring the bankruptcy courts to permit such access or to provide alternative modes of electronic access could cause greater disruption in bankruptcy courts than in the district courts or courts of appeals.

Moreover, a given bankruptcy case may include multiple self-represented litigants. Under the amendments to Civil Rule 5, any self-represented litigant who is neither enrolled in the court's electronic-filing system nor enrolled in a court-provided electronic-noticing program would continue to be served by means other than electronic notice from the court. But in a case that includes two or more such litigants, those self-represented litigants might be misled by amended Civil Rule 5 into omitting to make traditional service on the other self-represented litigants. Admittedly, this risk appears not to have materialized in disruptive ways in the district courts that have already eliminated the requirement of paper service on litigants who receive notices from the court's electronic-filing system. It may be the case that self-represented litigants learn their particular service obligations on other self-represented litigants from an order entered

in the case or by calling the clerk's office, and therefore duly serve any self-represented litigants in the case who need such service. But the lack of known problems in these district courts might also stem from the rarity – in the district courts – of cases featuring more than one self-represented litigant who is neither registered with the court's electronic-filing system nor registered to receive electronic notices from the court. Because such cases are less rare in the bankruptcy courts, problems might be more likely to result in those courts.

To avoid this risk, the Bankruptcy Rules will continue to require that all self-represented litigants make traditional service on all other litigants. While this will continue to require redundant paper service (by self-represented litigants who are not using the court's electronic-filing system) on the many participants in a bankruptcy proceeding who neither need nor want such paper copies, it will avoid the risk that a self-represented litigant would fail to make the required traditional service on another self-represented litigant who needs it.

Accordingly, Rule 7005 is amended to provide that Rule 5005(a)(3)(B) – not Fed. R. Civ. P. 5(d)(3)(B) – governs electronic filing by a self-represented individual. The amendments to Rule 7005 also provide that Civil Rule 5(d)(1)(B) reference to service "under Rule 5(b)(2)" and Civil Rule 5(b)(2)'s reference to "[a] notice of filing sent to a person registered to receive it through the court's electronic-filing system" mean service by sending a paper to a registered user by filing it with the court's electronic-filing system.

B. Rule 8011

Assuming that the Bankruptcy Rules maintain their current approach to self-represented litigants' service and electronic filing, it is necessary to consider which approach – the current one or the one that will be newly adopted for the Civil and Appellate Rules – will govern in bankruptcy appeals.

Part II.B.1 discusses policy arguments for and against the various possible approaches, and suggests that the best approach may be to treat bankruptcy appeals the same way as other matters that are heard in the district courts and courts of appeals. This approach is illustrated in the sketch set out in Part II.B.2. An alternative would be to treat bankruptcy appeals the same way on appeal as they are treated in the bankruptcy courts. This approach is discussed in Part II.B.3.

1. Policy choices

Before setting out the sketches, it is useful to consider the policy arguments for and against each one. At the outset, it seems useful to note that whatever choice is made on filing and service for SRLs in bankruptcy appeals, the application of those choices will be to a relatively small number of cases and litigants. For example, in the year ending September 30, 2023:

- In the federal district courts, of 339,731 civil cases filed, 1,346 were bankruptcy appeals and another 140 were matters withdrawn from the bankruptcy courts.

- In the five Bankruptcy Appellate Panels as group, 320 appeals were commenced.

- In the federal courts of appeals in the year ending September 30, 2023, of 39,987 total appeals filed, 657 were bankruptcy appeals.

So bankruptcy appeals are quite rare compared to original proceedings in either the bankruptcy courts or the district courts. (In addition, one might speculate that self-represented litigants may be less likely to litigate actively in bankruptcy appeals than in proceedings in the bankruptcy courts. This might be true, for example, to the extent that appeals in bankruptcy cases are more likely to be taken in high-stakes and complex matters. But this is, of course, pure speculation; I haven't found figures concerning the number of SRLs involved in bankruptcy appeals.)

In sum, the group of litigants *in bankruptcy appeals* who would be affected by any rule change is small. And so one might argue that the stakes of the choices discussed in this part are relatively low, and that one might place a premium on choosing the options that best promote clarity and administrability.

a. SRL e-filing access in bankruptcy appeals

I can see some arguments in favor of having the practice on appeal[14] track the ordinary practice of the relevant appellate court, at least as to electronic-filing access. That is to say, a court that ordinarily allows SRLs to use its electronic-filing system presumably would experience no difficulties in allowing SRLs to do so in bankruptcy appeals as well. And an SRL would be unlikely to be confused by such an approach; it seems easy to understand that one level of court might permit such access even though another level of court bars it. In fact, such a phenomenon currently exists today, given the relatively greater openness to such access shown by the local practices of the courts of appeals (compared with the district courts) and of the district courts (compared with the bankruptcy courts).

We should also take account of the fact that in some circuits bankruptcy appeals may go to a BAP instead of to a district court. Thus, we should consider how any proposed amendment would affect BAPs.[15] Three of the BAPs have posted provisions indicating that they currently

14 I envision that the filing of the notice of appeal would occur in accordance with the practice in the lower court – here, the bankruptcy court. So by practice on appeal, I mean events after the filing of the notice of appeal.

15 There may well be close connections between the court of appeals for a circuit and the BAP for that circuit. See, e.g., Eighth Circuit BAP Rule 8024A(a)(1) ("The Clerk of the United

take approaches to SRL e-filing that would be compatible with proposed Civil Rule 5:

- First Circuit BAP. See General Order No. 2 Rule 1(c): "Use of the ECF System is voluntary for all litigants proceeding without representation by an attorney …." See also id. Rule 2(c) (offering additional filing methods for SRLs).

- Ninth Circuit BAP. See Administrative Order Regarding Electronic Filing in BAP Cases Rule 2(d): "Any litigant who is not a licensed attorney authorized to practice before the BAP may file a motion requesting leave to register for CM/ECF."

- Tenth Circuit BAP Rule 8001-1(b): "Individuals not represented by an attorney … may, but are not required to, file using the ECF system."

The Eighth Circuit BAP's approach is compatible with the proposed Civil Rule 5 approach in that it's receptive to SRL e-filing, but in fact this BAP's rule goes beyond the current proposal by making e-filing mandatory for non-incarcerated SRLs. See Eighth Circuit BAP Rule 8011A: "All documents, other than those filed by an inmate, shall be filed electronically…."[16] The apparently mandatory aspect of this BAP's program is incompatible with proposed Civil Rule 5, but note that it's also in violation of current Bankruptcy Rule 8011(a)(2)(B)(ii), which provides that SRLs "may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions."

The Sixth Circuit BAP may already be taking an approach that's consistent with the proposed rule, but that's not clear from this BAP's published materials, so further checking might be advisable. Sixth Circuit BAP Rule 8011-1 states: "…. The 'Sixth Circuit Guide to Electronic Filing' is adopted to govern the filing of documents in cases filed with the BAP." Arguably, this evinces an intent to track whatever the Sixth Circuit does concerning e-filing. And the Sixth Circuit now permits pro se litigants to file by email. But it does so in a local rule, not in the Sixth Circuit Guide to Electronic Filing. So without checking further with the BAP, it is not possible to be sure what the BAP's current practice is. And it's not clear whether the Sixth Circuit offers an electronic noticing program as such; it does allow people in general to sign up for email notices from PACER concerning a case, but that's different from an e-noticing program. So the proposed amendments might effect more of a change to practice in the Sixth Circuit Court of Appeals and BAP than in some other circuits.

I am less able to think of arguments in favor of having the e-filing practice on appeal

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States Court of Appeals for the Eighth Circuit shall serve as the Clerk of the United States Bankruptcy Appellate Panel for the Eighth Circuit.").

16 By contrast, the Eighth Circuit makes it optional for pro se filers in the court of appeals: "Use of the CM/ECF system for filing is mandatory for attorney filers. It is voluntary for non-attorney filers." https://media.ca8.uscourts.gov/files/faq.pdf .

track that of the bankruptcy court below, though I welcome any suggestions.

b. Service by SRLs in bankruptcy appeals

As to service, the question is whether it makes sense to change the approach to service by non-electronically-filing SRLs on CM/ECF participants in bankruptcy appeals to the district courts and BAPs. It seems to me that adopting the new service approach for such appeals could be okay if the circumstances of bankruptcy appeals differ sufficiently from those of litigation in the bankruptcy court itself. The main impediment to changing the service approach in the bankruptcy court is the concern that there may be multiple SRLs in the same proceeding, and that if multiple SRLs are in fact not participating in CM/ECF or a court sponsored electronic noticing system, then they might erroneously fail to serve each other by traditional means. A factual question to which I don't know the answer is whether the same difficulty is likely to arise on appeal. If it is likely to arise on appeal, then that would weigh in favor of having bankruptcy appeals track the bankruptcy-court practice with respect to service.

On the other hand, if the multiple-SRL problem is not as likely to arise on appeal, then perhaps the appellate practice could diverge from the bankruptcy-court practice on service without causing problems. It's not obvious that changing the service requirement that applies to self-represented paper filers in the district courts and courts of appeals would cause confusion for SRLs while they litigate in the bankruptcy courts. For one thing, a SRL typically will have litigated in the bankruptcy court – and become accustomed to the service requirements that apply there – before they litigate on appeal. And in many appeals (e.g., final-judgment appeals that result in affirmance), there may be no further proceedings in the bankruptcy court after the appellate proceeding concludes. Given that there are so few bankruptcy appeals generally, it seems as though the likelihood of confusion from a different service rule on appeal may be low.

As with filing, so too with service, another consideration is whether changing the practice applicable to appeals would disrupt the BAPs' current practices. Here, it does appear that – like many district courts – the BAPs probably follow the national rules' current approach on the service question. Four of the five BAPs either have a provision making clear that they follow Bankruptcy Rule 8011(c)'s approach to service or seem likely to do so:

- First Circuit BAP: "In accordance with Fed. R. Bankr. P. 8011(c), documents filed by any means other than through the ECF System must also be served by one of the following methods on the other parties to the appeal: personal delivery; mail; third-party commercial carrier; or email, if the entity served consented in writing to email service…."

- Sixth Circuit BAP, Ninth Circuit BAP, and Tenth Circuit BAP (possibly): A quick search didn't disclose any local provision on point, so I assume that the court applies Rule 8011(c).

The Eighth Circuit BAP has an ambiguous local provision that might be read to indicate that even paper filers needn't provide separate service on litigants who will receive the electronic notice via CM/ECF. Eighth Circuit BAP Rule 8014A(c) states: " Service shall be made by CM/ECF upon filing of the brief. However, one paper copy of the brief shall be served on any party who is not a CM/ECF participant."

c. Overall policy considerations

In sum, I can see arguments for having service practice in bankruptcy appeals continue to track the service practice in the bankruptcy courts, though those arguments are strongest as to the level of the intermediate appeal to district courts and BAPs, and somewhat weaker at the level of the court of appeals (because the courts of appeals – unlike the BAPs – would be moving to the new service practice anyway if the proposed rule changes are adopted).

There is also the issue of overall simplicity of design. It may be useful for the practice on bankruptcy appeals to track the ordinary practice in the relevant appellate court. It also may be useful for the treatment of e-filing and service by SRLs to be treated in tandem – that is, to apply the updated service approach whenever the updated e-filing approach applies and vice versa. Taken together, these considerations may weigh in favor of treating bankruptcy appeals the same way as other matters that are heard in the district courts and courts of appeals. The next section illustrates that approach.

2. Treating bankruptcy appeals the same as other matters in the district court: Amendment to Rule 8011 (and conforming amendment to Rule 8004(a)(3))

If the committees decide that the service and filing approaches that ordinarily apply in the district courts and courts of appeals should also apply on bankruptcy appeals, then it will be necessary to bring Rule 8011 into parallel with the goals of the SRL service and e-filing project.[17] This could be accomplished by means of the amendments sketched in Part I.B above, with one adjustment.

The adjustment concerns notices of appeal. Because notices of appeal are filed in the court from which the appeal is taken, the practice concerning notices of appeal from the bankruptcy court should track the practice that applies to other filings in the bankruptcy court. One can argue that the proposed sketch shown in Part I.B would accomplish that, because Rule 8011 as currently drafted seems designed only to govern filings in the district court or BAP, and

17 By contrast, if the committees were to decide that the new service and filing approaches should apply to bankruptcy appeals only in the courts of appeals – and not in the district courts or BAPs – then no changes to Rule 8011 would be necessary. That is because Appellate Rule 25(a)(5), not Bankruptcy Rule 8011, governs filing and service in the courts of appeals.

not filings in the bankruptcy court.[18] But once Rule 8011's treatment of filing and service diverges from the approach that applies in the bankruptcy court, it will become more important to ensure clarity concerning which rule applies to the filing of a notice of appeal (or other document, such as a motion for a stay) in the bankruptcy court.

A straightforward way to accomplish this would be to insert a new Rule 8011(a) that would read: "**(a) Scope.** This rule governs signature, service, and filing of documents required or permitted to be filed in a district court or BAP." Then Rule 8011's existing subdivisions would be re-lettered – that is, (a) would become (b), and so on. To adjust to the re-lettering, one would also need to make a conforming amendment to Rule 8004.[19] Admittedly, there are always transition costs associated with re-numbering an entire rule, because references to the prior version of the rule will no longer track the current numbering. But in the case of Rule 8011, those transition costs may be relatively manageable. As of February 27, 2025, a Westlaw search for court decisions citing Rule 8011 after November 30, 2014 (that is, the last day before the comprehensive 2014 revisions took effect) pulls up only 14 cases. Concededly, the renumbering could also require changes in local rules; but if Rule 8011 were to be amended to adopt the new approach to SRL service and e-filing, local rule amendments would be necessary anyway.

In sum, to implement the policy choice of updating bankruptcy appellate practice in the district courts and BAPs to track the proposed new approach to SRL service and e-filing, one could add the new subdivision 8011(a) concerning scope, re-letter the remaining subdivisions of Rule 8011, implement the proposed amendments to Rule 8011 sketched in Part I.B of this memo, and make a conforming amendment to the cross-reference in Rule 8004(a)(3):

Rule 8011. Filing and Service; Signature

(a) Scope. This rule governs signature, service, and filing of documents required or permitted to be filed in a district court or BAP.

(b) Filing.

18 One might initially be tempted to argue that Rule 8001(a) also suggests as much, because it provides in part that "[t]hese Part VIII rules govern the procedure in a United States district court and in a bankruptcy appellate panel on appeal from a bankruptcy court's judgment, order, or decree," and it does not say anything about the Part VIII rules governing procedure in the bankruptcy court. But that argument plainly doesn't work: It proves too much. The Part VIII rules explicitly govern some activities in the bankruptcy court, such as the filing of the notice of appeal. See Rule 8003(a)(1).

19 Specifically, one would revise Rule 8004(a)(3) to refer to "Rule 8011(e)" instead of "Rule 8011(d)."

(1) With the Clerk. A document required or permitted to be filed in a district court or BAP must be filed with the clerk of that court.

(2) Method and Timeliness.

(A) Nonelectronic Filing.

* * *

(B) Electronic Filing.~~(i)~~[20] By a Represented Person--Generally Required; Exceptions. An entity represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for cause or is allowed or required by local rule.

~~(ii)~~ **(C) Electronic Filing By ~~an Unrepresented~~ a Self-Represented Individual--When Allowed or Required.**

(i) In General. ~~An~~ A self-represented individual ~~not represented by an attorney: •~~ may ~~file electronically only if allowed by~~ use the court's electronic-filing system [to file documents and receive notice of activity in the case] unless a court order or ~~by~~ local rule prohibits the individual from doing so.~~; and~~ A self-represented individual ~~•~~ may be required to file electronically only by ~~court~~ order in a case~~,~~ or by a local rule that includes reasonable exceptions.

(ii) Local Provisions Prohibiting Access. If a local rule – or any other

20 I suggest this re-numbering in order to avoid running out of levels of numbering and lettering.

local court provision that extends beyond a particular litigant or case – prohibits self-represented [individuals] from using the court's electronic-filing system, the provision must include reasonable exceptions or must permit the use of another electronic method for filing [documents] and for receiving electronic notice [of activity in the case].

(iii) Conditions and Restrictions on Access. A court may set reasonable conditions and restrictions on self-represented [individuals'] access to the court's electronic-filing system.

(iv) Restrictions on a Particular [Individual]. A court may deny a particular [individual] access to the court's electronic-filing system and may revoke an [individual]'s previously granted access for not complying with the conditions authorized in (iii).

~~(iii)~~ **(D) Electronically Filed Same as a Written Paper.** A document filed electronically is a written paper for purposes of these rules.

~~(C)~~ (E) **When Paper Copies Are Required.** No paper copies are required when a document is filed electronically. If a document is filed by mail or by delivery to the district court or BAP, no additional copies are required. But the district court or BAP may, by local rule or order in a particular case, require that a specific number of paper copies be filed or furnished.

(3) Clerk's Refusal of Documents. The court clerk must not refuse to accept for filing any document solely because it is not presented in proper form as required by

these rules or by any local rule or practice.

~~(b)~~ (c) **Service of All Documents Required.** Unless a rule requires service by the clerk or the document will be served under (d)(1), a party must, at or before the time of the filing of a document, serve it on the other parties to the appeal. Service on a party represented by counsel must be made on the party's counsel.

~~(c)~~ (d) **Manner of Service.**

(1) **Service by a Notice of Filing Sent Through the Court's Electronic-Filing System.** A notice of filing sent to a person registered to receive it through the court's electronic-filing system constitutes service on that person as of the notice's date. But a court may provide by local rule that if a paper is filed under seal, it must be served by other means.

~~(1) Nonelectronic~~ (2) **Service by Other Means.** ~~Nonelectronic service~~ A paper may also be served under this rule by ~~any of the following~~:

(A) personal delivery;

(B) mail; ~~or~~

(C) third-party commercial carrier for delivery within 3 days~~.~~; or

~~(2) Service By Electronic Means. Electronic service may be made by:~~

~~(A) sending a document to a registered user by filing it with the court's electronic-filing system; or~~

~~(B) using other~~ (D) electronic means that the person served has consented to in writing.

(3) When Service Is Complete.

(A) Service under (d)(1) is complete as of the date of the notice of filing.

(B) Service by other electronic means is complete on sending, unless the person making service receives notice that the document was not received by the person served.

(C) Service by mail or by third-party commercial carrier is complete on mailing or delivery to the carrier. ~~Service by electronic means is complete on filing or sending, unless the person making service receives notice that the document was not received by the person served.~~

(4) Definition of "Notice of Filing." The term "notice of filing" in this rule includes a notice of docket activity, a notice of electronic filing, and any other similar electronic notice provided to case participants through the court's electronic-filing system to inform them of activity on the docket.

~~(d)~~ (e) Proof of Service.

(1) Requirements. A document presented for filing must contain either of the following if it was served other than through the court's electronic-filing system:

(A) an acknowledgement of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) the mail or electronic address, the fax number, or the address of the place of delivery--as appropriate for the manner of service--for

each person served.

(2) Delayed Proof of Service. A district or BAP clerk may accept a document for filing without an acknowledgement or proof of service, but must require the acknowledgment or proof of service to be filed promptly thereafter.

(3) For a Brief or Appendix. When a brief or appendix is filed, the proof of service must also state the date and manner by which it was filed.

~~(e)~~ (f) **Signature Always Required.**

(1) Electronic Filing. Every document filed electronically must include the electronic signature of the person filing it or, if the person is represented, the counsel's electronic signature. 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.

(2) Paper Filing. Every document filed in paper form must be signed by the person filing it or, if the person is represented, by the person's counsel.

Committee Note

Rule 8011 is amended to address two topics concerning self-represented litigants. (Concurrent amendments are made to Rule 7005, Civil Rule 5, Criminal Rule 49, and Appellate Rule 25.) A new Rule 8011(a) addresses the scope of Rule 8011. Rule 8011(a) becomes Rule 8011(b) and is amended to expand the availability of electronic modes by which self-represented litigants can file documents with the court and receive notice of filings that others make in the case. Rule 8011(c) becomes Rule 8011(d) and is amended to address service of documents filed by a self-represented litigant in paper form. Because all such paper filings are uploaded by court staff into the court's electronic-filing system, there is no need to require separate paper service by the filer on case participants who receive an electronic notice of the filing from the court's electronic-filing system. New Rule 8011(d)'s treatment of service is also reorganized to reflect the primacy of service by means of the electronic notice.

Subdivision (a). As noted above, concurrent amendments are changing the practice for

filings by self-represented litigants under the Civil, Criminal and Appellate Rules as well as Rule 8011. However, for the reasons explained in the Committee Note to Rule 7005, no similar amendments are being made elsewhere in the Bankruptcy Rules. Accordingly, this package of amendments will not change the practice for filings by self-represented litigants in the bankruptcy courts. Notices of appeal are filed in the court from which the appeal is taken, and so the practice concerning notices of appeal from the bankruptcy court should track the practice that applies to other filings in the bankruptcy court. Rule 8011 is designed only to govern filings in the district court or BAP, and not filings in the bankruptcy court. But now that Rule 8011's treatment of filing and service will diverge from the approach that applies in the bankruptcy court, it becomes more important to ensure clarity concerning which rule applies to the filing of a notice of appeal (or other document, such as a motion for a stay) in the bankruptcy court. Accordingly, new subdivision (a) provides that Rule 8011 governs signature, service, and filing of documents required or permitted to be filed in a district court or BAP.

Subdivision (b)(2)(C). Under new Rule 8011(b)(2)(C)(i), the presumption is the opposite of the presumption set by the prior Rule 8011(a)(2)(B)(ii). That is, under new Rule 8011(b)(2)(C)(i), self-represented litigants are presumptively authorized to use the court's electronic-filing system to file documents in their case subsequent to the case's commencement. If a district court or BAP wishes to restrict self-represented litigants' access to the court's electronic-filing system, it must adopt an order or local rule to impose that restriction.

Under Rule 8011(b)(2)(C)(ii), a local rule or general court order that bars persons not represented by an attorney from using the court's electronic-filing system must include reasonable exceptions, unless that court permits the use of another electronic method for filing documents and receiving electronic notice of activity in the case. But Rule 8011(a)(2)(C)(iii) makes clear that the court may set reasonable conditions on access to the court's electronic-filing system.

A court can comply with Rules 8011(b)(2)(C)(ii) and (iii) by doing either of the following: (1) Allowing reasonable access for self-represented litigants to the court's electronic-filing system, or (2) providing self-represented litigants with an alternative electronic means for filing (such as by email or by upload through an electronic document submission system) and an alternative electronic means for receiving notice of court filings and orders (such as an electronic noticing program).

For a court that adopts the option of allowing reasonable access to the court's electronic-filing system, the concept of "reasonable access" encompasses the idea of reasonable conditions and restrictions. Thus, for example, access to electronic filing could be restricted to non-incarcerated litigants and could be restricted to those persons who satisfactorily complete required training and/or certifications and comply with reasonable conditions on access. Also, a court could adopt a local provision stating that certain types of filings – for example, notices of appeal – cannot be filed by means of the court's electronic-filing system. Rule 8011(b)(2)(C)(ii) refers to "a local rule – or any other local court provision that extends beyond a particular litigant

or case" to make clear that Rule 8011(b)(2)(C)(ii) does not restrict a court from entering an order barring a specific self-represented litigant from accessing the court's electronic-filing system.

Rule 8011(b)(2)(C)(iv) provides that the court may deny a specific self-represented litigant access to the court's electronic-filing system, and that the court may revoke a self-represented litigant's access to the court's electronic-filing system.

Subdivision (c). Existing Rule 8011(b) generally requires that a party, "at or before the time of filing a document, [must] serve it on the other parties to the appeal." The existing rule exempts from this requirement instances when "a rule requires service by the clerk." The rule is amended to add a second exemption, for instances when "the document will be served under (d)(1)." This amendment is necessary because new Rule 8011(d)(1) encompasses service by the notice of filing that results from the clerk's uploading into the system a paper filing by a self-represented litigant. In those circumstances, service will not occur "at or before the time of filing a document," but it will occur when the court's electronic-filing system sends the notice to the litigants registered to receive it.

Subdivision (d). Rule 8011(d) is restructured so that the primary means of service – that is, service by means of the court's electronic-filing system – is addressed first, in subdivision (d)(1). Existing Rule 8011(c)(1) becomes new Rule 8011(d)(2), which continues to address alternative means of service. New Rule 8011(d)(4) defines the term "notice of filing" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket.

Subdivision (d)(1). Amended Rule 8011(d)(1) eliminates the requirement of separate (paper) service on a litigant who is registered to receive a notice of filing from the court's electronic-filing system. Litigants who are registered to receive a notice of filing include those litigants who are participating in the court's electronic-filing system with respect to the case in question and also include those litigants who receive the notice because they have registered for a court-based electronic-noticing program. (Current Rule 8011(c)(2)(A)'s provision for service by "sending a document to a registered user by filing it with the court's electronic-filing system" had already eliminated the requirement of paper service on registered users of the court's electronic-filing system by other registered users of the system; the amendment extends this exemption from paper service to those who file by a means other than through the court's electronic-filing system.)

The last sentence of amended Rule 8011(d)(1) states that a court may provide by local rule that if a paper is filed under seal, it must be served by other means. This sentence is designed to account for districts or BAPs in which parties in the case cannot access other participants' sealed filings via the court's electronic-filing system.

Subdivision (d)(2). Subdivision (d)(2) carries forward the contents of current Rules 8011(c)(1) and (2), with two changes.

The subdivision's introductory phrase ("Nonelectronic service may be by any of the following") is amended to read "A paper may also be served under this rule by." This locution ensures that what will become Rule 8011(d)(2) remains an option for serving any litigant, even one who receives notices of filing. This option might be useful to a litigant who will be filing non-electronically but who wishes to effect service on their opponent before the time when the court will have uploaded the filing into the court's system (thus generating the notice of filing).

Prior Rule 8011(c)(2)(A)'s reference to "sending a document to a registered user by filing it with the court's electronic-filing system" is deleted, because this is now covered by new Rule 8011(d)(1).

Subdivision (d)(3). Rule 8011(c)(3) ("When Service is Complete") becomes Rule 8011(d)(3) and is amended to distinguish between service under new Rule 8011(d)(1) – that is, service by means of the notice of electronic filing, which is complete as of the notice's date – and service by "other electronic means," which continues to be complete on "sending, unless the person making service receives notice that the document was not received by the person served." Experience has demonstrated the general reliability of notice and service through the court's electronic-filing system on those registered to receive notices of electronic filing from that system.

Subdivision (d)(4). New Rule 8011(d)(4) defines the term "notice of filing" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket. There are two equivalent terms currently in use: Notice of Electronic Filing and Notice of Docket Activity. "Notice of filing" is intended to encompass both of those terms, as well as any equivalent terms that may come into use in future. The word "electronic" is deleted as superfluous now that electronic filing is the default method.

* * *

Rule 8004. Leave to Appeal from an Interlocutory Order or Decree Under 28 U.S.C. § 158(a)(3)

(a) Notice of Appeal and Accompanying Motion for Leave to Appeal. To appeal under 28 U.S.C. § 158(a)(3) from a bankruptcy court's interlocutory order or decree, a party must file with the bankruptcy clerk a notice of appeal under Rule 8003(a). The notice must:

(1) be filed within the time allowed by Rule 8002;

(2) be accompanied by a motion for leave to appeal prepared in accordance with (b); and

(3) unless served electronically using the court's electronic-filing system, include proof of service in accordance with Rule 8011~~(d)~~ (e).

* * *

Committee Note

Rule 8004(a)(3) is amended to conform to the renumbering of Bankruptcy Rule 8011(d) as Rule 8011(e).

3. Treating bankruptcy appeals the same as proceedings in the bankruptcy court: Possible Appellate Rules amendment

Alternatively, the committees might decide not to amend Bankruptcy Rule 8011, and to preserve the current approach to filing and service for purposes of appeals to a district court or BAP. Note, though, that absent additional amendments, the service and filing approaches that apply on appeal to the court of appeals might be thought to track the (new) procedures that would apply in the district courts and courts of appeals generally.

This is because, under the current rules, Appellate Rule 25(a)(5), not Bankruptcy Rule 8011, governs filing and service in the courts of appeals. Appellate Rule 1(a)(1) provides: "These rules govern procedure in the United States courts of appeals." Bankruptcy Rule 8001(a) provides that the Part VIII Rules "govern certain procedures on appeal to a United States court of appeals under 28 U.S.C. § 158(d)." The 2014 Committee Note to Rule 8001(a) lists (as Part VIII Rules that "relate to appeals to courts of appeals") Rules 8004(e), 8006, 8007, 8008, 8009, 8010, 8025, and 8028) – but not Rule 8011.

Nor would it be persuasive to suggest that Bankruptcy Rule 1001 somehow applies Rules 5005 or 9036 to bankruptcy matters in the courts of appeals. It's true that Rule 1001(a) states that "[t]hese rules, together with the Official Bankruptcy Forms, govern the procedure in cases under the Bankruptcy Code, Title 11 of the United States Code." But Rules 5005 and 9036 are drafted in ways that show they are not designed to address proceedings in the court of appeals. For example, each refers to the "clerk," which is defined by Rule 9001(b)(2) to mean "a bankruptcy clerk if one has been appointed; otherwise, it means the district-court clerk."

Thus, the current rules allocate to Appellate Rule 25(a)(5) the role of governing filing and service for proceedings in the courts of appeals, including bankruptcy appeals. So if the rulemakers wish to exempt bankruptcy appeals from proposed updated treatment of SRL service

and e-filing in the courts of appeals, some amendments to the Appellate and Bankruptcy Rules would seem necessary to accomplish that. I am not sketching such amendments here, because I surmise that the committees will prefer to keep the practice in the courts of appeals uniform across types of appeal rather than exempting bankruptcy appeals from the new SRL service and e-filing approach in the courts of appeals. But one could tentatively say that the change could be accomplished by amending Rule 8011 and also Appellate Rule 6 (Appeal in a Bankruptcy Case).

III. Conclusion

The project on SRL service and e-filing, if it goes forward in any form, will require amendments to the Bankruptcy Rules. This memo sketched the basic choices that will arise depending on whether or not bankruptcy-court practice will diverge from the new SRL service and e-filing practices that will apply in the district courts and courts of appeals.

Encl.

TAB 12

12. Discovery Subcommittee – Filing Under Seal

Under the Action items heading, the Discovery Subcommittee presented its proposed change to Rule 45(b)(1) on service of a subpoena. The other topic on the Subcommittee's agenda is filing under seal.

This topic has been on the Subcommittee's agenda for several years. For a while, the Subcommittee's work was paused while an A.O. committee worked on practices for sealing. Then we were informed that there was no reason to continue to defer action.

At that point, the Subcommittee had drafted a possible rule change that would confirm something that seemed established by caselaw – filing under seal can be justified only by a stronger showing than is necessary for granting a protective order under Rule 26(c).

Because there seemed little debate about whether the standard for filing under seal was different, the question arose whether adopting a rule saying so would serve a purpose. Because the various circuits expressed the pertinent standard in slightly different ways, adopting an amendment might actually cause problems if it were taken to alter the existing standard in some circuits.

Some proponents of amendments to address sealing emphasized the variety of procedures adopted in different district courts providing procedures for sealing decisions. So a question that emerged was whether the national rules should prescribe procedures for motions to seal.

At the same time, there were suggestions that – owing to a variety of factors including nature of caseload – it might be more appropriate not to impose nationwide procedures on decisions that could involve different challenges in different districts.

In addition, it also emerged that "sealing" did not have one universal meaning. Instead, there seem to be "flavors" of sealing that might intrinsically call for different procedures.

So the following discussion is designed to introduce the filing under seal issues that might have to be addressed were nationwide procedural directives to be adopted. For the present, then, the Subcommittee is hoping for direction from the full Committee on several issues:

(1) Should the Subcommittee try to develop nationally uniform procedures for handling motions to seal?

(2) If so, how should it go about gathering information to inform a decision about which procedures to adopt? As introduced below, the various proposals we have received cannot all be adopted as some conflict with others.

(3) If the national rules do not prescribe procedures for motions to seal, is there a value nonetheless to amend the rules to specify that the standard for sealing court files differs from the standard for protective orders?

At its Feb. 28 meeting, the Subcommittee held a discussion of these issues, largely based on the introductory material below. The notes of that discussion appear along with the other notes of the Feb. 28 meeting in the Action Items section of this agenda book.

Here is the introduction that was before the Subcommittee:

Filing Under Seal – nationally uniform procedures?

Because the goal on this topic is likely to be to identify a good way to obtain information that would inform our choices, it seems useful to begin with some background.

Focus on sealed filings began with 20-CV-T, a submission from Prof. Eugene Volokh, the Reporters' Committee for Freedom of the Press, and the Electronic Frontier Foundation, urging the adoption of a new Rule 5.3 with very detailed requirements for motions to seal materials filed in court, and strict limits on the handling of such motions. Various other submissions have followed, including 21-CV-G, from the Lawyers for Civil Justice, opposing Prof. Volokh's proposals, 21-CV-T, from the Knight First Amendment Institute at Columbia University supporting rulemaking (attaching a 95-page compendium of the local rules of district courts), and 22-CV-A, The Sedona Conference Commentary on the Need for Guidance and Uniformity and filing ESI and Records Under Seal, including a seven-page model rule. Links to these submissions are provided at the end of this report.

Going forward, it is expected that the Subcommittee will receive guidance from the Clerk Liaison and it is also hoped that the Federal Magistrate Judges Association will continue to provide advice and guidance.

The standard for sealing

The Advisory Committee has received a number of submissions urging that the rules should explicitly recognize that issuance of a protective order under Rule 26(c) invokes a "good cause" standard quite distinct from the more demanding standards that the common law and First Amendment require for sealing court files. There seems to be little dispute about the reality that the standards are different, though different circuits have articulated and implemented the standards for filing under seal in somewhat distinct ways. Indeed, it might be said that there is relative uniformity among the circuits that filings under seal must meet a higher standard than protective order motions. As the Subcommittee has previously reported, that should not be difficult to accomplish. See, e.g., *June Medical Services, L.L.C. v. Phillips*, 22 F.4th 512, 521 (5th Cir. 2022) ("Different legal standards govern protective orders and sealing orders.").

The Subcommittee's current orientation is not to try to displace any of the circuit standards, or to try to determine how much they differ. Instead, when the issues were first raised, the Discovery Subcommittee focused on making explicit in the rules the differences between issuance of a protective order regarding materials exchanged through discovery and filing under seal. Two years ago, therefore, it presented the full Committee with sketches of rule provisions to accomplish this goal:

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(c) Protective Orders.

* * * * *

(4) ***Filing Under Seal.*** Filings may be made under seal only under Rule 5(d)(5).

* * * * *

The Committee Note could recognize that protective orders – whether entered on stipulation or after full litigation on a motion for a protective order – ought not also authorize filing of "confidential" materials under seal. Instead, the decision whether to authorize such filing under seal should be handled by a motion under new Rule 5(d)(5).

Rule 5. Serving and Filing Pleadings and Other Papers

(d) Filing.

* * * * *

(5) ***Filing Under Seal.*** Unless filing under seal is directed [or permitted] {authorized} by a federal statute or by these rules, no paper [or other material] may be filed under seal unless [the court determines that] filing under seal is justified and consistent with the common law and First Amendment rights of public access to court filings.[1]

This provision could be accompanied by a Committee Note explaining that the rule does not take a position on what exact locution must be used to justify filing under seal, or whether it applies to all pretrial motions. For example, some courts regard "non-merits" or "discovery" motions as not implicating rights of public access comparable to those involved with "merits" motions. Trying to draw such a line in a rule would likely prove difficult, and might alter the rules in some circuits.

One starting point is that since 2000 Rule 5(d)(1)(A) has directed that discovery materials not be filed until "used in the proceeding or the court orders filing." Exchanges through discovery subject to a protective order therefore do not directly implicate filing under seal.

Another starting point here is that there are federal statutes and rules that call for sealing. The False Claims Act is a prominent example of such a statute. Within the rules, there are also provisions that call for submission of materials to the court without guaranteeing public access. Rule 26(b)(5)(B) obligates a party that has received materials through discovery and then been notified that the producing party inadvertently produced privileged materials to return or sequester

[1] The bracketed addition "or permitted" was suggested during the Advisory Committee's October 2023 meeting, to reflect the possibility that federal law might permit such filing without directing that it occur. It might be better to say "authorized," so that possibility is also included in the above sketch.

the materials, but also says the receiving party may "promptly present the information to court under seal for a determination of the [privilege] claim." As noted below, Rule 5.2(d) also authorizes court orders for filing under seal to protect privacy. Rule 5.2(h) provides that if a person entitled to protection regarding personal information under Rule 5.2(a) does not file under seal, the protection is waived. Other rule provisions mentioning filing under seal include:

Rule 5.2(f) – Option to file unredacted filing under seal, which the court must retain as part of the record.

Rule 26(c)(1)(F) – protective order "requiring that a deposition be sealed and opened only on court order" [possibly redundant now that discovery materials are filed only when "used in the proceeding"]

Rule 45(e)(2)(B) – subpoena provision parallel to Rule 26(b)(5)(B)

Rule G(3)(c)(ii)(B) – complaint in forfeiture action filed under seal

Rule G(5)(a)(ii)(C)(1) – 60-day deadline for filing claim in forfeiture proceeding "not counting any time when the complaint was under seal"

There is a lingering issue about what constitutes "filing." Rule 5(d)(1)(A) says that "[a]ny paper after the complaint that is required to be served must be filed no later than a reasonable time after service." One would think that an application to the court for a ruling on privilege under Rule 26(b)(5)(B) should be served on the party (or nonparty) that asserted the privilege claim. Having given the notice required by the rule, the party claiming privilege protection is surely aware of the contents of the allegedly privileged materials, so service of the motion (including the sealed information) would not be inconsistent with the privilege. And it is conceivable that should the court conclude the materials are indeed privileged its decision could be reviewed on appeal, presumably meaning that the sealed materials themselves should somehow be included in the record. Perhaps they would be regarded as "lodged" rather than filed.

As noted already, Rule 5.2(d) also has provisions on filing under seal to implement privacy protections per court order. In somewhat the same vein, Rule 5.2(c) limits access to electronic files in Social Security appeals and immigration cases.

Rule 79 also may bear on these issues. Rule 79(d) directs the clerk to keep "records required by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference."

Finally, it is worth noting that it appears there are different degrees of sealing. Beyond ordinary sealing, there may be more aggressive sealing for information that is "highly confidential," or some similar designation. And national security concerns may in exceptional circumstances call for even stricter confidentiality protections. It is not clear that a Civil Rule adopting these distinctions is necessary or appropriate.

For the present, however, the Subcommittee does not have a pressing need for guidance from the Committee about the standard for sealing.

Uniform procedures for filing under seal and unsealing

This is the topic on which considerable additional work needs to be done.

Many of the submissions to the Committee have gone well beyond urging that the rules recognize the diverging standards for protective orders and filing under seal. Indeed, since most recognize that the courts are already aware of this difference in standards, one might say that the main objective of the current proposals is to promote nationally uniform procedures for deciding whether to authorize filing under seal. At least some judges seem receptive to efforts to standardize the handling of decisions whether to permit filing under seal.

These proposals contain a variety of procedures for handling sealed filings. One submission (22-CV-A, from the Sedona Conference) contains a model rule that is about seven pages long. Another (21-CV-T, from the Knight First Amendment Institute at Columbia University) attaches a 95-page compilation of local rules regarding sealing from all or almost all district courts. Some of the local rules are quite elaborate, and other districts give little or no attention to procedures for filing under seal in their local rules.

Thus, there does presently seem to be considerable variety in local rules and practices on filing under seal. Adopting a set of nationally uniform procedures could introduce more consistency in the treatment of such issues, but also would likely conflict with the local rules of at least some courts. That might be more important to lawyers who appear in many courts than to those who mainly appear in only one district. And for judges, it might be that an inter-district variation regarding sealing procedures is not too important.

Perhaps for such reasons, the Subcommittee has been uncertain how far to venture into prescribing uniform procedures. Although the various proposals received so far have urged the adoption of a new Rule 5.3 on filing under seal, the Subcommittee's inclination is instead to treat these procedural issues within the framework of existing Rule 5(d). Though there are rules addressed to only one kind of motion (e.g., Rule 37 on motions to compel; Rule 50 on motions for judgment as a matter of law; Rule 56 on motions for summary judgment; and Rule 59 on motions for a new trial), motions to seal do not seem of similar moment, so that a whole rule devoted to them does not seem warranted.

At the same time, the Rule 5(d) approach sketched above could be adapted to include various features suggested by submissions received by the Committee. The following offers a variety of alternative provisions on which the Subcommittee hopes to receive reactions from the full Committee, building on the sketch presented above.

The question at present is how to obtain feedback from the Federal Magistrate Judges Association and also – with the assistance of our Clerk Liaison – from court clerks. It cannot be said that at least some proposed measures identified below could create logistical difficulties.

Rule 5. Serving and Filing Pleadings and Other Papers

(d) Filing.

* * * * *

(5) ***Filing Under Seal.*** Unless filing under seal is directed by a federal statute or by these rules, no paper [or other material] may be filed under seal unless [the court determines that] filing under seal is justified and consistent with the common law and First Amendment rights of public access to court filings. The following procedures apply to a motion to seal:

(i) [Unless the court orders otherwise,] The motion must not be filed under seal;

Many urge that motions to seal themselves be included in the public docket and open to public inspection. But there may be circumstances in which even that openness could produce unfortunate results. The bracketed phrase would take account of those situations while retaining the presumption that motions to seal should not themselves be under seal. One example is provided by Rule 5.2(d), which calls for a court order to authorize sealing to protect personal privacy.

The rule could specify something more about what the motion should include, but that seems unnecessary given the rule's invocation of common law and First Amendment limitations in filing in court under seal. A number of submissions provide that sealing orders be "narrowly tailored." But that seems implicit in the invocation of the existing limitations on filing under seal.

In the same vein, the proposal by some that there be "findings" to support an order to seal seems an unnecessary addition. Except for court trials governed by Rule 52, there are few findings requirements in the rules. (Rule 26(b)(3) does seem to have such a requirement because the court may certify a class only if it finds that the predominance and superiority prongs of the rule are satisfied.) Again, once the common law and First Amendment standards are specified as criteria for deciding a motion to seal, adding a findings requirement seems unnecessary. Perhaps it would be useful were frequent appellate review anticipated, but appellate review of discovery-related rulings is rare, and there are no similar findings requirements for such rulings.

A potential problem here is that the party that wants to file the materials may not itself be in a position to make the showing required to justify sealing. For example, if the party that wants to file the materials obtained them through discovery from somebody else, the entity capable of making the required showing is not the one that wants to file these items. (This may often be true.)

One possibility might be to direct that the parties confer about the motion to seal before presenting it to the court, as is presently required for a motion to compel under Rule 37(a)(1). But the motion to seal situation may be quite different from the motion to compel situation. Party agreement is not sufficient to support sealing if the common law or First Amendment requirements are not met, while party agreement is almost always sufficient to resolve discovery disputes. Indeed, party agreement was a motivating factor behind the certification requirements of Rule 37(a)(1).

In a sense, there may often be two antagonistic parties wanting different things. Often the party that wants to make the filing is indifferent to whether it is under seal, perhaps even favoring public filing. It's another party (or perhaps a nonparty that responded to a subpoena) that wants the court to seal the confidential materials. Conferring might simplify the court's task in such circumstances, but it does not promise to relieve the court of the ultimate duty to make a decision on the motion to seal.

(ii) Upon filing a motion to seal, the moving party may file the materials under [temporary] {provisional} seal[, providing that it also files a redacted version of the materials];

Some of the proposals forbid a court ruling on a motion to seal for a set period (say 7 days) after the motion is filed and docketed. But it appears that the reality is that many such filings are in relation to motions or other proceedings that make such a "waiting period" impractical. For example, a seven-day waiting period would seem to dilute the authority Rule 5.2(d) provides for a court order authorizing filing personal identifying information under seal. The filing of a redacted version of the materials sought to be sealed may sometimes provide some measure of public access, however.

(iii) The moving party must give notice to any person who may claim a confidentiality interest in the materials to be filed;

This provision is designed to permit nonparties to be heard on whether the confidential materials should be sealed. Perhaps it should be a requirement of (i) above, and it might also include some sort of meet-and-confer requirement.

Alternative 1

(iv) If the motion to seal is not granted, the moving party may withdraw the materials, but may rely on only the redacted version of the materials;

Alternative 2

(iv) If the motion to seal is not granted, the [temporarily] {provisionally} sealed materials must be unsealed;

The question of what should be done if the motion to seal is denied is tricky. One answer (Alternative 2) is that the temporary seal comes off and the materials are opened to the public. Unless that happens, it would seem that the court could not rely on the sealed portions in deciding the motion or other matter before the court. On the other hand, it seems implicit that if the motion is granted the court can consider the sealed portions in making its rulings. Whether that might somehow change the public access calculus might be debated.

Things get trickier if the motion is denied and the party claiming confidentiality is not the one that wanted to file the materials. To permit that party (or nonparty) claiming confidentiality to snatch back the materials would deprive the party that filed them of the opportunity to pursue the result it sought in filing the materials in the first place.

Discussion at the Subcommittee meeting on Feb. 28 indicated that in CM/ECF era there may actually be no way to "withdraw" temporarily or provisionally sealed materials from the court's files. So the withdrawal option (Alternative 2) may be off the table. That might be a reason to forbid any filing under seal until the court rules on the motion to seal, but such a requirement could introduce frustrating delays in the litigation.

(v) The motion to seal must indicate a date when the sealed material may be unsealed. Unless the court orders otherwise, the materials must be unsealed on that date.

This is a recurrent proposal. It cannot reasonably be adopted along with the alternative (below) that the materials must be returned to the party that filed them, or to the one claiming confidentiality, at the termination of the litigation.

(vi) Any [party] {interested person} [member of the public] may move to unseal materials filed under seal.

Various proposals have been submitted along these lines. One caution at the outset is that such a provision seems to overlap with Rule 24's intervention criteria. Rule 24 has been employed to permit intervention by nonparties to seek to unseal sealed materials in the court's files. See 8A Fed. Prac. & Pro. § 2044.1.

Such intervention attempts may sometimes raise standing issues. A recent example is *U.S. ex rel. Hernandez v. Team Finance, L.L.C.*, 80 F.4th 571 (5th Cir. 2023), a False Claims Act case in which the district court denied a motion to intervene by a "health care economist." The intervenor sought to unseal information about health care pricing in an action alleging that defendant routinely billed governments for doctor examinations and care services that did not actually occur. The court of appeals concluded that "violations of the public right to access judicial records and proceedings and to gather news are cognizable injuries-in-fact sufficient to establish standing." But the court also remanded for a determination whether the application to intervene was untimely under Rule 24(b).

Indeed, it is interesting to note that Prof. Volokh (the source of the original submission to the Committee) seems himself to be a rather active intervenor. See, e.g., *Mastriano v. Gregory*, 2024 WL 40003343 (W.D. Okla., Aug. 26, 2024) (Volokh granted leave to intervene to move to unseal two exhibits that were filed under seal, and motion to unseal granted); *Sealed Appellant v. Sealed Appellee*, 2024 WL 980494 (5th Cir., March 7, 2024) (Prof. Volokh intervened to challenge the sealing of the file after "this case came to his attention after one of the district court's orders turned up in a scheduled daily Westlaw search for cases mentioning sealing and the First Amendment"); *Doe v. Town of Lisbon*, 78 F.4th 38 (1st Cir. 2023) (Prof. Volokh granted intervention to seek identity of police officer who sued seeking to have his name removed from list of officers found guilty of misconduct, but motion to unseal denied).

Because there is an existing body of precedent on intervention for these purposes, providing some parallel right by rule looks dubious. On the one hand, the proposal that every "member of the public" can intervene may be too broad. Rule 24(b)(1), which is ordinarily relied

upon for such intervention to unseal, also has other requirements that might not be included in a new rule.

The role of nonparty confidentiality claimants (mentioned above) seems distinguishable. Particularly if their confidential information was obtained under the auspices of the court (e.g., by subpoena), it would seem to follow that they should have some avenue to protect those interests when a party sought to file those materials in court. (It might be mentioned that most of the submissions seem to take no notice of the possibility that nonparties might favor filing under seal.)

(**vii**) Upon final termination of the action, any party that filed sealed materials may retrieve them from the clerk.

A proposal made in at least one submission is that all sealed materials be unsealed within 60 days after "final termination" of the action. If that "final termination" is on appeal, it may be difficult for the district court clerk's office to know when to unseal. Imposing such a duty on the clerk's office, rather than empowering the party that filed the material to request its return based on a showing that final termination of the action has occurred, seems more reasonable.

The question what is a "final termination of the action" might create uncertainty. At least in the district court, that might be said to be the entry of judgment. But not all judgments end the litigation in the district court. For one thing, Rule 54(a) says that "'[j]udgment' as used in these rules means any order from which an appeal lies." So a partial final judgment under Rule 54(b) would seem to be included. And under 28 U.S.C. § 1292 a variety of interlocutory decisions are reviewable immediately. In addition, Rule 23(f) permits a party displeased with a ruling on class certification to seek immediate discretionary review of that decision in the court of appeals. Presumably those interlocutory reviews are not necessarily the "final termination of the action."

Alternatively, as reflected in at least one local rule, the clerk could be directed to destroy the sealed materials after final termination of the action. That would also present the monitoring problem mentioned just above.

But discussion during the Subcommittee's Feb. 28 meeting raises questions about whether the clerk can actually "destroy" materials filed with the court, and whether there is really some way the party that filed the materials can "retrieve" them.

As noted above, these proposals have also prompted at least one submission opposing adoption of any such rule amendments. See 21-CV-G from the Lawyers for Civil Justice, arguing that such amendments would unduly limit judges' discretion regarding confidential information, conflict with statutory privacy standards, and stoke unprecedented satellite litigation.

Discussions during the Advisory Committee's October 2023 meeting stressed the reality that many litigations involve highly confidential technical and competitive information; making filing under seal more difficult could prove very troublesome.

But attorney members of the committee stressed the extreme variety of practices in different districts, sometimes making the lawyers' work much more difficult. Some districts have very elaborate local provisions on filing under seal, and others have few or almost no provisions dealing with the topic. But it was also noted that this divergence might in some instances reflect

the sorts of cases that are customary in different districts. There was discussion of the tension between recognizing the need for local latitude in dealing with handling these problems and also recognizing that concerns about perceptions of excessive sealing of court records have continued.

* * * * *

As noted above, the Subcommittee seeks direction on (1) whether it should attempt to craft nationally uniform procedures for motions to seal; (2) if so, how it should go about gathering information about the possible impact on district courts of adopting such procedures; and (3) whether if nationally uniform procedures would not be helpful it makes sense nevertheless to amend the rules to make clear what seems already to be clear from the caselaw – that the standard to support filing under seal is more rigorous than the one needed to justify a protective order.

TAB 13

13. Rule 43/45 Subcommittee – Criteria for Permitting Remote Testimony

As noted in the Action Items section above, the Subcommittee is also reviewing a proposal to relax the current constraints on remote trial testimony. The original proposal (24-CV-B) urged a fairly aggressive change to Rule 43(a), seemingly putting the burden on the court to arrange for remote testimony whenever "in-person testimony at trial cannot be obtained." Since that time, representatives of the Subcommittee have attended bar events at which remote testimony issues were discussed. Most recently, that involved the Miami winter meeting of the American Association of Justice, during which the proponent of submission 24-CV-B clarified that imposing this burden on the court was not essential to the proposal. During that meeting, a further submission – 25-CV-C – has been submitted responding to questions the Subcommittee invited the AAJ participants to address. In addition, at least one submission (24-CV-N, from the Lawyers for Civil Justice) has been received expressing opposition to an amendment that would permit remote trial testimony more readily. The recent submission first delivered in Miami at the AAJ event is included in this agenda book.

Until 1996, remote trial testimony was not authorized under the rules. Instead, Rule 43(a) said that if no statute or rule permitted otherwise "[a]t trial, the witnesses' testimony must be taken in open court."

In 1996, Rule 43(a) was amended to add: "For good cause, in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." The Committee Note about this change emphasized the rarity of such circumstances, identifying unforeseeable inability of the witness to attend trial as the paradigm.

Since that time there have been at least two developments that may justify relaxing the current constraints on remote trial testimony. First, technology has changed enormously. In the early 1990s, it may be that only audio testimony over telephone lines would have been possible. As almost everyone knows, Zoom, Teams, and other technological innovations have in the last three decades vastly improved the capacity to receive simultaneous sight and sound from a distant person. Indeed, it is a standard everyday activity indulged by millions.

The pandemic experience brought home how much these technological developments could facilitate litigation. Many federal courthouses were effectively closed for extended periods, but "in court" litigation events continued via Zoom or Teams or the like. For many lawyers and judges, these services streamlined much pretrial activity, particularly motion hearings and case management conferences.

Trials could benefit from this technology as well. In at least some states – and in some federal courts by party agreement – remote witness participation became possible. In other adjudicatory matters (e.g., immigration hearings) remote participation was widely used.

These developments provide reasons for reconsidering the strictures of current Rule 43(a) – particularly the "compelling circumstances" requirement. They have also called to the Subcommittee's attention the somewhat odd disjunction between Rule 43(a) and Rule 43(c), which provides:

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

Though there is no explicit authorization for remote testimony, this provision does not seemingly require that the witness be present in court to provide the "oral testimony." Certainly the witnesses who testified in depositions need not be in court. But it does not appear that Rule 43(c) was considered when Rule 43(a) was amended in 1996.

Though one might say that there is a major difference between a "trial" and a hearing on a motion, in at least some instances that difference might seem less compelling. One example is a motion for a preliminary injunction under Rule 65(a). If credibility determinations are a reason for insisting on live in-person testimony, it would seem that they may often matter in preliminary-injunction hearings. Moreover, under Rule 65(a)(2) even after the hearing has begun the court "may advance the trial on the merits and consolidate it with the hearing" on the motion, seemingly dissolving the dividing line between a "trial" and a "motion" altogether.

So the Subcommittee has begun to consider whether – if a change is proposed for Rule 43(a) – there should be serious consideration of a change to Rule 43(c) as well.

The focus has been on the stringent "compelling circumstances" requirement now in Rule 43(a). After the AAJ event in Miami, the Subcommittee members who attended had a debriefing session that involved discussion of how Rule 43(a) might look with "compelling circumstances" removed. That topic was discussed during the Feb. 24 meeting of the Subcommittee, though the main focus of that meeting was on Rule 45(c), and the notes of that meeting appear in the material in the Action Items section above in this agenda book.

This agenda book report introduces the possibility the Subcommittee has begun to consider to relax the current restrictions on remote trial testimony. In addition, toward the end, it offers a possible amendment to Rule 43(c) to bring it into alignment with Rule 43(a). [Whether that should be done is a matter for discussion.]

There seem to be varying degrees of enthusiasm among federal judges for remote trial testimony. The Bankruptcy Rules Committee has published a rule change authorizing remote testimony for "contested matters" but not for adversary proceedings. State courts in a number of states – for example, Texas and Michigan – have had much successful experience with remote testimony. Against this background, the focus of current discussion is only on giving judges who conclude there is good cause to authorize remote testimony the latitude to do so without having also to conclude that "compelling circumstances" justify such testimony. There is no thought of obligating judges to permit remote testimony.

Much fact-gathering must be done. One source hopefully will be a mini-conference this Fall to provide the Subcommittee with in-depth appreciation of the issues involved. With that (and other outreach) in contemplation, this report is designed to stimulate Committee members' reactions. It should be emphasized that it remains unclear whether a rule change will be proposed as well. But it should be useful to describe the current thoughts so that Advisory Committee reactions can help the Subcommittee chart its way.

With those caveats, here is how Rule 43(a) might be revised:

Rule 43. Taking Testimony

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

* * * * *

This possible revision substitutes "remote testimony" for "testimony . . . by contemporaneous transmission from a different location." The premise is that the shorter phrase has become commonplace since the rule was amended in 1996.

This would be a small change in the rule – only deleting three words, but a Committee Note could stress a number of themes in explaining how this small change should be applied under the amended rule. The following is not by any means a draft Committee Note, but it does discuss things that a Note could address. At least some of them may be controversial, and this presentation does not presume to determine how those controversies would be resolved.

A Note could stress the changes that have occurred since the rule was amended to permit remote testimony in 1996. For one thing, technology has changed hugely since 1996. To offer a comparison, the whole issue of e-discovery did not emerge for the rulemakers until a January 1997 conference, and did not result in rule changes for almost a decade after that. Thirty years ago, "contemporaneous transmission from a remote location" was often by telephone. Even the rulemakers used telephone conferences for subcommittee meetings well into the 21st century.

As an introduction to the removal of "compelling circumstances," then, the Note could explain that experience with technology since 1996 and the judicial inventiveness of pandemic responses to remote proceedings have together provided a great deal of judicial experience with proceedings using technology that did not exist when the rule was amended to permit remote testimony only when this standard could be satisfied.

Nonetheless, the Note should also stress that the amendment does not retreat from the view that in-person testimony is critical, and may be supplanted by remote testimony only when a careful examination of pertinent factors shows that in the given circumstance that strong preference for in-person testimony at trial should be relaxed. Nothing in the rule (unlike the original proposed amendment we received) requires a judge to permit remote trial testimony, and the assumption of the amendment is that courts will approach requests for remote trial testimony with caution and skepticism.

It may be that the previous paragraph conveys a too-constrictive tone, even though the amendment would remove the "compelling circumstances" prerequisite. It may be that different judges have very different attitudes about the value of in-person trial testimony or risks of remote testimony. And it may also be that the technological feasibility of remote testimony differs

significantly from courthouse to courthouse and from place to place. So a Note should probably stress that the rule leaves that decision to the discretion of the trial judge.

Against that background, a Note could identify a non-exclusive series of factors that a court could weigh in deciding whether to authorize remote trial testimony. The Note's theme might be that the good cause standard has real teeth in this context, given the universally-recognized importance of face-to-face evaluation of credibility, and that judges should therefore carefully consider all the pertinent factors before authorizing remote testimony.

The starting point can be the factors identified in the 1996 Note, but the contemporary treatment of those factors may diverge from what the 1996 Note said, at least in tenor. Below is a list of factors that presently come to mind, with some discussion of them. The Note would not be meant as a roadmap, but could call attention to how these factors bear on whether to authorize remote testimony in a given case. For discussion purposes, if there are others that should be added it would be good to identify them now.

Party agreement: The 1996 Note provides a pretty good description of the role of party agreement:

> Good cause and compelling circumstances may be established with relative ease if all parties agree that testimony should be presented by transmission. The court is not bound by a stipulation, however, and can insist on live testimony. Rejection of the parties' agreement will be influenced, among other factors, but the apparent importance of the testimony in the full context of the trial.

That approach seems equally relevant under a stand-alone good cause standard. And granting permission for remote testimony may be particularly important when both sides want to present some witnesses by remote testimony. But the decision is ultimately for the court, not the parties.

Importance of having this witness testify: The fact a witness can offer admissible testimony hardly proves that it is important to have that particular witness at trial. Indeed, under Fed. R. Evid. 403, the court may exclude "cumulative" witnesses who have relevant evidence.

At the same time, there may be situations in which only one witness has personal knowledge of critical matters, such as what was said during a given conversation, or what happened at a specific location that is important to the dispute.

In between, there are myriad gradations. At the other end of the spectrum from the "essential" witness with "unique" knowledge, for example, a witness may be needed to lay a foundation for admission of a given exhibit, or to show that a person was at a given location at a particular time. Depending on the exhibit or the circumstances at the given time, there may be numerous others who can provide the same information. This is the opposite of "unique" evidence.

This factor may sometimes resemble the "apex witness" concern that some report arises with frequency. Many cases hold that high government officials and high corporate officers ought not even be required to appear for a deposition unless they have unique and extremely important knowledge. Indeed, depending on the circumstances of a given case, there may be a significant question about whether the high official has any direct knowledge of the matters to be presented

at trial. At least in some circumstances, insisting on testimony by a given witness when others could equally provide comparable evidence could be employed to impose costs on another party. Though providing remote testimony may often be less intrusive for the witness than appearing in court for in-person testimony, given the need to prepare adequately and be present electronically the right moment may be more burdensome than submitting to a deposition.

Importance of in-person testimony to make credibility determinations: Particularly as to witnesses who only provide a foundation for exhibits or present other noncontroversial matters, there may be little concern with the value of in-person attendance to enable the trier of fact to determine credibility. As to other witnesses, however, conflicts between the testimony of different witnesses about important events in the case may make credibility determinations central to the case. Courts may have different views on the value of face-to-face judgments of credibility, but this factor should inform the court's decision whether in-person testimony would contribute value to the trial.

Technology issues: There has been a sea change in technology since the 1996 amendment was adopted, and further changes are likely. Nonetheless, the court should ordinarily give considerable attention to at least two sorts of technology issues:

First, the court may evaluate the technology available in its courtroom. Not all courtrooms are identical in that regard. For various reasons, including security concerns, it may be very difficult to navigate the technology in some courts. For a court with such technological arrangements,

Second, the court should also make a careful inquiry into the method the proponent of remote testimony proposes to use to provide that testimony. The proponent ought to be able to assure the court that such testimony will be smoothly presented.

Deposition testimony as a substitute: Another consideration is whether deposition testimony from this witness – particularly a video deposition – would be equal to or better than "live" remote testimony. If the deposition of the witness was taken a long time before trial, the deposition may not fairly represent what the witness can provide on the issues that have emerged in trial preparation. If so, however, it may be that a re-deposition of this witness would be a viable solution and therefore a reason to relax the rule that ordinarily a witness need submit to a deposition only once.

The 1996 Note took a position: "Ordinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena." Of course, the "reach of a trial subpoena" is nationwide now (subject to our proposed amendment to Rule 45(c)), but the more basic point is that there may be a policy disagreement about whether a deposition is to be preferred. The proponents of change urge that the rule should presume that remote testimony is preferred. Granting the court expanded latitude to authorize remote testimony does not necessarily mean that the rule should embrace this hierarchy of methods of testimony when deciding whether to authorize remote testimony in a particular case, but given technological change since 1996, the 1996 preference for a video deposition no longer seems obvious.

Evaluating safeguards: As in 1996, the amended rule would still require "adequate safeguards." As with technology, it would seem that the proponent of the witness should bear the burden of persuading the court that such safeguards will be in place. Some assert that parties routinely agree on safeguards. Further information may suggest some safeguards that could be mentioned in a Note, though not as an exclusive list. On this score, the 1996 Committee Note did include the following: "Deposition procedures ensure the opportunity of all parties to be represented while the witness is testifying." Whether that can be said with remote testimony, or how it may be ensured, may be important factors. Short of having lawyers for all the parties in the room where the witness testifies, experience will probably show that safeguards have been developed to achieve something like parity with the traditional deposition setting.

Timing: There are at least two timing issues that may warrant mention.

First, the 1996 Note strongly implied that remote testimony should be limited to situations in which the need for it resulted from a sudden, last-minute development:

> A party who could reasonably foresee the circumstances offered to justify transmission of testimony will have special difficulty in showing good cause and the compelling nature of the circumstances.

At that time, a subpoena could not be used to compel a witness to provide trial testimony unless the witness was within the "subpoena power" of the trial court. Though the *Kirkland* case has cast doubt on this conclusion, the 2013 amendment to Rule 45 changed that predicate assumption; now a subpoena may compel the witness to attend at a place within the geographical limits of Rule 45(c). Our Rule 45(c) amendment efforts are designed to ensure that the court that balances the 43(a) factors and finds good cause for this witness to testify remotely will not encounter an authority barrier to obtaining that remote testimony.

The 1996 timing discussion presumably provided comfort for parties beyond the "subpoena power" of the court because the fact they were located far away would likely be known early on. (Corporate officers might be a prominent example.) Removing that limiting factor may invite something like "apex trial testimony." Whether that could be justified under the other factors mentioned above is debatable, however. If the only reason for opposing remote testimony by the CEO who genuinely has unique and important evidence is that the parties knew all along that she lived and worked on the other side of the country, it might not seem that factor should be decisive should the court conclude that remote testimony is preferable to a deposition.

Second, there is a sequential aspect to timing. Our Rule 45(c) approach attempts to make it clear that a subpoena should be served on the remote witness only after the court has authorized remote testimony by that witness. This should ordinarily not be a last-minute thing. Rule 26(a)(1)(A)(i) requires the initial disclosures include the identity of every individual the disclosing party "may use to support its claims or defenses."

More to the point, perhaps, Rule 26(a)(3)(A) requires that pretrial disclosures (made at least 30 days before trial) identify the witnesses a party expects to call and also designate those witnesses it plans to present by deposition in Rule 26(a)(3)(A)(ii). In the Action Items section of this agenda book there is a slight tweak to Rule 26(a)(1)(A)(i) designed to bring this matter to the fore as

pretrial preparation is heating up. This disclosure would bring the matter to the court's attention and permit it to determine whether the circumstances provide good cause for remote testimony from this witness. Of course, that would not be clear in the instance identified in the 1996 Committee Note – an unforeseeable last-minute inability of a witness expected to come to court to show up.

Amending 43(c) also?

As we have learned, there is something of a disjunction between Rule 43(a) and Rule 43(c), though we have not been told that it presents any problems. One ambiguity is to determine the dividing line between a trial [governed by Rule 43(a) – "At trial, * * *"] and a motion hearing, such as a motion for a preliminary injunction.

Perhaps it is best to let sleeping dogs lie. It seems that oral testimony offered during motion hearings is ordinarily in-person, so the remote testimony issue with which we are grappling may not be presented. See 9A Fed. Prac. & Pro. § 2416 at nn. 10-11. But one might add specific reference to remote testimony to the delphic "oral testimony" in the current rule. [Arguably "oral testimony" meant in-person testimony when the rule was written.] For a starting point, the following might be added to parallel Rule 43(a):

(c) Evidence on a Motion. When a motion relies on facts outside the record, the court may hear the mater on affidavits or may hear it wholly or partly on oral testimony or on depositions. <u>For good cause and with appropriate safeguards, the court may permit remote oral testimony.</u>

A Committee Note could say that the factors bearing on good cause under amended Rule 43(a) also bear on whether to permit such remote testimony under Rule 43(c).

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February 13, 2024

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Re: Proposed Amendments to Rules 43 and 45 of the Federal Rules of Civil Procedure

Dear Secretary Byron:

We respectfully submit the enclosed proposal to amend Rules 43(a) and 45(c) of the Federal Rules of Civil Procedure for the consideration of the Advisory Committee on Civil Rules.

The proposed changes (i) make live trial testimony via contemporaneous transmission under Rule 43(a)—not deposition video—the preferred alternative for witnesses whose in-person attendance at trial cannot be secured, and (ii) clarify the ability of courts to issue subpoenas compelling a witness to testify via live contemporaneous transmission from any location within the geographic limitations of Rule 45(c), i.e., that the 100-mile limit applies to the location where the witness will sit for the contemporaneous transmission, not the courthouse where the trial is held.

The proposed amendments effectuate a long overdue modernization of civil trial practice and promote the just, speedy, and inexpensive determination of civil actions promised by Rule 1. They also resolve a growing split among federal district courts as to the applicability of Rule 45(c)'s 100-mile limit to testimony via live contemporaneous transmission under Rule 43(a)—a question first considered by a court of appeals last July in *In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023). There, the Ninth Circuit concluded that, "[w]hile technology and the COVID-19 pandemic have changed expectations about how legal proceedings can (and perhaps should) be conducted, the rules defining the federal subpoena power have not materially changed," which is an issue "for the Rules Committee and not for [a] court." *Id.* at 1046–47.

This proposal does not seek to change the preference for live, in-person trial testimony that is a longstanding value of our legal tradition. But there is little dispute among lawyers and judges

that testimony via contemporaneous live transmission better promotes the truth-seeking goal of trials than videotaped deposition testimony, particularly with recent advances in videoconferencing technology. But, contrary to these uncontroversial principles, courts continue to interpret Rules 43 and 45 and their Advisory Committee notes as requiring them to conduct trials in which juries are subjected to hours (if not days) of testimony presented in the form of spliced, disjointed video clips from depositions taken during the discovery phase. Replacing deposition testimony with testimony via live contemporaneous transmission (from a location remote from the trial court but otherwise within the limitations of Rule 45(c)) for witnesses whose physical presence at trial cannot be obtained will greatly enhance the truth-seeking function of our civil justice system, reduce the costs and increase the efficiency of civil litigation, and promote justice by maximizing access to evidence.

The proponents of these amendments are listed below. For the convenience of the Committee, all communications can be directed to the undersigned at tom@hbsslaw.com, copying racheld@hbsslaw.com.

Respectfully submitted,

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PROPOSED AMENDMENTS TO RULES 43 AND 45 OF THE FEDERAL RULES OF CIVIL PROCEDURE

EXECUTIVE SUMMARY

This proposal seeks to modify Rules 43 and 45 of the Federal Rules of Civil Procedure to: (1) ensure that courts can require witnesses unable or unwilling to testify live in person at trial to testify live via contemporaneous transmission under Rule 43(a), and (2) clarify that the place of compliance for subpoenas for live trial testimony via contemporaneous transmission is the location from which the testimony is transmitted, not the courthouse where the trial is conducted. The specific proposed textual changes are set forth in the next section.

It is axiomatic that live witness testimony is essential to the truth-seeking mission of trial. There is no real debate that jurors' ability to evaluate witness demeanor and credibility is best served by the presentation of live witnesses in open court subject to real-time cross-examination in the physical presence of the jury. But courts and litigants also have long recognized that, when a witness cannot be physically present at trial, the next best option is for that witness to testify live via contemporaneous transmission. Indeed, some courts have questioned whether there is any meaningful difference between in-person and remote testimony, particularly in light of advancements in videoconferencing and courtroom technology necessitated by the COVID-19 pandemic. Testimony by deposition, in contrast, not only undermines juror interest and engagement, but it is often taken during the discovery phase of the case, when the litigants often have not yet narrowed the case to the triable issues. Yet Rule 43 and its accompanying Advisory Committee notes continue to favor the presentation of pre-recorded deposition video over live testimony via contemporaneous transmission.

The Advisory Committee sought to remedy this with the 2013 amendments to Rule 45 permitting nationwide service of subpoenas. Read in tandem with Rule 43(a), the amended version of Rule 45(c) was intended to empower courts to issue subpoenas compelling trial testimony via contemporaneous transmission from any place within 100 miles of the witness's location. However, since the 2013 amendments went into effect, federal courts have reached starkly different conclusions about the place of compliance for subpoenas for trial testimony via contemporaneous transmission, with a significant and growing minority of courts concluding that the 1996 amendments to Rule 43(a) preclude them from ordering remote trial testimony from witnesses outside Rule 45's 100-mile limit. The confusion has created costly uncertainties for litigants, unnecessarily burdened trial courts with time-consuming disputes, and enabled litigants to game the Federal Rules to shield inculpatory witnesses from trial. The proposed amendments, if implemented, would eliminate this confusion, enhance the truth-seeking mission of trials, and promote more efficient, cost-effective, and just civil litigation.

PROPOSED TEXTUAL CHANGES

RULE 43

The proposed amendments to Rule 43(a) below maintain the gold standard of live, in-person trial testimony, but promote the use of live testimony via contemporaneous submission, rather than deposition testimony, as the default alternative.

> (a) *In Open Court*. At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. ~~For good cause in compelling circumstances and with appropriate safeguards,~~ In the event in-person testimony at trial cannot be obtained, the court, with appropriate safeguards, ~~may~~must ~~permit testimony~~require witnesses to testify in open court by contemporaneous transmission from a different location unless precluded by good cause in compelling circumstances or otherwise agreed by the parties. The existence of prior deposition testimony alone shall not satisfy the good cause requirement to preclude contemporaneously transmitted trial testimony.

RULE 45

The proposed amendments to Rule 45(c) below clarify that the "place of compliance" for subpoenas for testimony via contemporaneous transmission is the location from which that testimony is transmitted, not the location of the courthouse where the transmitted testimony will be received.

> (1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:
>
> > (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
> >
> > (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
> >
> > > (i) is a party or a party's officer; or
> > >
> > > (ii) is commanded to attend a trial and would not incur substantial expense~~.~~; or
> >
> > (C) by contemporaneous transmission from anywhere within the United States, provided the location commanded for the transmission complies with 45(c)(1)(A) or (B).

BACKGROUND & POINTS IN SUPPORT OF PROPOSED AMENDMENTS

A. Rule 43(a) should make live trial testimony by contemporaneous transmission, not prerecorded deposition video, the alternative to live, in-person trial testimony.

1. With modern videoconferencing technology, live testimony via contemporaneous transmission offers the same benefits as in-person testimony.

The "inherent goal of our system of justice established by our forefathers" is to ensure "the 'powerful force of truth-telling.'"[1] It is universally recognized that this goal is best served through the presentation of live, in-person testimony.[2] As the Advisory Committee's notes to the 1996 amendments to Rule 43(a) emphasize, "The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition."

But courts and practitioners have long recognized that, when a witness cannot be physically present in the courtroom, testimony by contemporaneous video transmission satisfies many of the goals of in-person testimony, providing an opportunity for live cross-examination and enabling the factfinder to evaluate the witness's demeanor and credibility in real time.[3] And this is more true now than ever: the COVID-19 pandemic spurred dramatic improvements to videoconferencing technology and accelerated federal courts' already

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[1] *In re Actos (Pioglitazone) Prods. Liab. Litig.*, No. 12-cv-64, 2014 WL 107153, at *6 (W.D. La. Jan. 8, 2014) (quoting Fed. R. Civ. P. 43(a) advisory committee's note to 1996 amendment); *see also In re Vioxx Prods. Liab. Litig.*, 439 F. Supp. 2d 640, 644 (E.D. La. 2006).

[2] *See Actos*, 2014 WL 107153, at *5 ("Ideally, all witnesses would appear in Open Court and testify before the trier of fact . . . ."); *Vioxx*, 439 F. Supp. 2d at 644 ("[L]ive, in-person testimony, is optimal for trial testimony."); Fed. R. Civ. P. 43 advisory committee's note to 1996 amendment ("The importance of presenting live testimony in court cannot be forgotten.").

[3] *See Warner v. Cate,* No. 12-cv-1146, 2015 WL 4645019, at *1 (E.D. Cal. Aug. 4, 2015) ("Because a witness testifying by video is observed directly with little, if any, delay in transmission, . . . courts have found that video testimony can sufficiently enable cross-examination and credibility determinations, as well as preserve the overall integrity of the proceedings."); *Actos*, 2014 WL 107153, at *8 ("[U]se of 'live' contemporaneous transmission grants the trier of fact—here, the jury—the added advantage inherent in observing testimony in open court that is *truly contemporaneous* and part of the whole trial experience, [and] thus better reflects the *fluid dynamic* of the trial they are experiencing, and, better serves the goal of 'truth telling.'"); *Lopez v. NTI, LLC*, 748 F. Supp. 2d 471, 480 (D. Md. 2010) *(*"The use of videoconferencing . . . will not prejudice Defendants. Each of the witnesses will testify in open court, under oath, and will face cross-examination. . . . With videoconferencing, a jury will also be able to observe the witness'[s] demeanor and evaluate his credibility in the same manner as traditional live testimony."); *Sallenger v. City of Springfield*, No. 03-cv-3093, 2008 WL 2705442, at *1 (C.D. Ill. July 9, 2008) ("Video conferencing allows the jury to view the witness as he testifies, and thus, it satisfies many of the goals of in person testimony . . . ."); *Vioxx*, 439 F. Supp. 2d at 644 ("By allowing for contemporaneous transmission, the Court allows the jury to see the live witness along with his 'hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration,' and, thus, satisfies the goals of live, in-person testimony . . . ." (quoting *Arnstein v. Porter*, 154 F.2d 464, 470 (2d Cir. 1946)).

"consistent sensitivity to the utility of evolving technologies that may facilitate more efficient, convenient, and comfortable litigation practices,"[4] requiring them to become more adept at and comfortable with remote proceedings and improve the technological capacities of courtrooms. Numerous federal courts seamlessly conducted entire trials remotely during the pandemic.[5] Indeed, technological advancements have led many courts to question whether there is any practical difference between live testimony and contemporaneous video transmission.[6]

2. Trial testimony via contemporaneous transmission unquestionably better serves the fact-finding mission of trial than pre-recorded deposition video.

At minimum, "there is little doubt that live testimony by contemporaneous transmission offers the jury better quality evidence than a videotaped deposition."[7] In 1939, Judge Learned Hand remarked that "[t]he deposition has always been, and still is, treated as a substitute, a second-best, not to be used when the original is at hand," and that to hold otherwise "is not to help the reform of procedure, but to introduce an irrational and unfair exception, until deposition become competent regardless of the accessibility of the deponents at trial."[8] Federal

[4] Charles A. Wright et al., 9A *Federal Practice and Procedure* § 2414 (4th ed. 2008 & 2022 Supp.).

[5] *See* Christopher Robertson, *The Jury Trial Reinvented*, 9 Tex. A&M L. Rev. 109, 120–21 (2021).

[6] *See Liu v. State Farm Mut. Auto. Ins. Co.*, 507 F. Supp. 3d 1262, 1266 (W.D. Wash. 2020) ("[G]iven the clarity and speed of modern videoconference technology, there will be no discernable difference between witnesses' 'live' versus 'livestreamed' testimony . . . ."); *Lopez*, 748 F. Supp. 2d at 480 ("With videoconferencing, a jury will . . . be able to observe the witness's demeanor and evaluate his credibility in the same manner as traditional live testimony."); *FTC v. Swedish Match N. Am., Inc.*, 197 F.R.D. 1, 2 (D.D.C. 2000) ("[T]o prefer live testimony over testimony by contemporaneous video transmission is to prefer irrationally one means of securing the witness's testimony which is exactly equal to the other."); Suppl. Order Answering Pet. for Writ of Mandamus at 4–5, *In re Kirkland*, No. 22-70092 (9th Cir. June 29, 2022), Dkt. No. 9 ("*Kirkland* Mandamus Pet. Resp.") ("Technology has advanced to the point where the Court can discern no meaningful difference between taking testimony in-person versus taking testimony by videoconference."). Interestingly, in one study of remote jury trials, some mock jurors "felt it was easier to judge witness credibility" when the witness testified remotely "because they had a closer view of the witness rather than looking across a courtroom." Online Courtroom Project, *Online Jury Trials: Summary and Recommendations* at 8 (2020).

[7] *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 19-md-2885, 2021 WL 2605957, at *5 (N.D. Fla. May 28, 2021); *see also In re Xarelto (Rivaroxaban) Prods. Liab. Litig.*, MDL No. 2592, 2017 WL 2311719, at *4 (E.D. La. May 26, 2017) (finding live testimony by video "preferable to a year-old video deposition"); *Actos*, 2014 WL 107153, at *8 (concluding that live witness testimony via contemporaneous transmission "more fully and better satisfy the goals of live, in-person testimony" than deposition video); *Swedish Match*, 197 F.R.D. at 2 ("The court will have a greater opportunity through the use of live video transmission to assess the credibility of the witness than through the use of deposition testimony. . . . I am mystified as to why anyone would think that forcing a person to travel across the continent is reasonable when his testimony can be secured by means which are . . . preferable to reading his deposition into evidence."); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, MDL No. 551, 1988 WL 525314, at *2 (W.D. Wash. Aug. 9, 1988) ("Presentation of witnesses under Court-controlled visual electronic methods provides a better basis for jurors to judge credibility and content than does use of written depositions."); *In re San Juan Dupont Plaza Hotel Fire Litig.*, 129 F.R.D. 424, 425–26 (D.P.R. 1989) (finding trial testimony via contemporaneous transmission a "viable, and even refreshing, alternative" to the "droning recitation of countless transcript pages of deposition testimony read by stand-in readers in a boring monotone").

[8] *Napier v. Bossard*, 102 F.2d 467, 469 (2d Cir. 1939) (Hand, L.).

courts have echoed this sentiment for decades.[9] Witness testimony presented in the form "spliced, edited, and recompiled clips of deposition that took place over multiple days"[10] results in an "unavoidable esthetic distance"[11] that reduces jurors' comprehension, engagement, and interest and impairs their ability to evaluate witness credibility. As one court aptly commented:

> To best fulfill its fact-finding duties, a jury should be engaged and highly sensitive to each witness. As this Court knows all too well, the deposition, whether read into the record or played by video has the opposite effect. It is a sedative prone to slowly erode the jury's consciousness until truth takes a back seat to apathy and boredom.[12]

Parties forced to present testimony from key witnesses through dated and immutable depositions may also be prejudiced. Depositions are usually taken during the discovery phase and thus may not address what are ultimately the critical factual issues for trial. And trials are "dynamic, ever evolving process[es]" with "inevitable, unexpected developments and shifts"[13] to which static deposition testimony is ill-suited to respond.

B. Rule 45(c) should unambiguously empower trial courts to issue subpoenas for trial testimony via contemporaneous transmission from any place within 100 miles of the witness's location.

1. The 2013 amendments to Rule 45 sought to allow nationwide service of subpoenas, including for Rule 43 live trial testimony via contemporaneous transmission.

The 2013 amendments removed the geographics limits of Rule 45(b)(2) to allow service of subpoenas "at any place within the United States."[14] Accordingly, trial courts may issue a nationwide subpoena commanding "a person to attend a trial, hearing, or deposition" within

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[9] *See, e.g.*, *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 511 (1947) ("Certainly to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to court, jury or most litigants."); *Mazloum v. D.C. Metro. Police Dept.*, 248 F.R.D. 725, 728 (D.D.C. 2008) (urging the parties to reach an arrangement allowing for a key witness to testify live at trial because "tediously reading deposition excerpts into the record" would be "highly unsatisfactory"); *Paul v. Int'l Precious Metals Corp.*, 613 F. Supp. 174, 179 (S.D. Miss. 1985) (finding videotaped deposition "particularly unappealing" and an inadequate substitute for the live testimony of a key witness); *Kolb v. Suffolk Cnty.*, 109 F.R.D. 125, 129 (E.D.N.Y. 1985) ("Clearly, testimony by deposition is less desirable than oral testimony and should be used as a substitute only under very limited circumstances."); *B.J. McAdams, Inc. v. Boggs*, 426 F. Supp. 1091, 1105 (E.D. Pa. 1977) ("A party should not be forced to rely on 'trial by deposition' rather than live witnesses.").

[10] *Mullins v. Ethicon, Inc.*, No. 12-cv-2952, 2015 WL 8275744, at *2 (S.D.W. Va. Dec. 7, 2015).

[11] *Actos*, 2014 WL 107153, at *8.

[12] *In re Vioxx Prods. Liab. Litig.*, 438 F. Supp. 2d 664, 668 (E.D. La. 2006).

[13] *Actos*, 2014 WL 107153, at *8.

[14] Fed. R. Civ. P. 45 & advisory committee's note to 2013 amendment.

"100 miles of the person of where the person resides, is employed, or regularly transacts business in person."[15]

The Advisory Committee intended the amended version of Rule 45 to be read with Rule 43(a) to allow courts to issue subpoenas compelling trial testimony via contemporaneous transmission from any location within 100 miles of the witness's location. It squarely addressed this issue in its responses to public comments to the proposed 2013 amendments. One of the comments, from a lawyer in Hawaii, observed the persistent difficulty he faced in persuading courts to enforce subpoenas for witnesses with a "transient presence in paradise" to testify at trials in Hawaii from the mainland by means of contemporaneous transmission under Rule 43(a).[16] The Discovery Subcommittee agreed that a Rule 45 subpoena "is properly issued for this [very] purpose"—to compel a witness outside the trial court's subpoena power to testify at trial via Rule 43 contemporaneous transmission from "a place within the limits imposed by Rule 45," i.e., within 100 miles of the witness's location.[17] The Advisory Committee concurred and determined that its note to the 2013 amendment should "confirm this plain reading of the revised Rule 45 text."[18] The note was therefore revised to state, "When an order under Rule 43(a) authorizes testimony from a remote location, the witness can be commanded to testify from any place described in Rule 45(c)(1)."[19] The note also makes clear that Rule 45(c)'s geographic limits were intended to protect witnesses from the burden of *traveling* more than 100 miles[20]—a concern not implicated by testimony remotely transmitted under Rule 43(a).

In recommending adoption of the 2013 amendments in full, the Committee on Rules of Practice and Procedure "concurred" with all the Advisory Committee's Rule 45 recommendations, including its "clarify[ing]" note "confirm[ing] that, when the issuing court has made an order for remote testimony under Rule 43(a), a subpoena may be used to command the *distant* witness to attend and testify within the geographical limits of Rule 45(c)."[21]

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[15] Fed. R. Civ. P. 45(c)(1).

[16] Paul Alston, Comment to Committee on Rules of Practice and Proc. Regarding Revisions to Fed. R. Civ. P. 45 (Jan. 25, 2012), https://www.uscourts.gov/file/16846/download.

[17] Minutes of Civil Rules Advisory Committee Meeting at 13 (Mar. 22–23, 2012), https://www.uscourts.gov/file/15074/download.

[18] *Id.*

[19] Fed. R. Civ. P. 45 advisory committee's note to 2013 amendment.

[20] *Id.* ("Rule 45(c)(1)(A) does not authorize a subpoena for trial to require a party or party officer *to travel* more than 100 miles . . ." (emphasis added)); *id.* ("Under Rule 45(c)(1)(B)(ii), nonparty witnesses can be required *to travel* more than 100 miles within the state where they reside, are employed, or regularly transact business in person only if they would not, as a result, incur 'substantial expense.'" (emphasis added)).

[21] Summary of the Report of the Judicial Conference, Committee on Rules of Practice and Procedure at 21, 23 (Sept. 2012), https://www.uscourts.gov/file/14521/download (emphasis added).

2. Since the 2013 amendments, federal courts have split on whether Rule 45 permits them to issue subpoenas for trial testimony via contemporaneous transmission to witnesses located more than 100 miles from the trial court.

Since the 2013 amendments, a majority of federal courts have—as the Advisory Committee intended—interpreted Rule 45(c)'s 100-mile limit to apply to the place from which remote testimony is transmitted.[22] For example, in *Walsh*, the District of Massachusetts observed that the 100-mile limit of Rule 45(c), as amended, "restricts the place of *compliance* with the subpoena, not the location of the court from which the subpoena issues."[23] The court concluded, based on "the plain language of Rules 43 and 45 and their accompanying Advisory Committee notes," that it could "issue a subpoena under Rule 45, upon a finding of good cause and compelling circumstances, for a witness to provide remote testimony from any place within 100 miles of her residence, place of employment, or place where she regularly conducts business."[24] Similarly, in *3M Combat Arms Earplug Products Liability Litigation*, the Northern District of Florida held that Rules 43(a) and 45 were to be read in "tandem" to permit a party to "use a Rule 45 subpoena to compel remote testimony by a witness from anywhere so long as the place of compliance (where the testimony will be given by the witness and not where the trial will take place) is within the geographic limitations of Rule 45(c)."[25]

However, a growing minority of courts have held that Rule 45(c)'s geographic limits prohibit them from issuing subpoenas for testimony via contemporaneous transmission to anyone located more than 100 miles from the trial court.[26] In so holding, these courts have often relied exclusively on the Advisory Committee's notes to Rule 43 without considering its notes to

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[22] *See, e.g.*, *Walsh v. Tara Constr., Inc.*, No. 19-cv-10369, 2022 WL 1913340, at *2 (D. Mass. June 3, 2022); *In re Taxotere (Docetaxel) Prod. Liab. Litig.*, No. 16-17039, 2021 WL 6202422, at *3 (E.D. La. July 26, 2021); *Off. Comm. of Unsecured Creditors v. Calpers Corporate Partners LLC*, No. 18-cv-68, 2021 WL 3081880, at *3 (D. Me. July 20, 2021); *United States v. $110,000 in U.S. Currency*, No. 21-cv-981, 2021 WL 2376019, at *3 (N.D. Ill. June 10, 2021); *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 19-md-2885, 2021 WL 2605957, at *3–4 (N.D. Fla. May 28, 2021); *Int'l Seaway Trading Corp. v. Target Corp.*, No. 20-mc-00086, 2021 WL 672990, at *4–5 (D. Minn. Feb. 22, 2021); *In re Newbrook Shipping Corp.*, 498 F. Supp. 3d 807, 815 (D. Md. 2020), *vacated on other grounds by* 31 F.4th 889 (4th Cir. 2021); *Redding v. Coloplast Corp.*, No. 19-cv-1857, slip op. at 3 (M.D. Fla. Aug. 28, 2020); *Diener v. Malewitz*, No. 18-cv-85, 2019 WL 13223871, at *7 (D. Wyo. Oct. 18, 2019); *In re NCAA Grant-in-Aid Cap Antitrust Litig.*, No. 14-md-2541, slip op. at 5–6 (N.D. Cal. Aug. 31, 2018); *Xarelto*, 2017 WL 2311719, at *4–5; *In re DePuy Orthopaedics, Inc. Pinnacle Hip Implant Prods. Liab. Litig.*, MDL No. 11-2244, 2016 WL 9776572, at *2 (N.D. Tex. Sept. 9, 2016); *Actos*, 2014 WL 107153, at *8–10.

[23] 2022 WL 1913340, at *2.

[24] *Id.*

[25] 2021 WL 2605957, at *3–4.

[26] *See, e.g.*, *Moreno v. Specialized Bicycle Components, Inc.*, No. 19-cv-1750, 2022 WL 1211582, at *1–2 (D. Colo. Apr. 25, 2022); *Singh v. Vanderbilt Univ. Med. Ctr.*, No. 17-cv-400, 2021 WL 3710442, at *2 (M.D. Tenn. Aug. 19, 2021); *Ashton Woods Holdings LLC v. USG Corp.*, No. 15-cv-1247, 2021 WL 8084334, at *1 (N.D. Cal. Apr. 5, 2021); *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig.*, No. 17-md-2785, 2021 WL 2822535, at *4–6 (D. Kan. July 7, 2021); *Black Card LLC v. Visa USA Inc.*, No. 15-cv-27, 2020 WL 9812009, at *2 (D. Wyo. Dec. 2, 2020); *Roundtree v. Chase Bank USA, N.A.*, No. 13-cv-239, 2014 WL 2480259, at *1 (W.D. Wash. June 3, 2014); *Lin v. Horan Cap. Mgmt., LLC*, No. 14-cv-5202, 2014 WL 3974585, at *1 (S.D.N.Y. Aug. 13, 2014).

the 2013 amendments to Rule 45. In *Black Card*, for instance, the District of Wyoming concluded that "a full reading of Rule 43 and the committee notes"—including their instructions that the "good cause" standard "is anticipated for witnesses who are already expected to attend the trial" and "[o]rdinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena"—demonstrated that "subpoenas for live video testimony under Rule 43 are subject to the same geographic limits as a trial subpoena under Rule 45."[27] The *Moreno* and *EpiPen* decisions, similarly, were predicated only on the notes to the 1996 amendments to Rule 43.[28]

3. The Ninth Circuit's 2023 *Kirkland* decision underscores the urgent need for clarification of Rules 43 and 45.

The need for clarifying amendments has grown more critical in the wake of the recent *In re Kirkland* decision,[29] the first from a United States Court of Appeals to address the interplay between Rule 45(c)'s 100-mile limit and subpoenas for trial testimony via contemporaneous transmission under Rule 43(a).

In *Kirkland*, the Ninth Circuit considered a petition from John and Poshow Ann Kirkland for a writ of mandamus directing the United States Bankruptcy Court for the Central District of California to quash trial subpoenas directing them to testify via contemporaneous submission from their homes in the U.S. Virgin Islands. The Ninth Circuit found that the petition "present[ed] a novel issue involving the interplay between two Federal Rules of Civil Procedure that has divided district courts across the country and that is likely to have significant continued relevance in the wake of technological advancements and professional norms changing how judicial proceedings are conducted," but one that was "likely to evade direct appellate review."[30]

In its response to the petition, the bankruptcy court agreed that mandamus jurisdiction was necessary to resolve two "conflicting lines of authority" with "equally plausible interpretations" of Rules 43 and 45 and urged the Ninth Circuit to side with the majority of courts concluding that Rule 45(c)'s 100-mile limit does not apply to witnesses ordered to testify by means of contemporaneous transmission under Rule 43.[31] Citing its own experience conducting trials with testimony taken exclusively by remote video transmission, the bankruptcy court argued that "[t]echnology has advanced to the point where the Court can discern no meaningful difference between taking testimony in-person versus taking testimony by videoconference" and that remote video testimony allows juries "to assess the demeanor and credibility of the [remote] witnesses to the same extent as would have possible had [they] been

[27] 2020 WL 9812009, at *2–3.

[28] *See Moreno*, 2022 WL 1211582, at *1–2; *EpiPen*, 2021 WL 2822535, at *4.

[29] 75 F.4th 1030, 1051–52 (9th Cir. 2023).

[30] *Id.* at 1036.

[31] *Kirkland* Mandamus Pet. Resp. at 2–3.

physically present in the courtroom."[32]

The Ninth Circuit disagreed, concluding that "neither the text of the rules nor the advisory committee's notes establish that the 100-mile limitation is inapplicable to remote testimony or that the 'place of compliance' under Rule 45 changes the location of the trial or other proceeding to where the witness is located when a witness is allowed to testify remotely."[33] The Ninth Circuit dismissed the Advisory Committee's notes to the 2013 amendments to Rule 45 because "it is the text of the rules that control, and 'the [n]otes cannot . . . change the meaning that the Rules would otherwise bear'"[34] and reasoned that the term "trial" as used in Rule 45 necessarily meant "a specific event that occurs in a specific place: where the court is located," regardless of where or how the witness may "appear."[35] While the Ninth Circuit acknowledged that "technology and the COVID-19 pandemic have changed expectations about how legal proceedings can (and perhaps should) be conducted," it concluded that "the rules defining the federal subpoena power have not materially changed" and it was "bound by the text of the rules."[36] The issue, therefore, was "one 'for the Rules Committee and not for [a] court.'"[37]

C. The proposed amendments ensure more efficient, cost-effective, and fair civil trials.

1. The proposed amendments maximize access to evidence in multidistrict litigation, which is rarely confined to the jurisdiction of a single federal district court.

The need for trial testimony via contemporaneous transmission is arguably most acute in multidistrict litigation, which has become the primary vehicle for the resolution of complex civil cases and is designed for the efficient management of large numbers of similar claims that often involve multiple parties and evidence dispersed nationwide. In such cases, witnesses

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[32] *Id.* at 4-5. The bankruptcy court also cited a 2022 survey it conducted on "hearings or trials conducted by videoconference," in which 65% of respondents stated they had not experienced "any problems with remote hearings or trials in the past" and only 1 of 287 reported encountering any issues with remote cross-examination. *Id.* at 5.

[33] *Kirkland*, 75 F.4th at 1044.

[34] *Id.* at 1043 (alterations in original) (quoting *Tome v. United States*, 513 U.S. 150, 168, (1995) (Scalia, J., concurring)).

[35] *Id.* at 1043–44; *see also id.* at 1045 ("[T]here is no indication that Rule 45's reference to attending 'a trial' was intended to refer to anything other than the location of the court conducting the trial."). In reaching this conclusion, the Ninth Circuit did not consider the body of cases concluding that Rule 77(b) expressly permits a fully virtual civil jury trial with no fixed location. *See, e.g.*, *Le v. Reverend Dr. Martin Luther King, Jr. Cnty.*, 524 F. Supp. 3d 1113, 1115 (W.D. Wash. 2021) (construing Rule 77 as allowing a fully virtual civil jury trial with no fixed location because "Rule 77(b) sets forth the caveat 'so far as convenient,' which is in stark contrast to the imperative 'must,' used in connection with 'open court'" and therefore "offers the flexibility to conduct trials in 'non-traditional ways'" (quoting *Gould Elecs. Inc. v. Livingston Cnty. Rd. Comm'n*, 470 F. Supp. 735, 738 (E.D. Mich. 2020))); *see also id.* at 1116 ("Nothing about a virtual jury trial is inconsistent with the principles underlying Rules 43(a) and 77(b).").

[36] *Kirkland*, 75 F. 4th at 1046.

[37] *Id.* at 1047 (quoting *Swedberg v. Marotzke*, 339 F.3d 1139, 1145 (9th Cir. 2003)).

relevant to all parties' claims and defenses are unlikely to be confined to a single federal district. Geographic limitations on MDL courts' ability to subpoena testimony via contemporaneous transmission can therefore unfairly handicap plaintiffs, who must make a no-win forum selection choice at the outset when the identities and locations of key trial witnesses are unknown. Such limits also undermine the purpose of bellwether trials, which are intended to present the best evidence to juries to obtain outcomes representative for all underlying actions. Without access to critical witness testimony, verdicts in bellwether trials are inaccurate predictors of the merits of the remaining claims, undermining their ability to facilitate productive settlement discussions and global resolutions of claims.

2. The proposed amendments minimize, if not eliminate, litigants' ability to exploit the Rules to unfairly immunize adverse witnesses and evidence from jury consideration.

Rule 45's 100-mile limit can be exploited by litigants to unfairly shield adverse evidence from trial in several ways. Defendants may take advantage of plaintiffs' lack of knowledge regarding the identity and location of essential witnesses by urging the JPML to centralize the litigation in a jurisdiction outside the 100-mile range of those witnesses. Litigants can also hand-pick the witnesses within their control whose testimony will be most favorable to their claims or defenses, forcing the opposing party to rely on inferior deposition testimony for witnesses outside the 100-mile limit at trial, thereby hindering that party's ability to effectively present its best evidence to the jury.[38] Litigants can even intentionally relocate critical witnesses outside the subpoena reach of the trial court. The proposed amendments would minimize, if not eliminate, such gaming tactics.[39]

3. The proposed amendments will save time and money for both litigants and courts.

Resolving disputes over deposition designations is time consuming and a wasteful drain of judicial resources. As explained in the *Manual on Complex Litigation*, "[u]nless the parties can reach substantial agreement on the form and content of the videotape to be shown to the jury,

[38] *See, e.g.*, *3m Combat Arms Earplug*, 2021 WL 6327374, at *5 (concluding that defendants sought a tactical advantage by preventing two witnesses essential to the case from testifying live at trial just after one of them made statements contradicting his prior testimony); *Vioxx*, 439 F. Supp. 2d at 643 (finding that the defendant's refusal to produce a witness "possess[ing] information highly relevant to the plaintiff's claims" and "damaging to [the defendant's] position" for trial was "for a purely tactical advantage," namely, "to eliminate any unpredictability and limit [the witness's] trial testimony to his 'canned' deposition testimony"); *Wash. Pub. Power Supply*, 1998 WL 525314, at *2 ("Defendants do not claim they cannot get witnesses to appear voluntarily [at trial] for 'live' testimony. They rely instead on the tactical advantage they have in not being required to do so, while at the same time indicating that they intend to call the same witnesses in person [in] their own case.").

[39] Litigants faced with an order requiring witnesses to testify via contemporaneous transmission have also been known to thereafter produce the at-issue witness in person for trial. *See Wash. Pub. Power Supply*, 1998 WL 525314, at *2; *accord* Cathaleen A. Roach, *It's Time to Change the Rule Compelling Witness Appearance at Trial: Proposed Revisions to Federal Rule of Civil Procedure 45(e)*, 79 Geo. L.J. 81 (1990).

the process of passing on objections can be so burdensome and time-consuming as to be impractical for the court."[40] Live testimony by contemporaneous transmission, on the other hand, "ensure[s] efficient use of judicial resources" because it relieves the court "of the burden of reviewing voluminous transcripts of multi-day depositions, analyzing hours of edited videos submitted for trial, and then ruling on objections to those videos."[41]

Promoting the use of testimony by contemporaneous transmission would also provide courts with greater precision and flexibility in trial scheduling, avoiding the constraints of individual witness availabilities and travel schedules. Litigants would benefit from the reduced costs of witness travel. And assurance that witnesses outside the 100-mile limit could be compelled to testify remotely at trial, if necessary, would likely reduce the number and attendant costs of depositions taken during discovery.

[40] *Manual for Complex Litigation (Fourth)* § 12.333.

[41] *Mullins*, 2015 WL 8275744, at *2; *see also Actos*, 2014 WL 107153, at *6 (criticizing the defendants' inability to secure the in-person attendance of important witnesses at trial, which "result[ed] in the parties still taking discovery depositions" and "a large number of motions" needing resolution on the eve of trial and "the parties' continu[ing] to present disputed video depositions for evidentiary resolution" and declaring that "this Court simply will not be able to rule on the very large number of additional video transcripts and objections that would be required it the Plaintiffs were not permitted to use the procedures established in Rules 43 and 45 to present live testimony at trial via contemporaneous transmission").

TAB 14

14. Third Party Litigation Funding and Cross-Border Discovery Subcommittees

This section of the agenda book provides brief status reports about ongoing work of other subcommittees. Because this work is at an early stage, this section is limited to providing a general status update. Each subcommittee welcomes reactions from members of the Advisory Committee and expects to continue its ongoing work.

TPLF SUBCOMMITTEE

This subcommittee was created at the Committee's October 2024 meeting, and has embarked on a program designed to educate subcommittee members about the issues involved. The topic has been on the Committee's agenda for a long time, so some background may be useful.

In mid-2014, the Chamber of Commerce proposed that Rule 26(a)(1)(A) be amended to require disclosure of third party funding of cases pending in federal court. At its Fall 2014 meeting, the Committee decided to take no action, in large part because of uncertainty about this relatively new phenomenon. In 2017, the topic was initially assigned to the MDL Subcommittee, but that subcommittee determined that TPLF did not seem to play a prominent role in MDL proceedings. The subject remained on the Committee's agenda, however.

In 2019 – partly in response to inquiries from members of Congress – the full Committee got an extensive report on the fruits of the ongoing monitoring of TPLF and decided to continue to monitor the topic but not otherwise to take action.

Meanwhile, there were developments in other arenas. In Congress, a number of bills calling for disclosure of TPLF were introduced. Most recently, in February 2025, Rep. Issa introduced H.R. 1109 (119th Cong. 1st Sess.), the Litigation Transparency Act of 2025. A copy of this bill is included in this agenda book.

Bills have been introduced in a number of states directing disclosure as well. Several years ago the State of Wisconsin adopted "tort reform" legislation that included disclosure requirements for TPLF arrangements. Other states that have entertained such legislative proposals include West Virginia and Louisiana.

Some district courts have adopted local rules or practices with regard to disclosure of funding. The District of New Jersey adopted a local rule requiring disclosure whether there was funding and, if so, of the identity of the funder. In the Northern District of California, there is a local rule or standing order calling for disclosure in class actions.

TPLF has also attracted substantial academic attention. There have been several academic conferences in the U.S. focusing on funding. In addition, an academic book published in Europe in late 2024 contained a full section on litigation funding. A symposium issue of the law journal of Tel Aviv University, to be published in 2025, contains papers from many scholars (mainly American, including this Reporter) on American experiences and concerns. There likely are other such symposia out there.

There is, in short, little question that TPLF has gained prominence. And the amount of such funding seems to be growing rather rapidly.

There seems to be sharp disagreement as to these developments. On one side, litigation funding is supported in some circles as "unlocking the courthouse door" by facilitating the assertion of valid claims.

On the other hand (as illustrated in connection with the work of the MDL Subcommittee), litigation funding is not supported as enabling the assertion of hundreds or even thousands of groundless claims "found" by claims aggregators and "sold" to lawyers who don't do their Rule 11 due diligence before filing in court. The arguments presented to the MDL Subcommittee in support of vigorous "vetting" of claims in MDL proceedings were partly based on this sort of concern.

From a rulemaking standpoint, beyond deciding whether to regard litigation funding as basically good or bad, there are a number of questions needing answers. Here are some of them:

(1) How does one describe in a rule the arrangements that trigger a disclosure obligation? In an era when lawyers and law firms often rely on bank lines of credit to pay the rent, pay salaries, hire expert witnesses, etc., all seem to agree that TPLF disclosure requirements should not apply to such commonplace arrangements.

(2) Is this problem limited to certain kinds of litigation? For example, some see MDL proceedings or "mass tort" litigation as a particular locus. Others regard patent litigation as a source of concern; in the District of Delaware there have been disputes about disclosure of funding in patent infringement litigation. Yet others (including a number of state attorneys general) fear that litigation funding may be a vehicle for malign foreign interests to harm this country, or at least hobble American companies when they compete for business abroad.

(3) Should the focus be on "big dollar" funding? One sort of funding is what is called "consumer" funding, often dealing with car crashes and involving relatively modest amounts of money. "Commercial" funding, on the other hand, is said in some instances to run to millions of dollars.

(4) Does funding prompt the filing of unsupported claims? Funders insist that they carefully scrutinize the grounds for the claims before deciding whether to grant funding, and that they reject most requests for funding. They also say that they offer expert assistance to lawyers that get the funding to help them win their cases. Since the usual non-recourse nature of funding means that the funder gets nothing unless there is a favorable outcome, it seems that funding groundless claims would not make sense.

(5) The above is largely keyed to funding of individual lawsuits. A new version, it seems, is "inventory funding," which permits the funder to acquire an interest in multiple lawsuits. One might say this verges on a line of credit; in a real sense if a firm's inventory of cases don't pay off the firm can't pay the bank. How such inventory funding actually works remains somewhat uncertain.

(6) If some disclosure is required, what should be disclosed, and to whom should it be disclosed? The original proposal called for disclosure of the underlying agreement and all underlying documentation. But if funders insist on candid and complete disclosure

regarding the strengths and weaknesses of the cases on which lawyers seek funding, core work product protections would often seem to be involved.

(7) Will requiring some disclosure lead to time-consuming discovery forays that distract from the merits of the underlying cases?

(8) What is the court to do with the information disclosed if disclosure is required? One concern is that lawyers seeking funding are handing over control of their cases in contravention of their professional responsibilities. Though judges surely have a proper role in ensuring that the lawyers appearing before them behave in an ethical manner, they would not usually undertake a deep dive into the lawyer-client relationship to make certain the lawyers are behaving in a proper manner.

(9) If judges don't normally have a responsibility to monitor the lawyers' compliance with their professional obligations, does that change when settlement is possible? Should judges then be concerned that settlement decisions are controlled by funders whose involvement is not known to the court?

There surely are other questions to be explored. Prof. Clopton has undertaken to review the growing literature on the subject of litigation funding. And presently it seems likely that the George Washington National Law Center will hold an all-day conference about the topic for the subcommittee, tentatively scheduled for October 23, 2025, the day before the Committee's Fall meeting.

CROSS-BORDER DISCOVERY SUBCOMMITTEE

This subcommittee also remains in the learning outreach mode. Its ongoing efforts include the following, among other things: In May 2024, representatives of the subcommittee met with the Lawyers for Civil Justice in Washington, D.C., to discuss cross-border issues. Then in July 2024, there was a meeting in Nashville with representatives of the American Association for Justice. In August 2024, the Sedona Conference arranged an online session with some of the members of its Working Group 6 (which focuses on cross-border discovery) and during the first week of March 2025, representatives of the subcommittee are attending the meeting of Working Group 6 in Los Angeles and will be on a panel to continue these discussions. In addition, Prof. Clopton has met with a panel of transnational discovery experts affiliated with the ABA. The information-gathering effort continues.

Significant questions remain, however. One is whether there is widespread enthusiasm for rule amendments keyed to cross-border discovery issues. To a significant extent, it seems that lawyers say "we can work that out." The basic tools for working it out seem to be in place in the rules already. There seems no doubt that any party could raise cross-border discovery issues in a Rule 26(f) discovery-planning meeting and present any disagreements to the court under Rule 16.

For at least some lawyers, the current rules appear to be sufficient. To consider one possible rule amendment – to add explicit reference to cross-border discovery to Rule 26(f) – there appear to be sectors of the bar that find that possibility extremely unnerving. For some of them, a rule change along these lines might signal to the judge that it is important to put the brakes on discovery and proceed in a gingerly manner. Some might consider that a recipe for delay tactics.

A somewhat different point is that divergent attitudes toward privacy and intrusive discovery could create a zero-sum situation. From one perspective, multinational actors may be faced with a Hobson's choice between violating non-U.S. privacy rules (e.g., the GDPR in the EU), and disobeying American judicial orders to provide the sort of broad discovery common in U.S. litigation, risking possible default.

In the background lies the Hague Convention. Early on, some responding parties insisted that American courts should routinely insist that parties seeking discovery abroad be required to resort first to the Convention's techniques.

Many claim that the Convention is too slow and too narrow to satisfy the information needs of U.S. litigation. The Convention itself may offer a middle ground solution if the parties agree to appointment of a local official in the country where the information is held to streamline the Convention process. But that is possible only if all the parties agree.

To complicate things further, many countries are not signatories to the Convention, and some that are parties to the Convention have "reservations" that forbid complying with American discovery.

Mediating between these divergent attitudes toward privacy and the legitimacy of giving parties the power to compel disclosure without having first to get a court order to that effect is a challenging task. At the margins, one side says that the other side is "hiding" its critical information overseas, and the other side says the American plaintiffs are exploiting American discovery to make their clients face the risk of sanctions in the U.S. unless they violate the privacy laws of an EU (or other) country. Thus the Hobson's choice.

On top of this is the question when any additional rules for "cross-border" discovery apply. In hard-copy days, one could often say fairly confidently that the information sought under Rule 34 was "located" in a specific place – inside or outside this country. With storage "in the cloud," that certainty has largely vanished. Hence it may be that many, if not most, companies with widespread operations including some presence outside the U.S. would be subject to "cross-border discovery" if ordered to respond in the ways an American court would ordinarily order them to respond absent the cross-border complication.

In its *Aerospatiale* decision in 1987, the Supreme Court, by a 5-4 vote, rejected the "first resort" requirement and instead offered a multi-factor analysis district judges should employ in deciding whether to order discovery of information supposedly "located" outside this country.

There seem to be various views on whether *Aerospatiale* has really been followed by U.S. judges. One view is that – perhaps because they are steeped in the traditions of American litigation – American judges put a thumb on the scale in favor of doing things "our way." So a rule change might take the form of directing judges to do things the "right" way under the *Aerospatiale* analysis.

But at least an undercurrent of pro-amendment argument seems to favor a rule that adheres to Justice Blackmun's partial dissent in *Aerospatiale* (on behalf of four Justices) and direct judges (perhaps under the heading "comity") to give more weight to privacy interests and other concerns

emphasized in other countries. Indeed, there may be a tension between the American full-disclosure attitude and the elevation of privacy elsewhere to levels not recognized in this country.

These are clearly weighty issues; elsewhere in this agenda book there is discussion of kindred issues about privacy in terms of court records that include the last four digits of Social Security numbers or reveal the initials of minors in court records. Contrast Germany, where court files are closed to the public and accessible only to the parties to the case.

At present, this subcommittee is uncertain whether a rule change is warranted or, if so, what it should be. It invites views from the full Committee.

Notes of Zoom meeting
TPLF Subcommittee
Nov. 14, 2024

On Nov. 14, 2024, the TPLF Subcommittee of the Advisory Committee on Civil Rules meet via Zoom. Participating were Judge David Proctor (Chair of the Subcommittee), Judge Robin Rosenberg (Chair of the Advisory Committee), Judge Marvin Quattlebaum, Joseph Sellers, Jocelyn Larkin, David Wright, Prof. Zachary Clopton, Prof. Andrew Bradt (Assoc. Reporter, Advisory Committee), Prof. Richard Marcus (Reporter, Advisory Committee.

The meeting was introduced as designed to discuss a focus for this work. The topic seems to be mentioned often in legal literature, but its actual prevalence is less easily gauged. It may be that patent litigation is a major sector of litigation funding and that it is less prominent in other kinds of litigation. This is anything but an "easy topic" for the Advisory Committee to tackle. Meanwhile, there have been and may continue to be bills in Congress addressing disclosure and perhaps other features of TPLF. Rep. Issa introduced another bill – H.R. 9922 – on Oct. 4, 2024.

There certainly has been much interest; perhaps more of late. At least two law school conference in recent weeks have focused on TPLF. And not all funders are the same, whether they are "good" or "bad." Some may covet huge returns commensurate with the considerable risks they take. Others may be offering support to litigation they regard as serving the "social good" rather than seeking financial profit. There are some district local rules. The District of New Jersey has for more than three years had a disclosure rule, and the N.D. Cal. also has a limited disclosure rule that the district may be reviewing. This continues to be a moving target.

The main procedural focus for the Civil Rules is on disclosure, rather than attempting by rule to regulate the terms of funding arrangements. But even when one limits attention to disclosure rules, there remain many questions:

(a) What has to be disclosed? If Uncle Fred offers to make sure his niece can pay the rent and buy groceries after she was injured in a car crash, should disclosure be required if he expects to be paid back when niece collects?

(b) Should disclosure be limited to "commercial entities"? Insurance disclosure is limited to entities in the insurance business. Uncle Fred is not a commercial entity. But determining what other entities are within the rule may be challenging. On this score, knowing what's actually going on could prove important, and constant evolution of this activity could present problems in defining what's actually going on.

(c) Is disclosure to be limited to the identity of the funder or to include details about the funding agreement? Given the reported desire of funders for candid reports from lawyers about the strengths and possible weaknesses of their cases, much core opinion work product might be included in the development funding agreements.

(d) Should disclosure initially be limited to disclosure to the court? That could avoid some problems of disclosure of core work product, but might also raise issues about "ex parte communications with the court."

(e) Would a disclosure rule lead to follow-up discovery to get more information? For example, could the other side demand to know whether funding had been sought from other funders, and to learn details of the results of that funding effort?

Additional background information focused on the early attention to TPLF by the MDL Subcommittee quite a few years ago. This Subcommittee is not starting from scratch, but it is starting afresh. Eventually, after considerable work, the MDL Subcommittee determined that there was no need to include this topic within what became Rule 16.1. Recognizing the topic is broadly important, however, the Advisory Committee retained it on the docket, but as a "study and monitor" item. Back then, there was no "horror story" about the consequences of litigation funding. It is not clear there has been one since then.

As compared to the prior monitoring activity, the current subcommittee is "proactive," not just "reactive." But there are many questions on which reliable information is important, including: (1) how to define the funding on which we are focused; (2) how prevalent it is; (3) what effect it has on the litigation in which it is used; (4) what are judges now doing about the presence of TPLF in litigation before them and do they need additional tools to address it; and (5) what should judges do with disclosures if they are mandated – recuse? Take action if somebody other than counsel of record is controlling the litigation?

On all these sorts of topics, a variety of opinions have been expressed. We must take a broad view. That prompted the observation that it may be that 30% to 50% of TPLF activity is in patent cases. In a way, that's understandable. *Markman* hearings are expensive, there is big upside for successful patent plaintiffs (and their funders). So though the "headlines" may suggest that funding exists across the docket the reality may be very different. Meanwhile, in terms of what judges are supposed to do with the information disclosed, there may be very different state law rules on attorney conduct that bear on whether this sort of arrangement is improper. (It seems that Kentucky and Montana forbid such arrangements, while Arizona has a "no holds barred" attitude toward nonclient nonlawyer control of litigation.)

The key question, it was stressed, is what is happening in the federal courts. The state courts may have comparable concerns, but those are not a Civil Rules matter.

A comparison was offered to the ongoing attention to Rule 7.1. It's not clear whether funding vehicles will often (if ever) be entities in which judges hold stakes that might call for them to recuse. And at least some defense-side lawyers have informally suggested that when funding is available on the plaintiff side that attracts "better" lawyers. (So maybe there is sometimes a net benefit from funders' involvement.) At the same time, we should be worried that if we start trying to monitor all conferences looking at the "hot topic" of funding "our cup will runneth over."

Against this background, it was suggested that a broad Subcommittee approach would probably seek input from funders, plaintiff counsel, defense counsel, business interests, and the academy. In addition, the Federal Judicial Center should ideally be able to offer important empirical research.

Another participant noted that learning more about local rules and the experience under local rules would be valuable. In addition, in relation to the ongoing Rule 7.1 effort, a question

might be whether details about who is "behind" the funder could be important. For example, what if a witness at the trial has a stake in a funder eligible for a big payday if there is a successful result at trial?

A different point was made about the content of disclosures. What if there is a schedule of funder payments? Could defendant exploit knowledge of that schedule to obtain an advantage if it knew what the schedule was?

Another member asked whether these issues are really susceptible to a rules-based solution. Maybe problems could be avoided by providing that, absent a court order for broader disclosure, mandated disclosure be only to the court.

Another member emphasized the potentially distracting post-disclosure consequences that could occur. For example, a public interest group that provides financial support for litigation efforts it supports once faced a subpoena from the other side seeking disclosure of all materials about the funding decision. When opposing parties seek discovery of such background information, the "vast majority" of cases deny the discovery requests. Wouldn't it be better to leave that to the court on a case-by-case basis?

A caution was added: Our attention has not gone beyond disclosure, and not to "regulation" of funding arrangements. Opening the door to broad discovery could have an unfortunate impact on the strategy and handling of the case.

Another potential area of concern is the interplay of the Civil Rules and the rules of professional responsibility. It may be that the academic community is well situated to address these concerns. For our purposes, the key question is whether the court needs to know about these things, not so much whether the parties would want to find out about them.

One way of looking at the question we are talking about is whether this is a quantitative or a qualitative problem: is the sheer number of cases involving such funding the big deal, or is the possibility that in some of them inappropriate arrangements have been made? That prompted the reaction that we might try to put to one side funding that resembles "payday loans." But sometimes "payday loan" sorts of arrangements may be a pretty big deal, as in the NFL Concussion MDL.

The meeting concluded with a plan of action: Prof. Clopton would try to gather and triage conference invitations. Prof. Marcus would contact Emery Lee of FJC Research about what it would provide to inform the Subcommittee. There is also a TPLF "trade show" in February or so, which might provide useful answers. And the upcoming LCJ and AAJ gatherings could be excellent opportunities to get a variety of views on these topics.

A further meeting in early to mid-December would be a good idea.

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119TH CONGRESS
1ST SESSION

H. R. 1109

To amend title 28, United States Code, to provide for transparency and oversight of third-party beneficiaries in civil actions.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 7, 2025

Mr. ISSA (for himself, Mr. COLLINS, and Mr. FITZGERALD) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend title 28, United States Code, to provide for transparency and oversight of third-party beneficiaries in civil actions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Litigation Transparency Act of 2025".

SEC. 2. TRANSPARENCY AND OVERSIGHT OF THIRD-PARTY BENEFICIARIES IN CIVIL CASES.

(a) IN GENERAL.—Chapter 111 of title 28, United States Code, is amended by adding at the end the following:

"§ 1660. Third-party beneficiary disclosure

''(a) IN GENERAL.—Except as provided in subsection (b), in any civil action, a party or any counsel of record for a party shall—

''(1) disclose in writing to the court and all other named parties to the civil action the identity of any person (other than counsel of record) that has a right to receive any payment or thing of value that is contingent on the outcome of the civil action or a group of actions of which the civil action is a part; and

''(2) produce to the court and to each other named party to the civil action, for inspection and copying, any agreement creating a contingent right referred to in paragraph (1), including any ancillary agreement or document, except as otherwise stipulated or ordered by the court.

''(b) EXCEPTION.—The requirements under subsection (a) shall not apply with respect to a person that has a right to receive payment described in subsection (a)(1) if the right to receive payment is solely—

''(1) the repayment of the principal of a loan;

''(2) the repayment of the principal of a loan plus interest that does not exceed the higher of 7 percent or a rate two times the annual average 30-year constant maturity Treasury yield, as published

by the Board of Governors of the Federal Reserve System, for the year preceding the date on which the relevant agreement was executed; or

''(3) the reimbursement of attorney's fees.

''(c) TIMING.—The disclosures required by subsection (a) shall be made not later than the later of—

''(1) 10 days after the execution of any agreement described in subsection (a)(2); or

''(2) the time of the filing of the action before the court.

''(d) DUTY TO CORRECT.—A party or counsel of record that made a disclosure required by this section shall supplement or correct each such disclosure in a timely manner—

''(1) if such party or counsel of record learns that the disclosure is or has become incomplete or incorrect in some material respect, if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

''(2) as ordered by the court.''.

(b) CLERICAL AMENDMENT.—The table of sections for chapter 111 of title 28, United States Code, is amended by adding at the end the following:

''1660. Third-party beneficiary disclosure.''.

SEC. 3. APPLICABILITY.

The amendments made by this Act shall apply to any civil action pending on or commenced after the date of enactment of this Act.

○

TAB 15

15. Rule 55 – Default; Default Judgment

During its October 2024 meeting the Advisory Committee discussed Rule 55 and the FJC study Default and Default Judgment Practices in the District Courts, which is included in this agenda book.

The stimulus for the focus on the Rule is the mandatory language directed to the Clerk in the current rule, and the agenda book offered an alternative for consideration:

Rule 55. Default; Default Judgment

(a) Entering a Default. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk may ~~must~~ enter the party's default [upon finding that the party has failed to plead or otherwise defend].

(b) Entering a Default Judgment.

(1) ***By the Clerk.*** If the clerk determines that the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk – on the plaintiff's request, with an affidavit showing the amount due – may ~~must~~ enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.

(2) ***By the Court.*** In all other cases, the party must apply to the court for a default judgment. A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 7 days before the hearing. The court may conduct hearings or make referrals – preserving any federal statutory right to a jury trial – when, to enter or effectuate judgment, it needs to:

(A) conduct an accounting;

(B) determine the amount of damages;

(C) establish the truth of any allegation by evidence; or

(D) investigate any other matter.

* * * * *

As reflected in the minutes of the October 2024 Advisory Committee meeting, various concerns were raised by Committee members about whether such a change would be desirable. There might be instances in which the propriety of entering default under Rule 55(a) would present the Clerk with difficult calls on whether service had been properly made, whether the time to respond had elapsed, etc. With regard to entry of default judgments, the Clerk might also confront

a question about whether the claim was for "a sum certain or a sum that can be made certain by computation." It is not difficult to imagine that in some instances that determination could prove challenging for the Clerk.

Shifting the verb from "must" to "may" could reduce pressure on the Clerk, but might suggest the Clerk has unbridled discretion. Another concern was that the rule currently does not provide for notice to the defaulted party of the request for entry of judgment unless that party has not formally appeared in the action. One alternative suggested was that the rule might say the Clerk must enter a default or default judgment or submit the matter to the assigned judge. Ways of adding that idea included saying that the Clerk must enter the default or default judgment "unless ordered by the court" or that the Clerk "may defer to the court." As noted below, some of the local rules permit the Clerk to refer the application for entry of default to the assigned judge.

A different sort of concern raised was that attorneys or litigants (particularly pro se litigants) may be unclear on how these matters are handled. Indeed, the FJC report itself mentioned confusion about the operation of the rule. Given the rule's current mandatory language, some litigants (perhaps pro se litigants) may be suspicious if the clerk refers the matter to the court.

Support was also expressed for the current rule, however; at least one member of the Committee supported the current rule and opposed appearing to provide the clerk with discretion on whether to enter defaults or default judgments.

At the same time, there was uncertainty about whether the rule really presents problems in everyday operation, so that one consideration is that making changes could produce a risk of complication or confusion where presently there is no real problem. But Committee members expressed concern that the rule is not clear for attorneys on what must or will be done when entry of default or default judgment is sought. Providing guidance in the rule could produce benefits for the bar.

Because the Committee's discussion raised possible complexities, the conclusion at the October Committee meeting was that there should be additional study and that the Committee could return to this topic at its Spring meeting.

This memorandum provides additional background for that discussion, while leaving open the question whether the current rule has created problems that warrant amendment. On occasion it draws from the compilation of local rule treatment of entry of default and related problems presented in Appendix C to the FJC report. At the end, this memo presents a suggestion for a "bare bones" amendment that would leave many details to local rules rather than imposing nationwide standards.

State court contrast

There has been much concern recently about the increasing frequency of default judgments in state courts, often in debt collection matters in which the alleged debtor does not have assistance of counsel and fails to appear. See Pew Charitable Trusts, How Debt Collectors Are Transforming the Business of State Courts (2020). Some of this activity may result from the practice of "debt buying." See Federal Trade Commission, *Structure & Practices of the Debt Buying Industry* (2013). See also Paula Hannaford-Agor & Brittany Kauffman, Prevent Whack-A-Mole

Management of Consumer Debt Cases: A Proposal for a Coherent and Comprehensive Approach for State Courts (2020). The ALI has launched a Project on High Volume Litigation to consider these issues. There has been substantial academic attention to what's happening in state courts as well. See, e.g., Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 Harv. L. Rev. 1704 (2022).

Changing the procedures for default cases may be in order to respond to what Prof. Bookman calls "a broken adversarial system" in the state courts. Pamela Bookman, *Default Procedures*, 173 U. Pa. L. Rev. __ (forthcoming 2025) (at 3). But these important developments do not seem pertinent to concerns about Rule 55. The claims asserted in these state-court actions would almost always be based on state law, and in the event of diversity of citizenship the amount-in-controversy requirement would ordinarily prevent filing in federal court.

Prof. Bookman cites "existing procedural reform efforts, such as right-to-counsel movements and active judging" as suitable responses. Id. at 10. But she also recognizes that "state civil courts' default procedures and their implementation diverge markedly from federal courts." Id. at 10-11). She adds:

> The arc of *federal* civil procedure over the last few decades has shown a retrenchment, raising barriers to court access through distrust of plaintiff's lawyers in a variety of defendant-friendly procedural moves. * * * State courts, however, have maintained their ease of court access, yielding a growing procedural gulf between increasingly defendant-friendly federal courts and plaintiff-friendly state courts.

Id. at 8.

So although there may be significant problems with default practices in state court, no such problems appear to bear on the operation of Rule 55. Indeed, as reported in Figures 1 and 2 to the FJC Report included in this agenda book (pp. 24-25), the number of default judgments in federal court has been declining since the 1980s, and is presently below 2% of civil terminations. Compare Bookman, id. at 1-2 (reporting that state-court default rates are "often over 70% in debt-collection cases * * * down from rates as high as 95% a decade ago").

Role of discretion

Because the question of discretion for the Clerk was raised during the October Committee meeting, it may be useful to include what the Federal Practice & Procedure treatise says about the role of discretion for the court under Rule 55(b)(2):

> When an application is made to the court under Rule 55(b)(2) for the entry of a judgment by default, the district judge is required to exercise sound judicial discretion in determining whether the judgment should be entered. The ability of the court to exercise its discretion and refuse to enter a default judgment is made effective by the two requirements of Rule 55(b)(2) that an application must be presented to the court for the entry of judgment and that notice of the application must be sent to any defaulting party who has appeared. The latter requirement enables the defaulting party to show cause to the court why a default judgment should not be entered or why the requested relief should not be granted. This

> element of discretion makes it clear that the party making the request is not entitled to a default judgment as of right, even when the defendant is technically in default and that fact has been noted under Rule 55(a). * * *
>
> In determining whether to enter a default judgment, the court is free to consider a number of factors that may appear from the record before it. * * * Among the factors considered are the amount of money potentially involved; whether material issues of fact or issues of substantial public importance are at issue; whether the default is largely technical; whether plaintiff has been substantially prejudiced by the delay involved; and whether the grounds for default are clearly established or are in doubt. Furthermore, the court may consider how harsh an effect a default judgment might have; or whether the default was caused by a good-faith mistake or excusable or inexcusable neglect on the part of the defendant. Plaintiff's actions also might be relevant; if plaintiff has engaged in a course of delay or has sought numerous continuances, the court may determine that a default judgment would not be appropriate.

10A Fed. Prac. & Pro. § *2685* at 28-49. The quoted material spans many pages of the treatise because the notes to this text provide citations to a multitude of illustrative cases.

Many of these considerations might bear on entry of default judgment by the Clerk even when suit is for a "sum certain." It does not seem that the Clerk should be weighing all these matters, so it might be that one would suggest considering abrogation of Rule 55(b)(1) rather than changing from "must" to "may." Alternatively, as noted below in relation to local rule provisions, it may be preferable to recognize in the rule that the Clerk may refer the question whether to enter default judgment to the court.

Need for national procedures and clarity for the bar

One concern mentioned at the October 2024 meeting was that counsel do not know what the procedures are when they want to seek entry of default or default judgment. On this topic, Appendix C to the FJC report provides valuable information, including details described under the next heading.

One thing Appendix C shows is that about half the districts have no default-related procedures in their local rules. Whether that is a sign that more national particulars are needed or not may be debated. But at least it shows that in about half the districts adding particulars to the national rules would not, under Rule 83, nullify any existing local rules. On the other hand, the fact so many districts have adopted local rules may show that adding particulars to Rule 55 would be useful. The variation among local rules could show that adopting particulars in the national rule would also invalidate some divergent existing local rules. Perhaps such divergence is warranted by divergent local conditions, but it is not clear why.

Drawing on local rules in various districts, this memorandum introduces a variety of issues that might be addressed in revisions of Rule 55, which has remained relatively unchanged since

adoption in 1938. An abiding question is whether to undertake such revisions or leave these specifics to local rules and local practice.

Issues addressed in local rules

The local rules reported in Appendix C to the FJC report identify a number of possible additions to the national rules. At least some of these local rule provisions are arguably at tension with Rule 83(a)(1), which says that local rules "must be consistent with – but not duplicate" the national rules. But that is not a matter for this Committee. See 28 U.S.C. § 2071(c)(1) (vesting authority to review local rules in the judicial council of the circuit).

Instead, it may be useful to note features of local rules that add to what's in Rule 55. In some instances, the differences may be semantic. The following attempts to identify some ideas found in local rules that might be added to Rule 55 (and therefore – pursuant to Rule 83 – made binding on all districts).

Entry of default – Rule 55(a)

Terminology: Rule 55(a) says that the Clerk must enter default when "failure [to plead or otherwise defend] is shown by affidavit or otherwise." Some local rules, however, speak of an "application" or "request" or "motion" or "unsworn declaration under penalty of perjury" to support entry of default. These differences seem insignificant. In terms of "motion," one might note that Rule 7(b)(1) says that "[a] request for a *court* order must be made by motion." Some local rules refer to an "order" by the Clerk.

Notice: Rule 55(a) does not require notice to the defendant about the entry of default, and Rule 55(b)(1) says the clerk must enter default judgment if the claim is for a sum certain, but does not require notice to the defendant of this request. Unless the defendant is a minor or an incompetent person, the rule directs the clerk to enter judgment without notice. (How the clerk is to know whether the defendant is a minor or an incompetent person is not spelled out in the rule.) Rule 55(b)(2), applicable in "all other cases," then provides that the plaintiff must "apply to the court for a default judgment." Notice is required under Rule 55(b)(2), however, only when the defendant has "appeared personally or by a representative."

Some local rules require, however, that the party seeking entry of default give notice. Thus, Rule 55.1(a)(1) of the W.D. Mo. says:

> Written notice of the intention to move for entry of default must be provided to counsel or, if counsel is unknown, to the party against whom default is sought, regardless of whether or the party have entered an appearance. Such notice shall be given at least 14 days prior to the filing of a motion for entry of default.

E.D. Wash. Local Rule 55(a)(1) similarly says such notice is required "regardless of whether counsel or the party have entered an appearance. Such notice shall be given at least 14 days prior to the filing of the motion for entry of default." Since Rule 55(b)(2) requires notice when a default judgment is sought from the court (not the Clerk) and says notice is only required for parties that have appeared in the action, there might be a challenge to this local rule under Rule 83.

Local Rule 55(a) of the W.D. Wash., on the other hand, says:

> A motion for entry of default need not be served on the defaulting party. However, in the case of a defaulting party who has entered an appearance, the moving party must give the defaulting party written notice of the requesting party's intention to move for entry of default at least fourteen days prior to filing its motion and must provide evidence that such notice has been given in the motion for entry of default.

E.D.N.C. Local Rule 55.1(a) requires a motion and says:

> Following the 21-day response time provided under Local Civil Rule 7.1(f)(1), the motion shall be submitted to the presiding judge if it is opposed or if the allegedly defaulting party has filed a responsive pleading. Otherwise the motion shall be referred to the clerk and if the clerk is satisfied that the moving party has effected service or process, the clerk shall enter a default.

Clerk's notice burden: An alternative method of giving notice appears in M.D. La. Local Rule 55: "The clerk shall provide notice of entry of default to each defendant or the defendant's attorney at the last known address." So this provision puts the onus on the clerk rather than the plaintiff, though how the clerk is to provide notice when the defendant has not appeared could present difficulties.

Contents of showing: Rule 55(a) says only that the Clerk may enter a default when the party "has failed to plead or otherwise defend." Rule 12(a)(1)(A)(i) requires that a defendant serve an answer "within 21 days after being served with the summons or complaint."

Local rules sometimes specify what must be shown. For example, E.D. Mich. Local Rule 55.1 says:

> Requests for, with affidavits in support of, a Clerk's Entry of Default shall contain the following information: (a) A statement identifying the specific defendant who is in default. (b) A statement attesting to the date the summons and complaint were served upon the defendant who is in default. (c) a statement indicating the manner of service and the location where the defendant was served.

D. Utah Local Rule 55-1 says:

> To obtain an entry of default pursuant to Fed. R. Civ. P. 55(a), a party must file a "motion for entry of default" and a proposed order. The motion must describe with specificity the method by which each allegedly defaulting party was served with process in a manner authorized by Fed. R. Civ. P. 4, that the time for response has expired, and that the party against whom default is sought has failed to plead or otherwise defend. Should the clerk determine that entry of default is not

appropriate for any reason, the clerk will issue an order denying entry of default. An order denying entry of default is reviewable by the court upon motion.[1]

Clerk's responsibility: N.D. Ok. Local Rule 55-1(a) says: "Once a proper motion [for entry of default] has been filed, the Court Clerk will prepare and enter default after *independently determining that service has been effected, that the time for response has expired, and that no answer or appearance has been filed*." Such an obligation might sometimes be burdensome for the Clerk.

Rule 41(b) overtones: As indicated in the FJC report, entry of default may link to concerns about failure to prosecute. Thus, N.D. Tex. Local Rule 55.1 provides:

> If a defendant has been in default for 90 days, the presiding judge may require the plaintiff to move for entry of a default and a default judgment. If the plaintiff fails to do so within the prescribed time, the presiding judge will dismiss the action, without prejudice, as to that defendant.

M.D. Fla. Local Rule 1.10 appears to go further:

> (a) PROOF OF SERVICE. Within twenty-one days after service of a summons and complaint, a party must file proof of service.
>
> (b) APPLICATION FOR A DEFAULT. Within twenty-eight days after a party's failure to plead or otherwise defend, a party entitled to a default must apply for the default.
>
> (c) APPLICATION FOR A DEFAULT JUDGMENT. Within thirty-five days after entry of a default, the party entitled to a default judgment must apply for the default judgment or must file a paper identifying each unresolved issue – such as liability of another defendant – necessary to entry of the default judgment.
>
> (d) FAILURE TO ACT TIMELY. Failure to comply with a deadline set in this rule can result in dismissal of the claim or action without notice and without prejudice.

Reference to court: W.D. Mo. Local Rule 55.1(a)(4) provides: "Notwithstanding the provisions of Federal Rule of Civil Procedure 55(a), the Clerk of Court may refer any request for entry of default judgment to the Court for review prior to formal entry." Though this provision speaks of default judgment (dealt with in Local Rule 55.1(b)) it seems different from what Rule 55(a) says, and may be reflect uneasiness about the command "must" in the national rule.

Entry of Default Judgment – Rule 55(b)(1)

Entry of default as prerequisite: Rule 55(b)(1) says that the Clerk may enter default judgment only "against a defendant who has been defaulted for not appearing." This sequence has been recognized by courts. See, e.g., *Savoia-McHugh v. Glass*, 95 F.4th 1337, 1340 n. 6 (1st Cir.

[1] Below, there are examples of local rules recognizing that the Clerk can refer matters to the assigned judge. This local rule seems to be stronger than that.

2024) ("Entry of the default must precede entry of a default judgment."). Nonetheless, some local rules explicitly require that entry of default be included in the request for entry of default judgment. E.g., D. Utah Local Rule 55-1(2) ("The motion for default judgment must include the clerk's certificate of default").

On the other hand, E.D.N.C. Local Rule 55.1(b)(2) includes the following: "If a party files a motion for default judgment prior to entry of default, the moving party must also serve the party against which default is sought under subsection (a) of this rule [dealing with entry of default]."

Waiting period to seek entry of default judgment: W.D. La. Local Rule 55.1 directs the clerk to mail notice of the entry of default to each defendant and provides: "A judgment of default shall not be entered until 14 calendar days after entry of default."

Notice: Local Rule 55.1(c) of the E.D.N.Y. and S.D.N.Y. provides:

> Unless otherwise ordered by the Court, all papers submitted to the Court pursuant to Local Rules 55.1(a) or (b) shall simultaneously be mailed to the party against whom a default judgment is sought at the last known residence of such party (if an individual) or the last known business address of such party (if a person other than an individual). Proof of such mailing shall be filed with the Court. If the mailing is returned, a supplemental affidavit shall be filed with the Court setting forth that fact, together the reason provided for return, if any.

The Committee Note to this local rule acknowledges that the national rule does not require service but says that "experience has shown that mailing notice of such an application is conductive to both fairness and efficiency."

Meet and confer requirement: D. Or. Local Rule 55-1 (applicable to entry of default or default judgment) says that if the opposing party "has filed an appearance in the action, or has provided written notice of intent to file an appearance to the party seeking an order or judgment of default, then * * * the parties must make a good faith effort to confer before a motion or request for default is filed." An accompanying Practice Tip says that this requirement is "in addition to the requirement in Fed. R. Civ. P. 55(b)(2)" of notice to a party that has appeared.

Contents: Rule 55(b)(2) [but not 55(b)(1)] says that a default judgment must not be entered against a minor or incompetent person. 50 U.S.C. § 3931(b)(1) says that default judgment must not be entered against a person in military service. Some local rules require that such certifications be made to the court. See, e.g., M.D. Tenn. Local Rule 55.01.

Computation of interest: E.D.N.C. Local Rule 55.1(b)(2) directs that a motion seeking default judgment under Rule 55(b)(1) include a "supporting affidavit" including "the principal amount due," "information enabling the principal amount due to be calculated to a sum certain," "information enabling the computation of the interest to the date of judgment" and "the proposed post-judgment interest rate." The affidavit is also to specify "the amount of costs claimed."

Attorney fees: Some local rules address the showing needed to include an award of attorney fees in the default judgment. D. Alaska Local Rule 55.1(b) specifies that "a claim for 'reasonable attorney's fees' is not a claim for a sum certain," and directs submission of "the facts supporting

any claim for attorney's fees, including the amount of fees sought, the actual time spent, and actual fees incurred." C.D. Cal. Local Rule 55-3, on the other hand has a "Schedule of Attorneys' Fees" keyed to the amount of the judgment and says: "An attorney claiming a fee in excess of this schedule may file a written request."

Time limit to move for entry of judgment after entry of default: S.D. Cal. Local Rule 55.1 says: "If plaintiff(s) fail(s) to move for default judgment within thirty (30) days of the entry of a default, the Clerk will prepare, with notice, an order to show cause why the complaint against the defaulted party should not be dismissed."

Authority for Clerk to refer matter to court: N.D.N.Y. Local Rule 55.1 specifies what is needed to support entry of default judgment under Rule 55(b)(1), and adds:

> The Clerk shall then enter judgment for principal, interest, and costs. If, however, the Clerk determines, for whatever reason, that it is not proper for a sum certain default judgment to be entered, the Clerk shall forward the documents submitted * * * to the assigned district judge for review. The assigned district judge shall then promptly notify the Clerk as to whether the Clerk shall properly enter a default judgment.

D.Vt. Local Rule 55(b) includes the following:

> Consultation and Referral to District Judge: If the clerk determines that it may not be appropriate to enter a default judgment under Fed. R. Civ. P. 55(b)(1), the clerk may confer with the district judge. The district judge will advise the clerk whether default judgment under Rule 55(b)(1) is appropriate. If such a judgment is not appropriate, the clerk shall so notify the applicant, who may then proceed to move for default judgment under Fed. R. Civ. P. 55(b)(2).

* * * * *

The foregoing may go into excessive detail, but can serve to identify many issues that might be built into Rule 55 by amendment. As noted at the outset, however, it is not clear that amending the rule would respond to a real problem, particularly in comparison to the stated concerns about default practice in the state courts.

Although there is considerable variation among the local rules described in the FJC report, that does not mean any of them is inconsistent with current Rule 55. To the extent the Committee concludes that some of these specifics provided in local rules should be added to Rule 55, it would probably be desirable to state – at least in a Committee Note – that under Rule 83 districts may adopt provisions including additional requirements for entry of default or default judgments that are not mandated by the national rule.

For present purposes, however, the question is whether an amendment proposal is desirable, and if so what it should say.

For purposes of discussion, one variation on the draft before the Committee during its October 2024 meeting might be:

Rule 55. Default; Default Judgment

(a) Entering a Default. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk may ~~must~~ enter the party's default or [refer] {forward} the matter to the assigned judge for directions.

(b) Entering a Default Judgment.

(1) ***By the Clerk.*** If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk – on the plaintiff's request, with an affidavit showing the amount due – may ~~must~~ enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person nor in military service affected by 50 U.S.C. § 3931, or [refer] {forward} the matter to the assigned judge for directions.[2]

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[2] Reference to 50 U.S.C. § 3931 seems warranted, though it is not presently mentioned in Rule 55. Some local rules do mention this provision. It is entitled "Protection of servicemembers against default judgments," and provides:

(a) Applicability of section

This section applies to any civil action or proceeding, including any child custody proceeding, in which the defendant does not make an appearance.

(b) Affidavit requirement

(1) Plaintiff to file affidavit

In any action or proceeding covered by this section, the court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit --

(A) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or

(B) if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service.

(2) Appointment of attorney to represent defendant in military service

If in an action covered by this section it appears that the defendant is in military service, the court may not enter a judgment until after the court appoints an attorney to represent the defendant. If an attorney appointed under this section to represent a servicemember cannot locate the servicemember, actions by the attorney in the case shall not waive any defense of the servicemember or otherwise bind the servicemember. A later provision calls for plaintiff to post a bond if the court is unable to determine whether the defendant is in military service.

In case this approach seems useful, here is a first cut Committee Note to such an amendment:

COMMITTEE NOTE

Rules 55(a) and 55(b)(1) are amended to provide that they do not command the clerk to enter a default or default judgment whenever they empower the clerk to do so. A thorough study of district-court default practices by the Federal Judicial Center showed considerable variety in actual practices, and also that local rules often provide the clerk discretion to refer the matter to the presiding judge. See Emery Lee & Jason Cantone, Default and Default Judgment Practices in the District Courts (FJC March 2024). Because the clerk may sometimes be uncertain whether the criteria for entry of a default or a default judgment have been satisfied, this amendment recognizes that the clerk may refer these matters to the court.

Various districts have adopted local rules prescribing additional specifics regarding entry of default or default judgment. See Appendix C to the FJC Report. This amendment does not displace districts' authority under Rule 83 to adopt such specifics by local rule.

Alternatively, the Committee could consider abrogating Rule 55(b)(1). This provision may originally have been designed to relieve judges of burdens that clerks could handle. But it is not clear that the rule presently does so. And because it may direct the clerk to determine whether the claim is for a "sum certain" or one that can be made certain by calculation, it may present challenges for the clerk in some instances. Adding in the need to award costs could present additional challenges for the clerk, particularly if an attorney fee award is included in the costs. When Rule 55 was adopted in 1938, attorney fee awards were rare, but presently there are myriad statutory provisions that authorize an attorney fee award to a prevailing plaintiff, sometimes prompting aggressive litigation about the proper amount to be awarded.

* * * * *

As introduced in this memorandum, one could say that reworking Rules 55(a) and (b)(1) to address the many things contained in some local rules could require attention to many moving parts. Whether actual difficulties call for that effort is uncertain, and perhaps a modest revision providing only that the clerk may alternatively refer a Rule 55(a) or 55(b)(1) request to the court would suffice.

Given the possibility that amendment of the rule could be said to supersede this statutory requirement, it may be prudent to include mention of the statute in Rule 55(b)(1) and, perhaps, add a reference to it in Rule 55(b)(2).

Default and Default Judgment Practices in the District Courts

Prepared for the Judicial Conference Advisory Committee on Civil Rules

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Contents

Executive Summary

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

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

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

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

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

Background

Rule 55 provides for a confusing two-step process for entry of defaults and default judgments. Before entry of a default judgment, a default must typically be entered. Rule 55(a) provides: "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default." Rule 55(b)(1) in turn provides:

> If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk—on the plaintiff's request, with an affidavit showing the amount due—must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.[2]

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

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

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

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

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

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

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

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

Id. at n.3.

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

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

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

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

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

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

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

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

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

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

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

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

10. *See id.* at 24.

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

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

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

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

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

Approach

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

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

Rule 55(a) Defaults

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule 55(b)(1) Default Judgments

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

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

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

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

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

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

25. *Id.* at 450.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Active Auditing of Potential Defaults and Default Judgments

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPENDIX A: Drafting of Rule 55

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Dodge. Yes.

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

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

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

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

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

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

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

Mr. Morgan. And what does the judge do?

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

Mr. Morgan. He signs the judgment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Loftin. There would be no preliminary judgment.

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

Mr. Lofton. That is it.

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

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

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

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

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

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

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

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

Mr. Mitchell. No.

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

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

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

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

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

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

Dean Clark. Yes.

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

Mr. Mitchell. No.

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

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

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

Mr. Mitchell. Yes.

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

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

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

Mr. Mitchell. That is the Western Code system.

Mr. Wickersham. That is a logical system.

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

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

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

Mr. Morgan. I understand that is the rule.

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

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

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

Mr. Dodge. No.

Mr. Lemann. On a liquidated claim?

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

Mr. Lemann. And the judge signs the order?

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

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

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

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

Mr. Donworth. How about a foreclosure?

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

Professor Sunderland. There are two steps on that.

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

. . . .

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

Mr. Olney. It is done in our courts.

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

Mr. Olney. Certainly it is done in California.

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

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

Dean Clark. Is there a local rule?

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

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

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

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

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

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

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

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

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

Mr. Mitchell. Well, is there any motion?

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

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

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

Mr. Lemann. Yes, I make that motion.

Mr. Morgan. I second the motion.

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

Mr. Morgan. An affidavit of default.

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Mitchell. No.

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

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

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

Mr. Mitchell. No.

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

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

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

Mr. Cherry. That is all.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Wickersham. No, that is a variation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

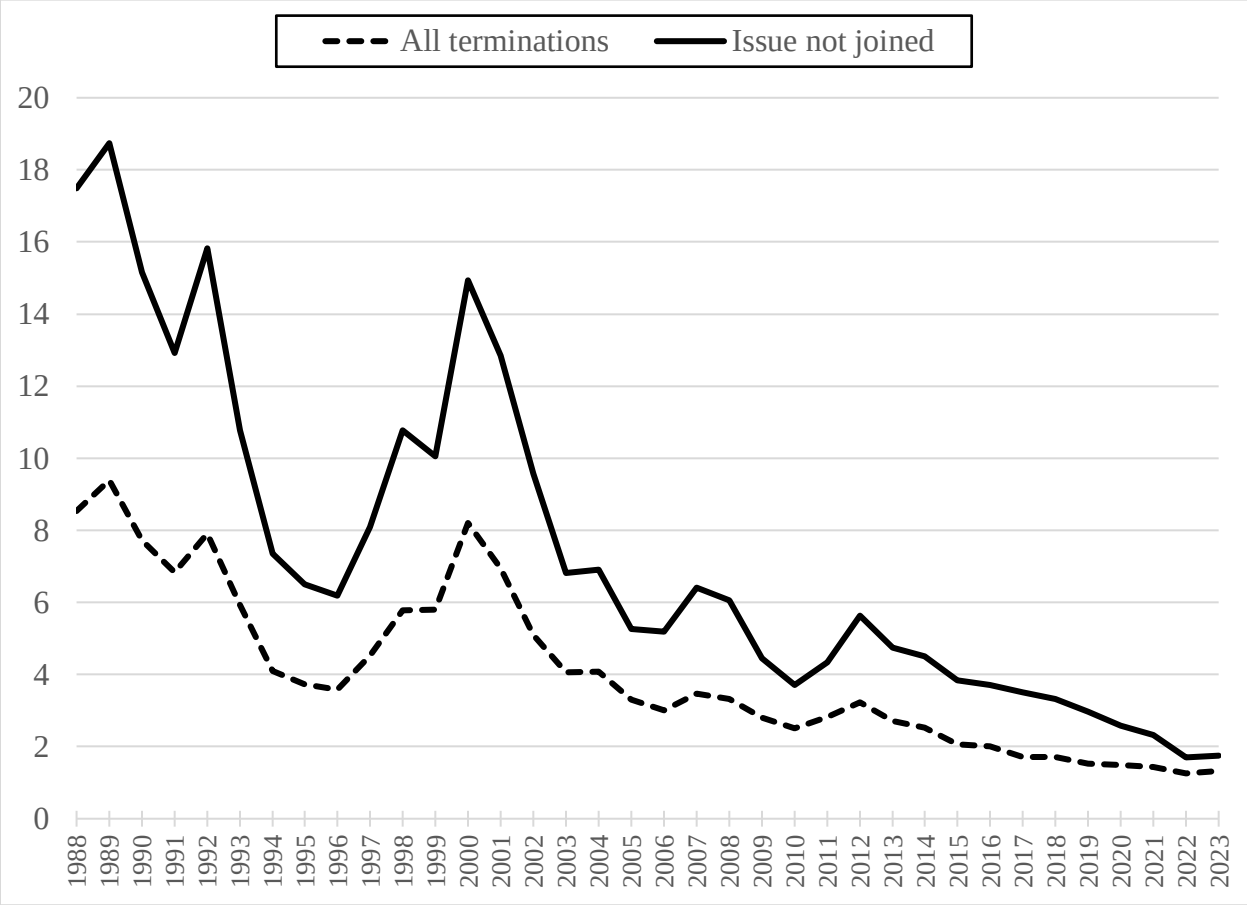
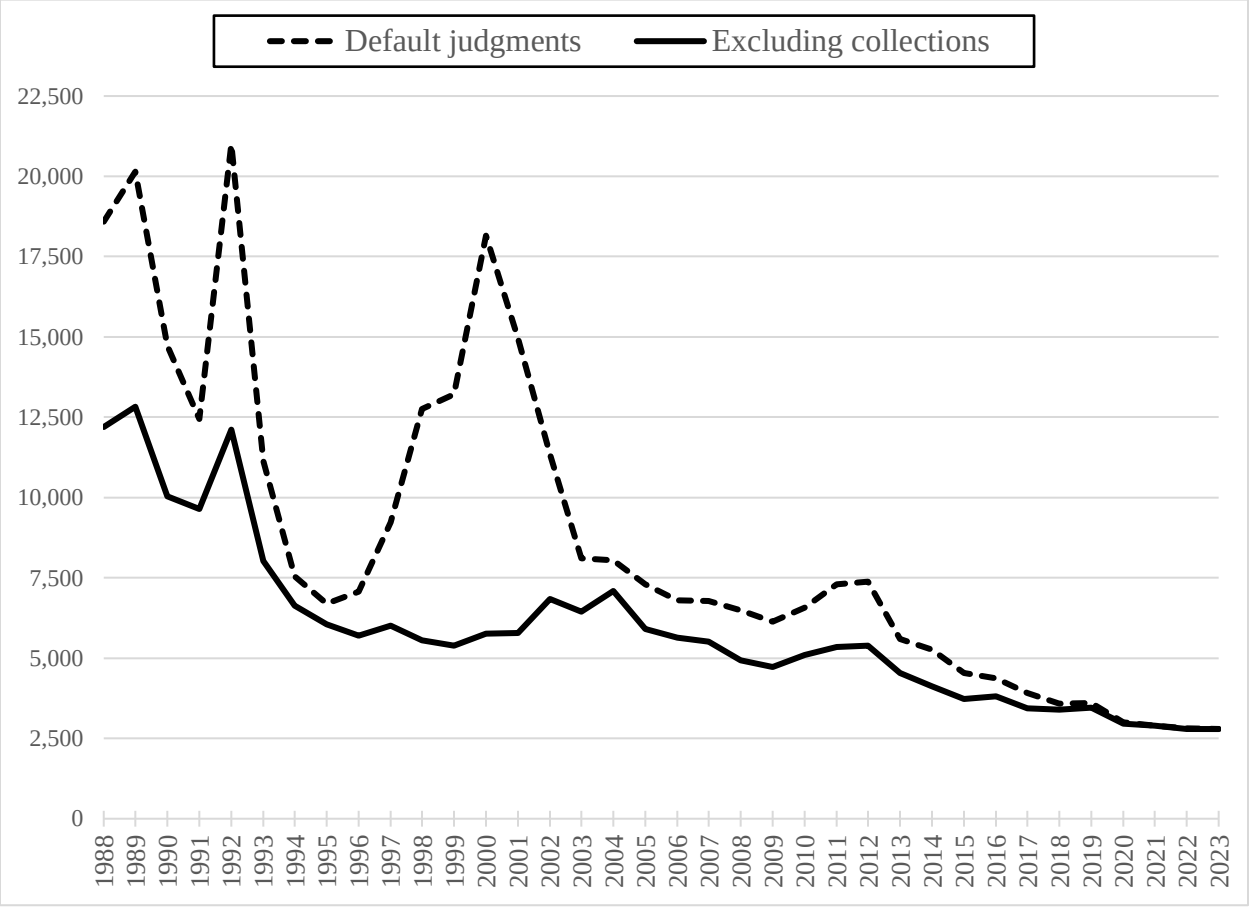


Figure 2: Counts of Default Judgments, Issue Not Joined Only, Fiscal Years 1988–2023 (Source: Civil Integrated Data Base)



APPENDIX C: Local Rules by Circuit and District

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

DISTRICT OF COLUMBIA CIRCUIT

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

FIRST CIRCUIT

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

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

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

District of Rhode Island (03)

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

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

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

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

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

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

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

District of Puerto Rico (04)

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

(a) Damages.

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

(b) Collection or Foreclosure Actions.

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

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

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

(3) original or certified copies of all promissory notes;

(4) copies of all mortgage deeds;

(5) a certification from the Registry of the Property or a verified title search.

https://www.prd.uscourts.gov/sites/default/files/local_rules/20230714-USDCPR-Local-Rules.pdf

SECOND CIRCUIT

District of Connecticut (05)

No local rule

https://www.ctd.uscourts.gov/sites/default/files/Revised-Local-Rules-11-22-2021_0.pdf

New York Northern (06)

N.D.N.Y. Civ. R. 55.1 Clerk's Certificate of Entry of Default

A party applying to the Clerk for a certificate of entry of default pursuant to Fed. R. Civ. P. 55(a) shall submit an affidavit showing that (1) the party against whom it seeks a judgment of affirmative relief is not an infant, in the military, or an incompetent person (2) a party against whom it seeks a judgment for affirmative relief has failed to plead or otherwise defend the action as provided in the Federal Rules of Civil Procedure and (3) it has properly served the pleading to which the opposing party has not responded.

N.D.N.Y. Civ. R. 55.2 Default Judgment (amended January 1, 2022)

(a) By the Clerk. Prior to filing a request for a default judgment for a sum certain, the party must first obtain a Clerk's Certificate of Entry of Default as required by L.R. 55.1. When a party is entitled to have the Clerk enter a default judgment pursuant to Fed. R. Civ. P. 55(b)(1), the party shall submit, with the form of judgment, the Clerk's certificate of entry of default, a statement showing the principal amount due, not to exceed the amount demanded in the complaint, giving credit for any payments, and showing the amounts and dates of payment, a computation of the interest to the day of judgment, a per diem rate of interest, and the costs and taxable disbursements claimed. An affidavit of the party or the party's attorney shall be appended to the statement showing that

1. The party against whom it seeks judgment is not an infant or an incompetent person;
2. The party against whom it seeks judgment is not in the military service, or if unable to set forth this fact, the affidavit shall state that the party against whom the moving party seeks judgment by default is in the military service or that the party seeking a default judgment is not able to determine whether or not the party against whom it seeks judgment by default is in the military service;
3. The party has defaulted in appearance in the action;
4. Service was properly effected under Fed. R. Civ. P. 4;
5. The amount shown in the statement is justly due and owing and that no part has been paid except as set forth in the statement this Rule requires; and
6. The disbursements sought to be taxed have been made in the action or will necessarily be made or incurred.

The Clerk shall then enter judgment for principal, interest and costs. If, however, the Clerk determines, for whatever reason, that it is not proper for a sum certain default judgment to be entered, the Clerk shall forward the documents submitted in accordance with L.R. 55.2(a) to the assigned district judge for review. The assigned district judge shall then promptly notify the Clerk as to whether the Clerk shall properly enter a default judgment under L.R. 55.2(a).

(b) By the Court. Prior to filing a motion for default judgment, the party must first obtain a Clerk's Certificate of Entry of Default as required by L.R. 55.1.A party shall accompany a motion to the Court for the entry of a default judgment, pursuant to Fed. R. Civ. P. 55(b)(2), with a clerk's certificate of entry of default in accordance with Fed. R. Civ. P. 55(a), a proposed form of default judgment, and a copy of the pleading to which no response has been made. The moving party shall also include in its application an affidavit of the moving party or the moving party's attorney setting forth facts as required by L.R. 55.2(a).
https://www.nynd.uscourts.gov/sites/nynd/files/local_rules/Local%20Rules%202022_Final.pdf#page=56

New York Southern (07) and New York Eastern (08) share local rules
E.D.N.Y. & S.D.N.Y. Civ. R. 55.1. Certificate of Default
A party applying for entry of default under Fed. R. Civ. P. 55(a) shall file:
(a) a request for a Clerk's Certificate of Default; and
(b) an affidavit demonstrating that:
(1) the party against whom a notation of default is sought is not an infant, in the military, or an incompetent person;
(2) the party has failed to plead or otherwise defend the action; and
(3) the pleading to which no response has been made was properly served.
A proposed Clerk's Certificate of Default form must be attached to the affidavit.

COMMITTEE NOTE
The Committee believes that Local Civil Rule 55.1 is helpful in setting forth the contents of the affidavit to be submitted by a party seeking a certificate of default pursuant to Fed. R. Civ. P. 55(a).
2018 COMMITTEE NOTE
The revision to Local Rule 55.1 incorporates the revised ECF Rule requiring the electronic filing of a request for a Clerk's Certificate of Default.

E.D.N.Y. & S.D.N.Y. Civ. R. 55.2. Default Judgment
(a) By the Clerk. Upon issuance of a Clerk's certificate of default, if the claim to which no response has been made only sought payment of a sum certain, and does not include a request for attorney's fees or other substantive relief, and if a default judgment is sought against all remaining parties to the action, the moving party shall submit an affidavit showing the principal amount due and owing, not exceeding the amount sought in the claim to which no response has been made, plus interest, if any, computed by the party, with credit for all payments received to date clearly set forth, and costs, if any, pursuant to 28 U.S.C. § 1920.
(b) By the Court. In all other cases the party seeking a judgment by default shall apply to the Court as described in Fed. R. Civ. P. 55(b)(2), and shall append to the application:
(1) the Clerk's certificate of default,
(2) a copy of the claim to which no response has been made, and
(3) a proposed form of default judgment.

(c) Mailing of Papers. Unless otherwise ordered by the Court, all papers submitted to the Court pursuant to Local Civil Rule 55.2(a) or (b) above shall simultaneously be mailed to the party against whom a default judgment is sought at the last known residence of such party (if an individual) or the last known business address of such party (if a person other than an individual). Proof of such mailing shall be filed with the Court. If the mailing is returned, a supplemental affidavit shall be filed with the Court setting forth that fact, together with the reason provided for return, if any.

COMMITTEE NOTE
Although Fed. R. Civ. P. 55(b) does not require service of notice of an application for a default judgment upon a party who has not appeared in the action, the Committee believes that experience has shown that mailing notice of such an application is conducive to both fairness and efficiency, and has therefore recommended a new Local Civil Rule 55.2(c) providing for such mailing.
https://www.nysd.uscourts.gov/sites/default/files/local_rules/2021-10-15%20Joint%20Local%20Rules.pdf#page=56

Western District of New York (09)
W.D.N.Y. Civ. R. 55 DEFAULT JUDGMENT
The procedure for Default Judgment under Fed.R.Civ.P. 55 is a two-step process: (a) entry of default by the Clerk of Court (Fed.R.Civ.P. 55(a)); and (b) entry of default judgment, by the Clerk of Court when the claim is for a sum certain pursuant to Fed.R.Civ.P. 55(b)(1) and by the Court in all other instances pursuant to Fed.R.Civ.P. 55(b)(2):

(a) Entry of Default. The documents required for obtaining entry of default are:
(1) Request for Clerk's Entry of Default;
(2) Affidavit (or Declaration) in Support of Request of Entry of Default;
(3) Proposed form for Clerk's Entry of Default; and
(4) A Certificate of Service indicating that these documents were served upon defendant.

(b) Default Judgment.
(1) By the Clerk of Court. A party entitled to a default judgment when the claim is for a sum certain, pursuant to Fed.R.Civ.P. 55(b)(1), shall submit to the Clerk of Court:
(A) Request for Entry of Default Judgment for Sum Certain;
(B) an affidavit by the party seeking default judgment or the party's attorney showing that: (i) the party against whom judgment is sought is not an infant or an incompetent person; (ii) the party has defaulted in appearance in the action; (iii) the amount shown by the statement is justly due and owing and no part thereof has been paid except as therein set forth; and (iv) the disbursements sought to be taxed have been made in the action or will necessarily be made or incurred therein;
(C) a statement showing the principal amount due, which shall not exceed the amount demanded in the complaint, giving credit for any payments and showing the amounts and dates thereof, a computation of the interest to the day of judgment, and the costs and taxable disbursements claimed;

(D) a proposed judgment containing the last known address of each judgment creditor and judgment debtor and, if any such address is unknown, an affidavit by the party seeking default judgment or the party's attorney stating that the affiant has no knowledge of the address; and
(E) a Certificate of Service indicating that these documents were served upon the defendant. Upon confirming the submission is in compliance with the Federal and Local Rules, the Clerk of Court shall enter judgment for principal, interest, and costs.
(2) By the Court. An application to the Court for the entry of a default judgment, pursuant to Fed.R.Civ.P. 55(b)(2), shall reference and include the docket numbers of the Clerk's Entry of Default and the pleading to which no response has been made.

(c) Notwithstanding the above, the Court, on its own initiative, may enter default or direct the Clerk of Court to enter default.
https://www.nywd.uscourts.gov/sites/nywd/files/2022%20Civil%20Local%20Rules%20FINAL%20with%20SIGNATURES.pdf#page=43

District of Vermont (10)
D. Vt. Civ. R. Default Judgment.
(a) Clerk's Entry of Default. When a party is entitled to default judgment under Fed. R. Civ. P. 55(b)(1) or Fed. R. Civ. P. 55(b)(2), that party must first obtain a clerk's entry of default under Fed. R. Civ. P. 55(a). An application for a clerk's entry of default must include a statement explaining the basis for entitlement to an entry of default.
(b) By the Clerk.
(1) Documents to Submit. When a party is entitled to default judgment under Fed. R. Civ. P. 55(b)(1), that party must submit:
(A) an application for entry of default judgment;
(B) a proposed default judgment with a statement containing the following:
(i) the amount due, not exceeding the amount of the original demand; and
crediting any payments, showing the amounts and dates of them;
(ii) a computation of accrued interest as of the proposed judgment date; and
(iii) any claimed costs and taxable disbursements.
(C) an affidavit containing the following:
(i) the party against whom judgment is sought is not an infant, an incompetent person, or in the military;
(ii) the party against whom judgment is sought has defaulted by not appearing or defending;
(iii) the amount shown in the statement is justly due and no amount has been paid except as stated; and
(iv) the disbursements sought to be taxed have been made or necessarily will be made in the future.
(2) Consultation and Referral to District Judge. If the clerk determines that it may not be appropriate to enter a default judgment under Fed. R. Civ. P. 55(b)(1), the clerk may confer with a district judge. The district judge will advise the clerk whether default judgment under Rule 55(b)(1) is appropriate. If such a judgment is not appropriate, the clerk shall so notify the applicant, who may then proceed to move for default judgment under Fed. R. Civ. P. 55(b)(2), in accordance with subsection (c).

(c) By the Court. When a party requests the court enter a default judgment, that party must submit the following documents:
(1) a copy of the clerk's entry of default;
(2) a motion for entry of default judgment; and
(3) a proposed default judgment order.
https://www.vtd.uscourts.gov/sites/vtd/files/LocalRules.pdf#page=34

THIRD CIRCUIT

District of Delaware (11)
D. Del. Civ. R. 77.2. Orders and Judgments by the Clerk.
(a) Orders by the Clerk. The Clerk is authorized, without further direction of a judge, to sign and enter orders specifically delineated as allowed to be signed by the Clerk under the Fed. R. Civ. P., and also the following:
(1) Orders specifically appointing persons to serve process in accordance with Fed. R. Civ. P. 4.
(2) Orders on consent noting satisfaction of a judgment, providing for the payment of money, withdrawing stipulations, annulling bonds, exonerating sureties or setting aside a default.
(3) Orders of dismissal on consent, with or without prejudice, except in cases to which Fed. R. Civ. P. 23, 23.1 or 66 apply.
(4) Orders entering default for failure to plead or otherwise defend in accordance with Fed. R. Civ. P. 55.
https://www.ded.uscourts.gov/sites/ded/files/local-rules/District%20of%20Delaware%20LOCAL%20RULES%202016.pdf#page=35

District of New Jersey (12)
No local rule (there is an *in rem* rule)
https://www.njd.uscourts.gov/sites/njd/files/CompleteLocalRules.pdf

Pennsylvania Eastern (13)
No local rule
https://www.paed.uscourts.gov/sites/paed/files/documents/locrules/civil/cvrules.pdf

Pennsylvania Middle (14)
No local rule (mentioned as a sanction)
https://www.pamd.uscourts.gov/sites/pamd/files/LR120114.pdf

Pennsylvania Western (15)
No local rule
https://www.pawd.uscourts.gov/sites/pawd/files/lrmanual20181101.pdf

Virgin Islands (91)
No local rule
https://www.vid.uscourts.gov/sites/vid/files/local_rules/LocalRulesofCivilProcedure2021.pdf

FOURTH CIRCUIT

Maryland (16)

D. Md. Civ. R. 108. JUDGMENTS

2. Default

a) Entry of Default

To obtain an entry of default pursuant to Fed. R. Civ. P. 55(a), the plaintiff must file a written request with the Court. This request shall contain the last known address of the defendant. Promptly upon the entry of default, the Clerk shall mail the entry of default to the defendant at the address stated in the request and to the defendant's attorney of record, if any, together with a notice informing the defendant that default has been entered and that the defendant may move to vacate the entry of default within 30 days.

b) Default Judgment

To obtain a default judgment pursuant to Fed. R. Civ. P. 55(b), the plaintiff must file a written request with the Court supported by an affidavit stating whether the defendant is a minor, an incompetent person, or in military service, with supporting facts pursuant to 50 U.S.C. § 3931(b)(1). If it appears that the defendant is a minor or an incompetent person, the Court shall not enter a default judgment unless a general guardian, conservator, or other fiduciary has appeared on behalf of the defendant. If it appears that the defendant is in military service, the Court shall not enter a default judgment until after it appoints an attorney to represent the defendant pursuant to 50 U.S.C. § 3931(b)(2).

https://www.mdd.uscourts.gov/sites/mdd/files/LocalRules.pdf#page=39

North Carolina Eastern (17)

E.D.N.C. Civ. R. 55.1 Entry of Default and Default Judgment

(a) Entry of Default by Clerk.

To obtain an entry of default pursuant to Fed. R. Civ. P. 55(a), a party must file a motion for entry of default and a proposed order. The moving party shall serve, in the manner provided in Fed. R. Civ. P. 5, any party that has failed to appear, and all other parties, with the motion for entry of default, and proposed order. Such service shall also be made on any attorney the moving party knows, or reasonably should know, represents the party against which default is sought. The motion shall be supported by an affidavit that describes with specificity how each allegedly defaulting party was served with process in a manner authorized by Fed. R. Civ. P. 4 and the date of such service. Following the 21-day response time provided under Local Civil Rule 7.1(f)(1), the motion shall be submitted to the presiding judge if it is opposed or if the allegedly defaulting party has filed a responsive pleading. Otherwise, the motion shall be referred to the clerk and if the clerk is satisfied that the moving party has effected service of process, the clerk shall enter a default.

(b) Default Judgment.

(1) General Requirements. Any motion for default judgment shall be served on every party that has appeared in the action and be supported by an affidavit stating that each party against which judgment is sought is not an infant, an incompetent person, or in the military service of the United States as defined in the Servicemembers Civil Relief Act of 2003, as amended.

(2) By the Clerk. A motion seeking default judgment pursuant to Fed. R. Civ. P. 55(b)(1) shall be accompanied by a proposed order and the supporting affidavit. If a party files a motion for default judgment prior to entry of default, the moving party must also serve the party against which default is sought pursuant to subsection (a) of this rule. The supporting affidavit shall show:
(A) the party against which judgment is sought has not appeared in the action;
(B) the principal amount due, giving credit for any payments and showing the amounts and dates of payment;
(C) the information enabling the principal amount due to be calculated as a sum certain, if it is not already a sum certain;
(D) the information enabling the computation of the interest to the date of judgment;
(E) the proposed post-judgment interest rate and the reasons for using it if the moving party claims that a post-judgment interest rate other than that provided by 28 U.S.C. § 1961 applies; and
(F) the amount of any costs claimed.
Additionally, if a claim is based on a contract, the moving party shall cite the relevant contract provisions in the motion for default judgment or supporting memorandum, if any, and file a copy of the contract as an attachment to the motion for default judgment. The clerk may submit any motion for default judgment to the presiding judge for review.
(3) By the Court. A motion seeking default judgment pursuant to Fed. R. Civ. B. 55(b)(2) shall include the docket entry number of the clerk's entry of default.
https://www.nced.uscourts.gov/pdfs/Local%20Civil%20Rules%202023.pdf#page=58

North Carolina Middle (18)
No local rule
https://www.ncmd.uscourts.gov/sites/ncmd/files/2021_June_21_CIVRulesEffective.pdf

North Carolina Western (19)
No local rule
https://www.ncwd.uscourts.gov/sites/default/files/local_rules/Revised_Local_Rules_1.pdf

South Carolina (20)
DISTRICT COURTS AND CLERKS
D.S.C. Civ. R. 55.01: Orders and Judgments. The clerk of court is authorized to enter judgments by default as provided for in Fed. R. Civ. P. 55(a) and 55(b)(1) without further direction of the court pursuant to Fed. R. Civ. P. 58. However, such action may be suspended, altered, or rescinded by the court for good cause shown.
https://www.scd.uscourts.gov/Rules/Civil%20Rules%20-%20Current.pdf#page=44

Virginia Eastern (22)
No local rule (*in rem* actions)
https://www.vaed.uscourts.gov/sites/vaed/files/LocalRulesEDVA.pdf

Virginia Western (23)
No local rule
https://www.vawd.uscourts.gov/sites/Public/assets/File/court/local_rules.pdf

West Virginia Northern (24)
No local rule
https://www.wvnd.uscourts.gov/sites/wvnd/files/Local%20Rules%20-%20Final%20July%202010%20JPB_1.pdf

West Virginia Southern (25)
No local rule
https://www.wvsd.uscourts.gov/court-info/local-rules-and-orders/local-rules

FIFTH CIRCUIT

Louisiana Eastern (3L)
No local rule
https://www.laed.uscourts.gov/sites/default/files/local_rules/2022%20CIVIL%20RULES%20LAED%20w%20Amendments%203.1.22.pdf

Louisiana Middle (3N)
M.D. La. Civ. R. 41 - DISMISSAL OF ACTIONS
. . .
(b) Dismissal for Failure to Prosecute.
(1) A civil action may be dismissed by the Court for lack of prosecution as follows:
(A) Where no service of process has been made within 90 days after filing of the complaint;
(B) Where no responsive pleadings have been filed or no default has been entered within sixty days after service of process, except when Fed. R. Civ. P. 12(a)(3) applies or a dispositive motion is pending; . . . . .
https://www.lamd.uscourts.gov/sites/default/files/pdf/2022%20Local%20Rules%20Revisions%208-18-2022.pdf#page=22

M.D. La. Civ. R. 55 - DEFAULT
In addition to the provisions of Fed. R. Civ. P. 55, the following rules apply to default judgments:
• All requests for entry of default shall be made to the Clerk of Court in writing;
• The clerk shall provide notice of entry of default to each defendant or the defendant's attorney at the last known address;
• A judgment of default shall not be entered until fourteen days after entry of default.
https://www.lamd.uscourts.gov/sites/default/files/pdf/2019LocalRules.pdf#page=30

Louisiana Western (36)
W.D. La. Civ. R. 55 - DEFAULT
W.D. La. Civ. R. 55.1 Default Judgment
In addition to the provisions of FRCvP 55, the following rules apply to default judgments:

A. All requests for entry of default shall be made to the clerk in writing;
B. The clerk shall mail by regular mail notice of entry of default to each defendant or his or her attorney at his or her last known address;
C. A judgment of default shall not be entered until 14 calendar days after entry of default.
Amended June 28, 2002 and December 1, 2009
https://www.lawd.uscourts.gov/sites/lawd/files/UPLOADS/localrules.WDLA.2021Oct06.pdf#page=25

Mississippi Northern (37)
No local rule (attachment and *in rem*)
https://www.msnd.uscourts.gov/sites/msnd/files/forms/2021-%20MASTER%20COPY%20-%20CIVIL%20FINAL.pdf

Mississippi Southern (38)
No general provision (*in rem* actions)
https://www.mssd.uscourts.gov/sites/mssd/files/2021_MASTER_COPY_CIVIL_FINAL.pdf

Texas Northern (39)
N.D. Tex. Civ. R. 55.1 Failure to Obtain Default Judgment.
If a defendant has been in default for 90 days, the presiding judge may require the plaintiff to move for entry of a default and a default judgment. If the plaintiff fails to do so within the prescribed time, the presiding judge will dismiss the action, without prejudice, as to that defendant.

N.D. Tex. Civ. R. 55.2 Default Judgments by the United States. [REPEALED]

N.D. Tex. Civ. R. 55.3 Request for Entry of Default by Clerk.
Before the clerk is required to enter a default, the party requesting such entry must file with the clerk a written request for entry of default, submit a proposed form of entry of default, and file any other materials required by Fed. R. Civ. P. 55(a).
https://www.txnd.uscourts.gov/sites/default/files/documents/CIVRULES.pdf#page=23

Texas Eastern (40)
No local rule (*in rem* actions)
https://www.txed.uscourts.gov/sites/default/files/HR_Docs/Local%20Rules%202021.pdf

Texas Southern (41)
No local rule, but referenced in
S.D. Tex. Civ. R. 5.5 Service of Pleadings and Other Papers. All motions must be served on all parties. Motions for default judgment must be served on the defendant-respondent by certified mail (return receipt requested). (Amended by General Order 2004-10, effective September 7, 2004.)
https://www.txs.uscourts.gov/sites/txs/files/LR%20May%202020%20Reprint.pdf#page=7

Texas Western (42)
W.D. Tex. Civ. R. 55 Failure to Obtain Default Judgment (Deleted)
https://www.txwd.uscourts.gov/wp-content/uploads/Documents/Local%20Court%20Rules/Local%20Court%20Rules%20(Full)%20062421.pdf#page=3

SIXTH CIRCUIT

Kentucky Eastern (43) and Kentucky Western (44)
Joint local rules have no specific rule on defaults and default judgments

Eastern District of Michigan (45)
E.D. Mich. Civ. R. 55.1 Clerk's Entry of Default
Requests for, with affidavits in support of, a Clerk's Entry of Default shall contain the following information:
(a) A statement identifying the specific defendant who is in default.
(b) A statement attesting to the date the summons and complaint were served upon the defendant who is in default.
(c) A statement indicating the manner of service and the location where the defendant was served.
https://www.mied.uscourts.gov/altindex.cfm?pagefunction=localRuleView&lrnumber=LR55.1

E.D. Mich. Civ. R. 55.2 Clerk's Entry of Judgment by Default
Requests for a Clerk's Entry of Judgment by Default must be accompanied by an affidavit which sets forth:
(a) The sum certain or the information necessary to allow the computation of a sum certain.
(b) The name of the defendant who is subject to default.
(c) A statement that the defendant is not:
(1) an infant or an incompetent person, or
(2) in the military service.
(d) A statement that a default has been entered because the defendant failed to plead or otherwise defend in accordance with Fed. R. Civ. P. 55(a).
COMMENT: The Clerk's Office has forms for requests for a Clerk's Entry of Judgment by Default and Affidavit of Sum Certain to assist parties and attorneys in complying with LR 55.2.
https://www.mied.uscourts.gov/altindex.cfm?pagefunction=localRuleView&lrnumber=LR55.2

Western District of Michigan (46)
No local rule
https://www.miwd.uscourts.gov/court-info/local-rules-and-orders/local-civil-rules

Ohio Northern (47)
No local rule
https://www.ohnd.uscourts.gov/court-info/local-rules-and-orders

Ohio Southern (48)

S.D. Ohio Civ. R. 55.1 Defaults and Default Judgments

(a) If a party makes proper service of a pleading seeking affirmative relief but, after the time for making a response has passed without any response having been served and filed, that party does not request the Clerk to enter a default, the Court may by written order direct the party to show cause why the claims in that pleading should not be dismissed for failure to prosecute.

(b) If a party obtains a default but does not, within a reasonable time thereafter, file a motion for a default judgment, the Court may by written order direct the party to show cause why the claims upon which default was entered should not be dismissed for failure to prosecute.

(c) Nothing in this Rule shall be construed to limit the Court's power, either under Fed. R. Civ. P. 41 or otherwise, to dismiss a case or one or more claims or parties for failure to prosecute.

https://www.ohsd.uscourts.gov/sites/ohsd/files//Local%20Rules%20Effective%202022-02-07.pdf#page=27

Tennessee Eastern (49)

No local rule

https://www.tned.uscourts.gov/sites/tned/files/localrules.pdf

Tennessee Middle (50)

M.D. Tenn. Civ. R. 55.01 – MOTIONS FOR ENTRY OF DEFAULT.

Motions for entry of default under Fed. R. Civ. P. 55(a) must be accompanied by an unsworn declaration under penalty of perjury under 28 U.S.C. § 1746 verifying: (i) proof of service; (ii) the opposing party's failure to plead or otherwise defend; (iii) if the opposing party is an individual, that the opposing party is not a minor or incompetent person; and, (iv) if the opposing party is an individual, that the opposing party is not in the military service, as required by 50 U.S.C. § 3931(b)(1). Evidence from the Defense Manpower Data Center, or other reliable source, confirming that the opposing party is not in the military service must be appended to the unsworn declaration.

https://www.tnmd.uscourts.gov/court-info/local-rules-and-orders/local-rules

Tennessee Western (51)

No local rule

https://www.tnwd.uscourts.gov/pdf/content/LocalRules.pdf

SEVENTH CIRCUIT

Illinois Northern (52)

No default judgment rule but LR41.1, the "inactive cases" screening mechanism:

N.D. Ill. Civ. R. 41.1. Dismissal for Want of Prosecution or By Default

Cases which have been inactive for more than six months may be dismissed for want of prosecution. An order of dismissal for want of prosecution or an order of default may be entered if counsel fails to respond to a call of the case set by order of court. Notice of the court call shall

be by publication or as otherwise provided by the court. In the Eastern Division publication shall be in the Chicago Daily Law Bulletin unless the court provides otherwise.
https://www.ilnd.uscourts.gov/_assets/_documents/_rules/LRRULES.pdf#page=36

There is an *in rem* rule
https://www.ilnd.uscourts.gov/_assets/_documents/_rules/LRRULES.pdf#page=89

Illinois Central (53)
No local rule
https://www.ilcd.uscourts.gov/sites/ilcd/files/November%201%2C%202021%20ILCD%20Local%20Rules%20%28Final%29%20%28Revisions%202.4.2022%29.pdf

Illinois Southern (54)
S.D. Ill. Civ. R. 55.1 DEFAULT JUDGMENT
(a) Entry by Clerk. The Clerk of Court shall enter a default against any party who fails to respond to a complaint, crossclaim, or counterclaim within the time and in the manner provided by Federal Rule of Civil Procedure 12. The serving party shall give notice of the entry of default to the defaulting party by regular mail sent to the last known address of the defaulted party and shall certify to the Court that notice has been sent.
(b) Default Judgment. Any motion for default judgment pursuant to Federal Rule of Civil Procedure 55(b) shall contain a statement that a copy of the motion has been mailed to the last known address of the party from whom default judgment is sought. If the moving party knows, or reasonably should know, the identity of an attorney thought to represent the defaulted party, the motion shall also state that a copy has been mailed to that attorney.
https://www.ilsd.uscourts.gov/Forms/2021LocalRules.pdf#page=27

Indiana Northern (55)
No local rule
https://www.innd.uscourts.gov/sites/innd/files/LocalRules11182019.pdf

Indiana Southern (56)
No local rule
https://www.insd.uscourts.gov/sites/insd/files/Local%20Rules%2012-1-21.pdf

Wisconsin Eastern (57)
E.D. Wis. Civil L. R. 41. Dismissal of Actions.
. . .
(b) Dismissal Where No Answer or Other Pleading Filed. In all cases in which a defendant has failed to file an answer or otherwise defend within 6 months from the filing of the complaint and the plaintiff has not moved for a default judgment, the Court may on its own motion, after 21 days' notice to the attorney of record for the plaintiff, or to the plaintiff if pro se, enter an order dismissing the action for lack of prosecution. Such dismissal must be without prejudice.

https://www.wied.uscourts.gov/sites/wied/files/documents/Local_Rules_2010-0201_Amended_2022-0103.pdf#page=43

Wisconsin Western (58)
No local rule
https://www.wiwd.uscourts.gov/local-rules

EIGHTH CIRCUIT

Arkansas Eastern (60)
No local rule
https://www.are.uscourts.gov/sites/are/files/local_rules/All_LR.pdf

Arkansas Western (61)
No local rule
https://www.arwd.uscourts.gov/sites/arwd/files/local_rules/ARWD%20local%20rules.pdf

Iowa Northern (62) and Iowa Southern (63)
N.D. Iowa Civ. R. 41 DISMISSALS OF ACTIONS
a. Involuntary Dismissals. After giving the parties the notice prescribed in section (c) of this rule, the Clerk of Court will, in the following circumstances, enter an order dismissing a civil action without prejudice:
1. Where service has not been made on any defendant within 90 days after the filing of the complaint, and the plaintiff has failed to file a statement in writing within 97 days after the filing of the complaint setting forth good cause for why service has not been made; or
2. As to a particular defendant, where service has been made upon that defendant and neither an answer nor a request for other action has been filed as to that defendant within 30 days after the date the answer was due; or
3. Where a default has been entered and a motion for entry of judgment by default in accordance with Federal Rule of Civil Procedure 55(b) has not been made within 30 days after the entry of default, unless the plaintiff advises the Clerk of Court that further court action is necessary before a default judgment can be sought; or
4. Where a deadline set for the performance of any act required by the Federal Rules of Civil Procedure, the Local Rules, or an order of the court has been exceeded by more than 30 days and an extension of time has been neither requested nor granted.
https://www.iasd.uscourts.gov/sites/iasd/files/Local%20Rules%20-%20Final%2012142020.pdf#page=42

Minnesota (64)
No local rule
https://www.mnd.uscourts.gov/court-info/local-rules-and-orders

Missouri Eastern (65)

No local rule (*in rem* and as sanction).
https://www.moed.uscourts.gov/sites/moed/files/CMECF_localrule.pdf

Missouri Western (66)

W. D. Mo. Civ. R. 55.1 DEFAULT JUDGMENT

Obtaining a default judgment is a two-step process: (1) a party must first file a motion for entry of default and obtain a Clerk's Entry of Default, and (2) a party must then file a motion for default judgment.

(a) Entering a Default. Upon motion, the Clerk of Court shall enter the default of any party against whom a judgment for affirmative relief is sought and who has failed to plead or otherwise defend.

1. Notice Required. Written notice of the intention to move for entry of default must be provided to counsel or, if counsel is unknown, to the party against whom default is sought, regardless of whether counsel or the party have entered an appearance. Such notice shall be given at least 14 days prior to the filing of the motion for entry of default. If notice cannot be provided because the identity of counsel or the whereabouts of a party are unknown, the moving party shall inform the Clerk of Court in the declaration or affidavit.

2. Declaration or Affidavit Required. The moving party must show (a) that the party against whom default is sought was properly served with the summons and complaint in a manner authorized by Federal Rule of Civil Procedure 4; (b) that the party has failed to timely plead or otherwise defend; and (c) that proper notice of the intention to seek an entry of default, as described above, has been accomplished.

3. No Notice of Hearing Required. The Clerk shall enter default upon the filing of a properly supported motion for entry of default.

4. Court Review. Notwithstanding the provisions of Federal Rule of Civil Procedure 55(a), the Clerk of Court may refer any request for entry of default judgment to the Court for review prior to formal entry.

(b) Entering a Default Judgment.

1. Motion Practice. All applications and requests for default judgment shall be conducted by motion practice. No motion for default judgment shall be filed unless an entry of default has been entered by the Clerk of Court. By declaration or affidavit, the moving party must (A) specify whether the party against whom judgment is sought is an infant or an incompetent person and, if so, whether that person is represented by a general guardian, conservator, or other like fiduciary; and (B) attest that the Servicemembers Civil Relief Act, 50 U.S.C. App. §§ 501-597b, does not apply.

2. Court Review. Notwithstanding the provisions of Federal Rule of Civil Procedure 55(b)(l), the Clerk of Court may refer any request for entry of default judgment to the Court for review prior to formal entry.

https://www.mow.uscourts.gov/sites/mow/files/DC-Local_Rules.pdf#page=37

Nebraska (67)

D. Neb. Civ. R. 55.1 Default Judgment.

(a) Clerk's Entry of Default.

To obtain a clerk's entry of default under Federal Rule of Civil Procedure 55(a), a party must:

(1) file a motion for the clerk's entry of default; and
(2) e-mail a proposed clerk's entry of default to the clerk at clerk@ned.uscourts.gov. This clerk's entry of default should state that a default is being entered for failure to plead or otherwise defend under Federal Rule of Civil Procedure 55(a).
(b) Clerk's Entry of Default Judgment.
If a party requests the clerk to enter a default judgment under Federal Rule of Civil Procedure 55(b)(1), the party must:
(1) file a motion for clerk's judgment by default;
(2) file an affidavit (a) stating the amount, for a sum certain or that can by computation be made certain, and that does not exceed the amount asked for in the complaint plus the exact computation of interest and costs, and (b) stating that the defendant against whom judgment is to be entered is not an infant or incompetent person as stated in Federal Rule of Civil Procedure 55(b)(1); and
(3) e-mail a proposed clerk's judgment for the clerk's signature to clerk@ned.uscourts.gov.
(c) Court's Entry of Default Judgment.
If a party requests a judgment from the court under Federal Rule of Civil Procedure 55(b)(2), the party must, after obtaining a clerk's entry of default under Federal Rule of Civil Procedure 55(a) and Nebraska Civil Rule 55.1(a):
(1) file a motion for default judgment;
(2) file an affidavit stating that the party against whom the default judgment is requested is (a) not an infant or incompetent person as stated in Federal Rule of Civil Procedure Rule 55(b)(2) or (b) meets the exceptions stated in Federal Rule 55(b)(2);
(3) e-mail to the judge's chambers a proposed judgment; and
(4) in cases in which damages must be proved, request an evidentiary hearing before the trial judge.
https://www.ned.uscourts.gov/internetDocs/localrules/NECivR.2021.pdf#page=47

North Dakota (68)
No local rule
https://www.ndd.uscourts.gov/lci/Local_Rules.pdf

South Dakota (69)
No local rule on procedures (mentioned in taxation of costs rule)
https://www.sdd.uscourts.gov/sites/sdd/files/local_rules/CIVIL%20RULES%20%202015.pdf

NINTH CIRCUIT

Alaska (7-)
D. Alaska Civ. R. 55.1 Entry of Default and Default Judgment
(a) Entry of Default. Motions for entry of default must include proof of service of the complaint per Fed. R .Civ. P. 4 and notice to appearing parties.
(b) Judgment Following Default.

(1) Attorney's Fees. For purposes of Fed. R. Civ. P. 55(b)(1), a claim for "reasonable attorney's fees" is not a claim for a sum certain.
(2) Supporting Evidence. Motions for judgment following entry of default must be supported by declarations and evidence establishing the right to relief, including but not limited to:
(A) calculations supporting the amount of judgment;
(B) relevant contract documents;
(C) the facts supporting any claim for prejudgment interest, including the applicable interest rate and calculation of interest due, see 28 U.S.C. § 1961;
(D) the facts supporting any claim for attorney's fees, including the amount of fees sought, the actual time spent, and actual fees incurred; and
(E) compliance with the Service Members Civil Relief Act, 50 USC §§ 3901-4043.
https://www.akd.uscourts.gov/sites/akd/files/local_rules/Local_Civil_Rules_12-2020.pdf#page=39

Arizona (70)
No local rule
https://www.azd.uscourts.gov/sites/azd/files/local-rules/Local%20Rules%20Master%20File%202023.pdf#page=119

California Northern (71)
No local rule
https://www.cand.uscourts.gov/wp-content/uploads/2023/10/CAND_Civil_Local_Rules_10-19-2023.pdf

California Eastern (72)
No local rule (*in rem*)
https://www.caed.uscourts.gov/caednew/assets/File/EDCA%20LOCAL%20RULES%20EFF%203-1-2022%20.pdf#page=211

Central District of California (73)
C.D. Cal. Civ. R. 55-1 Default Judgments. When application is made to the Court for a default judgment, the application shall be accompanied by a declaration in compliance with F.R.Civ.P. 55(b)(1) and/or (2) and include the following:
(a) When and against what party the default was entered;
(b) The identification of the pleading to which default was entered;
(c) Whether the defaulting party is an infant or incompetent person, and if so, whether that person is represented by a general guardian, committee, conservator or other representative;
(d) That the Servicemembers Civil Relief Act (50 U.S.C. App. § 521) does not apply; and
(e) That notice has been served on the defaulting party, if required by F.R.Civ.P. 55(b)(2).

C.D. Cal. Civ. R. 55-2 Default Judgment - Unliquidated Damages. If the amount claimed in a judgment by default is unliquidated, the applicant may submit evidence of the amount of damages

by declarations. Notice must be given to the defaulting party of the amount requested. The party against whom judgment is sought may submit declarations in opposition.

C.D. Cal. Civ. R. 55-3 Default Judgment - Schedule of Attorneys' Fees. When a promissory note, contract or applicable statute provides for the recovery of reasonable attorneys' fees, those fees shall be calculated according to the following schedule:

Amount of Judgment	Attorneys' Fees Awards
$0.01 - $1,000	30% with a minimum of $250.00
$1,000.01 - $10,000	$300 plus 10% of the amount over $1,000
$10,000.01 - $50,000	$1200 plus 6% of the amount over $10,000
$50,000.01 - $100,000	$3600 plus 4% of the amount over $50,000
Over $100,000	$5600 plus 2% of the amount over $100,000

This schedule shall be applied to the amount of the judgment exclusive of costs. An attorney claiming a fee in excess of this schedule may file a written request at the time of entry of the default judgment to have the attorney's fee fixed by the Court. The Court shall hear the request and render judgment for such fee as the Court may deem reasonable.
https://www.cacd.uscourts.gov/sites/default/files/documents/LocalRules_Chap1_12_20_0.pdf#page=91

California Southern (74)

S.D. Cal. Civ. R. 55.1 Default Judgments

If plaintiff(s) fail(s) to move for default judgment within thirty (30) days of the entry of a default, the Clerk will prepare, with notice, an order to show cause why the complaint against the defaulted party should not be dismissed.
https://www.casd.uscourts.gov/_assets/pdf/rules/2021.07.5%20Local%20Rules.pdf#page=44

S.D. Cal. Civ. R. 77.2 Orders Grantable by Clerk

The Clerk is authorized to sign and enter orders specifically allowed to be signed by the Clerk under the Fed. R. Civ. P. and is, in addition, authorized to sign and enter the following orders without further direction of a judge:

a.

. . . .

d. Orders entering default for failure to plead or otherwise defend in accordance with Fed. R. Civ. P. 55(b)(1).
https://www.casd.uscourts.gov/_assets/pdf/rules/2021.07.5%20Local%20Rules.pdf#page=54

Local rule for defaults in actions *in rem* (including maritime)
https://www.casd.uscourts.gov/_assets/pdf/rules/2021.07.5%20Local%20Rules.pdf#page=71

Guam (93)

D. Guam Civ. R. 77 Clerk's Authority.

(a) Orders Grantable by Clerk. The Clerk of Court is authorized to grant, sign, and enter the following orders without further direction by the Court. Any orders so entered may be suspended, altered, or rescinded by the Court for cause shown:

. . .

(2) Orders . . . entering defaults for failure to plead or otherwise defend, in accordance with Fed. R. Civ. P. 55, Federal Rules of Civil Procedure . . .

https://www.gud.uscourts.gov/sites/gud/files/civil_rules_effective_20190722_0.pdf#page=27

Hawaii (75)

No local rule

https://www.hid.uscourts.gov/files/order532/2019_08_26_administrative_Order%20Amending%20the%20Local%20Rules%20eff%202019_09_01(1).pdf?PID=11&MID=47

Idaho (76)

No local rule

https://www.id.uscourts.gov/content_fetcher/print_pdf_packet.cfml?Court_Unit=District&Content_Type=Rule&Content_Sub_Type=Civil

Montana (77)

No local rule (other than in prisoner cases)

https://www.mtd.uscourts.gov/sites/mtd/files/LocalRules_2022.pdf#page=34

Nevada (78)

D. Nev. Civ. R. 77-1. JUDGMENTS AND ORDERS GRANTABLE BY THE CLERK

. . .

(b) The clerk must:

. . .

(2) Enter default for failure to plead or otherwise defend under Fed. R. Civ. P. 55(a);

(3) Enter judgments by default in the circumstances authorized by Fed. R. Civ. P. 55(b)(1);

https://www.nvd.uscourts.gov/wp-content/uploads/2020/04/Local-Rules-of-Practice-Amended-2020.pdf#page=78

Northern Mariana Islands (94)

No local rule

https://www.nmid.uscourts.gov/documents/localrules/LR20171101.pdf

Oregon (79)

D. Or. Civ. R. 55-1 Conference Required Prior to Filing for Default

If the party against whom an order or judgment of default pursuant to Fed. R. Civ. P. 55 is sought has filed an appearance in the action, or has provided written notice of intent to file an appearance

to the party seeking an order or judgment of default, then LR 7-1 and LR 83-8 apply, and the parties must make a good faith effort to confer before a motion or request for default is filed.
Practice Tip: The requirement to confer is in addition to the requirement in Fed. R. Civ. P. 55(b)(2) that, "If a party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 7 days before the hearing."
https://www.ord.uscourts.gov/index.php/rules-orders-and-notices/local-rules/civil-procedure/1803-lr-55-default

Specific cross-reference to this:
D. Or. Civ. R. 83-8 Cooperation Among Counsel
(a) Counsel must cooperate with each other, consistent with the interests of their clients, in all phases of the litigation process and be courteous in their dealings with each other, including matters relating to scheduling and timing of various discovery procedures.
(b) The Court may impose sanctions if it finds that counsel has been unreasonable in not accommodating the legitimate requests of opposing counsel. In a case where an award of attorney fees is applicable, the Court may consider lack of cooperation when setting the fee.
https://www.ord.uscourts.gov/index.php/rules-orders-and-notices/local-rules/civil-procedure/1777-lr-83-rules-and-directives-by-the-district-court

Washington Eastern (80)
E.D. Wash. Civ. R. 55 DEFAULT; DEFAULT JUDGMENT
Obtaining a default judgment is a two-step process: (1) a party must first file a motion for entry of default and obtain a Clerk's Order of Default, and (2) a party must then file a motion for default judgment.
(a) Entering a Default. Upon motion, the Clerk of Court shall enter the default of any party against whom a judgment for affirmative relief is sought and who has failed to plead or otherwise defend.
(1) Notice Required. Written notice of the intention to move for entry of default must be provided to counsel or, if counsel is unknown, to the party against whom default is sought, regardless of whether counsel or the party have entered an appearance. Such notice shall be given at least 14 days prior to the filing of the motion for entry of default. If notice cannot be provided because the identity of counsel or the whereabouts of a party are unknown, the moving party shall inform the Clerk of Court in the declaration or affidavit.
(2) Declaration or Affidavit Required. The moving party must show (a) that the party against whom default is sought was properly served with the summons and complaint in a manner authorized by Federal Rule of Civil Procedure 4; (b) that the party has failed to timely plead or otherwise defend; and (c) that proper notice of the intention to seek an entry of default, as described above, has been accomplished.
(3) No Notice of Hearing Required. The Clerk shall enter default upon the filing of a properly supported motion for entry of default.
(b) Entering a Default Judgment.
(1) Motion Practice. All applications and requests for default judgment shall be conducted by motion practice. No motion for default judgment shall be filed unless an order of default has been

entered by the Clerk of Court. A motion for default judgment shall be filed and noted for hearing in accordance with LCivR 7. By declaration or affidavit, the moving party must (A) specify whether the party against whom judgment is sought is an infant or an incompetent person and, if so, whether that person is represented by a general guardian, conservator, or other like fiduciary; and (B) attest that the Servicemembers Civil Relief Act, 50 U.S.C. App. §§ 501-597b, does not apply.
(2) Court Review. Notwithstanding the provisions of Federal Rule of Civil Procedure 55(b)(l), the Clerk of Court may refer any request for entry of default judgment to the Court for review prior to formal entry.
(c) through (d) [Reserved]
https://www.waed.uscourts.gov/sites/default/files/localrules/LocalCivilRules.pdf#page=25

Washington Western (81)

W.D. Wash. Civ. R. 55 DEFAULT; DEFAULT JUDGMENT

(a) Entry of Default
Upon motion by a party noted in accordance with LCR 7(d)(1) and supported by affidavit or otherwise, the clerk shall enter the default of any party against whom a judgment for affirmative relief is sought but who has failed to plead or otherwise defend. The affidavit shall specifically show that the defaulting party was served in a manner authorized by Fed. R. Civ. P. 4. A motion for entry of default need not be served on the defaulting party. However, in the case of a defaulting party who has entered an appearance, the moving party must give the defaulting party written notice of the requesting party's intention to move for the entry of default at least fourteen days prior to filing its motion and must provide evidence that such notice has been given in the motion for entry of default.
(b) Judgment on Default
(1) No Default Judgment Absent a Default. No motion for judgment by default should be filed against any party unless the court has previously granted a motion for default against that party pursuant to LCR 55(a) or unless default otherwise has been entered.
(2) Supporting Evidence Required. Plaintiff must support a motion for default judgment with a declaration and other evidence establishing plaintiff's entitlement to a sum certain and to any nonmonetary relief sought.
(A) Plaintiff shall provide a concise explanation of how all amounts were calculated, and shall support this explanation with evidence establishing the entitlement to and amount of the principal claim, and, if applicable, any liquidated damages, interest, attorney's fees, or other amounts sought. If the claim is based on a contract, plaintiff shall provide the court with a copy of the contract and cite the relevant provisions.
(B) If plaintiff is seeking interest and claims that an interest rate other than that provided by 28 U.S.C. § 1961 applies, plaintiff shall state the rate and the reasons for applying it. For prejudgment interest, plaintiff shall state the date on which prejudgment interest began to accrue and the basis for selecting that date.
(C) If plaintiff seeks attorney's fees, plaintiff must state the basis for an award of fees and include a declaration from plaintiff's counsel establishing the reasonable amount of fees to be awarded, including, if applicable, counsel's hourly rate, the number of hours worked, and the tasks performed.

(3) By the Clerk. The clerk may not enter judgment by default in the case of a defaulting party who has entered an appearance, or who is an infant or incompetent, or who is or may be in the military service. In addition, a claim for "reasonable attorney's fees" is not for a sum certain under Fed. R. Civ. P. 55(b)(1) unless the complaint states the amount of fees sought. Motions to have the clerk enter a default judgment shall be noted in accordance with LCR 7(d)(1). A motion for entry of default judgment by the clerk need not be served on the defaulting party.
(4) By the Court. In all other cases, including instances where a defaulting party has entered an appearance, is an infant or incompetent, or is or may be in the military service, a motion for entry of a judgment by default must be addressed to the court. If there has been no appearance in the action by the defaulting party, the motion shall be noted in accordance with LCR 7(d)(1), but it need not be served on the defaulting party and notice of the motion need not be given to the defaulting party. If the defaulting party has appeared, the motion shall be noted in accordance with LCR 7(d)(3), and service of all papers filed in support of the motion must be made at the defaulting party's address of record and shall also be served by electronic means if available. In the absence of an address of record, service shall be made at the defaulting party's last known address and shall also be served by electronic means if available. The court may conduct such hearing or inquiry upon a motion for entry of judgment by default as it deems necessary under the circumstances of the particular case.
https://www.wawd.uscourts.gov/sites/wawd/files/WAWD%20All%20Local%20Civil%20Rules%20Clean%202022.pdf#page=97

TENTH CIRCUIT

Colorado (82)
D. Colo. Civ. R. 55.1 DEFAULT JUDGMENT FOR A SUM CERTAIN
(a) Required Showing. To obtain a default judgment under Fed. R. Civ. P. 55(b)(1), a party shall show by motion supported by affidavit:
(1) that the defendant who has been defaulted:
(A) is not a minor or an incompetent person;
(B) is not in the military service, as set forth in the Servicemembers Civil Relief Act, 50 U.S.C. § 3931, Protection of Servicemembers Against Default Judgments;
(C) has not made an appearance; and
(2) the sum certain or the sum that can be made certain by computation.
(b) Form of Judgment. The moving party shall submit a proposed form of judgment that recites:
(1) the party or parties in favor of whom judgment shall be entered;
(2) the party or parties against whom judgment shall be entered;
(3) when there are multiple parties against whom judgment shall be entered, whether the judgment shall be entered jointly, severally, or jointly and severally;
(4) the sum certain consisting of the principal amount, prejudgment interest, and the rate of postjudgment interest; and
(5) the sum certain of attorney fees enumerated in the document on which the judgment is based.
http://www.cod.uscourts.gov/Portals/0/Documents/LocalRules/2021_Final_Local_Rules.pdf?ver=2022-02-16-135206-217#page=30

Kansas (83)

D. Kan. Civ. R. 77.2 ORDERS AND JUDGMENTS GRANTABLE BY CLERK

(a) Orders and Judgments. The clerk may grant the following orders and judgments without direction by the court:

. . .

(6) Entry of default and judgment by default as provided for in Fed. R. Civ. P. 55(a) and 55(b)(1).
https://ksd.uscourts.gov/sites/ksd/files/MASTER%20COPY%20updated%2010-25-23.pdf#page=55

New Mexico (84)

No local rule
https://www.nmd.uscourts.gov/sites/nmd/files/local_rules/Local%20Rules%20of%20Civil%20Procedure%20Adopted%20October%201%2C%202020_0.pdf

Oklahoma Northern (85)

N.D. Okla. Civ. R. 55 – Default; Default Judgment

N.D. Okla. Civ. R. 55-1 Procedure for Obtaining Default Judgment.

(a) Entry of Default by Court Clerk. To obtain an entry of default pursuant to Fed. R. Civ. P. 55(a), the party must provide the Court Clerk with a "Motion for Entry of Default by the Clerk." The motion shall recite the facts that establish service of process, be accompanied by affirmations concerning non-military service, and state that the individual is neither an infant nor an incompetent person. Once a proper motion has been filed, the Court Clerk will prepare and enter default, after independently determining that service has been effected, that the time for response has expired, and that no answer or appearance has been filed.

(b) Entry of Default Judgment. In its discretion, the Court may set a hearing on the motion with respect to which notice shall be provided by the party moving for default judgment in accordance with the requirements of Fed. R. Civ. P. 55(b).
https://www.oknd.uscourts.gov/sites/default/files/madcap/Default.htm#lcvr55.htm%3FTocPath%3DCIVIL%2520RULES%7C_____23

Oklahoma Eastern (86)

E.D. Okla. Civ. R. 55.1 Procedure For Obtaining Default Judgment.

(a) Entry of Default by Court Clerk. To obtain an entry of default pursuant to Fed. R. Civ. P. 55(a), the party must provide the Court Clerk with a "Motion for Entry of Default by the Clerk." The motion shall recite the facts that establish service of process, and be accompanied by affirmations concerning non-military service and that the individual is neither an infant nor an incompetent person. Once a proper motion has been filed, the Court Clerk will prepare and enter default, after independently determining that service has been effected, that the time for response has expired and that no answer or appearance has been filed.

(b) Entry of Default Judgment. In cases where a plaintiff's claim is for a sum certain or a sum that can be made certain by computation, a plaintiff may request the Court Clerk to enter a default judgment under Fed.R.Civ.P. 55(b)(1). The plaintiff must file a motion for default judgment

accompanied by a concise brief, a form of judgment, and an affidavit (1) stating the amount for a sum certain or that can by computation be made certain and (2) stating that the defendant against whom judgment is to be entered is not an infant or an incompetent person. In all other cases, a party must apply to the Court for a default judgment pursuant to the provisions of Fed.R.Civ.P. 55(b)(2). In its discretion, the Court may set a hearing on a motion for default judgment with respect to which notice shall be provided by the party moving for default judgment in accordance with the requirements of Fed.R.Civ.P. 55(b)(2).
https://www.oked.uscourts.gov/sites/oked/files/Local_Civil_Rules.pdf#page=33

Oklahoma Western (87)

W.D. Okla. Civ. R. 55.1 Application for Default Judgment.

No application for a default judgment shall be entertained absent an affidavit in compliance with the Servicemembers Civil Relief Act.
https://www.okwd.uscourts.gov/wp-content/uploads/Local_Rules_05-26-2021.crs-edit.pdf#page=39

District of Utah (88)

D. Utah Civ. R. 55-1 DEFAULTS AND DEFAULT JUDGMENTS

The procedure for obtaining a default judgment under Fed. R. Civ. P. 55 is a twostep process: (a) entry of default by the clerk pursuant to Fed. R. Civ. P. 55(a); and (b) entry of default judgment, by the clerk when the claim is for a sum certain pursuant to Fed. R. Civ. P. 55(b)(1), and by the court in all other instances pursuant to Fed. R. Civ. P. 55(b)(2).

Entry of Default.

To obtain an entry of default pursuant to Fed. R. Civ. P. 55(a), a party must file a "motion for entry of default" and a proposed order. The motion must describe with specificity the method by which each allegedly defaulting party was served with process in a manner authorized by Fed. R. Civ. P. 4, and the date of such service. The clerk will independently determine whether service has been effected, that the time for response has expired, and that party against whom default is sought has failed to plead or otherwise defend. Should the clerk determine that entry of default is not appropriate for any reason, the clerk will issue an order denying entry of default. An order denying entry of default is reviewable by the court upon motion.

Default Judgment.

No motion for default judgment must be filed unless a certificate of default has been entered by the clerk. If a party obtains a certificate of default but does not, within a reasonable time thereafter, file a motion for default judgment, the court may direct the party to show cause why the claims upon which default was entered should not be dismissed for failure to prosecute.

(1) By the Clerk.

(A) In cases where a claim is for a sum certain or a sum that can be made certain by computation, a party may request the clerk enter a default judgment against any party other than the United States, its officers, or its agencies, by filing a motion for default judgment under Fed. R. Civ. P. 55(b)(1). The motion must clearly identify that the party is seeking default judgment from the clerk under Fed. R. Civ. P. 55(b)(1). The motion must be accompanied by a concise brief, a form of

judgment, and an affidavit stating: (i) the amount due; (ii) that the defendant has failed to appear; and (iii) that the defendant is not a minor or an incompetent person.
(B) If the clerk determines that it may not be appropriate to enter a default judgment under Fed. R. Civ. P. 55(b)(1), the clerk may confer with the presiding judge. The presiding judge will advise the clerk whether default judgment by the clerk is appropriate. If such a judgment is not appropriate, the motion for default judgment will be addressed by the presiding judge.
(2) By the Court. In all cases not falling under DUCivR 55-1(b)(1), a party must apply to the court for a default judgment in accordance with Fed. R. Civ. P. 55(b)(2). The motion for default judgment must include the clerk's certificate of default and a proposed form of default judgment. In cases against the United States, its officers, or its agencies, the claimant must establish a claim or right to relief by evidence that satisfies the court in compliance with Fed. R. Civ. P. 55(d). Upon receipt of the motion, the court may conduct further proceedings to enter or effectuate judgment as it deems necessary.
(3) Affidavit Required by Servicemembers Civil Relief Act. All motions for default judgment must be accompanied by an affidavit: (i) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or (ii) if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service.
https://www.utd.uscourts.gov/sites/utd/files/Dec%202021%20Civil%20Rules.pdf#page=64

District of Wyoming (89)
No local rule
https://www.wyd.uscourts.gov/sites/wyd/files/local_rules/localrules-cv22.pdf

ELEVENTH CIRCUIT

Alabama Northern (26)
No local rule
https://www.alnd.uscourts.gov/sites/alnd/files/ALND%20Local%20Rules%20Revised%2012-04-2019.pdf

Alabama Middle (27)
No local rule
https://www.almd.uscourts.gov/sites/default/files/forms/ALMD%20Local%20Rules.pdf

Alabama Southern (28)
S.D. Ala. Civ. R. 41. Dismissal of Actions
. . .
(b) Dismissal Where No Answer or Other Pleading Filed. Whenever a served Defendant has failed to answer or otherwise defend within six (6) months from the filing of the complaint and the Plaintiff has not sought default and default judgment, the Court upon notice may dismiss the action for failure to prosecute, in accordance with applicable law.
https://www.alsd.uscourts.gov/sites/alsd/files/local-rules.pdf#page=48

In rem actions
https://www.alsd.uscourts.gov/sites/alsd/files/local-rules.pdf#page=56

Florida Northern (29)
No general local rule
Attachment actions:
https://www.flnd.uscourts.gov/sites/flnd/files/local_rules/local_rules_0.pdf#page=46
In rem actions:
https://www.flnd.uscourts.gov/sites/flnd/files/local_rules/local_rules_0.pdf#page=49

Florida Middle (3A)
M.D. Fla. Civ. R. 1.10 Filing Proof of Service of Process; Deadline for Default
(a) PROOF OF SERVICE. Within twenty-one days after service of a summons and complaint, a party must file proof of service.
(b) APPLICATION FOR A DEFAULT. Within twenty-eight days after a party's failure to plead or otherwise defend, a party entitled to a default must apply for the default.
(c) APPLICATION FOR A DEFAULT JUDGMENT. Within thirty-five days after entry of a default, the party entitled to a default judgment must apply for the default judgment or must file a paper identifying each unresolved issue — such as the liability of another defendant —necessary to entry of the default judgment.
(d) FAILURE TO ACT TIMELY. Failure to comply with a deadline in this rule can result in dismissal of the claim or action without notice and without prejudice.
https://www.flmd.uscourts.gov/sites/flmd/files/local_rules/flmd-united-states-district-court-middle-district-of-florida-local-rules.pdf#page=17

Florida Southern (3C)
Similar to Florida Northern—rules for attachments and *in rem* actions, no general rule
https://www.flsd.uscourts.gov/sites/flsd/files/Local_Rules_Effective_120121_FINAL.pdf#page=77

Georgia Northern (3L)
N.D. Ga. Civ. R. 55: DEFAULT
N.D. Ga. Civ. R. 55.1 MAGISTRATE JUDGES: DEFAULT JUDGMENTS
(A) Pretrial Matters on Reference from Judge. The magistrate judges may, in appropriate cases, enter default judgments and review motions to set aside default judgments.
https://www.gand.uscourts.gov/sites/gand/files/local_rules/NDGARulesCV_2.pdf#page=60

Georgia Middle (3G)
No local rule
https://www.gamd.uscourts.gov/sites/gamd/files//Local_Rules_3-7-22.pdf

Georgia Southern (3J)
No local rule
https://www.gasd.uscourts.gov/court-info/local-rules-and-orders/local-rules

TAB 16

16. Random Assignment of Cases

Whether the Advisory Committee should pursue a Federal Rule of Civil Procedure covering case assignment in the district courts remains on the agenda. Attention to case assignment in the district courts continues to grow, particularly in cases seeking nationwide injunctions against executive action, but also in areas including bankruptcy and patents.

Forum shopping is, of course nothing new; in a system in which multiple courts are proper venues, litigants may prefer courts that they predict will be most advantageous for their causes and seek to litigate in those courts, whether by filing there, seeking a transfer, or enforcing a forum-selection clause. But in some divisions or districts, plaintiffs can effectively select the judge based on where they file; that is, if by filing in a particular location, such as a division with only one judge, a plaintiff knows to which judge the case will be assigned. The opportunity to "judge shop" raises serious questions of fairness and legitimacy. As a result, the Advisory Committee has received several suggestions, including a July 10, 2023 letter from Senator Schumer signed by 18 other senators, to consider a rule requiring random assignment of some cases among all the judges in a district.

Shortly before this Committee's April 2024 meeting, the Judicial Conference of the United States issued guidance to all districts recommending district-wide random assignment of any civil action seeking to bar or mandate state- or nationwide enforcement of state or federal law. After releasing this guidance, Judge Robert J. Conrad, Jr., secretary of the Conference, stated: "The random case-assignment policy deters judge-shopping and the assignment of cases based on the perceived merits or abilities of a particular judge. It promotes the impartiality of proceedings and bolsters public confidence in the federal Judiciary." This guidance, however, was exhortatory, not mandatory.

In light of the Judicial Conference guidance, however, the Committee concluded that it would be best to monitor the extent to which districts chose to adopt the suggested procedures. The Committee endorsed this approach again at its October 2024 meeting, and the Standing Committee did not object at its January 2025 meeting.

The Reporters, assisted by law librarians at UC-Berkeley, continue to track these developments, since there is no centralized source of district activity. In the year since the guidance was issued, many districts have adopted the guidance, including those with one or two-judge divisions have shifted to more random assignment in the kinds of cases described in the guidance. For instance, the Western District of Virginia has six one or two-judge divisions and adopted the guidance on June 14, 2024.[1] Other districts that have adopted the guidance include: the Southern

[1] *See* Western District of Virginia Standing Order 2024-6, June 14, 2024 https://www.vawd.uscourts.gov/sites/Public/assets/File/StandingOrders/Court/Random-Assignment-of-Civil-Cases.pdf.

District of Florida,[2] the Northern District of Indiana,[3] the Southern District of Indiana,[4] the Western District of Kentucky,[5] the Western District of Pennsylvania.[6]

Districts continue to deliberate, including through their local-rules process. Most recently, the District of Massachusetts, which has one-judge courthouses in Worcester and Springfield, adopted random assignment throughout the district of cases seeking to block federal laws.[7] Conversely, other districts with single-judge divisions have not changed their formal assignment procedures.

This issue will remain on the Advisory Committee's agenda as the districts continue to respond to the Judicial Conference guidance. The Reporters will continue to monitor the situation as it develops. The Reporters will continue to follow whether districts have altered their case-assignment policies consistent with the guidance.

[2] Southern District of Florida Administrative Order 2024-34 (May 6, 2024) https://www.flsd.uscourts.gov/sites/flsd/files/adminorders/2024-34.pdf.
[3] Northern District of Indiana, General Order NO. 2024-28 (Aug. 30, 2024).
[4] Southern District of Indiana General Order/Administrative Policy 2024-11, (April 15, 2024).
[5] Western District of Kentucky, General Order No. 24-05 (May 2, 2024).
[6] Western District of Pennsylvania, Administrative Order 2024-09 (July 17, 2024).
[7] District of Massachusetts, Gen. Order 25-1 (Feb. 1, 2025).

TAB 17

17. Attorney Admissions

This item will be an oral report.

TAB 18

18. Rules 5.3, 83, Federal "Common Rules," and new Rule 5(e) – Suggestions 24-CV-O through 24-CV-R

This memorandum introduces what have been posted as four separate amendment ideas, but all in the same 14-page submission, which is included in this agenda book. These proposals are directed also to the Appellate, Bankruptcy, and Criminal Rules Advisory Committees. As of this writing, we have not been informed that any of these three other committees intends to take up any of these proposals.

Since the proposals are all embodied in one document, this memorandum addresses all four of them in sequence.

(1) Name styling

24-CV-O proposes a new Rule 5.3:

Rule 5.3. Format of Papers

(a) Format. All papers, except exhibits in their original form, must comply with Fed. R. App. P. 32(a)(1), (4), (5), and (8).

(b) Nonconforming Documents. If a document does not conform to the requirement of this Rule and Rule 10(a), the Clerk will notify the filing party of the identified deficiency and request that the deficiency be corrected by the end of the next business day. If a deficiency is not corrected by the end of the next business day, the Clerk will forward the pleading to the assigned judge with notice of the identified deficiency and a recommendation, if appropriate, that the pleading be stricken for failure to comply with the applicable rules.

(c) Use by Court. Every document created by the court or clerk must comply with Rule 5.3(a).

Proposed Rule 5.3(a) invokes Fed. R. App. P. 32(a)(8), also proposed in this submission. That proposed new rule is as follows: "All names must be set in their normal case and diacritics. In headings, lower-case letters may be set in all caps."

The explanation for this proposal is that "[a]ll caps names are one of the main bugbears of sovereign citizen/organized pseudolegal commercial (OPCA) type litigants." According to Wikipedia, OPCA attitudes are rooted in conspiracy theories.

It is also urged that "[c]apitalization and diacritics are an inherent part of names. just as much as spacing and letters. Changes to them will often be culturally insulting."

No doubt there have been occasions when sovereign citizen litigants have imposed some burdens on the federal courts. It is not clear, however, that the use of all caps has added to these burdens. And it may well be that parties and others use all-caps designations. As a contrast, some people prefer all lower case renditions of their names. For example, the famous California lawyer e. robert "bob" wallach was sometimes known as "lower case bob." And that is not an unique example. Consider Professor john a. powell of UC Berkeley.

Incorporating the Appellate Rules into the Civil Rules would not be an unprecedented sort of thing. For example, some Bankruptcy Rules do invoke the Civil Rules. But the Appellate Rules to a considerable extent focus on issues somewhat distinct from the concerns of trial-level courts like the district courts and the bankruptcy courts. Indeed, one of the reasons for creating the Supplemental Rules for Social Security reviews was that those proceedings are essentially appellate in nature, making the operation of the Civil Rules ill-suited to resolving them.

Thus submission seems also to impose new burdens on the clerk's office, which is directed to review filings in district court to ensure that they conform to the requirements of the Appellate Rules (including the new one proposed in the submission). Then – seemingly without any court involvement – the clerk's office is to direct that the deficiency be corrected "by the end of the next business day." If that correction is not made, the clerk is to send the offending pleading to the assigned judge with a "recommendation" that the judge strike the pleading. It seems odd for the clerk to be making recommendations to the judge.

Proposed Rule 5.3(c) then commands the judge to comply with Rule 5.3(a). Perhaps this means the clerk is to return to the judge any document created by the judge that the clerk regards as out of compliance with that proposed Rule 5.3(a).

Surely a district could decide to adopt a local rule along these lines. Indeed, ftn. 12 asserts that proposed Rule 5.3(b) is drawn verbatim from a local rule. But it is hardly clear why every district should be commanded to handle such matters in this manner.

(2) Adopting common local rules
into the federal rules

The second proposal does not include a proposed rule amendment. Instead, it is that the Advisory Committee "systematically survey the local rules" and identify "types of provisions that are frequent in local rules." When those types are identified, the national rules should "adopt the most common version as the baseline default," which would "simplify most local rules." The goal would be to "reduce system-wide complexity." This treatment would be "beneficial for rules that don't have a genuine reason for local differences."

This is hardly the first time it has been proposed to overhaul district local rules. Not long after the Civil Rules went into effect in 1938, a committee was set up to study variations in local rules and practices. This committee issued a report in 1940. See Report on Local District Court Rules, 4 Fed. R. Serv. 969 (1940). Concerns about divergent local rules did not vanish.

Those concerns led to the Standing Committee's Local Rules Project of the 1990s, which involved very vigorous efforts to review and evaluate local rules under the leadership of Dean Coquillette, then Reporter of the Standing Committee. Eventually that effort led to a Standing Committee recommendation that all local rules be numbered to "correspond" to the national rules so that lawyers would know where to look in the local rules for rules on a given topic. See Rule 83(a)(1) (local rules "must conform to any uniform numbering system prescribed by the Judicial Conference"). The question whether a given local rule is valid may sometimes be vexing to unravel. See 12 C. Wright, A. Miller & R. Marcus, Fed. Prac. & Pro. § 3153 (3d ed. 2014).

But past experience shows that efforts to regularize handling of local rules have proven vexing. And the question whether there is a "genuine reason for local differences" could sometimes produce unpromising debates. Moreover, it is a given that the interpretation of a given district's local rule is a matter to be decided by the judges of that district. Imposing "common local rules" on a nationwide basis would seem to undercut that independence. Although the submission provides the assurance that "I explicitly do *not* here suggest any override of local rules," it seems that something of the sort could follow.

(3) Extracting new Federal Common rules and deduplicating extant Rules

The third suggestion goes beyond any one set of rules and urges adoption of a "new Rules set – the Federal Common Rules" – that would include "only matters which are shared between the specific rules sets. This goal could be achieved by moving to this new set of rules all "duplicative FRAP, FRBP, FRCrP, & FRCvP rules" and also including rules "substantively applicable to all or nearly all courts (e.g., FRCvP 11)."

There certainly has been an effort in recent decades to pursue uniformity among rule sets on topics for which that is suitable. An example is the Time Counting Project of ten or fifteen years ago, which resulted in adoption of parallel provisions in most of the rule sets. That focused project involved only time counting, but required much effort. This submission seems to look far beyond that sort of inter-committee effort and to create a new freestanding set of rules that would govern all the others (and have its own Advisory Committee?).

The example given on pp. 9-10 of the submission is that the form of papers should be uniform under all sets of rules. In particular, it is recommended that specific length limits be adopted (seemingly largely drawn from the Appellate Rules). But the submission cautions that its proposals on length limits are just an example. "Common rules should address anything that is in scope. Please don't let the perfect be the enemy of the good; these can and should be done incrementally, one type of rule at a time, and not held off until a never-reached future where all the Rules are wholesale revised at once."

Most of the sets of existing rules have by now undergone restyling. The Civil Rules process took countless hours over a two- to three-year period. With the Civil Rules, the decision was to do them all at once rather than seriatim. Though it took a lot of effort, the effort paid off in many ways.

Despite that, and great efforts to avoid problematic results, problems did result. The eventual resolution of the problem with Rule 81(c), addressed by the Advisory Committee during its October 2024 meeting is an illustration. For reasons lost in the mists of time, the verb tense in the rule case changed in the restyling effort – "If the state law did ~~does~~ not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time." That change led eventually to the proposed amendment approved by this Committee in October 2024. The example shows the riskiness of making even modest changes.

(4) Standardizing page equivalents for words and lines

The last proposal addresses "unexplained differences in lines and words per page equivalence" in the Appellate Rules and the Bankruptcy Rules. Seeking standardization and drawing on the Appellate Rules, the submission proposes addition of a new Rule 5(e) on "length limits" on p. 14 of the submission.

It seems that this proposal is motivated by a desire for "normalization (or at least explanation in notes)." It may well be that local rules or other local practices contain specifics like the ones on p. 14 of the submission, but it is not clear that supplanting those local provisions or imposing national limits where there are not local limits would respond to an actual problem in practice.

* * * * *

This submission clearly reflects very substantial study of our rule sets and much thought about them. But despite that it is recommended that the submission[s] be removed from the agenda.

Dear Committees on Appellate, Bankruptcy, Criminal, and Civil Rules —

I respectfully make 4 primary rules suggestions:

1. style names in normal case and diacritics;
2. adopt common local rules into federal rules;
3. extract common rules; and
4. standardize page equivalents for words and lines.

I also make several simplification suggestions along the way, but those are only incidental. Likewise, I am sure that the Committees can improve on my proposed language and examples. Please consider the underlying substance and intent, not just the examples given.

Sincerely,
Sai[1]
President, Fiat Fiendum
August 22, 2024

[1] Sai is my full legal name; please use gender-neutral language and no title. I am partially blind; please send all communications, in § 508 accessible format, by email.

1. Name styling

a. Avoidable trigger for OPCA litigants; low level waste

All-caps names are one of the main bugbears of sovereign citizen / organized pseudolegal commercial argument (OPCA)[2] type litigants, who think that e.g. ALICE SMITH refers to a quasi-corporate entity created by the government[3], whereas Alice Smith refers to an actual human.

This is of course utterly without merit. However, as a pragmatic, descriptive statement: the use of all-caps names causes easily avoidable vexatious litigation. This is burdensome for everyone — and this common distraction for OPCA litigants obscures their potential legitimate claims. It harms nothing to put "Alice Smith" on a summons, subpoena, case caption, etc. — rather than "ALICE SMITH" — and would avoid triggering this particular hang-up.

b. Inaccuracy and insult

Capitalization and diacritics are an inherent part of names, just as much as spacing and letters. Changes to them will often be culturally insulting.

Putting all names in all caps is inaccurate, and obscures actual differences in names.[4] For example:

- Shauna MacDonald, Canadian actress
- Shauna Macdonald, Scottish actress
- Leroy Van Dyke, American singer
- Lawrence VanDyke, 9th Cir. judge
- Cornelius Vanderbilt, American businessman

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[2] *See* e.g. *Meads v Meads* 2012 ABQB 571 (exhaustively documenting OPCA), *cited by* e.g. *U.S. Bank N.A. v. Janelle*, No. 20-cv-337 (D. Me. Oct. 15, 2021)

[3] *See Meads* at [7], [75]–[76], [211]–[212], [323]–[324] (collecting cases), & [417]–[446] ("strawan").

[4] Names vary to an extent that you may not be aware of; for background, I suggest reading e.g. Patrick McKenzie & tony rogers' *Falsehoods Programmers Believe About Names – With Examples* and W3C's *Personal names around the world*. In short, leaving a name in its original form is the only accurate practice.
This extensive compilation of explainers includes many which are likely of interest and relevance, e.g. about Bitcoin, email, video, postal addresses, and typography (e.g., particularly relevant here, one about case).

- Laura van den Berg, American novelist
- Ed Vande Berg, American baseball player
- Jeff Vandeberg, American architect
- Ana de Alba, 9th Cir. judge

Many fonts lack diacritics on capitals, so e.g. 1st Cir. judges Myrna Pérez & José A. Carbanes would often have their names be rendered PEREZ & JOSE rather than PÉREZ & JOSÉ. Although rare, these can be minimal pairs — e.g. Chris Perez and Chris Pérez are different people (baseball player and guitarist, respectively), as are John van Dyke (canoeist) and John Van Dyke (politician).

c. Annoyance and time waste

When drafting, party and case names set in all-caps[5] waste time, since copying citations and quotes often requires resetting them into normal case. This is minor, sure — but a couple minutes routinely wasted, added over the whole system, collectively wastes substantial time, annoyance, and expense.

d. Bad style

Using all-caps is bad typography and more difficult to read.[6]

Example: USING ALL-CAPS IS BAD TYPOGRAPHY AND MORE DIFFICULT TO READ.

[5] E.g. *Janelle*, *supra*.
[6] *See* e.g. Matthew Butterick, *Typography for Lawyers*, regarding all caps & caption pages.

e. Suggestion

There is no reason to have names in all caps, and good reasons — simple respect, accuracy, pragmatic avoidance of OPCA, avoidance of waste, and legibility — to style them in their normal fashion.

I therefore suggest that the FRAP, FRBP, FRCrP, & FRCvP be amended to add a style[7] requirement for names to always be set in their normal case and diacritics.

I suggest, for example, the following:[8]

- FRAP 32(a)(*new* 8): *Names.*

  All[9] names must be set in their normal case and diacritics. In headings, lower-case letters may be set in small caps.

  Committee note: E.g. William McKinley, not WILLIAM MCKINLEY; Johannes van der Waals, not JOHANNES VAN DER WAALS; João da Silva Feijó, not JOAO DA SILVA FEIJO; Michael ffrench-O'Carroll, not MICHAEL FFRENCH-O'CARROLL; JPMorgan Chase, not JPMORGAN CHASE. In a heading (but not a caption), e.g. Affidavit of William McKinley is also permissible.

  Errors due to mistake or technical inability[10] should be corrected where feasible, but not rejected.

- FRAP 32(*new* h): *Use by court.*

  Every document created by the court or clerk must comply with Rules 32(a)(1), (4), (5), (6), and (8).

- FRAP 27(d): *amend to add* ", and the name styling requirements of Rule 32(a)(8)".

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[7] I note that FRAP 32 & FRBP 8015 require particular typefaces and other typography requirements, as do many LCvR and LCrR. This suggestion is more substantive, since it is for fidelity to actual differences, not just presentation.

[8] My intent with this suggestion is only to add a name style rule into existing style rules, and have courts follow the same style (so that e.g. subpoenas & summons are captured, and court-issued documents' & forms' style can be copied by filers). FRCrP & FRCvP lack style rules (though they are in local rules), so I gave illustrative examples to cover all four Rules sets; that is only incidental, and is a distinct suggestion (see suggestion 2). I list them as separate rules only to make this suggestion self-sufficient; I believe that these should all be moved to common rules (together with all or nearly all of e.g. FRAP 32 & FRBP 8014), instead of creating substantive new rules or cross-citing FRAP (see suggestion 3).

[9] This is intended to cover humans in particular, but all other names also. The example of JPMorgan Chase for the notes is meant to demonstrate that "all" means all, without having to state it explicitly.

[10] My intent here is to make this a "best effort" type rule — e.g. many people don't know how to type ō (or more difficult diacritics like Vietnamese, e.g. Nguyễn Ngọc Trường Sơn); one may not know if a name should have diacritics or internal capitalization (e.g. where prior records didn't reflect them, as is common), etc. Reasonable attempts that don't comply shouldn't be taken as grounds for rejection, but one should at least make a reasonable attempt.

- FRBP 8015(a)(*new* 8) & note: *add* identical to FRAP 32(a)(8)

- FRBP 8015(*new* i): *Use by court.*

  Every document created by the court or clerk must comply with Rules 8015(a)(1), (4), (5), (6), and (8).

- FRBP 8014(f)(2) *amend to add* "and name styling" *after* "type style"

- FRCvP *new* 5.3: *Form of Papers.*

  (a) *Format.*

  All papers, except exhibits in their original form[11], must comply with Fed. R. App. P. 32(a)(1), (4), (5), (6), and (8).

  (b) *Nonconforming documents.*[12]
  If a document does not conform to the requirements of this Rule and Rule 10(a), the Clerk will notify the filing party of the identified deficiency and request that the deficiency be corrected by the end of the next business day. If a deficiency is not corrected by the end of the next business day, the Clerk will forward the pleading to the assigned judge with notice of the identified deficiency and a recommendation, if appropriate, that the pleading be stricken for failure to comply with applicable rules.

  (c) *Use by court.*

  Every document created by the court or clerk must comply with Rule 5.3(a).

- FRCrP 49(*new* e)(1–3), *Form of Papers*: *add* identical to FRCvP 5.3(a–c)

[11] My intent here is to exempt documents that were not created under the Rules, and are from some prior or external source that the filer doesn't control — i.e. to *not* impose a re-formatting requirement like Sup. Ct. R. 33.1 — while capturing all documents created under the Rules, i.e. which the filer does control.

[12] This is verbatim D.D.C. LCvR 5.1(g) (other than substituting "Fed. R. Civ. P." with "Rule"), simply because that's the first one I looked at. I have no comment on its merit relative to other courts' local rules on handling nonconforming documents, but I think some such provision is worthwhile. Again, this is distinct and incidental; see suggestion 2.

2. Adopting common local rules into federal rules

a. Context

There are many local rules that are universal (or near universal), yet are not in the federal rules. Adopting a common baseline would simplify local rules, ensure that their provisions are in fact deliberate variations rather than oversights in the federal rules, simplify matters for people who practice in multiple courts, and simplify case law on the rules.

For example:[13]

- no ex parte communication, e.g. D.D.C. LCvR 5.1(a), 9th Cir. R. 25-2
- fax & email require permission, e.g. D.D.C. LCvR 5.1(b), 9th Cir. R. 25-3
- first filing should include name & contact info, e.g. FRAP 32(a)(2)(F), D.D.C. LCvR 5.1(c), 9th Cir. R. 3-2(b), 21-2(a), 27-3(c)(i)
- filing format, e.g. D.D.C. LCvR 5.1(d), 9th Cir. R. 25-5(d)
- exhibits on complaints etc should be essential, e.g. D.D.C. LCvR 5.1(e)
- 28 USC 1746 declaration, e.g. FRAP 25(a)(2)(A)(3), D.D.C. LCvR 5.1(f), 9th Cir. R. 4-1(c)(1), (c)(2), (e)
- handling of nonconforming documents, e.g. D.D.C. LCvR 5.1(g)
- filing sealed documents, e.g. D.D.C. LCvR 5.1(h), 9th Cir. R. 27-13

b. Suggestion

I suggest that the Committees:

- systematically survey the local rules,
- identify types[14] of provisions that are frequent in local rules but are not covered by the federal rules, and

[13] Again, using D.D.C. LCvR & 9th Cir. R. merely by way of example. As best I can recall, similar provisions are in nearly all local rules I've personally read:
[14] By "type" I mean the minimal synopsis form, as I gave above — virtually all courts will have filing format requirements, procedure for filing under seal, etc., even if their details differ.

- adopt the most common[15] version[16] as the baseline default in the federal rules, so as to most simplify the most local rules.

Where feasible, these should be merged into common rules (as proposed below), or at least be concordant with them (e.g. having consistent words per page provisions[17]).

Local rules can of course still vary. I explicitly do *not* here suggest any override of local rules, à la FRAP 32.1(a). Although I think that standardization would be beneficial for rules that don't have a genuine reason for local differences, here I am only proposing system-level simplification and collection, not substantial substantive change (other than to apply defaults when an unusual court's local rules haven't spoken to it).

I believe that the vast majority of local rules cover issues the federal rules simply fail to address, or have merely incidental differences between local rules — rather than expressing a genuine difference of opinion and decision to have a procedural "circuit split" (as it were). Those common rules are ripe for simplification, and the federal rules would benefit from covering the issues they address.

By way of metric, consider the combined page length of the entire set of federal rules — including all local rules. My suggestion is to reduce system-wide complexity, i.e. that combined page length, by turning local rules into federal ones that most courts would adopt with relatively little substantive variation. The simpler, the better.[18]

[15] "Common" can be a functionally identical majority, or an approximate middle ground that would work as a consensus baseline (e.g. for page length limits).
[16] By "version" I mean the particular choice of rule for a given type, i.e. the details.
[17] n.b. FRAP & FRBP's words per page conversions are not currently consistent; see suggestion 4
[18] To recapitulate Pascal: if I'd had more time and energy, I would've made these suggestions more concise too. I have tried to at least be clear, so the Rules can be more concise than I am here.

3. Extracting a new Federal Common Rules and deduplicating extant Rules

a. Suggestion

A substantial amount of the Rules are needlessly duplicative, not just between courts but between Rules sets — for example, FRBP 8015 & FRAP 32. This adds needless complexity, creates potential for issues of surplusage, and makes the Rules harder to maintain.

I therefore suggest:

- create a new Rules set — the Federal Common Rules — which is to include only matters which are shared between the specific Rules sets
- move to the FCR all
    - duplicative FRAP, FRBP, FRCrP, & FRCvP rules, and
    - rules substantively applicable to all or nearly all courts (e.g. FRCvP 11)
- replace the moved rules with a very short application of the FCR, and — only if there is a difference that the Committees actually want to keep — an override statement.[19]

Not everything in the FCR has to be applicable to *all* courts. For example, I would expect that rules for service, summons, e-discovery, CM/ECF, FRCvP 11 type sanctions, form and format, handling sealed filings, correction of technical errors, etc. should generally be identical — but appellate courts don't tend to issue summons or have discovery (except in some rare cases of original appellate jurisdiction). That doesn't prevent them from being in the FCR.

[19] In programming jargon: be DRY — Don't Repeat Yourself. Put the shared rules in one place, point to them, and only state overrides.

Likewise, some things may be different in certain Rules sets. E.g. for motions, length limits are:

- FRAP 27(d)(2) & FRBP 8013(f)(3): 20p motion & opposition, 10p reply
- FRCrP & FRCvP: none in the federal rules[20]
    - e.g. D.D.C. LCrR 47(e) & LCvR 7(e): 45p motion & opposition, 25p reply

b. Worked example [21]

For instance, FRAP, FRBP, LCrR, & LCvR format & length rules could be extracted as follows:

FCR 5[22] Form of papers

(… et cetera …)

(d) Format

Unless otherwise ordered by the court, all filings must:

(1) be on 8½×11 inch paper or electronic equivalent
(2) be double spaced, except that single spaced is allowed for
    (i) quotations more than two lines long and indented
    (ii) headings
    (iii) footnotes
(3) have 1 inch margins on all sides
(4) have no text in the margins, except pagination
(5) be submitted in native electronic PDF format, if electronically produced
(6) be in 12 point font or larger, except that
    (i) 10 point font or larger is allowed in footnotes

(e) Length limits

(1) *Generally*[23]

Unless otherwise ordered by the court, filings are length limited as follows. Items in FCR 5(e)(3) are excluded from the length limits.

(i) Handwritten or typewritten filings must follow the page-based limit.
(ii) Electronically produced filings must follow either:
    (A) the word-based limit; or
    (B) if monospaced, and if a line-based limit is listed, the

[20] The federal rules probably should create a default, as this is likely in all local rules; see suggestion 2 above.
[21] I have tried to combine and simplify the various rules into a single, clear statement.
[22] The FCR numbering is made up arbitrarily just to illustrate the example.
[23] I think that the absence of a page based limit only for supplemental authorities and for amicus briefs on rehearing is so nonsensical that I have added those in, following the same ratios as the other rules — it seems to me clear that e.g. a handwritten statement of authorities is not intended to be required to count words when handwritten filings in general are not, nor that there is intended to be a difference between amicus briefs on merits and rehearing as to whether they can/must use a page, line, or word based limit equivalence. I have no idea why line based limits are only sometimes present, nor why the word based limits have different ratios, so have left them as-is. On both points, see suggestion 4.

line-based limit.

(2) *Limits*

(i)	*Motion:*	
	(A) *FRAP & FRBP:*	20 pages or 5,200 words, except
	(i) *Motion for rehearing:*	15 pages or 3,900 words
	(B) *FRCrP & FRCvP:*	45 pages or 11,700 words[24]
(ii)	*Opposition to motion:*	
	(A) *FRAP & FRBP:*	20 pages or 5,200 words
	(B) FRCrP & FRCvP:	45 pages or 11,700 words
(iii)	*Reply to motion:*	
	(A) *FRAP & FRBP:*	10 pages or 2,600 words
	(B) FRCrP & FRCvP:	25 pages or 6,500 words
(iv)	*Principal brief:*	30 pages, 13,000 words, or 1,300 lines
(v)	*Reply brief:*	15 pages, 6,500 words, or 650 lines
(vi)	*Combined principal and reply brief:*	35 pages, 15,300 words, or 1,500 lines
(vii)	*Supplemental authorities:*	2 pages or 350 words
(viii)	*Amicus brief on merits:*	15 pages, 6,500 words, or 650 lines
(ix)	*Amicus brief on rehearing:*	10 pages or 2,600 words

(3) *Items excluded from length limits:*[25]

(i) factual exhibits, including
  (A) affidavits not containing legal argument
  (B) copies of record
  (C) addenda of statutes, rules or regulations
(ii) cover pages
(iii) disclosure statements
(iv) indexes, including
  (A) tables of contents
  (B) tables of citations
  (C) indexes of record
(v) certificates of compliance with any rule
(vi) signature blocks
(vii) proofs of service

(4) Certificate of compliance with length limits

(… et cetera …)

[24] My example FRCvP & FRCrP limits just copy from D.D.C. local rules — namely LCvR 7(e) & (o), LCvR 84.6(a), LCrR 47(e), and DCtLBR 9033-1(f) — and apply the 260 words per page equivalent used in FRAP & FRBP for motions. See suggestion 2 regarding a substantive FRCrP & FRCvP length limit rule.

[25] I have omitted FRAP 32(f)'s "any item specifically excluded" item because that's tautological. I have also incidentally simplified, combined, & organized a few items from FRAP 32(f) & FRBP 8013(a)(2)(C).

Then replace the extant rules as follows:

- FRAP 32(a)(4), FRBP 8015(a)(4): *Common format.* The brief must comply with FCR 5(d).
- FRAP 21(d) (last sentence & subparagraphs):
  Non-common length limit. A petition must comply with FCR 5(e), with a limit of 7,800 words or 30 pages.
- FRAP 5(c) (last sentence & subparagraphs): A paper must comply with FCR 5(e)
- FRAP 27(d)(2), FRBP 8013(f)(3), 8022(b) (last sentence & subparagraphs): *Common length limit.* A motion, response, or reply must comply with FCR 5(e).
- FRAP 28.1(e), 29(a)(5), 29(b)(4), 32(a)(7), FRBP 8015(a)(7), 8016(d), 8017(a)(5), 8017(b)(4): *Common length limit.* A brief must comply with FCR 5(e).
- FRAP 35(b)(2), 40(b) (last sentence & subparagraphs): *Common length limit.* The petition must comply with FCR 5(e).
- FRAP 28(j) (second to last sentence): The letter must comply with FCR 5(e).
- FRBP 8014(f) (second to last sentence): The submission[26] must comply with FCR 5(e).

Or, better, delete all of those, and replace with:

FRAP 32(*new* h) Common format and length

(1) Common format
All filings must comply with FCR 5(d) except as specified in this rule or its local rule counterpart.

(2) Override of common format
FCR 5(d)(6): all text must be in 14 point font or larger.[27]

(3) Common length limit
All filings must comply with FCR 5(e) except as specified in this rule or its local rule counterpart.

(4) Non-common length limits
(i) petitions under FRAP 21 (extraordinary writs): 7,800 words or 30 pages

FRBP 8015(*new* i) Common format and length

(a) Common format
All filings must comply with FCR 5(d) except as specified in this rule or its local rule counterpart.

(b) Common length limit
All filings must comply with FCR 5(e) except as specified in this rule or its local rule counterpart.

[26] I have kept these with their current terminology. I suggest that the FRAP 28(j) & 8014(f) be conformed to use the same term — perhaps one of "letter" or "submission", perhaps a more descriptive one like "update" or "notification".
[27] Current FRAP 39(a)(5)(A).

For parallelism, add:[28]

FRCvP *new* 7.2 Common format and length

(a) *Common format*
All filings must comply with FCR 5(d) except as specified in this rule or its local rule counterpart.

(b) *Common length limit*
All filings must comply with FCR 5(e) except as specified in this rule or its local rule counterpart.

(c) *Non-common length limits*
(1) *Mediation statement:* 2,600 words or 10 pages [29]

FRCrP *new* 47.1 Common format and length

(a) *Common format*
All filings must comply with FCR 5(d) except as specified in this rule or its local rule counterpart.

(b) *Common length limit*
All filings must comply with FCR 5(e) except as specified in this rule or its local rule counterpart.

Example revised local rule merger and override:

W.D. Mo. LCvR 7.0(d) *Length Limits*

1. *Common length limit*
All filings must comply with FCR 5(e) except as specified in this rule.

2. *Override of common length limits:*
   A. *Motion:* 780 words or 3 pages[30]
   B. *Opposition to motion:* 780 words or 3 pages
   C. *Reply to motion:* 780 words or 3 pages

3. *Non-common length limits:*
   A. *Suggestions on motion:* 3,900 words or 15 pages
   B. *Suggestions on opposition to motion:* 3,900 words or 15 pages
   C. *Suggestions on reply to motion:* 2,600 words or 10 pages

[28] This is just for illustration, supposing that these are adopted per suggestion 2.
[29] D.D.C. LCvR 84.6 says 10 pages; I've added the 260 words per page equivalent used in most of FRAP & FRBP. This is just an illustration of how a given Rules set might have additions to the Common Rules, supposing for the sake of example that FRCvP were to adopt rules about mediation under suggestion 2.
[30] This part is not specified in W.D. Mo. LCvR 7.0, and I do not know W.D. Missouri practice, but it appears to be implied by the separation into motions (etc) plus separate suggestions (i.e. memorandum of facts & law). I looked at a few filings of W.D. Mo. motions and suggestions in RECAP in order to infer the implied rule for the main document length limit, just to give an example of a local rule override. Even with the override, FCR 5(e)(2), (3), & (4) are kept.

c. Comments

This is merely an *example* to illustrate how extracted and simplified Rules and Common Rules would look. Any extraction will have to simplify and standardize things, but the Committees may well choose differently than I did.

Please don't get hung up on the particular choices that I used here — particularly not the ones described in footnotes. None of them are essential parts of this suggestion, and they should be treated as distinct suggestions, not blocking this.

My choice of illustrating this with length limits is likewise just an example. Common Rules should address anything that is in scope. Please don't let perfect be the enemy of good; these can and should be done incrementally, one type of rule at a time — not all held off until a never-reached future where all of the Rules are wholesale revised at once.

To recapitulate: this suggestion is specifically about extracting rules that are currently in common across different sets of rules into a unified Common Rules, so that

- they're not specified redundantly in the FRAP, FRBP, FRCrP, & FRCvP, and
- the Rules remove distinctions without a difference that make things unnecessarily complex.

When there are actual differences — e.g. (currently only local) FRCrP & FRCvP have different motion page limits; FRAP alone has petitions for extraordinary writs, and gives them a distinct length limit; FRCrP and FRCvP both have discovery and preemptive disclosure obligations which substantially overlap, but FRCrP 16(a) & *Brady/Giglio* obligations differ from FRCvP 26(a) — only the difference should be stated in particular rules, with the shared parts moved to Common Rules.

4. Standardizing page equivalents for words and lines

I note that the extant FRAP & FRBP length limits have unexplained differences in lines and words per page equivalence. I've no idea why this is, so I flag it for the Committees to consider normalization (or at least explanation in notes). See:

- words per page:
  - none[31]: FRAP 28(j), 29(b)(4); FRBP 8014(f), 8017(b)(4)
  - 260: FRAP 5(c), 21(d), 27(d)(2), 35(b)(2), 40(b); FRBP 8013(f)(3), 8022(b)
  - ~433: FRAP 28.1(e) (principal, response), 32(a)(7); FRBP 8015(a)(7), 8016 (principal, reply)
  - ~437: FRAP 28.1(e) (combined); FRBP 8016(d) (combined)

- lines per page:
  - none: FRAP 5(c), 21(d), 27(d)(2), 28(j), 29(b)(4), 33(b)(2), 40(b); FRBP 8013(f)(3), 8014(f), 8017(b)(4), 8022(b)
  - ~43: FRAP 28.1(e), 32(a)(7); FRBP 8015(a)(7), 8016(d)

I suggest standardizing and simplifying the statement of whatever conversion rules are wanted. E.g.:

> FCR 5(e) Length limits
>
> (5) *Definition of 'pages'*
>
> Length limits are generally stated in terms of pages ('*p*'). Filings are acceptable if they meet any of the following:
> (i) no more than *p* handwritten or typewritten pages;
> (ii) no more than 43×*p*[32] lines of monospaced text, e.g. 1,290 lines if "30 pages";[33]
> (iii) no more than 260×*p* words, e.g. 7,800 words if "30 pages"; or
> (iv) in a brief, no more than 433×*p* words, e.g. 12,990 words if "30 pages".

If this is adopted, then the various "*P* pages or *W* words or *L* lines" limits above, and in the current rules, could be simplified to just "*P* pages", and the "if stated" caveat for line limits could be deleted.

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[31] These have word limits but not page limits. I believe this is due to oversight, not intention.

[32] I realize that this formulation is unusual in US law. I have adopted it from UK law, where it is common; see e.g. Working Time Regulations 1998 SI 1998/1822 part II. I believe it is an improvement to state the formula outright, rather than obfuscating it behind a disconnected set of parallel word, line, and page limits that create a trap for the unwary.

[33] I believe this is likely no longer in use, and monospace is bad typography, so suggest deleting it. It can be retained if the Committees think it still relevant. In any event, it should be changed to a clear, simple, consistent statement as here.

TAB 19

19. Rule 12(f) – Suggestion 24-CV-T

Joshua Goodrich has submitted 24-CV-T, proposing the following amendment to Rule 12(f):

> The court may strike from a pleading and supporting brief(s) or memorandum an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

As Mr. Goodrich notes, the current rule has been interpreted to authorize motions to strike only with regard to pleadings, not also regarding other papers filed in court. See 5C Federal Practice & Procedure § 1380 at 394: "Rule 12(f) motions may only be directed towards pleadings as defined by Rule 7(a); thus motions, affidavits, briefs, and other documents outside of the pleadings are not subject to Rule 12(f)."

It is not clear that this is a problem, and it does appear that making such a change could cause problems.

According to the submission, there is a problem:

> This limitation creates a problematic scenario in litigation where one party may attack the character or integrity of opposing counsel in a brief. If the allegations are clearly baseless, there is no procedural mechanism to strike them, leaving the attacked party with no legal recourse. The absolute privilege defense of defamation, which typically applies in defamation cases related to judicial proceedings, further insulates attorneys from making unfounded accusations, leaving the attacked attorney without a remedy. Moreover, courts often hesitate to use their inherent authority to strike such material, compounding the issue.

The submission urges that "accusations of this nature [against counsel] cannot be used as tools of harassment or to undermine the professionalism of legal practice."

Finally, it adds that this amendment to Rule 12(f) "would also provide courts with a valuable tool for managing pro se litigants who, without formal legal training, may inadvertently or unintentionally include scandalous, irrelevant, or defamatory material in their briefs."

There can be little debate that intemperate behavior can be a problem in the federal courts. There may be some debate about whether it's more likely in motions or other submissions than in pleadings. Discovery disputes, for example, may generate a lot more heat than light. And for more than a generation Rule 37(a)(1) has therefore directed that the parties make a good faith effort to confer to work out the problem before filing a discovery motion.

Rule 30(d)(3)(A) authorizes a motion to terminate a deposition on the ground that "it is being conducted in bad faith or in a manner than unreasonably annoys, embarrasses, or oppresses the deponent or party." There surely have been examples of depositions in which opposing counsel engaged in personal attacks on one another. See, e.g., *Redwood v. Dobson*, 476 F.3d 462 (7th Cir. 2007) ("Banner's conduct of this deposition was shameful – not as bad as the insult-redden performance by Joe Jamail that incensed the Supreme Court of Delaware, see *Paramount*

Communications, Inc. v. QVC Network, Inc., 637 A.2d 34, 52-57 (Del. 1994), but far below the standards to which lawyers must adhere.").

In many places, both federal courts and state courts have adopted "civility codes" to try to rein in what may become abusive combativeness by lawyers. Whether these tendencies are embodied more often in written submissions filed in court (including sometimes exhibits to discovery motions regarding communications between counsel) or in other ways is not so clear.

But this proposed amendment does not necessarily offer a cure for the problem that reportedly exists from time to time. For one thing, granting a motion to strike may not actually expunge the court's record or remove the objectionable assertion from materials filed in court. There have been occasions when parties have been directed to remove materials filed in court and replace them with redacted filings (to protect trade secrets, for example), but it is not clear that a motion to strike an insufficient defense from an answer results in the filing of an amended answer lacking the insufficient defense. More often, the case goes forward and that portion of the pleading is rendered inoperative due to the motion to strike. If that's so, striking things from other filings does not seem to expunge the public record.

And adding this amendment to Rule 12(f) could generate more motions to strike than should be enabled. Presumably such motions would occur in litigations in which the relations between counsel are rocky or worse. If one side can move to strike portions of the other side's filings (on a discovery motion, for example), could it occur that the other side responds with a motion to strike the motion to strike?

The 1983-93 Rule 11 experience suggests that such things are at least imaginable. One concern about post-1983 Rule 11 motions was that some litigants seemed to add them to every filing – "sanction the other side for making this motion or filing this opposition." As amended in 1993 to address this concern, Rule 11(c)(2) now requires that the motion for sanctions be "made separately from any other motion."

Another possible sticking point relates to timing. Under Rule 12(a)(4) a motion under Rule 12(b) or Rule 12(e) suspends the duty to answer, but a Rule 12(f) motion to strike matter from a pleading does not. Submission 23-CV-V urged that Rule 12(a)(4) be amended to suspend the duty to answer when a motion to strike is filed. At its October 2024 meeting, the Committee removed this suggestion from the agenda.

The timing question here is whether the obligation to respond to the challenged motion, memorandum of points and authorities, brief, etc., would be extended until the motion to strike is decided. If tit-for-tat motions to strike could be anticipated in some high-antagonism litigations, that could delay the resolution of the underlying motions a long time.

The submission points out a concern with filings from *pro se* litigants. It is certainly true that courts often encounter difficulties managing litigation involving such litigants. But it does not seem that making it clear that they may grant motions to strike would go a long way toward solving those problems. And it might be that authorizing them might prompt these litigants to engage in tit-for-tat motions to strike.

Finally, the submission says that it is a fundamental paradox that Rule 12(f) authorizes motions to strike "redundant, immaterial, impertinent, or scandalous matter" from pleadings but not from briefs. Though a motion to strike may be a valuable tool to remove an insufficient defense, there is a faintly Victorian air to the remainder of Rule 12(f). So if changing Rule 12(f) to remove what the submission calls the "fundamental paradox" between the handling of pleadings and other filings in court is important, there is another route to this destination. The rule could be amended as follows:

> The court may strike from a pleading an insufficient defense ~~or any redundant, immaterial, impertinent, or scandalous matter~~.

But to date no showing has been offered to support such a change, or to indicate that the current rule has provided difficulties.

If one thinks that there is a "paradox" between specifically authorizing the striking of material from pleadings but not saying the same about other filings, it might be responded that at least on occasion in the past (e.g., when the rules were adopted) the pleadings might be read to the jury. The same could not be said of motion papers. But particularly in the age of "fake news" there seem to be reasons to curtail such accusations by motion.

It is recommended that this submission be dropped from the agenda.

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September 26, 2024

H. Thomas Byron III, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, D.C. 20544

Subject: Proposed Amendment to Federal Rule of Civil Procedure 12(f)

Dear Mr. Byron,

Introduction

I am writing to propose an important amendment to Federal Rule of Civil Procedure 12(f), aimed at addressing a critical gap in the current rule's application. Specifically, I propose that Rule 12(f) be extended to cover not only pleadings but also briefs and other filings that accompany motions. While the current rule provides courts with a mechanism to strike irrelevant or scandalous content from pleadings, it does not extend to briefs or memoranda, where such improper content often appears. This creates a significant loophole that allows parties to introduce damaging, inflammatory, or irrelevant material in briefs, which cannot be addressed under the current rule. The proposed amendment would close this gap and ensure consistency in the removal of inappropriate content across all filings, thereby enhancing the fairness and integrity of court proceedings.

The current text of Rule 12(f) reads:

> "Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:"

I propose that the rule be amended as follows:

> "Motion to Strike. The court may strike from a pleading **and supporting brief(s) or memorandum** an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:"

Rationale for the Proposed Amendment

Currently, Rule 12(f) provides a mechanism for courts to strike improper content from pleadings, but it does not extend to briefs and other supporting filings. As case law confirms, Rule 12(f) is limited to material in "pleadings" as defined under Rule 7(a), which excludes motions, briefs, and memoranda. Consequently, while courts may address inappropriate or improper content within a pleading, they lack a procedural vehicle to strike such content from briefs. This limitation has

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practical implications, particularly when briefs include unsubstantiated accusations against opposing counsel or other scandalous material.

For instance, in Searcy v. Soc. Sec. Admin., 956 F.2d 278 (10th Cir. 1992), the court affirmed that a motion to strike could not be applied to a motion to dismiss, citing that Rule 12(f) applies only to pleadings.

> "Generally, therefore, motions, briefs, and memoranda may not be attacked by a motion to strike. See Searcy v. Soc. Sec. Admin., 956 F.2d 278, 1992 WL 43490, *1, *4 (10th Cir. March 2, 1992) (affirming, "for substantially the same reasons set forth" in the attached Magistrate Judge's Report and Recommendation the recommendation that a motion to strike the defendant's motion to dismiss should be denied because "**there is no provision in the Federal Rules of Civil Procedure for motions to strike motions and memoranda**") (unpublished); Applied Capital, Inc. v. Gibson, No. Civ. 05-98 JB/ACT, 2007 WL 5685131, *7 *18 (D.N.M. Sep 27, 2007) (Browning, J.) (citing Searcy v. Soc. Sec. Admin., 956 F.2d 278 (10th Cir. 1992), and refusing to strike motion to dismiss because "**[m]otions to strike are reserved for striking pleadings")**; Coleman v. City of Pagedale, No. 4:06-CV-1376 ERW, 2008 WL 161897, *4 (E.D.Mo. Jan. 15, 2008) (holding that a sur-reply and memorandum were not pleadings and could not be attacked with a motion to strike); 2 James Moore, Milton I. Shadurupdates Mary P. Squiers, MOORE'S FEDERAL PRACTICE § 12.37[2] (3rd ed. 2008) ("Only material included in a 'pleading' may be the subject of a motion to strike, and courts have been unwilling to construe the term broadly. **Motions, briefs, or memoranda, objections, or affidavits may not be attacked by the motion to strike.**"). Ysais v. New Mexico Judicial Standard Com'n, 616 F. Supp. 2d 1176 (D.N.M. 2009)

Similarly, courts in cases like Wilson v. City of Des Moines, 338 F. Supp. 2d 1008 (S.D. Iowa 2004) and Coleman v. City of Pagedale, 2008 WL 161897 (E.D. Mo. Jan. 15, 2008) have consistently held that motions to strike are improper when directed toward non-pleading materials such as briefs and memoranda.

> "[t]he Court could also deny the motion to strike as improper. Rule 12(f) of the Federal Rules of Civil Procedure provides that a "court may order stricken from any ***pleading*** any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed.R.Civ.P. 12(f). According to the language of Rule 12(f), motions to strike apply only to pleadings and not to motions. See Knight v. United States, 845 F.Supp. 1372, 1374 (D.Ariz.1993); Krass v. Thomson-CGR Med. Corp., 665 F.Supp. 844, 847 (N.D.Cal.1987). Pleadings include complaints, answers, replies to counterclaims, answers to cross-claims, third-party complaints, and third-party answers. See Fed.R.Civ.P. 7(a); see also Knight, 845 F.Supp. at 1374 n. 5 (discussing what constitutes a pleading as defined in Fed.R.Civ.P. 7)."emphasis added Wilson v. City of Des Moines, 338 F.Supp.2d 1008 (S.D. Iowa 2004)

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> "As is evident from the language of this rule, motions to strike may only be directed toward "material contained in pleadings." Williams ex rel. McIntosh v. City of Beverly Hills, Mo., 2007 WL 2792490, at *2 (E.D. Mo. September 24, 2007)" Coleman v. City of Pagedale, Case No. 4:06CV01376 ERW (E.D. Mo. Jan. 15, 2008)

This limitation creates a problematic scenario in litigation where one party might attack the character or integrity of opposing counsel in a brief. If the allegations are clearly baseless, there is no procedural mechanism to strike them, leaving the attacked party with no legal recourse. The absolute privilege defense of defamation, which typically applies in defamation cases related to judicial proceedings, further insulates attorneys from making unfounded accusations, leaving the attacked attorney without a remedy. Moreover, courts often hesitate to use their inherent authority to strike such material, compounding the issue.

As recognized by various courts, motions to strike are "viewed with disfavor" due to concerns about their potential use as dilatory tactics. However, courts have also acknowledged that these motions serve the important function of removing unnecessary and prejudicial material from the record. For example, in Operating Engineers Local 324 Health Care Plan v. G & W Construction Co., 783 F.3d 1045 (6th Cir. 2015), the court emphasized the reluctance to strike pleadings except in extreme circumstances.

> "A motion to strike is well-taken when "it is clear that the matter to be stricken could have no possible bearing on the subject matter of litigation." LeDuc v. Kentucky Central Life Ins. Co., 814 F.Supp. 820, 830 (N.D. Cal. 1992). Impertinent allegations are those that are not responsive or relevant to issues involved in the action and which could not be admitted as evidence in the litigation. Fantasy, Inc., 984 F.2d at 1527. "Scandalous" within the meaning of Rule 12(f) includes allegations that cast a cruelly derogatory light on a party or other person. Talbot v. Robert Mathews Distributing Co., 961 F.2d 654, 665 (7th Cir. 1992)." McGee v. Airport Little League Baseball, Inc., 2:21-cv-1654 DAD DB PS (E.D. Cal. Feb 06, 2023).

An extension of Rule 12(f) to include supporting briefs would provide a fair mechanism to address situations where one party uses filings to make inflammatory or irrelevant accusations that have no bearing on the merits of the case. Additionally, it would reduce the likelihood of distracting from legitimate issues and allow for an efficient resolution of cases.

The Case for This Amendment

Courts already have broad discretion under Rule 12(f) to strike content in pleadings, but its narrow scope does not account for the reality that briefs, motions, and memoranda are often where the most inflammatory or inappropriate content appears. As courts such as the Northern District of California in Lofton v. Verizon Wireless (Vaw) LLC, Case No.: 13-cv-5665 YGR (N.D. Cal. May 23, 2014) have noted, the goal of Rule 12(f) is to minimize litigation and eliminate spurious issues.

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Extending the rule's application to briefs would serve this same goal.

Finally, courts are currently left with little guidance on how to handle inflammatory material in briefs. Without a rule-based remedy, such material is often left unaddressed, creating potential for injustice, harm to reputations, and undue delay.

Example of Extreme Conduct: the proposed change would cure

An accusation of fraudulent or unethical conduct against another member of the bar is a serious charge, carrying potential consequences that extend beyond the legal dispute. As the court observed in Williams v. Florida Health Sciences Center, Inc., No. 8:05-CV-68-T-23, 2007 WL 641328, at *3 (M.D. Fla. 2007), such accusations require a heightened degree of caution: "Launching allegations of fraud against opposing counsel without reasonable inquiry as to their truth is unprofessional and unethical behavior, not to mention offensive and damaging to reputable attorneys."

When accusations of misconduct or fraud against opposing counsel are made in pleadings or briefs without sufficient basis or relevance to the legal controversy, they can inflict lasting damage on the reputation of the accused attorney and erode the integrity of the court. In Nat'l Viatical, Inc. v. Universal Settlements Int'l, Inc., File No. 1:11-CV-1226 (W.D. Mich. Aug 27, 2012), the court agreed that baseless accusations against counsel that had no relevance to the substantive issues of the case could not be allowed to stand. The court held that such allegations, when unsupported, "only serve to damage the reputation of the attorneys and the decorum of court proceedings."

Given the gravity of this type of extreme conduct, the proposed amendment to Rule 12(f) seeks to provide courts with a procedural mechanism to address these inappropriate allegations when they appear in briefs or other filings. An accusation of fraudulent conduct against opposing counsel, if not properly substantiated or relevant to the underlying legal matters, should be subject to being struck from the record. This would ensure that accusations of this nature cannot be used as tools of harassment or to undermine the professionalism of legal practice.

Allowing unsupported and inflammatory claims to remain in the record—particularly when aimed at counsel—causes reputational harm and diverts the court's attention from the merits of the case. Striking such material from both pleadings and supporting briefs would uphold the dignity of court proceedings and protect the professional standing of attorneys, ensuring that accusations of fraud and misconduct are appropriately addressed within the confines of the law and the rules of professional responsibility.

Rule 12(f) fundamental paradox

There is a fundamental paradox in the current framework of Rule 12(f): while an unsupported or inappropriate accusation against opposing counsel can be stricken from a pleading, the same accusation can be allowed to remain unchallenged if it appears in a supporting brief. This creates an

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illogical inconsistency in the administration of justice. The purpose of striking irrelevant, redundant, or scandalous material from pleadings is to protect the integrity of the judicial process and ensure that only pertinent matters are before the court. Allowing the same harmful or defamatory content to persist in briefs, which are equally a part of the court's record, undermines this objective. It defies logic to strike inflammatory or unsubstantiated claims from one document while permitting them to stand unaltered in another that serves the same function. This inconsistency allows the potential for reputational harm to linger without remedy and distorts the intended balance of fairness and decorum in legal proceedings. If the purpose of Rule 12(f) is to protect against prejudice, this protection should logically extend to both pleadings and briefs.

Preventing Strategic Use of Inflammatory Content

Without the proposed amendment to Rule 12(f), litigants may exploit a significant loophole by using briefs and other filings as a strategic vehicle to introduce improper content that would otherwise be stricken from a pleading. This allows parties to circumvent the intent of Rule 12(f), which aims to eliminate redundant, immaterial, impertinent, or scandalous material from court proceedings. While such content can be easily stricken from pleadings, placing the same inflammatory or defamatory allegations within briefs enables litigants to lodge damaging accusations without immediate recourse. By presenting these claims in briefs, parties can subtly introduce irrelevant or prejudicial matters that may influence the court's perception, even if they are ultimately unrelated to the substantive legal issues. This tactic undermines the fairness of the proceedings and damages the reputation of opposing counsel or parties, as such inflammatory material can remain part of the public court record without challenge. The proposed amendment would close this loophole by extending Rule 12(f) to cover briefs, ensuring that improper material is not used as a litigation strategy to harm opposing parties and undermine the integrity of the judicial process.

The proposed amendment to Rule 12(f) would also provide courts with a valuable tool for managing *pro se* litigants, who, without formal legal training, may inadvertently or intentionally include scandalous, irrelevant, or defamatory material in their briefs. Courts often face difficulties in addressing such content from pro se parties, who may not fully understand the boundaries of appropriate legal argumentation. By extending the scope of Rule 12(f) to briefs, courts would have a clear and efficient means to strike improper material from pro se filings, protecting the opposing party from unfair prejudice while preserving the decorum of the proceedings. This procedural safeguard would allow courts to maintain focus on the merits of the case, reduce the likelihood of abusive litigation tactics, and ensure that all parties, including *pro se* litigants, adhere to the same standards of professional conduct in their submissions.

Conclusion

The proposed amendment to Rule 12(f) would eliminate a critical inconsistency in how courts handle improper content in filings. By extending the rule to cover briefs and memoranda, the courts would be equipped to strike inflammatory, scandalous, or irrelevant material wherever it appears,

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rather than limiting this remedy to pleadings. This change is essential to preventing strategic misuse of briefs as a vehicle for unsubstantiated accusations and to ensuring that all parties—including *pro se* litigants—adhere to the standards of professional conduct. Ultimately, this amendment would promote fairness, protect reputations, and uphold the dignity of the judicial process, allowing courts to focus on the merits of the case rather than being sidetracked by improper content. Thank you for your consideration of this important proposal.

I appreciate your consideration of this important matter and look forward to any opportunity to further discuss this proposal.

Sincerely,

Joshua S. Goodrich

Joshua S. Goodrich, J.D., LL.M.

TAB 20

20. Rule 30(d)(1) – Suggestion 25-CV-A

Serena Morones urges that the Rule 30(d)(1) limit on the duration of expert depositions be shortened from seven to four hours. According to her letterhead, she is an accountant who offers forensic accounting services. She reports that there is a shortage of "honest, credible expert witnesses" even though "[t]he world of justice needs dedicated individuals who are willing to serve in the expert role." She has been doing so for 27 years, and is "one of Chambers-ranked CPAs in 2024, notable for my service as an expert witness."

But she says that "testifying in a seven-hour deposition has caused me to consider leaving the profession on several occasions." She offers four reasons:

> (1) Experts must prepare and provide extensive reports under Rule 26(a)(2)(B), which should mean that lengthy deposition questioning is not often necessary. [Indeed, it was hoped when the expert disclosure provision was adopted in 1993 that disclosure would obviate the need of expert depositions.]
>
> (2) Lawyers waste time in expert depositions, including "late-afternoon repeated questioning aimed at trapping the deponent into a sound bit for use in a Rule 702 motion."
>
> (3) Lawyers taking expert depositions are often uncivil and try to intimidate the expert with "personally demeaning and hostile questioning."
>
> (4) Particularly after the pandemic and the advent of remote work, a seven-hour deposition "feels inhumane in today's world."

Though it may be time to reconsider the Rule 30 duration limit on depositions, it might be odd to do that only for expert depositions. Accordingly, unless the Committee regards a reexamination of deposition duration for all witnesses, it seems best to remove this item from the agenda.

Some background may be helpful. Before 2000, there was no duration limit in the rules on any depositions. At the same time, until the 1993 amendments, depositions of expert witnesses who would testify at trial were not guaranteed by the rules, which focused instead on an interrogatory answer, after which the other side could seek a deposition. The 1993 amendments introduced the demanding expert report requirements of Rule 26(a)(2)(B) and also introduced Rule 26(b)(4)(A), providing a right to take the expert's deposition, but only after the expert report is provided. As with all depositions, the rules did not then set a duration time limit.

In 1998, a package of proposed amendments for the discovery rules went out for public comment. Some of them might be viewed as relief generally useful to defending parties – such as the proposed removal of the term "subject matter" from the definition of the scope of discovery in Rule 26(b)(1). Others seemed more responsive to parties asserting claims. The proposed duration limit on depositions met with favor among many on the plaintiff side, who contended that defense counsel sometimes insisted on marathon depositions of plaintiffs.

There were quite a few submissions regarding the proposed time limit for depositions. Interestingly, the final hearing (in January 1999) was held in Chicago. At that hearing, we were

informed that the Illinois state courts had adopted an across-the-board three-hour limit several years before. Adopting that time limit had been controversial, and was opposed by some defense groups. Strikingly, at the January 1999 hearing several witnesses testified that they had opposed the three-hour limit on behalf of defense organizations. But they had changed their view; experience under the new limitation showed that it worked. The Committee proceeded with the Rule 30 duration limitation.

It might be useful to survey state practice now to determine whether other states have duration limits for depositions, and in particular whether they have time limits only for expert depositions. Certainly the expert report (when the report requirement is applicable) ought to give opposing counsel a leg up in preparing for the deposition. And it might be added that expert discovery regarding retained experts is not "discovery" in the ordinary sense – designed to unearth potentially admissible relevant evidence. Instead, it is limited to enabling the other side to know what the expert will say at trial – an aid to cross-examination. So there is a sense in which a shorter duration for expert depositions might be justified.

But one could also make a stronger argument for time limits for depositions of non-expert witnesses. Though preparing for and sitting through depositions can be wearying for the designated expert and expensive for the retaining party, to a considerable extent that expense for the party is income to the expert witness. The submission says that the current permission for a seven-hour deposition "may deter good people from entering the profession." That seems to be the "expert witnessing" profession. One might say that the existence of thick phonebook-style lists of people offering expert witness services suggests that there is no dearth of such witnesses.

Ordinary witnesses do not usually have the same sort of what one might call profit potential from their (often inadvertent) familiarity with matters in dispute. Even employees of a party likely receive no extra salary for being witnesses in the case. It may well be that shortening the duration of all depositions would be a good idea to protect such people.

And there are examples of such protections sometimes as to employees of a party. The "apex deposition" concern sometimes prompts judges to forbid depositions of high government officials or corporate officers, or strictly limit the duration to a shorter time than seven hours.

The court may provide stricter limitations in a given case. Under Rule 26(f), the parties might even suggest that as part of their discovery plan. So the seven-hour deposition is not graven in stone.

Nonetheless, a blanket limitation of "expert depositions" to three hours while all others may last seven hours seems unwarranted. It might sometimes also produce complications when determining which witness is covered by this time limit. The expert report requirement applies only to experts "retained or specially employed to provide expert testimony." Many parties may make hiring decisions based on expertise of candidates for hiring. Probably testifying about what the company did when relevant to a litigation would be regarded as part of their job duties though that testimony might often draw on their "expertise." Yet they would not be specially retained or employed; they would *already* work for the company.

We now have Rule 26(a)(2)(C) to deal with such experts who were not specially retained. The prime example is treating doctors. If a new "expert witnesses" time limit were adopted, should it apply to them and full-time employees of a party?

In sum, though there may be a reason to reconsider the time limit for depositions adopted in 2000, changing it only for expert witnesses seems unwarranted. Unless the deposition duration topic should be reopened, it is suggested that this submission be dropped from the agenda.

Morones Analytics

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January 9th, 2025

Honorable R. David Proctor, Committee Member
Hugo L. Black United States Courthouse
1729 5th Avenue North
Birmingham, AL 35203

Dear Honorable R. David Proctor,

Re: Length of Expert Depositions

I am writing to request that the Committee on Civil Rules consider shortening the length of expert depositions from seven hours to four hours.

When I consider the future of our justice system, I believe it is essential to address outdated conventions that may deter good people from entering the profession. There is a shortage of accountants and an even greater shortage of honest, credible expert witnesses. The world of justice needs dedicated individuals who are willing to serve in the expert role.
I am a testifying expert with 27 years of experience, and at 58 years old, I have a few years left in my career. I have testified at trial over 90 times and participated in approximately 40 depositions. I am one of four Chambers-ranked CPAs in 2024, notable for my service as an expert witness.

The grueling experience of testifying in a seven-hour deposition has caused me to consider leaving the profession on several occasions. I do not believe that a seven-hour expert deposition serves the cause of justice for the following reasons:

1. **Efficiency and Redundancy**: Experts are required to disclose the basis for their opinions in an expert report. Consequently, not as much time is needed to discover what the expert intends to say at trial compared to a fact witness.

2. **Time and Cost**: In my experience, a significant portion of an expert deposition is a waste of time and client money. Several hours are spent on lengthy background sections, making the expert explain what is already in the report, or on late-afternoon repeated questioning aimed at trapping the deponent into a sound bite for use in a Rule 702 motion. A shorter deposition will force attorneys to prepare and ask only the most relevant questions.

3. **Civility and Conduct**: Often, depositions are uncivil and intended to intimidate the expert. Our justice system has weak processes for preventing incivility. On several occasions, I have been subjected to seven hours of personally demeaning and hostile questioning. Shortening the duration would minimize the negative impact on those of us who need to endure the long haul of an expert career.
4. **Attention Spans**: Attention spans have significantly shortened with the advent of digital media and the COVID-19 era remote work. A seven-hour intense cross-examination session, replete with uncivil attacks, feels inhumane in today's world.

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I am concerned about my ability to recruit and mentor young, credible experts if they know they have to suffer through this kind of experience. Please consider changing the rules to reduce the length of expert depositions to four hours.

Thank you for your consideration.

Serena Morones

Serena Morones, CPA, ASA, ABV, CFE
serena@moronesanalytics.com
503-906-1579

TAB 21

Federal Judicial Center

Date: February 25, 2025

To: Advisory Committees on Rules of Practice and Procedure

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

Re: Federal Judicial Center Research and Education

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

RESEARCH

Completed Research for Rules Committees

Default and Default-Judgment Practices in the District Courts

At the request of the Civil Rules Committee, the Center studied district-court practices with respect to the entry of defaults and default judgments under Civil Rule 55 (www.fjc.gov/content/389994/default-and-default-judgment-practices-district-courts). In most districts, the clerk of court enters defaults, perhaps in consultation with chambers. District practices with respect to entry of default judgments for a sum certain were more varied; in many districts, the clerk of court never enters default judgments pursuant to the national rule.

Prior Convictions as Impeachment Evidence for Criminal Defendants

At the request of the Evidence Rules Committee, the Center prepared a research plan for surveying criminal defense attorneys on factors determining how defendants plead and whether they testify, consistency of rulings on whether criminal histories would be admissible for impeachment, and the predictive value of criminal history on defendants' truthfulness as witnesses. The committee decided to proceed with a proposal to amend Evidence Rule 609 without waiting for the research, which would have taken approximately two years.

Broadcasting Criminal Proceedings

The Center provided the Criminal Rules Committee with research support as it studied whether the proscription on remote public access to criminal proceedings should be amended. The committee decided not to pursue an amendment to that proscription at this time.

The Need for Redacted Social Security Numbers in Bankruptcy Cases

In light of proposals to fully redact Social Security numbers in public filings, rather than all but the last four digits, the Bankruptcy Rules Committee asked the Center to survey bankruptcy trustees and others on the need for partial Social Security numbers on certain public forms. Based on the results of the survey, the committee decided not to pursue a requirement for full redaction at this time, and it decided to continue to monitor treatment of the issue by other committees.

Remote Participation in Bankruptcy Contested Matters

The Center provided the Bankruptcy Rules Committee with research support as it studied remote participation in contested matters.

Current Research for Rules Committees

Intervention on Appeal

At the request of the Appellate Rules Committee, the Center is conducting research on interventions on appeal.

Bankruptcy Judges' Use of Masters

At the request of the Bankruptcy Rules Committee, the Center surveyed bankruptcy judges on how and whether they would use masters if they had the authority to do that.

Complex Criminal Litigation

As suggested by the Criminal Rules Committee, the Center is developing a collection of resources on complex criminal litigation as one of its curated websites.

Completed Research for Other Judicial Conference Committees

Redaction of Non-Government Party Names in Social Security and Immigration Case Documents

As part of its privacy study for the Committee on Court Administration and Case Management, the Center prepared a study of Social Security and immigration cases that (1) prepared a compilation of local rules and procedures on redacting non-government party names and (2) examined redaction in samples of publicly available dispositive documents (www.fjc.gov/content/391683/redaction-non-government-party-names-social-security-and-immigration-case-documents).

Civics Education and Outreach

A new curated website shows public-outreach and civics-education efforts by individual federal courts, as well as materials prepared by the Center and the Administrative Office (www.fjc.gov/content/388217/overview). The curated resources educate the public about the role, structure, function, and operation of the federal courts. The site includes an interactive map, created at the request of the Committee on the Judicial Branch, that displays highlighted civics-education resources and civics-program information pages on court websites. This may assist courts in developing or expanding their own civics efforts.

Remote Public Access to Court Proceedings

At the request of the Committee on Court Administration and Case Management, the Center conducted focus groups with district judges, magistrate judges, and bankruptcy judges to learn about their experiences providing remote public access to proceedings with witness testimony during the pandemic.

Current Research for Other Judicial Conference Committees

Evaluation of a Pilot Program in Which Comparative Sentencing Information Is Incorporated Into Presentence Investigation Reports

At the request of the Committee on Criminal Law, the Center is evaluating a two-year pilot program in which selected districts are incorporating comparative sentencing information from the Sentencing Commission's Judiciary Sentencing Information (JSIN) platform into presentence investigation reports.

The Privacy Study: Unredacted Sensitive Personal Information in Court Filings

At the request of the Committee on Court Administration and Case Management, the Center is conducting research on unredacted personal information in public filings.

Case Weights for Bankruptcy Courts

The Center has collected data and is conducting analyses for updating bankruptcy-court case weights. Case weights are used in the computation of weighted caseloads, which in turn are used when assessing the need for judgeships. The research was requested by the Committee on Administration of the Bankruptcy System.

Other Completed Research

United States District Courts' Local Rules and Procedures on Electronic Filing by Self-Represented Litigants

Prepared to supplement a planned episode of *Court to Court*, a documentary-style video program presented by the Center's Education

Division, this report compiles local rules and procedures in the ninety-four district courts on electronic filing by self-represented litigants (www.fjc.gov/content/391989/united-states-district-courts-local-rules-and-procedures-electronic-filing-self). More than two thirds of the courts permit self-represented litigants to use the court's electronic filing system at least on a case-by-case basis.

Science Resources

The Center maintains a curated website for federal judges with resources related to scientific information and methods (www.fjc.gov/content/326577/overview-science-resources). Recently added is information on dementia and the law (www.fjc.gov/content/385467/dementia-and-law).

JUDICIAL GUIDES

In Preparation

Manual for Complex Litigation

The Center is preparing a fifth edition of its *Manual for Complex Litigation* (fourth edition, www.fjc.gov/content/manual-complex-litigation-fourth).

Reference Manual on Scientific Evidence

The Center is collaborating with the National Academies of Science, Engineering, and Medicine to prepare a fourth edition of the *Reference Manual on Scientific Evidence* (third edition, www.fjc.gov/content/reference-manual-scientific-evidence-third-edition-1).

Manual on Recurring Issues in Criminal Trials

The Center is preparing a seventh edition of what previously was called *Manual on Recurring Problems in Criminal Trials* (sixth edition, www.fjc.gov/content/manual-recurring-problems-criminal-trials-sixth-edition-0).

Benchbook for U.S. District Court Judges

The Center is preparing a seventh edition of its *Benchbook for U.S. District Court Judges* (sixth edition, www.fjc.gov/content/benchbook-us-district-court-judges-sixth-edition).

HISTORY

Spotlight on Judicial History

Since 2020, the Center has posted twenty-five short essays about judicial history on a variety of topics (www.fjc.gov/history/spotlight-judicial-history). Recently posted are "Tort Claims Against the United States" (www.fjc.gov/history/spotlight-judicial-history/tort-claims-against-united-states) and "The Codification of Federal Statutes on the Judiciary" (www.fjc.gov/history/spotlight-judicial-history/federal-judicial-statutes).

Work of the Courts

Of the Center's seven essays on the work of the courts, the most recent two are "Foreign Treaties in the Federal Courts" (fjc.gov/history/work-courts/foreign-treaties-in-federal-courts) and "Juries in the Federal Judicial System" (www.fjc.gov/history/work-courts/juries-in-federal-judicial-system).

EDUCATION

Specialized Workshops

Reconstruction and the Constitution: A Historical Perspective

A two-day, in-person judicial workshop in Philadelphia on the Reconstruction Amendments included visits to the National Constitution Center; Independence Hall; the Old City Hall, where the Supreme Court met from 1791 to 1800; and Congress Hall, where Congress met from 1790 to 1800.

Ronald M. Whyte Intellectual Property Seminar

A four-day, in-person judicial workshop addressed the basics of patent, copyright, and trademark law; patent case management; and emerging issues in intellectual-property law. It was cosponsored by the Berkeley Center for Law and Technology.

Search and Surveillance Warrants in the Digital Age

This three-day, in-person program was designed for magistrate judges who handle criminal warrant applications as part of their day-to-day responsibilities.

Law and Technology Workshop for Judges

This three-day, in-person workshop addressed artificial intelligence and its regulation and governance, digital forensics, statistics in law and forensic evidence, technology and cognitive liberty, technology and the Fourth Amendment, access to justice, cybersecurity, and ethical and policy issues with artificial intelligence.

Distance Education

Evaluating Historical Evidence

The Center is offering judges a six-part interactive online series that provides tools for managing cases with significant historical evidence. Historians discuss historical methodology and provide practical tips on evaluating historical evidence, whether presented in the form of expert witnesses, amicus briefs, or litigant arguments. The first episode was "An Introduction: What Do Historians Do and How Do They Do It?"

Implications of Purdue Pharma *for Bankruptcy Judges*

A live webcast for bankruptcy judges discussed the implications of the Supreme Court's June 27, 2024, decision in *Harrington v. Purdue Pharma*

L.P., which held, "The bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seek to discharge claims against a nondebtor without the consent of affected claimants."

Court to Court

A documentary-style video program presenting innovation and creative problem solving by personnel in individual court units around the country, this program included as a recent episode "Transforming Justice: The Power of Drug Courts" (featuring Northern District of West Virginia Magistrate Judge Michael Aloi and Special Offender Specialist and U.S. Probation Officer Jill Henline).

Court Web

This monthly webcast included as recent episodes "Honoring the Past, Inspiring the Future—the 100th Anniversary of the Federal Probation Act" (featuring Northern District of Illinois Judge Edmond Chang, chair of the Criminal Law Committee, and District of Maryland Chief Probation Officer Leon Epps); "Neuroscience-Informed Decision-Making" (featuring retired District of Massachusetts Judge Nancy Gertner, now managing director of the Massachusetts General Hospital Center for Law, Brain & Behavior, and codirector and cofounder psychiatrist and lawyer Dr. Judith Edersheim); and "An Update on the Cardone Report after the 60th Anniversary of the CJA" (featuring District of New Hampshire Judge Landya B. McCafferty and Western District of Texas Judge Kathleen Cardone).

Term Talk

The Center presents periodic webcasts with the nation's top legal scholars discussing what federal judges need to know about the U.S. Supreme Court's most impactful decisions. Recent episodes included "*City of Grants Pass v. Johnson*; *McElrath v. Georgia*" (discussing status and conduct in the context of ordinances that punish sleeping and the absolute bar against retrying acquitted defendants even when there are inconsistent verdicts), "*Smith v. Arizona*; *Diaz v. United States*" (discussing guidelines for determining when reports prepared by analysts are testimonial and limitations on expert testimony about a defendant's mental state), "*Erlinger v. United States*; *Pulsifer v. United States*" (discussing the existence of a prior offense as a jury question and the requirements for safety-valve relief under the First Step Act), "*Chiaverini v. City of Napoleon*" (discussing how probable cause for one charge does not insulate other charges from a § 1983 malicious-prosecution claim), "*United States Trustee v. John Q. Hammons*; *Harrington v. Purdue Pharma L.P.*" (discussing the Supreme Court's rejection of the release of claims against third-party nondebtors without claimant consent and the Court's decision not to reimburse claimants for bounded nonuniformities), "*Fischer v. United States*; *Snyder v. United States*" (discussing the 2002 Sarbanes-Oxley Act as applied to January 6 defendants

and whether the amended federal bribery statute criminalizes gratuities), and "*Alexander v. S.C. State Conference of NAACP*; *Robinson v. Callais*" (discussing how courts should determine if race or party affiliation predominates in a legislature's redistricting and the uncertainty surrounding application of the *Purcell* principle).

Supreme Court Term in Review for Bankruptcy Judges

A 2024 webcast discussed some of the most significant Supreme Court decisions, including key bankruptcy cases.

Diocese Cases in Bankruptcy

This webcast for bankruptcy judges addressed the authority of the court, the scope of the automatic stay, and limitations of bankruptcy relief. It included discussion of the overarching themes of religion, trauma, procedural justice, confidence in the court system, and the inevitable media presence.

Consumer Case-Law Update for Bankruptcy Judges

This quarterly webcast features retired Western District of Tennessee Bankruptcy Judge William H. Brown discussing the latest consumer-bankruptcy case-law updates.

Business Case-Law Update for Bankruptcy Judges

This quarterly webcast features Professor Bruce Markell (a retired bankruptcy judge).

General Workshops

National Workshops for Trial-Court Judges

Three-day workshops are held for district judges in even-numbered years and annually for magistrate judges and bankruptcy judges respectively.

Circuit Workshops for U.S. Appellate and District Judges

The Center has recently put on three-day workshops for Article III judges in the Fourth and Ninth Circuits.

National Conference for Pro Se and Death Penalty Staff Attorneys

This three-day educational conference was most recently presented in 2024.

Orientation Programs

Orientation Programs for New Trial-Court Judges

The Center invites newly appointed trial-court judges to attend two one-week conferences focusing on skills unique to judging. The first phase includes sessions on trial practice, case management, and judicial ethics. In addition, district judges learn about the sentencing process, magistrate judges learn about search warrants, and bankruptcy judges learn about the bankruptcy code. The second phase includes sessions on such topics as civil-

rights litigation, employment discrimination, security, self-represented litigants, relations with the media, and ethics.

Orientation for New Circuit Judges

Orientation programs for new circuit judges include a three-day program hosted by the Center and a program at New York University School of Law for both state and federal appellate judges.

Orientation for New Term Law Clerks

The Center offers online orientation to new term law clerks. Phase I is offered before the clerkship begins, and phase II is offered after the clerkship has begun.