ADVISORY COMMITTEE
ON
CRIMINAL RULES

April 24, 2025

AGENDA
Meeting of the Advisory Committee on Criminal Rules
April 24, 2025
Washington, D.C.

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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

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College of the Law, San Francisco
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Raleigh, NC

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Duke University School of Law
Durham, NC

Associate Reporter

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Advisory Committee on Evidence Rules

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New York, NY

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ADVISORY COMMITTEE ON CRIMINAL RULES

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

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Honorable Jane Boyle United States District Court Dallas, TX	Honorable Timothy Burgess United States District Court Anchorage, AK
Dean Roger A. Fairfax, Jr. Howard University School of Law Washington, DC	Honorable Michael Harvey United States District Court Washington, DC
Marianne Mariano, Esq. Office of the Federal Public Defender Buffalo, NY	Honorable Michael W. Mosman United States District Court Portland, OR
Shazzie Naseem, Esq. Berkowitz Oliver LLP Kansas City, MO	Honorable Jacqueline H. Nguyen United States Court of Appeals Pasadena, CA
Catherine M. Recker, Esq. Welsh & Recker PC Philadelphia, PA	Honorable Carlos A. Samour, Jr. Colorado Supreme Court Denver, CO

Liaison
Honorable Paul J. Barbadoro (*Standing*) United States District Court Concord, NH

Clerk of Court Representative
Brandy S. Lonchena, Esq. Clerk United States District Court Pittsburgh, PA

Advisory Committee on Criminal Rules

Members	Position	District/Circuit	Start Date		End Date
James C. Dever III Chair	D	North Carolina (Eastern)	Member: Chair:	2022 2022	---- 2025
Acting Assistant Attorney General, Criminal Division	DOJ	Washington, DC		---	Open
Andre Birotte, Jr.	D	California (Central)		2021	2027
Jane Boyle	D	Texas (Northern)		2021	2027
Timothy Burgess	D	Alaska		2021	2026
Roger A. Fairfax, Jr.	ACAD	Washington, DC		2019	2025
Michael Harvey	M	District of Columbia		2023	2026
Marianne Mariano	FPD	New York (Western)		2023	2025
Michael W. Mosman	D	Oregon		2024	2026
Shazzie Naseem	ESQ	Missouri		2024	2027
Jacqueline H. Nguyen	C	Ninth Circuit		2019	2025
Catherine M. Recker	ESQ	Pennsylvania		2018	2025
Carlos A. Samour, Jr.	JUST	Colorado		2024	2027
Sara Sun Beale Reporter	ACAD	North Carolina		2005	Open
Nancy J. King Associate Reporter	ACAD	Tennessee		2007	Open

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(2025)

Rule 17 Subpoenas Subcommittee Judge Jacqueline Nguyen, Chair Judge Jane Boyle Ms. Marianne Mariano Ms. Catherine Recker Ms. Sonja Ralston (DOJ) Judge James Dever	**Rule 40 Subcommittee** Judge Michael Harvey, Chair Judge Andre Birotte Dean Roger Fairfax Ms. Marianne Mariano Ms. Sonja Ralston (DOJ) Judge James Dever
Rule 43 Subcommittee Judge Andre Birotte, Chair Judge Tim Burgess Mr. Shazzie Naseem Justice Carlos Samour Ms. Sonja Ralston (DOJ) Judge James Dever	**Rule 49.1 Subcommittee** Judge Michael Harvey, Chair Judge Andre Birotte Ms. Marianne Mariano Mr. Shazzie Naseem Ms. Sonja Ralston (DOJ) Judge James Dever
Pro Se Filing Subcommittee Judge Timothy Burgess, Chair Dean Roger Fairfax Judge Michael Harvey Ms. Marianne Mariano Mr. Shazzie Naseem Judge James Dever	

As of April 24, 2025

RULES COMMITTEE LIAISON MEMBERS

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

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

TAB 1

TAB 1A

ADVISORY COMMITTEE ON CRIMINAL RULES
MINUTES
November 6-7, 2024
New York, New York

Attendance and Preliminary Matters

The Advisory Committee on Criminal Rules ("the Committee") met on November 6-7, 2024, in New York, New York. The following members, liaisons, reporters, and consultants were in attendance:

Judge James C. Dever III, Chair
Judge André Birotte Jr.
Judge Jane J. Boyle
Judge Timothy Burgess
Judge Robert J. Conrad, Jr.
Dean Roger A. Fairfax, Jr. (via Microsoft Teams on Nov. 7)
Judge Michael Harvey
Marianne Mariano, Esq.
Judge Michael Mosman
Shazzie Naseem, Esq.
Judge Jacqueline H. Nguyen
Brandy Lonchena, Esq., Clerk of Court Representative
Catherine M. Recker, Esq.
Justice Carlos Samour
Finnuala Tessier, Esq.[1]
Judge John D. Bates, Chair, Standing Committee
Judge Paul Barbadoro, Standing Committee Liaison
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Professor Catherine Struve, Reporter, Standing Committee
Professor Daniel R. Coquillette, Standing Committee Consultant (via Microsoft Teams)

The following persons participated to support the Committee:

H. Thomas Byron, Esq., Secretary to the Standing Committee
Kyle Brinker, Esq., Law Clerk, Standing Committee
Shelly Cox, Management Analyst, Rules Committee Staff (via Microsoft Teams)
Bridget M. Healy, Esq., Counsel, Rules Committee Staff
Laural L. Hooper, Esq., Senior Research Associate, Federal Judicial Center
Rakita Johnson, Administrative Analyst, Rules Committee Staff
S. Scott Myers, Esq., Counsel, Rules Committee Staff (via Microsoft Teams)
Dr. Timothy Reagan, Federal Judicial Center (via Microsoft Teams)

[1] Ms. Tessier represented the Department of Justice.

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Additional persons attended, at the request of the Committee, to discuss a proposal to amend Rule 17. They are listed on pages 17, 25, and 31 of these minutes.

Opening Business

Judge James Dever, Chair of the Criminal Rules Committee, began the meeting by welcoming meeting participants and thanking the staff from the Administrative Office of the United States Courts for arranging the meeting. Judge Dever specifically welcomed Judge Robert Conrad, Director of the Administrative Office of the U.S. Courts; Ms. Finnuala Tessier, who represented the Department of Justice in place of Principal Deputy Assistant Attorney General Nicole Argentieri; Professor Daniel Coquillette, Consultant to the Standing Committee; and Dr. Tim Reagan, from the Federal Judicial Center. Judge Dever noted three members had been reappointed to the Committee: Judge André Birotte, Judge Jane Boyle, and Catherine Recker.

Judge Dever then welcomed three new members to the Committee: Justice Carlos Samour, Shazzie Naseem, and clerk of court representative Brandy Lonchena. Judge Dever noted that Kyle Brinker began as rules law clerk for the Committee on Rules of Practice and Procedure and that Allison Bruff, former staff attorney for the Committee, had departed for a new career opportunity. Judge Dever welcomed members of the public attending the meeting in person or by video and thanked them for their presence. Judge Dever said that the Committee's next meeting would be in Washington, D.C., on April 24, 2025.

A motion to approve the minutes of the spring meeting passed unanimously.

Judge Dever asked the Rules staff to present updates on pending rules and legislation. Thomas Byron, Secretary to the Standing Committee, said that no proposed criminal rule amendments were expected to come into effect this year or next year. Other proposed rule amendments appeared in the meeting agenda book at page 90.

Mr. Brinker noted that pending legislation of interest was collected in the agenda book beginning on page 97. He mentioned the Trafficking Survivors Relief Act of 2024, which provided that a person who has been convicted of a nonviolent federal offense as a result of having been a victim of trafficking may move the convicting court to vacate the judgment of conviction, to enter a judgment of acquittal, and to order that references to the arrest and criminal proceedings be expunged from all official records. Mr. Brinker said he brought the bill to the Committee's attention because the provisions would not fit within Rule 29(c)'s requirement that a motion for judgment of acquittal be filed within 14 days after a jury verdict or the discharge of a jury. He also noted that bill's provisions did not appear to fall within the rules governing Section 2255 proceedings.

Rule 53

Judge Dever recognized Judge Mosman to provide an update on the work of the Rule 53 Subcommittee. Judge Mosman thanked Professors Beale and King for their assistance providing written materials to the Subcommittee both before and after the Subcommittee's last meeting. He also thanked Laurel Hooper and others at the FJC for a comprehensive memorandum surveying a

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wide variety of articles on this subject as well as relevant state and federal court procedures and experiences. Lastly, he thanked Zachary Hawari, the former rules law clerk, for a memorandum on the history of Rule 53.

Judge Mosman noted that the Subcommittee was formed to consider requests from various organizations to amend Rule 53 to allow broadcasting of some criminal proceedings and that the Committee continued to receive supporting materials from interested parties. Judge Mosman said that the request was to end, in whole or in part, Rule 53's general ban on broadcasting in federal criminal cases. He said it required an understanding of the policies underlying Rule 53.

Judge Mosman explained that there is a right to a public trial under the First and Sixth Amendments of the Constitution, but no interested party had suggested that current practice falls below any constitutional standard. Rather, the request sought to further greater transparency, increase trust in the judicial system, and improve civic education and understanding of how courts work. Judge Mosman recognized that the Committee on Court Administration and Case Management had recommended, and the Judicial Conference then approved, a policy permitting audio broadcasting of non-trial proceedings in civil and bankruptcy cases when no testimony is being taken.

Judge Mosman expressed Subcommittee members' concerns about fundamental differences between civil and criminal cases, including heightened due process, privacy, and security concerns in criminal cases. With the help of the Federal Judicial Center, the Subcommittee reviewed state-court experiences with broadcasting proceedings. Judge Mosman noted that the Minnesota Supreme Court undertook a similar review before amending its rules to allow expanded broadcasting.

Judge Mosman stated that the Subcommittee's review found little empirical research on court systems that allow broadcasting. He noted that the agenda book materials included a memorandum to the Minnesota Advisory Committee, which concluded that the methodology on most data regarding how cameras in the courtroom impact judicial outcomes is flawed. The memorandum explained that existing data is generally not applicable to populations other than the exact population studied because existing studies suffered from low sample size, self-reporting bias, and the inability to be replicated. The memorandum also stated that the data did offer a limited perspective on how cameras impact courts, but Judge Mosman questioned the reliability of that comment based on the memorandum's critiques of the existing data.

The research identified by the Subcommittee was fundamentally anecdotal. The Subcommittee found no reliable, empirical study from a state court that looks at whether potential jurors withhold sensitive information from broadcasted trials more than unbroadcasted trials. The Subcommittee also found no empirical study looking at whether jurors convict more often in broadcasted trials than unbroadcasted trials. The Subcommittee found no study that alleviates concerns that broadcasting criminal trials would have a negative impact on communities of color, both in conviction rates and in community perception of crime rates.

Judge Mosman reviewed social science studies not grounded in state-court experience. As an example, Judge Mosman explained that one study, entitled *Cameras in the Courtroom: The*

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Effects of Media Coverage on Witness Testimony and Juror Perceptions, provided unreliable conclusions because it involved undergraduate college student serving as witnesses or jurors in fake trials that had (or did not have) cameras. The study showed the witness students a video of a fake robbery and compared the students' factual recall. Judge Mosman next noted one empirical study that found that expanded media coverage leads to an increase in sentencing lengths, although the study was limited to proceedings before elected judges.

Judge Mosman said that the materials also contained testimonials, including from individuals once opposed to cameras but who had changed positions. Judge Mosman pointed out that the Derek Chauvin trial was cited as a success of broadcasting in the courtroom, including by the trial judge. But a public defender in that trial noted that a defense expert witness had a severed pig's head placed on his doorstep in California and a defense counsel met a mob outside the courthouse that damaged his car. She attributed both incidents to increased media exposure. Judge Mosman concluded that state-court experiences provide few lessons for the Subcommittee. He invited interested parties to provide the Subcommittee with additional research.

Judge Mosman said that the identified research did not rebut the Subcommittee's concerns, including privacy and security concerns for those compelled to participate in criminal proceedings. These concerns were described by a memorandum by Professors Beale and King, which was included in the agenda book starting on page 105. Judge Mosman asserted that trial participants retain a degree of privacy and security interests even though they may be compelled to provide testimony. He thought the appropriate question was one of degree: to what degree do we require people who show up in court to sacrifice their privacy and security concerns?

Judge Mosman stated that these concerns are very real for jurors. He estimated that every trial judge in the Committee meeting has regularly had people in court tell them something that the person had never told anybody in their lives. But because they were obligated by oath to do so, the participants reveal sensitive information, such as their sexual and criminal histories. Judge Mosman commented that it is difficult to measure the amount of information that court participants might forego providing, but this should be a critical consideration. He said that this was similarly true for witnesses. Judge Mosman said there is already enormous reluctance to testify in federal court, particularly in cases involving sex crimes, Indian country, minors, and violence. Judge Mosman recalled a recent RICO case involving a motorcycle gang where the government had to compel a delivery driver to testify that he had delivered a package.

Judge Mosman noted that exceptions can be made, but he said that the result would be a patchwork system for who has to be subjected to enhanced media coverage. "What does that mean that not everybody is subjected to the same rules?" He also observed that it is difficult to know who has heightened privacy concerns. Judge Mosman said that he has had older victims who were as ashamed to admit that they had been defrauded and lost their money as they were to admit any other fact in their lives. Judge Mosman suggested that making an exception for this concern would be placing a broad exception into the rule.

Judge Mosman then surveyed other arguments in favor of broadcasting. He stated that one argument was that live broadcasting impairs the opportunity for artificial intelligence to misrepresent federal court proceedings. Judge Mosman questioned whether live broadcasting

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would be the most appropriate way to counter AI misrepresentations. A second argument contended that broadcasting is needed for civic education. Judge Mosman agreed that civic education is important, but he questioned whether state courts had shown that broadcasting is an effective vehicle for civic education and whether civic education should trump privacy and security concerns for court participants. Citing *United States v. Donald Trump*, a final argument contended that some cases are of such particular importance that barring cameras "threatens to undermine democracy itself." Judge Mosman replied that conducting business as usual, where the same rules apply no matter who shows up in court on a particular day, is a critical element of democracy.

Accordingly, Judge Mosman stated that the Subcommittee recommended no action on the suggestion to amend Rule 53 but expressed an interest in observing future developments in court broadcasting and receiving additional studies.

Judge Dever invited Professor Beale to make additional comments. Professor Beale noted that the agenda book listed relevant state provisions and that the FJC study that Judge Dever referenced was expected to become available later in the month. Professor Beale also observed that one study cited to support broadcasting involved Chinese students viewing video materials but that the study's context likely differed substantially from American criminal proceedings. Professor Beale said that it would take several years to study the effects of the recent Judicial Conference broadcasting policy.

Judge Dever invited Committee members and liaisons to comment on the proposal to change Rule 53 and repeated that the Subcommittee unanimously recommended no change. A practitioner member agreed with the Subcommittee's recommendation and suggested that as the number of participants in a proceeding increases, the potential for harm increases. The member recalled a civil case in which the court regularly conducted virtual hearings with hundreds of participants. In the virtual hearings, one could see the attorneys and the background of their offices. At the close of one hearing, a participant in the virtual proceeding notified someone who was waiting outside the office of counsel for the receiver that the hearing ended. The individual then attacked the receiver's counsel, putting him in the hospital.

A judge member thought that there are ways to reduce the Subcommittee's concerns. He provided an example of a state rule that gives state trial judges discretion to permit expanded media coverage in a particular case, which the judge could decline to exercise when the case involves heightened concerns. He said that the rule works well and he had not confronted issues with it. The judge member suggested that broadcasting would not be appropriate in trials involving certain subject matters, types of victims, or other particular concerns. He observed that some cases garner increased community attention and allowing expanded access would permit the community to understand the proceedings better.

As an example, the member said that he had presided over a high-profile state case related to a shooting in the Aurora Theater. He observed that the case affected the community at large, and the community was very interested in it. The member recalled that he permitted media organizations to broadcast the feed from the court camera. Several victims had written the judge member letters protesting his decision, but later thanked him for allowing expanded access so that they could follow proceedings without being in the courtroom. He said that it also allowed the

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community to learn about the proceedings without relying on the media to describe the proceedings. The member recognized that certain limitations to broadcasting he implemented, including restricting broadcasting during voir dire and having the court control the camera, reduced the risk of harm. The judge member said that he would not favor requiring broadcasting, but expanded media access can work when the rule gives the trial judge discretion. He recognized that getting relevant empirical evidence will be difficult, but he supported continuing to study state court experiences.

Judge John Bates, Chair of the Standing Committee, inquired whether the Subcommittee discussed the option of giving trial judges discretion to make decisions about whether to broadcast a particular proceeding. Judge Mosman responded that the Subcommittee had discussed this discretionary option. Judge Mosman observed that most states with expanded media access provide judges with discretion, but their limited experiences did not rebut the Subcommittee's concerns about the possible broad impact on justice. He said that individual cases do not answer how broadcasting impacts justice in quantifiable ways. For example, does it result in more convictions or fewer in some kinds of cases? Do people withhold information? Judge Mosman also asserted that expanded access in a few specific cases would not give the public a representative picture of how the justice system works.

Ms. Tessier identified two considerations for the Committee. First, Rule 53 prohibits broadcasting to the public, but it does not necessarily prohibit remote participation, such as a closed-circuit television at a remote courthouse to allow victims to watch proceedings. Second, she pointed out that a pilot project studying broadcasting would likely conflict with Rule 53.

Judge Dever invited Professor Beale to comment on the Subcommittee's pilot project discussion. Professor Beale agreed that a pilot project could not be authorized because it would conflict with the existing rule. She noted that there had been pilot projects under the civil rules, which do not include a total ban on broadcasting. But because it contains a total ban, Rule 53 would need to be changed to allow a broadcasting pilot project in criminal proceedings.

Professor Beale noted that the Subcommittee did not recommend changing Rule 53 to allow a pilot project. She explained that, even if authorized, a pilot project would require recruiting districts that want to participate. This itself could be problematic because districts that would want to participate could be different than districts that would not want to participate. Professor Beale said that the courts that participated in the civil broadcasting pilot program were pleased with the results, yet the Standing Committee and Judicial Conference determined that the pilot project was not positive enough and broadly applicable enough to justify amending the civil broadcasting rules.

Professor Struve, Reporter to the Standing Committee, recalled that two districts participated in the civil pilot project. Judge Bates noted that the pilot project also required the parties in each case to consent.

Judge Dever emphasized the importance of cooperating witnesses in criminal cases and the need to protect their physical safety. He noted that the Committee participated in a larger working group related to the topic of protecting cooperators because of the serious physical threats to cooperators in criminal cases. Judge Dever said that the recent broadcasting policy provided judges

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with discretion in civil and bankruptcy cases when the proceeding does not involve witness testimony, but participants in criminal proceedings often reference cooperating witnesses even when no testimony is being taken. Judge Dever stated that the risk of additional exposure to cooperating witnesses influenced the Subcommittee's decision to recommend no change to Rule 53.

Judge Conrad commented on broadcasting's possible effect on the prevalence of jury trials. He stated that criminal trials are already a rare occurrence, and he expressed concern that broadcasting would increase security risks for participants and further discourage trials. Judge Conrad also agreed that broadcasting exacerbates safety concerns for trial participants. He recalled cases involving interstate criminal activity where people came to the courtroom and threatened prosecutors and jurors, and Judge Conrad asserted that broadcasting would increase this concern.

A judge member agreed with the Subcommittee's recommendation. She noted that courts of appeals often broadcast arguments, but how broadcasting could impact trial courts was less clear. She recalled the broadcasted trial of O.J. Simpson and expressed concern that broadcasting may have impacted how the lawyers in that case presented evidence. The member suggested that the more high-profile the case, the more access the media may want and the more broadcasting may impact the presentation of evidence. She cited the recent trial involving Johnny Depp as the latest example. She said that many state court judges had received requests for expanded media access in certain cases and predicted that the Committee would need to confront the broadcasting issue again in the future.

Another judge member recognized that an interested party indicated it intended to present additional information, and he asked how the Committee would proceed with new materials coming in.

Professor Beale explained that the Committee had several options. It could retain the subcommittee and put the matter on its study agenda, take no action and defer consideration, or take a final vote.

Judge Dever invited further comment on how the Committee should proceed. He thanked the FJC for its extensive study on state-court approaches to broadcasting.

Professor King explained that a final vote would remove the matter from the agenda, but the matter could be reproposed at any time.

Judge Dever observed that the Committee often receives suggestions related to matters that it had previously studied and resolved. Judge Dever affirmed that the Committee would continue to review suggestions that are submitted.

Judge Mosman suggested that the Committee vote on the Subcommittee's recommendation to take no action. He said that the matter could be appropriate for study if the Committee expects to receive a study soon but questioned whether a relevant, reliable study could be produced in the near future.

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Judge Dever noted that the Subcommittee's recommendation was unanimous, and he proposed voting on the recommendation, acknowledging that the Committee may reexamine the matter in the future.

A vote to take no action passed, with one member voting nay and the DOJ representative abstaining. Judge Dever thanked Judge Mosman and Judge Conrad for leading the Subcommittee. Judge Dever repeated that the Committee will continue to review additional studies or other information brought to the Committee's attention. He thanked Judge Mosman and Judge Conrad for their work with the Subcommittee.

Rule 49.1

Judge Dever recognized Judge Harvey to discuss the Subcommittee's work related to Rule 49.1, noting that the agenda book materials on this topic began on page 237. Judge Harvey thanked Professor Beale, Professor King, and staff for compiling materials for the Subcommittee.

Judge Harvey said that he would speak about three topics related to Rule 49.1.

First, the DOJ suggested the use of pseudonyms to identify minors in public criminal filings instead of the minor's initials. Two bar associations that represent victims made a similar suggestion for the use of gender-neutral pseudonyms. The bar associations suggested that gender-neutral terms would serve as an additional safety precaution. Judge Harvey stated that the Subcommittee unanimously supported the DOJ proposal. He noted that the public defender representative had no objection to the proposal and that many federal public defender offices said they already use aliases or pseudonyms for minors. Judge Harvey also noted that this had been DOJ policy. Judge Harvey said that the Subcommittee discussed the option of using a consistent pseudonym for each minor across jurisdictions, but such a change would require a more complicated rule amendment. Tracing restitution across jurisdictions would be better addressed through collaborative discussion. Judge Harvey said that a concern arose that using a gender-neutral pseudonym would be difficult in cases where a minor's gender is relevant to the government's evidence. Accordingly, the Subcommittee agreed that it would not want a rule that requires the use of gender-neutral identifiers where the evidence is not gender neutral. Judge Harvey commented that the DOJ was open to the possibility of including a committee note that would encourage the use of gender-neutral identifiers where possible and necessary to protect the identity of the minor. Judge Harvey concluded that the Subcommittee would likely propose an amendment to Rule 49.1 consistent with the DOJ proposal and perhaps with a committee note encouraging the use of gender-neutral terms.

Second, Senator Wyden had proposed a change to fully redact social security numbers in public filings. Judge Harvey said that the Privacy Rules Working Group had been considering the issue for a number of years and that a Bankruptcy Rules Subcommittee decided that including the last four digits of social security numbers was still important in public bankruptcy filings. That subcommittee recommended, and the Bankruptcy Rules Committee agreed, to continue permitting the last four social security number digits in filings.

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Judge Harvey said that the Subcommittee discussed the benefits and consequences of including the last four digits of social security numbers in criminal filings. He commented that the Subcommittee sensed no need for the last four digits, and an informal survey of federal public defender offices showed no objection to excluding the last four digits. He noted that the DOJ did not raise concerns about the full redaction of social security numbers, and the court clerk liaison did not see a need for their inclusion. Judge Harvey indicated that the Subcommittee would continue to research the possible consequences of including the last four digits in criminal filings.

Judge Harvey asked the Committee what the consequence to uniformity would be if the Subcommittee recommended a change to redact individuals' full social security numbers and other Committees declined to make a similar change.

Third, the Privacy Working Group recommended no further consideration on issues identified in pages 252 through 254 of the meeting agenda book. These issues were not the subject of any specific suggestion. Judge Harvey explained that these were areas where Rule 49.1 and other related rules could be clarified. He asserted that the Privacy Working Group made its recommendation because the Committee has limited resources and the Working Group found no evidence that the rules caused real-world problems.

Judge Harvey said that the Subcommittee unanimously agreed with the Working Group's recommendation, and he recommended that no further action be taken with respect to those issues. Judge Harvey then invited comment by the Committee.

Professor Beale observed that a change requiring pseudonyms may cause uniformity concerns. She said that the Committee should monitor related discussions in other rules committees so that the rules committees could collaborate on any proposed change.

Mr. Byron noted that the pseudonym suggestion was docketed as an agenda item for other committees, but the other rules committees had not yet discussed the issue. He said that the other rules committees hoped to first hear the views of the Criminal Rules Committee on the issue because the suggestion was first addressed to the Criminal Rules Committee. Mr. Byron agreed that rules uniformity is important and encouraged the Committee to make any change in alignment with the other rules committees.

Professor Beale observed that including the last four digits of individuals' social security numbers in public criminal filings presents a risk because a person's full number could be gleaned from the last four digits in conjunction with other personal information. She encouraged the Rules Office staff to research the risk of including the last four digits in public filings and to monitor how the issue progresses before the other rules committees.

Dr. Reagan noted that the Federal Judicial Center was conducting a project looking at civil and criminal public filings to find out why and how often social security numbers are not redacted. He said that the information could help the Committee understand the need, if any, for social security numbers in public filings. Already, he observed many cases where a person's social security number was included in an exhibit but was irrelevant to the litigation. Mr. Reagan said that the FJC would share the results when the study is completed if asked by the Committee.

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Ms. Tessier said that the use of pseudonyms for minors is particularly important in criminal cases. She explained that 18 U.S.C. § 3509 reflects Congress's view that it is particularly important to protect the identity of minors in criminal cases and said that the DOJ would support a change to the criminal rules even if other rules committees decided not to make similar changes.

Judge Dever invited further comments. Hearing none, Judge Dever thanked Judge Harvey for chairing the Subcommittee. He said that the Subcommittee's goal is to make a recommendation regarding these issues at the spring meeting.

Rule 40

Judge Dever turned the Committee's attention to the suggestion, materials for which started at page 261 of the agenda book, regarding procedures for revoking or modifying pretrial release under Rule 40. He noted that the Magistrate Judge's Advisory Group (MJAG) submitted a comprehensive suggestion, which was included in the agenda book at page 266. Judge Dever said that he was inclined to appoint a subcommittee to study the matter. He invited Professor Beale to comment.

Professor Beale observed that the Committee previously encountered this issue but did not have enough information at that time to warrant exploring a rule revision. She thought that the MJAG suggestion provided the additional information to show that there is a need for a subcommittee to research the issue.

Judge Dever indicated that he would appoint Judge Harvey to chair the subcommittee and invited him to comment. Judge Harvey agreed that a subcommittee should study the issue, noting his personal experiences with Rule 40 demonstrated that the rule was confusing, and he observed that the Federal Magistrate Judges Association supported researching changes to Rule 40.

Rule 43

Judge Dever turned to the suggestion at page 284 in the agenda book regarding Rule 43 and the expanded use of videoconferencing in federal court. Judge Dever noted that Rule 43 had previously been the subject of proposals from judges advocating for the use of videoconferencing for Rule 11, sentencing, and revocation proceedings. Judge Dever commented that the proposals had always been from judges, never from the National Association of Criminal Defense Lawyers or from the Association of Assistant U.S. Attorneys. He said that the issue for the Committee was whether to appoint a subcommittee to study Rule 43, and he invited Professor King to comment.

Professor King said that the proposal argued changes to Rule 43 would promote efficiency and appease parties and counsel who would prefer videoconferencing for some proceedings. She explained that the proposal would change Rule 43 so that all kinds of pretrial proceedings could be held by videoconference, including Rule 11 and sentencing hearings. Professor King noted an FJC survey showing that most judges polled were amenable to some additional videoconferencing, but the survey did not specify which proceedings the judges would be amenable to. Professor King said that she did not see anything in the proposal that changed or supplemented the concerns that

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were raised in prior Committee deliberations and asked whether the Committee believed reconvening a subcommittee would be proper.

A practitioner member observed that the Committee had previously determined that in person proceedings are best when a person is pleading guilty to a criminal offense, and he agreed that convenience and efficiency should not trump the importance of being in person for these types of proceedings. Accordingly, he recommended against continued consideration of the issue.

A judge member agreed that convenience benefits alone did not justify changing the rule. However, he said that a change could be valuable in circumstances where a party in a sparsely populated district must make substantial efforts to get to the federal courthouse.

Judge Dever noted that parties already may appear via videoconference with consent for initial appearances, arraignments, and in misdemeanor cases. He asked the Committee for its views on allowing videoconferences for proceedings in addition to what the rules already allow but excluding critical proceedings, for example, a proceeding where a defendant pleads guilty to a serious offense.

A judge member thought that parties should have some flexibility because litigants in large districts sometimes must travel many hours for a short proceeding. But he thought that some proceedings, such as sentencings, generally should not be conducted by videoconference. He indicated that he was undecided about whether the rules should allow a change of plea to be conducted remotely.

Ms. Tessier commented that the proposal would require the defendant's consent, which the DOJ considered important for the issue, and that a subcommittee had not considered an issue with the defendant's consent since the CARES Act. She suggested that a subcommittee could research whether there were issues with videoconferencing during proceedings under the CARES Act.

A practitioner member observed that this issue had been studied before, and though the CARES Act allowed for expanded videoconferencing for a period, she thought that the experience did not change the considerations that led the Committee to decide against changing the rule. She said that when the Committee previously considered similar changes, defense participants had suggested that any change should include a requirement of the defendant's consent. The member agreed with Judge Conrad that criminal trials are becoming more uncommon. Thus, she commented, many defendants appear in court only for their initial appearance, plea, and sentencing. She said that in-person appearances for such proceedings promote respect for the judicial system and keep proceedings focused on defendants.

Another practitioner member expressed a concern that defendants would feel pressured to consent to videoconferencing and observed that a similar concern was raised during discussions related to proposed changes to Rule 62.

A practitioner member commented that a distinguishing feature of the CARES Act period was that defendants were similarly situated during the pandemic, since proceedings were conducted regularly by videoconference. The member suggested that defendants were more

accepting of videoconference because "we were all doing it remotely." He agreed that defendants could feel coerced to consent now that defendants are not similarly situated and proceedings are not conducted regularly by videoconference. He thought that proceedings where defendants could be deprived of their freedom demand in-person appearances.

A practitioner member recalled a case near the end of the CARES Act period when courts also conducted proceedings in person. In the case, the court was scheduling a proceeding that would determine whether the defendant remained detained. The member said that conducting the proceeding in person, rather than by videoconference, would have delayed the proceeding and possibly caused unnecessary detention. She offered this as evidence that the process itself could be coercive by adding delay if a defendant wishes to appear in person.

A judge member observed that in his experience requests to appear remotely usually came from the defense. He asked whether the Committee thought that most defense attorneys would prefer in-person appearances at all proceedings.

A practitioner member responded that defendants often appreciate the option to waive appearance or appear remotely for routine matters, such as status conferences. He said that for proceedings that may deprive them of their liberty, defendants want to be present with their attorney so that they can better communicate with counsel. He noted that poor video quality could impair communication and cause the defendant distress. The practitioner member emphasized that communication between defendants and their attorneys is important, and appearing in person helps improve the lawyer-client relationship because it creates an opportunity for discussion outside of the proceeding.

A judge member thought that a rule change, if any, should be driven by the defense and not only for the convenience of the court.

Judge Dever observed that Rule 43 already allows a defendant to be absent from conferences about legal questions. He asked if the Committee could identify proceedings for which the rule should be changed to allow videoconferencing.

Judge Bates recalled fielding questions from judges about whether the rules permit videoconferencing for status conferences and said that these experiences demonstrated that the rules are not clear regarding when judges can use videoconferencing. He also said that he had held many proceedings by videoconference in misdemeanor cases since the end of the CARES Act period and had not experienced problems. He suggested that many in the federal judiciary supported expanding the use of virtual proceedings, though he acknowledged the support may have been because judges did not know they may already use videoconference for many proceedings. Judge Bates wondered whether judicial support alone warranted a subcommittee to study the issue. He said that he did not believe that felony pleas and sentencings should be remote, but he signaled that he was open to arguments that a rule change could alleviate the concerns previously raised.

Judge Dever indicated an intent to appoint a subcommittee and said that the first question to discuss would be what universe of proceedings should be covered by a rule change. He said that

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the Committee appeared to agree that a change should not cover pleas and sentencings, and the rules already allow with the defendant's consent videoconferencing for initial appearances and arraignments.

A judge member asked whether the Committee should vote on the decision to form a subcommittee and questioned whether the Committee agreed in the way outlined by Judge Dever.

Judge Dever asked the judge member if it was the member's opinion that the issue had been studied enough by the Committee, and the member answered affirmatively.

Judge Dever asked the Committee to identify a proceeding that should be covered by a rule change. Judge Conrad offered competency hearings as an example. A judge member responded that he thought competency hearings would be excluded. Judge Dever said that he preferred to conduct competency hearings in person. Another judge member said that the Committee should consider permitting videoconferencing for competency hearings because transporting some defendants to court for such hearings can be difficult.

A judge liaison said that courts should conduct status of counsel hearings and similar critical proceedings in person.

Judge Dever invited further comment. Hearing none, Judge Dever thought that the Committee raised enough issues worth studying to appoint a subcommittee. He stated that he would appoint a subcommittee to report at the next meeting.

Rule 42

Judge Dever recognized Professor Beale to discuss contempt proceedings under Rule 42. Professor Beale stated that the proposal was based on a long and detailed law review article exploring contempt proceedings and finding possible improvements. She said that the article suggested changes to statutes and other changes that would be substantive or that at least sit on the border between procedure and substance. Accordingly, Professor Beale recommended that the Committee remove the suggestion from the agenda.

Judge Dever agreed with Professor Beale and invited comments. Hearing none, the Committee unanimously voted to remove the suggestion from the agenda.

Attorney Admission

Judge Dever recognized Professor Struve to report on attorney admissions. Professor Struve said that a Subcommittee had been formed to study a proposal to change the current attorney admissions practice, which results in some attorneys seeking to practice in multiple federal districts being required to take the bar exam in multiple states. She stated that the Committee previously dropped from consideration a proposal for a national bar of the United States District Courts, but it was continuing to consider other possibilities. Professor Struve thanked Judge Birotte, Ms. Recker, and Dr. Reagan for their support with the Subcommittee.

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Professor Struve said that one proposal under consideration was to adopt a national rule that would foreclose federal districts from requiring attorneys practicing before a court in the district to be a member of the bar of the encompassing state. Professor Struve said that another possibility was to adopt a rule providing for admission to any federal district court for an attorney who is a member of any state bar or any federal court and is of good moral and professional character, similar to Appellate Rule 46. She noted that some contend that practice before trial courts is different than practice before courts of appeals. Professor Struve said that the Committee remains mindful of the need to consider whether there is rulemaking authority to address the topic consistent with statutory requirements. She said that the Subcommittee would continue to receive information on the topic.

Professor Struve said the Subcommittee also discussed requirements that out-of-district attorneys associate with local counsel. She recalled that the Subcommittee raised potential concerns about mandating that some districts have more permissive admissions procedures and concerns with how a change could affect local legal culture or impact client protection. She said the Subcommittee also discussed whether a change could implicate the regulation of unauthorized practice of law. Professor Struve stated that the Subcommittee was gathering information about views from state authorities on that topic.

Judge Dever invited comments. Professor Coquillette agreed that the judiciary's rulemaking authority to address attorney admissions was an important question. He observed that most federal districts have promulgated rules regulating attorney admissions.

Judge Dever invited further comment. Hearing none, he turned to the next topic.

Electronic Filing and Service by Self-Represented Litigants

Judge Dever noted that Judge Burgess chaired the Subcommittee and that Professor Struve had prepared a report on developments considered by a working group including participants from other rules committees as well.

Judge Burgess said that the working group focused on increasing electronic access and service by self-represented litigants. Judge Burgess explained that the draft rule would presumptively permit self-represented litigants to file electronically and require alternatives if a court order or rule bars such filings. Judge Burgess said that the working group was using Civil Rule 5 as a template.

Professor Struve explained that the project raised two policy ideas, one concerning service and one concerning filing. She said that the first idea would eliminate the requirement that a self-represented litigant separately effect paper service on litigants who are already receiving electronic notice. Professor Struve said that the second idea would presumptively allow self-represented litigants to access a court's electronic filing system. Professor Struve noted that courts would likely approach incarcerated self-represented litigants differently, recognizing that these litigants may lack consistent internet access. She concluded that many incarcerated litigants therefore would not be affected by the electronic filing change.

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Professor Struve commented that the Committee would now have the benefit of other rules committees' discussions on the issue. She said that the Bankruptcy Rules Committee raised concerns about cases with multiple pro se litigants, a concern particularly salient to bankruptcy practice because a bankruptcy case can involve many creditors whose amount at issue does not justify hiring an attorney. In these cases, self-represented litigants may not understand their service responsibilities. Professor Struve said that the Bankruptcy Rules Committee appeared least likely to allow self-represented litigants to use bankruptcy courts' electronic filing systems. She also said that several Bankruptcy Rules Committee members were highly skeptical of a rule that would go further than presumptively allowing access to a court's electronic system.

Professor Struve said that the Appellate and Civil Rules Committees tended to think those concerns are distinct to bankruptcy because the committees thought having multiple pro se litigants in a single appellate or civil matter is unlikely. Professor Struve said that these two committees thus seemed open to considering this proposal. Professor Struve and Judge Dever invited the Committee's thoughts.

A judge member asked if the Committee wanted to continue studying the issue if the outcome might differ from the Bankruptcy Rules Committee.

Professor Struve said that the Committee did not need to vote on the issue, but a discussion would be helpful. Judge Dever thought the Committee would not be deterred by the Bankruptcy Rules Committee acting differently.

Judge Dever questioned whether the current rule—which allows pro se litigants access to electronic filing only when permitted by a court order or local rule—is adequate. He asked Committee members if they would object to the Criminal Rules treating the issue differently than the Bankruptcy Rules.

Professor Struve noted that the draft rule took into consideration court clerk concerns by allowing for alternatives. She predicted that if the draft rule was published for comment, the Committee would learn much from the public feedback. Professor Struve noted that the FJC was also discussing ways to provide additional helpful information.

A practitioner member noted that incarcerated individuals could have trouble accessing electronic filing systems. He also asked how courts would respond if an individual failed to file in a timely fashion due to difficulty accessing technology.

Professor Struve thanked the practitioner member for raising the questions and emphasized that the draft rule change would, at most, permit but not require electronic access. Professor Struve also noted that the federal rules do not account for the prison mailbox rule in the era of electronic filing.

Federal Judicial Center Research and Education Report

Judge Dever recognized Dr. Reagan to provide a report from the FJC. Dr. Reagan explained that the FJC had resumed reporting to rules committees and added to its report information on the

FJC's education division and history office because education had sometimes been suggested as an alternative to rulemaking.

Judge Dever thanked Dr. Reagan and noted that the full report appeared on page 428 of the agenda book.

Rule 17

Judge Dever turned the Committee's attention to Rule 17. He said that the Committee had been studying the issue for two years and began by discussing problems with the current rule. Judge Dever explained the timeline of the next day's panel discussion. He said that the panel discussion would help the Committee gather information, but it was not intended to be a drafting session for the Committee. Judge Dever recognized Judge Nguyen to further introduce the next day's discussion.

Judge Nguyen commented that the Subcommittee met 13 times over the preceding two and a half years and thanked all participants for their support. She said that the Subcommittee began by asking whether there was a problem with the existing rule and how the rule could be improved. The Subcommittee heard from many interested parties and learned that subpoena practice differs across the country. Some districts strictly apply the *Nixon* standard, a practice that discourages parties from using third-party subpoenas. In addition, districts have different procedures on how a party requests a third-party subpoena.

Judge Nguyen said that the Subcommittee studied several different issues. The Subcommittee studied procedural issues, such as ex parte and protective order procedures. The Subcommittee also discussed whether and how the *Nixon* standard should be changed. Judge Nguyen explained that in doing so the Subcommittee thought about two types of information: unprotected information and protected personal or confidential information. She said that the Subcommittee drafted frameworks for each type of information, but the draft language was merely a starting point to facilitate discussion.

Professor Beale noted that pages 442 and 443 of the agenda book had the list of questions for the speakers. She said that the speakers were encouraged to share personal experiences with the rule and to react to the draft rule language. Professor Beale explained that the Subcommittee invited speakers from varying districts and professional backgrounds, including a mix of prosecutors and defense attorneys, a privacy expert, and an individual speaking from the perspective of victims. Professor Beale detailed the timeline of the panel presentations and opportunities for Committee questions.

Judge Dever said that the Subcommittee studied the varying subpoena practices under Rule 17 and acknowledged that some districts have a limited third-party subpoena practice. He agreed that the draft language was not a recommendation but a way of thinking through issues. Judge Dever identified two questions for the Committee: is the draft rule an improvement and how would it affect court and lawyer workloads. A judge member observed that the proposal would permit parties to obtain more information than they could under the current Rule 17 as interpreted by *Nixon*.

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Judge Dever noted that speaker biographies appeared in the agenda book. A judge member asked if the speakers had access to the draft language. Judge Dever answered that the panel members did.

Judge Nguyen commented that the agenda book included the draft rule language as well as a redlined version. Judge Dever asked for further comment. Hearing none, Judge Dever said that the meeting would resume at 8:30 a.m. the following day. Judge Dever adjourned the Committee until the next day.

The next day, Judge Dever welcomed meeting participants and noted that the meeting was intended for discussion of the proposal to amend Rule 17 of the Federal Rules of Criminal Procedure. He explained that the White Collar Crime Committee of the New York City Bar submitted the proposal and that Judge Nguyen was serving as chair of the Subcommittee. Judge Dever explained that the Subcommittee was studying potential problems with the current rule and potential solutions.

Judge Dever noted that the material for this issue began at page 438 of the agenda book. He repeated that the meeting was not meant to be a drafting session, but instead the Committee is interested in finding out how Rule 17 is being applied and if there are ways to improve it. Judge Dever thanked the panel for their time and asked meeting participants to introduce themselves.

Judge Nguyen again thanked the panel participants and explained the structure of the panel discussion. The first panel included:

Eóin Beirne, partner, Mintz Levin, Boston, Massachusetts;

Geremy Kamens, Federal Public Defender, Eastern District of Virginia, Alexandria, Virginia;

Professor Stephen Henderson, Judge Haskell A. Holloman Professor of Law, University of Oklahoma School of Law, Norman, Oklahoma; and

Alixandra Smith, Criminal Chief, United States Attorney's Office, Eastern District of New York, Brooklyn, New York.

Judge Nguyen recognized Mr. Beirne to begin the panel discussion. Mr. Beirne said that the *Nixon* standard is outdated and does not afford defendants their constitutional rights. He offered to illustrate this with his experience in the Varsity Blues cases from the District of Massachusetts, where more than 50 defendants—including parents of college applicants, school coaches, administrators, and testing proctors—were charged with conspiracy to commit fraud, bribery, and money laundering by bribing university officials to admit their children as athletes in sports they did not play or would never play at college level. The government took the position that the schools were victims of the fraud, that the students would not have been admitted if they had known they were not going to play the sports, and that donations have no role in admissions. Mr. Beirne explained that for the parents who did not plead guilty, the millions of documents and recordings subject to discovery contained a lot of highly sensitive information about people who had not been charged that the government had obtained through grand jury subpoenas, including academic

records, medical and mental health records of minors, and communications between spouses and between other family members. The Magistrate Judge entered a "very, very strict protective order" agreed to by all that covered who could access the material, for what purpose, to whom could it be shown as part of trial preparation, and how it must be redacted, stored, and destroyed. Mr. Beirne said that through snippets received from the government it became apparent to defense counsel that the schools' claims that donations didn't matter to admissions were false. As a trial date had not yet been set, the defense moved for Rule 17(c) subpoenas to two schools, which resulted in a large production of documents that refuted the schools' claims that donations played no part in admission. Later, in the trial of the first two parents, the court ruled that documents relating to school donations were inadmissible and could not be used to impeach witnesses from the school who testified that donations didn't matter to admissions. Those defendants were convicted. (The defendants included the exclusion of the documents in an appeal, and the Court of Appeals vacated the convictions on other grounds, Mr. Beirne explained.) In another case in front of a different judge, the court permitted the defense to use the documents to "thoroughly" impeach the testimony of the school witnesses that donations played no role, and that defendant was acquitted.

Mr. Beirne provided several takeaways. First, he said the government had no incentive to search for this "highly exculpatory" information because it did not fit within the government's theory of wrongdoing, and the defense met the *Nixon* standard only because it had received a snippet of the information by chance. Mr. Beirne asserted that a less onerous standard would afford defendants the constitutional right to compulsory process to properly prepare a defense, after which the judge would decide whether the information is admissible, a decision that may be appealed in the event of a conviction. Access to the material and use or disclosure of that material are very different things, he said.

Second, Mr. Beirne stressed the right solution for protecting sensitive material is a protective order, not in camera review. He stated that in the Varsity Blues case, it would have been practically impossible for the court to review the tens of thousands of documents received under the negotiated protective order; almost all would have been considered protected material under the draft. The protective order, he said, also required filing under seal, redactions, and anonymizations to protect privacy.

Third, Mr. Beirne said that the court correctly agreed that the government had no right to learn defense strategy when the defense was requesting documents, or to learn what the defense received. The process involved ex parte filings and an ex parte motion, and the court in his case correctly granted the motion to quash the government's subpoena to the school asking for everything it had produced to the defense. He noted that as with a grand jury subpoena, a recipient of a Rule 17 subpoena cannot be prevented from disclosing the subpoena, especially if they have a notification obligation under statute, such as FERPA.

Fourth, he said virtually all of the materials the defense received that were to be used at trial were turned over to the government per Rule 16. Everything else stayed hidden and governed by the strict protective order.

Fifth, Mr. Beirne commented that an interesting situation occurred where, due to ex parte filings, the court learned that the government may have possessed information that it did not know

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was exculpatory. The judge gave the defense a choice: disclose documents in order to broaden the scope of *Brady* or hold the documents until required to be turned over, but not insist that the government violated its *Brady* obligations.

Sixth, regarding how to incorporate laws and other regulations into the decision about whether a defendant can access documents, in his case, Mr. Beirne said, the school cited FERPA as a basis for it not to turn over the relevant records, and the school provided notice to students, who got lawyers and intervened in the case. All that resulted was a reaffirmation of the protective order that was already in place, with the judge finding that the defendant's right to compulsory process outweighed any restrictions FERPA placed on the school's ability to disclose the relevant information.

Mr. Beirne recommended that to protect privacy, the Committee should leave it to the courts to impose strict protective orders which the parties and the recipient of the subpoena can negotiate, rather than distinguish between protected and unprotected information at the front end, which would lead to unnecessary delay and complication. Mr. Beirne further recommended that the rule not require the return of materials to the court for in camera review in white collar or large conspiracy or RICO cases, as it would be too unwieldy and impractical. He added that he agreed with the local rules in the District of Massachusetts that permit service of subpoenas without court permission once a trial has been set.

Judge Nguyen recognized Mr. Kamens. Mr. Kamens said that he was no fan of the *Nixon* standard but that the subpoena practice in his district works fairly well. Motions to quash do not require a substantial amount of the court's attention, parties serve trial subpoenas for witnesses and documents without first obtaining court permission, and subpoenas for documents before trial also work reasonably well, although he took issue with the *Nixon* standard.

Mr. Kamens provided as an example a case (being appealed by the Department of Justice) where the defendant was charged as a felon in possession of a firearm after a traffic stop. The defense argued that the court should dismiss the indictment due to selective enforcement by law enforcement in violation of the Equal Protection Clause, citing data showing a racial disparity in traffic stops. The court had granted the defense request for an ex parte subpoena for data on five months of traffic stops by the police department, data that a state law required it collect. After receiving the subpoena, instead of moving to quash, the police department representative negotiated with defense counsel and agreed that the department would produce a narrower set of information. The defense expert was able to conduct a regression analysis using the data and show the stops of black drivers far exceeded what would be expected based on the racial composition of the locations in which the stops occurred.

Mr. Kamens offered this example as a demonstration of the importance of negotiation in subpoena practice. He expressed concern that the language in the discussion draft would upend the practice of obtaining subpoenas that works reasonably well in most cases in his district. It would, he warned, increase litigation over terms such as "substantial doubt," "personal," and "confidential"; require more judicial involvement; and largely eliminate negotiations between the recipient and the parties about confidentiality issues and an appropriate protective order before the matter comes to the court.

Judge Nguyen thanked Mr. Kamens and recognized Professor Henderson. Professor Henderson supported expanding Rule 17 and emphasized the critical value of information privacy. He noted that a criminal defendant has constitutional rights not afforded to the prosecution. Professor Henderson suggested that Rule 17 should acknowledge this asymmetry by ensuring that if a defendant is denied access by statute, a court must consider the defendant's Sixth Amendment rights. Perhaps this could be phrased as whether the interests of justice and fair trial require access. Professor Henderson recommended requiring federal prosecutors—but not federal criminal defendants—to comply with state privacy laws. He noted that it was criminal defense attorneys who are seeking a revision of the rule, not prosecutors, who are very well able to operate under the current rule with the grand jury, special agents, cooperation agreements, and more at their disposal. He thought that the draft rule would substantially improve subpoena practice for defendants in districts that operate under the extremely narrow *Nixon* framework, and supported the disclosure restrictions in the draft.

Professor Henderson said that the draft rule should distinguish between protected and unprotected information by looking only to existing positive law, stating it would not be realistic to require judges to determine what is private or personal in every instance, and added that protected information should include trade secrets. He advised against using language that would encourage litigation about the scope of existing privacy protections and inquired whether the rule could allow a party to certify in good faith that information is unprotected. Professor Henderson recommended using a single exception for grand jury subpoenas rather than repeatedly referring to subpoenas other than grand jury subpoenas. He supported the draft's provisions regarding subpoenas sought by pro se defendants, and its ex parte procedures, but suggested that the rule give more guidance on what circumstances constitute good cause. Lastly, Professor Henderson recommended using a showing of "reasonably likely" in place of "likely" in subdivisions (c)(4)(B)(i) and (c)(4)(B)(iv).

Judge Nguyen turned to Ms. Smith. Ms. Smith began by expressing her general concerns with the draft rule. She said that she had seen no evidence that Rule 17 as interpreted by *Nixon* was causing problems. She thought the *Nixon* standard provides a transparent, flexible, and reasonable framework for the implementation of Rule 17, and judicial oversight of that standard is critical, because it allows each judge to tailor the standard to the needs of the particular case. Ms. Smith commented that she had not heard of a single case where the existing standard prevented defense counsel from obtaining materials necessary to defend their client. From the earlier description of the Varsity Blues case, she thought the standard did not prevent counsel from obtaining materials necessary to defend their client; the issue was a second line question about the court's decision to allow the defense to use those materials at trial. She said the government has the burden of proof; has a responsibility to protect the rights of parties, victims, witnesses, and third parties; and is constrained by laws, regulations, and policies not applicable to criminal defendants including Rule 6(e), the Privacy Act, the Crime Victims Rights Act, and Department of Justice Policy, which restrict what the government can or cannot use when it receives information pursuant to subpoena. Defense counsel are responsible to their client alone and are not subject to the restrictions on obtaining and disseminating information that regulate the government. Ms. Smith said that there is nothing unfair about the government having greater investigative tools.

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Ms. Smith thought that the draft was vastly disproportionate to concerns that the *Nixon* standard is too narrow, that the draft would negatively affect the safety and privacy rights of third parties and cause extensive litigation. She anticipated increased litigation over the interaction with rules governing Jencks material, Rule 16, and the Fourth Amendment.

Ms. Smith observed that the draft rule did not sufficiently protect victim and witness privacy interests. She said that under the draft showing for protected information it would be significantly easier to obtain a subpoena than under the *Nixon* standard—allowing a subpoena for information that is not in fact admissible at trial without restrictions prohibiting the party from using the information for nefarious purposes, such as to embarrass or harass witnesses, making victims and witnesses less likely to cooperate in certain criminal cases. She criticized the draft as asymmetric, allowing the defense to subpoena information to disprove the offense, but not information to prove the offense, even though the government bears the burden of proof, and allowing defendants to obtain materials ex parte from victims and witnesses without the guardrails applicable to the government and without sufficient judicial oversight.

Ms. Smith asserted that protective orders are important but not sufficient to protect information in cases involving violence and the draft rule would particularly hurt the most vulnerable victims and witnesses who are less likely to have counsel that can advocate for their interests. These third parties may not understand terms in the subpoena or what information would be protected from disclosure. For example, a person receiving the subpoena might not know what "non content" information is and end up providing materials that should not be obtained by subpoena, or could reveal privileged information when they don't know what information is privileged. They may not know that the date on the subpoena must be the hearing date and not an earlier arbitrary date, she said, noting that there have been problems in her circuit with defense counsel putting dates on subpoenas that were not the hearing or trial date.

Ms. Smith said that though the rule would permit a third party to move to quash an inappropriate subpoena, many victims and witnesses may not be able to afford an attorney. Lastly, Ms. Smith suggested that the protection for personal and confidential information should be expanded to cover additional non-victim witnesses, such as eyewitnesses, cooperating witnesses, or other individuals whose personal and confidential information, like a home address, might be just as dangerous to obtain as for a victim. The draft also moves to a much earlier stage litigation about who is a victim; the facts that determine victims are often not litigated until sentencing.

Judge Nguyen invited questions from the Committee. A practitioner member asked Ms. Smith if she was referring to the Eastern District of New York or a broader area when she said that there was no evidence that Rule 17(c) prevents defendants from accessing needed information. Ms. Smith said that her assertion that she has seen no cases where defendants were unable to access information they needed for trial or that was exculpatory was based on her past experiences and review of the meeting materials. A member said she didn't understand how it is possible to say there is no evidence when in some districts the judges are not open to Rule 17(c) subpoenas and the court of appeals so closely adheres to *Nixon*; it is not an active area for the defense.

A judge member asked Ms. Smith if she was wholly opposed to the draft proposal. Ms. Smith responded that she had significant concerns with the draft. The judge member asked Ms.

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Smith if she agreed that the defense does not receive information prior to trial under Rule 17 that is not trial related. Ms. Smith responded that it is supposed to be for trial, so that if the information is trial related the defense should get that and she did not know of information that is not trial related that the defense should obtain.

Another judge member asked if the issue stemmed from a disagreement over the purpose of the rule—for obtaining evidence for trial, or as an investigative tool. Ms. Smith agreed that the White Collar Committee would like the rule to be more of an investigative tool, but the purpose of Rule 17 is to gather evidence for trial, not to be used as a general investigatory tool, that the rule should be tailored to relevant and admissible evidence for trial and not open civil discovery.

Professor Henderson disagreed and said that the rule is meant for criminal defendants to prepare a defense, not simply to gather evidence for trial. There are no criminal trials in many jurisdictions anymore; it is a system of pleas, and this is the opportunity for the defense to make its case, and it would be too narrow-minded to think of this for trial only.

Mr. Kamens noted a conversation he'd had with an experienced judge who said he'd not experienced defense attorneys sending out subpoenas to harass people, because most cases don't go to trial. Mr. Kamens said that the risk that defense counsel would use a subpoena to harass a witness or for another improper purpose is low and any such case would be an outlier, that most cases are handled by public defenders and CJA lawyers who have an interest in not harassing but simply doing their job. If it was a risk, you should see it in his district where subpoenas are issued relatively freely, but the problem did not exist in his district. He said the rule should focus on the vast majority of cases, not outliers. The rule already provides specific protection for a victim's personal or confidential information. The comment that lawyers are providing dates that are not hearing or trial dates is not at all true in his district, the clerk's office always look to see if that date is correct. He agreed with Professor Henderson that compulsory process requires the defense get the evidence (*Washington v. Te*xas). He also objected to the draft provision that required a defendant to show "substantial" doubt about an element, barring access to material that cast some doubt. All are issues better addressed on the back end, not the front.

A judge member asked Mr. Kamens if he recommended keeping the current rule. Mr. Kamens thought that the *Nixon* standard is too restrictive, and a targeted proposal that would address that would be beneficial, but he did not support the broader, wholesale revision, which he thought would upend the practice in a number of districts around the country.

Ms. Tessier asked Professor Henderson how the rule could ensure the protection of the Fourth Amendment rights of the individual whose information is sought from a third party, and gave an example of a subpoena for a person's email from Google. Professor Henderson responded that it is unclear what Fourth Amendment interests would be implicated by that example, noting that a subpoena has long been treated differently than a search warrant, and the party of true interest is not the party being subpoenaed. But a recipient could protect the rights of the person through a motion to quash. Since Apple made it a market issue, he thought that similar companies would file those motions in the appropriate cases. He also added that in the decades he has been working on privacy, he has never heard someone say that criminal defendants defending themselves are a threat to Fourth Amendment interests. Ms. Tessier asked if the draft sufficiently protects the Fourth

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Amendment rights of the person whose information is sought from unrepresented subpoena recipients, such as a subpoena to witnesses' employers asking for emails. Professor Henderson responded that the rule likely did not sufficiently consider the issue, though it is not a problem unique to Rule 17. It arises when a grand jury asks for the information and has not been well addressed.

Judge Bates asked the panel members whether the district in which they practice requires court approval before a trial subpoena can issue. Mr. Kamens, Ms. Smith, and Mr. Beirne responded that court approval is not required for a subpoena tied to a specific hearing or trial date, but court approval is required for production of documents in advance of trial. Judge Bates asked if they all believe that is the way Rule 17 should stay, and they responded yes. Mr. Kamens said that he would be concerned about a rule requiring judicial approval for trial subpoenas in all circumstances. Ms. Smith said the practice in the Eastern District and Southern District of New York, for trial subpoenas, is that unless you get a court order the documents are returnable to the court. So they go to both parties, and there have been difficulties with defense not providing those documents in a timely manner. There is no court approval before the subpoena is issued, but there is litigation after they come back about whether those documents can be admitted.

A judge member asked if a subpoena duces tecum is issued before trial, say there is a hearing but not a trial, is it returned to the court or to the issuing party. Ms. Smith said they are returnable to the issuing party, and then as a matter of practice they must be provided to the other party, unless the party seeks a court order not to disclose them to the other party. As a technical matter they don't go to the court unless there is a dispute over the subpoena itself or the documents. Mr. Beirne added that defense counsel often adds to a subpoena that orders the recipient to show up with the documents on the first day of the trial or hearing, "In lieu of appearing in court, call me and we'll negotiate," and that's often what happens. The production is a voluntary one and the subpoena recipients don't turn up in court. Rule 16 governs whether or not it is turned over to the government. Mr. Kamens agreed that is what happens in the Eastern District of Virginia as well.

A judge member asked how the current practice prevents disclosure of personal or confidential information to a party who serves a subpoena before trial. Mr. Kamens said that a recipient can move to quash but that typically the bar to disclosure is a privilege. Generalized concerns about confidentiality are not sufficient to outweigh the defendant's interest in a fair trial and compulsory process. He said it is a mistake to pair a privilege, which is a bar to disclosure, generally, with general notions of confidentiality—which are important but typically not sufficient to overcome the weighty interests of a criminal defendant defending himself.

Judge Nguyen asked Mr. Beirne how routine Rule 17 subpoena practice is in his district. Mr. Beirne said that Rule 17 subpoena practice is quite routine, it happens most of the time, and does not typically result in significant litigation because the production is negotiated. He recommended that a good practice of the magistrate judges in his district is to admonish the parties at the outset that if a 17(c) subpoena is served to obtain confidential information, the parties should agree on a mechanism to protect that information. If the parties can't agree, the magistrate judge would order something. A judge member asked in what percentage of cases Rule 17 subpoenas are litigated. Mr. Beirne estimated maybe 5% of cases involve a motion to quash.

Professor King understood that the judge asks the parties to agree on protective steps, but what happens when there is an ex parte request. Mr. Beirne responded that the judge issues a directive to each side: if you serve trial subpoenas, you are charged with making sure private information stays private. There is an understanding that each party may use ex parte subpoenas.

Ms. Smith contested earlier assertions that information obtained by defense counsel or defendants is not used improperly. She provided two recent examples, both in non-white collar cases, where even with protective orders, there was abuse. In one, the defense attorney filed a motion with photographs of the minor victim of sexual abuse that were subject to a protective order, and another in which defendants used discovery materials to obtain personal and confidential information of potential witnesses and threaten legal and retaliatory action against those witnesses. She expressed concern that a rule change expanding the information defendants can obtain would create an environment more conducive to abuse. A practitioner member asked Ms. Smith how the information in her examples was obtained and whether a protective order was violated. Ms. Smith responded that the information in both cases was obtained under Rule 16, which she said has more protections than Rule 17, and that the actions did violate the protective orders.

The practitioner member asked Ms. Smith if she had ever moved for a Rule 17 subpoena and if she had to make a motion to do that. Ms. Smith responded that she had not had to make a motion and said that the practice in her district is that the materials she receives are immediately made available to the other party. There is no judicial involvement on the front end, the party obtains the subpoena from the clerk's office and serves it.

Judge Nguyen turned the Committee's attention to the next panel, which included:

Michael Caruso, Assistant Federal Public Defender, Southern District of Florida, Miami, Florida;

Eric Olshan, United States Attorney, Western District of Pennsylvania, Pittsburgh, Pennsylvania;

Guy Petrillo, partner, Petrillo Klein Boxer, New York, New York; and

Renée Williams, Chief Executive Officer, National Center for Victims of Crime, Hyattsville, Maryland.

Judge Nguyen recognized Mr. Caruso, who began by saying what he liked in the proposal: the explicit ex parte process and the revision to the *Nixon* standard would be beneficial in many districts, and would slightly increase their ability to represent clients in his district. He had several concerns about the draft rule, however, including that the motion requirement for every subpoena would drain their limited time and resources, the category for protected information may be too vague, the standard for the disclosure of protected information was too restrictive, and the provision on unprotected information may provide less information than the subcommittee intended. He described the practice in his district—they do not need to go to the clerk's office to get a subpoena, the clerk of the court supplies subpoenas to them, and he has one on his desktop

that he can fill out and have one of his investigators serve. No motion is required unless the subpoena seeks pretrial production. Mr. Caruso said that a motion requirement for every subpoena would be a significant burden for practice in his district, which involves the second highest number of cases filed and the second highest number of trials, and a median time from appearance to sentencing for a case that pleads of seven months and for a case that proceeds to trial of fourteen and a half months. The motion requirement would delay the disposition of cases while not providing a corresponding benefit. He described a cooperative subpoena practice, where except in fewer than five very complex cases, he has called the owner of the information to ask if that person has the information, to agree on the best language for the subpoena, and whether service by email is acceptable. He offered an example that reflected his typical subpoena practice: his client was the CEO of a company, accused by the government (and by bank officers who were civil defendants) to have stolen money from a bank, causing its insolvency. They called the FDIC, who said they had the information and would respond to a subpoena, and they worked to narrow the scope of the subpoena so it wouldn't waste anyone's time. He said he knows no one in his office or the CJA panel, who together represent 90 – 95% of defendants in his district, who had ever used a subpoena to harass or coerce a witness. If we can't agree, he explained, the dispute goes to the court and the court resolves a motion to quash or modify, which is a rare occurrence.

Mr. Caruso thought that the category of protected information "personal *or* confidential" in the draft was too broad. He agreed with Professor Henderson that a rule change should be tied to existing law and promote certainty and uniform application across the country. There is uneven application of Rule 17 across the country and even within a single district. Mr. Caruso also identified language that he regarded as too restrictive: "cast substantial doubt, on the accuracy of evidence," which sounded to him like outcome altering information, wasn't clear as to whether it referred to only the information sought or combined with other evidence, and didn't clarify if an attorney would have to ask the judge to revisit the decision should a witness provide testimony suggesting a stronger basis for believing it would "cast substantial doubt." Similarly, "accuracy" may not include bias evidence. Combining these two hurdles, he said, is too restrictive and would lead to uneven application. Considering multiple levels of review—motion to quash and back-end review—there is already plenty of protection and deterrence, including protective orders, reputational and financial harm, and defense counsel are too busy and interested in representing clients effectively to use Rule 17 to harass or coerce an information holder.

Mr. Caruso closed with concerns about the standard "information material to preparing the defense" for unprotected information as a standard that could be applied unevenly and more restrictively than intended. He noted that the Court in *Armstrong* recognized the word "defense" could include both sword and shield claims, but that the context of Rule 16 supported a narrow interpretation. Also, the Court was concerned about the defendant's ability to compel government work product, which is not a concern present in the Rule 17 context.

Judge Nguyen recognized Mr. Olshan. Mr. Olshan agreed with Ms. Smith that the *Nixon* standard appropriately balances permitting defendants to obtain admissible evidence with avoiding unnecessary and resource consuming fishing expeditions. He questioned whether a problem existed to justify a complete rewrite of Rule 17. In his view, any lack of uniformity that exists in its application is more likely to benefit the defendant, with a broader interpretation of admissibility that permits defendant to obtain more than *Nixon* allows, rather than a narrower interpretation that

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bars a defendant from obtaining what *Nixon* permits. Mr. Olshan said that the draft rule would cause even wider variation than currently exists under *Nixon* and its progeny, and increase the risk of harassment and embarrassment for victims, other witnesses, and non-witnesses, that is significantly minimized under the current *Nixon* regime.

Turning to the draft rule's privacy protections, Mr. Olshan thought that the protections afforded to victims would require litigation to define "personal and confidential" and should be expanded to all whose information is sought. For example, a person testifying about past conduct for which the statute of limitations has run, a child or other person who experienced trauma by witnessing the charged offense, cooperating witnesses, and codefendants are no less deserving of protection for their personal or confidential information than the victim of the charged offense. Mr. Olshan also thought that the draft rule's reliance on external privacy laws was misplaced and unclear about what information it protected. For example, would records subject to HIPAA be protected all the time, only when HIPAA might preclude disclosure, or only when HIPAA does preclude disclosure. Would medical records in the patient's possession or a family member's possession be protected? What if the patient signed a waiver several years earlier or had received notice of the subpoena? What if the issuing district is in a state that has one set of privacy laws, and the subpoena recipient is in a different state that has a different set of privacy laws? He said these ambiguities in the draft rule would cause cumbersome litigation, multiple times in a case, and often close before trial. And these decisions about the scope of privacy laws could affect noncriminal proceedings, without the benefit of expert practitioners in those areas. This would be especially burdensome where ex parte subpoenas are issued for recipients who are unrepresented or cannot afford counsel.

Regarding the issuance of subpoenas for non-trial proceedings, Mr. Olshan said that they do not object to Rule 17 subpoenas for sentencing or other specific hearings, like suppression hearings, a practice that happens in his district and many others. But by only using the word "upcoming," and rejecting the word "scheduled," the draft effectively decoupled subpoenas from any hearing, allowing subpoenas to issue at any time, and thereby would permit the kind of fishing expeditions that *Nixon* prohibits, because upon charge there will be a trial in theory "upcoming."

Mr. Olshan also expressed concern that the draft rule's standard for obtaining a subpoena for protected information was asymmetrical between the defense and prosecution, and provide the defense more access to information by subpoena than the government even though the government had the burden of proof and is subject to more stringent privacy laws than private parties, including Rule 6(e) and the Fourth Amendment. The defense could obtain inadmissible evidence for an affirmative defense, but the government could not obtain inadmissible evidence under the draft to disprove an affirmative defense.

He also was concerned about jettisoning the requirement of admissibility, which ensures that the information is linked to a particular hearing and prevents the type of fishing expedition *Nixon* criticized. Mr. Olshan said the draft standard allows the defense to obtain information, regardless of whether that information is reliable or admissible, such as extrinsic evidence of misconduct that would not be admissible under the Rules of Evidence, from subpoena recipients who may not have the wherewithal to challenge the subpoena.

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For unprotected information, Mr. Olshan said that the draft rule would permit broad access to information from third parties including private journals and files stored on their personal computers or their personnel files at work, just on a hunch that they might contain information damaging to a witness's reputation. Unrepresented witnesses without the knowledge, resources, or incentive to move to quash a subpoena may respond with overproduction, and the volume of additional subpoenas would overwhelm the courts. It is not necessary to create a new, broad investigative tool for defendants from scratch in order to respond to the concerns expressed at the 2022 meeting.

Judge Nguyen recognized Mr. Petrillo. Mr. Petrillo welcomed the Committee's effort to amend Rule 17 and said that courts apply the rule with a great deal of variability. He noted that in a recent case in Connecticut, the judge ruled that all Rule 17 subpoenas require a motion, that defense counsel refrain from engaging with counsel for subpoenaed parties, and that any questions be directed to the court on the day of return. Other courts accept ex parte motions for Rule 17 subpoenas on a routine basis. In some districts, subpoenas are permitted for impeachment material, in others they are not. He believed the Rule calls out for textual clarity.

He recommended excluding business entities from the protections that the draft rule provides to victims, and to exclude business entity confidential information, because businesses are routinely represented by counsel, protective orders are routinely ordered and can be made applicable to businesses, and defense counsel routinely negotiates with the counsel for entity receiving the subpoena. It is rare that an accommodation cannot be reached and there is a motion to quash. Parties often agree to limit confidential information to attorney's eyes only or experts, and Rule 17 subpoenas are often used to obtain this information.

Mr. Petrillo also recommended that the standard for privacy protection be changed to "is protected under established state and federal law" to avoid litigation overload. He thought that the rule should not require a different factual showing to obtain personal and confidential information, as the measures that courts apply to protect confidential information, including in camera review, address the concerns. Further, Mr. Petrillo said that requiring a party to show substantial doubt about accuracy (in subdivision (c)(4)(B)(iv)) would be an extremely high burden that may not be possible to meet without viewing the documents. He recommended a reasonableness standard instead. Lastly, Mr. Petrillo commented that the draft rule's requirement (in the same subdivision) that the defense show that the information sought would likely support an affirmative defense would impose too high a burden. He urged abandoning the bifurcation of the standard and adoption of a simpler, more straightforward standard for both.

Judge Nguyen recognized Ms. Williams. Ms. Williams provided background about the National Center for Victims of Crime and said that her comments were from the perspective of individual, rather than institutional, victims. She stated that the premises of the proposed rule change—that *Nixon* prevents access to information that the defendant should be able to obtain and that Rule 17 prevents timely access to such information—were flawed regarding private or confidential information about victims. Ms. Williams explained that the draft rule would cause victims to turn over everything and further chill victims from coming forward. Victims are not represented, and already shoulder a burden when motions come up. She agreed with Ms. Smith that there are important differences between criminal proceedings and civil proceedings, where

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they are represented and have put themselves at issue. Ms. Williams said that victims should always receive notice about subpoenas for personal or confidential information, be given reasonable time to be heard on a subpoena, be provided with information about potential legal support, and be entitled to a hearing on a motion for a subpoena. Ms. Williams said that the scope of protected information should include information protected by law and other personal and confidential information. She was concerned that removing *Nixon's* admissibility requirement would lead to untethered fishing expeditions, and that the standard for admissibility at a hearing other than at trial could be much lower and this could be a workaround for some defense attorneys. She added that everyone seems to agree that the lack of a definition of what is personal or confidential is very concerning.

Judge Nguyen invited questions from the Committee. A judge member asked if clarifying Rule 17 to promote uniformity would be more appropriate than implementing a more substantial change. Mr. Petrillo responded that clarification would be helpful for courts who do not deal with Rule 17 as often as others, and urged the Committee to consider extensive commentary.

Judge Nguyen asked if the restrictive interpretation of Rule 17 Mr. Petrillo described by the judge in Connecticut was common in that District. Mr. Petrillo responded that another judge in that district had also required a motion with redactions to protect defense strategy, but had not barred communication with the subpoena recipient.

Professor Beale asked whether small and large business entities are sufficiently similar to treat them the same under a proposed rule change. Mr. Petrillo answered that he did not have experience with subpoenas to small business entities who don't have a legal department and outside counsel.

Professor Beale asked all panelists whether judicial permission or additional information is required to issue a non-trial subpoena. Mr. Caruso said that he had used blank subpoena forms provided by the clerk of the court for hearings, trials, and sentencing proceedings. He said he'd never used that subpoena for plea negotiations or working out terms of a plea; each subpoena has to be tied to a particular hearing. Mr. Olshan said that in his experience subpoenas issue for sentencing and suppression hearings without prior court permission, but there has to be a scheduled date. Otherwise you have to go to court for approval. In his district, they do not have trial dates until much later. It could be a year or two even three years before they have a trial date. Mr. Petrillo said his district's practice is consistent with Mr. Olshan's description. Mr. Caruso said that in their district they get a trial date a week or two after arraignment, and the sentencing is scheduled on the date of the plea or the jury's verdict. He had experienced issues with timing where the judge schedules a suppression hearing for three days later and obtaining information by subpoena within that short period of time was burdensome.

Professor King asked each panelist whether the judges that they practice before permit subpoenas to obtain impeachment evidence and how the panelists negotiate subpoena terms with unrepresented subpoena recipients. Mr. Caruso said that he can obtain impeachment evidence by subpoena and that he also cooperates with unrepresented recipients about the terms of a potential subpoena, that he has never subpoenaed a victim directly, and that he found that the small mom-and-pop employers are often more protective of their employees' information because they often

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view them as a family. His process is to ask do you have this information, would you be willing to provide it, and would you accept a subpoena. It had never been acrimonious. Mr. Olshan acknowledged that courts take varying approaches to impeachment evidence under the existing rule and he always comes back to the concept of admissibility, the impeachment information must be admissible. Mr. Olshan raised concern that if there is a set date, the government may not learn how many subpoenas have been issued by the defense or what information was obtained. In his district, there is no reciprocal production to the government if the defense obtained a Rule 17(c) subpoena. They might find out about if an unrepresented person receives a subpoena and the person contacts the government. He described a capital case in which a defense subpoena had issued to a third-party educational institution for a government witness's educational records, and the entity called the former student, which is how the government learned about it and negotiated the production of a set of records. That situation where third parties are producing records in response to a subpoena and no one would ever know about it would be amplified under the draft rule. Say the subpoena is issued to the friend of a victim or witness to a crime that says you are directed to produce all text messages and communications to the other person, the recipient says, "I better do it, this is from a court." Mr. Petrillo said when the defense seeks impeachment material it always comes to the attention of the government, it is generally not thought to be an area where defense strategy is implicated, and that he had seen courts take varied approaches to subpoenas for impeachment evidence. Mr. Petrillo supported a potential rule change that would require courts to address potential subpoenas to unrepresented parties at the outset.

A practitioner member asked how courts in complex cases treat subpoenas that are not necessarily tied to a hearing date, where the investigation has been ongoing, but the defense needs more than the government is providing through discovery and is unable necessarily to describe it with specificity or show it would be admissible. Mr. Caruso said that he had not experienced a case where a subpoena could not be tied to a hearing date. Mr. Olshan said that in his district (where hearing or trial dates are not routinely set), his practice had been to cooperate with defense counsel, but defense counsel retained the ability to file a motion for early production. Mr. Olshan also said that even where the defense had to obtain court permission, the court was often willing to take a permissive approach to admissibility, relevance, and specificity under *Nixon*. Mr. Petrillo said that defense counsel often raises potential Rule 17 subpoenas in the first pretrial conference to receive a ruling or guidance from the court as to how to proceed absent a date.

Professor Beale observed that Rule 17 currently requires notice when seeking personal or confidential information about a victim. She asked whether the panel had experienced problems under the current rule with victims not receiving notice or not understanding the subpoena or their rights as victims, including when a subpoena was issued to another individual seeking information about a victim. Ms. Williams responded that even sophisticated victims do not understand notices and do not know their rights. That's when they call her organization, because they are terrified and don't know what the notice means. Mr. Olshan said that the concern also would apply to nonvictim third parties. Mr. Caruso stated that there are significant guardrails in the draft, including motions to quash to handle these kinds of outlier issues. Defendants are entitled to exculpatory information in the hands of third parties, the question is are there sufficient guardrails, and he thought the judicial oversight at the front end, back end, and through the motion to quash are sufficient. Ms. Williams noted that there is very little litigation under the CVRA and there is no guidance, because victims' rights are not enforced. Mr. Petrillo said that the draft rule addressed what should happen

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when a subpoena is issued to an unrepresented party and that the return should go to the court for review.

A judge member asked if the panelists had further comment about the concern over a lack of uniformity. Mr. Olshan said that there was not such variability in practice to justify the proposed changes, and the courts and parties around the country are managing. Mr. Caruso said that the lack of uniformity is caused by the *Nixon* standard and the inability of many defendants to submit ex parte applications under Rule 17. This means defendants must either reveal defense strategy through a public motion or to forego seeking the information. That is a significant unevenness that really rebuts the notion that defendants are all getting what they need, because in districts where you cannot file ex parte they are not filing.

Ms. Tessier asked Ms. Williams if her organization provided services to those negatively affected by crime but who do not meet the statutory definition of victim. Ms. Williams answered that her organization did. Ms. Tessier asked if victims have difficulty dealing with subpoenas under current practice. Ms. Williams said her organization provides different advice to those who meet the statutory definition of victim from those who do not. A practitioner member asked Ms. Williams if her organization worked with victims who had received grand jury subpoenas. Ms. Williams answered that she did not know and could provide the Committee with an answer later.

A practitioner member asked Mr. Olshan if he had ever served a Rule 17(c) subpoena. Mr. Olshan answered that he had. The practitioner member asked Mr. Olshan if he had ever made a motion to meet the *Nixon* standard. Mr. Olshan said that he may have but it would have been rare and a situation where there was no court date so we had to file a motion like the defense would. Mr. Olshan said that more often any such motion would have sought missing material like a certificate of authenticity for business records.

Judge Nguyen thanked the panel and said that the Committee would resume with the next panel after a break. After the break, the Committee turned its attention to the next panel, which included:

Matthew Fishbein, retired partner, Debevoise & Plimpton, New York, New York;

Lisa Miller, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice, Washington, District of Columbia;

David Patton, partner, Hecker Fink LLP, New York, New York; and

Craig Randall, Chief, Criminal Division, Western District of North Carolina, Huntersville, North Carolina.

Mr. Fishbein described the process leading to the New York City Bar subcommittee's proposal, which requires a motion when the subpoena seeks personal or confidential information. He said the current rule is ambiguous and imprecise, and inconsistently applied. The *Nixon* standard does not balance the interests among the government, defense, and subpoena recipient, it involved a government subpoena not a defense, and its narrow requirements can be explained by the Court's discomfort that the government was circumventing the prohibition on using grand jury

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subpoenas to obtain evidence against an already indicted defendant. *Nixon* was never meant to apply to defense subpoenas. Lower court applications of *Nixon* have hampered defense counsel's ability to obtain from third parties information that is often critical to preparing a defense. Prosecutors are hampered by *Nixon*, but less so because of their ability to obtain information from third parties by other means. Mr. Fishbein supported expanding the scope of Rule 17 to give the defense an investigative tool.

Turning to the discussion draft, Mr. Fishbein opposed the additional hurdles for obtaining a subpoena for protected information and the motion requirement for seeking a subpoena for nonprotected information. The City Bar's proposal also includes a distinct procedure for obtaining personal or confidential information. But Mr. Fishbein thought that a subpoena for protected information should be the only type where a party must first obtain court permission. In such a case, the court might issue a protective order, redaction, or other limitations. He opposed any requirements for issuance other than a showing that the information is material to preparing the defense. The drafts required showings are substantial burdens that are also problems with the *Nixon* rule. If the defense can't identify a specific item, it can't advocate its admissibility. How is the party supposed to know before obtaining the documents if they will cast substantial doubt on the evidence or establish an affirmative defense? The standard of material to preparing the defense is sufficient to prevent baseless fishing expeditions. The draft puts the concerns of individuals whose protected information that may be in the hands of third parties over the needs of criminal defendants whose liberty is at stake. In the civil context, when a subpoena seeks confidential information, the rule does not impose a higher burden on the party serving the subpoena, the party receiving the subpoena may file a motion to quash.

Mr. Fishbein also opposed requiring a motion for a Rule 17 subpoena. The Rule does not require a motion, and presently many courts do not require a motion, and the sky has not fallen. The comment's explanation for requiring a motion does not explain why a motion is required for a Rule 17 subpoena when it is not required for a grand jury or civil subpoena. Compulsory process with the threat of contempt is the point of a subpoena. The threat of abuse or harassment is present with grand jury and civil subpoenas, but typically there is no need for court involvement, the parties work it out, and no reason to believe it wouldn't work as well with Rule 17 subpoenas. He cautioned against additional court involvement because a party seeking a subpoena would have to reveal its strategy, creating a dilemma for defense counsel—defense would have to make a motion in the hopes of obtaining information material to the defense or abandon the attempt because of the risk of revealing strategy or the risk that information harmful to the defense would be revealed to the government. Requiring court permission would also impose an unnecessary burden on the court for subpoenas seeking unprotected information.

Judge Nguyen recognized Ms. Miller who said that the *Nixon* standard largely works, and even with the *Nixon* standard there are some examples of abuse, like attempts to use Rule 17 as a general discovery device and otherwise. Ms. Miller said she had not experienced this with the defenders in Miami, but more with private counsel. She said precedent post-*Nixon* has not limited the case to government subpoenas because the Rule itself does not distinguish between the government and the defense. A modest revision based on *Nixon* would be far more workable than the draft rule to address concerns about the lack of uniformity and that some defense counsel feel the *Nixon* standard is too stringent.

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She discussed current practice under *Nixon*, stating that relevance is a low bar and many courts already apply the admissibility requirements as "likely admissible." As for impeachment, she said it often depends on whether it is admissible, and noted impeachment evidence has been sought improperly under Rule 17 in the context of post-trial Rule 33 proceedings. Ms. Miller thought that the lack of uniformity was not unique to Rule 17. She noted that districts vary greatly in the volume of litigation and crime rates, and such factors help explain the variations in how judges manage their own dockets. She said that the draft rule would increase variation in the courts in unexpected ways, such as variations in state laws governing privacy, and offered case examples where courts reached different conclusions about state laws.

Ms. Miller also argued that expanding defense access to information could lead to harm to witnesses and cooperators, despite protective orders. Under the draft, before a witness list is provided or a trial date is set, defense counsel could issue ex parte subpoenas to obtain jail calls of coconspirators and codefendants on the theory that information in those jail calls is material to the defense, even if not admissible, if the calls are not protected by state law, and the court would not review the returns. The calls could include information about cooperation, and the location of cooperators or witnesses, leading to harm. She provided examples of cases in which information disclosed to the defendant by the government during discovery was used by the defendant to harm and intimidate third parties:

- a case where counsel released material to the defendant in violation of a protective order, allowing the defendant to determine the identity of a cooperator, who subsequently was found murdered with discovery material scattered around his body;
- a case where a defendant posted on Instagram the statement of a codefendant he'd received in discovery, and falsely labeled the codefendant a snitch, leading to threats against the codefendant in detention; and
- a case in which a gang ordered the killing of a witness disclosed in discovery.

Ms. Miller turned to what would happen if the defendant was unrepresented and sought an ex parte subpoena. The motion would go to the court, but she questioned whether the court will be positioned without input from the government to evaluate whether the subpoena was appropriate and who would have standing to litigate that because the government may still be identifying victims at sentencing. She related a case in which the defendant had threatened to murder two victims and served a subpoena in violation of 17(c)(3) through standby counsel for the victim's personnel file with highly sensitive information, which was delivered to standby counsel and into defendant's possession.

Without the *Nixon* standard, Ms. Miller suggested, there may be no limits on the timing for obtaining impeachment evidence from third parties, as there are for obtaining impeachment information from the government. She suggested that the draft rule would improperly expand the scope of Rule 17 to provide criminal defendants with discovery tool beyond the limits of Rule 16. She recommended that the protections afforded to victims should also be afforded to other witnesses. Ms. Miller said that the draft rule would chill cooperation, create delay the disposition of cases when subpoenas are sought close to trial, and burden unrepresented and under-resourced individuals.

Ms. Miller, noting again that she could not speak for the Department of Justice, proposed codifying *Nixon* in part but changing the standard from "admissible" evidence to "likely admissible." She also proposed adding to a modified *Nixon* standard a carve out in the rule that would permit a trial judge to issue a subpoena, upon a party's motion, if it doesn't otherwise satisfy the requirements of the rule but is in the interest of justice and compliance would not be unreasonable or oppressive. She argued it would allow the judge who is best positioned to direct its case, a clear indication they could issue subpoenas more broadly, and allow for incremental change rather than dramatic change.

Judge Nguyen recognized Mr. Patton. He said that there is enormous variation in Rule 17 practice among and within districts. They not only apply the *Nixon* factors differently, but more important is the huge variation on ex parte policy. There are judges who will turn over material meant to be ex parte to the government, others will respect ex parte submissions, and others who will give you the benefit of the doubt, but it is possible they will disagree and disclose the material to the government. He also mentioned for the same reasons defense counsel may not go to the judge when a subpoena recipient refuses to respond.

Mr. Patton said it is quite common for the government to issue grand jury subpoenas post-indictment, beyond search warrants. He said the risk of abuse is greater but there is very little barrier to subpoena practice in the civil side. He also identified problems with the current rule, saying that defendants often do not receive material information and have fewer tools than the government. He thought that the most important changes to Rule 17 would be having a clear ex parte provision and making clear that Rule 17 subpoenas are appropriate for investigative purposes. Mr. Patton questioned why the rule would have a higher standard for obtaining protected information than unprotected information, rather than dealing with that through a protective order. Lastly, he thought that the draft rule would not contribute to violations of protective orders or abuse of information received under Rule 16.

Judge Nguyen recognized Mr. Randall. Mr. Randall agreed with several prior panelists that the proposed change was disproportionate to the harms cited for the change. He said that the *Nixon* standard established a reasonable and clear framework with workable boundaries for protecting privacy rights while permitting parties to obtain needed information for criminal hearings. Mr. Randall said it works well because it relies on well-established rules about what is admissible. The draft rule would create confusion, cause additional litigation, and raise concerns about the potential for abuse by allowing parties to obtain personal information. He termed the draft a complete overhaul that would add to Rule 17 a set of functions that the Rule was never designed to serve. Questions raised include how the rule would interact with the Speedy Trial Act, the Fourth Amendment, HIPAA laws and others.

Mr. Randall suggested the rule would be used primarily to obtain information to shame a witness and discourage the witness from testifying. He agreed with some other panelists that it would burden unrepresented individuals who would be unlikely to resist the subpoena and questioned why the additional protections applied only to victims and not all potential witnesses. For example, a child who witnessed a violent assault would not fit within the CVRA definition of a victim but should have the same protections under the rule.

Next, Mr. Randall recommended that the rule provide more guidance about the circumstances that would constitute good cause to obtain an ex parte subpoena. He raised concern that every defense subpoena would be an ex parte subpoena if the defense cites defense strategy, and without the *Nixon* standard the defense could seek vast amounts of information without input from the opposing party that would help the court determine if it involved victim information, or guide appropriate restrictions. Mr. Randall commented that defense counsel already fail to provide reciprocal discovery and the rule will enhance the disparity in discovery disclosures, and that the draft rule's procedures for in camera review would cause trial delays, raising questions about how the draft rule would interact with the Speedy Trial Act.

Judge Nguyen asked whether the DOJ thought there was a greater risk to victims and witnesses in jurisdictions in districts that interpret *Nixon* more permissively compared to districts that have no subpoena practice or interpret *Nixon* very strictly. Ms. Miller said that she had not noted a trend. Mr. Randall said that he also did not have a sense of current abuses.

A practitioner member responded to the expressions of uncertainty about what the defense needs that it is not getting by noting a case in which the defense asked for a certain group of emails it discovered it needed after reviewing discovery, but the government said it didn't think the emails were necessary. Because the perspective of the government is different than the defense, a rule change that would provide defendants with expanded investigative power is needed. He asked Mr. Randall for his thoughts about Ms. Miller's proposal to change the "admissible" standard to "likely admissible." Mr. Randall responded that he thought Ms. Miller's proposal was a reasonable approach. Mr. Fishbein said that a "likely admissible" standard would not provide defendants with sufficient tools to find admissible evidence because they need information that would lead to admissible evidence. Mr. Fishbein observed that the draft rule would also provide protections for nonvictims and questioned the risk of abuse identified by other panelists.

Another practitioner member asked Mr. Randall if he had ever issued a Rule 17(c) subpoena. Mr. Randall responded that he had. The practitioner member asked if a motion is required in such circumstances. Mr. Randall said that there is not a motion requirement and that there is little Rule 17 litigation in his district. He said that he had typically made Rule 17(c) motions for business records not provided earlier. The member asked if both the defense and government can serve Rule 17(c) subpoenas without court permission in his district. Mr. Randall answered that both parties can.

Judge Nguyen thanked the panelists and said that the Committee would resume after a break. After the break, the Committee asked questions to all panelists. Judge Nguyen started by asking the panelists if they had a reaction to Ms. Miller's proposal to change *Nixon's* admissible standard to likely admissible.

Mr. Fishbein repeated that likely admissible was a better standard than admissible, but he supported an even broader definition because the rule should have a mechanism for the defense to obtain information that could lead to admissible evidence. He said that a better standard would be the New York City Bar's proposed standard of "material to the prosecution or defense" from Rule 16 because it would address the concerns about fishing expeditions and was a phrase already well-known and understood.

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Judge Bates asked Ms. Miller if an acceptable standard would be "likely admissible or likely to lead to the discovery of likely admissible evidence." Ms. Miller said that she understood why her defense colleagues would like the standard and preliminarily indicated that she may personally support it, but Ms. Miller repeated that she preferred a catchall interest of justice standard combined with a likely admissible standard. Ms. Miller said that this would better capture a broader set of circumstances because she had confidence that trial judges are best positioned to make these determinations, like Federal Rule of Evidence 403 determinations for a particular case.

Ms. Tessier explained that Ms. Miller's proposal included putting *Nixon* into Rule 17 and allowing for a court in a particular case to determine that the interests of justice or exceptional circumstances warrant a subpoena that does not satisfy even the loosened *Nixon* standard, which would require a court order. Ms. Tessier asked the panelists if this proposal addressed their concerns.

Mr. Fishbein responded that that proposal could be a broad standard, but he was concerned that the proposal was open to interpretation in different ways. He asked if the proposal would mean that a subpoena seeking nonprotected information under a likely admissible standard would not require a motion, but a similar subpoena based on the "interest of justice" would require a motion. Mr. Fishbein said that this would make a difference because he thought the rule should not typically require a party to make a motion before issuing a subpoena.

Ms. Tessier, repeating the caveat that the Department is not able to take a position on language that is not published for comment, explained that she was referring to a narrower, more tailored amendment where the change would leave in place subpoena practice as it had developed in different districts because the practice in different districts is attuned to the needs of those particular districts, but adding a loosened *Nixon* standard to the rule because that standard is not in the rule, so that most subpoenas have to abide by a loosened *Nixon* standard, and requiring court approval before obtaining a subpoena that does not satisfy the loosened *Nixon* standard.

Judge Nguyen assured participants that the draft rule was merely a starting point for discussion, not a recommendation by the Subcommittee. Judge Nguyen also emphasized that any participant's comments would not be construed as a commitment to that position, and that questions such as whether the rule should have more front-end protections or focus on the back end with protective orders are still very open. Judge Nguyen thought that even an incremental change to *Nixon* could have a significant impact on districts that apply *Nixon* strictly.

Professor Henderson expressed concern with a rule change attuned to particular districts because criminal defendants' constitutional rights are the same in every jurisdiction. He said that the variation among jurisdictions in subpoena practice is almost a secret code. Reading the rule gives you no idea what is going on and how varied this is. He said that is deeply problematic. The Federal Rules should be understandable and followed, and he stressed the need to spell out in the rule what is actually happening to promote more uniformity.

Mr. Kamens said that Rule 17 currently is not a viable vehicle for defendants in some districts because of the distance between the defense's good faith belief—based on reasons the defense can put in a motion—that a custodian of information has information that would be

material to the defense, and the complete absence of any knowledge about the content, source, or form of that information, which is critical to admissibility. The variation, aside from the ex parte issue, stems from some courts allowing movants to make reasonable guesses about the information and some not allowing movants to do so. Mr. Kamens said that a "likely admissible" standard would still have this problem if courts continue to demand information about the form, content, and source of the information sought.

A practitioner member asked if a "possibly admissible" standard would be a narrower change that would alleviate concerns about obtaining information without knowing the form and content of it, suggesting it would not be a fishing expedition but indicate good faith as an officer of the court that the custodian has some information but can't yet articulate that it is likely admissible.

Judge Dever also asked the panel if a potential narrower amendment that would (1) loosen the *Nixon* test slightly by allowing a subpoena for information described specifically, is relevant, and is likely to lead to the discovery of admissible evidence; (2) permit subpoenas to issue ex parte and (3) retain all the back end protections including protective orders and the motion to quash, would address the two problems they had heard about. Namely, the problem that in many districts defense counsel acting in good faith, with no interest in a terabyte of data because they will not get their fees and don't have the time, cannot obtain a subpoena. He said the defense should be able to get the camera outside the place where the Hobbs Act robbery happened, because the video was not in the discovery provided and they got the wrong guy. Or in a fraud case where the government didn't produce any of the information from an accounting firm that the defendant says he relied on in good faith, the defense in the Eastern District of Pennsylvania should be able to get that and they cannot. And the other problem is that some districts courts require anytime you issue a subpoena, whatever you get, you have to give it all over, even inculpatory information, which the defense would have no obligation to produce under the rules. The better practice is to recognize that the defense will comply with Rule 16's requirement to turn over whatever it will use at trial.

Mr. Beirne supported Judge Dever's suggestion because untethering the standard from admissibility is what judges are doing in the districts where the rule is working, and is the right thing to do. Mr. Patton agreed and said that a narrow fix to *Nixon* and an ex parte provision would solve 90% of the problems.

Ms. Miller asked how an ex parte provision would interact with the requirement of notification to victims. Judge Dever responded that such a change would not change the notification requirement in (c)(3). Judge Dever also stated that the fundamental problems are that meeting the *Nixon* standard is too difficult in some districts and that courts require all information produced by any subpoena to be disclosed to the other side. Ms. Miller thought the crime scene video should be obtainable, and that Judge Dever's suggested change would raise the floor, similar to her own unofficial proposal.

Mr. Fishbein said that he preferred a likely to lead to admissible evidence standard more than a likely admissible standard, but he thought that defense counsel could live with Judge Dever's suggestion. Mr. Fishbein also thought that the rule should have a mechanism so that parties are not required to share the information, but another way to do that other than an ex parte motion

is not requiring a motion to issue a subpoena so there is no notice to the other side about why the subpoena is necessary. Mr. Fishbein questioned the need to seek an ex parte order in every circumstance with the possible exception of when a subpoena seeks personal or confidential information.

Judge Dever said that he was referring to having no need for a motion before the issuance of a subpoena but having a protective order that the parties agree to, the opportunity for negotiation of the scope and if needed, a motion to quash. A judge member asked if this would apply to both protected and nonprotected information. Judge Dever responded that for purposes of getting others' reaction, yes it would.

Mr. Randall supported a narrower change similar to Ms. Miller's proposal. He thought that the standard should remain tied to admissibility but could be changed to likely admissible. Mr. Randall stated that this change would lessen the concern about ex parte procedures because there would be greater ability to identify and set bounds on what can be obtained through that standard, providing more control on the front end of the process. Mr. Kamens also supported the suggestion.

Professor Henderson said that the suggestion would be an improvement and proposed including a provision that would permit obtaining potentially exculpatory evidence regardless of its admissibility. Mr. Caruso said that an explicit ex parte process was critical, but he thought that districts that read *Nixon* very restrictively would continue to do so under a likely admissible standard. Mr. Caruso preferred a standard where a defendant could obtain information helpful to the defense, which would also incorporate exculpatory evidence.

Judge Bates questioned the feasibility of applying a "possibly" admissible standard. He thought that this standard was nearly limitless but could imagine applying a "likely" admissible standard.

Judge Conrad thought that a fundamental question was whether Rule 17 relates to trial documents or is a discovery tool. Judge Conrad said that when defendants receive information through an open file policy, that is giving the defense more than it's entitled to constitutionally. He acknowledged that defendants may sometimes not receive admissible or exculpatory evidence through an open file policy because the government does not possess the evidence, or because its theory of the case is fundamentally different from the defense perspective. Judge Conrad asked the government representatives if they opposed thinking of Rule 17 as a potential discovery tool for documents not in their possession, or if they still thought of Rule 17 as limited to the production of trial documents.

Mr. Kamens asked Judge Conrad if he meant discovery tool in the Rule 16 sense or as an investigatory tool. Judge Conrad responded that Rule 17 could be reformed, and the government could continue to allege that defendants are trying to use Rule 17 as a discovery tool in a way not intended by the rule. Mr. Kamens answered that Rule 17 is a tool of investigation, when we are seeking information prior to trial. Ms. Miller said that the government may still oppose the use of Rule 17 as a general discovery tool, but she asserted that the Committee did not need to decide the question when deciding whether to amend Rule 17. She explained her position was in part based on the many cases, like *Kaley*, discussing how discovery is limited in criminal matters because of

the important differences in criminal and civil systems and the interests served by those systems. She said that one could conceive of Rule 17 as a quasi-discovery device for something that is admissible or implicates a trial issue, but not a general discovery device for broad discovery purposes.

Professor Henderson encouraged the Committee to think about how a change could implicate the Sixth Amendment's right to a public trial. Judge Conrad responded that the Committee was thinking of tying subpoenas to a hearing or trial date, which would be inconsistent with using Rule 17 as a general investigative tool. Ms. Miller clarified that she was including the use of Rule 17 for trials or other evidentiary proceedings, including a suppression hearing.

A practitioner member said that like a grand jury subpoena, production under Rule 17 is an investigative tool, and the information received may be information that the party must provide in discovery. The member said she was struck by how many districts do not require an up front motion. She noted that if counsel issues a subpoena, currently the information is returned to counsel. She asked how it would impact practice if a change required certain protected information such as victim information to be returned to the court, perhaps not necessarily for in camera review, but for the court to decide how the information would be released to the requesting party. Mr. Caruso said that for his practice the change would be slightly impactful by changing the time it would take to receive information. He thought that at the beginning it would take longer, but as local practice developed it would be shorter.

Professor King observed that there was support for the ability to secure a subpoena without a motion in some circumstances. She asked for confirmation that the current practice was that (1) a motion is not required for a subpoena for a document for trial; (2) it should be required if the requesting party is pro se; and (3) it may be required for an ex parte subpoena, depending on the jurisdiction. She asked whether that description was consistent with the panelists' understanding of the current practice or what the panelists thought would be appropriate.

Mr. Kamens responded that in his district a motion is not required when the subpoena is tied to a trial or hearing, but a motion is required when asking for a return before a trial date and the subpoena is not tied to a specific hearing. That motion would be ex parte if they did not want to share the rationale for seeking the subpoena. Mr. Caruso said that practice in his district is similar, a motion is not required when tied to a hearing, trial, or sentencing date, but a party would need to make a motion to receive information before a hearing when a hearing has no date set but he is fairly confident a date will be set. He also noted that if he served a trial subpoena and the recipient refused to produce the information until the trial date, he would file a motion asking that information be produced immediately. Mr. Patton said that the previous descriptions were consistent with practice in his district where they can freely get a subpoena from the clerk that is stamped and signed and send it out without bothering the judge. He noted that subpoena recipients often produce the information well in advance of the hearing date, because the recipient just sends it or through discussion.

Ms. Miller provided an example case where the defense moved ex parte and under seal for the issuance of subpoenas to the defendant's employer and multiple state agencies, directing compliance on a date before the trial that was not tied to any hearing. The government argued that

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it violated Rule 17 because the defendant needed advanced court permission when the subpoena was not tied to a particular hearing or trial date. The court later questioned the relevance of the requested information and specificity of the requests. Ms. Miller said that in her experience parties usually did not need a motion if no victim issues were implicated and the subpoena was tied to a specific hearing or trial. But a motion would be required to receive prehearing production.

Mr. Kamens said that practice in his district is similar, that as long as we put the trial date, the clerk's office will comply. He said he could ask for the documents to be produced earlier so the recipient need not show up at trial and there is often negotiation about that. Mr. Fishbein questioned the need for a motion to seek prehearing production, particularly in districts where trial dates are not set for many months, and did not understand what purpose is served by the motion requirement. Mr. Randall said that in his district parties need not make a motion when the subpoena is tied to a hearing or trial date. Mr. Randall also thought that the more the standard for issuing a subpoena becomes untethered from admissibility, the more concerns arise from subpoenas that are not tied to a specific hearing or trial date. Admissibility is what tethers it to the trial or hearing; if you sever that, it becomes a completely different beast.

Professor King observed that the admissibility standard seems to be not only the lynchpin to a particular proceeding as opposed to wide open investigation, it also prevents parties from obtaining certain information, like privileged information that would not be admissible, or impeachment information when the relevant witness may not testify. She asked if a likely admissible standard would change how courts approach impeachment and privileged information. Ms. Miller said that in practice some courts currently use a likely admissible standard and adopting it would do the same work. But she raised concern that a loosened standard such as possible would pose too much risk that defendants could use subpoenas to advance interests other than defending their criminal case. She noted that often there are parallel civil suits, particularly in white collar cases, for example, where information inadmissible in the criminal case could provide an advantage. Mr. Kamens questioned whether the admissibility standard is what bars disclosure of privileged information and suggested that privilege bars disclosure regardless of the Rule 17 standard and that a recipient is entitled to invoke that privilege in response to the subpoena. Mr. Kamens also emphasized the importance of impeachment information and said many places will not allow a subpoena for impeachment alone, but that impeachment is often critical to the defense and the outcome of the case. Mr. Caruso questioned the risk raised by Ms. Miller that defendants would seek subpoenas to advance improper interests, and that those are outlier cases. The defense attorneys he knows are not interested in that; they are interested in advancing the interests of their clients under the Sixth Amendment.

A judge member said that a core disagreement was the purpose of Rule 17: one side viewed Rule 17 as limited to information needed for a hearing or trial and the other side viewed Rule 17 as an investigatory tool. He didn't know how the Committee can amend the rule without knowing its purpose. He invited Ms. Miller to address this point. The judge member also asked how an interest of justice standard would improve uniformity, because any trial judge can justify a decision one way or the other under that standard. Ms. Miller responded that she thought the disagreement about the rule's purpose did not need to be resolved to achieve a modest, incremental change in a rule and referenced Judge Dever's statement that it can be better even if not perfect. She asked whether Rule 16 should be amended in addition to or instead of Rule 17 if the Committee decided

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that the defendant should have a general discovery tool. Rule 17 is a procedural rule, in her view, and if the Committee wants to take on the broader project maybe it should consider the interplay with Rule 16. Mr. Randall agreed with Ms. Miller. Ms. Miller also pointed out that courts vary in how they approach other issues, such as Fourth Amendment protection. Professor Henderson commented that the Rules should be written clearly to apply to everyone. Rule 16 is about discovery rather than investigation, and he questioned whether a defendant has a right to investigation at all if Rule 17 does not provide it. Mr. Patton supported discussing the purpose of Rule 17 and questioned whether the current rule focused only on trials. He said that Rule 17(c) currently contemplates documents being produced well in advance of trial, and no one expects that documents are dumped on someone's desk the morning of opening statements. So he did not view the changes being discussed as radical.

A judge member said that he thought Ms. Miller's position was that one could take a limited view of Rule 17 and still enact within that view the modest changes that Judge Dever proposed and save for another day changes that would transform the purpose of the rule. Ms. Miller said that description was correct and repeated that she preferred adding a provision giving modest discretion to the trial judge through an interest of justice provision. The judge member asked if both proposals kept the rule within a limited purpose. Ms. Miller answered that they did.

Another judge member asked Ms. Miller if her proposal would still allow some investigatory discovery and whether likely to lead to admissible evidence is investigative. Ms. Miller responded that the status quo allows some investigation with the *Nixon* standard, it just has to be tied to the concepts in that standard. The judge member asked if a loosened *Nixon* standard would be permissible for investigative purposes and not merely what is admissible for trial. Ms. Miller answered that it would, but repeated that the status quo permits some investigation.

Judge Nguyen invited more comment. Ms. Tessier asked defense counsel what protective measures beyond protective orders they would recommend for protecting witnesses and cooperators if the *Nixon* standard were loosened, given that that has already occurred under Rule 17. Mr. Patton recommended the measures outlined in the New York City Bar's proposal. Ms. Tessier asked if he was referring to the provision requiring a motion if a subpoena requests personal or confidential information. Mr. Patton said that he was but only as long as the other changes were adopted as well. Mr. Fishbein also identified subsection (i) of their proposal as a protective measure, that provides that the Court may for a good cause and based on specific and articulable facts require a party to obtain court approval before issuing a subpoena, so if the government thought that there were vulnerable witnesses or victims, this would be a way for them to raise that issue and ask for the court's oversight.

Professor Beale asked the prosecution panelists about any concern they had with the draft rule allowing a subpoena for unprotected information material to the prosecution or defense and that is not reasonably available from another source without meeting the higher standard for protected information. Maybe it is the camera pointed toward the robbery, or casino records in a case where the defendant says he won money at a casino and the money is not drug proceeds. Ms. Miller said that such a provision should not be adopted. She said that such material is not constitutionally required to prepare an adequate defense. Ms. Miller inquired whether there could be a pilot project for a proposed rule and suggested a modest change would be most appropriate.

Professor Beale asked if her suggestion represented the modest change she referred to. Ms. Miller responded that the modest change she would propose was closer to the likely admissible standard.

Judge Nguyen thanked the panelists.

After a break, Judge Dever reconvened the Committee to discuss the issue. Judge Nguyen encouraged the Committee to think about unintended consequences. She observed that many panelists agreed that the Rule 17 practice should not be changed or restricted for those districts that have their practice settled. She invited comments from the Committee members.

A judge member asked if there was agreement on a solution that would help and not harm subpoena practice. He said that his district rarely confronted Rule 17 issues.

A practitioner member questioned whether a change to a likely admissible standard would have any practical effect.

Another practitioner member agreed and questioned whether a modest change would solve the problem and said he could imagine reasons why the interest of justice standard will not work. The practitioner member expressed interest in resolving the disagreement about the purpose of Rule 17.

A judge member thought the only critical distinction was Rule 16 versus Rule 17, intraparty or third party, not discovery versus investigation. He said that he did not believe the discovery label was important. The judge member favored a much more limited approach, like what has been discussed today, and noted there was lot of common ground among the members and panelists. He acknowledged the defense would not be as happy as they would be if we did something much more drastic, but it would solve many of the problems.

Another judge member agreed that an incremental change to the *Nixon* standard was probably warranted and wanted to study how the issue develops.

Ms. Lonchena noted the difference in districts on whether blank subpoenas are handed out freely or available only by motion.

A judge liaison thanked the Subcommittee and reporters. He thought that *Nixon* is too restrictive and should be incrementally broadened. The judge liaison agreed with Judge Dever's approach and favored allowing investigation in connection with a proceeding or hearing. He said that he thought judicial review should be limited to what is needed to serve the purposes of that review, but that front end judicial review was needed when there is an unrepresented party, and for the victim provision already in the rule. He questioned the value of additional judicial review before subpoena issuance, noting that when the subpoena sought protected information the rule could require production to the court and protective orders.

A practitioner member asked a judge member how he thought courts would apply a likely admissible standard, which she thought practitioners favored. The judge member responded that he thought it would not change anything and that likely admissible is already the de facto standard

because at the front end there is too little knowledge of the case for him to make a decision about what is admissible and he ends up deciding what is likely admissible.

Ms. Tessier agreed with an incremental approach. She too thought that the distinction between investigation and discovery was less important than the question of what information a party may obtain. Rule 17 is already used for investigative purposes, but it is for investigating information that is admissible or likely admissible. She said her concern was allowing investigation into tangential or collateral issues. She thought the Committee would find more support among prosecutors with a narrow, incremental change and that they agree likely admissible is how *Nixon* is interpreted in most districts and would accept that change. Ms. Tessier repeated her support for an interest of justice exception, noting there is a good example of that in Rule 15 for depositions. There might be particular information that is very important to the defense, but they cannot yet articulate why it would meet the likely admissibility standard, and it would be left to the judge's discretion, so that courts could assure that subpoenas are not misused.

A judge member supported a narrow change by addressing *Nixon* directly along the lines of the proposals by the prosecution panelists and expressed interest in the interest of justice exception. He expressed concern about the burden on the court if the rule were changed to require more judicial involvement before issuance, and that ex parte motions would be difficult for judges to decide on the front end. The judge member also supported acknowledging that the rule is an investigative device.

A judge member said that discussing the purpose of Rule 17 was important and supported acknowledging that Rule 17 is investigatory. He said the thought they were all on the same page in the view that the rule is investigatory because it allows the defense to obtain information that it would not otherwise obtain. It is the only way the defense can get anything from a third party. The judge member supported adopting a standard similar to likely to lead to admissible evidence or material to the defense, which are more consistent with the investigatory purpose. He said that he was not inclined to tie the rule to admissibility. He observed that many were happy with current Rule 17 practice, and he agreed that incremental change would be appropriate, including changing the admissibility standard and ex parte procedures. The judge member supported a procedure for a defendant to obtain information ex parte without revealing defense strategy, and suggested that the rule could incorporate procedures where practitioners are happy with Rule 17 practice.

Judge Conrad supported a minimal modification, baby steps. He agreed that the correct distinction would be that Rule 16 relates to intraparty discovery and Rule 17 relates to third party practice. He thought the important issues were fixing the *Nixon* standard and resolving ex parte procedures so that it is viable but does not overburden judges. He thought the defense shouldn't have to turn over all the information received by a subpoena if they don't want the prosecution to know about it.

Judge Bates thanked everyone for the great job on very difficult and important issues, and recommended looking at a narrower approach because it could solve identified problems and avoid unintended consequences. He said that it may be unnecessary to decide the investigation versus discovery distinction to propose a rule change.

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Professor King said that the next effort was likely drafting a narrower draft amendment relating to ex parte procedures based on places where that is working well, loosening the admissibility requirement, and reducing the burden on trial judges particularly regarding motions up front. She asked whether the full *Nixon* standard should be included in the text of the rule amendment—describing the item with reasonable particularity, stating facts that it is likely to be possessed by the recipient and not reasonably available from another source? Professor King observed that there was disagreement about ex parte procedures, whether the rule should require more than good cause for an ex parte subpoena, or whether it should require a motion at all. She also asked what the committee note should include if the proposed amendment includes an interest of justice exception, such as mentioning exculpatory evidence, or the absence of legal protection for the information sought, or that it should be an exceptional circumstance. She also observed that many panelists disfavored distinguishing between protected and unprotected information.

Professor Beale asked if a proposed rule should include more protections from misuse or abuse of Rule 17 and encouraged the Committee to think about the issue.

Judge Dever thanked all participants and invited more comment. He supported incremental change and questioned whether the problem stemmed from some districts reading *Nixon* too narrowly. He said that he observed a consensus on at least raising the floor to correct some districts reading *Nixon* too restrictively, prohibiting ex parte motions, and requiring the defense to produce Rule 17 information to the government. He agreed with the characterization that Rule 16 is intraparty discovery, whereas Rule 17 relates to third party information, and Rule 17 should permit ex parte process. Judge Dever also asked for comment on the proposed interest of justice exception and suggested that the exception would introduce ambiguity and expand the change beyond the problems identified. He suggested someone could try to use a subpoena in connection with a compassionate release motion to get proof of innocence. He questioned whether the proposed exception would be proper.

A judge member thought that the interest of justice exception would be unnecessary and said that the Committee should avoid it.

Judge Nguyen thanked the reporters, Professors Beale and King, for their incredible work and time spent on Rule 17 issues. She also thanked Judge Dever for having the panelists appear before the full Committee. Judge Nguyen commented that the feedback from the panelists was much more meaningful with the questions and input from the full Committee.

Judge Nguyen said that the current rule does not speak to many of the issues discussed by the panelists. She thought that there was a consensus that a protective order may be sufficient for protected information, for example, and on an incremental change that does not try to address all of the problems raised. Judge Nguyen asked if the Committee had other views. Judge Nguyen also said that an incremental approach meant that many issues would not be addressed, at least in the text of the rule. She suggested that the committee note could provide guidance if the Committee seeks to adjust *Nixon*, and the note may advise that *Nixon's* admissibility standard is too tough and that the revision is meant to correct it. Judge Nguyen asked for feedback on what should be included. Lastly, she questioned the value of an interest of justice exception and suggested that it would cause an increase in litigation.

Ms. Tessier explained that the interest of justice provision meant to account for unpredicted circumstances because the DOJ had understood that defendants cannot identify the cases where they have not been able to receive needed information because they didn't know what they didn't get. Thus, it was meant as a narrow exception that pulled from language already in the rules. Ms. Tessier also cautioned against thinking that a small textual change to the rule would also be a narrow change. She said that the differences among the proposed changes to the admissibility standard—such as between likely admissible and possibly admissible or between likely admissible and likely to lead to admissible evidence—were enormous, and she raised a concern that a change to only the admissibility standard could lead to a significant change in practice. Ms. Tessier encouraged the Committee to consider the practical effect of any proposed change.

Judge Conrad said that the discussion had been helpful in clarifying that Rule 16 relates to intraparty information and Rule 17 relates to third-party information. He noted that the title of Rule 17 is "Subpoena" and inquired whether changing the titles of Rule 16 and Rule 17 could help understand the rules.

A practitioner member said that an issue that was raised as prohibitive in some districts at the Arizona conference was how the return for an ex parte motion is handled. She stated that some districts require the return to go to both parties. The member stated that an amendment should address who should receive the return from a subpoena, or the change would not have a meaningful impact on practice.

Judge Bates observed that the Committee appeared to have narrowed the proposed amendment it would consider. But he cautioned against putting broad ideas into the committee note that should rather be expressed in the rule text. Judge Bates stated that the committee note is not the place to make changes to the rules. Judge Dever agreed and clarified that changes cannot be made only to the committee note without changing the rule text.

A judge member said that he was most concerned about disclosure of personal or confidential information in the ex parte context. He recognized that it may make sense not to include this kind of amendment in the rule if the Committee seeks to make only a narrow change. However, the member encouraged the Committee to consider this risk and how districts like Ms. Smith's handle it when discussing ex parte procedures.

Judge Nguyen invited further comment. A practitioner member said that she would want to review the relevant case law, but an interest of justice exception seemed like it would be a radical departure. She said that the few circumstances in which she had participated in Rule 15 depositions were somewhat dramatic. Another practitioner member also questioned an interest of justice exception and agreed that it may cause additional litigation.

Professor King asked whether an amendment should discuss or mention *Nixon*. "How much of *Nixon* do you want to put in the text?" Ms. Tessier said that the rule should address all parts of *Nixon*. She said that discussing only one part of *Nixon* in a change would cause confusion. She noted that includes that the requested documents are not otherwise procurable reasonably in advance of the hearing, not limited to trial, that the party cannot properly prepare for the proceeding without the documents and the request is made in good faith. A judge liaison agreed and said that

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the rule should specify which parts of *Nixon* the rule would change or retain. He was less sure about the concept of impeachment.

Professor King asked how a rule should phrase the requirements for issuance. A judge liaison said that the rule should phrase the standards as requirements for issuance even if there is no front-end motion requirement. It would serve as a check on lawyers as officers of the court, and could be invoked by a motion to quash.

Concluding Remarks

Professor Beale noted that the Rule 17 Subcommittee would continue its work and report its progress at the next Committee meeting. Judge Dever thanked Judge Nguyen and the reporters for their excellent work and again welcomed Mr. Naseem, Ms. Lonchena, and Justice Samour to the Committee. Judge Dever said that the Committee's next meeting would be in Washington, D.C., on April 24, 2025. He also thanked Mr. Byron and the members of the team at the Administrative Office. Judge Dever noted that Judge Birotte would chair the Rule 43 Subcommittee and Judge Harvey would chair the Rule 40 Subcommittee.

Judge Dever then announced that the meeting was adjourned.

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TAB 1B

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

January 7, 2025

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

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

The following attended on behalf of the Advisory Committees:

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

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

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

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

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

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

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

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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

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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

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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

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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

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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

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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

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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.

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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.

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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

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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

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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

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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

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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.

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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

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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.

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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 1C

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.

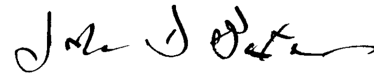
The Advisory Committee decided to remove from its agenda a proposal to amend Rule 702 (Testimony by Expert Witnesses) regarding peer review and a suggestion regarding a possible amendment or new rule to address allegations of prior false accusations of sexual misconduct. In addition, the Advisory Committee 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

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Elizabeth J. Cabraser
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Stephen A. Higginson
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Troy A. McKenzie
Patricia Ann Millett
Lisa O. Monaco
Andrew J. Pincus
D. Brooks Smith
Kosta Stojilkovic
Jennifer G. Zipps

TAB 1D

PROPOSED AMENDMENTS TO THE FEDERAL RULES

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).	

PROPOSED AMENDMENTS TO THE FEDERAL RULES

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

PROPOSED AMENDMENTS TO THE FEDERAL RULES

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.	

PROPOSED AMENDMENTS TO THE FEDERAL RULES

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

PROPOSED AMENDMENTS TO THE FEDERAL RULES

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 1E

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 2

TAB 2A

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Rule 17 Subcommittee

RE: New Discussion Draft and Committee Note

DATE: March 28, 2025

I. Overview of new discussion draft.

A. Introduction. At the fall meeting this past November, the Committee devoted an entire day to Rule 17. Twelve invited speakers shared their views about the issues addressed in the Subcommittee's previous discussion draft. There was widespread agreement—among both the speakers and Committee members—on a significant number of points, including the following:

- Courts are now applying the *Nixon* standards and various procedural aspects of Rule 17 inconsistently.
- It may be possible to get agreement on a standard that would relax somewhat *Nixon*'s admissibility requirement.
- Although some subpoenas should require court approval, others should be available to the parties without a motion.
- Access to ex parte subpoenas to third parties is needed, and when material is produced, automatic disclosure to the opposing party should not be required.
- In camera review by judges before disclosure is burdensome. It is not needed in all cases.
- Some subpoenas can be returned directly to the requesting party and need not be returned to the court.
- Negotiation rather than litigation between the requesting party and subpoena recipient is the norm for many cases and should be encouraged.
- Subpoenas should be available to both parties for sentencing and at least some evidentiary hearings in addition to trial, including hearings on suppression motions.

On other points, differing views were more pronounced. Members and speakers expressed different opinions about the following:

- the efficacy of protective orders;
- the degree to which various changes would increase risks to and chill cooperation by victims and witnesses;
- the magnitude of the difficulties posed by the current rule for defendants;
- whether certain changes would prompt abuse by defendants; as well as
- the need for different standards for protected and unprotected information, and how to define that distinction.

In light of this helpful guidance, over a series of meetings, the Subcommittee created a revised draft attached to this memorandum that reflects a much narrower, more incremental set of revisions to Rule 17.

B. Summary of revisions in new discussion draft (in addition to style)

(1) First, new (c)(1)(B) clarifies that subpoenas for documents or other items may be used for proceedings other than trial. It provides that the rule allows subpoenas for sentencings, and hearings for detention and suppression, in addition to trial. Some courts had interpreted the prior language as barring subpoenas for proceedings other than trial.

(2) Second, new (c)(1)(B)—along with new (c)(2)(B)—codifies a modified version of the *Nixon* standard for all non-grand-jury subpoenas seeking the production of documents or other items. The Committee was persuaded that courts had applied the admissibility requirement in *Nixon*'s interpretation of prior text inconsistently, and sometimes too rigidly. The standard in the revised text will provide an adequate and consistent opportunity for both the prosecution and defense to obtain the evidence they need from third parties.

(3) Third, new (c)(2)(A) and (c)(4) address when a party must obtain the court's permission by motion before serving a subpoena and when the party may do that without motion or court oversight. Courts continue to debate this based in part on the ambiguity of existing language. The revised rule provides a clear rule explaining when a motion is and is not required, and states that a party may serve the subpoena without a motion, unless a motion is required by another provision of Rule 17, a local rule, or a court order. Existing (c)(3) already requires a motion for certain victim information, and new (c)(4) requires self-represented parties to file a motion before serving a subpoena to produce items.

(4) Fourth, new (c)(2)(C) ensures that a court may exercise its discretion to permit a party to file a motion for a subpoena ex parte for good cause. This, too, is a contested question under the existing language of the rule.

(5) Fifth, new (c)(2)(D) clarifies that a party has no duty to inform the other parties about a subpoena when no motion is required, absent an order to do so.

(6) Sixth, new (c)(5) clarifies when a subpoena recipient must produce the designated items to the court rather than the requesting party. This is yet another issue on which courts had reached different conclusions when interpreting the rule's existing text. The revised text makes returns to a party's counsel discretionary, and only mandates returns to the court if the requesting party is self-represented.

(7) Seventh, new (c)(6) resolves another dispute about the meaning of the rule's existing text, with some courts reading it to require one party to have access to any item a subpoena recipient produces to another party. The new text provides that disclosure of information and other items between parties, including information and items the party may obtain by subpoena, is regulated by Rule 16 and other discovery rules.

II. Issues in the text on which the Subcommittee was divided or uncertain. (All line numbers in this memo refer to the redline version of the discussion draft.)

A. Line 26. Include express authorization to use Rule 17(c) subpoenas for revocation hearings, or leave as contingent on court permission?

Arguments to remove brackets and add revocation to the list of authorized proceedings.

- Rule 32.1 says the person is entitled to an opportunity to present evidence, and 17(c) is the only mechanism to obtain evidence from third parties.
- A subpoena is sometimes necessary to obtain material from a treatment agency with whom probation has contracted.
- Both the government and defense have had to use Rule 17 often in revocations.
- The government doesn't have a grand jury or any other specified subpoena power for a revocation.
- If omitting revocations here in (c)(1)(B) casts doubt about the availability of subpoenas for *testimony* at revocations, this might make it difficult for the government to make its case; because there is recently developing case law barring hearsay in revocation hearings and without witnesses, the government would lose.

Arguments to delete from list and make it contingent on court permission.

- Listing revocations is not necessary from the government's perspective to avoid concerns about hearsay. The list of proceedings is in (c)(1), not (a), where it would apply to subpoenas for testimony as well as the production of items. We had heard no complaints about subpoenas for testimony, and we put this list in (c) so it would have no effect on subpoenas for testimony. If there is concern about restricting the availability of subpoenas for testimony at revocations if they are not on the list, something can be added to the text or the note clarifying that the new text limits only subpoenas for production of items and does not address subpoenas for testimony
- There was some concern that because revocations are brought by the probation office and the probation officer often testifies, adding revocations here in the rule would allow those on probation and supervised release to subpoena personal and confidential information about the officer for their hearings for purposes of impeachment.

B. Line 31. Change *Nixon*'s admissibility requirement to "likely to be admissible" or to "likely to lead to evidence that will be admissible"? This is a critical issue, the issue that prompted the Committee to investigate changing the rule. The Subcommittee, however, remains divided about the language here, and believes the Committee should discuss this and decide. At its last meeting a majority expressed a preference for "likely to be admissible" over "likely to lead to admissible evidence."

Arguments favoring "likely to lead to evidence that is admissible."

- Defense attorneys in places that already have a well-functioning subpoena practice thought this phrase more accurately described the standard courts there applied.

- It would be an incremental change reflecting practice in many districts, not permission to conduct fishing expeditions or discovery.
- Defense attorneys argued that this standard is applied to government subpoenas. For example, in one case the government was able to obtain all recorded calls made by a defendant. The government had no specific information about any information or call, but it was able to obtain the calls in the hope that they were likely to lead to admissible evidence.

Arguments favoring "likely to be admissible"

- Adopting "likely to lead to" would "blow open" subpoena practice and make it something akin to civil discovery, to be used as discovery tools.
- The Department of Justice is strongly opposed to "likely to lead" but views "likely to be admissible" as a more incremental change.
- Together with expanding subpoenas to proceedings where the rules of evidence don't apply—for example leading to evidence that would be admissible at sentencing— would be incredibly broad.

Note language guidance? Is the language in the Note on this new text appropriate? Would more examples be helpful?

C. Lines 48 and 51: Adding motion and order requirement to subpoenas for personal and confidential information about a prospective witness.

Arguments to add "prospective witness" to (c)(3)'s motion and order requirement.

- Rather than a major expansion of (c)(3), this is a modest limit on what would be an expansion on the use of subpoenas resulting from (1) providing that a court order is not required before service except as noted and (2) expressly authorizing ex parte. Because these changes increase the likelihood that personal and confidential information about prospective witnesses will be sought by subpoena, sometimes ex parte, a motion requirement is appropriate.
- Prospective government witnesses, like victims, are involuntarily drawn into criminal cases. And, like victims, they have strong privacy interests in their personal or confidential information. As a matter of policy, the rule should recognize and provide protection for those interests.
- Judicial review will help ensure that subpoenas for material that has heightened privacy value meets the standards of Rule 17. This added protection will not only protect the privacy interests of prospective government witnesses, it may also help the government reassure witnesses, encouraging them to cooperate and testify.
- Witnesses, like victims, may fear that subpoenas can be used for improper purposes, including harassment. Judicial review of proposed subpoenas seeking personal or confidential information about witnesses will reduce the likelihood of misuse of subpoenas for such purposes.
- This applies to a narrow category of information.
- Experience with subpoenas that are too broad and intrusive underly this aspect of the CVRA and Rule 17.
- Most sensitive records require a court order anyway, so this might not be a major change.

Arguments against adding "prospective witness" to (c)(3)'s motion and order requirement.

- This expansion of (c)(3) is unnecessary.
  - Any court that wishes to require a motion in this situation may do so by local rule or court order, and there is no basis for assuming judges will not exercise their local rulemaking and individual discretion appropriately.
  - A court concerned about ex parte subpoenas for personal and confidential information about a prospective witness for the other side need not allow the motion to be ex parte.
- The expansion is also unwarranted.
  - Currently there is no requirement in the rule that the prosecution or defense seek an order from the court to obtain information from third parties about anyone but a victim. The government did not allege there was any problem with (c)(3). Indeed, until the November meeting its position was to leave (c)(3) alone since it was based on statutory language.
  - The government's examples of abuse are not common and do not support the blanket assumption that defense attorneys won't comply with the law when seeking information about prospective witnesses.
- This provision may cause increased litigation. Many speakers in November noted their opposition to attempting to define different sets of requirements based on potential sensitivity of the information sought. Adding witnesses to (c)(3) is likely to significantly increase the number of cases in which this may be contested.
- It will have a one-sided effect because the government is much more likely to call witnesses than the defense.
- Legislatures have already carefully calibrated the competing interests in various privacy and other statutes, including requiring a court order when appropriate. The CVRA requires a court order for a subpoena for victim information, and that is why (c)(3) was added. Neither the CVRA nor any other statute provides similar protections for "prospective witnesses" generally. The rule should not limit existing judicial discretion by requiring a court order where the legislature does not require one.
- This would undermine the effort to eliminate the unnecessarily restrictive interpretations of the existing rule that have made it impossible in some districts for the defense to obtain Rule 17 subpoenas. Witness credibility is always central, and defendants need information about prospective witnesses, such as records from family court, treatment and mental health records, and medical claims. It is not a rare occurrence that defendants seek protected information, and a motion requirement would have a significant effect.
- Expanding (c)(3) may be contrary to the Committee's directive to make only minimal changes and to increase judicial burdens only when necessary.
- How would a defendant—or the court—know who prospective government witnesses are to apply this provision if it was added? And how would government—or the court—know who defense witnesses will be? How would one defendant know who a codefendant will call as a witness? Rule 16 now says neither party has to reveal statements of its "prospective witnesses," there is no obligation in the rule to inform the other party who its prospective witnesses are.

What sort of likelihood that the witness will indeed testify would be required, or what sort of proof?

- Would this apply to the defendant herself if she plans to testify and the government seeks personal and confidential information to impeach her from a third party? What if defense seeks personal and confidential information about herself from a third party?

D. Lines 53, 57-58. Adding discretionary *notice* requirement to subpoenas for personal and confidential information about a prospective witness.

It was suggested during the Subcommittee's discussion that something be added to the rule suggesting that a court "may" order notice to the prospective witness when that person's information was the subject of a subpoena, unless notice was prohibited by statute. Members were divided with defense members adamantly opposed. The arguments here are similar to those collected above regarding the possibility of requiring a court order.

Arguments for adding notice to "prospective witnesses" to (c)(3).

- The reasons for notice here are the same as they are for victims. The information is being sought from third parties who may not have the same incentives as the person whose information is sought to contest the subpoena.
- It shouldn't be acceptable to get personal or confidential information about someone without letting that person know.
- The proposed notice would go to the person whose information is being sought, not to the government. Government witnesses will likely tell the government about such subpoenas, but that is not certain.

Arguments against.

- This is well beyond the problems that prompted this revision of Rule 17, not an incremental change.
- Whether notice is required should not be a function of the rule, but a function of whatever statute regulates the protected information. The risk of inadvertently or deliberately displacing a policy about notice that a legislature may choose to regulate differently was one of the main objections to the bifurcated approach rejected in November. Congress in the CVRA chose notice for only victims. Legislatures and courts regulating the law protecting other information may choose differently.
- Notice before a court could issue an order authorizing a subpoena would not only create delay, but also create a new and much more frequent notice obligation.
- Notice is more complicated than just requiring a motion and order. It requires contact information and proof of sending and perhaps receiving notice. The government already has an infrastructure for notification to those who qualify as victims under the statutory definition, but there is no such infrastructure for notice to "potential witnesses" of the prosecution. And there is no basis to impose this additional burden on defense attorneys.
- To the extent that the parties would have to do the notifying for their own witnesses, a notice requirement would in effect bar ex parte subpoenas for information about prospective witnesses, undermining the discretion of the judge

to grant an ex parte subpoena when there is good cause that the Committee thought was so important to include.

- The government now obtains the same highly personal information by grand jury subpoena without ever informing the person whose information is obtained.
- Perhaps for these reasons, a similar notice requirement to prospective witnesses when a subpoena seeks information about them is rare in the states.

E. Line 64. Is discretion needed to allow returns directly to self-represented party rather than to the court?

Argument for including an unless clause in the text.

- An unrepresented party may be an attorney or someone who has otherwise demonstrated to the court that a court order is not required. Retaining the bracketed language will preserve the judge's discretion to determine whether a motion is needed.

Arguments for leaving it out.

- There is no need to include this language for such unlikely circumstances.
- The language may be read as giving the courts carte blanche to ignore the carefully crafted revised *Nixon* standard.

F. Multiple lines. Should guidance in (a) about obtaining and filling in blank form be moved to both (b) and (c)?

The Subcommittee was divided about whether, instead of leaving the last sentence of (a) where it appears now, more guidance and clarity would be provided if this text appeared as (b)(1) as a separate subsection about what a party must do to get a subpoena for testimony. (The other text in (b) that would become (b)(2).)

As revised, (a) would read as follows, with only the first sentence:

> **In General.** A subpoena must state the court's name and the proceeding's title, include the court's seal, and require the recipient to attend and testify or produce designated items at a specified time and place.

Arguments for moving the second sentence to (b)

- It would give those looking for what is required for a subpoena to testify just one place to look.
- Text could be added to (c) so that there is no negative implication that a clerk need not issue a blank subpoena to produce items by moving that sentence to (b) alone.

Arguments for leaving second sentence in (a).

- No one has complained about this language in (a) or about confusion as to how to get a subpoena for testimony. The Committee wanted to change only what was needed to fix the problems identified, and this was not a problem.

- The language in (a) now applies to grand jury subpoenas, so adding something to (c)(2)(D) would not be enough; addressing the negative implication would require another provision in (c)(1).
- Whatever is added to (c) to preclude a negative implication would be needless repetition in a rule that is already quite lengthy.

III. ***Possible addition to the rule text or Note that the Subcommittee did not have a chance to discuss: Should the rule text or Note encourage courts to consider protective orders or in camera review for potentially sensitive material?*** Potential spots in the Note—Line 92 just before 17(c)(2).

V. ***Other concerns or suggestions—Anything else Committee Members would like to discuss?***

TAB 2B

Clean Version

1 **Rule 17. Subpoena**

2 **(a) In General.** A subpoena must state the court's name and the proceeding's title, include
3 the court's seal, and require the recipient to attend and testify or produce designated items
4 at a specified time and place. The clerk must issue a blank subpoena—signed and sealed—
5 to the requesting party, who must fill in the blanks before the subpoena is served.

6 **(b) Subpoena to Testify—Defendant Unable to Pay Costs and Witness Fees.** Upon a
7 defendant's ex parte application, the court must order that a subpoena be issued for a
8 named witness if the defendant shows the necessity of the witness's presence for an ad
9 equate defense and an inability to pay the witness's fees. The process costs and witness
10 fees will then be paid as they are for witnesses responding to government subpoenas.

11 **(c) Subpoena to Produce Data, Objects, or Other Items.**

12 **(1)** ***In General***.

13 (A) *Items obtainable.* A subpoena may require the recipient to produce any
14 item, including any data, book, paper, document, or other information or
15 object.

16 (B) *Non-Grand-Jury Proceedings—Limitations***.** Unless the court permits
17 otherwise, a non-grand-jury subpoena is available only for a trial, or for a
18 hearing on detention, suppression, [or] sentencing [,or revocation]. The
19 subpoena must describe each designated item with reasonable particularity
20 and seek only items that:

21 (i) are likely to be possessed by the subpoena's recipient;

22 (ii) are not reasonably available to the party from another source; and

23 (iii) are, or contain information that is, likely to [be/lead to] evidence
24 admissible in the designated proceeding.

25 **(2)** ***Non-Grand-Jury Subpoena—Issuance and Disclosure Generally.***

26 (A) *When a Motion and Order Are Required.* A motion and order are not
27 required before service of a non-grand-jury subpoena unless (3) or (4), a
28 local rule, or a court order requires them.

29 (B) *Necessary Showing In a Motion.* The movant must:

30 (i) describe each designated item with reasonable particularity; and

31 (ii) state facts showing that each item satisfies (1)(B) (i)-(iii).

32 (C) *Ex-Parte Motion.* The court may, for good cause, permit the party to file
33 the motion ex parte.

34 (D) *Disclosure When No Motion Is Required.* When no motion is required, a
35 party need not disclose to any other party that it is seeking or has served
36 the subpoena, unless a local rule or court order provides otherwise.

37 **(3)** ***Non-Grand-Jury Subpoena for Personal or Confidential Information About a***
38 ***Victim [or Prospective Witness*****].**

39 (A) *Motion and Order Required.* After a complaint, indictment, or information
40 is filed, a non-grand-jury subpoena requiring the production of personal
41 or confidential information about a victim [or prospective witness] may be
42 served on a third party only upon motion and by court order.

43 (B) *Notice to a Victim [or Prospective Witness]*. Unless there are exceptional
44 circumstances, the court must, before entering the order, require giving
45 notice to the victim so that the victim can move to quash or modify the

46 subpoena or otherwise object. [Unless otherwise prohibited by law, the
47 court may require giving notice to a prospective witness.]

48 **(4)** ***Subpoena by a Self-Represented Party.*** A subpoena is available to a self-
49 represented party only after the party:

50 (A) files a motion;

51 (B) makes the showing described in (2)(B); and

52 (C) obtains an order.

53 **(5)** ***Place to Produce the Designated Items.*** Unless the court orders otherwise, a
54 subpoena requested by a self-represented party must require the recipient to
55 produce to the court the designated items. A non-grand-jury subpoena requested
56 by a represented party may require the recipient to produce the designated items
57 to that party's counsel.

58 **(6)** ***Disclosing to Other Parties the Items Received.*** A party must disclose to an
59 opposing party an item the party receives from a subpoena's recipient only if the
60 item is discoverable under these rules.

61 **(7)** ***Quashing or Modifying the Subpoena.*** On motion made promptly, the court may
62 quash or modify the subpoena if compliance would be unreasonable or
63 oppressive. A party responding to a motion to quash a non-grand-jury subpoena
64 must make the showing described in (2)(B).

65 **(d)** **Service.** A marshal, a deputy marshal, or any nonparty who is at least 18 years old may
66 serve a subpoena. The server must deliver a copy to the witness or to the subpoena's
67 recipient and must tender to the witness one day's witness-attendance fee and the legal

68 mileage allowance. The server need not tender the attendance fee or mileage allowance
69 if the United States, a federal officer, or a federal agency has requested the subpoena.

70 **(e) Place of Service.**

71 **(1)** ***In the United States***. A subpoena requiring a witness to attend a hearing or trial—
72 or requiring a recipient to produce designated items—may be served at any place
73 within the United States.

74 **(2)** ***In a Foreign Country.*** If the witness is in a foreign country, 28 U.S.C. § 1783
75 governs the subpoena's service.

76 **(f) Subpoena for a Deposition.**

77 **(1)** **Issuance.** A court order to take a deposition authorizes the clerk in the district
78 where the deposition is to be taken to issue a subpoena for any witness named or
79 described in the order.

80 **(2)** **Place.** After considering the convenience of the witness and the parties, the court
81 may order—and the subpoena may require—the witness to appear anywhere the
82 court designates.

83 **(g) Contempt Order for Disobeying a Subpoena.** The court (other than a magistrate judge)
84 may hold in contempt a witness or subpoena recipient who, without adequate excuse,
85 disobeys a subpoena issued by a federal court in that district. As under 28 U.S.C. § 636(e),
86 a magistrate judge may hold in contempt a witness or subpoena recipient who, without
87 adequate excuse, disobeys a subpoena issued by that magistrate judge

88 **(h) Information Not Subject to a Subpoena.** No party may subpoena a statement of a
89 witness or of a prospective witness under this rule. Rule 26.2 governs the production of
90 the statement.

TAB 2C

Redline Version

Rule 17. Subpoena

(a) ~~Content~~In General. A subpoena must state the court's name and the proceeding's title~~ of the proceeding~~, include the court's seal~~ of the court,~~ and require ~~command~~ the recipient ~~witness~~ to attend and testify or to produce designated items at ~~the~~ a specified time and place ~~the subpoena specifies~~. The clerk must issue a blank subpoena—signed and sealed—to the requesting party ~~requesting it~~, ~~and that party~~ who must fill in the blanks before the subpoena is served.

(b) Subpoena to Testify—Defendant Unable to Pay Costs and Witness Fees. Upon a defendant's ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows ~~an inability to pay the witness's fees and~~ the necessity of the witness's presence for an adequate defense and an inability to pay the witness's fees. ~~If the court orders a subpoena to be issued, the~~The process costs and witness fees will then be paid ~~in the same manner~~ as ~~those paid~~ they are for witnesses ~~the~~ responding to government subpoenas.

(c) ~~Producing~~Subpoena to Produce Information, ~~Documents and~~ Objects, or Other Items.

(1) *In General*.

(A) *Items obtainable.* A subpoena may ~~order~~require the ~~witness~~recipient to produce any item, including any data, books, papers, documents, ~~data,~~ or other information or objects ~~the subpoena designates~~. ~~The court may direct the witness to produce the designated items in court before trial or before they are to be offered into evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.~~

24 (B) *Non-Grand-Jury Proceedings—Limitations.* Unless the court permits
25 otherwise, a non-grand-jury subpoena is available only for a trial, or for a
26 hearing on detention, suppression, [or] sentencing [,or revocation]. The
27 subpoena must describe each designated item with reasonable particularity
28 and seek only items that:

29 (i) are likely to be possessed by the subpoena's recipient;

30 (ii) are not reasonably available to the party from another source; and

31 (iii) are, or contain information that is, likely to [be/lead to] evidence
32 admissible in the designated proceeding.

33 **(2)** ~~***Quashing or Modifying the Subpoena***. On motion made promptly, the court may~~
34 ~~quash or modify the subpoena if compliance would be unreasonable or~~
35 ~~oppressive.~~***Non-Grand-Jury Subpoena—Issuance and Disclosure Generally.***

36 (A) *When a Motion and Order Are Required.* A motion and order are not
37 required before service of a non-grand-jury subpoena, unless (3) or (4), a
38 local rule, or a court order requires them.

39 (B) *Necessary Showing In a Motion.* The movant must:

40 (i) describe each designated item with reasonable particularity; and

41 (ii) state facts showing that each item satisfies (1)(B)(i)-(iii).

42 (C) *Ex Parte Motion.* The court may, for good cause, permit a party to file the
43 motion ex parte.

44 (D) *Disclosure When No Motion is Required*. When no motion is required, a
45 party need not disclose to any other party that it is seeking or has served
46 the subpoena, unless a local rule or court order provides otherwise.

47 **(3)** ***Non-Grand-Jury Subpoena for Personal or Confidential Information About a***
48 ***Victim [or Prospective Witness].***

49 (A) *Motion and Order Required.* After a complaint, indictment, or information
50 is filed, a non-grand-jury subpoena requiring the production of personal or
51 confidential information about a victim [or prospective witness] may be
52 served on a third party only upon motion and by court order.

53 (B) *Notice to a Victim [or Prospective Witness]*. ~~Before entering the order and~~
54 ~~u~~Unless there are exceptional circumstances, the court must, before
55 entering the order, ~~must~~ require giving notice to the victim so that the
56 victim can move to quash or modify the subpoena or otherwise object.
57 [Unless otherwise prohibited by law, the court may require giving notice
58 to a prospective witness.]

59 **(4)** ***Subpoena By a Self-Represented Party.*** A subpoena is available to a self-
60 represented party only after the party:

61 (C) files a motion;

62 (D) makes the showing described in (2)(B); and

63 (E) obtains an order.

64 **(5)** ***Place to Produce the Designated Items.*** [Unless the court orders otherwise] a
65 subpoena requested by a self-represented party must require the recipient to
66 produce to the court the designated items. A non-grand-jury subpoena
67 requested by a represented party may require the recipient to produce the
68 designated items to that party's counsel.

69 **(6)** ***Disclosing to Other Parties the Items Received.*** A party must disclose to an
70 opposing party an item the party receives from a subpoena's recipient only if
71 the item is discoverable under these rules.

72 **(7)** ***Quashing or Modifying the Subpoena.*** On motion made promptly, the court
73 may quash or modify the subpoena if compliance would be unreasonable or
74 oppressive. A party responding to a motion to quash a non-grand-jury subpoena
75 must make the showing described in (2)(B).

76 **(d)** **Service.** A marshal, a deputy marshal, or any nonparty who is at least 18 years old may
77 serve a subpoena. The server must deliver a copy ~~of the subpoena~~ to the witness or to the
78 subpoena's recipient and must tender to the witness one day's witness-attendance fee
79 and the legal mileage allowance. The server need not tender the attendance fee or
80 mileage allowance if ~~when~~ the United States, a federal officer, or a federal agency has
81 requested the subpoena.

82 **(e)** **Place of Service.**

83 **(1)** ***In the United States.*** A subpoena requiring a witness to attend a hearing or
84 trial—or requiring a recipient to produce designated items—may be served at
85 any place within the United States.

86 **(2)** ***In a Foreign Country.*** If the witness is in a foreign country, 28 U.S.C. § 1783
87 governs the subpoena's service.

88 **(f)** **~~Issuing a Deposition~~ Subpoena for a Deposition.**

89 **(1)** ***Issuance.*** A court order to take a deposition authorizes the clerk in the district
90 where the deposition is to be taken to issue a subpoena for any witness named or
91 described in the order.

92 **(2)** ***Place.*** After considering the convenience of the witness and the parties, the court
93 may order—and the subpoena may require—the witness to appear anywhere the
94 court designates.

95 **(g)** **Contempt** **Order for Disobeying a Subpoena.** The court (other than a magistrate judge)
96 may hold in contempt a witness or subpoena recipient who, without adequate excuse,
97 disobeys a subpoena issued by a federal court in that district. As under 28 U.S.C. § 636(e),
98 a magistrate judge may hold in contempt a witness or subpoena recipient who, without
99 adequate excuse, disobeys a subpoena issued by that magistrate judge ~~as provided in 28~~
100 ~~U.S.C. § 636(e)~~ .

101 **(h)** **Information Not Subject to a Subpoena.** No party may subpoena a statement of a
102 witness or of a prospective witness under this rule. Rule 26.2 governs the production of
103 the statement.

TAB 2D

1 **Committee Note**

2 The amendments to Rule 17 respond to gaps and ambiguities in its text that have
3 contributed to conflicting interpretations in the courts and difficulties in application. The changes
4 include revisions that clarify the procedures for subpoenas to produce data, objects, or other items
5 and the availability of such subpoenas for proceedings other than trial, as well as revisions that
6 delineate which provisions apply to certain types of subpoenas. The amendments also include
7 stylistic revisions to text and headings.

8 **Rule 17(a).** In addition to stylistic changes, the text in (a)(1) has been revised to clarify
9 that it applies to subpoenas for producing items as well as those for testimony.

10 **Rule 17(b)** formerly headed "Defendant Unable to Pay," has been retitled to clarify that
11 it applies only to subpoenas for testimony. Changes to the text are stylistic only.

12 **Rule 17(c),** covering subpoenas to produce data, objects, or other items, has been revised
13 to address multiple issues with the prior language that had contributed to conflicting
14 interpretations in the courts. Formerly it had three subsections, now it has seven. The changes
15 are intended to promote clarity about what the Rule requires, while safeguarding the discretion
16 of courts to tailor subpoena practice to the circumstances of a district or case. The section's
17 heading —"Subpoena to Produce Information, Objects, or Other Items"—was revised to more
18 accurately describe the amended language in (c)(1)(A).

19 **Rule 17(c)(1)(A)** continues to describe what a subpoena may obtain, but it has been
20 revised to refer to "items" that include "data," "or other information or object." This recognizes
21 that parties use subpoenas to obtain electronically stored information and other intangible items
22 in addition to "documents" or other objects.

23 Perceived ambiguities in the language of the last two sentences of former (c)(1)
24 contributed to several conflicts in case law, including when a subpoena may be sought ex parte,
25 and the rules for production and disclosure. The revised rule replaces these two sentences with
26 separate provisions containing explicit direction about each of these issues.

27 **Rule 17(c)(1)(B)** is new. The first sentence limits the use of non-grand-jury subpoenas
28 to produce items, "unless the court permits otherwise," to trial and those proceedings where
29 subpoenas are most likely to be needed and presently used regularly in many districts: sentencing
30 hearings under Rule 32, pre-trial suppression hearings, and, less frequently, detention hearings
31 under the Bail Reform Act. There is no other mechanism available to compel evidence from third
32 parties at these proceedings, even though both parties may need to do so. Some decisions have
33 interpreted the prior text of the Rule to bar the use of Rule 17 subpoenas to produce items at any
34 hearing other than grand jury proceedings and trial. This change to the Rule's text expressly
35 authorizes the use of a non-grand-jury subpoena to obtain evidence for introduction at the listed
36 hearings.

37 The "unless" clause explicitly recognizes the discretion of the court to permit a Rule 17
38 subpoena to produce items in other evidentiary hearings not listed in the Rule in which a party
39 may be allowed to present witnesses or evidence. Examples include preliminary hearings, new
40 trial hearings, or revocation hearings. The present use of Rule 17 subpoenas for items in such

41 proceedings is not as common, in part because of the difficulties, costs, and delays that may arise
42 when subpoena practice is imported into these less formal or more expedited proceedings.

43 Rule 17's provisions are not applicable to hearings under § 2254 or § 2255, where a court
44 may apply subpoena provisions in the Federal Rules of Civil Procedure. See Rule 12 of the Rules
45 Governing § 2254 Proceedings and Rule 12 of the Rules Governing §2255 Proceedings.

46 The second sentence, along with the requirements in **(c)(1)(B)(i) – (iii),** articulates a
47 modified version of the test announced by the Supreme Court in *Nixon v. United States,* 418 U.S.
48 683 (1974), which interpreted the previous text of Rule 17. Applying *Nixon,* all but a handful of
49 lower courts have read Rule 17 as limiting non-grand-jury subpoenas to produce documents or
50 other items to those that met specificity, relevance, and admissibility requirements. Many courts
51 added one or more of the additional following criteria: that the items sought must not be otherwise
52 obtainable by due diligence, that advance inspection was needed to properly prepare and avoid
53 delay, and that the subpoena is not a "fishing expedition."

54 The Committee agreed that the basic character of Rule 17 subpoenas as seeking evidence
55 for a particular proceeding should remain unchanged, and that the rule should continue to prohibit
56 the use of subpoenas for general discovery from third parties. But it also determined that the
57 admissibility requirement, as well as other aspects of the prevailing interpretation of the prior
58 language, was being applied inconsistently, resulting in harmful uncertainty and unnecessarily
59 restricted access to evidence needed from third parties for trial and other proceedings.

60 The new text now codifies a modified version of the *Nixon* standard intended to provide
61 an adequate and more predictable opportunity for both the prosecution and defense to obtain from
62 third parties the evidence they need for the proceeding designated in the subpoena. The new text
63 imposes upon a party the duty to ensure that every subpoena to produce items meets this standard,
64 including those obtained and served without motion.

65 As to specificity and the prevention of "fishing expeditions," the second sentence in
66 (**c)(1)(B)** first requires that the subpoena "describe each designated item with reasonable
67 particularity." This requirement serves at least two functions. First, it informs the recipient what
68 is being requested so that the recipient can decide how to comply and whether to file a motion to
69 quash. Second, it prevents parties from using such subpoenas for discovery and "fishing
70 expeditions," which can create unacceptable burdens for recipients, courts, and those individuals
71 and entities whose information the recipient is ordered to produce. The requirements in
72 **(c)(1)(B)(i) and (ii)** advance this same goal by limiting the subpoena to items "likely to be
73 possessed by the subpoena's recipient," and "not reasonably available to the party from another
74 source."

75 The text of **(c)(1)(C)(iii)** requires that each item either be, or contain information that is,
76 likely to be admissible—or likely to lead to evidence that is admissible—in the designated
77 proceeding." In using "*likely t*o [be/lead to evidence that is] admissible," the Committee
78 deliberately rejected stricter formulations applied by some courts. In some circumstances, it will
79 be impossible to be certain *before* a proceeding begins that a precisely identified item <u>will</u> be
80 admissible, when, for example, its admissibility depends on whether the opposing party first
81 presents other evidence. For example, impeachment evidence should be available to a party by

82 subpoena for use at trial when a party knows that a witness will or is [very] likely to testify. That
83 evidence should not be unavailable simply because admissibility cannot be determined
84 definitively until after the witness has actually testified. [The "likely to be admissible" standard
85 is already used by [many] courts applying Rule 17 and more accurately describes the appropriate
86 inquiry.] There is no separate reference to "relevance" in **(c)(1)(B)** because information would
87 not be "likely [. . .] admissible" unless it was relevant.

88 If a court is concerned that without judicial oversight some categories of subpoenas—
89 such as those seeking particular types of information, or seeking information for a particular type
90 of proceeding—pose a special risk of noncompliance with the requirements in (c)(1)(B), the court
91 has discretion to require that those subpoenas be authorized by motion and court order (see
92 (c)(2)(A)) and/or to order that the recipient produce the items to the court instead of directly to
93 the requesting party's counsel (see (c)(5)).

94 **Rule17(c)(2)** resolves several disputed issues about obtaining subpoenas to produce items
95 that arose under the prior language of the Rule. All of (c)(2) is new. The language formerly in
96 (c)(2) about motions to quash is now (c)(7).

97 **Rule 17(c)(2)(A)** defines when a motion and court order are required before a party may
98 serve a non-grand-jury subpoena to produce items. Courts have disagreed about if or when the
99 former language in (c)(1)—which stated "the court may direct the witness to produce the
100 designated items in court before trial or before they are offered in evidence"—required a court
101 to first approve a subpoena under 17(c). The resulting practice has differed greatly from court to
102 court (and in some cases judge to judge), with some courts requiring motions for every subpoena
103 to produce items, others permitting parties to obtain and serve such subpoenas without judicial
104 involvement (unless the subpoena sought victim information under (c)(3)), and still others
105 insisting on prior approval in certain circumstances but not others.

106 The Committee concluded that mandating a prior motion and court order for every
107 subpoena to produce items—or for every subpoena that seeks production before trial, as some
108 courts had interpreted the former language in (a)—places unnecessary burdens on courts and
109 parties alike and is contrary to existing practice in many districts. Other requirements stated in
110 the Rule or otherwise available to the court are adequate to control potential abuse of the
111 subpoena process by the parties. Districts that have required, under the prior language of the rule,
112 a motion and court order whenever a subpoena seeks production prior to trial may continue that
113 practice by local rule or court order. That level of judicial oversight before service, however, is
114 no longer required by the revised text of the Rule.

115 The amended rule clearly specifies the circumstances that will always require prior court
116 approval via motion, and it preserves the discretion of judges to require motions in other
117 situations. It provides that a motion and order are not required before service of a non-grand-jury
118 subpoena to produce items "unless (3) or (4), a local rule, or a court order requires them."

119 **Rule 17(c)(2)(B).** When a motion is required for a non-grand-jury subpoena, new
120 (c)(2)(B) states exactly what a party must do in the motion to prove that the proposed subpoena
121 does indeed comply with (c)(1)(B)'s requirements. Rule 17(c)(2)(C)(i) requires the party to
122 demonstrate to the court that the subpoena describes each designated item with reasonable

123 particularity. And (2)(C)(ii) requires the party to "state facts," showing each item is "likely to be
124 possessed by the subpoena's recipient," "not reasonably available to the party from another
125 source," and "relevant to and likely to [be/lead to evidence that is] admissible in the designated
126 proceeding." Requiring a factual basis is intended to prevent the use of Rule 17 subpoenas based
127 upon unsubstantiated guesses or mere speculation.

128 **Rule 17(c)(2)(C)** ensures that a court may, for good cause, allow a party to file a motion
129 for a subpoena to produce items ex parte and under seal. Whether a party may seek a subpoena
130 ex parte has been another contested question under the prior language of Rule 17(c). Although
131 some courts have read the Rule to preclude ex parte subpoena practice, most allow it, some by
132 local rule. Proceeding ex parte is important when disclosure to another party of what the subpoena
133 requests, the identity of the recipient, or the explanation why the subpoena complies with
134 (c)(2)(B) could lead to the damage to or loss of the items that the party is attempting to obtain,
135 or divulge trial strategy, witness lists, or attorney work-product. Without the ex parte option,
136 defense counsel may face the impossible choice of either not seeking a subpoena and violating
137 the ethical duty to prepare a plausible defense, or seeking the subpoena and disclosing their trial
138 strategy, work-product, and other confidential information to the government and co-defendants
139 (who may have adverse interests).

140 **Rule17(c)(2)(D)** clarifies that a party has no duty to inform the other parties about a
141 subpoena when no motion is required, absent an order to do so.

142 **Rule 17(c)(3)** retains the requirement in (c)(3) of a motion and court order for a subpoena
143 seeking personal and confidential information about a victim, now in subparagraph (A), as well
144 as the requirement of prior notice to a victim absent exceptional circumstances. Both
145 requirements were added to the Rule in 2008 to implementing the Crime Victim's Rights Act and
146 are unchanged [See the discussion regarding adding "prospective witnesses" to (c)(3) in memo.]

147 **Rule 17(c)(4)** This new provision extends the motion requirement to a subpoena
148 requested by a self-represented party. Two reasons underlie this decision. First, self-represented
149 parties are not bound by ethical rules that deter an attorney's misuse of the court's compulsory
150 authority, raising the risk that the subpoena would not comply with (c)(1)(C). Second, requiring
151 judicial oversight of this very small subset of subpoenas would not significantly add to the courts'
152 burden, even in districts where there is relatively little motion practice under Rule 17.

153 **Rule 17(c)(5)** is also new. It clarifies when a subpoena must order the recipient to produce
154 designated items to the court, and when it need not do so. Again, the text in former (c)(1) stating
155 that the "court may direct the witness to produce the designated items in court before trial or
156 before they are to be offered into evidence" produced conflicting decisions on this point. Some
157 courts read the rule as always requiring returns to the court, others that it required returns to the
158 court whenever a subpoena ordered production before trial, and still others that it permitted
159 returns directly to the requesting party unless the court ordered items produced to it. The
160 Committee concluded that judges should have discretion to determine where (and how)
161 production should take place. To the extent the prior text of the rule was leading to unnecessary
162 limits on the discretion of the court to allow returns to the requesting party, it created needless
163 burdens for courts and required revision.

164 Accordingly, subsection (5) sets two defaults, both subject to departure by court order.
165 First, it provides that a subpoena requested by a self-represented party must require the recipient
166 to produce the designated items to the court. Judicial oversight at both the issuance stage and
167 production stages is added assurance that parties without legal training or ethical responsibilities
168 will not deliberately or unintentionally access inappropriate or non-compliant information that a
169 judge would be able to intercept if the recipient were required to provide the items to the court.
170 The second default in (5) is for all other non-grand-jury subpoenas, namely those sought by
171 represented parties. It provides the subpoena may require the recipient to produce the designated
172 items to that party's counsel, reflecting present practice in many districts. The rule places no
173 restrictions on the court's discretion to vary from these default rules. For example, when a
174 subpoena is likely to produce private or privileged information, it is common practice for courts
175 to order in camera review before disclosure to anyone.

176 New **Rule 17(c)(6)** states "A party must disclose to an opposing party an item the party
177 receives from a subpoena's recipient only if the item is discoverable under these rules." This
178 provision resolves another dispute about the meaning of the Rule's prior text, which some courts
179 read as requiring that each party have access to any item that a subpoena recipient produces to
180 another party. That position undermines the careful calibration of discovery and disclosure in
181 Rule 16 and other discovery rules. For example, even if every item produced by a subpoena is
182 admissible, it does not follow that the requesting party will decide to use all of those items in its
183 "case-in-chief at trial." And a defense subpoena may produce inculpatory evidence the
184 government did not know about, as well as evidence the defense hopes to use at the designated
185 proceeding. The new text recognizes that disclosure of information and other items between
186 parties, including information and items the party may obtain by subpoena, is regulated by the
187 Constitution, Rule 16, and other discovery rules. Rule 17 does not modify that carefully
188 developed law.

189 **Rule 17(c)(7)** contains the text about motions to quash previously in (c)(2). A second
190 sentence has been added clarifying that the showing described in (c)(2)(B) must be made by the
191 party responding to a motion to quash a non-grand-jury subpoena to produce items.

192 **Rule 17(d)** adds the words "or to the subpoena's recipient" after witness to clarify that it
193 applies to both subpoenas for testimony and subpoenas to produce items.

194 **Rule 17(e)(1)** contains a similar addition to that in (d) to clarify its application to
195 subpoenas to produce items as well as subpoenas for testimony.

196 **Rule 17(g)** includes three changes: (1) the heading has been revised to better describe its
197 context; (2) "or subpoena recipient" has been added to clarify its application to both subpoenas
198 for testimony and subpoenas to produce items; and (3) a reference to 28 U.S.C. §636 was moved
199 to the beginning of the last sentence.

TAB 3

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professors Sara Sun Beale and Nancy King, Reporters**

RE: **Reference to Minors by Pseudonyms and Redaction of Social-Security Numbers, Rule 49.1 (24-CR-A and 24-CR-C)**

DATE: **March 26, 2025**

This memorandum provides an update on the Subcommittee's work since the November meeting and its plans moving forward.

I. THE USE OF PSEUDONYMS TO REFER TO MINORS

As explained in the Department's suggestion (24-CR-A), 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 have pointed 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. The AAJ and NCVBA (24-CR-C) supported the Department's proposal, but they added 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, and members reported that neither defense attorneys 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. Members also support adding language to the Advisory Committee notes indicating that gender neutral or other non-identifying terms should be considered where possible.

However, despite the reporters' work with the style consultants and with the reporters for sister committees (which may adopt parallel amendments to their own privacy rules), the Subcommittee was not able to reach agreement on the language of an amendment in time for submission at the April meeting. Members expressed concern that language suggested by the style consultants to streamline Rule 49.1(a) was more of a change than necessary to incorporate the substance of the proposed change. This could have negative consequences. Some practitioners who were asked for comments interpreted the proposed language as requiring them to include—and then redact—certain information. The Subcommittee thought that interpretation was not sound, but it was reluctant to generate concerns of this nature. Moreover, a greater than necessary change in the language could have unintended consequences (as demonstrated by the

belated recognition that the language being discussed was not limited to individuals "known to be minors"). Members suggested language that would implement the proposal to require pseudonyms with minimal changes to the current structure and language, and the Subcommittee requested the reporters to return to the style consultants to see if that language (or something similar) would be acceptable.

II. COMPLETE REDACTION OF SOCIAL SECURITY NUMBERS AND TAXPAYER-IDENTIFICATION NUMBERS

As noted at the November meeting, there has been agreement that neither the prosecution nor the defense need the last four digits of social-security numbers in public filings, but the Subcommittee wanted to understand whether there was any harm in including this information. Rules Law Clerk Kyle Brinker provided an excellent research memorandum explaining how this information could be misused by identity thieves and fraudsters.[1] Moreover, full redaction is now considered a best practice by a variety of government agencies. The Subcommittee found this analysis very convincing, and it concluded the case had been made for complete redaction of social-security numbers in Rule 49.1.

However, reviewing the introductory language of Rule 49.1(a) as well as (a)(1) caused the Subcommittee to focus, for the first time, on the question whether the last four digits of taxpayer-identification numbers should also be redacted.

Mr. Brinker's research memoranda did not focus on individual taxpayer-information numbers (ITINs). The Internal Revenue Service requires any individual who is not eligible to get a social security number to apply for an ITIN if they must furnish a taxpayer identification number for U.S. tax purposes or file a U.S. federal tax return. The IRS website provides the following examples:

- A nonresident alien individual claiming reduced withholding under an applicable income tax treaty for which an ITIN is required (see Regulations section 1.1441-1(e)(4)(vii)(A)). Also see Pub. 515, Withholding of Tax on Nonresident Aliens and Foreign Entities.
- A nonresident alien individual not eligible for an SSN who is required to file a U.S. federal tax return or who is filing a U.S. federal tax return to claim a refund or to report income.
- A nonresident alien individual not eligible for an SSN who elects to file a joint U.S. federal tax return with a spouse who is a U.S. citizen or resident alien. See Pub. 519, U.S. Tax Guide for Aliens.
- A U.S. resident alien (based on the number of days present in the United States, known as the "substantial presence" test) who files a U.S. federal tax return but who

[1] To avoid providing any sort of roadmap for misuse of this information, we did not include Mr. Brinker's memorandum in the agenda book.

isn't eligible for an SSN. For information about the substantial presence test, see Pub. 519.

- A nonresident alien student, professor, or researcher who is required to file a U.S. federal tax return but who isn't eligible for an SSN, or who is claiming an exception to the tax return filing requirement. See Pub. 519.
- An alien spouse claimed as an exemption on a U.S. federal tax return who isn't eligible to get an SSN. See Pub. 501, Dependents, Standard Deduction, and Filing Information, and Pub. 519.

…

- An alien individual eligible to be claimed as a dependent on a U.S. federal tax return but who isn't eligible to get an SSN. Your spouse is never considered your dependent. For more information about whether an alien individual is eligible to be claimed as a dependent on a U.S. federal tax return, see Pubs. 501 and 519.

…

- A dependent/spouse of a nonresident alien U.S. visa holder who isn't eligible for an SSN. See Pub. 519."

Millions of individuals now possess ITINs, and individual ITINs could be useful to identity thieves and fraudsters. As of December 2023, the IRS had issued 26 million ITINs, and there were more than 5.8 million active ITINs.[2] ITINs are now commonly used for a variety of non-tax purposes, including obtaining drivers' licenses and credit cards, and opening bank accounts, and establishing a credit history. Thus, having an individual's full ITIN would be of great value to identity thieves and fraudsters.[3]

But the risk of disclosing only the last four ITIN digits is less clear than the risk associated with SSNs. The ITIN has a nine-digit format like the SSN but always begins with the number "9" (9XX-XX-XXXX). The fourth and fifth numbers range from "50" to "65," "70" to "88," "90" to "92," and "94" to "99." We have no more information about how the IRS assigns the numbers, and we do not know if or how an identity thief could reconstruct an entire ITIN with the last four digits. Moreover, we have no information about whether various entities—such as banks, credit card companies, or drivers' license bureaus—accept the last four ITIN digits for authentication.

The Subcommittee has requested that additional research be done on the potential for harm from public filings including the final four digits of taxpayer-identification numbers, as well as additional information about the different types of taxpayer-identification numbers.

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[2] Treasury Inspector General for Tax Administration, Administration of the Individual Taxpayer Identification Number Program, December 2023, p. 1, available at https://www.tigta.gov/sites/default/files/reports/2024-11/2024400012fr.pdf (last viewed, February 19, 2025).

[3] Id. at 1-2.

III. COORDINATION WITH SISTER RULES COMMITTEES AND NEXT STEPS

The reporters have been coordinating with their counterparts on the other rules committees. The preliminary views of their counterparts on the Civil and Appellate Rules Committees are generally supportive of parallel changes to Civil Rule 5.2, which would be incorporated into Appellate Rule 25(a)(5).

The Subcommittee hopes to get the additional research on ITINs as well as updated language acceptable to the style consultants in time to coordinate with the Civil and Appellate Rules Committees before the fall meetings. Although the Bankruptcy Committee has determined that the last four digits of social-security numbers remain useful in bankruptcy proceedings, the bankruptcy reporters are staying abreast of these discussions.

TAB 4

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professors Sara Sun Beale and Nancy King, Reporters**

RE: **Rule 40, clarifying procedures for previously released defendant arrested in one district under a warrant issued in another district (24-CR-D & 23-CR-H)**

DATE: **March 27, 2025**

The Magistrate Judge's Advisory Group (MJAG) and Judge Zachary Bolitho have recommended clarification of Rule 40, which currently provides:

Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District

(a) **In General.** A person must be taken without unnecessary delay before a magistrate judge in the district of arrest if the person has been arrested under a warrant issued in another district for:

(i) failing to appear as required by the terms of that person's release under 18 U.S.C. §§3141 –3156 or by a subpoena; or

(ii) violating conditions of release set in another district.

(b) **Proceedings.** The judge must proceed under Rule 5(c)(3) as applicable.

(c) **Release or Detention Order.** The judge may modify any previous release or detention order issued in another district, but must state in writing the reasons for doing so.

(d) **Video Teleconferencing.** Video teleconferencing may be used to conduct an appearance under this rule if the defendant consents.

Judge Bolitho suggested that Rule 40 be amended to address two issues:

- Whether a defendant who has been arrested on a petition to revoke pre-trial *or presentencing* release from another district have the right to a detention hearing in the district of arrest; and
- If so, what is the standard that applies in the detention hearing?

MJAG's more comprehensive proposal identifies seven points of confusion that arise when defendants are arrested for failing to appear in, or for violating conditions of pretrial or presentence release set in, another district. It recommends the Committee draft a new Rule 5.2 "Revoking or Modifying Pretrial Release" that would address each of the seven issues for pretrial release.

- Which parts of Rule 5(c)(3) apply?

- Why does the rule exclude "adjacent district" as an option?
- Why does the rule not address informing the defendant of the alleged violation?
- Why does the rule not address informing the defendant about the right to consult counsel, and how does the previous appointment of counsel in the issuing district affect the right?
- What detention standard applies?
- Under what circumstances would a judge in the arresting district modify a detention order?
- Does a magistrate judge in the issuing district have the authority to modify a detention order by a magistrate judge in the arresting district?

At its November 2024 meeting, after a brief discussion, the Committee decided to refer these proposals for in-depth study by a subcommittee to be chaired by Judge Harvey.[1]

The proposals raise a multiplicity of issues. One foundational question concerns the history and development of the relevant provisions. At the request of the reporters, Rules Law Clerk Kyle Brinker prepared a memorandum on the history of Rule 40 and Rule 5. The Subcommittee has now received Mr. Brinker's memorandum and a memorandum from the reporters identifying and commenting on the issues raised by the proposals.

The Subcommittee has a Teams meeting scheduled for April 9 to discuss what issues it wishes to focus on initially and what additional research it feels will be most helpful. Judge Harvey will report on these discussions at our April meeting.

[1] The other members of the Subcommittee are Judge Birotte, Dean Fairfax, Ms. Mariano, and Ms. Tessier (representing the Department of Justice).

TAB 5

TAB 5A

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professors Sara Sun Beale and Nancy King, Reporters**

RE: **Expanded use of video conferencing (Rule 43) (24-CR-D)**

DATE: **March 27, 2025**

Judge Brett Ludwig has requested that the Committee consider amending Rule 43 to extend the district courts' authority to use videoconferencing, beyond initial appearances and arraignments, with the defendant's consent.[1] He contended that experience under the CARES Act demonstrated that there is no good reason to limit the use of technology to only initial appearances and arraignments. He urged that under the CARES Act "courts around the country embraced the use of technology without any noticeable deficit in the administration of justice," and his own court and others were "able to fairly and efficiently conduct all manner [of] pretrial hearings by videoconference, including Change of Plea Hearings under Rule 11 and Sentencing Hearings under Rule 32."

Judge Ludwig noted several advantages of expanding the authority to use video-conferencing with the defendant's consent. It would give judges flexibility to make use of the expenditures already made for these resources, showing Congress and the public that the courts are taking steps to offer substantial affirmative cost savings in many districts, including his own, where there are no long-term pretrial detention facilities within close proximity to the courthouse. Bringing defendants to the courthouse imposes significant costs for personnel, transportation, and security expenses at both the jail and courthouse, and imposes physical and mental costs on defendants. He also stated that "[w]hen the CARES Act authority ended, several frustrated defendants and defense counsel complained, insisting they would have preferred to appear by videoconference. Under the current rules, I could not accommodate them."

The Committee has previously considered proposals to expand the use of video conferencing, in each case ultimately declining to amend Rule 43.[2] After discussion of Judge Ludwig's proposal at the November 2024 meeting, Judge Dever appointed the Subcommittee, chaired by Judge Birotte,[3] to consider whether to recommend any amendments expanding the availability of remote appearance of defendants for proceedings other than trials, pleas, or initial sentencings.

Meeting via Teams, the Subcommittee discussed the possibility of expanding the use of video conferencing with the defendant's consent to some or all of the hearings listed below, which

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[1] Judge Ludwig also noted that his proposal would also eliminate the need for separate authorization in Rules 5 and 10.

[2] For a discussion of these proposals, see Agenda Book, Advisory Committee on Criminal Rules, November 6-7, 2024, at 284-90, *available at* https://www.uscourts.gov/sites/default/files/2024-12/2024-11-criminal-rules-meeting-agenda-book-final-revised-12-6_0.pdf .

[3] The other members of the Subcommittee are Judge Burgess, Mr. Naseem, Ms. Tessier (representing the Department of Justice), and Justice Samour (who was unable to participate in the Teams call due to a last minute conflict).

contemplate the defendant's presence, and for which neither Rule 43 nor another rule expressly permits appearance by video. The starred proceedings may carry a constitutional right to presence.

- *5.1 – **preliminary hearing** ("may cross-examine … witnesses and introduce evidence")
- 7(b) – **waiver of indictment** ("in open court and after being advised …")
- *12(f),(h) – **suppression hearing** (referencing Rule 26.2 and government witness)
- *12.2 – **insanity/competency hearings** in non-capital cases (18 U.S.C. 4247(d)[4])
- 15(c) – **deposition** (absent waiver or disruptive conduct defendant must be in witness' presence)
- 17.1 – **pretrial conference** (refers to statements by defendant during the conference)
- *32.1(a) **- initial appearance for revocation** (must be "taken . . . before . . . magistrate judge")
- *32.1(b)(1) – **preliminary hearing – revocation** (opportunity to appear, present evidence …)
- 32.2(b)(1)(B) – **forfeiture hearing** (court may consider "additional evidence … presented by the parties")
- 32.2(c) – **ancillary proceeding in forfeiture** (not explicitly referencing a hearing, but allowing third party to file a petition asserting an interest in property and providing for discovery)
- 33(a) – **hearing on a motion for a new trial** (but says nothing about presence of defendant)
- *44(c)(2) – **conflict inquiries** (court "must personally advise each defendant ….")
- *46(j)/ 18 U.S.C. § 3142(f) – **detention hearing** (opportunity to testify, present witnesses …)

The Subcommittee recognized the challenges that arise in districts that are very large geographically. For example, judges in the District of Alaska cover both the Anchorage and Juneau calendars, which are approximately 600 miles apart by plane. Moreover, there is no federal detention center in the state, and pretrial transfers are handled by the marshals using private jet transportation. Additionally, in some cases court appointed counsel come from Oregon, Washington, or Idaho, and they would benefit from the greater availability of remote proceedings.

Despite recognizing these challenges, the Subcommittee ultimately concluded that Rule 43 should not be amended to expand the use of video conferencing. Members emphasized several points. The rule already allows remote hearings on legal matters like status conferences. But challenges would arise with testimonial hearings, like detention hearings, where remote proceedings could lead to issues, such as claims of ineffective assistance of counsel, due to the lack of in-person interaction.

Some of the discussion focused on the possibility of allowing change of plea hearings to be conducted with the defendant appearing remotely. Members stressed the importance of the judge being able to see the defendant in person, and they noted that in-person interactions between the defendant and counsel are often crucial to ensuring the process goes smoothly. A member also noted the general consensus among the defense bar that in-person proceedings are preferred

[4] 18 U.S.C. 4247(d) provides :

> At a hearing ordered pursuant to this chapter the person whose mental condition is the subject of the hearing shall be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him …. The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.

because they ensure clear communication and reinforce the seriousness of proceedings for clients, especially when their liberty is at stake. The Department of Justice also had concerns about expanding video conferencing to change of plea proceedings. In districts where Magistrate Judges conduct plea colloquies and there are long delays before the District Court adopts the Magistrate Judge's Report and Recommendation, permitting the Magistrate Judge to conduct the colloquy remotely could increase the likelihood that a defendant would move to withdraw the plea before it was accepted by the District Court.

Members discussed, but ultimately decided not to pursue, either a hardship exception or a distance-based exception, perhaps applied on a district-by-district basis. The shared concern was that this could be a slippery slope. A distance-based exception could eventually lead to cost-cutting measures, for example, potentially affecting how in-person meetings with clients would be approved or how Criminal Justice Act vouchers would be reviewed for in-person meetings if a virtual option were available.

The Subcommittee also discussed allowing waiver of indictment and competency proceedings to be conducted with the remote participation of the defendant but decided against recommending either change. Members noted waivers of indictment are handled almost exclusively during changes of plea in open court—which the Subcommittee had concluded should remain in-person proceedings. As to competency determinations, members noted that the current system is working efficiently, and seldom requires contested hearings.

TAB 5B

From: Brett Ludwig
Sent: Sunday, March 24, 2024 8:23 PM
To: RulesCommittee Secretary
Subject: Proposed Change to Federal Rules of Criminal Procedure -- Post-COVID Use of Videoconferencing Technology

Dear Rules Committee,

My name is Brett Ludwig. I serve as a District Judge in the Eastern District of Wisconsin. I write to urge the committee to amend the Federal Rules of Criminal Procedure to allow district judges greater flexibility in using videoconference technology to conduct pretrial hearings in criminal cases. The change I propose is minor; it simply extends a court's authority to use videoconferencing, beyond Initial Appearances and Arraignments, with the defendant's consent. I am attaching a Word document showing how this could be accomplished with two minor revisions to Fed. R. Crim P. 43. The change would also eliminate the need for separate authorization in Rules 5 and 10; simplification of those rules is also shown in the attachment.

Currently, the Rules allow the use of videoconferencing with the defendant's consent, but only for Initial Appearances and Arraignments. *See* Fed. R. Crim P. 5(g) and 10(c). There is no good reason to limit the use of technology to those types of hearings. During the COVID-19 pandemic, the CARES Act expanded district court authority to use videoconferencing, and courts around the country embraced the use of technology without any noticeable deficit in the administration of justice. Indeed, my court and others were able to fairly and efficiently conduct all manner pretrial hearings by videoconference, including Change of Plea Hearings under Rule 11 and Sentencing Hearings under Rule 32. With the expiration of the CARES Act on May 11, 2023, however, courts lost this ability and were forced to abandon the use of videoconferencing, even when doing so would have been more efficient and even when a defendant wished to proceed by videoconference. Indeed, in my circuit, district courts are *prohibited* from conducting change of plea or sentencing hearings by videoconference, even when a defendant consents. *See United State v. Bethea*, 888 F.3d 864 (7th Cir. 2018) (reversing and remanding district court's sentencing judgment based on use of videoconferencing even though defendant affirmatively requested sentencing by videoconference.)

Allowing the use of videoconferencing technology post-pandemic would enable district judges to continue to schedule and conduct hearings in a flexible manner while also ensuring that judicial resources are maximized. Most courts were required to invest additional judiciary funds in technology in response to the COVID-19 pandemic. Authorizing courts to continue to use videoconferencing will ensure that the judiciary makes the most of those expenditures. At a time of increased budget scrutiny, the judiciary should show Congress and the public that we are taking steps to maximize our efficient use of appropriated funds.

Use of videoconferencing also offers substantial affirmative cost savings in many districts, including mine. Our district does not have long-term pretrial detention facilities within close proximity to the courthouse. Accordingly, when a pretrial hearing requires a defendant's physical presence in the courtroom, we must expend significant resources to comply. These costs include personnel, transportation and security expenses at both the jail and courthouse. And these costs must be incurred even for relatively short (sometimes mere 20 minute) hearings. As our COVID experience showed, we can avoid those costs without sacrificing the rights of defendants or the needs of judicial administration.

The current rules also impose a physical and mental cost on defendants. By requiring their physical presence in the courthouse, the rules force defendants to get up early, well in advance of the hearing, to be transported to the courthouse, where they wait in a small holding cell until their hearing commences. They then have to undergo the time and hassle associated with their return trip to their holding facility. When the CARES Act authority ended, several frustrated defendants and defense counsel complained, insisting they would have preferred to appear by videoconference. Under the current rules, I could not accommodate them.

In the end, my proposal is a modest one. I simply ask that the rules be amended to permit courts to use technology that was already purchased during the pandemic to handle pretrial hearings as we did during the pandemic with the defendant's consent.

Let me know if you have any questions. I look forward to hearing from you.

Brett Ludwig

Brett H. Ludwig
United States District Judge
Eastern District of Wisconsin
United States Federal Building and Courthouse
517 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
414-297-3071

Fed. R. Crim. P. 43: Defendant's Presence

(a) **When Required**. Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:

- (1) the initial appearance, the initial arraignment, and the plea;
- (2) every trial stage, including jury empanelment and the return of the verdict; and
- (3) sentencing.

(b) **When Not Required**. A defendant need not be present under any of the following circumstances:

- (1) **Organizational Defendant**. The defendant is an organization represented by counsel who is present.
- (2) **Misdemeanor Offense**. The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur ~~by video teleconferencing or~~ in the defendant's absence.
- (3) **Conference or Hearing on a Legal Question**. The proceeding involves only a conference or hearing on a question of law.
- (4) **Sentence Correction**. The proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c).

(c) **Waiving Continued Presence**.

- (1) **In General**. A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:
  - (A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant or an obligation to remain during trial;
  - (B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or
  - (C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.
- (2) **Waiver's Effect**. If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

(d) **Definition of Presence**. A defendant is present when appearing in person in the courtroom. The court may, for good cause and with the defendant's consent, allow a defendant to be present by videoconference from another location, or when videoconference is not feasible, by teleconference.

Rule 5: Initial Appearance

~~(g) **Video Teleconferencing**. Video teleconferencing may be used to conduct an appearance under this rule if the defendant consents.~~

Rule 10: Arraignment

(a) **In General**. An arraignment must be conducted in open court and must consist of:

- (1) ensuring that the defendant has a copy of the indictment or information;
- (2) reading the indictment or information to the defendant or stating to the defendant the substance of the charge; and then
- (3) asking the defendant to plead to the indictment or information.

(b) **Waiving Appearance**. A defendant need not be present for the arraignment if:

- (1) The defendant has been charged by indictment or misdemeanor information;

(2) The defendant, in a written waiver signed by both the defendant and defense counsel, has waived appearance and has affirmed that the defendant received a copy of the indictment or information and that the plea is not guilty; and

(3) The court accepts the waiver.

~~(c) **Video teleconferencing**. Video teleconferencing may be used to arraign a defendant if the defendant consents.~~

TAB 6

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

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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:

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2 The report is available at https://www.fjc.gov/content/391989/united-states-district-courts-local-rules-and-procedures-electronic-filing-self .

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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:

1 **Rule 5. Serving and Filing Pleadings and Other Papers**

2 **(a) Service: When Required.**

3 **(1) In General.** Unless these rules provide otherwise, each of the following papers must

4 be served on every party:

5 (A) an order stating that service is required;

6 (B) a pleading filed after the original complaint, unless the court orders otherwise

7 under Rule 5(c) because there are numerous defendants;

8 (C) a discovery paper required to be served on a party, unless the court orders

9 otherwise;

10 (D) a written motion, except one that may be heard ex parte; and

11 (E) a written notice, appearance, demand, or offer of judgment, or any similar

12 paper.

13 * * *

14 **(b) Service: How Made.**

15 **(1) Serving an Attorney.** If a party is represented by an attorney, service under this rule

16 must be made on the attorney unless the court orders service on the party.

17 **(2) Service by a Notice of Filing Sent Through the Court's Electronic-Filing System.**

18 A notice of filing sent to a person registered to receive it through the court's

19 electronic-filing system constitutes service on that person as of the notice's date.

20 But a court may provide by local rule that if a paper is filed under seal, it must be

21 served by other means.

22 **(3) Service by Other Means ~~in General~~.** A paper ~~is~~ may also be served under this rule

23 by:

24 (A) handing it to the person;

25 (B) leaving it:

26 (i) at the person's office with a clerk or other person in charge or, if no one

27 is in charge, in a conspicuous place in the office; or

28 (ii) if the person has no office or the office is closed, at the person's

29 dwelling or usual place of abode with someone of suitable age and

30 discretion who resides there;

31 (C) mailing it to the person's last known address – in which event service is

32 complete upon mailing;

33 (D) leaving it with the court clerk if the person has no known address;

34 (E) ~~sending it to a registered user by filing it with the court's electronic-filing~~

35 ~~system or~~ sending it by ~~other~~ electronic means that the person has

36 consented to in writing – in ~~either of~~ which events service is complete

37 upon ~~filing or~~ sending, but is not effective if the ~~filer or~~ sender learns that

38 it did not reach the person to be served; or

39 (F) delivering it by any other means that the person has consented to in writing –

40 in which event service is complete when the person making service

41 delivers it to the agency designated to make delivery.

42 ~~**(3) Using Court Facilities.** [Abrogated (Apr. 26, 2018, eff. Dec. 1, 2018.]~~ **(4) Serving**

43 <u>**Papers That Are Not Filed.** Rule 5(b)(3) governs service of a paper that is not</u>

44 <u>filed.</u>

45 <u>**(5) Definition of "Notice of Filing."** The term "notice of filing" in this rule includes a</u>

46 <u>notice of docket activity, a notice of electronic filing, and any other similar</u>

47 <u>electronic notice provided to case participants through the court's electronic-filing</u>

48 <u>system to inform them of activity on the docket.</u>

49 * * *

50 **(d) Filing.**

51 **(1) Required Filings; Certificate of Service.**

52 **(A) Papers ~~after~~ <u>After</u> the Complaint.** Any paper after the complaint that is

53 required to be served must be filed no later than[3] a reasonable time after

54 service. But disclosures under Rule 26(a)(1) or (2) and the following

55 discovery requests and responses must not be filed until they are used in

56 the proceeding or the court orders filing: depositions, interrogatories,

57 requests for documents or tangible things or to permit entry onto land, and

58 requests for admission.

59 **(B) Certificate of Service.** No certificate of service is required when a paper is

60 served <u>under Rule 5(b)(2)</u>~~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).

61 ~~system~~. When a paper that is required to be served is served by other

62 means:

63 (i) if ~~the paper~~ it is filed, a certificate of service must be filed with it or

64 within a reasonable time after service; and

65 (ii) if ~~the paper~~ it is not filed, a certificate of service need not be filed,

66 unless filing is required by court order or by local rule.

67 **(2)** ~~**Nonelectronic Filing.** A paper not filed electronically is filed by delivering it:~~

68 ~~(A) to the clerk; or~~

69 ~~(B) to a judge who agrees to accept it for filing, and who must then note the filing~~

70 ~~date on the paper and promptly send it to the clerk.~~

71 ~~(3)~~ **Electronic Filing and Signing.**

72 **(A) By a Represented Person—Generally Required; Exceptions.** A person

73 represented by an attorney must file electronically, unless nonelectronic

74 filing is allowed by the court for good cause or is allowed or required by

75 local rule.

76 **(B) By ~~an Unrepresented~~ a Self-Represented[4] Person—When Allowed or**

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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

77 **Required.**

78 (i) **In General.** A self-represented person ~~not represented by an attorney:~~

79 ~~(i)~~ may ~~file electronically only if allowed by~~ use the court's

80 electronic-filing system [to file papers[5] and receive notice of

81 activity in the case],[6] unless a court order or ~~by~~ local rule prohibits

82 the person from doing so.~~; and (ii)~~ A self-represented person may

83 be required to file electronically only by ~~court~~ order in a case~~,~~ or

84 by a local rule that includes reasonable exceptions.

85 (ii) **Local Provisions Prohibiting Access.** If a local rule – or any other

86 local court provision that extends beyond a particular litigant or

---

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.

87 case – prohibits self-represented persons from using the court's

88 electronic-filing system, the provision must include reasonable

89 exceptions or must permit the use of another electronic method for

90 filing [papers] and for receiving electronic notice [of activity in the

91 case].[7]

92 (iii) **Conditions and Restrictions[8] on Access.** A court may set

93 reasonable conditions and restrictions on self-represented persons'

94 access to the court's electronic-filing system.

95 (iv) **Restrictions on a Particular Person.** A court may deny a particular

96 person access to the court's electronic-filing system and may

97 revoke a person's previously granted access for not complying

98 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.

99 **(C) Signing.** A filing made through a person's electronic-filing account and
100 authorized by that person, together with that person's name on a signature
101 block, constitutes the person's signature.
102 **(D) Same as a Written Paper.** A paper filed electronically is a written paper for
103 purposes of these rules.
104 **(3) Nonelectronic Filing.**[9] A paper not filed electronically is filed by delivering it:
105 (A) to the clerk; or
106 (B) to a judge who agrees to accept it for filing, and who must then note the filing
107 date on the paper and promptly send it to the clerk.
108 **(4) Acceptance by the Clerk.** The clerk must not refuse to file a paper solely because it
109 is not in the form prescribed by these rules or by a local rule or practice.

110 **Committee Note**
111
112 Rule 5 is amended to address two topics concerning self-represented litigants.
113 (Concurrent amendments are made to [add cites to Bankruptcy Rules],[10] Criminal Rule 49, and
114 Appellate Rule 25.) Rule 5(b) is amended to address service of documents (subsequent to the
115 complaint) filed by a self-represented litigant in paper form. Because all such paper filings are
116 uploaded by court staff into the court's electronic-filing system, there is no need to require
117 separate paper service by the filer on case participants who receive an electronic notice of the
118 filing from the court's electronic-filing system. Rule 5(b)'s treatment of service is also
119 reorganized to reflect the primacy of service by means of the electronic notice. Rule 5(d) is
120 amended to expand the availability of electronic modes by which self-represented litigants can
121 file documents with the court and receive notice of filings that others make in the case. Also, the
122 order of what had been Rules 5(d)(2) ("Nonelectronic Filing") and 5(d)(3) ("Electronic Filing
123 and Signing") is reversed – with (d)(2) becoming (d)(3) and vice versa – to reflect the modern
124 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.

125
126 **Subdivision (b).** Rule 5(b) is restructured so that the primary means of service – that is,
127 service by means of the court's electronic-filing system – is addressed first, in subdivision
128 5(b)(2). Existing Rule 5(b)(2) becomes new Rule 5(b)(3), which continues to address alternative
129 means of service. New Rule 5(b)(4) addresses service of papers not filed with the court, and new
130 Rule 5(b)(5) defines the term "notice of filing" as any electronic notice provided to case
131 participants through the court's electronic-filing system to inform them of a filing or other
132 activity on the docket.
133
134 **Subdivision (b)(2).** Amended Rule 5(b)(2) eliminates the requirement of separate
135 (paper) service (of documents after the complaint) on a litigant who is registered to receive a
136 notice of filing from the court's electronic-filing system. Litigants who are registered to receive a
137 notice of filing include those litigants who are participating in the court's electronic-filing system
138 with respect to the case in question and also include those litigants who receive the notice
139 because they have registered for a court-based electronic-noticing program. (Current Rule
140 5(b)(2)(E)'s provision for service by "sending [a paper] to a registered user by filing it with the
141 court's electronic-filing system" had already eliminated the requirement of paper service on
142 registered users of the court's electronic-filing system by other registered users of the system; the
143 amendment extends this exemption from paper service to those who file by a means other than
144 through the court's electronic-filing system.)
145
146 The last sentence of amended Rule 5(b)(2) states that a court may provide by local rule
147 that if a paper is filed under seal, it must be served by other means. This sentence is designed to
148 account for districts in which parties in the case cannot access other participants' sealed filings
149 via the court's electronic-filing system.
150
151 **Subdivision (b)(3).** Subdivision (b)(3) carries forward the contents of current Rule
152 5(b)(2), with two changes.
153
154 The subdivision's introductory phrase ("A paper is served under this rule by") is
155 amended to read "A paper may also be served under this rule by." This locution ensures that
156 what will become Rule 5(b)(3) remains an option for serving any litigant, even one who receives
157 notices of filing. This option might be useful to a litigant who will be filing non-electronically
158 but who wishes to effect service on their opponent before the time when the court will have
159 uploaded the filing into the court's system (thus generating the notice of filing).
160
161 **Subdivision (b)(3)(E).** The prior reference to "sending [a paper] to a registered user by
162 filing it with the court's electronic-filing system" is deleted, because this is now covered by new
163 Rule 5(b)(2).
164
165 Although subdivision (b)(3)(E) carries forward – for service by other electronic means –
166 the prior rule's provision that such service is not effective if the sender "learns that it did not
167 reach the person to be served," no such proviso is included in new subdivision (b)(2). This is

168 because experience has demonstrated the general reliability of notice and service through the
169 court's electronic-filing system on those registered to receive notices of electronic filing from
170 that system.
171
172 **Subdivision (b)(4).** New Rule 5(b)(4) addresses service of papers not filed with the
173 court. It makes explicit what is arguably implicit in new Rule 5(b)(2): If a paper is not filed with
174 the court, then the court's electronic system will never generate a notice of filing, so the sender
175 cannot use Rule 5(b)(2) for service and thus must use Rule 5(b)(3).
176
177 **Subdivision (b)(5).** New Rule 5(b)(5) defines the term "notice of filing" as any electronic
178 notice provided to case participants through the court's electronic-filing system to inform them
179 of a filing or other activity on the docket. There are two equivalent terms currently in use: Notice
180 of Electronic Filing and Notice of Docket Activity. "Notice of filing" is intended to encompass
181 both of those terms, as well as any equivalent terms that may come into use in future. The word
182 "electronic" is deleted as superfluous now that electronic filing is the default method.
183
184 **Subdivision (d)(1)(B).** Subdivision (d)(1)(B) previously provided that no certificate of
185 service was required when a paper was served "by filing it with the court's electronic-filing
186 system." This phrase is replaced by "under Rule 5(b)(2)" in order to conform to the change to
187 subdivision (b)(2).
188
189 **Subdivision (d)(2)(B).** Under new Rule 5(d)(2)(B)(i), the presumption is the opposite of
190 the presumption set by the prior Rule 5(d)(3)(B). That is, under new Rule 5(d)(2)(B)(i), self-
191 represented litigants are presumptively authorized to use the court's electronic-filing system to
192 file documents in their case subsequent to the case's commencement. If a district wishes to
193 restrict self-represented litigants' access to the court's electronic-filing system, it must adopt an
194 order or local rule to impose that restriction.
195
196 Under Rule 5(d)(2)(B)(ii), a local rule or general court order that bars persons not
197 represented by an attorney from using the court's electronic-filing system must include
198 reasonable exceptions, unless that court permits the use of another electronic method for filing
199 documents and receiving electronic notice of activity in the case. But Rule 5(d)(2)(B)(iii) makes
200 clear that the court may set reasonable conditions on access to the court's electronic-filing
201 system.
202
203 A court can comply with Rules 5(d)(2)(B)(ii) and (iii) by doing either of the following:
204 (1) Allowing reasonable access for self-represented litigants to the court's electronic-filing
205 system, or (2) providing self-represented litigants with an alternative electronic means for filing
206 (such as by email or by upload through an electronic document submission system) and an
207 alternative electronic means for receiving notice of court filings and orders (such as an electronic
208 noticing program).
209
210 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

1 **Rule 49. Serving and Filing Papers**

2 **(a) Service on a Party.**

3 **(1) What is Required.** Each of the following must be served on every party: any written
4 motion (other than one to be heard ex parte), written notice, designation of the
5 record on appeal, or similar paper.

6 **(2) Serving a Party's Attorney.** Unless the court orders otherwise, when these rules or a
7 court order requires or permits service on a party represented by an attorney,
8 service must be made on the attorney instead of the party.

9 **(3) Service by ~~Electronic Means~~ a Notice of Filing Sent Through the Court's**
10 **Electronic-Filing System.** A notice of filing sent to a person registered to
11 receive it through the court's electronic-filing system constitutes service on that
12 person as of the notice's date. But a court may provide by local rule that if a paper
13 is filed under seal, it must be served by other means.

14 ~~**(A) Using the Court's Electronic-Filing System.** A party represented by an~~
15 ~~attorney may serve a paper on a registered user by filing it with the court's~~
16 ~~electronic-filing system. A party not represented by an attorney may do so~~
17 ~~only if allowed by court order or local rule. Service is complete upon~~

18 ~~filing, but is not effective if the serving party learns that it did not reach~~

19 ~~the person to be served.~~

20 ~~**(B) Using Other Electronic Means.** A paper may be served by any other~~

21 ~~electronic means that the person consented to in writing. Service is~~

22 ~~complete upon transmission, but is not effective if the serving party learns~~

23 ~~that it did not reach the person to be served.~~

24 **(4) Service by ~~Nonelectronic~~ Other Means.** A paper may also be served by:

25 (A) handing it to the person;

26 (B) leaving it:

27 (i) at the person's office with a clerk or other person in charge or, if no one

28 is in charge, in a conspicuous place in the office; or

29 (ii) if the person has no office or the office is closed, at the person's

30 dwelling or usual place of abode with someone of suitable age and

31 discretion who resides there;

32 (C) mailing it to the person's last known address – in which event service is

33 complete upon mailing;

34 (D) leaving it with the court clerk if the person has no known address; ~~or~~

35 (E) sending it by electronic means that the person has consented to in writing – in

36 which event service is complete upon sending, but is not effective if the

37 sender learns that it did not reach the person to be served; or

38 ~~(E)~~ (F) delivering it by any other means that the person consented to in writing –

39 in which event service is complete when the person making service

40 delivers it to the agency designated to make delivery.

41 **[(5) Serving Papers That Are Not Filed.** Rule 49(a)(4) governs service of a paper that is

42 not filed.[11]]

43 **(6) Definition of "Notice of Filing."** The term "notice of filing" in this rule includes a

44 notice of docket activity, a notice of electronic filing, and any other similar

45 electronic notice provided to case participants through the court's electronic-filing

46 system to inform them of activity on the docket.

47 **(b) Filing.**

48 **(1) When Required; Certificate of Service.** Any paper that is required to be served

49 must be filed no later than a reasonable time after service. No certificate of

50 service is required when a paper is served ~~by filing it with the court's electronic-~~

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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.

51 ~~filing system~~ under Rule 49(a)(3). When a paper is served by other means, a
52 certificate of service must be filed with it or within a reasonable time after service
53 or filing.

54 **(2) ~~Means of~~ Electronic Filing and Signing.**

55 **(A) By a Represented Person – Generally Required; Exceptions.** A party
56 represented by an attorney must file electronically, unless nonelectronic
57 filing is allowed by the court for good cause or is allowed or required by
58 local rule.[12]

59 **(B) By a Self-Represented Person – When Allowed or Required.**

60 **(i) In General.** A self-represented person may use the court's electronic-
61 filing system [to file papers and receive notice of activity in the
62 case], unless a court order or local rule prohibits the person from
63 doing so.[13]

64 **(ii) Local Provisions Prohibiting Access.** If a local rule – or any other
65 local court provision that extends beyond a particular litigant or
66 case – prohibits self-represented persons from using the court's
67 electronic-filing system, the provision must include reasonable
68 exceptions or must permit the use of another electronic method for
69 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.

70 case].

71 **(iii) Conditions and Restrictions on Access.** A court may set reasonable

72 conditions and restrictions on self-represented persons' access to

73 the court's electronic-filing system.

74 **(iv) Restrictions on a Particular Person.** A court may deny a particular

75 person access to the court's electronic-filing system and may

76 revoke a person's previously granted access for not complying

77 with the conditions authorized in (iii).

78 **(C) Means of Filing.** ~~**Electronically.**~~ A paper is filed electronically by filing it

79 with the court's electronic-filing system.

80 **(D) Signature.** A filing made through a person's electronic-filing account and

81 authorized by that person, together with the person's name on a signature

82 block, constitutes the person's signature.[14]

83 **(E) Qualifies as Written Paper.** A paper filed electronically is written or in

84 writing under these rules.

85 ~~**(B)**~~ **(3) Nonelectronic~~ally~~ Filing.** A paper not filed electronically is filed by delivering it:

86 (i) to the clerk; or

87 (ii) to a judge who agrees to accept it for filing, and who must then note

88 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.

89 ~~**(3) Means Used by Represented and Unrepresented Parties.**~~

90 ~~**(A) Represented Party.** A party represented by an attorney must file~~

91 ~~electronically, unless nonelectronic filing is allowed by the court for good~~

92 ~~cause or is allowed or required by local rule.~~

93 ~~**(B) Unrepresented Party.** A party not represented by an attorney must file~~

94 ~~nonelectronically, unless allowed to file electronically by court order or~~

95 ~~local rule.~~

96 **(4) Signature.** Every written motion and other paper must be signed by at least one

97 attorney of record in the attorney's name--or by a person filing a paper if the

98 person is not represented by an attorney. The paper must state the signer's address,

99 e-mail address, and telephone number. Unless a rule or statute specifically states

100 otherwise, a pleading need not be verified or accompanied by an affidavit. The

101 court must strike an unsigned paper unless the omission is promptly corrected

102 after being called to the attorney's or person's attention.

103 **(5) Acceptance by the Clerk.** The clerk must not refuse to file a paper solely because it

104 is not in the form prescribed by these rules or by a local rule or practice.

105 **(c) Service and Filing by Nonparties.** A nonparty may serve and file a paper only if

106 doing so is required or permitted by law. A nonparty must serve every party as

107 required by Rule 49(a), but may use the court's electronic-filing system only if

108 allowed by court order or local rule.

109 **(d) Notice of a Court Order.** When the court issues an order on any post-arraignment

110 motion, the clerk must serve notice of the entry on each party as required by Rule

111 49(a). A party also may serve notice of the entry by the same means. Except as

112 Federal Rule of Appellate Procedure 4(b) provides otherwise, the clerk's failure to

113 give notice does not affect the time to appeal, or relieve--or authorize the court to

114 relieve--a party's failure to appeal within the allowed time.

115 **Committee Note**

116 Rule 49 is amended to address two topics concerning self-represented litigants.
117 (Concurrent amendments are made to [add cites to Bankruptcy Rules],[15] Civil Rule 5, and
118 Appellate Rule 25.) Rule 49(a) is amended to address service of documents filed by a self-
119 represented litigant in paper form. Because all such paper filings are uploaded by court staff into
120 the court's electronic-filing system, there is no need to require separate paper service by the filer
121 on case participants who receive an electronic notice of the filing from the court's electronic-
122 filing system. Rule 49(b) is amended to expand the availability of electronic modes by which
123 self-represented litigants can file documents with the court and receive notice of filings that
124 others make in the case.
125
126 **Subdivision (a)(3).** Rule 49(a)(3) is revised so that it focuses solely on the service of
127 notice by means of the court's electronic-filing system. What had been Rule 49(a)(3)(B)
128 (concerning "other electronic means" of service) is relocated, as revised, to a new Rule
129 49(a)(4)(E).
130
131 Amended Rule 49(a)(3) eliminates the requirement of separate (paper) service on a
132 litigant who is registered to receive a notice of filing from the court's electronic-filing system.
133 Litigants who are registered to receive a notice of filing include those litigants who are
134 participating in the court's electronic-filing system with respect to the case in question and also
135 include those litigants who receive the notice because they have registered for a court-based
136 electronic-noticing program. (Current Rule 49(a)(3)(A)'s provision for service by "on a
137 registered user by filing [the paper] with the court's electronic-filing system" had already
138 eliminated the requirement of paper service on registered users of the court's electronic-filing
139 system by other registered users of the system; the amendment extends this exemption from
140 paper service to those who file by a means other than through the court's electronic-filing
141 system.)
142
143 The last sentence of amended Rule 49(a)(3) states that a court may provide by local rule
144 that if a paper is filed under seal, it must be served by other means. This sentence is designed to
145 account for districts in which parties in the case cannot access other participants' sealed filings

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15 The cites to the Bankruptcy Rules will depend on the option selected by the Bankruptcy Rules Committee.

146 via the court's electronic-filing system.
147
148 **Subdivision (a)(4).** Rule 49(a)(4) is retitled "Service by Other Means" to reflect the
149 relocation into that subdivision – as new Rule 49(a)(4)(E) – what was previously Rule
150 49(a)(3)(B). The subdivision's introductory phrase ("A paper may be served by") is amended to
151 read "A paper may also be served by." This locution ensures that Rule 49(a)(4) remains an
152 option for serving any litigant, even one who receives notices of filing. This option might be
153 useful to a litigant who will be filing non-electronically but who wishes to effect service on their
154 opponent before the time when the court will have uploaded the filing into the court's system
155 (thus generating the notice of filing).
156
157 Although new subdivision (a)(4)(E) carries forward – for service by other electronic
158 means – the prior rule's provision that such service is not effective if the sender "learns that it did
159 not reach the person to be served," no such proviso is included in new subdivision (a)(3). This is
160 because experience has demonstrated the general reliability of notice and service through the
161 court's electronic-filing system on those registered to receive notices of electronic filing from
162 that system.
163
164 **[Subdivision (a)(5).** New Rule 49(a)(5) addresses service of papers not filed with the
165 court. It makes explicit what is arguably implicit in new Rule 49(a)(3): If a paper is not filed with
166 the court, then the court's electronic system will never generate a notice of filing, so the sender
167 cannot use Rule 49(a)(3) for service and thus must use Rule 49(a)(4).]
168
169 **Subdivision (a)(6).** New Rule 49(a)(6) defines the term "notice of filing" as any
170 electronic notice provided to case participants through the court's electronic-filing system to
171 inform them of a filing or other activity on the docket. There are two equivalent terms currently
172 in use: Notice of Electronic Filing and Notice of Docket Activity. "Notice of filing" is intended
173 to encompass both of those terms, as well as any equivalent terms that may come into use in
174 future. The word "electronic" is deleted as superfluous now that electronic filing is the default
175 method.
176
177 **Subdivision (b)(1).** Subdivision (b)(1) previously provided that no certificate of service
178 was required when a paper was served "by filing it with the court's electronic-filing system."
179 This phrase is replaced by "under Rule 49(a)(3)" in order to conform to the change to
180 subdivision (a)(3).
181
182 **Subdivision (b)(2).** Amended Rule 49(b)(2) governs electronic filing and signing. New
183 Rules 49(b)(2)(A) and (B) replace what had been Rule 49(b)(3). Under new Rule 49(b)(2)(B)(i),
184 the presumption is the opposite of the presumption set by the prior Rule 49(b)(3)(B). That is,
185 under new Rule 49(b)(2)(B)(i), self-represented litigants are presumptively authorized to use the
186 court's electronic-filing system to file documents in their case subsequent to the case's
187 commencement. If a district wishes to restrict self-represented litigants' access to the court's
188 electronic-filing system, it must adopt an order or local rule to impose that restriction.

189
190 Under Rule 49(b)(2)(B)(ii), a local rule or general court order that bars persons not
191 represented by an attorney from using the court's electronic-filing system must include
192 reasonable exceptions, unless that court permits the use of another electronic method for filing
193 documents and receiving electronic notice of activity in the case. But Rule 49(b)(2)(B)(iii) makes
194 clear that the court may set reasonable conditions on access to the court's electronic-filing
195 system.
196
197 A court can comply with Rules 49(b)(2)(B)(ii) and (iii) by doing either of the following:
198 (1) Allowing reasonable access for self-represented litigants to the court's electronic-filing
199 system, or (2) providing self-represented litigants with an alternative electronic means for filing
200 (such as by email or by upload through an electronic document submission system) and an
201 alternative electronic means for receiving notice of court filings and orders (such as an electronic
202 noticing program).
203
204 For a court that adopts the option of allowing reasonable access to the court's electronic-
205 filing system, the concept of "reasonable access" encompasses the idea of reasonable conditions
206 and restrictions. Thus, for example, access to electronic filing could be restricted to non-
207 incarcerated litigants and could be restricted to those persons who satisfactorily complete
208 required training and/or certifications and comply with reasonable conditions on access. Also, a
209 court could adopt a local provision stating that certain types of filings – for example, notices of
210 appeal – cannot be filed by means of the court's electronic-filing system. Rule 49(b)(2)(B)(ii)
211 refers to "a local rule – or any other local court provision that extends beyond a particular litigant
212 or case" to make clear that Rule 49(b)(2)(B)(ii) does not restrict a court from entering an order
213 barring a specific self-represented litigant from accessing the court's electronic-filing system.
214
215 Rule 49(b)(2)(B)(iv) provides that the court may deny a specific self-represented litigant
216 access to the court's electronic-filing system, and that the court may revoke a self-represented
217 litigant's access to the court's electronic-filing system.
218
219 **Subdivision (b)(3).** What had been Rule 49(b)(2)(B) (concerning nonelectronic means of
220 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):

1 **Rule 45. Computing and Extending Time**
2
3 * * *
4
5 **(c) Additional Time After Certain Kinds of Service.** Whenever a party must or may act within

6 a specified time after being served and service is made under Rule 49(a)(4)(C), (D), and

7 ~~(E)~~ (F), 3 days are added after the period would otherwise expire under subdivision (a).

8 **Committee Note**

9

10 Subdivision (c) is amended to conform to the renumbering of Criminal Rule 49(a)(4)(E) as Rule
11 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.

1 **Rule 25. Filing and Service**

2 **(a) Filing.**

3 **(1) Filing with the Clerk.** A paper required or permitted to be filed in a court of appeals

4 must be filed with the clerk.

5 **(2) Filing: Method and Timeliness.**

6 **(A) Nonelectronic Filing.**

7 **(i) In General.** For a paper not filed electronically, filing may be

8 accomplished by mail addressed to the clerk, but filing is not

16 Cf. proposed Civil Rule 5(b)(4).

9 timely unless the clerk receives the papers within the time fixed for

10 filing.

11 **(ii) A Brief or Appendix.** A brief or appendix not filed electronically is

12 timely filed, however, if on or before the last day for filing, it is:

13 • mailed to the clerk by first-class mail, or other class of mail that

14 is at least as expeditious, postage prepaid; or

15 • dispatched to a third-party commercial carrier for delivery to the

16 clerk within 3 days.

17 **(iii) Inmate Filing.** If an institution has a system designed for legal mail,

18 an inmate confined there must use that system to receive the

19 benefit of this Rule 25(a)(2)(A)(iii). A paper not filed

20 electronically[17] by an inmate is timely if it is deposited in the

21 institution's internal mail system on or before the last day for filing

22 and:

23 • it is accompanied by: a declaration in compliance with 28 U.S.C.

24 § 1746--or a notarized statement--setting out the date of

25 deposit and stating that first-class postage is being prepaid;

26 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).

27 that the paper was so deposited and that postage was
28 prepaid; or
29 • the court of appeals exercises its discretion to permit the later
30 filing of a declaration or notarized statement that satisfies
31 Rule 25(a)(2)(A)(iii).

32 **(B) Electronic Filing ~~and Signing. (i) By~~ by a Represented Person--Generally**
33 **Required; Exceptions.** A person represented by an attorney must file
34 electronically, unless nonelectronic filing is allowed by the court for good
35 cause or is allowed or required by local rule.

36 **~~(ii)~~ (C) Electronic Filing by ~~By~~ ~~an Unrepresented~~ a Self-Represented Person--**
37 **When Allowed or Required.**

38 **(i) In General.** A self-represented person ~~not represented by an attorney: •~~
39 may ~~file electronically only if allowed by~~ use the court's
40 electronic-filing system [to file papers and receive notice of
41 activity in the case], unless a court order or ~~by~~ local rule prohibits
42 the person from doing so.~~; and •~~ A self-represented person may be
43 required to file electronically only by ~~court~~ order in a case~~,~~ or by a
44 local rule that includes reasonable exceptions.

45 **(ii) Local Provisions Prohibiting Access.** If a local rule – or any other
46 local court provision that extends beyond a particular litigant or
47 case – prohibits self-represented persons from using the court's
48 electronic-filing system, the provision must include reasonable

49 exceptions or must permit the use of another electronic method for

50 filing [papers] and for receiving electronic notice [of activity in the

51 case].

52 **(iii) Conditions and Restrictions on Access.** A court may set reasonable

53 conditions and restrictions on self-represented persons' access to

54 the court's electronic-filing system.

55 **(iv) Restrictions on a Particular Person.** A court may deny a particular

56 person access to the court's electronic-filing system and may

57 revoke a person's previously granted access for not complying

58 with the conditions authorized in (iii).

59 ~~**(iii)**~~ **(D) Signing.** A filing made through a person's electronic-filing account and

60 authorized by that person, together with that person's name on a signature

61 block, constitutes the person's signature.

62 ~~**(iv)**~~ **(E) Same as a Written Paper.** A paper filed electronically is a written paper

63 for purposes of these rules.

64 **(3) Filing a Motion with a Judge.** *[Not shown in this draft, for brevity.]*

65 **(4) Clerk's Refusal of Documents.** *[Not shown in this draft, for brevity.]*

66 **(5) Privacy Protection.** *[Not shown in this draft, for brevity.]*

67 **(b) Service of All Papers Required.** Unless a rule requires service by the clerk or the paper will

68 be served under Rule 25(c)(1), a party must, at or before the time of filing a paper, serve

69 a copy on the other parties to the appeal or review. Service on a party represented by

70 counsel must be made on the party's counsel.

71 **(c) Manner of Service.**

72 **(1) Service by a Notice of Filing Sent Through the Court's Electronic-Filing System.**

73 A notice of filing sent to a person registered to receive it through the court's

74 electronic-filing system constitutes service on that person as of the notice's date.

75 But a court may provide by local rule that if a paper is filed under seal, it must be

76 served by other means.

77 **(2) Service by Other Means.** A paper may also be served under this rule by:

78 ~~Nonelectronic service may be any of the following:~~

79 (A) personal delivery, including delivery to a responsible person at the office of

80 counsel;

81 (B) ~~by~~ mail; ~~or~~

82 (C) ~~by~~ third-party commercial carrier for delivery within 3 days; or

83 (D) ~~. (2) Electronic service of a paper may be made (A) by sending it to a~~

84 ~~registered user by filing it with the court's electronic-filing system or (B)~~

85 ~~by~~ sending it by ~~other~~ electronic means that the person to be served

86 consented to in writing.

87 (3) **Considerations in Choosing Other Means.** When reasonable considering such

88 factors as the immediacy of the relief sought, distance, and cost, service on a party

89 must be by a manner at least as expeditious as the manner used to file the paper

90 with the court.

91 (4) **When Service Is Complete.** Service by mail or by commercial carrier is complete on

92 mailing or delivery to the carrier. Service by a notice from the court's electronic-

93 filing system is complete as of the notice's date.[18] Service by other electronic

94 means is complete on filing or sending, unless the party making service is notified

95 that the paper was not received by the party served.

96 **(5) Definition of "Notice of Filing."** The term "notice of filing" in this rule includes a

97 notice of docket activity, a notice of electronic filing, and any other similar

98 electronic notice provided to case participants through the court's electronic-filing

99 system to inform them of activity on the docket.

100 **(d) Proof of Service.**

101 (1) A paper presented for filing must contain either of the following if it was served other

102 than through the court's electronic-filing system:

103 (A) an acknowledgment of service by the person served; or

104 (B) proof of service consisting of a statement by the person who made service

105 certifying:

106 (i) the date and manner of service;

107 (ii) the names of the persons served; and

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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.

108 (iii) their mail or electronic addresses, facsimile numbers, or the addresses

109 of the places of delivery, as appropriate for the manner of service.

110 (2) When a brief or appendix is filed by mailing or dispatch in accordance with Rule

111 25(a)(2)(A)(ii), the proof of service must also state the date and manner by which

112 the document was mailed or dispatched to the clerk.

113 (3) Proof of service may appear on or be affixed to the papers filed.

114 **(e) Number of Copies.** *[Not shown in this draft, for brevity.]*

115

116 **Committee Note**

117

118 Rule 25 is amended to address two topics concerning self-represented litigants.
119 (Concurrent amendments are made to [add cites to Bankruptcy Rules],[19] Civil Rule 5, and
120 Criminal Rule 49.) Rule 25(a)(2) is amended to expand the availability of electronic modes by
121 which self-represented litigants can file documents with the court and receive notice of filings
122 that others make in the case. Rule 25(c) is amended to address service of documents filed by a
123 self-represented litigant in paper form. Because all such paper filings are uploaded by court staff
124 into the court's electronic-filing system, there is no need to require separate paper service by the
125 filer on case participants who receive an electronic notice of the filing from the court's
126 electronic-filing system. Rule 25(c)'s treatment of service is also reorganized to reflect the
127 primacy of service by means of the electronic notice.
128
129 **Subdivision (a)(2)(C).** Under new Rule 25(a)(2)(C)(i), the presumption is the opposite of
130 the presumption set by the prior Rule 25(a)(2)(B)(ii). That is, under new Rule 25(a)(2)(C)(i),
131 self-represented litigants are presumptively authorized to use the court's electronic-filing system
132 to file documents in their case. If a district wishes to restrict self-represented litigants' access to
133 the court's electronic-filing system, it must adopt an order or local rule to impose that restriction.
134
135 Under Rule 25(a)(2)(C)(ii), a local rule or general court order that bars persons not
136 represented by an attorney from using the court's electronic-filing system must include
137 reasonable exceptions, unless that court permits the use of another electronic method for filing
138 documents and receiving electronic notice of activity in the case. But Rule 25(a)(2)(C)(iii) makes
139 clear that the court may set reasonable conditions on access to the court's electronic-filing
140 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.

184
185 **Subdivision (c)(1).** Amended Rule 25(c)(1) eliminates the requirement of separate
186 (paper) service on a litigant who is registered to receive a notice of filing from the court's
187 electronic-filing system. Litigants who are registered to receive a notice of filing include those
188 litigants who are participating in the court's electronic-filing system with respect to the case in
189 question and also include those litigants who receive the notice because they have registered for
190 a court-based electronic-noticing program. (Current Rule 25(c)(2)'s provision for service by
191 "sending [a paper] to a registered user by filing it with the court's electronic-filing system" had
192 already eliminated the requirement of paper service on registered users of the court's electronic-
193 filing system by other registered users of the system; the amendment extends this exemption
194 from paper service to those who file by a means other than through the court's electronic-filing
195 system.)
196
197 The last sentence of amended Rule 25(c)(1) states that a court may provide by local rule
198 that if a paper is filed under seal, it must be served by other means. This sentence is designed to
199 account for circuits (if any) in which parties in the case cannot access other participants' sealed
200 filings via the court's electronic-filing system.
201
202 **Subdivision (c)(2).** Subdivision (c)(2) carries forward the contents of current Rule
203 25(c)(1), with two changes.
204
205 The subdivision's introductory phrase ("Nonelectronic service may be any of the
206 following") is amended to read "A paper may also be served under this rule by." This locution
207 reflects the inclusion of other electronic means (apart from service through the court's electronic-
208 filing system) in new Rule 25(c)(2)(D) and also ensures that what will become Rule 25(c)(2)
209 remains an option for serving any litigant, even one who receives notices of filing. This option
210 might be useful to a litigant who will be filing non-electronically but who wishes to effect
211 service on their opponent before the time when the court will have uploaded the filing into the
212 court's system (thus generating the notice of filing).
213
214 The prior reference to "sending [a paper] to a registered user by filing it with the court's
215 electronic-filing system" is deleted, because this is now covered by new Rule 25(c)(1).
216
217 **Subdivision (c)(4).** Amended subdivision (c)(4) carries forward the prior rule's
218 provisions that service by electronic means other than through the court's electronic-filing
219 system is complete on sending unless the party making service is notified that the paper was not
220 received by the party served, and that service by mail or by commercial carrier is complete on
221 mailing or delivery to the carrier.
222
223 As to service through the court's electronic-filing system, the amendments make two
224 changes. First, the amended rule provides that such service "is complete as of the notice's date."
225 Under new subdivision (c)(1), when a litigant files a paper other than through the court's
226 electronic-filing system, service on a litigant who is registered to receive a notice of filing

227 through the court's electronic-filing system occurs by means of the notice of filing. But that
228 service does not occur "on filing" when the filing is made other than through the court's
229 electronic-filing system. There can be a short time lag between the date the litigant files the
230 document with the court and the date that the clerk's office uploads it into the court's electronic-
231 filing system. Thus, new subdivision (c)(1) and amended subdivision (c)(4) provide that service
232 by a notice of filing sent to a person registered to receive it through the court's electronic-filing
233 system is complete as of the date of the notice of filing.
234
235 Second, although subdivision (c)(4) carries forward – for service by other electronic
236 means – the prior rule's provision that such service is not effective if the sender "is notified that
237 the paper was not received by the party served," no such proviso is included as to service by a
238 notice of filing sent to a person registered to receive it through the court's electronic-filing
239 system. This is because experience has demonstrated the general reliability of notice and service
240 through the court's electronic-filing system on those registered to receive notices of electronic
241 filing from that system.
242
243 **Subdivision (c)(5).** New Rule 25(c)(5) defines the term "notice of filing" as any
244 electronic notice provided to case participants through the court's electronic-filing system to
245 inform them of a filing or other activity on the docket. There are two equivalent terms currently
246 in use: Notice of Electronic Filing and Notice of Docket Activity. "Notice of filing" is intended
247 to encompass both of those terms, as well as any equivalent terms that may come into use in
248 future. The word "electronic" is deleted as superfluous now that electronic filing is the default
249 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)

TAB 7

TAB 7A

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professors Sara Sun Beale and Nancy King, Reporters**

RE: **Sai's suggestions 24-CR-E, 24-CR-F, 24-CR-G, and 24-CR-H**

DATE: **March 3, 2025**

We have received four new suggestions from Sai.[1] In the first, Sai suggests that the rules should preclude use of all capital letters (caps) for party and case names and require that proper diacritics be used. Second, Sai suggests that the substance of local rules that are universal or near universal should be incorporated into the federal rules. Third, Sai suggests that to the extent that the various sets of federal rules of procedure have similar provisions, the provisions should be moved to a set of Federal Common Rules that apply across the various sets of federal rules except when individual differences are provided in the separate rules. Fourth, Sai calls for standardized page equivalents for words and lines and elimination of monospaced fonts.

These suggestions were addressed to each of the Appellate, Bankruptcy, Criminal and Civil Rules Committees. The Appellate Rules Committee considered the suggestions at its fall meeting and removed them from its agenda. We expect that the Bankruptcy and Civil Rules Committees will take up the proposals at their spring meetings.

The question for discussion at the April meeting is whether the Committee has an interest in pursuing any of these suggestions or wishes to remove them from its agenda.

Style Names in Normal Case and Diacritics (24-CR-E). Sai suggests that filings, whether by litigants or courts, avoid using all caps for the names of persons and that proper diacritics be used. Sai argues the use of all caps can cause vexatious litigation because "sovereign citizens/organized pseudolegal commercial (OPCA) type litigants" think a person named in all caps is a "quasi-corporate entity created by the government." Second, Sai notes that some names use capitals other than (or in addition to) an initial cap. In those situations, using all caps is inaccurate and can obscure actual differences in names. Sai also points out that capitalization and diacritics are inherent parts of names, and changing the font to all caps and eliminating diacritics can be culturally insulting. Finally, Sai contends that the use of all caps is bad typography, more difficult to read, and requires time to cut and paste.

The current Rules of Criminal Procedure include no formatting requirements, though Rule 7(c) does require indictments to be "written" and Rule 47(b) requires motions not made during a trial or hearing to be "in writing" unless the court permits the motion to be made by other means.

Although Sai is certainly correct that it is important for pleadings to correctly state the names of parties and others (including correct spacing and use of diacritical marks), it would be a major departure to add the suggested formatting requirements to the Rules of Criminal Procedure. We are not aware that the misconception about typeface said to be held by sovereign

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[1] Sai is this individual's full legal name. Sai requests the use of gender neutral language and no courtesy title.

citizens or organized pseudolegal commercial litigants has been a significant problem in criminal cases.

As noted above, the Appellate Rules Committee removed this suggestion from its agenda without dissent.

Adopting Common Local Rules as Federal Rules (24-CR-F). Sai suggests that the Advisory Committees systematically survey the existing local rules, identify types of provisions that are commonly found in local rules but not included in the federal rules, and adopt the most common form of those local rules into the a new set of Federal Rules. Sai argues that incorporating local rules that are universal or near universal into a new set of Federal Rules 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."

Given the number and variety of local rules, the project Sai envisions would require time and resource consuming cross-committee research and drafting. As noted above, the Appellate Rules Committee removed this suggestion from its agenda without dissent.

New Federal Common Rules (24-CR-G). Sai points out that a significant number of topics are addressed by parallel rules. Sai asserts this duplication adds "needless complexity, creates potential for issues of surplusage, and makes the Rules harder to maintain." Therefore, Sai suggests creating a new rules set, the Federal Common Rules, which would contain matters shared between rules sets. The separate rules sets would contain only those matters unique to their constituency.

This proposal, like the proposal for incorporating local rules into the Federal Rules, would be time and resource consuming. As noted above, the Appellate Rules Committee removed this suggestion from its agenda without dissent.

Standardizing Page Equivalents for Words and Lines (24-CR-H). Sai points out that length limits in the Federal Rules of Bankruptcy Procedure, like those in the Federal Rules of Appellate Procedure, are stated in some places in terms of words, lines, or pages. Sai believes that these discrepancies are not justified and suggests standardization by a new definition of "pages." Sai also believes that the monospace limits are no longer technologically necessary and that the Advisory Committee should consider eliminating them. As noted above, the Appellate Rules Committee removed this suggestion from its agenda without dissent.

This suggestion does not appear to be applicable to the Federal Rules of Criminal Procedure, which contain no similar limits on words, lines, and pages.

TAB 7B

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]

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[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.

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[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 8

TAB 8A

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professors Sara Sun Beale and Nancy King, Reporters**

RE: **Rule 15, Depositions for discovery (25-CR-B & 25-CR-E)**

DATE: **March 27, 2025**

The Committee has received two suggestions for amendments to Rule 15 to authorize pretrial depositions for discovery.

In 25-CR-B, Michael Kelly and Sergio Acosta propose an amendment that would permit a defense motion to take a limited number of pretrial depositions to prepare for trial in the event the district judge concludes the depositions are in the interests of justice. Their amendment would also permit the court to order more than five depositions if the defendant can show exceptional circumstances. Kelly and Acosta contend that the amendment is necessary to provide defendants with a reasonable opportunity to present affirmative third-party testimony at trial in response to criminal charges. They assert that defense lawyers often forego the opportunity to call witnesses because they have been unable to determine what the witness would say. They identify two main barriers to determining what a potential defense witness might say: potential witnesses decline to speak with them, and existing discovery does not provide sufficient information to determine what they would say in response to specific questions. Kelly and Acosta describe their experience in a recent case as illustrative of the need for pretrial depositions. They also provide proposed language amending Rule 15.

In 25-CR-E, Larry Krantz submits his article, which describes the need for pretrial defense depositions, arguing that the defendant should have at least the same opportunity to prepare for a criminal trial where his liberty at stake as for a civil trial. Krantz contends that the decision to delete from the draft rules of criminal procedure a provision allowing for depositions was based on several factors, including the absence of defense lawyers on the drafting committee, and strong advocacy by one member who took a one-sided tough on crime attitude. He argues that the current imbalance between the prosecution and defense in witness access makes federal criminal trials "lopsided," a problem that is largely invisible to participants other than defense counsel. Krantz notes the successful experience of 13 states that provide for depositions as a matter of right without prior court approval, as well as 6 states that allow for discovery depositions upon leave of court for good cause. Krantz provides proposed language amending Rule 15.

These proposals are on the agenda of the April meeting for a preliminary discussion of the question whether a subcommittee should be appointed to consider these proposals in greater depth.

TAB 8B

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February 24, 2025

BY EMAIL (RulesCommittee_Secretary@ao.uscourts.gov)

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Re: A Proposal to Amend Rule 15 of the Federal Rules of Criminal Procedure

Dear Mr. Byron,

We are writing to propose an amendment to Rule 15 of the Federal Rules of Criminal Procedure. The proposed amendment would permit defendants to make a motion to a federal district court to take a limited number of pretrial depositions to prepare for trial in the event that the district judge concludes the depositions are in the interest of justice. The amendment would also permit the district judge to order more than five depositions if the defendant can show the existence of exceptional circumstances. We have provided a redlined version of our proposed amendment to Rule 15 as an attachment to this letter.

An amendment is necessary to provide defendants with a reasonable opportunity to present affirmative third-party testimony at trial in response to criminal charges. Currently, in courthouses around the country, defense lawyers often forego the opportunity to call witnesses to testify in federal criminal cases because they do not know what witnesses will say and do not want to jeopardize their client's freedom based on a mistaken prediction of a third-party witness's testimony. These defense lawyers usually do not know what witnesses will say because (i) the witnesses declined to speak with them; and (ii) the lawyers do not have sufficient assurances from existing discovery about what those witnesses would say in response to specific questions. When defense lawyers forego the opportunity to call these witnesses, the lawyers limit themselves to the traditional strategy of trying to raise a reasonable doubt with the jury about the government's case, principally through cross-examination of the government's witnesses.

The truth-finding functions of criminal jury trials in district courts would be significantly enhanced if defense lawyers had greater confidence to call third-party witnesses in their clients' case-in-chief. Pretrial depositions would provide defense lawyers with the opportunity to test

their client's factual defenses and to discover exculpatory information that the government has not been able to identify or failed to produce. Moreover, the public can have greater confidence in verdicts if defendants have sufficient opportunities to develop evidence in their defense. Finally, the amendment would also provide an important institutional safeguard to ensure that the government is complying with its obligations to produce exculpatory evidence required by *Brady v. Maryland*, 373 U.S. 83 (1963).

In a recent high-profile criminal case that we defended, we saw the critical role that pretrial depositions can play in obtaining a just result. In *United States v. Bobby Peavler*,[1] the government sought to present false testimony from an FBI agent about our client's statements in a proffer interview. Through a series of unusual circumstances, the district court held pretrial evidentiary hearings and concluded that the government's interview memorandum did not fairly characterize what our client said. We moved to dismiss the case because we had reason to believe that there were also critical errors or omissions in the memoranda of witness interviews that we did not attend. Before ruling on our motion, the district court authorized defense counsel to take ten pretrial depositions to determine whether there were similar errors in other government interview memoranda. Before any of the depositions could be taken, the Justice Department moved to dismiss the case with prejudice in the interest of justice.

But the *Peavler* case was unique because defense lawyers ordinarily do not have the opportunity to compare an FBI interview memorandum against their own transcript-style notes or to test the veracity of the government's interview memoranda in pretrial evidentiary hearings and pretrial depositions. If a witness declines to speak with defense counsel or defense investigators (which is more often than not the case), the defense lawyer does not have an independent basis to evaluate what is written in a government interview memorandum. That presents a serious risk of uncertainty at trial, which will likely result in the lawyer not calling the witness to testify. When defense lawyers do not have a basis to evaluate whether a witness can offer exculpatory evidence, that creates an unacceptable risk of exculpatory evidence being missed and innocent defendants being convicted. There should be an amendment to Rule 15 to prevent that type of case-dispositive unfairness and injustice.

I. Background

A. Rule 15 Has Traditionally Authorized the Taking of Depositions in Very Limited Circumstances.

Beginning with Rule 15's adoption in 1944, depositions have been permitted only as a means to preserve testimony, not to obtain discovery.[2] Under Rule 15, "the taking of depositions is to be restricted to cases in which they are necessary" and "[i]t was contemplated that in

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[1] Crim. Action No. 1:19-cr-00378-JMS-MJ (S.D. Ind.).

[2] FED. R. CRIM. P. 15 advisory committee notes to 1944 adoption, subdivision (a) ("This rule continues the existing law permitting defendants to take depositions in certain limited classes of cases under *dedimus potestatem* and *in perpetuam rei memoriam,* 28 U.S.C. former § 644").

criminal cases depositions would only be used in exceptional circumstances, as has been the practice heretofore."[3] *Id.* As Rule 15 was originally adopted, only defendants could take depositions, and the Supreme Court rejected repeated proposals by the Advisory Committee to permit the prosecution to take depositions.[4]

Rule 15 has been amended three times after its adoption, and none of the amendments contemplated that a defendant would be able to take depositions for the purposes of obtaining discovery. The historical rationale for the ban on discovery depositions does not appear to have been seriously disputed during the initial adoption of the rule or the various amendments. The amendments to Rule 15 included the following:

- In 1974, the Supreme Court proposed to amend Rule 15 to permit the government (and not just defendants) to take pretrial depositions of witnesses and to set forth the rules for depositions elected by the government or a witness. The 1974 notes to Rule 15 confirmed that "[t]he principal objective is the preservation of evidence for use at trial" and that "[i]t is not to provide a method of pretrial discovery nor primarily for the purpose of obtaining a basis for later cross-examination of an adverse witness."[5]

  Congress initially declined to approve the proposed 1974 amendments, but it ultimately did so with some revisions in 1975. However, Congress expressed no disagreement on the limited role of depositions. The House Conference Report stated that "the Committee believes that Rule 15 will not encourage trials by deposition" and reiterated that a deposition "may be taken only in exceptional circumstances when it is in the interest of justice that the testimony of a prospective party be taken and preserved . . . ."[6] Both the Supreme Court and Congress attempted to define when a deposition could be used as substantive evidence if the witness was "unavailable."[7]

  Under the terms of Rule 15 following the 1975 amendments, the Supreme Court and Congress agreed that only "the testimony of a prospective witness of a party"

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3 *Id.*

4 Orfield, *The Federal Rules of Criminal Procedure*, 33 CALIF. L. REV. 543, 559 (1945).

5 FED. R. CRIM. P. 15 advisory committee notes to 1974 amendment. Although Congress initially postponed the effective date of the proposed 1974 amendments, including Rule 15, until August 1, 1975, 88 Stat. 397, it ultimately passed the Federal Rules of Criminal Procedure Amendments Act of 1975, Pub. L 94-64, 89 Stat. 370, on July 31, 1975, making the amended rule effective as of December 1, 1975.

6 FED. R. CRIM. P. 15 advisory committee notes to 1975 enactment.

7 *Id.*

could be taken and preserved for use at trial.[8] The Supreme Court emphasized that "[t]his means the party's own witness and does not authorize a discovery deposition of an adverse witness."[9] However, the Court acknowledged that there were circumstances where a pretrial deposition "can be used in the case in chief as well as for purposes of impeachment."[10]

Finally, Rule 15 was changed "to make clear that the court always has authority to order the taking of a deposition, or to allow the use of a deposition, where there is an agreement of the parties to the taking or to the use."[11]

- The 2002 amendments changed Rule 15 in a number of ways. It removed the language that a deposition could be taken only of "a prospective witness of a party" and instead allowed a deposition to be taken of a "prospective witness." The advisory committee notes stated that the 2002 changes were intended to be "stylistic" unless stated otherwise, and some courts continued to interpret the "prospective witness of a party" requirement as still being in force.[12]

  There was also a substantial revision of the subsection about the permissible "use" of a deposition. Instead of attempting to define when a deposition could be used as substantive evidence, Rule 15 was revised to state merely that "[a] party may use all or part of a deposition as provided by the Federal Rules of Evidence."[13] Changes were also implemented to clarify who would pay deposition expenses and to clarify that a court could order the production of "data" (instead of a book or a record) as part of a pretrial deposition.

- Finally, in 2012, Rule 15 was changed to identify the circumstances under which pretrial depositions could be taken for witnesses in foreign countries without the defendant's presence. The amendment authorized "a deposition outside the defendant's presence only in very limited circumstances after the court makes

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[8] *Id.* (observing that the House Conference Committee "does not want to encourage the use of depositions at trial, especially given the importance of having live testimony from a witness on the witness stand.").

[9] FED. R. CRIM. P. 15 advisory committee notes to 1974 amendment.

[10] *Id.*

[11] *Id.*

[12] FED. R. CRIM. P. 15 advisory committee notes to 2002 amendments; *see, e.g.*, *United States v. Sellers*, No. 1:08-CR-52, 2009 WL 10701941, at *1 n.1 (N.D.W.Va. Jan. 23, 2009).

[13] *Id.*

> case-specific findings."[14] "The amended rule recognizes the important witness confrontation principles and vital law enforcement and other public interests that are involved."[15] Additional language was added to emphasize that "[a]n order authorizing a deposition to be taken under this rule does not determine its admissibility."[16]

Through all of the amendments, federal courts have consistently declined to permit depositions to be used for discovery purposes.[17]

B. There Are Significant Practical Limitations on Defendants' Ability to Present the Testimony of Third Parties at Jury Trials.

Under the current Federal Rules of Criminal Procedure, there are powerful practical limitations on a defendant's ability to present testimony of third-party witnesses at trial. First, there are limitations on a defendant's ability to obtain documents or other evidence for trial that might suggest the substance of a potential witness's testimony. Rule 16 requires the government to disclose or produce various categories of evidence in its possession, and Rule 17 permits a defendant to subpoena documents that can be offered as admissible evidence at trial. While these rules provide helpful tools to defendants, the problem is that documents do not tell the entire story of what happened from any potential witness's point of view, and testimony from witnesses is usually essential in piecing together the full story suggested by the documents.

Second, defense counsel or their investigators can approach potential witnesses and ask them to speak about the allegations in the case. This approach can be successful at times, but many potential witnesses will not agree to meet voluntarily with defense lawyers or their investigators. An often-cited reason is that witnesses would prefer not to "get involved" in a criminal case. Or the witness's lawyer will decline for the witness to be interviewed out of concern that it could raise the witness's profile with prosecutors in an unhelpful way. A defense lawyer can subpoena a reluctant witness to appear to testify at trial, but takes a risk that the witness will offer surprise testimony adverse to the interests of the defendant with little time or evidence to counter it. A defense lawyer has every reason to fear that this testimony would be considered particularly damaging by the jury if it comes from a witness called by the defense. Indeed, in some circumstances, it might be malpractice for a defense lawyer, not knowing what a witness is going to say, to call a witness whose testimony proves to be damaging to the defendant.

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14 FED. R. CRIM. P. 15 advisory committee notes to 2012 amendments.

15 *Id.*

16 FED. R. CRIM. P. 15(f).

17 *See, e.g.*, *United States v. Fei Ye*, 436 F.3d 1117, 1123–24 (9th Cir. 2006) ("While the district court's belief that it would be more convenient and efficient to allow pretrial depositions may be well-founded, Rule 15 makes no exception for convenience and efficiency"); *United States v. Mann*, 590 F.2d 361, 365 (1st Cir. 1978).

Third, under *Brady v. Maryland*, the government is obligated to disclose exculpatory information to the defense. That disclosure usually occurs through the production of FBI or other agency interview memoranda, grand jury transcripts, and/or government correspondence. There may be recorded interviews when the government, in its discretion, decides to record them. However, this process is imperfect, at best. Typically, FBI interview memoranda omit the questions, summarize answers on a broad level, and omit the context in which witnesses are answering the questions. And, as seen in the *Peavler* case and elsewhere, the FBI interview summaries can sometimes be unreliable, omitting exculpatory information and including false inculpatory information. In some districts, the FD-302 memoranda are produced only shortly before trial, making it even more difficult for defense lawyers to verify whether their contents are accurate.

None of these sources of discovery provide a defense lawyer with the necessary confidence to call witnesses who decline to be interviewed by the defense. This common problem is particularly insidious because it is not susceptible to easy verification or quantification. There is no study that the Federal Judicial Center can conduct to provide an accurate estimate of how much exculpatory evidence is never revealed to defense counsel and/or never presented to a jury at trial. Witnesses typically do not review FBI interview memoranda for accuracy, and they do not have an incentive to do so. Federal district judges have to rely on conclusory assurances from prosecutors that they have complied with their *Brady* obligations. And defense lawyers typically cannot challenge those assurances, much less identify the amount of missing exculpatory evidence when they have never seen or heard it.

These are not new problems. As an example, Robert Cary of Williams & Connolly LLP wrote a book about the extensive *Brady* problems encountered in the 2008 trial of U.S. Senator Ted Stevens.[18] Mr. Cary was one of the lead defense lawyers in the case for Senator Stevens. Among other things, after describing the failings of the prosecution of Senator Stevens, Mr. Cary observed that "witnesses . . . are usually extremely intimidated by the government, and as a result are too scared to talk to defense lawyers."[19] Mr. Cary raised concerns about the accuracy of FD-302 memoranda and wrote that DOJ interviews should be recorded, asking "what is more likely to be complete and accurate: a memo prepared by an FBI agent based on notes and memory or an actual recording?"[20] Mr. Cary also asked, "[w]hat is less expensive for the government: paying an FBI agent to type a memo after-the-fact or simply hitting the record button and storing the recording in an electronic database?"[21]

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18 Rob Cary, *Not Guilty: The Unlawful Prosecution of U.S. Senator Ted Stevens* (2014).

19 *Id.* at 390.

20 *Id.* at 392.

21 *Id.*

C. The *Peavler* Case Provides a Case Study of Why There Is a Need for an Amendment to Rule 15.

Our recent experience in the *Peavler* case demonstrated that those very same discovery problems persist today. In that case, the grand jury returned a securities fraud indictment against two former executives of Celadon Group, Inc., a national trucking company with securities listed on the New York Stock Exchange. One of the defendants was our client, Bobby Peavler, who served as the chief financial officer of Celadon. U.S. District Judge Jane Magnus-Stinson presided over the case.

The case was publicized by the Justice Department on a national and local level. U.S. Attorney General William Barr highlighted the case in a speech discussing the DOJ's coordination of enforcement efforts with the Securities and Exchange Commission.[22] The Fraud Section of DOJ's Criminal Division in Washington, D.C. described the *Peavler* case as one of four "significant" securities or commodities fraud indictments brought nationwide in 2019.[23] The U.S. Attorney for the Southern District of Indiana held a live press conference to announce the indictment, which was covered extensively and recorded by local news outlets.[24]

In defending the *Peavler* case, we had a distinct advantage not common in other cases. Because our client was interviewed by the government pursuant to a proffer agreement, our lawyers were present for his interview. Because our lawyers were present, we were able to take transcript-style notes of the interview. We knew what was said in the interview, who said it, and what was not said during the interview. When the government produced the interview summary of our client's interview on Form FD-302, we saw that the government's interview summary was riddled with errors. For instance, we saw that it contained 18 important misstatements or omissions of exculpatory evidence alone. It also contained numerous other errors, including conflating accusatory questions by prosecutors with the answers provided by our client. These errors occurred even though the interview had been attended by three prosecutors, two FBI agents, and a Postal Inspector.

The government's errors in its FD-302 memorandum related to the essential allegations in the indictment, which claimed that the value of the company's used truck inventory had dropped and that the company's investors, auditors, and lending financial institution were misled about it.

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[22] Speech, U.S. Attorney General William P. Barr (Oct. 3, 2019), available at https://www.justice.gov/opa/speech/us-attorney-general-william-p-barr-delivers-remarks-us-securities-and-exchange-commission (last visited on Feb. 24, 2025).

[23] Fraud Section, Criminal Division, U.S. Department of Justice, *Year in Review, 2019*, at 46 (Feb. 5, 2020), available at https://www.justice.gov/d9/fieldable-panel-panes/basic-panes/attachments/2020/02/05/2019-yir.pdf (last visited on Feb. 24, 2025).

[24] Tim Evans and Tony Cook, *Feds Charges Former Celadon Executives with Securities Fraud*, IndyStar (Dec. 5, 2019), available at https://www.indystar.com/story/news/crime/2019/12/05/former-celadon-trucking-executives-charged-fraud/2618464001/ (last visited on Feb. 24, 2025).

For instance, the memorandum failed to note that our client stated multiple times that he believed the accounting for the used truck inventory was accurate. The FD-302 memorandum failed to acknowledge that our client stated he did not believe at the time that the purchases and sales of the used trucks were interdependent on each other. Similarly, it failed to describe that our client believed that the chairman of the audit committee had requested that the outside auditor conduct its own review and was satisfied with the truck values before signing the securities filing. And, as a last example, the memorandum falsely asserted that our client admitted that his representations to the financial institution were deceptive, which our client never said.[25]

For over two years, we raised the deficiencies in our client's interview memorandum with the government and the district court. Ultimately, relying on Rule 104 of the Federal Rules of Evidence, the district court held two evidentiary hearings to determine what was said during the proffer interview. In the first hearing, the government presented its evidence, offering the testimony of an experienced FBI agent who authored the memorandum. We cross-examined the agent. None of the other prosecutors or agents present at the interview testified. In the second hearing, we presented the testimony of the defense lawyer who took transcript-style notes of the interview. In presenting that testimony of the defense lawyer, our client made a partial waiver of his work product protections. The government cross-examined our lawyer.

While the district court was considering which testimony to credit, we moved to dismiss the case for prosecutorial misconduct. We explained that there was reason to believe that there were similar errors of missing exculpatory information in other government interview memoranda of witnesses who had not spoken with us. For example, we highlighted the FBI interview memoranda of an outside auditor that failed to describe what was said in a critical audit committee meeting about the review of the used truck inventory by the outside auditing firm. Even the outside auditor repeatedly described the meeting as "not normal," which made it impossible to believe that she was not asked extensive questions by the government about what was said in this "not normal" meeting with Celadon's audit committee. Amidst all of these arguments, and even after reviewing the relevant transcript-style notes of our lawyer, the government insisted that it should be permitted to present the testimony from the FBI agent that we had shown to be false.

The district court issued two rulings. First, in an unpublished order, it ruled that the FD-302 memorandum of our client's interview "is not entirely accurate and is in some ways distorted."[26] The district court concluded that "more information is necessary to determine whether the Government's FD-302 Reports concerning statements given by potential witnesses are similarly inaccurate, or whether there is any merit to Mr. Peavler's contention that the Government may have committed systemic misconduct."[27] Using its inherent authority, the district court concluded that it was necessary to authorize the "unusual remedy" of authorizing

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[25] A full list of the 18 misstatements and omissions in the FD-302 memorandum can be found at Docket No. 251-1 in the *Peavler* case.

[26] *Peavler* case, Docket No. 267 at 2.

[27] *Id.*

ten pretrial depositions "for purposes of determining the accuracy of the FD-302 Reports concerning the witnesses' statements to the Government."[28]

Second, two weeks later, the district court elaborated on the reasons for its conclusions that the government's FD-302 memorandum and notes were "not entirely accurate and, in some ways, distort the reality of what was said, and by whom."[29] The district court explained:

> First, [the FBI agent's] contemporaneous, handwritten notes of the Proffer Interview are conclusory. They do not capture the questions that were asked, the precise answers that were given, or which individual said what. Given that the questions asked by the Government's counsel were often longer and more complex than the answers provided by Mr. Peavler, the failure to record the contents of the Proffer Interview in a question-and-answer format is problematic and, in some instances, misleading. [The agent's] FD-302 report, which was based in part on her handwritten notes and in part on her recollection of the Proffer Interview, similarly does not utilize a question-and-answer format, and instead represents a summary of her version of what she believes Mr. Peavler said during the Proffer Interview. Such a summary is not a proper substitute for Mr. Peavler's actual words.
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> Second, [the agent] appears to have misattributed statements made by other individuals to Mr. Peavler. [To support its conclusion, the district court then provided a detailed example concerning the government's false accusation of an inculpatory statement by our client.] While this evidence concerns only one of the 41 statements offered by the Government, it raises significant doubts about the accuracy of both [the agent's] FD-302 and of her recollections in general.
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> Third, the cross-examination of [the agent] was devastating. On numerous occasions—at least 150 by the Court's count—she indicated that she did not have any independent recollection about the Proffer Interview other than what was recorded in her notes or her FD-302.[30]

The district court stated that "[p]ursuant to the Proffer Agreement, the Government is entitled to use *Mr. Peavler's own statements* to impeach him or to show a contradiction between what he presents at trial and what he said during the Proffer Interview, but the Government is not entitled to use *its spin on his statements* or statements made by others for that purpose."[31] It further observed that "[i]t is the province of the jury to draw inferences from Mr. Peavler's statements, and the

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28 *Id.*

29 *Peavler* case, Docket No. 274 at 8 (available on Westlaw at 2022 WL 2967716).

30 *Id.* at 6-8.

31 *Id.* at 10 (emphases in the original).

Government may not take it upon itself to perform that function."[32] The district court concluded that the government had not proven by a preponderance of the evidence that the disputed statements were made by our client. Meanwhile, our motion to dismiss was still pending.

Shortly after we began to schedule the depositions of witnesses to show similar mistakes in other FD-302 memoranda, the government moved to dismiss the entire indictment with prejudice "in the interests of justice."[33] As a result, the pretrial depositions were not held, and we still do not know what the third-party witnesses in that case would have said if they had been called to testify at trial. While the case against our client was over, there is every reason to be concerned that similar problems are occurring in other cases on a frequent basis.

II. Discussion

We propose two substantive changes to Rule 15. First, we propose to add a new subparagraph to section (a) expressly permitting pretrial discovery depositions for defendants. Only defendants should have the right to take pretrial discovery depositions because prosecutors do not need it – they have the power to compel witnesses to testify before a grand jury. The new subparagraph would read as follows:

> **To Provide Discovery for a Defendant.** A defendant may move that a prospective witness be deposed in order to prepare for trial. The court may grant the motion in the interest of justice. The court may authorize the taking of more than five depositions if there are exceptional circumstances.

Second, we propose amending Rule 15(c)(1) to require the presence of a defendant in custody at a deposition only if the district court orders it.

A. The Amendment of Rule 15 Would Strengthen the Federal Criminal Justice System In a Variety of Ways.

There are three principal reasons to adopt this amendment to Rule 15 and to authorize a limited number of pretrial depositions: (i) it will create greater confidence in the reliability of the outcomes of criminal trials; (ii) it will create greater confidence in the criminal convictions that are obtained by guilty pleas; and (iii) it will create an important institutional safeguard to identify and prevent *Brady* violations.

The public, the courts, and the parties will have greater confidence in the outcome of criminal trials if Rule 15 is amended. The criminal justice system works best when both sides have full access to the evidence and possess an unencumbered ability to call third-party witnesses to testify. Third-party witnesses can often be most persuasive to a jury because they are not perceived to have an interest in the outcome of the case. While defendants have no

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32 *Id.*

33 *Peavler* case, Docket No. 278.

burden under the law to call any witnesses, and juries are so instructed by courts, defendants can still benefit and improve their chances of obtaining an acquittal in the right circumstances by presenting testimony from third-party witnesses about key facts.

Without an amendment to Rule 15, defense counsel do not have a practical ability to call third-party witnesses who refuse to speak with them. There is too much uncertainty. If the government does not intend to call the witness in its case-in-chief, it might not produce its FD-302 memorandum of the witness's interview to the defendant. In that circumstance, the defense may know very little about what a witness might say on the stand. When defense lawyers know so little, they will not be inclined to call a witness to testify.

Even if the government produces the FD-302 memorandum of the witness's interview to the defense and if the memorandum is accurate (which the defense lawyer usually has no way to verify), there are still many reasons for a defense lawyer to be cautious. An FD-302 memorandum will not tell the defense lawyer what questions were asked. It will not indicate whether the witness would have changed the answer if the question were worded differently. It will not reveal the witness's tone of voice, body language, the existence of any hesitation, or other contextual clues from the witness that aid a lawyer in trying to determine a witness's likely testimony. The FD-302 memorandum may have omitted important details or seemingly innocuous details that can make the difference between a witness with helpful testimony and a witness with harmful testimony. A lawyer has good reason to be reluctant to call a witness with so many uncertainties and with the client's liberty at stake.

Pretrial discovery depositions solve many of these problems. If a pretrial deposition is taken, the defense lawyer will know exactly what the witness was asked and what the witness answered. The lawyer can see if the witness might change the answer if the question is asked differently. The lawyer can observe the non-verbal cues that often speak as loudly as words. And the lawyer can press if there are any details omitted. In other words, the lawyer can make an informed and reasonably confident judgment as to whether to call the witness at trial as part of the defense case.

Moreover, pretrial depositions will also improve the defense's cross-examinations of witnesses called by the government. Defense lawyers often try to impeach government witnesses based on prior inconsistent statements reflected in the contents of FD-302 memoranda.[34] Witnesses can deflect defense questioning by claiming they do not remember what they told the government or denying that they made such statements. And the witnesses might be right that the FD-302 memoranda did not accurately capture what was said. If a defense lawyer is trying to impeach a witness based on a memorandum that does not accurately

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[34] In 2018, U.S. District Judge Katherine Forrest from the Southern District of New York issued a memorandum to parties in her courtroom with guidelines to help defense counsel because she found "counsel are often unclear as to the lines for proper 302 use." Guidelines Regarding Appropriate Use of 302 Forms in Criminal Trials at 1 (June 11, 2018), available at https://blog.federaldefendersny.org/wp-content/uploads/2018/06/Forrest-on-302s.pdf (last visited on Feb. 24, 2025). She observed that "[s]tatements contained in 302s can be very useful—and properly so—for impeachment purposes during criminal trials." *Id.*

reflect what the witness said, the use of the FD-302 memorandum only distracts the jury from finding the truth.

The better practice would be to have a written transcript from pretrial depositions to impeach witnesses or to introduce as substantive evidence if permitted by the Federal Rules of Evidence. This would allow the defendant to proceed to trial based on a transcript that the defendant (and the prosecution) knows is accurate. In attempting to find the truth in the cross-examination of a witness, most defense lawyers would find that the use of a FD-302 memorandum is a poor substitute for a written transcript prepared by a court reporter.

If defendants are given a full opportunity to develop their case, the public, the courts and the parties can have more confidence in the verdicts in criminal cases (whether in favor of the government or the defendant). No one will have to wonder whether the outcome of a trial would have been different if only the defense knew what an important witness would say and if the defense was not hampered by practical limitations on its ability to call that witness to testify.

The public, the courts, and the parties will have greater confidence in the convictions obtained by guilty pleas. The right to use pretrial depositions will also increase confidence in the soundness of convictions that are secured by guilty pleas. Early in cases, defense lawyers are often required to give advice to clients about whether to accept a plea deal or to proceed to trial. Before giving that advice, the lawyer has to discuss the strengths and weaknesses of the government's case with the client. However, throughout pretrial proceedings, the defense lawyer and the client are usually confronted with the problems that the nature of the evidence is not always clear and that the client may not get to test his or her defenses until the trial itself. Prosecutors in some districts do not even produce the FD-302 memoranda until shortly before trial. Without the ability to take depositions, a client may plead guilty to an offense without knowing whether a defense exists.

This amendment to Rule 15 would allow defense lawyers to test their clients' defenses prior to a plea agreement and before trial. Pretrial discovery depositions would allow the defense lawyer to give better and more accurate advice to the client about the relative strengths and weaknesses of the case. In many cases, the depositions may facilitate the entry of a guilty plea once the client understands the full extent of the evidence and understands that the lawyer has left no important stone unturned. If the client pleads guilty, the public, the courts, and the parties know that there was every opportunity to test the government's case and that there is every reason to believe that the client's guilty plea was obtained with full access to the information needed to make an informed decision about a plea agreement. If the pretrial depositions reveal the existence of a defense previously unknown to the defendant and dissuade the entry of a guilty plea, the allowance of the pretrial discovery depositions would prevent the conviction of the innocent and further strengthen the confidence in the criminal justice system.

The amendment would provide an important institutional safeguard against Brady violations. The amendment would create a critical mechanism to identify if exculpatory information has been withheld or otherwise missed by the Justice Department. Under the current set of rules, there is no external check that allows either district courts or defense lawyers to verify the accuracy of representations by prosecutors that they have satisfied their *Brady*

obligations. Courts generally accept the government's representation of *Brady* compliance, and the burden shifts to the defense to show why the government's representation is inaccurate. Without access to pretrial depositions and without the ability to interview unwilling witnesses, there is often no feasible way for the defense to identify the inaccuracies of the government's interview memoranda.

There are certainly many documented examples of *Brady* violations.[35] However, when *Brady* issues are discovered by defense counsel, it is often through happenstance. In the *Peavler* case, we only learned of the problematic nature of the FBI's interview memoranda because our client chose to be interviewed by the government. In the case of Senator Ted Stevens, exculpatory evidence was learned in part from a surprise FBI whistleblower complaint and in part from a FD-302 memorandum that the government produced at the last minute because it happened to call a particular FBI agent as a summary witness and realized "[t]hey were about to get caught."[36] In *United States v. Cloud*, it was only a "nick-of-time disclosure" by a witness's attorney to defense counsel that prevented the jury from hearing "tainted testimony" and from defense counsel being forced to cross-examine that key witness without knowledge of "the motivation for her testimony."[37]

There is good reason to believe that *Brady* violations occur far more frequently than they are reported. The government does not record most interviews of witnesses and instead relies on FBI or other law enforcement agents to take handwritten notes of the interviews and then prepare a typewritten memorandum of the interview. The typical FD-302 memorandum contains the

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35 *See, e.g.*, *United States v. Rozier*, No. 1:22-CR-27, 2024 WL 3897786, at *10 (N.D. Ind. Aug. 22, 2024) (granting new trial based on an undisclosed government interview memorandum because "the undisclosed information could make the difference between conviction and acquittal on the ten counts in the superseding indictment"); *United States v. Cloud*, 102 F.4th 968, 971 (9th Cir. 2024) (affirming monetary sanctions against the government, which were imposed under the district court's exercise of supervisory powers, because of *Brady* violations); *United States v. Robinson*, 68 F.4th 1340, 1351 (D.C. Cir. 2023) (ordering new trial because of *Brady* violations); *United States v. Bundy*, 968 F.3d 1019, 1023 (9th Cir. 2020) (affirming dismissal of indictment as remedy to *Brady* violations); *United States v. Obagi*, 965 F.3d 993, 998 (9th Cir. 2020) (finding *Brady* violation from late disclosure); *United States v. Nunez*, 791 F. App'x 347, 351-52 (3d Cir. 2019) (finding a willful *Brady* violation by the government, though no prejudice to the defendant); *United States v. Martinez*, 388 F. Supp. 3d 225, 236 (E.D.N.Y. 2019) (ordering a new trial based on a *Brady* violation). *Cf. United States v. Nejad*, 487 F. Supp. 3d 206, 208, 214 (S.D.N.Y. 2020) (concluding that prosecutors "repeatedly violated their disclosure obligations and, at best, toed the line with respect to their duty of candor . . ." and observed that "in the last criminal case tried before [the district court], the Government also seriously breached its *Brady* obligations.").

36 Rob Cary, *Not Guilty: The Unlawful Prosecution of U.S. Senator Ted Stevens* 128-145 (2014); *id.* at 273-276; *id.* at 130 (asserting that exculpatory information was produced as *Giglio* material because "[t]hey were about to get caught"); *id.* at 143 ("We only got [undisclosed *Brady* information] because we were lucky").

37 *Cloud*, 102 F.4th at 980.

same flaws identified by the district court in the *Peavler* case: it does not identify the questions or questioner, it provides a broad summary of the witness's answer in a narrative form, and can easily conflate the question with the answer. It is not easy to take transcript-style notes, and most agents have a heavy workload that discourages the taking of transcript-style notes for interviews that can last several hours. In the *Peavler* case, for instance, the two lead FBI agents authored 44 separate FD-302 memoranda concerning witness interviews.

This proposed amendment of Rule 15 should not be construed as a criticism of FBI agents or federal prosecutors. They have a difficult job. Most prosecutors, agents, and witnesses speak faster than FBI agents can write. The FBI has declined to require the recording of every witness interview, leaving agents in a difficult position. Moreover, criminal cases can be very complex, and even prosecutors and agents acting in good faith can commit *Brady* violations.[38] However, the cost of the current system is that innocent people can be convicted without the necessary access to all of the exculpatory evidence. When even prosecutors and agents of good faith can commit *Brady* violations, it is essential to create an external safeguard that can protect defendants in systematic way from being forced to proceed to trial without all of the exculpatory evidence.

We believe the proposed amendment would create an important institutional safeguard. It would allow defense lawyers to depose the most important witnesses in the case and explore whether there is any exculpatory information that has not been produced to the defense. When there are outright errors in FBI memoranda, defense counsel can expose them. Where there are holes in the contents of FBI interview memoranda (like with the interview memoranda of the outside auditor in the *Peavler* case), pretrial depositions would allow defense lawyers to determine what is missing. Where questions were not asked by the government, the defense lawyer can obtain the answer in a pretrial deposition. When there are conflicting statements in FBI interview memoranda, pretrial depositions would permit questioning to resolve the inconsistencies and determine whether the defense has received accurate information.

If the amendment is adopted, it would create the most effective institutional check in our judicial system to identify and prevent cases where exculpatory evidence is not being produced. It would save innocent people from being unjustly convicted. It would allow for more robust trials. It would permit the courts to gain the factual basis necessary to understand how often exculpatory information is not being produced by the government. The amendment would strengthen our system in nearly every respect.

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[38] *See, e.g.*, *Stickler v. Greene*, 527 U.S. 263, 280 (1999) (observing that a *Brady* violation can occur "irrespective of the good faith or bad faith of the prosecution").

B. There Would Be Strong Safeguards to Protect Against Improper Use of Depositions.

This proposal contains protections against the dangers that have animated previous concerns about pretrial discovery depositions.

District courts would have to approve the taking of pretrial discovery depositions. First, in contrast to depositions in civil cases, the district court would have to approve the taking of any pretrial discovery depositions. A defendant would have the burden of showing that the depositions are necessary and in the interest of justice. District courts would have discretion to limit the number of depositions or to impose other conditions necessary to ensure the fairness of the depositions.

A defendant would need to satisfy the burden with a submission to the district court explaining why a pretrial discovery deposition is in the interest of justice. The defendant would have to explain why a deposition is necessary and confirm that the witness will not otherwise speak with defense counsel. In a portion of the submission that would likely need to be *ex parte*, the defendant would have to explain how this witness's testimony could be relevant to the defense's case-in-chief, and may need to reveal theories of the defense. With this kind of submission, the district court would have the necessary factual predicate to decide whether a pretrial discovery deposition is in the interest of justice.

As described above, previous versions of Rule 15 required that depositions only be taken of a party's own "prospective witness" and that a defendant could not take a deposition of the government's witness. However, throughout the pretrial proceedings, it is difficult to know whether a witness will be called by the government or the defense. Sometimes, the government plans to call a witness, but then changes its mind before trial. The same is true for the defense. Meanwhile, when defense lawyers are uncertain as to how some witnesses will respond to specific questions, it is difficult to know in advance whether that witness is a "prospective witness" for the government or the defense. There may be witnesses whom the government intends to rely upon, but who would be more accurately characterized as witnesses for the defense once the facts are known. Because the purpose of pretrial discovery depositions is, in part, to identify which witnesses to call in the defense case-in-chief, there should be no limitations on which witnesses can be deposed.

The district court would have discretion to respond to any well-founded concerns about witness safety, harassment, obstruction of justice, or improper influencing of witnesses. If there were any significant concerns about the dangers of a witness's appearance at a pretrial deposition, the district judge could deny a defendant's motion to take a pretrial deposition as not being in the interest of justice. The district court would have broad discretion in making this assessment, and the government would have every opportunity to object on these grounds.

There may be some cases that are not as suitable for pretrial discovery depositions. For instance, in cases involving allegations of terrorism or violent crimes, the district court may conclude that pretrial depositions are not appropriate for some or all of the witnesses. Those types of considerations – weighing concerns of safety, harassment, obstruction of justice, or

improper influencing of witnesses – are already undertaken by district courts in assessing whether defendants should be released before trial and, if so, under what conditions. Those types of issues should be weighed on a case-by-case basis, and pretrial discovery depositions should not be foreclosed for all cases and all defendants simply because they are not appropriate for some cases and some defendants.

Concerns about witness safety or obstruction of justice can be overstated in some circumstances. There is no shortage of criminal statutes that the government can use to prosecute anyone for any effort to dissuade, intimidate, improperly influence, or harm a witness or otherwise obstruct justice. The district court is in the best position to assess in each individual case whether those types of concerns should override a defendant's ability to obtain pretrial discovery depositions in the interest of justice.

Costs and burden could be controlled by a presumptive cap of five depositions unless a defendant could show the existence of exceptional circumstances. By setting a presumptive limit on the number of depositions, the amendment to Rule 15 would limit the cost and expense imposed on the parties and limit concerns about defendants conducting fishing expeditions. This limit would encourage defendants and their counsel to focus on the witnesses whose testimony could be most important at trial and would not otherwise be available to the defense before trial. In most cases, five depositions should be sufficient to understand the risks of proceeding to trial and the existence of exculpatory evidence not otherwise revealed.

To further reduce costs of pretrial discovery depositions, we propose to amend Rule 15(c)(1) to not require the government to arrange for the presence of a detained defendant at a pretrial deposition unless the district court orders it. If a pretrial deposition is being taken for discovery purposes and not to preserve testimony for trial, it may not be necessary for a defendant to attend the deposition. The purpose of a pretrial discovery deposition is to ensure that defense counsel has obtained all of the facts, which is not dissimilar to the purpose of other witness interviews typically conducted outside of the presence of defendants. The district court would be in the best position to make a case-by-case determination of whether it would be necessary for the government to produce a defendant in custody for a pretrial discovery deposition.

There would not be a significant risk of "trials by deposition." The use of discovery depositions would not present a significant risk that federal criminal trials would become "trials by deposition," a concern expressed by the House Conference Report in 1975. In contrast to civil cases, there is nationwide service of process for witnesses to appear at trial. If the witness is available to appear at trial, then the prior deposition testimony is likely to be hearsay and inadmissible.[39] Prosecutors have their own incentives to present live witnesses at trial, because

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39 FED. R. EVID. 801(c); *see also, e.g.*, FED. R. EVID. 804(b)(1) (stating that former testimony is not excluded by the rule against hearsay if the declarant is unavailable as a witness and the testimony "(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and (B) is now offered against a party who had--or, in a civil case, whose predecessor in interest had--an opportunity and similar motive to develop it by direct, cross-, or redirect examination.").

live witnesses are much more credible and persuasive with juries than witnesses appearing by videotaped depositions.

Moreover, defense lawyers would have their own motivations not to take pretrial discovery depositions in many circumstances. There is always a possibility that a pretrial deposition could alert the government to previously unknown inculpatory evidence. Testimony from pretrial depositions might be admissible in some circumstances, including when the witness is "unavailable" at trial. Some defense lawyers might be concerned that the use of pretrial depositions would tip off the government to defense strategy and allow time for the government to undermine it. Other lawyers might be concerned that the government would later speak with the deposed witness and persuade the witness that his or her recollections were mistaken, negating any benefit for the defense from the deposition testimony. And even more lawyers might be more comfortable pursuing a traditional reasonable doubt defense without introducing any affirmative testimony in the defense case-in-chief.

However, even if some defense lawyers do not want to seek pretrial depositions for their own strategic reasons, it should not eliminate the option for every defense lawyer and every defendant in every case. Some defense lawyers and their clients may decide that the benefits of pretrial discovery depositions outweigh the risks, particularly if it is the only way to ensure that they obtain exculpatory evidence before trial. In the *Peavler* case, we concluded that the depositions were necessary to ensure that we had all of the exculpatory evidence and did not have to rely on inaccurate government memoranda to prepare for trial. Rule 15 should not foreclose options for creative lawyering and dictate the outcome of strategic decisions that should be made by defendants and their counsel.

C. States Have Successfully Permitted Pretrial Discovery Depositions in Criminal Cases.

A number of states have shown that pretrial discovery depositions can strengthen the criminal justice system in essential ways. These states include Florida, Indiana, Arizona, Iowa, Missouri, Nebraska, North Dakota, and Vermont. While there are differences among these States' procedures for pretrial depositions, they largely follow the same pattern and provide a critical outlet for a defendant to discover the existence of exculpatory evidence.

Florida. Florida has permitted discovery depositions in criminal cases since 1968.[40] Over its 57-year existence, Florida's rule has been extensively studied and challenged. For instance, in 1989, after commissioning a 95-page blue ribbon report on the issue at the request of the Florida legislature, the Florida Supreme Court observed:

> From all the evidence and testimony taken during the proceedings one fact is clear: virtually all parties at oral argument recognized that depositions in criminal cases play a necessary role in our criminal justice system by insuring fairness and equal administration of justice. Moreover, although there are undeniably some abuses of the deposition process, such abuses are not nearly as widespread as

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40 FLA. RULE OF CRIM. PROC. § 3.220.

> originally feared. Indeed, the records and transcripts in these proceedings lead to a single inevitable conclusion. Discovery depositions are a necessary and valuable part of our criminal justice system, and they are clearly worth the risk of some minor abuse. Although we are amending the discovery rule in hopes of curtailing these abuses, we retain discovery depositions in all cases except misdemeanor cases, where depositions may only be taken upon a showing of good cause.[41]

To prevent potential "abuses," the Florida Supreme Court modified the rule so that defendants could not be present at depositions without court approval.[42]

In 1995, the Florida Supreme Court revisited the discovery depositions rule and made further modifications, amending the rule so that the trial judge had authority to disallow the taking of a deposition.[43] However, the Florida Supreme Court reaffirmed its finding from six years earlier that depositions in criminal cases "play a necessary role in our criminal justice system by insuring fairness and equal administration of justice" and rejected efforts to "substantially limit the availability" of pretrial discovery depositions.[44]

Indiana. The Indiana Supreme Court has observed that "depositions are a routine component of pre-trial practice, both in civil and criminal matters."[45] Indiana's current statute provides that "[t]he state and the defendant may take and use depositions of witnesses in accordance with the Indiana Rules of Trial Procedure."[46] "[C]ourts can limit criminal defendants' discovery privileges—including depositions—if they find 'the defendant has no legitimate defense interest . . . or that the State has a paramount interest to protect.'"[47] Like Florida, Indiana has a long history of permitting pretrial discovery depositions in criminal

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41 *In re Amend. to Fla. Rule of Crim. Proc. 3.220 (Discovery)*, 550 So.2d 1097, 1098 (Fla. 1989).

42 *Id.*

43 *In re Amend. to Fla. Rule of Crim. Proc. 3.220(h)*, 668 So.2d 951, 952 (Fla. 1995), *supplemented sub nom. In re Amend. to Fla. Rule of Crim. Proc. 3.220(h) & Fla. Rule of Juv. Proc. 8.060(d)*, 681 So.2d 666 (Fla. 1996).

44 *Id.* at 951.

45 *Church v. State*, 189 N.E.3d 580, 586 (Ind. 2022).

46 IND. CODE ANN. § 35-37-4-3 (2024).

47 *Church*, 189 N.E.3d at 586 (quoting *Murphy v. State*, 352 N.E.2d 479, 481–82 (1976)).

cases.[48] As early as 1968, the Indiana Supreme Court recognized the taking of pretrial discovery depositions is a "practical necessity" in some cases.[49]

Arizona. Rule 15.3(a)(2) of Arizona's Rules of Criminal Procedure permits a court to order a pretrial deposition where, among other things, "a party shows that the person's testimony is material to the case or necessary to adequately prepare a defense or investigate the offense, that the person was not a witness at the preliminary hearing or at the probable cause phase of the juvenile transfer hearing, and that the person will not cooperate in granting a personal interview . . . ."[50] The court can "modify any of the moving party's proposed terms and specify additional conditions governing how the deposition will be conducted."[51] While a defendant has the right to present for pretrial depositions to preserve evidence, that right does not exist for discovery depositions.[52] Finally, "[a] victim has the right to refuse a deposition by the defendant, defendant's attorney, or other person acting on behalf of the defendant."[53]

Iowa. Rule 2.13(1) of Iowa's Rules of Criminal Procedure allows for pretrial discovery depositions, but only for witnesses listed by the government in the minutes of testimony.[54] Under that rule, "[a] defendant in a criminal case may depose all witnesses listed by the State in the minutes of testimony in the same manner, with the same effect, and with the same limitations, as in civil actions except as otherwise provided by statute and these rules." Before taking any depositions, a defendant is required to "file a written list of the names and addresses of all witnesses expected to be called for the defense except the defendant and surrebuttal witnesses" and update that list as the case progresses.[55] The state is permitted to take depositions

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48 *See, e.g.*, *Amaro v. State*, 239 N.E.2d 394, 397 (Ind. 1968) (framing the issue as "[d]oes Burns's 9-1610 (supra) grant to criminal defendants the right to take depositions of potential witnesses without a showing that the witness will not be able to testify on trial, to be denied by the Trial Court only where a paramount interest of the State is shown?" and concluding "[w]e think that within the confines of a limited discretion of the Trial Court to prevent 'fishing expeditions' or other abuses, the answer is yes.").

49 *Id.* at 398.

50 ARIZ. R. CRIM. P. 15.3(a)(2).

51 ARIZ. R. CRIM. P. 15.3(c)(2).

52 ARIZ. R. CRIM. P. 15.3(e).

53 ARIZ. R. CRIM. P. 15.3(v).

54 *State v. Weaver*, 608 N.W.2d 797, 801 (Iowa 2000) (holding that a defendant did not have the right to take a pretrial discovery deposition under a predecessor rule when the "proposed deponent, the victim, was not listed in the minutes of testimony").

55 IOWA R. CRIM. P. 2.13(2)(a)-(b).

of witnesses on the defendant's list.[56] With limited exceptions, the defendant is required to be personally present at all depositions.[57] "If either party objects to the taking of a deposition, the court shall determine whether discovery of the witness is necessary in the interest of justice and shall allow or disallow the deposition."[58]

Missouri. Missouri provides that a defendant "in any criminal case after an indictment or the filing of an information may obtain the deposition of any person on oral examination or written questions.[59] A defendant "shall not be physically present at a discovery deposition except by agreement of the parties or upon court order for good cause shown."[60] Missouri has a series of rules governing when a defendant or prosecutors can take a deposition to preserve testimony, the circumstances under which a defendant or prosecutors can use the deposition as admissible evidence, and the circumstances when prosecutors can take pretrial depositions.[61]

Nebraska. Nebraska provides for pretrial discovery depositions through a statute that places the burden on the party seeking the deposition. With limited exceptions, "at any time after the filing of an indictment or information in a felony prosecution, the prosecuting attorney or the defendant may request the court to allow the taking of a deposition of any person other than the defendant who may be a witness in the trial of the offense."[62] However, the court may only order the taking of the deposition if the testimony of the witness "(a) may be material or relevant to the issue to be determined at the trial of the offense; or (b) may be of assistance to the parties in the preparation of their respective cases."[63] "If the requisite showing is made, a deposition taken pursuant to this statute may be used at the trial by any party solely for the purpose of contradicting or impeaching the testimony of the deponent as a witness."[64]

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[56] IOWA R. CRIM. P. 2.13(2)(d).

[57] IOWA R. CRIM. P. 2.13(5).

[58] IOWA R. CRIM. P. 2.13(3).

[59] MO. SUP. CT. R. 25.12(a).

[60] MO. SUP. CT. R. 25.12(c).

[61] MO. SUP. CT. R. 25.13-25.16.

[62] NEB. REV. STAT. ANN. § 29-1917(1) (2024).

[63] NEB. REV. STAT. ANN. § 29-1917(1)(a)-(b).

[64] *State v. Vela*, 777 N.W.2d 266, 291 (Neb. 2010).

North Dakota. North Dakota permits discovery depositions without a motion to the court.[65] Upon a motion, however, a court may cancel or set conditions on the deposition if the deposition would "unreasonably annoy, embarrass, or oppress, or cause undue burden or expense to, the deponent or a party."[66] "[A] victim may refuse to participate in a deposition requested by the defendant or the defendant's attorney."[67] "The defendant may be present at the taking of a discovery deposition, but if the defendant is in custody, the defendant may be present only with leave of court."[68]

Vermont. Under Rule 15, "[a] defendant or the state, at any time after the filing of an indictment or information charging a felony, or charging a misdemeanor if authorized under subdivision (e)(4), may take the deposition of a witness subject to such protective orders and deposition schedule as the court may impose."[69] "The defendant shall not be physically present at the deposition except by agreement of the parties or upon court order for good cause shown."[70] Vermont's Rule 15 contains a detailed set of directives concerning many issues, including notifications that must be provided to the deponent.[71]

Our proposed amendment takes the best features from these existing state statutes and rules. Our amendment provides for a straightforward procedure that would not impose substantial burdens on the parties. It would provide the defendant with the ability to build its case through third-party testimony and to discover exculpatory evidence before trial. It would provide a safeguard to ensure that the government has disclosed all of the exculpatory evidence in its possession. It would provide the district court with the information and flexibility necessary to ensure that a pretrial discovery deposition is in the interest of justice. It would allow the district court to tailor the conditions of the depositions to fit the individual circumstances of each case.

III. Conclusion

Our proposed amendment of Rule 15 is necessary to fix a recurring problem – there are too many significant practical limitations on a defense lawyer's ability to learn of and offer exculpatory testimony from third-party witnesses. The *Peavler* case offered a unique window into how much exculpatory evidence can be missed or not recorded under the current rules.

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65 *See generally* N.D. R. CRIM. P. 15(a).

66 N.D. R. CRIM. P. 15(a)(4).

67 N.D. R. CRIM. P. 15(a)(5).

68 N.D. R. CRIM. P. 15(f)(1).

69 VT. R. CRIM. P. 15(a).

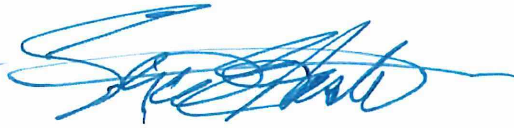
70 VT. R. CRIM. P. 15(b).

71 *See, e.g.*, VT. R. CRIM. P. 15(f).

Rather than permit pretrial depositions of other witnesses to determine the extent of missing or erroneous information in the government's FD-302 memoranda, the government in *Peavler* moved to dismiss the indictment with prejudice in the interests of justice. Defendants should not have to assume that they have received all exculpatory information from the government when they have no objective means to verify it.

Rule 15 was initially adopted in 1944, nearly twenty years before the Supreme Court issued its *Brady v. Maryland* decision. Since that time, federal criminal cases have become considerably more complicated and usually involve far more documents, and there is no institutional safeguard to ensure that exculpatory information is being identified and produced to defendants for use at trial. That should change. For decades, a number of states have shown it can be done. We respectfully suggest that Rule 15 should be amended to permit a limited number of pretrial discovery depositions in criminal cases.

Sincerely,



Michael Kelly — Sergio Acosta

cc: The Honorable James C. Dever III
United States District Judge
Chair, Advisory Committee on Criminal Rules

Professor Sara Sun Beale
Duke University School of Law
Reporter, Advisory Committee on Criminal Rules

Professor Nancy J. King
Vanderbilt University School of Law
Associate Reporter, Advisory Committee on Criminal Rules

Enclosure

Proposed Redlined Amendments to Federal Rule of Criminal Procedure 15

Rule 15. Depositions

(a) When Taken.

(1) **~~In General~~To Preserve Testimony for Trial.** A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice. If the court orders the deposition to be taken, it may also require the deponent to produce at the deposition any designated material that is not privileged, including any book, paper, document, record, recording, or data.

(2) **To Provide Discovery for a Defendant.** A defendant may move that a prospective witness be deposed in order to prepare for trial. The court may grant the motion in the interest of justice. The court may authorize the taking of more than five depositions if there are exceptional circumstances.

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(3~~2~~) **Detained Material Witness.** A witness who is detained under 18 U.S.C. § 3144 may request to be deposed by filing a written motion and giving notice to the parties. The court may then order that the deposition be taken and may discharge the witness after the witness has signed under oath the deposition transcript.

(b) Notice.

(1) **In General.** A party seeking to take a deposition must give every other party reasonable written notice of the deposition's date and location. The notice must state the name and address of each deponent. If requested by a party receiving the notice, the court may, for good cause, change the deposition's date or location.

(2) **To the Custodial Officer.** A party seeking to take the deposition must also notify the officer who has custody of the defendant of the scheduled date and location.

(c) Defendant's Presence.

(1) **Defendant in Custody.** If ordered by a court, and ~~E~~except as authorized by Rule 15(c)(3), the officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant:

(A) waives in writing the right to be present; or

(B) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion.

(2) **Defendant Not in Custody.** Except as authorized by Rule 15(c)(3), a defendant who is not in custody has the right upon request to be present at the deposition, subject to any conditions imposed by the court. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant--absent good cause--waives both the right to appear and any objection to the taking and use of the deposition based on that right.

(3) **Taking Depositions Outside the United States Without the Defendant's Presence.** The deposition of a witness who is outside the United States may be taken without the defendant's presence if the court makes case-specific findings of all the following:

(A) the witness's testimony could provide substantial proof of a material fact in a felony prosecution;

(B) there is a substantial likelihood that the witness's attendance at trial cannot be obtained;

(C) the witness's presence for a deposition in the United States cannot be obtained;

(D) the defendant cannot be present because:

(i) the country where the witness is located will not permit the defendant to attend the deposition;

(ii) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or

(iii) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing; and

(E) the defendant can meaningfully participate in the deposition through reasonable means.

(d) **Expenses.** If the deposition was requested by the government, the court may--or if the defendant is unable to bear the deposition expenses, the court must--order the government to pay:

(1) any reasonable travel and subsistence expenses of the defendant and the defendant's attorney to attend the deposition; and

(2) the costs of the deposition transcript.

(e) **Manner of Taking.** Unless these rules or a court order provides otherwise, a deposition must be taken and filed in the same manner as a deposition in a civil action, except that:

(1) A defendant may not be deposed without that defendant's consent.

(2) The scope and manner of the deposition examination and cross-examination must be the same as would be allowed during trial.

(3) The government must provide to the defendant or the defendant's attorney, for use at the deposition, any statement of the deponent in the government's possession to which the defendant would be entitled at trial.

(f) **Admissibility and Use as Evidence.** An order authorizing a deposition to be taken under this rule does not determine its admissibility. A party may use all or part of a deposition as provided by the Federal Rules of Evidence.

(g) **Objections.** A party objecting to deposition testimony or evidence must state the grounds for the objection during the deposition.

(h) **Depositions by Agreement Permitted.** The parties may by agreement take and use a deposition with the court's consent.

TAB 8C

Rule 15. Depositions.

(a) **When Taken**.

(1) *In General*. (i) A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice. (ii) A party may also move that a prospective witness be deposed for purposes of discovery. The court shall grant the motion for up to five deponents, so long as it finds that the testimony of the prospective witness(es) will likely be material to the issues at trial, and that there are no compelling reasons to deny the deposition. The court may impose whatever conditions it deems necessary for the conduct of the deposition, and may permit additional depositions in its discretion. (iii) If the court orders the deposition to be taken, it may also require the deponent to produce at the deposition any designated material that is not privileged, including any book, paper, document, record, recording, or data.

(2) *Detained Material Witness*. A witness who is detained under 18 U.S.C. §3144 may request to be deposed by filing a written motion and giving notice to the parties. The court may then order that the deposition be taken and may discharge the witness after the witness has signed under oath the deposition transcript.

(b) **Notice**.

(1) *In General*. A party seeking to take a deposition must give every other party reasonable written notice of the deposition's date and location. The notice must state the name and address of each deponent. If requested by a party receiving the notice, the court may, for good cause, change the deposition's date or location.

(2) *To the Custodial Officer*. A party seeking to take the deposition must also notify the officer who has custody of the defendant of the scheduled date and location.

(c) **Defendant's Presence**.

(1) *Defendant in Custody*.

(a) Except as authorized by Rule 15(c)(3), as to a deposition to perpetuate testimony, a defendant in custody has the right upon request to be present at the deposition, subject to any conditions imposed by the court. The court shall order that the the officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant:

(A) waives in writing the right to be present; or

(B) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion.

(b) As to a discovery deposition, the defendant shall have no right to attend, but the court may permit such attendance in the interest of justice, subject to any conditions deemed necessary. In the event the defendant's presence is permitted, the court shall order that the officer who has custody of the defendant produce the defendant at the deposition and keep the defendant in the witness's presence during the examination.

(2) *Defendant Not in Custody*. Except as authorized by Rule 15(c)(3), as to a deposition to perpetuate testimony, a defendant who is not in custody has the right upon request to be present at the deposition, subject to any conditions imposed by the court. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant – absent good cause – waives both the right to appear and any objection to the taking and use of the deposition based on that right. As to a discovery deposition, the defendant shall have no right to attend, but the court may permit such attendance in the interest of justice, subject to any conditions deemed necessary.

(3) *Taking Depositions Outside the United States Without the Defendant's Presence*. The deposition of a witness who is outside the United States may be taken without the defendant's presence if the court makes case specific findings of all the following:

(A) the witness's testimony could provide substantial proof of a material fact in a felony prosecution;

(B) there is a substantial likelihood that the witness's attendance at trial cannot be obtained;

(C) the witness's presence for a deposition in the United States cannot be obtained;

(D) the defendant cannot be present because:

(i) the country where the witness is located will not permit the defendant to attend the deposition;

(ii) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or

(iii) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing; and

(E) the defendant can meaningfully participate in the deposition through reasonable means.

(d) **Expenses**. If the deposition was requested by the government, the court may-or if the defendant is unable to bear the deposition expenses, the court must-order the government to pay:

(1) any reasonable travel and subsistence expenses of the defendant and the defendant's attorney to attend the deposition; and

(2) the costs of the deposition transcript.

(e) **Manner of Taking**. Unless these rules or a court order provides otherwise, a deposition must be taken and filed in the same manner as a deposition in a civil action, except that:

(1) A defendant may not be deposed without that defendant's consent.

(2) The scope and manner of the deposition examination and cross-examination must be the same as would be allowed during trial.

(3) The government must provide to the defendant or the defendant's attorney, for use at the deposition, any statement of the deponent in the government's possession to which the defendant would be entitled at trial.

(f) **Admissibility and Use as Evidence**. An order authorizing a deposition to be taken under this rule does not determine its admissibility. A party may use all or part of a deposition as provided by the Federal Rules of Evidence.

(g) **Objections**. A party objecting to deposition testimony or evidence must state the grounds for the objection during the deposition.

Rule 15. Depositions.

(a) **When Taken**.

(1) *In General*. (i) A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice. (ii) A party may also move that a prospective witness be deposed for purposes of discovery. The court shall grant the motion for up to five deponents, so long as it finds that the testimony of the prospective witness(es) will likely be material to the issues at trial, and that there are no compelling reasons to deny the deposition. The court may impose whatever conditions it deems necessary for the conduct of the deposition, and may permit additional depositions in its discretion. (iii) If the court orders the deposition to be taken, it may also require the deponent to produce at the deposition any designated material that is not privileged, including any book, paper, document, record, recording, or data.

(2) *Detained Material Witness*. A witness who is detained under 18 U.S.C. §3144 may request to be deposed by filing a written motion and giving notice to the parties. The court may then order that the deposition be taken and may discharge the witness after the witness has signed under oath the deposition transcript.

(b) **Notice**.

(1) *In General*. A party seeking to take a deposition must give every other party reasonable written notice of the deposition's date and location. The notice must state the name and address of each deponent. If requested by a party receiving the notice, the court may, for good cause, change the deposition's date or location.

(2) *To the Custodial Officer*. A party seeking to take the deposition must also notify the officer who has custody of the defendant of the scheduled date and location.

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(B) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion.

(b) As to a discovery deposition, the defendant shall have no right to attend, but the court may permit such attendance in the interest of justice, subject to any conditions deemed necessary. In the event the defendant's presence is permitted, the court shall order that the officer who has custody of the defendant produce the defendant at the deposition and keep the defendant in the witness's presence during the examination.

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(C) the witness's presence for a deposition in the United States cannot be obtained;

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(ii) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or

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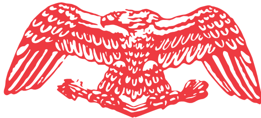
(2) The scope and manner of the deposition examination and cross-examination must be the same as would be allowed during trial.

(3) The government must provide to the defendant or the defendant's attorney, for use at the deposition, any statement of the deponent in the government's possession to which the defendant would be entitled at trial.

(f) **Admissibility and Use as Evidence**. An order authorizing a deposition to be taken under this rule does not determine its admissibility. A party may use all or part of a deposition as provided by the Federal Rules of Evidence.

(g) **Objections**. A party objecting to deposition testimony or evidence must state the grounds for the objection during the deposition.



Federal Bar Council Quarterly

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In My View

No Depositions in Federal Criminal Cases? It's Time to Revisit That Rule

By Larry H. Krantz

I have a recurring nightmare. I represent a client charged with securities fraud. He is facing 20 years. The indictment against him tracks the language of the statute, but provides no particularity. My request for a bill of particulars was denied. I have deposed none of the witnesses because the rules do not permit it. Nor have I interviewed any witnesses, because they refused to speak with me. They did not want to be involved and feared provoking the ire of the government. I have spoken with my client, who tearfully denies his guilt.

The trial starts. The prosecutors present a smooth case. They have prepared their witnesses in dozens of prep sessions. They have spoken to them all, in private, and know what they will say. I have been given notes of those conversations but they contain only what the law enforcement agents who were present chose to write down. In the last several prep sessions no notes at all were taken. Those few witnesses who refused to speak with the prosecutor were subpoenaed to testify in the grand jury. I could not be present or submit questions. I do have transcripts of that grand jury testimony, but the questions were barebones and designed to elicit only information helpful to the prosecution.

At trial there are a slew of new allegations against my client. I am left to blindly cross-examine. I ask only questions where:

(1) The witness's answer is locked in, based on documents;

(2) Logic compels only one answer; or

(3) I have a good plan of action regardless of the answer given.

I call no witnesses, because I cannot take the risk of calling them blind. I do my best to cross-examine but it feels like I have one hand tied behind my back. In summation, I hammer the presumption of innocence and the reasonable doubt standard, but it is not enough and the result is predictable: my client is convicted.

I wake-up in a cold sweat. But then I fall back to sleep.

I dream again. This time I have another federal criminal trial. I am representing the same client against the same allegations of securities fraud. But this time it is a civil case. All that is at issue is money. For this trial, the complaint spelled out the fraud with particularity, as required by the rules. Then, in discovery, I deposed every meaningful witness. I learned how their testimony was helpful and how it was damaging. I learned the holes in their testimony. I previewed areas of potential cross-examination. At trial I am prepared. There are no surprises. I know the questions to ask and the witnesses to call. Through cross-examination and presentation of my own witnesses, I prove what is needed. I sum up with confidence and the jury quickly finds for my client. I wake with a smile.

The Real World

As you have no doubt gathered, my nightmare and my dream are not just fantasies. They are reflections, albeit oversimplified, of the striking dichotomy between criminal and civil practice under the federal rules. That dichotomy is perhaps nowhere more glaring than as to the right to depositions. One need only compare Federal Rule of Civil Procedure 30 with Federal Rule of Criminal Procedure 15. Rule 30 encourages depositions as a critical part of the truth-seeking process:

Rule 30.

(a) When a Deposition May Be Taken.

> (1) *Without Leave*. A party may, by oral questions, depose any person, including a party, without leave of court. . . . The deponent's attendance may be compelled by subpoena under Rule 45.

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Rule 15 does the opposite. It eliminates depositions, except in the rarest instance where they are necessary to preserve testimony:

Rule 15. Depositions
(a) When Taken.

> (1) *In General*. A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice. . . .

This opposite treatment of the right to depositions under the civil versus criminal rules cries out for an answer to the question: Why? Intuitively, one would think that the criminal rules would be more permissive as to discovery, given that liberty rather than money is at stake. But the reverse is true.

So how did the rules on civil discovery become so different from the criminal rules? The answer lies in a decision made 80 years ago, and may surprise you.

The Dichotomy Between the Civil and Criminal Rules

The roots of the split between the civil and criminal rules are examined by Professor Ion Meyn in his article "Why Civil and Criminal Procedure Are So Different: A Forgotten History." 86 Fordham L. Rev. 697 (2017) ("Meyn"). As he explains, for centuries under the common law, federal criminal and civil procedure operated under the same rules – and in neither instance were depositions generally permitted. Rather, it was a two-step process: pleading to trial. Meyn at 701. But the civil rules underwent a radical transformation with the enactment of the Federal Rules of Civil Procedure in 1938. Under those rules, civil practice went to a three step process that included an in-between phase, discovery, which became the "heart" of litigation. *Id*. at 705-06.

The reforms embodied in the Rules of Civil Procedure were widely praised. The U.S. Supreme Court itself said a few years later in *Hickman v. Taylor*, 329 U.S. 495, 501 (1947):

> [C]ivil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for parties to obtain the fullest possible knowledge of the issues and facts before trial.

With the enactment of the civil rules complete, in 1940 Congress authorized the Supreme Court to draft rules of criminal procedure. Meyn at 707. The Supreme Court delegated its authority to a new advisory committee, just as it had done for the civil rules. *Id.* at 705-706. The Supreme Court appointed New York University Law Professor Arthur Vanderbilt as chair, Professor James Robinson as reporter, and Alexander Holtzoff, a special assistant to the U.S. Attorney General, as secretary. *Id.* at 707-708. The committee members were all prosecutors or academics. There was no representation from the defense bar. *Id*. at 729.

In a slice of history largely lost until Professor Meyn's research, the committee's initial approach to drafting the criminal rules was to mirror the reforms embodied in the recently enacted civil rules. According to documents uncovered by Professor Meyn, the first draft of the criminal procedure rules, which were written in 1941, adopted the civil rules "almost [in] whole cloth." *Id*. at 720. As the committee's reporter wrote about the draft: "[The] criminal rules follow as closely as possible in organization, in numbering and in substance the Federal Rules of Civil Procedure." *Id*. at 710. As justification, the reporter explained: "[T]he civil rules . . . have won a deserved prestige. There is no reason why the criminal rules might not well follow as closely as possible the plan and content of the civil rules and in that way gain some of the same confidence that has been afforded the criminal rules." *Id*. at 711. This mirroring of the civil rules in the first draft of the criminal rules included key aspects of the newly created discovery phase, including "depositions, document requests, physical and mental examinations, and requests for admission." *Id*. at 720.

Professor Meyn's conclusion is confirmed in a 1957 law review article by Professor Lester Orfield, who served on the original advisory committee. He wrote that "Rules 26 through 32 of the First Draft of the Federal Rules of Criminal Procedure dated September 8, 1941, were modeled on Rules 26 through 32 of the Federal Rules of Civil Procedure." Lester Orfield, *Depositions in Federal Criminal Cases*, South Carolina Law Review, Vol. 9: Iss. 3, Article 4, p. 2 (1957) ("Orfield").

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The full committee met in September 1941 to consider this first draft. While the draft had taken six months to complete, it "was undone in four days." Meyn at 712. According to the committee's internal notes, uncovered by Professor Meyn, this was principally because of objections loudly asserted by the committee's secretary, Holtzoff, and a few committee members who followed his lead. These opponents feared that defendants would misuse depositions to cause delay. They also believed that depositions simply did not belong in criminal cases, with one opponent opining that to "go into the other side's case to examine anybody . . . before trial is a thing you would never think of in a criminal case." *Id*. at 721. As another opponent said: "This is a way of getting discovery before trial and preparing evidence to meet it with, which means that unscrupulous defendants may fabricate evidence with which to meet the [government's] evidence." *Id*. at 722.

With these reservations expressed, Holtzoff – a strong opponent of engrafting the civil rules into the criminal context – volunteered to draft the second version of the rules. That version was drafted following the September 1941 meeting and dramatically altered the deposition (and other discovery) rights, limiting depositions to situations where there would otherwise be a "failure or delay of justice." In subsequent committee drafts over the next two years, the rule was further eroded: It was limited to instances where a witness would not otherwise be available for trial. *Id*. at 726. The other discovery reforms of the civil rules, including document requests, interrogatories and requests to admit, were also jettisoned.

In this way, the criminal rules ultimately adopted by Congress in 1944 parted ways materially from their sister civil rules. As documented by Professor Meyn, this rejection was most likely the result of the lack of criminal defense lawyers on the advisory committee, and Holtzoff's "force of personality." *Id*. at 736. As to why Holztoff pushed so hard to cleave the new criminal rules from the new civil rules, he appears to have had an overly zealous "tough on crime" mentality. His approach was blind to any consideration that some defendants might actually be innocent, or that in any event they were presumed innocent and entitled to a fair trial. As Holtzoff was later quoted as saying: "[P]erpetrators of crimes must be detected, apprehended and punished. The conviction of the guilty must not be unduly delayed. . . . The protection of the law-abiding citizen from the ravages of the criminal is one of the principal functions of government. Any form of criminal procedure that unnecessarily hampers and unduly hinders the successful fulfillment of this duty must be discarded or radically changed." *Id*. at 733. These views reveal Holtzoff's one-sided thinking about the criminal justice system. The rules ultimately drafted reflected this stilted view.

After 80 Years, It Is Time to Revisit the Rules

The prohibition against discovery depositions has not changed since the enactment of the criminal rules in 1944 (despite other amendments to the language of Rule 15). And there has been little to no organized pushback. The principle that a criminal defendant has no deposition rights has become so entrenched that it feels almost blasphemous to suggest that the rule be otherwise. The absence of depositions in federal criminal cases has become an immutable truth.

This is highly unfortunate. Based on my experience in trying both civil and criminal cases in federal courts, the absence of depositions in criminal cases does great harm to the truth-seeking process. In civil cases, the ability to conduct depositions is the great equalizer. Depositions allow both sides to uncover the facts needed to present the full picture at trial. And by presenting that full picture the factfinder is far better situated to evaluate the evidence and reach a just result.

The absence of depositions makes federal criminal trials lopsided events characterized by a cavernous witness access imbalance. One side knows everything that a prospective witness will say on a subject, while the other side knows little if anything. One side can tiptoe around the landmines, while the other side has to stay miles away from a potential explosion. This does not further the truth-seeking process or make for a fair trial. Just the opposite.

To make matters worse, this problem is largely invisible to participants other than defense counsel. It can often not be seen by prosecutors or even the judge. To understand the problem requires getting inside defense counsel's mind. It requires knowing the questions defense counsel does *not* ask because the answers are unknown. It requires knowing the witnesses defense counsel does *not* call because they have refused to interview. When I was a federal prosecutor earlier in my career, I was

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oblivious to these problems. To me, the system was just perfect as is.

These invisible problems are the real costs of the absence of depositions. And they underscore the need for reconsideration of the 80-year-old rule under which there are no depositions.

In reconsidering the rule, much can be learned from 13 states that have rejected the federal model and that do allow depositions in criminal cases, with varying limitations. Seven states – Vermont, Florida, Indiana, Missouri, Iowa, North Dakota and New Mexico – allow for depositions as a matter of right without prior court approval. Bryan Altman, *Can't We Just Talk About This First?: Making the Case for the Use of Discovery Depositions In Criminal Cases*, 75 Ark. L. Rev. 1, 38 (2022). Six states – New Hampshire, Texas, Arizona, Nebraska, Montana and Washington – allow for discovery depositions upon leave of court for good cause. *Id.* at 39. While there is great variation among the rules adopted, there is a unifying principle: These states have determined that the benefits of allowing depositions – with appropriate restrictions – outweigh the dangers cited by those who oppose depositions in criminal cases. In a 1989 study conducted in Florida, a commission created to evaluate the deposition rules that had been in effect since 1972 concluded: "[Discovery depositions in criminal cases] make a unique and significant contribution to a fair and economically efficient determination of factual issues in the criminal process. . . . [Criminal discovery depositions] should not be abolished or significantly curtailed." Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 Wisconsin Law Review 541, 613 (quoting the study). And while there currently are bills pending in Florida to prohibit the deposition of children and other vulnerable witnesses in criminal cases, the basic right to discovery depositions has remained in place for 50 years. *See* Jim Ash, *Defense Attorneys Wary of Bill to Limit Some Depositions in Criminal Cases,* The Florida Bar News (March 9, 2023) (floridabar.org); John F. Yetter, *Discovery Depositions in Florida Criminal Proceedings: Should They Survive?,* 16 Fla. St. U. L. Rev. 675 (1988). In all 13 of these states, the availability of depositions has remained in effect and the fears of deposition opponents – such as Holtzoff – have not been realized.

Conclusion

There are arguments on both sides of the debate over whether discovery depositions should be available in criminal cases, and if so, how they should proceed. But that debate has been muffled for decades because the existing rule is taken as a given. It is time for reconsideration. Even original committee member Orfield advocated for change in his 1957 law review article, writing:

> What about amending the Rule so as to adapt the wider scope of the Federal Rules of Civil Procedure? Much can be said for such a proposal. . . . [I]t should be the policy of the law to permit as broad a scope of inspection and deposition in criminal cases as apply in civil trials. I cannot believe that anyone will be deprived of a right by the promulgation of a rule which seeks to provide a means for unearthing facts, whether those facts are pertinent in a criminal prosecution or a civil action. (quotations omitted.)

Orfield at 38.

To be sure, any change in the rule to allow discovery depositions would have to be carefully tailored to deal with issues including witness safety, victim trauma, trial delay, and the consequences of the defendant's Fifth Amendment privilege (which precludes deposing the defendant absent waiver). But these issues can be addressed, particularly with the aid of judicial supervision over the process. And the presence of tough issues is no reason to avoid the debate entirely, or to throw out the proverbial "baby with the bathwater."

It is time for careful study and a more nuanced approach to the problem, rather than the current "one-size-fits all" solution that simply eliminates discovery depositions altogether. Justice demands it. In the words of Justice William J. Brennan, given in a lecture (later converted to an article) in which he advocated for more expansive discovery in criminal cases:

> Depositions have proved an important discovery tool in civil cases, and when a defendant's freedom, rather than civil liability, is at stake, we should enhance rather than limit the discovery that is available. Neither witness statements nor an opportunity to cross-examine at a preliminary hearing, when one is held, provide an adequate substitute for a deposition.

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William J. Brennan, *The Criminal Prosecution: Sporting Event or Quest for the Truth? A Progress Report,* 68 Washington University Law Quarterly 1, 12 (1990).

These words ring just as true today. We should listen to them.

Author's note: My thanks to Marjorie Berman, who assisted in the drafting of this article.

Editor's note: Readers with comments or differing views are encouraged to send their thoughts to the editor-in-chief, Bennette Kramer, at bkramer@schlamstone.com.

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TAB 9

MEMORANDUM

DATE: August 21, 2024

TO: Advisory Committees on the Bankruptcy, Civil, and Criminal Rules

FROM: Judge J. Paul Oetken
Andrew Bradt
Catherine T. Struve

RE: Joint Subcommittee on Attorney Admission Report

We write on behalf of the Joint Subcommittee on Attorney Admission to report on the Subcommittee's ongoing deliberations. As you know, the Subcommittee includes members of the Criminal, Civil, and Bankruptcy Rules Committees[1] and has been tasked with considering the proposal by Alan Morrison and others for adoption of national rules concerning admission to the bars of the federal district courts.[2]

We are grateful for the feedback provided by the Advisory Committees at their spring 2024 meetings. This memo summarizes our inquiries since then. Part I of this memo provides a brief summary of the project to date, including the 2024 discussions in the Standing Committee and Advisory Committee meetings. Part II turns briefly to the question of statutory authority for rulemaking on the topic of attorney admission. Part III considers the admission of attorneys to practice in the federal appellate courts. Part IV discusses local-counsel requirements and how those might affect the efficacy of any national rule that might be adopted concerning attorney admission. Part V summarizes what we have learned to date concerning attorney admission fees. Part VI explores the question of how a rule concerning admission to practice in federal district courts might intersect with state law concerning the unauthorized practice of law. And Part VII

1 The Subcommittee members are: Judge J. Paul Oetken (Chair; member, Bankruptcy Rules Committee), Judge André Birotte Jr. (member, Criminal Rules Committee), Thomas G. Bruton (Clerk of Court representative on the Civil Rules Committee), David J. Burman, Esq. (member, Civil Rules Committee); Judge Michelle M. Harner (member, Bankruptcy Rules Committee), Judge M. Hannah Lauck (member, Civil Rules Committee), and Catherine M. Recker, Esq. (member, Criminal Rules Committee).

2 See Suggestions 23-BK-G, 23-CR-A, and 23-CV-E, available at https://www.uscourts.gov/rules-policies/archives/suggestions/alan-morrison-23-bk-g .

notes that concerns about challenges facing attorneys who are military spouses may be partially addressed through other mechanisms.

I. The project to date

In this Part, we briefly sketch some of the major developments since the project's inception.

A. October 2023 Subcommittee discussion

The Subcommittee held its initial discussion in October 2023, and considered the three possible options sketched by Dean Morrison: (1) creating a national "Bar of the District Court for the United States," (2) adopting a rule providing that admission to any federal district court entitles a lawyer to practice before any federal district court, or (3) adopting a rule barring the district courts from requiring (as a condition of admission to the district court's bar) that the applicant reside in, or be a member of the bar of, the state in which the district court is located.

Subcommittee members expressed no interest in Dean Morrison's Option (1), and a number of members questioned its feasibility and/or predicted that it would generate much opposition. Some participants did express interest in considering Option (3). Participants also discussed the possibility of modeling a national rule for the district courts on Appellate Rule 46.

The Subcommittee members considered various policy concerns regarding any change from the current system. It was noted that requiring in-state bar admission is particularly burdensome in states that require applicants to take the bar examination. But participants also noted the need to allow districts to pursue their goal of protecting the quality of practice within the district – a goal that implicates both a lawyer's experience level and also the capacity of the admitting court to know of discipline imposed on the lawyer in other jurisdictions. The Subcommittee recognized that changing the rules on attorney admission might pose a revenue concern and observed that fee revenues currently fund a range of important court functions.

We also noted that any proposal would need to address questions of whether the rulemakers have statutory authority to address the topic of attorney admission.

The Subcommittee summarized its progress in a December 2023 report that was published in the agenda book for the Standing Committee's January 2024 meeting.[3]

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3 That report starts on page 101 of the agenda book that is available here: https://www.uscourts.gov/sites/default/files/2024-01_agenda_book_for_standing_committee_meeting_final_0.pdf .

B. Morrison / Alvord December 2023 comment

On December 21, 2023, after publication of the Subcommittee's December 2023 report to the Standing Committee, Dean Morrison and Thomas Alvord responded to the report:

> … Our primary goal in making this proposal was to eliminate the many barriers that prevented lawyers who are admitted to practice in one district court from practicing in other districts. It was our view that centralizing admission in the Administrative Office of the U.S. Courts would be the easiest way to accomplish that goal, but we are by no means wedded to that alternative.
>
> In particular, we have no interest in removing the authority from individual districts to discipline attorneys, and our suggestion to centralize discipline was based on our view about centralizing admission.
>
> As for the issues of costs of implementation and loss of revenue, we also recognize that the AO has much better access to the data than we do. In that connection, we note that different districts have different rules on how often attorneys must renew their licenses and how much the court charges for renewal. The lack of uniformity might be another issue the Subcommittee might consider if it is not inclined to support a centralized system of admission….

C. January 2024 Standing Committee discussion

At the Standing Committee's January 2024 meeting, the Subcommittee Chair and reporters summarized the Subcommittee's initial discussion (as well as the new Morrison / Alvord comments) and sought the Standing Committee's reactions.[4]

Multiple members of the Standing Committee expressed support for pursuing the project. A number of members expressed support for dropping Option (1), and no one expressed interest in pursuing that option. A couple of members expressed support for considering Option (3). It was noted that in-state bar admission is not a close proxy for quality of lawyering and that fees to local counsel can be costly for litigants. A committee member encouraged us to consider whether and how to assist military spouses who must practice law while moving multiple times.

Participants did express some reservations, as well. One member wondered whether lawyers admitted only to federal court would forum-shop into federal court; and other participants expressed concern that permitting out-of-state lawyers to handle state-law claims in diversity or supplemental jurisdiction could offend federalism values. It was noted that

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4 The relevant portion of the draft minutes of the meeting is available starting on page 22 of the agenda book available here: https://www.uscourts.gov/sites/default/files/2024-06_agenda_book_for_standing_committee_meeting_final_6-21-24.pdf .

admission to practice in the courts of appeal is not a close model for admission to practice in the trial court, where more can go wrong (e.g., with discovery).

Ethics and client-protection concerns were also highlighted. There was concern about national practitioners soliciting clients whom they can only represent in federal court. The importance of collaboration between district courts and state disciplinary authorities was noted. A member asked whether broadening admission standards for lawyers who are not members of the encompassing state's bar could raise questions of unauthorized practice of law.

The question of fees was also discussed, with one member asking how fees and revenues vary across districts.

D. February 2024 Subcommittee discussion

The Subcommittee held its second meeting on February 12, 2024. We first reported on the Standing Committee's January discussion.

The issue of local-counsel requirements emerged as a key theme during our February discussion. It was noted that some judges would oppose a rule amendment that would prevent the court from requiring the involvement of local counsel in every case. That requirement, for instance, could be viewed as important in a district that maintains a practice of moving cases quickly. Would broadening attorney admission requirements do much to increase access if the broadening rule change were offset by a broadened local-counsel requirement? Members suggested that it would be helpful to learn more about why the courts that require local counsel do so.

Attorney discipline also emerged as a matter of concern. While courts each have their own disciplinary systems, and can also coordinate with the disciplinary authorities of other jurisdictions, we questioned how any particular district court could stay abreast of disciplinary activity in far-flung jurisdictions. One idea was to require the admitted attorney to update the court concerning subsequent disciplinary actions in other jurisdictions.

Tim Reagan had already been researching the various district courts' attorney-admission fees, and he undertook to prepare an additional report on local-counsel requirements. (His findings on these topics are discussed in Parts IV and V, below.)

E. Spring Advisory Committee discussions

We provided a report to each of the relevant Advisory Committees (Bankruptcy, Civil, and Criminal) during their spring 2024 meetings. The most extensive discussion took place at the

Civil Rules Committee meeting.[5]

At the Civil Rules Committee's April 9, 2024 meeting, two judge members voiced strong opposition to the project, and a third judge member's comments were also somewhat skeptical. The first judge questioned why this is a rules issue; to him, this is a matter for state bars. He can see why a court would want lawyers practicing before it to be part of the state bar, as that increases the chances of repeat players and a sense of community. He also questioned the analogy to practice in the courts of appeals; coming in to argue an appeal differs from establishing a law practice in the state. The second judge agreed, noting that districts have distinct cultures and important traditions. This judge felt that admission pro hac vice suffices to accommodate the legitimate needs of out-of-state lawyers. The third judge noted that a district's bar-admission practices reflect the culture of the local bar as well as that of the local bench. During the Civil Rules discussion, Dan Coquillette also underscored the need to look at the unauthorized-practice issue.

Our report on the project did not generate feedback during the Bankruptcy Rules Committee's April 11, 2024 meeting, but a member shared a suggestion for a potential contact with state bar authorities. At the Criminal Rules Committee's April 18, 2024 meeting,[6] Jonathan Wroblewski (the DOJ representative) noted that the U.S. Supreme Court has very permissive practices about admitting attorneys to its bar, and he asked how the Court handles situations in which an attorney it has admitted is disbarred in another jurisdiction.

F. Summer 2024 Subcommittee discussion

The Subcommittee met virtually in July 2024. It reviewed Tim Reagan's research (detailed in Parts IV and V below) concerning local-counsel requirements and admission fees. Participants continued discussing the potential significance of local-counsel requirements, which might offset the effects of any new rule requiring the district courts to loosen their attorney-admission practices. The Subcommittee also discussed issues relating to the unauthorized practice of law (noted in Part VI of this memo). Participants noted that it would be useful to make inquiries among state bar authorities to learn whether they would have concerns about a national rule loosening district-court admission requirements for out-of-state lawyers. It was also noted that learning more about circuits' practices under Appellate Rule 46 (see Part III.A below) would be useful.

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5 The Civil Rules discussion is also described in the Civil Rules Committee's draft minutes starting at page 566 of the agenda book available here: https://www.uscourts.gov/sites/default/files/2024-06_agenda_book_for_standing_committee_meeting_final_6-21-24.pdf .

6 The Criminal Rules discussion is also described in the Criminal Rules Committee's draft minutes starting at page 600 of the agenda book available here: https://www.uscourts.gov/sites/default/files/2024-06_agenda_book_for_standing_committee_meeting_final_6-21-24.pdf .

II. Questions of rulemaking authority

One threshold question, as always, is whether the Rules Enabling Act provides rulemaking authority on this issue. In the language of the statute, would rulemaking regarding district court bar membership fit the category of "general rules of practice and procedure . . . for cases in the United States district courts" and not "not abridge, enlarge or modify any substantive right." The Reporters are continuing research on this question, though the existence of Appellate Rule 46, detailed further below, for a half century provides strong precedent on the general issue.

Questions were also raised about the relevance of 28 U.S.C. § 1654. We enclose a helpful memo from the then-Rules Law Clerk, Zachary Hawari, on that topic.

III. Federal appellate courts as a model?

As the Subcommittee has already discussed, the federal appellate courts might provide a model for attorney admission at the district-court level. Part III.A summarizes what we know of the courts of appeals' approaches under Appellate Rule 46, and Part III.B discusses the approach taken by the U.S. Supreme Court under its rules. Part III.C notes reasons why the appellate court experience may not generalize to the district court.

A. The federal courts of appeals

This subpart recapitulates Rule 46's features and summarizes what we have learned about admission fees and attorney discipline in the courts of appeals.

Appellate Rule 46 reads:

(a) Admission to the Bar.

(1) Eligibility. An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands).

(2) Application. An applicant must file an application for admission, on a form approved by the court that contains the applicant's personal statement showing eligibility for membership. The applicant must subscribe to the following oath or affirmation:
"I, ________________, do solemnly swear [or affirm] that I will

conduct myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States."

(3) Admission Procedures. On written or oral motion of a member of the court's bar, the court will act on the application. An applicant may be admitted by oral motion in open court. But, unless the court orders otherwise, an applicant need not appear before the court to be admitted. Upon admission, an applicant must pay the clerk the fee prescribed by local rule or court order.

(b) Suspension or Disbarment.

(1) Standard. A member of the court's bar is subject to suspension or disbarment by the court if the member:

(A) has been suspended or disbarred from practice in any other court; or

(B) is guilty of conduct unbecoming a member of the court's bar.

(2) Procedure. The member must be given an opportunity to show good cause, within the time prescribed by the court, why the member should not be suspended or disbarred.

(3) Order. The court must enter an appropriate order after the member responds and a hearing is held, if requested, or after the time prescribed for a response expires, if no response is made.

(c) Discipline. A court of appeals may discipline an attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with any court rule. First, however, the court must afford the attorney reasonable notice, an opportunity to show cause to the contrary, and, if requested, a hearing.

A few features of Rule 46 are worth noting. Rule 46(a)(1) mandates that an attorney is eligible for admission to the bar of a court of appeals if the attorney is "of good moral and professional character" and admitted to the bar of the U.S. Supreme Court, a state high court, another federal court of appeals, or a federal district court. Rules 46(a)(2) and (3) accord the court of appeals the authority to set the form of the application and to prescribe the fee. Rule 46(b) recognizes the court of appeals' authority to suspend or disbar the attorney, subject to a loose substantive test (suspension or disbarment by another court, or "conduct unbecoming") and some basic procedural protections. And Rule 46(c) recognizes a court of appeals' authority to

impose discipline short of suspension or disbarment upon lawyers practicing before the court, so long as it provides notice and an opportunity to be heard.

Thanks to helpful research by Tim Reagan, we know that the fee for admission to the bar of a court of appeals varies across the circuits.[7] It is "$199 plus any additional fee that the local court charges."[8] "The median [total] bar admission fee is $239, and the range is from $214 to $300."[9] Tim notes that because Appellate Rule 46 requires that the attorney seeking admission be admitted to another bar, the attorney will also have to pay for a certificate of good standing from that other bar.[10] Three circuits charge a renewal fee (of from $20 to $50) every five years.[11] Some circuits exempt stated categories of lawyers from paying the admission fee (or, in some instances, permit the lawyer to appear pro hac vice without paying a fee). The most common exemptions are those for federal government lawyers and lawyers representing IFP litigants.

As noted, Rule 46(b)(1)(A) provides for discipline based upon suspension or disbarment in another jurisdiction. In the Subcommittee's discussions, the question has arisen how a court of appeals would become aware of discipline imposed by another jurisdiction. Anecdotally, a court of appeals is more likely to be contacted about attorney discipline by authorities from states within the circuit than by authorities from states outside the circuit. But on at least some occasions, a court of appeals may become aware of discipline imposed by an out-of-circuit state. In at least one circuit, a local rule appears to require that members of the court's bar update the court if they are suspended or disbarred in another jurisdiction.[12] Self-reporting is of course an imperfect system; one can find examples where lawyers who should have self-reported failed to do so.

There is reason to think that not all attorney-discipline opinions can be found on electronic case-reporting systems such as WestlawNext or Lexis. It is thus perhaps unsurprising that an initial very rough search found not many opinions available on WestlawNext concerning reciprocal discipline.

The Subcommittee is currently making inquiries with the Circuit Clerks to ascertain how

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7 See Tim Reagan, Fees for Admission to Federal Court Bars 2 (FJC 2024) ("Reagan Fee Report"). Tim's report was distributed to the Subcommittee previously; you can also download it at https://www.fjc.gov/content/385023/fees-admission-federal-court-bars (last visited August 12, 2024).

8 Id. at 1.

9 Id. at 2.

10 Id. at 1 (noting that the fee for a certificate of good standing "in the states and territories range from no fee to $50").

11 Id. at 2.

12 Ninth Circuit Rule 46-2(c) provides in part: "An attorney who practices before this Court shall provide the Clerk of this Court with a copy of any order or other official notification that the attorney has been subjected to suspension or disbarment in another jurisdiction."

Rule 46 is functioning and whether the Rule's relatively open approach to attorney admission causes any problems with attorney conduct in the circuits.

B. The U.S. Supreme Court

Like the federal courts of appeals, the U.S. Supreme Court has a relatively permissive admission standard. Supreme Court Rule 5.1 provides:

> To qualify for admission to the Bar of this Court, an applicant must have been admitted to practice in the highest court of a State, Commonwealth, Territory or Possession, or the District of Columbia for a period of at least three years immediately before the date of application; must not have been the subject of any adverse disciplinary action pronounced or in effect during that 3-year period; and must appear to the Court to be of good moral and professional character.

Supreme Court Rule 8 governs disbarment and disciplinary action. It provides:

> 1. Whenever a member of the Bar of this Court has been disbarred or suspended from practice in any court of record, or has engaged in conduct unbecoming a member of the Bar of this Court, the Court will enter an order suspending that member from practice before this Court and affording the member an opportunity to show cause, within 40 days, why a disbarment order should not be entered. Upon response, or if no response is timely fled, the Court will enter an appropriate order.
>
> 2. After reasonable notice and an opportunity to show cause why disciplinary action should not be taken, and after a hearing if material facts are in dispute, the Court may take any appropriate disciplinary action against any attorney who is admitted to practice before it for conduct unbecoming a member of the Bar or for failure to comply with these Rules or any Rule or order of the Court.

The Supreme Court Practice treatise offers this description of the Supreme Court's approach:

> The issuance of an order to show cause is usually premised, as Rule 8 indicates, on a report by federal or state bar authorities that some form of serious discipline has been imposed upon the attorney in question…. The Supreme Court also learns of disbarment or disciplinary actions affecting members of its Bar from the periodic reports of the American Bar Association Center for Professional Responsibility, which maintains a computerized information system referred to as the National Discipline Data Bank. That data bank records disciplinary actions of all state, federal, and appellate courts and bar authorities. The Supreme Court

> Clerk's Office carefully reviews the reports of the Center for Professional Responsibility to determine whether any members of the Supreme Court Bar have been subjected to disbarment or other discipline, and it provides the Center with information concerning disbarment or discipline imposed by the Court….
>
> If reports of state disciplinary actions are made and it appears that any member of the Supreme Court Bar has been the subject of such discipline, the Clerk then makes an evaluation of the disciplinary sanction. A mere reprimand or other minor sanction is not likely to result in the issuance of a show cause order by the Court, although the fact that the state imposed such a sanction is duly noted. But if the state has imposed some significant disciplinary sanction falling short of permanent disbarment, a show cause order may well issue from the Court. In such situations, the Court has been known to impose a more severe sanction than that imposed by the state authorities, the sanction of permanent disbarment.[13]

The National Lawyer Regulatory Data Bank (as it is now called) warrants a bit of explanation. The ABA's website states:

> The ABA National Lawyer Regulatory Data Bank is the only national repository of information concerning public regulatory actions relating to lawyers throughout the United States. It was established in 1968 and is operated under the aegis of the ABA Standing Committee on Professional Discipline. ... The Data Bank is particularly useful for disciplinary authorities and bar admissions agencies in providing a central repository of information to facilitate reciprocal discipline and to help prevent the admission of lawyers who have been disbarred or suspended elsewhere. All states and the District of Columbia, as well as many federal courts and some agencies, provide regulatory information to the Data Bank.[14]

An important limitation of the Data Bank is that submission of data is voluntary, and thus may not be complete.[15] Moreover, one commentator stated in 2012 that disciplinary authorities "are not informed automatically when lawyers they license are reported to the Data Bank."[16] And

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13 Stephen M. Shapiro et al., Supreme Court Practice ch. 20, § 20.8 (11th ed. 2019) (ebook).
14 American Bar Association, National Lawyer Regulatory Data Bank, available at https://www.americanbar.org/groups/professional_responsibility/services/databank/ (last visited August 12, 2024).
15 See Jennifer Carpenter & Thomas Cluderay, Implications of Online Disciplinary Records: Balancing the Public's Interest in Openness with Attorneys' Concerns for Maintaining Flexible Self-Regulation, 22 Geo. J. Legal Ethics 733, 746 (2009).
16 Arthur F. Greenbaum, The Automatic Reporting of Lawyer Misconduct to Disciplinary Authorities: Filling the Reporting Gap, 73 Ohio St. L.J. 437, 506 n.277 (2012).

even when the authorities are told about the imposition of discipline in another jurisdiction, there may be mix-ups concerning who was disciplined: "because [the Data Bank] does not employ a universal identification number system, it is sometimes hard to identify whether a given lawyer, particularly one with a common name, has been reported."[17] Note, as well, that the "Data Bank only includes those who have actually been disciplined, thus, excluding lawyers who have been sanctioned by courts, but not disciplined."[18]

C. Whether the appellate experience generalizes to the district court

Initial anecdotal data suggest that, at least in one circuit, the current system has not led to problems with the quality of practice before the court of appeals. This is so even though it is possible that the court does not learn about disciplinary problems encountered by all the lawyers that practice before it. Similarly, the U.S. Supreme Court maintains a very large bar and a very permissive admission standard.

However, a number of participants in discussions of this project have questioned whether the experience of the federal courts of appeals with attorney admission can generalize to the context of admission to practice at the trial level. They note that the typical appellate proceeding involves a very confined set of activities and comparatively few deadlines (briefing and perhaps argument), whereas at the trial level – where the record is made and where the participants conduct discovery, hearings, and trials – much more can go awry if an unskilled or unscrupulous practitioner is involved.

IV. Local-counsel requirements

Many districts currently require that an attorney admitted pro hac vice associate local counsel. Dean Morrison and his fellow rule-change proponents appear to assume that admission to a district court's bar would exempt an out-of-state lawyer from the requirement of associating local counsel in a case.[19] But in the Subcommittee's most recent discussions, participants asked whether expanding access to district court bars would be a Pyrrhic victory for the rule change's

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17 Greenbaum, supra note 16, at 506 n. 277.

18 Lonnie T. Brown, Jr., Ending Illegitimate Advocacy: Reinvigorating Rule 11 Through Enhancement of the Ethical Duty to Report, 62 Ohio St. L.J. 1555, 1607–08 (2001).

19 Dean Morrison's proposal for a national rules change does not discuss local-counsel requirements. But the appended materials (which he and others previously submitted to the Northern District of California in support of a proposal for a local rule amendment) explain that not being admitted to practice in the district subjects litigants to onerous local-counsel requirements. See Petition of Public Citizen Litigation Group & 12 Others Pursuant to Local Rule 83-2 To Amend Local Rule 11-1(b) (Feb. 6, 2018), at 11 ("[U]nder the current Rule, if a client prefers to have as lead counsel a lawyer who is not eligible to become a member of the Bar of this Court, that will generally require retaining and paying for local counsel, not just to sign papers, but, for at least some judges, to appear in court.").

proponents if districts responded by also expanding their local-counsel requirement so that it encompasses attorneys who are admitted in the district but not in the encompassing state.

Currently, more than half of federal districts require participation by local counsel in litigation conducted by an attorney who is admitted pro hac vice. Tim found that "[f]ifty-six districts (60%) require local-counsel participation for pro hac vice appearances. In addition to being a member of the district court's bar, local counsel may be required to live or work in the district or be a member of the local state's bar."[20]

Some districts even require local counsel for some cases litigated by members of the district court's bar;[21] these districts do so in (variously) three types of circumstances: (1) if the attorney is not an in-state bar member, (2) if the attorney neither resides nor has an office in the district, and (3) if the attorney either doesn't reside in the district or lacks a full-time office there.

Courts vary in the degree of involvement that they require of local counsel. Many courts require that local counsel make the motion for non-local counsel's admission pro hac vice; it's possible that this might be one way that a district assures itself that someone has checked that the non-local counsel is in good standing with their home-state bar. The court may also require that local counsel:

- sign the first pleading,[22]
- review and sign all filings,[23]
- be available for service of litigation papers,[24]
- be prepared to try the case,[25]

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20 Tim Reagan, Local-Counsel Requirements for Practice in Federal District Courts (FJC 2024), at 10. Tim's report and its appendices are available here: https://www.fjc.gov/content/385779/local-counsel-requirements-practice-federal-district-courts (last visited August 12, 2024).

21 See Reagan, Local-Counsel Report, at 6 ("Thirteen districts (14%) require association with local counsel even for some members of the district court's bar."). In six of those districts, though, as Tim notes, the rules don't themselves require local counsel in this situation, but accord the judge discretion to require it.

22 See, e.g., E.D. Okla. Local Civil Rule 83.3(b) ("The local attorney shall sign the first pleading filed and shall continue in the case unless other local counsel is substituted.").

23 See W.D. Wash. Local Civil Rule 83.1(d)(2) ("Unless waived by the court … , local counsel must review and sign all motions and other filings [and] ensure that all filings comply with all local rules of this court ….").

24 See, e.g., E.D. Okla. Local Civil Rule 83.3(b) ("Any notice, pleading or other paper may be served upon the local counsel with the same effect as if personally served on the non-resident attorney.").

25 M.D. Tenn. Local Rule 83.01(e)(4) ("Entry of an appearance or otherwise participating as

- be prepared to step in for the lead counsel whenever necessary,[26]
- attend all court appearances,[27] and/or
- be "equally responsible with *pro hac vice* counsel for all aspects of the case."[28]

We might try to infer from the nature of these requirements the reasons why courts require local counsel. To take an obvious example, the requirements that local counsel be available to accept service seem addressed to a simple logistical point – and one that may be largely obsolete now that service of papers subsequent to the commencement of the case is ordinarily accomplished via CM/ECF. A requirement that local counsel review and sign all filings suggests that the court wishes to have a local (and thus more accountable?) lawyer review the filings' compliance with Civil Rule 11. Requirements that local counsel be available to step in at any time suggest that the court is concerned that out-of-district lawyers not cause delay. (A related example might be the Eastern District of Virginia, where local counsel are viewed as important to fulfilling the demands of the court's "rocket docket.") An additional possibility is that, by requiring local counsel, some courts are trying to address behavior by lawyers that doesn't rise to the level of a discipline issue but that implicates questions of quality of lawyering, civility, and professionalism.

Another theme that has emerged is the potential significance of the court's discretion to excuse compliance with the local-counsel requirement. Some local rules explicitly provide for such discretion. Additionally, some local rules expressly exempt some categories of attorney from the local co-counsel requirement.[29]

Dean Morrison and the other rule-change proponents are not taking direct aim at the local counsel requirements themselves (perhaps because they are not focusing on the relatively small number of districts that require local counsel even for some admitted attorneys). Rather, they appear to assume that admission would release an out-of-district lawyer from any obligation to associate local counsel. To test the plausibility of that assumption, it may make sense to focus on districts that currently require in-state bar membership for admission and ask whether those

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counsel of record is a representation that the attorney will be prepared to conduct the trial of the case, from which the attorney may only be relieved by approval of the Court.").

26 See W.D. Wash. Local Civil Rule 83.1(d)(2) ("By agreeing to serve as local counsel and by signing the pro hac vice application, local counsel attests that he or she is authorized and will be prepared to handle the matter in the event the applicant is unable to be present on any date scheduled by the court.").

27 See E.D. Mich. Local Rule 83.20(f)(2) ("Local counsel must attend each scheduled appearance on the case unless the Court, on its own motion or on motion or request of a party, dispenses with the requirement.").

28 M.D. Tenn. Local Rule 83.01(d)(6).

29 See, e.g., N.D. Okla. Loc. Gen. Rule 4-3(c) (exempting lawyers for the federal government, federal defenders, and CJA lawyers); M.D. Tenn. Local Rule 83.01(d)(2) (exempting lawyers for the federal government and federal defenders).

districts also impose a local-counsel requirement for attorneys who are only admitted pro hac vice.

We have not yet compiled that full list, but as a starting point, one can look at the nine districts in California, Delaware, Florida, and Hawaii that currently require in-state bar membership for admission (it is in those districts, of course, that in-state bar membership is the most onerous barrier because it requires taking the state bar exam). Here is a chart of those districts:

District	Local counsel required where lead attorney is admitted pro hac vice?
Central District of California	Yes. See C.D. Cal. Local Civil Rule 83-2.1.3.4.
Eastern District of California	Not exactly? E.D. Cal. Local Rule 180(b)(2)(ii) requires that an attorney admitted pro hac vice "shall … designate … a member of the Bar of this Court with whom the Court and opposing counsel may readily communicate regarding that attorney's conduct of the action and upon whom service shall be made."
Northern District of California	Yes. See N.D. Cal. Local Civil Rule 11-3(a)(3) (requiring "[t]hat an attorney, identified by name and office address, who is a member of the bar of this Court in good standing and who maintains an office within the State of California, is designated as co-counsel").
Southern District of California	Not exactly? S.D. Cal. Civil Rule 83.3(c)(4) requires that an attorney admitted pro hac vice must "designate … a member of the bar of this court with whom the Court and opposing counsel may readily communicate regarding the conduct of the case and upon whom papers will be served."
District of Delaware	Yes. See D. Del. Local Rule 83.5(d): "Unless otherwise ordered, an attorney not admitted to practice by the Supreme Court of the State of Delaware may not be admitted pro hac vice in this Court unless associated with an attorney who is a member of the Bar of this Court and who maintains an office in the District of Delaware for the regular transaction of business ("Delaware counsel"). … Delaware counsel shall be the registered users of CM/ECF and shall be required to file all papers. Unless otherwise ordered, Delaware counsel shall attend proceedings before the Court."
Middle District of Florida	Apparently not. (N.B.: This district's version of pro hac vice admission is called "special admission," see M.D. Fla. Local Rule 2.01(c).).
Northern District of Florida	Apparently not.
Southern District of Florida	Yes. See Rules 1(b)(1) (local counsel to move admission pro hac vice) and 1(b)(3) (requiring designation of "at least one member of the bar of this Court who is authorized to file through the Court's electronic filing system, with whom the Court and opposing counsel may readily communicate regarding the conduct of the case, upon whom filings shall be served, and who shall be

	required to electronically file and serve all documents and things that may be filed and served electronically, and who shall be responsible for filing and serving documents in compliance with the CM/ECF Administrative Procedures”).
District of Hawaii	Yes. See D. Haw. Local Rule 83.1(c)(2)(B)(vi) (requiring “designation of a current member in good standing of the bar of this court who maintains an office within the district to serve as associate counsel” and also “the associated attorney’s commitment to at all times meaningfully participate in the preparation and trial of the case with the authority and responsibility to act as attorney of record for all purposes; to participate in all court proceedings (not including depositions and other discovery) unless otherwise ordered by the court; and to accept service of any document”).

We can see that more than half of these districts (five of nine) require attorneys admitted pro hac vice to associate local counsel. It’s not implausible to surmise that at least some of these districts – if required by national rule to admit to their bar attorneys not admitted to the bar of the encompassing state – might consider whether to extend the local-counsel requirement to such attorneys.

These reflections prompt the following questions:

- Is this sampling of districts representative of the districts that currently take a restrictive approach to bar admissions?

- In districts with rules that require local counsel, how often are those requirements waived in practice?

- Would a national rule change on bar admission simply prompt widespread enlargement of local-counsel requirements?

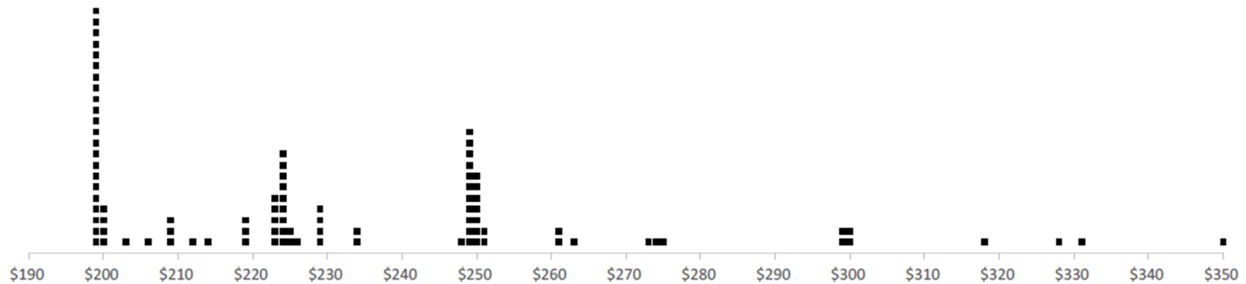
If the answer to the last of these questions is yes, then unless the rulemakers are willing to enlarge this project to encompass districts’ ability to require local counsel, one might question the prospects for effectively addressing the access and expense concerns that underpin the proposals we are currently considering.

V. Attorney admission fees

Our discussions have also focused on the fiscal implications of potential changes to the district courts’ attorney-admission framework. This Part briefly summarizes what we have learned about the revenue coming in and the uses to which it is put.

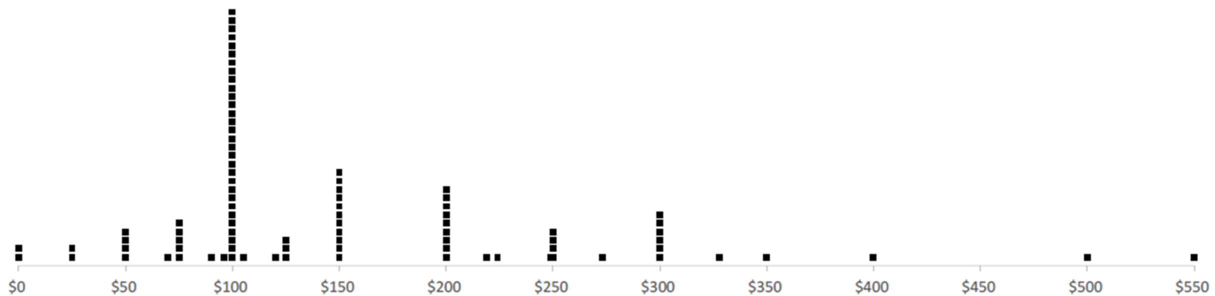
A. Revenue coming in

Tim Reagan has provided us with an overview of the fees charged by districts around the country. He reports that "admission fees range from the national minimum of $199 to $350."[30] His helpful graph[31] suggests that most districts set the fee in the $199 - $250 range:



In addition, roughly a quarter of districts charge periodic dues or renewal fees. "Twenty-five districts (27%) charge dues, often referred to as renewal fees. Renewal periods range from one to six years, and annualized dues range from $3 to $75."[32] From the detailed discussion in the accompanying footnote, it looks as though five districts have annualized 'dues' of more than $25.[33]

Separate from admission fees are the fees charged for pro hac vice admission. Tim reports that "[p]ro hac vice fees range from no fee to $550."[34] His accompanying graph[35] suggests that most districts charge $150 or less, with additional clusters at $200, $250, and $300:



30 Reagan Fee Report, supra note 7, at 3.
31 See id.
32 Id.
33 See id. at 3 n.6.
34 See id. at 3.
35 See id. at 4.

B. Uses to which revenue is put

The district courts do not keep the "national" portion of the admission fee, which is $199;[36] they remit that portion to the Administrative Office of the U.S. Courts. By contrast, there is no "national" portion of any fee for renewing a bar admission or for admission pro hac vice, and so the districts keep the entirety of those fees.

As we have previously noted, districts put their portion of the fees to various uses, including funding a clinic for self-represented litigants; guardians ad litem for defendants who are minors; bench/bar activities; reimbursement of pro bono expenses; and support for a court historical society.

VI. Unauthorized practice of law

During our discussions, a number of participants have stressed the importance of examining the relevance of state law concerning the unauthorized practice of law. An initial look at this field confirms that this topic is well worth the Subcommittee's consideration.

To some, the idea of federal-court attorney-admission barriers intersecting with unauthorized-practice-of-law issues might seem somewhat counterintuitive. After all, if a federal district court *authorizes* someone to practice as a member of the court's bar, how could practice in that court be *unauthorized*? An answer to this question becomes easier to discern if one distinguishes between different types of situations in which the question might be posed.

Some might intuitively imagine a scenario that a big-firm lawyer usually encounters: Big Corp. gets sued in federal court in State A, looks around for a high-powered lawyer, finds Lawyer B in State C, and hires B to handle the federal-court lawsuit in State A. It seems (and likely is) straightforward that B can handle the suit, without being admitted to practice in State A, so long as B is admitted to practice, or gets permission to appear pro hac vice, in the relevant federal district court in State A.

But a look at the caselaw indicates that unauthorized-practice issues usually come up in quite a different type of scenario. Lawyer D, say, is admitted to practice in State E but not in State F. Lawyer D moves to State F and doesn't get admitted in State F, but gets admitted in the federal district court for the District of F. Lawyer D hangs out a shingle in State F, sees clients, triages them, and only takes cases Lawyer D can bring in federal court. In at least some states, it seems, there is a potential risk that the state bar authorities would consider D to be engaging in the unauthorized practice of law in State F by so doing. The strictest caselaw on this topic is in some instances decades old, and there has been some movement toward making the rules on

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36 See District Court Miscellaneous Fee Schedule (setting fee "[f]or original admission of attorneys to practice" at $199), available at https://www.uscourts.gov/services-forms/fees/district-court-miscellaneous-fee-schedule (last visited June 28, 2024).

unauthorized practice of law more forgiving, but nonetheless it appears from an initial look at the caselaw that Lawyer D could run a substantial risk in a number of states by behaving as described.

We will not review here the details of the caselaw that we have gathered thus far. By definition, a field of law (like professional responsibility) that is governed state-by-state is challenging to summarize comprehensively. Moreover, some of the notable caselaw is relatively dated. Instead, we note a few key lines of authority and sketch some relevant concepts. A better sense of the scope and nature of likely problems might emerge from an inquiry with state bar authorities as the project moves forward.

It's useful to start with two sources of authority that might be influential to those shaping state law on unauthorized practice: the Model Rules of Professional Conduct and the Restatement of the Law Governing Lawyers.

Model Rule of Professional Conduct 5.5[37] currently provides in relevant part:

Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) **A lawyer who is not admitted to practice in this jurisdiction shall not:**

(1) **except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law**; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) **A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that**:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

37 See American Bar Association, Model Rules of Professional Conduct Rule 5.5, available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_5_unauthorized_practice_of_law_multijurisdictional_practice_of_law/ (last visited August 12, 2024).

(2) **are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized**;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) **A lawyer admitted in another United States jurisdiction** or in a foreign jurisdiction, **and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof**, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, **may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:**

(1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) **are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction…**.

Model Rule 5.5 (emphases added).

Much of the contents of the current version of Model Rule 5.5 – including most of the bolded language above – was contained in the version of Model Rule 5.5 adopted by the ABA House of Delegates in August 2002.[38] Of particular interest in the current context is Rule

38 See American Bar Ass'n Center for Professional Responsibility, Client Representation in the

5.5(d)(2), which authorizes the provision, by a lawyer not admitted in the state, "through an office or other systematic and continuous presence in this jurisdiction," of "services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction."

A key question is what the drafters meant by "authorized by federal … law or rule." Neither the Commentary nor the 2002 Report of the Commission on Multijurisdictional Practice addresses whether a federal court's admission of a lawyer to practice would count as authorization for this purpose, or what the scope of that authorization would be.[39]

The Restatement of the Law Governing Lawyers also provides relevant, but somewhat equivocal, authority on this point. Section 3 of the Restatement provides:

> § 3 Jurisdictional Scope of the Practice of Law by a Lawyer
>
> A lawyer currently admitted to practice in a jurisdiction may provide legal services to a client:
>
> (1) at any place within the admitting jurisdiction;
>
> (2) before a tribunal or administrative agency of another jurisdiction or the federal government in compliance with requirements for temporary or regular admission to practice before that tribunal or agency; and
>
> (3) at a place within a jurisdiction in which the lawyer is not admitted to the extent that the lawyer's activities arise out of or are otherwise reasonably related to the lawyer's practice under Subsection (1) or (2).

Comment g to Section 3 states in part:

21st Century: Report of the Commission on Multijurisdictional Practice title page & 19-20 (2002) ("MJP Commission Report"). An ABA commission is currently considering possible changes to Model Rule 5.5, including a proposal to authorize practice in all states based on admission in any single state. See Memorandum dated January 16, 2024 from David Machrzak, Chair, Center for Professional Responsibility Working Group on ABA Model Rule of Professional Conduct 5.5 to ABA Entities, Courts, Bar Associations (state, local, specialty, and international), Individuals, and Entities, available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/issues-paper-for-comment-mr5-5.pdf (last visited August 19, 2024) ("ABA Issues Paper"). That proposal, if adopted, would significantly change the assumptions on which restrictive federal-court admission rules are based. The ABA project does not address more specifically the federal-court-practice issues of interest here.

39 MJP Commission Report, supra note 38, at 34.

> g. Authorized practice in a federal agency or court. A lawyer properly admitted to practice before a federal agency or in a federal court (see § 2, Comment b) may practice federal law for a client either at the physical location of the agency or court or in an office in any state, so long as the lawyer's practice arises out of or is reasonably related to the agency's or court's business. Such a basis for authorized practice is recognized in Subsection (2). Thus, a lawyer registered with the United States Patent and Trademark Office could counsel a client from an office anywhere about filing a patent or about assigning the ensuing patent right, matters reasonably related to the lawyer's admission to the agency. (The permissible scope of practice of a nonlawyer patent agent may be less, since admission to the agency does not suggest competence to deal with matters, such as the assignment of patents, beyond the jurisdiction of the agency.)
>
> A lawyer admitted in one state who is admitted to practice in a United States district court located in another state, but who is not otherwise admitted in the second state, can practice law in the state so long as the practice is limited to cases filed in that federal court. Local rules in some few federal district courts additionally require admission to the bar of the sitting state as a condition of admission to the federal court. The requirement is inconsistent with the federal nature of the court's business….

Reading this commentary, one might be tempted to impute to the Restatement a broad view about the preemptive force of federal-court rules governing attorney admission to practice in federal court. Before reaching that conclusion, though, it is useful also to consider this observation in the Reporter's Note to comment e: "There are few decisions dealing with the question of permissible out-of-state practice. Several involve clear instances of impermissible practice, through setting up an office in a state in which the lawyer is not admitted." Admittedly, the Reporter's Note expresses only the views of the Reporter, and not necessarily those of the ALI. But together, the commentary and the Reporter's Note suggest a view that admission to practice in a federal district protects the lawyer from unauthorized-practice accusations so long as the lawyer limits that practice to the cases actually filed in federal court – but that the lawyer courts trouble by actually opening an office in a state in which the lawyer isn't admitted.

It's also useful to consider the U.S. Supreme Court's decision in *Sperry v. State of Florida*, 373 U.S. 379 (1963). *Sperry* provides some support for the idea that a lawyer who only maintains an in-state office for purposes of a solely federal-tribunal practice does not violate state unauthorized-practice prohibitions. However, *Sperry* can be read narrowly to apply only to the context in which it arose – federal patent office practice – in which the topic area is well-defined and the jurisdiction is exclusively federal.

Sperry was "a practitioner registered to practice before the United States Patent Office"

who had "not been admitted to practice law before the Florida or any other bar."[40] He had an office in Tampa and held "himself out to the public as a Patent Attorney."[41] The Florida Supreme Court found that he was engaging in unauthorized practice and enjoined him from, inter alia, from calling himself a patent attorney, giving legal opinions (even on patentability), preparing legal documents (including patent applications), "holding himself out, in [Florida], as qualified to prepare … patent applications," or otherwise practicing law.[42] The U.S. Supreme Court vacated and remanded, holding that 35 U.S.C. § 31[43] and regulations promulgated thereunder authorized the admission of persons, including nonlawyers, to practice before the Patent Office.[44] The Court did not define exactly what the state was foreclosed from prohibiting, but offered this guidance:

> Because of the breadth of the injunction issued in this case, we are not called upon to determine what functions are reasonably within the scope of the practice authorized by the Patent Office. The Commissioner has issued no regulations touching upon this point. We note, however, that a practitioner authorized to prepare patent applications must of course render opinions as to the patentability of the inventions brought to him, and that it is entirely reasonable for a practitioner to hold himself out as qualified to perform his specialized work, so long as he does not misrepresent the scope of his license.[45]

One might read *Sperry* to stand for the proposition that any valid federal-law provision authorizing a person to practice before a federal tribunal preempts the application of state unauthorized-practice provisions to a lawyer's work in connection with such authorized practice before a federal tribunal. Note, however, that federal patent applications differ from ordinary federal-court litigation because the subject-matter is discrete and exclusively federal, and might well be ordinarily separable from matters that might be covered by state law.

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40 Sperry, 373 U.S. at 381.

41 Id.

42 Id. at 382.

43 At the time, 35 U.S.C. § 31 provided:

> § 31. Regulations for agents and attorneys
> The Commissioner, subject to the approval of the Secretary of Commerce, may prescribe regulations governing the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Patent Office, and may require them, before being recognized as representatives of applicants or other persons, to show that they are of good moral character and reputation and are possessed of the necessary qualifications to render to applicants or other persons valuable service, advice, and assistance in the presentation or prosecution of their applications or other business before the Office.

44 Id. at 384-85.

45 Id. at 402 n.47.

As noted previously, it is challenging to offer confident appraisals of state unauthorized-practice law as it might apply to practice by lawyers admitted in federal court but not to the bar of the encompassing state. Much of the relevant caselaw is somewhat dated – raising the possibility that subsequent changes in applicable state statutes or rules might have undermined earlier and more restrictive approaches. Also, the Rules of Professional Conduct may provide incomplete guidance in some states, because unauthorized-practice principles are also contained in statutes that might not have been updated at the same time as the state's Rules of Professional Conduct.

Initial research has uncovered some authority in a couple of states that suggests that admission to practice in an in-state federal court may not always immunize a lawyer (who is not admitted to the state bar) from charges of unauthorized practice. The picture emerging is that the clearest case for protection from unauthorized-practice allegations is where the client relationship arose in a state where the lawyer is admitted to practice and the client then decides to sue (or is sued) in a federal court (in a different state) where the lawyer is admitted. The clearest case of danger of unauthorized practice would be where the lawyer opens a permanent office only in the encompassing state without being admitted there, and brings in new clients by interviewing them in that in-state office. Even if the lawyer appears only in federal court, the lawyer might be regarded (at least by authorities in some states) as engaging in unauthorized practice.

Due to this complexity, it may be difficult to draft a national rule without giving attention to the unauthorized-practice question in some way. While the picture of unauthorized-practice-of-law doctrine is still emerging, this topic merits attention as the Subcommittee seeks the views of state bar authorities concerning the issues raised by this project.

VII. Addressing concerns about attorneys who are military spouses

In the discussions to date, participants have sometimes mentioned that particular types of attorneys face particular hardship from restrictive bar admission rules. Lawyers who are military spouses are an example, as their spouse's work might require the family to relocate multiple times.

That particular concern might be partly addressed at the state bar level. An effort is underway to persuade state bar authorities to adopt special provisions to accommodate military spouses. The Military Spouse J.D. Network Foundation provides this description of its ongoing efforts:

> In February 2012, with the support of the ABA Commission on Women in the Profession, the ABA House of Delegates adopted a ABA Resolution 108 (2012) supporting changes in state licensing rules for military spouses with law degrees.

> In April 2012, Idaho became the first state to approve a military spouse licensing accommodation.
>
> Then in July 2012, the Conference of Chief Justices voted to support a resolution for admission of military spouse attorneys without examination. ….
>
> December 2012 saw the second state, Arizona, adopt a licensing rule specifically addressed the challenges faced by military spouse attorneys. Since then, other states have joined in the efforts to reduce barriers to employment for military spouses in the legal profession.
>
> In the years since, MSJDN has seen more than 40 states and the U.S. Virgin Islands pass common sense license reciprocity rules for military spouse attorneys. Our efforts continue as we work to reach all 50 states. MSJDN has also begun to petition the nine states which passed license reciprocity for military spouses but included harmful supervision requirements which have rendered the rules unduly burdensome and ineffective in practice.[46]

VIII. Conclusion

This report provides a snapshot of the Subcommittee's efforts as of summer and fall 2024. The Subcommittee will provide further updates as it continues its inquiries, and welcomes any additional Advisory Committee feedback in the meantime.

Encl.

46 See Military Spouse J.D. Network Foundation, State Licensing Efforts, available at https://msjdn.org/rule-change/ (last visited August 12, 2024).

MEMORANDUM

To: Catherine T. Struve
Andrew Bradt

From: Zachary Hawari, Rules Law Clerk

Re: History of 28 U.S.C. § 1654

Date: December 28, 2023

History

Why and when was this statute first adopted, and what was its subsequent history?

The statutory right to plead and conduct one's own case personally or by counsel goes back at least to the founding of the United States courts, and its language remains largely unchanged. Section 35 of the Judiciary Act of 1789 provided "[t]hat in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct their cases therein." 1 Stat. 73, 92 (1789).

The Judiciary Act of 1789 was introduced as Senate Bill No. 1 in the first legislative session of the first Congress, and its authorship is often credited to Oliver Ellsworth and the other two members of the drafting committee–William Paterson and Caleb Strong.[1] Section 35 contains the provision that became 28 U.S.C. § 1654, but it also included a more controversial provision providing for the appointment of United States Attorneys and the Attorney General.[2] I have not had much success in identifying the purpose or history of the relevant part of Section 35.

Some courts and commentators have since observed that the Sixth Amendment's right to counsel was being debated at the same time as the Judiciary Act.[3] The history of the common law right to self-representation, the Founders'

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[1] *See* New Light on the History of the Federal Judiciary Act of 1789 (jstor.org); The Judiciary Act of 1789: Charter for U.S. Marshals and Deputies (usmarshals.gov); First Federal Congress: Creation of the Judiciary (gwu.edu)

[2] New Light on the History of the Federal Judiciary Act of 1789 (jstor.org).

[3] Historical Background on Right to Counsel | Constitution Annotated | Congress.gov | Library of Congress

skepticism toward lawyers, the Sixth Amendment's right to counsel, and the Judiciary Act was discussed extensively by the Supreme Court in *Faretta v. California*, 422 U.S. 806, 812-32 (1975). More research would be required to understand how views during the 17th and 18th century led to Section 35, especially considering that views on the right to counsel in civil and criminal cases appears to have essentially reversed.[4]

In any event, Section 35 was codified in Section 747 of the Revised Statutes in the 1870s. The Judicial Code of 1911 then included a slightly modified version. 36 Stat. 1087, 1164 (1911). Section 272 of Chapter 11, which provided for provisions common to more than one court, stated: "In all courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein" (changes emphasized). When Title 28 was reorganized, that provision was moved from 28 U.S.C. § 394 to § 1654.

In 1948, § 1654 was briefly shortened to: "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel." 62 Stat. 869, 944 (1948). According to the reviser's notes for the 1948 amendment, the phrase "as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein" was "omitted as surplusage," and "[c]hanges were made in phraseology."[5] For example, "by the assistance of such counsel or attorneys at law" was apparently shortened to "by counsel."[6]

But in 1949, Congress "restore[d]" the "language of the original law." 63 Stat. 89, 103 (1949). Oddly, this restoration only included the "as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein" phrase.

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[4] Several colonies in the 17th century prohibited pleading for hire. *Faretta*, 422 U.S. at 827. Interestingly, the Massachusetts Body of Liberties included a proto-attorney-admission element or, at least, a provision giving the court power to reject a representative:

Every man that findeth himselfe unfit to plead his owne cause in any Court shall have Libertie to imploy any man *against whom the Court doth not except*, to helpe him, provided he give him noe fee or reward for his paines….

Id. at n.32 (quoting Art. 26 (1641)) (emphasis added).

[5] United States Code: General Provisions, 28 U.S.C. §§ 1651-1656 (1952) (loc.gov).

[6] It is not entirely clear whether shortening to "by counsel" was done in the 1948 amendment. The advisory committee notes to the 1944 amendment of Criminal Rule 44 quotes § 1654 with the assistance-of-counsel-or-attorney-at-law language. So, either there was another amendment between 1944 and 1948 or the 1949 amendment did not fully restore § 1654 to the 1911 version. Unfortunately, year-by-year versions of this statute have proven difficult to track down.

The change to “by counsel” survived the 1949 rollback. The allusion to the last phrase being “surplusage” in 1948 and its subsequent restoration in 1949 is intriguing, but I have not been able to find much legislative history on these changes. For example, the reviser’s notes and several cases refer to 80th Congress House Report No. 308, but I cannot find it online.

The current § 1654 has not changed since 1949. To summarize, these are the differences between 1789 and today:

> “[I]n all ~~the~~ courts of the United States~~,~~ the parties may plead and ~~manage~~ conduct their own ~~causes~~ cases personally or by ~~the assistance of such~~ counsel ~~or attorneys at law~~ as, by the rules of ~~the said~~ such courts, respectively, ~~shall be~~ are permitted to manage and conduct ~~their cases~~ causes therein.

Rule-Making Authority and Appellate Rule 46

Does the statute’s reference to counsel who are “permitted to … conduct causes” in the federal courts “by the rules of such courts” indicate that this statute accords the local courts authority over attorney admissions?

Courts were regulating attorney admissions and conduct prior to the REA, but it is not clear under what authority they did so—possibly inherent authority, some natural law theory, or statutory authorization like Section 35. *See generally Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867) (discussing attorney admission and discipline in the context of a Civil War era statute requiring attorneys to swear oaths).

More recently, the Supreme Court has “recogniz[ed] that a district court has discretion to adopt local rules that are necessary to carry out the conduct of its business. See 28 U.S.C. §§ 1654, 2071; Fed. Rule Civ. Proc. 83.” *Frazier v. Heebe*, 482 U.S. 641, 645 (1987). “This authority includes the regulation of admissions to its own bar.” *Id.* This is a point on which the dissent agreed. *Id.* at 652 (Rehnquist, J., dissenting) (“It is clear from 28 U.S.C. § 1654 that the authority provided in § 2071 includes the authority of a district court to regulate the membership of its bar.”).[7]

Nor was *Frazier* the first time the Supreme Court mentioned these provisions together as a basis for authority. The Court had previously noted that two district

[7] The Court held that the district court “was not empowered to adopt its local Rules to require members of the Louisiana Bar who apply for admission to its bar to live in, or maintain an office in, Louisiana where that court sits.” *Frazier*, 482 U.S. at 645. The dissent, however, believed that the Supreme Court lacked authority to set aside a rule promulgated by a district court governing admission to its own bar merely because it found the rules “unnecessary and irrational.” *Id.* at 652-55.

courts were "[a]cting under 28 U.S.C. §§ 1654, 2071, and Rule 83" when they promulgated local rules governing practice in their courts." *United States v. Hvass*, 355 U.S. 570, 571 (1958).[8]

Circuit courts have made similar statements. The Seventh Circuit stated that "[t]he authority to adopt rules relating to admission to practice before the federal courts was delegated by Congress to the federal courts in Section 35 of the Judiciary Act of 1789, … *now codified as* 28 U.S.C. § 1654." *Brown v. McGarr*, 774 F.2d 777, 781 (7th Cir. 1985); *see also Pappas v. Philip Morris, Inc.*, 915 F.3d 889, 895 (2d Cir. 2019) (quoting *Brown*). The Seventh Circuit also relied on § 2071 and inherent power to support the district court's authority to regulate attorney conduct.

It appears that courts have the necessary authority to regulate admission to the bar of that court under § 1654 and the REA, but it is not entirely clear whether § 1654, alone, would provide sufficient authority.[9]

If so, was this statute analyzed during prior rulemaking discussion on attorney admissions, for example in the lead-up to the adoption of Appellate Rule 46?

I have not found a direct reference to § 1654 in the discussion leading up to the addition of Appellate Rule 46 in the 1960s—at least not in the materials on the uscourts.gov website, namely the Committee Reports and Meeting Minutes. There is another archive of historical records that I have not yet searched, so there might still be something to be found.

Interestingly, however, in the minutes for the Appellate Rules Committee's August 1963 meeting, Dean O'Meara felt that attorney admission issues should be left for each appellate court to deal with by local rule while other members felt that this was an area where uniformity would be particularly helpful to the bar.[10]

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[8] The issue in *Hvass* was not, however, about the validity of a local rule, but rather whether a willfully false statement made by an attorney under oath during the district court's examination, under its local rule, into his fitness to practice before it, constitutes perjury.

[9] The reviser's note to the 1940s amendments to § 1654 also mentions these sections together, stating that "the revised section [1654] and section 2071 of this title effect no change in the procedure of the Tax Court before which certain accountants may be admitted as counsel for litigants under Rule 2 of the Tax Court." That said, the reviser's note was getting at separate discussion about who can appear before the Tax Court and whether it should be limited to attorneys.

[10] Circuit courts as they existed in the 18th century looked very different from modern courts of appeal, which were created in the Evarts Act in 1891. Another potential avenue for follow-up research is determining when courts of appeals created local rules governing attorney admission (presumably in the late 19th and early 20th centuries but possibly earlier) and seeing what authority they cited.

TAB 10

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.