ADVISORY COMMITTEE
ON
CIVIL RULES

October 21, 2026

AGENDA
Meeting of the Advisory Committee on Civil Rules
October 21, 2026

OPENING BUSINESS

1. Introductory Remarks

Committee Roster 6
Subcommittee List 8

2. Report of the Rules Committee Staff (RCS)

Draft Minutes of the June 2026 Standing Committee Meeting 13
September 2026 Report to the Judicial Conference of the United States 56
Status of Proposed Amendments to the Federal Rules 84
Pending Legislation Chart (119th Congress) 90

ACTION ITEMS

3. Review and Approval of Minutes

Draft Minutes of the April 2026 Meeting of the Advisory Committee on Civil Rules 97

For Publication

4. Rule 43(a)—Remote Trial Testimony 119

Rule 43(a) Proposal 120
Notes of August 28, 2026 Subcommittee Meeting 124
Notes of August 4, 2026 Subcommittee Meeting 130
S. Sraders January 28, 2026 Memorandum 132

INFORMATION ITEMS

Subcommittee Report

5. Third-Party Litigation Funding 139

Emery Lee, Fed. Judicial Ctr., Third-Party Funding Disclosures in the District of New Jersey, June 2021-June 2026 (2026) 152

Other Proposals/Matters Under Committee Consideration

6. Rule 23—Class Actions 168

7. Rule 35—Right of Representative to Attend Examinations 170

Suggestion 26-CV-1 (American Association for Justice)..... 173
Federal Judicial Center Report on State Practice..... 182
S. Sraders August 26, 2026 Memorandum 196

8. Rule 58—"Separate Document" Requirement 200

Suggestion 25-CV-Q (Brad Baranowski)..... 202

9. Filing in Court Under Seal..... 211

Excerpt from the October 24, 2025 Agenda Book for the Advisory Committee on Civil Rules..... 215
Excerpt from the April 1, 2025 Agenda Book for the Advisory Committee on Civil Rules..... 222
Notes of October 7, 2025 Discovery Subcommittee Meeting..... 227
Suggestion 26-CV-24 (Nora Freeman Engstrom)..... 229

10. Electronic Access to Immigration Cases..... 246

Suggestion 26-CV-12 (John Hawkinson)..... 249
Suggestion 26-CV-20 (Reporters Committee for Freedom of the Press) 258
Suggestion 26-CV-29 (Roger Parloff) 262

11. Standardizing Disclosures Regarding Prior Expert Testimony of Testifying Expert..... 266

Suggestion 26-CV-22 (John Shook)..... 268

RECOMMENDATION TO DROP FROM AGENDA

12. Procedure for Recusal Motions 276

Suggestion 25-CV-M (Sai) 279

13. "Status-Based" Indexing Bias in Judicial Records..... 285

Suggestion 26-CV-18 (Terrance Walker)..... 286

14. "Asymmetry" Between Opting Out of Class Actions and Not Opting Out..... 289

Suggestion 26-CV-19 (Karolis Doniela) 290

15. Amending Rule 11 to Address Problems Resulting from Use of AI..... 293

Suggestion 26-CV-21 (Hon. Patricia Barksdale)..... 294

16. Motion for Order Requiring Sworn Governmental Explanation in Liberty Constraint Cases 296

Suggestion 26-CV-23 (Donald Cottman) 298

17. "Case Progress" Specification in Rule 16 Scheduling Orders 305

Suggestion 26-CV-25 (Jay Price) 306

UPDATE

18. Report from the Federal Judicial Center (FJC)

Federal Judicial Center Research and Education Memorandum (August 27, 2026) 309

TAB 1

ADVISORY COMMITTEE ON CIVIL RULES

Chair	Reporter
Honorable Sarah S. Vance United States District Court New Orleans, LA	Professor Richard L. Marcus University of California, San Francisco San Francisco, CA
	Associate Reporter
	Professor Andrew Bradt University of California, Berkeley Berkeley, CA

Members

Honorable Benjamin J. Beaton
United States District Court
Louisville, KY

Honorable Jane Bland
Supreme Court of Texas
Austin, Texas

Honorable Annie Christoff
United States District Court
Memphis, TN

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

Honorable Rachel P. Kovner
United States District Court
Brooklyn, NY

W. Mark Lanier, Esq.
The Lanier Law Firm
Houston, TX

Jocelyn D. Larkin, Esq.
Impact Fund
Berkeley, CA

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

Honorable Lewis J. Liman
United States District Court
New York, NY

John S. Moran, Esq.
McGuireWoods
Washington, DC

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

Honorable Manish S. Shah
United States District Court
Chicago, IL

Brett A. Shumate, Esq.
Assistant Attorney General (ex officio)
United States Department of Justice
Washington, DC

David C. Wright III, Esq.
Robinson, Bradshaw & Hinson, P.A.
Charlotte, NC

ADVISORY COMMITTEE ON CIVIL RULES

Liaisons

Hon. Amul R. Thapar
(*Standing*)
United States Court of Appeals
Covington, KY

Hon. Leigh Martin May
(*Bankruptcy*)
United States District Court
Atlanta, GA

Consultant

Professor Edward H. Cooper
University of Michigan Law School
Ann Arbor, MI

Clerk of Court Representative

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

ADVISORY COMMITTEE ON CIVIL RULES
SUBCOMMITTEES
(effective October 1, 2026)

Discovery Subcommittee Hon. Annie Christoff, Chair John Moran, Esq. David Wright, Esq. Thomas Bruton, Clerk	**Rule 43/45 Subcommittee** Hon. M. Hannah Lauck, Chair Hon. Jane Bland Mark Lanier, Esq. Jocelyn Larkin, Esq. John Moran, Esq.
Third-Party Litigation Funding (TPLF) Subcommittee Hon. Lewis J. Liman, Chair Prof. Zachary Clopton Mark Lanier, Esq. Jocelyn Larkin, Esq. Hon. Marvin Quattlebaum David Wright, Esq.	

ADVISORY COMMITTEE ON CIVIL RULES

Members	Position	District/Circuit	Start Date	End Date
Sarah S. Vance Chair	D	Louisiana (Eastern)	Chair: 2025	2028
Benjamin J. Beaton	D	Kentucky (Western)	2026	2029
Jane Bland	JUST	Texas	2022	2028
Annie Christoff	M	Tennessee	2024	2027
Zachary D. Clopton	ACAD	Illinois	2023	2029
Rachel P. Kovner	D	New York (Eastern)	2026	2029
W. Mark Lanier	ESQ	Texas	2025	2028
Jocelyn D. Larkin	ESQ	California	2024	2027
M. Hannah Lauck	D	Virginia (Eastern)	2022	2028
Lewis J. Liman	D	New York (Southern)	2026	2029
John S. Moran	ESQ	District of Columbia	2026	2029
Marvin Quattlebaum, Jr.	C	Fourth Circuit	2024	2027
Manish S. Shah	D	Illinois (Northern)	2023	2028
Brett Shumate*	DOJ	Washington, DC	----	Open
David C. Wright	ESQ	North Carolina	2024	2027
Richard Marcus Reporter	ACAD	California	2023	2028
Andrew Bradt Associate Reporter	ACAD	California	2023	2028

Principal Rules Committee Staff: Sarah Sraders, 202-502-1820

_____

* Ex officio representative

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Staff

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

Bridget M. Healy, Esq.
Counsel

Sarah Sraders, Esq.
Counsel

Shelly Cox
Management Analyst

Rakita Johnson
Administrative Analyst

FEDERAL JUDICIAL CENTER
Staff

Hon. Robin L. Rosenberg
Director
Federal Judicial Center
Washington, DC

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

Appellate Rules Committee
Tim Reagan, Ph.D., J.D.
Senior Research Associate

Bankruptcy Rules Committee
Carly Giffin, Ph.D., J.D.
Senior Research Associate

Civil Rules Committee
Emery G. Lee, Ph.D., J.D.
Senior Research Associate

Criminal Rules Committee
Brittany Ripper, Ph.D., J.D.
Research Associate

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

Evidence Rules Committee
Elizabeth Wiggins, Ph.D., J.D.
Division Director

Timothy Lau, Ph.D., J.D.
Research Associate

TAB 2

MINUTES

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

June 3-4, 2026

The Judicial Conference Committee on Rules of Practice and Procedure (the Standing Committee) met in Chicago, Illinois, on June 3 and 4, 2026. The following members were present:

Judge James C. Dever III, Chair
Judge Paul J. Barbadoro
Elizabeth J. Cabraser, Esq.
Louis A. Chaiten, Esq.
Judge Colm F. Connolly
Judge Joan N. Ericksen
Judge Stephen Higginson
Justice Edward M. Mansfield
Dean Troy A. McKenzie
Andrew J. Pincus, Esq.
Judge Allison J. Rushing
Elizabeth J. Shapiro, Esq.[1]
Judge Amul R. Thapar
Bart H. Williams, Esq.

The following individuals also attended to support the work of the Standing Committee: Professor Edward Hartnett, Standing Committee Reporter; Carolyn A. Dubay, Secretary to the Standing Committee; Professor Catherine T. Struve (attended remotely), Professor Daniel R. Coquillette (attended remotely), Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee.

The following individuals attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules:
Judge Allison H. Eid, Chair
Professor Stephen Sachs, Reporter (attended remotely)

Advisory Committee on Bankruptcy Rules:
Judge Rebecca B. Connelly, Chair
Professor S. Elizabeth Gibson, Reporter (attended remotely)
Professor Laura B. Bartell, Associate Reporter

Advisory Committee on Civil Rules:
Judge Sarah S. Vance, Chair
Professor Richard L. Marcus, Reporter
Professor Andrew Bradt, Associate Reporter

Advisory Committee on Criminal Rules:
Judge Michael W. Mosman, 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

Judge Robert J. Conrad, Jr., Director of the Administrative Office of the U.S. Courts, also attended. Other attendees (participating remotely) included: Bridget Healy, Esq. and Sarah A.

[1] Ms. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Todd Blanche.

Sraders, Esq., Rules Committee Staff Counsel; Shelly Cox, Rules Committee Staff; and Dr. Tim Reagan, Senior Research Associate, Federal Judicial Center (FJC).

1. OPENING BUSINESS

A. Welcome and Opening Remarks

Judge James C. Dever, III, Chair of the Standing Committee, called the meeting to order and welcomed the members, participants, and observers, including those attending remotely. Dean Zachary Clopton, Dean of Northwestern Pritzker School of Law, also welcomed the attendees.

Judge Dever also paid tribute to Standing Committee member Judge D. Brooks Smith (3rd Cir.), who retired effective May 31, 2026. Judge Dever recounted Judge Smith's impressive career, noting that he had served as chief judge of the district court and Third Circuit and as Chair of the Judicial Conference Space and Facilities Committee, and been a member of the Criminal Rules Committee, the Committee on Judicial Conduct and Disability, and the Executive Committee. Judge Dever also read for the members a letter from Judge Brooks reflecting upon his time on the Standing Committee. Judge Dever then welcomed Judge Smith's successor, Judge Amul Thapar (6th Cir.) and announced that Judge Michelle Harner (Bankr. D. Md.) would become the chair of the Bankruptcy Rules Advisory Committee upon the end of the term of Judge Rebecca Connelly on September 30, 2026.

B. Discussion and Approval of the Meeting Minutes

Following these announcements, Judge Dever called for discussion and approval of the minutes of the January 6, 2026, meeting. After an opportunity for discussion and hearing no comments, upon motion and a second, with no opposition, the Standing Committee approved the minutes with one minor typographical correction.

C. 2025 Strategic Plan for the Judiciary

Judge Dever next asked the members for feedback on a request from Chief Judge Michael A. Chagares (3rd Cir.), Judiciary Planning Coordinator, to identify any agenda items that align with the Judicial Conference Executive Committee's priority goals from the 2025 Strategic Plan for the Judiciary. Judge Dever expressed support for prioritizing the use of public resources. After giving the members an opportunity to discuss the issue, upon motion and a second, with no opposition, the Standing Committee authorized the Chair, working with the Secretary, to respond directly to Chief Judge Chagares that the Committee would generally prioritize the goal to allocate and manage public resources more efficiently and effectively through the rules process.

D. Status of Rule Amendments

Carolyn A. Dubay, Chief Counsel and Secretary to the Standing Committee, gave a brief report on the status of proposed rule amendments, referencing the chart of proposed amendments included in the agenda book beginning on page 67. Ms. Dubay highlighted that final rule amendments had been delivered to Congress in April 2026, but that this package did not include Appellate Rules 29 and 32 and the Appendix of Length Limits, which were withdrawn for further consideration. Those amendments were withdrawn at the request of the Executive Committee of

the Judicial Conference for further consideration, and upon revision by the Appellate Rules Advisory Committee, they were submitted for final approval (see report of the Appellate Rules Advisory Committee).

E. Legislative Update

Ms. Dubay also provided an update on any pending legislation that directly or effectively amends the federal rules, referencing the chart of legislative proposals in the agenda book beginning on page 73. She drew the Standing Committee's attention to the Sunshine in the Courtroom Act of 2025, which would allow broadcasting in all court proceedings, including criminal proceedings, despite Criminal Rule 53's prohibition.

F. Federal Judicial Center Update

Dr. Tim Reagan provided the Standing Committee with an update on the FJC's activities relating to the work of the Rules Committees. The FJC Report is included in the agenda book beginning on page 79. In addition to the topics covered in the report, Dr. Reagan stated that the FJC had recently released on the judiciary's intranet a video documentary featuring courts that allow *pro se* electronic filing.

2. JOINT COMMITTEE BUSINESS

Judge Dever then turned to joint committee projects and business.

A. Joint Subcommittee on Attorney Admission

Professor Bradt presented on behalf of the Joint Subcommittee on Attorney Admission. Professor Bradt explained that this project began in 2023 with a suggestion from Dean Alan Morrison of George Washington Law School arising from the challenges lawyers with nationwide practices face because of differing district court bar admission policies. For example, many districts require admission to the state bar in which the district sits, and that includes districts in a small number of states (four) that require taking the state bar exam in order to be admitted.

Professor Brandt then recounted how since 2023, the subcommittee engaged in a substantial amount of work, including six subcommittee meetings, formal and informal outreach to judges, state bars, and other important stakeholders. The results of this inquiry established that district courts do not favor national rule-making on this issue for a number of reasons, including their interest in sustaining their local court practices and ensuring adequate supervision of their own district bars. There was also some concern that, were such a proposal to be passed, district courts would enhance their local rules to require more engagement of local counsel. There were also various issues related to whether the proposal was appropriate for consideration under the Rules Enabling Act. With this background, Professor Bradt stated that it was the subcommittee's unanimous recommendation to end the project and disband the subcommittee. Professor Bradt also summarized Dean Morrison's comments in response to the subcommittee's recommendation.

The Committee then heard the views of various reporters and consultants, who expressed understanding of Dean Morrison's concern about the significant disparity among district court

Draft

admission practices (including local residency requirements), but also advised caution in proceeding with national rulemaking on this issue for a variety of reasons. The consultants and reporters noted the Committee's earlier efforts to consider national rules of attorney conduct, which proved unsuccessful in light of concern for sustaining local and state authority over the practice of law. A reporter underscored caution about adopting a "one-size-fits-all" approach.

The members then discussed the subcommittee's recommendation.

A judge member expressed support for the subcommittee's recommendation after sharing his concern that national admission rules may inhibit the ability of individual judges to require higher standards of conduct and professionalism in their courtrooms (as set forth in standing orders, for example). Another member raised the issue of admission fees and asked whether that issue had been driving concerns behind the district court judges' objections. Professor Bradt noted that the FJC had completed a study on the amount of those fees and their variation and the use of such fees to fund important operations and provide support for pro bono staff attorneys and libraries. Professor Bradt emphasized, however, that while the issue of fees did come up with judges, potential loss of fees was not the primary concern, which focused on supervisory responsibilities and preserving local legal culture and traditions.

With no further discussion, upon motion and a second, with no opposition, the Standing Committee voted to conclude the attorney admission project and disband the subcommittee.

B. Electronic Filing and Service by Self-Represented Litigants

Professor Struve presented the self-represented litigant filing and service project to the Standing Committee relating to Appellate Rule 25; Bankruptcy Rules 5005, 8011, and 9036 (with a conforming amendment to Bankruptcy Rule 9006); Civil Rule 5 (with a conforming amendment to Civil Rule 6); and Criminal Rule 49 (with a conforming amendment to Criminal Rule 45).

Professor Struve explained that the proposed amendments were focused on two issues. First, the proposed amendments eliminate the requirement for self-represented litigants to complete a burdensome and redundant paper service of court filings (other than the initial pleading) if the litigant to receive such service already receives such documents through the court's electronic filing system or electronic noticing system. Second, the proposed amendments presumptively permit self-represented litigants to file court documents electronically, unless a court order or local rule bars them from doing so. If a court adopts a local rule barring self-represented litigants from using the court's electronic filing system, the proposed amendments further provide that any such local rule must either include reasonable exceptions to that prohibition or permit the use of another electronic method for filing documents and receiving electronic notice of activity in the case.

Professor Struve also informed the Committee that each of these proposed amendments was approved for publication by the relevant Advisory Committee, although the support of some members of the Bankruptcy Rules Advisory Committee extended only to publication for public comment with reserved skepticism as to whether the amendments would proceed to final approval. Professor Struve further explained that there are some variances in the proposed

amendments across the four rule sets to ensure consistency of language and application within the same rule set.

After providing this background, Professor Struve directed the Standing Committee's attention to language in the proposed common committee notes to Appellate Rule 25(a)(2)(C)(ii) (agenda book page 160), Bankruptcy Rule 5005(a)(3)(B)(ii) (agenda book page 139), Bankruptcy Rule 8011((a)(2)(C)(ii) (agenda book page 146), Civil Rule 5(d)(2)(B)(ii) (agenda book page 134), and Criminal Rule 49(b)(2)(B)(ii) (agenda book page 125). These committee note sections address whether a court may continue to require self-represented litigants to seek permission to use its electronic filing system under the new rule provisions. The Clerk of Court liaisons to the Advisory Committees had stressed that it would be useful for the committee note to expressly affirm the use of a permission-based system to help communicate clearly with self-represented litigants about the court's role in allowing such access. But some advisory committee members had raised concerns that the original proposed language might seem to approve standardless discretion concerning whether or not to grant permission. In response, the Appellate Rules Committee had approved revised note language that addressed those concerns. The Appellate Rules Committee's meeting occurred after the Bankruptcy Rules and Civil Rules Committees had met and approved the initial proposed language. The Criminal Rules Committee thereafter approved the language in the committee note as revised and approved by the Appellate Rules Committee.

To show the two versions of the language in the committee note, Professor Struve pointed to page 134 of the agenda book, the committee note for the proposed amendments to Civil Rule 5. The language in the first bracket (lines 220-223) is the language approved by the Bankruptcy Rules and Civil Rules Committees at their spring meetings. The language in the second bracket (lines 223-227) is the modified language approved by the Appellate Rules and Criminal Rules Committees. Professor Struve proposed that the Standing Committee approve the second bracketed alternative. Professor Marcus added that the Civil Rules Advisory Committee was not enthusiastic about the first bracketed language and did not have the second alternative before it at its spring meeting.

The members then discussed the proposed amendments.

A judge member asked whether there had been discussion about AI use among self-represented litigants and whether there were adequate protections to prevent disclosure of private information if documents are filed electronically and available for public access. Professor Struve responded that the surge in AI-assisted filings was not itself a topic of discussion, but that she believed that clerks would likely say that to the extent there are more filings, they would prefer not to receive them in paper form and scan them into the system. As for privacy, Professor Struve noted that the proposed rules would allow courts to establish a different system – such as an upload portal or requiring email submissions—that would allow the clerk's office to review filings from self-represented litigants before they are made available to the public. Further, Professor Struve added that any social security number in the filing would most likely be the filer's own number, in which case the filer would not be violating the privacy rules.

Another judge member expressed his support for the proposal, noting that it would save time and money and improve access to justice. As an example, he noted that one-third of all filings are

made after 5 p.m. Allowing self-represented litigants to use electronic filing and be able to file after 5 p.m. would make the system fairer. The judge member then asked whether the rule should be extended to allow self-represented nonparties to use electronic filing. Professor Struve responded that this issue had been discussed, particularly in the Criminal Rules context with respect to victims, and the choice was made to limit the presumptive access to e-filing to parties. This would not preclude a court from allowing electronic access to self-represented nonparties, but they would not receive the same presumptive right to use it as a default principle set forth in the revised rules.

Another judge member asked whether the Committee on Court Administration and Case Management (CACM) had been consulted on this project. Professor Struve explained that CACM had not been officially consulted, but CACM leadership and staff have been involved in a number of issues that overlap, including coordination on the Privacy Report to Congress. Judge Dever added that these proposed amendments are only at the publication stage, which will enable CACM to weigh in as well, and there will have to be coordination on training if the amendments are adopted, including training on privacy requirements.

The state judge member stated that his state recently moved to a rule that required self-represented litigants to file electronically unless they fell into an excepted group (such as confined persons) or filed a motion for good cause to not file electronically. He added that the state courts had not had problems with this new rule.

With no further discussion, upon motion and a second, with no opposition, the Standing Committee approved for publication and public comment the proposed amendments to Appellate Rule 25; Bankruptcy Rules 5005, 8011, and 9036 (with a conforming amendment to Bankruptcy Rule 9006); Civil Rule 5 (with a conforming amendment to Civil Rule 6); and Criminal Rule 49 (with a conforming amendment to Criminal Rule 45), as revised to include adoption of the second bracketed language approved by the Appellate and Criminal Rules Committees in the committee notes to Civil Rule 5(d)(2)(B)(ii) (page 134, lines 223-227), Bankruptcy Rule 5005(a)(3)(B)(ii) (agenda book page 139-140, lines 104-107), and Bankruptcy Rule 8011(a)(2)(C)(ii) (agenda book page 146, lines 151-154).

C. Privacy Rules Related to Taxpayer Identification Numbers and Minors

Judge Dever then turned to Ms. Dubay to present the proposed amendments to the privacy rules. Ms. Dubay noted that there were two privacy-related items on the agenda: (1) the proposed amendments to the privacy rules (Bankruptcy Rule 9037, Civil Rule 5.2, Criminal Rule 49.1), and (2) the Judicial Conference's biennial report to Congress regarding the status of the judiciary's efforts to address privacy concerns in public court filings.

Turning to the rule amendments, Ms. Dubay explained that initially the Advisory Committees had hoped to present a package of privacy amendments including updated privacy rules applicable in appeals through proposed amendments to Appellate Rule 25 and a new provision in Bankruptcy Rule 8011. The Appellate Rules Committee, however, decided at its spring meeting to further consider the proposed amendments given some concerns expressed about the redaction requirement in voluminous appendices. Ms. Dubay further explained that because of the desire for consistency with the approach to appeals, the Chair and Reporter of the Bankruptcy Rules

Advisory Committee would not put forward proposed amendments to Rule 8011 at this time to allow the members of the Bankruptcy Rules Advisory Committee to consider changes that the Appellate Rules Advisory Committee may suggest as to appeals. These changes would not affect the pending proposed privacy amendments Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1.

Like the package of proposed amendments regarding access to electronic filing and notice for self-represented litigants, Ms. Dubay noted that there is common language in the proposed committee notes that requires attention in light of a suggested modification received from the Department of Justice after the agenda book was published. The suggested revised committee note language was provided as a handout and is found immediately after page 587 of the agenda book.

Professor Hartnett, Reporter to the Standing Committee, added that the proposed amendments involved the replacement of minors' names with pseudonyms (rather than the use of initials) and complete rather than partial redaction of social security numbers (SSNs) and individual taxpayer identification numbers (ITINs). The amendments (to the Civil and Criminal Rules) would also clearly apply the redaction requirement to adoption taxpayer identification numbers (ATINs) and employer identification numbers (EINs). Professor Hartnett explained that the Advisory Committees generally considered the risk of fraud in making these recommendations, and although ATINs are low risk they were included to avoid confusion and for completeness.

Professor Beale, Reporter to the Criminal Rules Advisory Committee, then advised the Standing Committee that, to the extent that members were concerned that a minor could be identified because the parents are named publicly, the current rule does not prevent this because it only requires using a minor's initials. DOJ, which proposed the use of pseudonyms for minors in criminal cases, raised the concern that the existing rule with initials made it too easy to determine a minor's identity. The proposed amendment was narrow and responded only to this concern. Professor Beale also stated that strong concerns had been raised regarding protecting EINs, because EINs are used by individuals and not only corporate entities. Professor Beale added that DOJ's position was that EINs should not be redacted, but the Criminal Rules Advisory Committee believed that there was utility and convenience in treating all such numbers similarly, which also avoided the possibility of fraud.

Professor Hartnett then turned to the changes to the common committee note that DOJ had proposed. The proposed revision concerned the impact of expanding the redaction requirement to document exhibits and attachments, and whether this conflicted with the exemptions from the redaction requirement under subsection (b) of the current rules (exempting records of administrative proceedings, records of state court proceedings, and other court records). DOJ's proposed revision to the committee note to Civil Rule 5.2, Criminal Rule 49.1, and Bankruptcy Rule 9037 would make clear that the exemptions in subsection (b) still apply. Professor Beale added that although the Criminal Rules Advisory Committee had not had the opportunity to consider this proposed clarification, the revision was acceptable to the Criminal Rules Chair and Reporters.

The members then discussed the proposed amendments.

A judge member asked whether the Advisory Committees had considered full redaction of financial account numbers with respect to the risk of fraud. Professors Beale and King, Reporters to the Criminal Rules Committee, explained although the Committee learned there was a risk that someone could replicate an entire SSN with access to the last four digits, it had received no information that the same risk existed for financial account numbers.

On the issue of pseudonyms for minors, another lawyer member said that in some cases, due to the sensitive nature of the allegations, courts have permitted non-minor plaintiffs to use pseudonyms rather than initials because of a concern that the plaintiffs would otherwise be identifiable. She offered an example of the Uber sexual assault MDL cases and said that this practice was working well there. Professor Beale said that her understanding was that the practice of using pseudonyms was already widespread in criminal cases. Professor Garner asked whether the proposed amendments should include any guidance to courts on devising pseudonyms. He expressed concern that a judge may create a distinctive pseudonym, causing an innocent person with that name to be misidentified as the person involved.

On the issue of exemptions and the requirement to redact exhibits and attachments, Ms. Shapiro, on behalf of DOJ, said that the discussion of the exemptions versus the redaction rule was one of the most significant items of debate when the privacy rules were originally drafted some twenty years ago. DOJ's concern was that the proposed amended note language regarding exhibits and attachments could create some confusion about whether it was meant to supersede the exemptions in subsection (b). DOJ had therefore suggested a friendly amendment to the committee note to make clear that the rest of the rule remains intact. Professor Capra, Reporter to the Evidence Advisory Committee, noted that CACM was involved with the privacy rules when they were originally adopted, and expressed deep concern about the burdens of redaction. He suggested that these burdens may not be as great today with the potential for AI to assist in the redaction process.

A lawyer member asked generally whether the exemptions from the redaction requirement in subsection (b) were so broad that they undermined the proposed rule amendments. Professor Hartnett responded that this issue had been discussed, and there was concern about imposing new requirements on state administrative records that previously were not required to be redacted. The lawyer member acknowledged that it would be difficult to redact a voluminous record, but the committee note to the privacy amendments referred to parts of the record that are attached as exhibits, which may be lengthy but not as lengthy as an entire administrative record or entire state court proceeding. Professor Beale added that the language requiring redaction in documents and exhibits flowed from the FJC research on when SSNs are most often erroneously included in public filings. Dr. Reagan added that the CACM study involved a very exhaustive investigation into unredacted SSNs, and he examined civil, criminal, and appellate cases. He found that unredacted SSNs appear most often in exhibits, not in briefs.

Professor Beale also noted that under the proposed amended rule, the parties would be responsible for redactions and for choosing a pseudonym. The committee note advises that where possible gender-neutral pseudonyms should be used, but provides flexibility because in some cases, gender may be relevant. A judge member asked whether self-represented litigants needed to use pseudonyms when identifying minors and expressed concern that that in habeas proceedings, for example, a petitioner convicted of molesting a minor may be able to file a

habeas petition with the minor's name in the filing. Professor Beale responded that this was beyond the scope of the current proposal to change the use of initials to pseudonyms.

Another judge member added that she had no issue with the limited amendments proposed but thought that the time may have come to review the exemptions in subsection (b). A lawyer member agreed and proposed adding a question about exemptions when the proposed amendments are published for public comment. As to the committee note language, the lawyer member thought that the exemptions should not apply to something that would be filed electronically because it would undermine exactly what the privacy rules intend to do.

Judge Dever then asked Ms. Shapiro whether DOJ would oppose publication for public comment if the proposed amendments included the committee note language approved by the Advisory Committees. Ms. Shapiro responded that DOJ wanted the proposed amendments published for public comment to achieve the initial objective of using pseudonyms rather than initials for minors. If the additional language proposed by DOJ was not accepted, however, this would not change what the rule required and the exemptions would still apply. Judge Dever next asked the Advisory Committee Chairs and Reporters if they had anything further to add. Regarding the Criminal Rules, which had taken the lead on the privacy amendments project, Judge Mosman supported publication of the proposed amendments, with or without the proposed addition from DOJ, and reviewing the exemptions at a future date. Judge Connelly added that the proposed amendments to Bankruptcy Rule 9037 included the language about exhibits and attachments and replacing minors' initials with pseudonyms but did not include full redaction of SSNs because of the special needs in bankruptcy cases to identify the debtor. Professor Bartell added that EINs are also not included in the proposed amendments to Rule 9037 because EINs are affirmatively required on a petition and further, the Bankruptcy Rules Committee saw no reason to extend protections to non-individuals, which would happen if EINs were uniformly redacted.

A judge member then raised the issue of whether this amendment would require a judge to let a person proceed under a pseudonym, such as in a Title 9 or Individuals with Disabilities Education Act (IDEA) case, which may conflict with a body of law instructing judges on whether to allow someone to proceed under a pseudonym or not. Professor Marcus said that the existing case law was not meant to be changed by these amendments. Judge Dever asked whether the lawyer member who had previously shared her experience with pseudonyms in MDLs could respond to the judge member's question. The lawyer member responded that in the Uber MDL, there were different approaches to pseudonyms and it seemed to be an evolving practice. Judge Dever added that in his experience in criminal cases, DOJ had been using pseudonyms for quite some time.

Judge Dever then focused the discussion on whether the committee members preferred the new DOJ-proposed language in the committee note to the language approved by the Advisory Committees. A judge member said that she favored including the revised DOJ language. A lawyer member agreed and reiterated the suggestion to also ask a question in the published proposal about revising subsection (b) on exemptions and supported clarifying that amending the rule to address the exemptions in (b) would not apply to exhibits and attachments filed with a pleading. Professor Hartnett added that there had been occasions where questions were posed, and Professors Marcus, Beale, and Kimble suggested including the text of subsection (b) in the published version of the rule. Ms. Shapiro, on behalf of DOJ, agreed with including subsection

(b) in the published materials, but advised against including a question because this would distract from the changes being proposed for subsection (a). Another judge member, however, supported including a question because he thought that otherwise the exceptions would swallow the rule.

Judge Dever then observed that there was consensus on publishing the text of subsection (b) on exemptions even if it was not the subject of the proposed amendments and the proposed committee note as revised by DOJ. Judge Dever also expressed his view that it was rare for the committees to ask specific questions when publishing proposed amendments for public comment, and he thought the committees would receive robust commentary even without a specific question or prompt. Judge Dever also supported adding the text of subsection (c). As an additional note, Professor Hartnett added that there were minor technical differences in cross-references in the proposed committee notes because Criminal Rule 49.1 and Civil Rule 5.2 have their protective order provision in subsection (e), while Bankruptcy Rule 9037's protective order provision is in subsection (d). Professor Hartnett also pointed out a typographical error that required changing a cross-reference to Rule "5.2" and not "52."

With no further discussion, upon motion and a second, with no opposition, the Standing Committee approved for publication and public comment the proposed amendments to Criminal Rule 49.1, Civil Rule 5.2, and Bankruptcy Rule 9037, including publication of the entire text of each rule, the technical corrections, and the text suggested by the DOJ to be added to the end of the committee notes found on page169 (Criminal Rules), page 172 (Civil Rules), and page 174 (Bankruptcy Rules) of the agenda book.

D. Draft 2026 Privacy Report to Congress

Following approval of the proposed privacy amendments for publication and public comment, Ms. Dubay presented the 2026 Privacy Report to Congress for the Standing Committee's approval. She explained that the report is required by law every two years, and that if approved by the Standing Committee, it would be transmitted to the Judicial Conference at its September session for approval, and if so approved, the Director of the Administrative Office of the U.S. Courts would transmit the report to Congress.

Ms. Dubay then provided background on the development of the report. She explained that the report was a product of work and coordination between the Rules Committee Staff, CACM staff, and the FJC. She also advised that the CACM Privacy Subcommittee had reviewed the draft report and recommended that CACM endorse the report, which it did at its May 27, 2026, meeting. Ms. Dubay also noted that CACM approved the FJC's most recent report on privacy issues, which appears at the end of the agenda book, and thanked Kristin Garri for her work on the project. Ms. Dubay also noted that the reporters had all weighed in on the report and thanked them for their work.

With no questions or further discussion, upon motion and a second, with no opposition, the Standing Committee approved the 2026 Privacy Report to Congress, including any necessary modifications to reflect the Committee's action on the privacy amendments, and recommended its adoption.

3. ACTION ITEMS – REPORTS OF THE ADVISORY COMMITTEES

The Standing Committee next heard reports on action items from each of the five Advisory Committees.[2] A list of changes made by the Standing Committee to proposed amendments presented for final approval are set forth in Appendix A to these minutes.

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

Judge Eid presented action items on behalf of the Advisory Committee on Appellate Rules, which last met on April 16, 2026, in Charlotte, North Carolina. The first item was to request final approval of amendments to Rule 29, and conforming amendments to Rule 32 and the Appendix of Length Limits, relating to amicus briefs. The second item was to request final approval of amendments to Rule 15 relating to petitions for review of agency decisions. The Advisory Committee had no proposed amendments for publication and public comment to present beyond the proposed amendments to Rule 25 as part of the package of amendments relating to electronic notice and filing by self-represented litigants approved earlier in the meeting. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning on page 190.

Prior to turning to the action items, Judge Eid introduced the Advisory Committee's new reporter, Professor Stephen Sachs of Harvard Law School. Judge Eid also thanked Professor Hartnett for his tremendous service while serving as reporter to the Appellate Rules Committee.

1. *Amendments for Final Approval*

a. Rules 29, 32, and the Appendix of Length Limits (Amicus Briefs)

Judge Eid presented the Advisory Committee's request for final approval of amendments to Rule 29, along with conforming amendments to Rule 32 and the Appendix of Length Limits, found on page 231 of the agenda book. Judge Eid began with background as to why these proposed amendments were to be considered again after the Committee's final approval in June 2025 and subsequent approval by the Judicial Conference and transmission to the Supreme Court. Judge Eid explained that in early 2026, the Judicial Conference Executive Committee expressed concerns about language in proposed Rule 29(e)(2) relating to the disclosure requirements regarding new members of an amicus organization. To address these concerns, the Appellate Rules Advisory Committee and the Standing Committee voted to withdraw the proposed amendments for further consideration. The Supreme Court approved that request and the proposed amendments to Rules 29 and 32 and the Appendix of Length Limits were not forwarded to Congress.

The Advisory Committee then revisited the proposed amendments at its spring 2026 meeting, concentrating on the Executive Committee's concern about the new member provision. The proposed committee note had described this as an anti-evasion rule, treating new members of an amicus as if they were non-members. The concern about the rule was that an organizational amicus would have to disclose the identities of its contributing new members, which could dissuade either the organization or its new members from participating and filing a brief in the

[2] Information items presented by the Advisory Committees are set forth in Part 4 of these minutes.

first place. At its spring meeting, the Advisory Committee also considered the extent of the negative reaction to the proposal not only from the Executive Committee, but from the public during the public comment period. The Advisory Committee voted 5-1, with one abstention, to remove the new member provision from the proposal.

Additionally, Judge Eid explained that two additional modifications were proposed. First, after the amendment package was submitted to the Supreme Court, an ambiguity was identified in the language of proposed Rule 29(c) requiring a party or its counsel to make certain disclosures if the amicus failed to do so (the backup disclosure requirements). After discussion, the Advisory Committee voted without opposition to rephrase the requirement, removing proposed Rule 29(c) and inserting clarifying language into proposed Rule 29(b). Second, the Advisory Committee approved the removal of an erroneous cross-reference to Rule 29(a)(5). Judge Eid also reported that the Advisory Committee considered whether to submit these revisions for an additional round of public comment. Because the issue of the new member provision had been exhaustively discussed by the Advisory Committee, the Standing Committee, and public commenters, and the other revisions were technical in nature, the Advisory Committee voted without opposition to seek final approval without republication.

Before turning to member discussion, Professor Beale raised a question about the removal of language on page 193 of the agenda book indicating that the new member provision was stricken along with the provision requiring a new organization to disclose the date of its formation. Professor Sachs responded that it was stricken because it was duplicative (with the other provision found on page 234, lines 61 to 63 of the agenda book).

The members then discussed the proposed amendments.

A judge member raised a question about the text on page 234, line 58 of the agenda book requiring the amicus to provide an explanation of both how the brief will help the court and how the perspective of the amicus will help the court. He asked why an amicus should have both obligations. Professor Sachs responded that this requirement puts the onus on the amicus to tell the court how its brief provides information in addition to what the parties have said. The judge member and an attorney member then briefly discussed how the timing provisions of the rule, which were not being amended, operated in practice.

Following this discussion, upon a motion and a second, with no opposition, the Standing Committee gave final approval to the amendments to Rules 29 and 32 and the Appendix of Length Limits and recommended their adoption.

b. <u>Rule 15</u>

Judge Eid next presented the Advisory Committee's request for final approval of amendments to Rule 15, which concerns petitions for review or enforcement of agency orders. The text of the proposed amendment begins on page 227 of the agenda book, and the written report begins on page 195.

Judge Eid explained that the proposed amendments to Rule 15 were designed to address the "incurably premature" doctrine, under which certain petitions to rehear or reconsider an agency decision render the decision nonreviewable in a court of appeals; in such cases a pending petition

for review of the agency decision must be dismissed, and a new petition for review must be filed after the agency disposes of the rehearing petition. Judge Eid stated that the amendment was intended to mirror previous amendments to Rule 4, which deals with appeals from district court judgments. Rule 4 used to work in a similar way as Rule 15, with various post-judgment motions resulting in the dismissal of a premature notice of appeal, but Rule 4 was amended to provide that a premature notice of appeal becomes effective when the post-judgment motion is decided. The proposed amendments to Rule 15 would do the same for a premature petition for review.

Judge Eid reported that the Advisory Committee received three public comments on the proposed amendments, all of which were broadly supportive and conveyed no specific concerns. Judge Eid also noted that the Advisory Committee made two post-publication changes. First, it renumbered the proposed new subdivision from (d) to (f) to avoid confusion with the existing rule structure. Second, to avoid attempts to obtain premature review of orders that are non-final for reasons other than a pending rehearing petition, the Advisory Committee added language reaffirming that the order in question must be otherwise reviewable. The Advisory Committee voted unanimously to seek final approval of the proposed amendments to Rule 15. Professor Hartnett added that there were a few minor technical corrections made to the text of the rule after the Advisory Committee met that were included in the updated agenda book materials.

Following this discussion, upon a motion and a second, with no opposition, the Standing Committee gave final approval to the amendments to Rule 15 and recommended its adoption.

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

Judge Connelly presented action items on behalf of the Advisory Committee on Bankruptcy Rules, which last met on April 15, 2026, in Charlotte, North Carolina. These action items included requests for final approval of amendments to Rule 2002, Form 101, and Form 106C and a request for approval for publication and public comment on proposed amendments to Rule 2003. This latter request was in addition to the requests for publication and public comment on the proposed amendment packages relating to privacy and electronic notice and filing for self-represented litigants. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning on page 190.

Prior to turning to the action items, Judge Connelly thanked Judge Dever for his kind comments earlier in the meeting and for the opportunity to serve as chair of the Bankruptcy Rules Committee, which she described as a fabulous and enriching experience.

1. *Amendments for Final Approval – Rule 2002, Form 101 and Form 106C*

Judge Connelly reported on the Advisory Committee's request for final approval of amendments to Rule 2002 and to Official Forms 101 and 106C. The text of the proposed amendments begins on page 286 of the agenda book, and the written report begins on page 252.

With respect to Rule 2002, which relates to notices, Judge Connelly explained that the current version of Rule 2002(o) requires that captions of every notice given under Rule 2002 comply with Rule 1005. Rule 1005 requires, among other things, the debtor's name and the last four digits of the social-security number or individual debtor's taxpayer-identification number. The

Advisory Committee received a suggestion from clerks of court to amend the rule to reduce the burden on the clerks by requiring captions of Rule 2002 notices to include only the name of the court, the names of the debtor, the case number, the chapter under which the case was filed, and a description of the document's character. Judge Connelly reported that after the proposed amendment was published no comments or opposition were received regarding this change.

Judge Connelly then turned to the Advisory Committee's request for final approval of amendments to Official Form 101, the initial petition for an individual's bankruptcy case. In the petition, a debtor must set forth identifying information, including who the debtor is, the lsat 4 digits of the debtor's SSN, the debtor's address, and if they have one, an EIN. Judge Connelly noted that the way the form asked for the EIN sometimes induced self-represented debtors to list the EIN of their employer rather than their own, triggering concerns when multiple bankruptcy petitions listed the same EIN. The amendment, suggested by a clerk of court, clarifies in the instructions that the petitioner is to disclose the petitioner's EIN, not the EIN belonging to someone else, including the petitioner's employer. Judge Connelly reported that no comments or opposition were received regarding this change after publication.

Finally, Judge Connelly presented the Advisory Committee's request for final approval of amendments to Official Form 106C, which relates to property that can be claimed as exempt. The form is part of the package that every debtor must file to initiate a bankruptcy case and is where an individual debtor claims property exemptions. In the current version of Form 106C does not contain the total value of the property claimed as exempt. This omission requires trustees to manually add up the claimed exemptions to prepare their final report. A suggestion was made to amend Form 106C to require a statement of the total value of the claim exemptions. The Advisory Committee proposed amending the form to require a total for all entries (in Column C) that are stated in a specific amount. It also considered a second change to Form 106C to provide a total dollar value for Column B (which identifies the dollar value of the debtor's portion of the property for which exemptions are claimed). Judge Connelly reported that when the proposed amendments were published, the National Association of Consumer Bankruptcy Attorneys objected to the wording of the requirement to total column B, and based on that opposition, the Advisory Committee decided that only the total for column C would be included in the amendment.

The members then discussed the proposed amendments.

A judge member raised a question about the committee note for Rule 2002(o) relating to captions for notices and asked why the committee note referred to "most" notices, and why in one part it states "may" use the caption in Official Form 416B and why the note goes on to state that debtor notices "must" include the information in Section 342(c) of the Bankruptcy Code. Professor Bartell and Judge Connelly explained that the committee note was referring to notices other than the initial notice of bankruptcy, so "most" means all other notices. As to the "may" versus "must" language, not all notices under Rule 2002 are sent by the debtor, such as the notice of a meeting of creditors, so the language includes the additional statutory requirement for debtors. Another member asked a style question about Rule 2002(o) where it refers "this Rule 2002" and not simply "this rule." Professor Garner explained that this reference follows the style guide to make clear that when a rule refers to itself in a subpart of the rule, it is referring to the rule in its entirety, not simply the subpart.

A judge member asked a question about Official Form 106C and whether every entry in Column C had to have a specific amount to include in the total. Judge Connelly and Professor Bartell explained that the total only includes those entries in Column C that have a specific amount. Debtors have the option in Column C to provide either a specific amount or claim 100% of the fair market value of an exemption, up to any applicable statutory limit, such as the debtor's proceeds from a personal injury case. The total amount in the revised Form 106C would total only those items where the specific dollar amount is listed and not those where the box is checked for the fair market value.

The following day, during discussion of information items, another judge member asked about another pending suggestion to amend Official Form 106C. Professor Bartell explained that, due to the order in which certain questions were asked on the current form, debtors in Florida — where there is an unlimited homestead exception—do not answer a question that could reveal that they are subject to a federal limit on their exemption. The Advisory Committee is considering modifying the form so this question is asked in a way that debtors in Florida have to answer.

Following this discussion, upon a motion and a second, with no opposition, the Standing Committee gave final approval to the amendments to Rule 202, Official Form 101, and Official Form 106C and recommended their adoption.

2. *Preliminary Drafts for Publication and Public Comment – Rule 2003*

Judge Connelly next presented the Advisory Committee's request for approval for publication and public comment on proposed amendments to Rule 2003, which concerns holding a meeting of creditors. The text of the proposed amendments begins on page 301 of the agenda book, and the written report begins on page 254.[3]

Judge Connelly explained the meeting of creditors is required in Section 341 of the Bankruptcy Code and involves an examination of the debtor conducted by a trustee. Under the current rule, the meeting of creditors must be held no fewer than 21 and no more than 40 days after the order for relief in a chapter 7 or chapter 11 case, no fewer than 21 and no more than 35 days after the order for relief in a chapter 12 case, and no fewer than 21 and no more than 50 days after the order for relief in a chapter 13 case. The rule also requires that the meeting "be held at a regular place for holding court or at any other place designated by the United States trustee within the district convenient for the parties in interest." A suggestion was made by trustees to amend the rule to allow the meeting of creditors to be held no more than 60 days after the order for relief in chapter 12 and chapter 13 cases, and to revise the language to recognize that these meetings may be held remotely. The U.S. Trustee raised concerns about this suggestion but reached an agreement with the trustees who made the suggestion and the Advisory Committee now recommends publication of these proposed amendments. Professor Gibson noted that after

[3] As noted earlier in these minutes, this request was made in addition to the prior requests for approval for publication for public comment on the proposed amendments relating to privacy (Rule 9037) and electronic notice and filing by self-represented litigants (Rules 5005, 8011, and 9036, with a conforming amendment to Rule 9006).

approval by the Advisory Committee the last paragraph of the committee note was corrected to include a phrase that was previously left out.

The members then discussed the proposed amendments.

A judge member asked why there was a comma after the word "court" on page 302, line 31. Professor Kimble said that the comma made clear that "designated by the United States trustee" modified only "any place in the district," not "a regular place for holding court[.]" The judge member and the Style Consultants then discussed other options for making the language clear, including by adding "either" before "at" on line 30. Judge Connelly preferred to solicit public comment on the version approved by the Advisory Committee, which had been approved by the Executive Office of U.S. Trustee. Ms. Shapiro, on behalf of DOJ, underscored that the proposed language was sensitive to the trustees and there was careful negotiation on this language. Dean McKenzie, as liaison from the Standing Committee to the Bankruptcy Rules Committee, concurred with the suggestion not to alter the language prior to publication for public comment.

Following this discussion, upon a motion and a second, with no opposition, the Standing Committee approved the proposed amendments to Rule 2003 for publication and public comment.

C. Advisory Committee on Civil Rules – Judge Sarah S. Vance, Chair

Judge Vance presented action items on behalf of the Advisory Committee on Civil Rules, which last met on April 14, 2026, in Charlotte, North Carolina. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 305. The action items sought final approval of proposed amendments to Rule 7.1, Rule 41(a), Rule 45(b) and (c), Rule 26, and Rule 81. The Advisory Committee had no proposed amendments for publication and public comment to present beyond the proposed amendments to Rule 5.2 as part of the privacy amendments, and Rules 5 and 6 as part of the package of amendments relating to electronic notice and filing by self-represented litigants approved earlier in the meeting.

1. *Amendments for Final Approval*

a. Rule 7.1

Judge Vance presented the Advisory Committee's request for final approval of amendments to Rule 7.1. The text of the proposed amendments appears on page 388 of the agenda book, and the written report begins on page 307.

Judge Vance explained that the proposed amendments were designed to facilitate judges' compliance with recent guidance from the Code of Conduct Committee that a judge's financial interest in an owner of ten percent or more of a party creates a rebuttable presumption of recusal. The proposed amendments (1) replace references to "corporations" with the broader term "business organization"; and (2) add a requirement that a party disclose business organizations that directly or indirectly own ten percent or more of the party (e.g., corporate parents or grandparents).

Judge Vance next informed the Committee that during the publication period, the Advisory Committee received eight written comments and four witnesses testified about the rule. Most of the commentary expressed support for the rule changes, noting that the rule would assist judges in making informed recusal decisions. Following this feedback, the Advisory Committee voted unanimously to recommend final adoption of the Rule 7.1 amendments as published.

After an opportunity for discussion and hearing no comments, upon a motion and a second, with no opposition, the Standing Committee gave final approval to the amendments to Rule 7.1 and recommended its adoption.

b. Rule 41(a)

Judge Vance next presented the Advisory Committee's request for final approval of amendments to Rule 41(a). The text of the proposed amendments appears on page 394 of the agenda book, and the written report begins on page 308.

Judge Vance explained that the current rule refers to plaintiff's dismissal of an action, which led to conflicting interpretations of whether the rule permitted dismissal only of entire cases or narrower dismissal of claims or parties. The proposed amendments to Rule 41(a) would clarify that narrower dismissals are permitted to conform to the widespread practice developed in multi-claim and multi-party litigation to narrow the issues and facilitate settlement. The proposed amendments also clarify that only the parties who have appeared and remain in the case must sign a stipulation of dismissal.

Judge Vance further reported that during the publication period, three witnesses testified and 28 written comments were received. All of the feedback was favorable and lauded the amendments as eliminating procedural barriers to streamlining cases, facilitating settlements, and eliminating confusion among the circuits. The Advisory Committee voted unanimously to recommend final approval of the proposed amendments to Rule 41(a) as published.

After an opportunity for discussion and hearing no comments, upon motion and a second, with no opposition, the Standing Committee gave final approval to the amendments to Rule 41(a) and recommended its adoption.

c. Rule 45(c)

Judge Vance then presented the Advisory Committee's request for final approval of amendments to Rule 45(c). The text of the proposed amendments appears on page 403 of the agenda book, and the written report begins on page 309.

Judge Vance reported that the main purpose of the amendments is to address the Ninth Circuit's decision in *In re Kirkland*, which interpreted Rule 45(c) to mean that a subpoena could not compel remote trial testimony from a witness outside the geographic limits in Rule 45(c)(1), even if a court found that the Rule 43(a) requirements for remote testimony had been satisfied. The proposed amendments would clarify that a court's subpoena power for remote trial testimony extends nationwide, so long as the witness is not required to appear and give the remote testimony from a location farther than the distance authorized in Rule 45(c)(1).

Judge Vance also reported that during the publication period, the Advisory Committee received 31 public comments and testimony from 10 witnesses, most of which favored the amendment. A few comments opposed the amendments on the merits and argued that they should be deferred until the Advisory Committee completed its consideration of proposed amendments to Rule 43(a) governing remote testimony in general. A few other comments offered stylistic changes.

Judge Vance then advised the Committee that after hearing the testimony and reviewing the public comments, the Advisory Committee concluded that there was no reason to defer amending Rule 45(c) in light of continued reliance on the *Kirkland* decision. The Advisory Committee decided, however, to modify the fourth paragraph of the committee note. These modifications included clarification to wording that suggested that Rule 43(a) standard for remote trial testimony could apply to non-trial remote testimony in hearings. Judge Vance also noted a technical change made later to delete the cross-reference to Rule 26(a)(3)(A)(i) as potentially confusing and unnecessary.

The members then discussed the proposed amendments briefly, with a judge member commenting that this was a very good rule amendment and that he was supportive of the changes.

With no further discussion, upon a motion and a second, with no opposition, the Standing Committee gave final approval to the amendments to Rule 45(c) and recommended their adoption.

d. Rule 26

Judge Vance next presented the Advisory Committee's request for final approval of amendments to Rule 26(a)(3). The text of the proposed amendments appears on page 391 of the agenda book, and the written report begins on page 310.

Judge Vance explained that the proposed amendments to Rule 26(a)(3) would be a small change to clarify pre-trial disclosure of trial witnesses who are expected to testify remotely, which is necessary because of the need to address the issue of court permission for remote trial testimony under Rule 43(a). Judge Vance noted that the proposed amendments attracted very little public commentary, some of which were based on the misapprehension that the rule applied to initial disclosures, not the disclosures made at least thirty days before trial. The Advisory Committee voted unanimously to recommend final approval of the proposed amendment as published.

The members then discussed the proposed amendments.

A lawyer member asked whether the proposed amendment was intended to disclose earlier in the process whether a party was proffering a remote witness. Professor Marcus responded affirmatively. A judge member then asked about the word "will" on page 392, line 20 of the agenda book, when whether the person can be called as a remote witness depends on the court's permission. Professor Marcus acknowledged that a judge may deny a request for remote testimony, but the Rule 26 disclosure is accurate at the time it is made. Judge Dever added that the committee note on page 393, lines 37-39, talked about alerting the parties and the court that a party "proposes to present" witnesses remotely. The judge member suggested replacing the word

"will" with "is proposed to" to incorporate some concept of expectation as to what the party will present.

Another judge member asked whether there was any discussion about what lawyers would do to comply with this new disclosure because he could imagine lawyers disclosing that they expect to call a witness in person, but may later need to ask for the witness to appear remotely. A lawyer member added the concern that parties may start listing every witness as potentially remote to preserve the right to call that witness remotely later. Another lawyer member suggested that the adversary nature of the proceedings would result in parties specifying who they truly intend to present remotely, and counterintuitive trial strategy for a party to list all witnesses as remote if there was no need to present their testimony remotely. Judge Dever further added that in his experience, case management orders usually provide a period for people to object to pretrial disclosures.

As to the suggestion from the judge member to modify the text language to conform to the committee note, Professor Beale suggested that the language on page 392, line 20 be modified to read "it expects the testimony to be in person or remote." Professor Kimble endorsed this language as a matter of style.

With no further discussion, upon a motion and a second, with no opposition, the Standing Committee gave final approval to the amendments to Rule 26(a)(3)—as revised to read "it expects the testimony to be in person or remote" and set forth in the Appendix to these minutes—and recommended their adoption.

e. Rule 45(b)

Judge Vance presented the Advisory Committee's request for the Standing Committee to recommend final approval by the Judicial Conference of amendments to Rule 45(b)(1). The text of the proposed amendments appears on page 398 of the agenda book, and the written report begins on page 310.

Judge Vance explained that the proposed amendments were designed to clarify the authorized methods of delivery of a subpoena to the named person. First, the amendments would authorize service of a subpoena by the service methods permitted in Rule 4(e)(2)(A) and (B) for service of a summons and complaint. Second, the proposed amendments would authorize service by U.S. mail or commercial carrier, if the chosen method provided confirmation of actual receipt. Third, it would authorize the court, for good cause, to permit another method of service that was reasonably calculated to give notice. Judge Vance further explained that the proposed amendments would (1) add a 14-day notice requirement for subpoenas requiring appearances for trials, hearings, or depositions; and (2) allow the witness fee to be tendered at the time and place of appearance instead of at the time of service.

Judge Vance then reported that the Advisory Committee heard testimony from 11 witnesses and received close to 200 comments, most of which were from professional process servers who opposed the rule change as either detrimental to their business or having other fundamental defects. After review of these concerns, the Advisory Committee concluded that these objections were not persuasive and did not warrant a change to the published rule. The Advisory Committee

did vote, however, to modify the third paragraph of the committee note to address certain concerns raised by committee members regarding service by U.S. mail or commercial carriers. The Advisory Committee voted to modify the committee note to specify that for service by U.S. mail or commercial carriers, the person identified in either Rule 45(b)(1)(A)(i) or (ii) must receive the service. The modification to the committee note also removed a potentially confusing reference to Rule 45(b)(4). The Advisory Committee's changes to the committee note are identified on page 311 of the agenda book. With this change to the committee note after publication, the Advisory Committee voted unanimously to recommend final approval of the amendments to Rule 45(b)(1).

Professor Marcus added that several public comments raised concerns about the language that the subpoena must be delivered at an individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there, even though this language was taken directly from Rule 4. Additionally, many process servers commented that a process server is necessary. But the rule does not currently say this. It requires someone who is at least 18 years old and not a party to the action. Perhaps many people would prefer to have a professional handling service, but the rule does not require it.

The members then discussed the proposed amendments.

A judge member asked why the committee note was modified to address confirmation of actual receipt by the subpoena recipient but the text of the rule did not say this. A lawyer member added that the last paragraph of the committee note also suggested that tender of the fee at time of service was only required where practicable, but the rule text does not say this. As to the latter question, Professor Marcus responded that it is possible to change the rule language, but the rule does not make service ineffective if the fee is not tendered at the same time. As to the former question, Professor Marcus thought that the rule was clear that if a party had to confirm actual receipt, the receipt would need to be by someone who would have been a proper recipient. A judge member then asked why the rule no longer requires tender of payment at the time of service. Professor Marcus responded that the Advisory Committee had learned that delivering the check was sometimes an obstacle to fulfilling the service and that lawyers who want witnesses to appear would not want the cost of travel to stand in the way. Additionally, the Advisory Committee heard that attorneys may not want to serve those subpoenas with the fee if a case may settle and may prefer to instead to pay the fees when the witness appears. The judge member then asked whether there were ever instances of witnesses not being paid when they appeared to testify. Professor Marcus said that the rule requires payment at the time the witness appears, not after the testimony occurs, which prevents a party from saying that they would not pay a witness unless they like what the witness has to say.

Judge Dever suggested that revisions to the proposed rule text may be appropriate in accordance with the committee members' suggestions. After a break, Judge Vance and Professor Marcus proposed new language for the rule text on page 399, line 23 of the agenda book to add, after "of actual receipt," the following: "by a person identified in (i) or (ii)[.]" This change would align with the language in the committee note on page 401, line 67.

With no further discussion, upon a motion and a second, with no opposition, the Standing Committee gave final approval to the amendments to Rule 45(b)(1)—as revised to include "by a

person identified in (i) or (ii)" and set forth in the Appendix to these minutes—and recommended their adoption.

f. Rule 81

Judge Vance presented the Advisory Committee's request for final approval of amendments to Rule 81, which concerns jury demands after removal. The text of the proposed amendments appears on page 408 of the agenda book, and the written report begins on page 312.

Judge Vance explained that the proposed amendments were designed to eliminate uncertainty about whether and when a jury demand is required after a state case is removed to federal court. The proposed amendments: (1) preserve the right to a jury trial if a jury demand is made before removal; and (2) allow a jury demand under Rule 38(d) after removal if no demand was made in the state court if made within 14 days from when a party files a notice of removal or is served with a notice of removal by another party. Judge Vance added that there were four comments on the rule after publication, all favorable. The Advisory Committee voted unanimously to recommend final approval of the amendment to Rule 81(c)(3) as published.

Following this presentation, Professor Beale raised a question regarding language on page 409, lines 18 to 20, about whether the word "one" refers to a jury trial. Judge Vance confirmed that this was correct, and Professor Kimble said that he thought that the language was clear as a matter of style.

With no further discussion, upon a motion and a second, with no opposition, the Standing Committee gave final approval to the amendments to Rule 81 and recommended their adoption.

D. Advisory Committee on Criminal Rules – Judge Michael W. Mosman, Chair

Judge Mosman presented action items on behalf of the Advisory Committee on Criminal Rules, which last met on April 29, 2026, in Washington, D.C. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 413. The action items sought final approval of amendments to Rule 17 and proposed amendments to Rules 11 and 32 for publication and public comment. The proposed amendments for publication and public comment were in addition to the proposed privacy amendments and amendments relating to electronic notice and filing by self-represented litigants approved earlier in the meeting.

1. *Amendments for Final Approval – Rule 17*

Judge Mosman presented the Advisory Committee's request for final approval of amendments to Rule 17 relating to subpoenas for production in criminal cases. The text of the proposed amendments appears on page 490 of the agenda book, and the written report begins on page 414.

Judge Mosman explained the major changes proposed in the rule amendments, which are outlined on page 417 of the agenda book. First, the amendments expand the scope of proceedings for which a subpoena is available from trials to also include detention hearings, sentencing hearings, and the like. Second, the amendments relax the evidentiary standard for subpoenas to a "likely to be admissible" standard. Third, the amendments clarify when a motion and order is required to obtain a subpoena. Fourth, the amendments allow *ex parte* requests for subpoenas

upon a showing of good cause. Finally, the amendments allow direct production of responsive items to counsel in some instances. Judge Mosman further informed the Committee that the Advisory Committee received significant public comments, both written and oral, during the public comment period noting that the oral testimony was entirely from victims' representatives.

Judge Mosman next described the Advisory Committee's changes to the proposed amendments after publication, described in detail in the Committee Report starting at page 410 of the agenda book, noting that any changes were adopted unanimously after serious and substantial discussions. These post-publication changes included changes to Rule 17(a) (a technical correction making explicit that a subpoena can require testimony, production, or both testimony and production); Rule 17(c)(3)(A) (clarifying that a motion and order for a subpoena seeking personal or confidential information about a victim from a third party is required when the third party receiving the subpoena is a victim); and Rule 17(c)(5) (addition of presumptive requirement of return to the court for subpoenas requiring the production of personal and confidential information about a victim).

Judge Mosman added that the Advisory Committee also concluded that none of the proposed post-publication changes to Rule 17 required republication. Professor Coquillette later added that deciding whether republication is required depends on whether there are people who are interested in the rule change who are taken by surprise by a new rule, and he did not feel that in this context people would be taken by surprise by the proposed changes after publication.

On the Advisory Committee's post-publication changes to Rule 17(c)(3)(A) (and a corresponding change in the committee note), Judge Mosman explained that the Advisory Committee decided to add "including a victim" in this portion of the rule to make clear that victims are third parties for purposes of the protection of this particular rule. This change reflected concerns from a commenter, Professor Paul Cassell, that the rule, which requires a motion and order for subpoenas seeking personal and confidential information about victim from a third party, as well as notice to the victim whose information is sought, did not apply to subpoenas seeking such information from victims themselves, because they were not "third parties."

Judge Mosman next explained changes to Rule 17(c)(5) regarding the place of production with a corresponding change to the committee note. The commenters expressed strong concerns with privacy and safety based on information gained from records, such as medical or psychiatric records, that would reveal when and where recurring appointments were held. This information could make its way from counsel to the client putting the person in danger of unauthorized contact. As amended after publication, Rule 17(c)(5) added "unless the court orders otherwise" to clarify that the court would retain discretion to order otherwise. Judge Mosman also explained that absent the court ordering otherwise, the defaults set forth in the rule would apply (such as return to the court if the subpoena is issued by a self-represented party or requires the production of personal or confidential information about a victim). Professor Beale directed the Committee to page 422 of the agenda book, which contained a description of how the process had been working in many districts to allow victims the opportunity to ask the court to impose limitations or to negotiate with the party seeking that material. Professor Beale also explained that while this may be a substantial change to the published rule on place of production because it altered the default, republication was not required because this change put back in place the current

practice and there was no controversy in the Advisory Committee, from the defense lawyers, judges, or prosecutors, as to whether this should be done.

The members then discussed in detail the proposed amendments over the course of the first and second days of the meeting. Those discussions included the following comments and feedback.

First, a judge member asked about two potential language changes in proposed Rule 17(c)(2)(B) on page 493: (1) on line 53, change the word "seek" to match language elsewhere in the rule saying "requires production of" something; and (2) on lines 56-57, remove the words "to the party" to read simply "are not reasonably available from another source." The judge member also asked about a change in proposed Rule 17(c)(2)(C) on page 493, line 66, to update the reference from "(3) or (4)" to include the subsection (c). Professors Beale and King supported the changes to the word "seek" and adding subsection (c) to the references to (3) and (4). As to the suggestion to remove "to the party," Professors Beale and King explained that the language "to the party" is necessary because some information that the subpoena seeks may not be available to the defense but may be available to the government. For example, under the Stored Communications Act, the government could get information that an individual could not and therefore that information would not be reasonably available to the person who needed it. In light of this explanation, the judge member agreed that the language in proposed Rule 17(c)(2)(C) need not be changed.

Second, the judge member raised concerns about the committee note to Rule 17(c)(6), which he felt should address a timing issue with respect to the required disclosure of an item received in response to the subpoena and Rule 16, which is referenced in the committee note (page 511, line 527-531). The judge member had concerns about Rule 16, which only requires production of discoverable items "before trial," and the timing of the disclosure under the proposed amendments to Rule 17(c)(6) at earlier proceedings (such as detention hearings and suppression hearings). This timing could lead to a surprise for the opposing party when the document received under the subpoena is introduced, and he anticipated disputes about timing issues like this that are not addressed in the committee note.

Professor King explained in response to these concerns that the point of the proposed amendments to Rule 17(c)(6) was to address case law from some districts that required a party seeking a subpoena to disclose everything received in response to that subpoena to the other side—even if the request for the subpoena was an *ex parte* application. The proposed amendments in Rule 17(c)(6) seek to maintain the protections and scope of discovery under Rule 16 when the items are received through a Rule 17 subpoena. With the focus on this goal, the timing of disclosures was not addressed in the proposed amendments in Rule 17(c)(6). That issue, as Professor King explained, would be determined by case law or another rule. Professor Beale added that Rule 17 reflects the notion that whatever a party gathers by subpoena or by its own investigative efforts is not discoverable until the trial itself. Judge Dever further added that Rule 16, and not amended Rule 17, would have to answer when the items are discoverable. Judge Mosman also responded that there may be a weakness in Rule 16, which only requires disclosure before trial, with the adoption of the proposed amendments to Rule 17 on pretrial subpoenas for production, but courts could continue to handle issues of timing through existing practices relating to discovery when suppression and detention hearings take place. Judge Dever added that in his experience, if information was received at a hearing that a party had not seen, it

would not be uncommon for a lawyer to ask for a brief adjournment of the hearing to review the evidence presented.

The members then discussed potential revisions to the text of Rule 17(c)(6) to address the concerns raised. On page 497, lines 133-137, the judge member suggested the following: (1) insert the word "only" after "party" on line 134; (2) remove the word "only" from line 136, and (3) add "and when" to lines 136-137. The suggested text would read, "[a] party only must disclose to an opposing party an item that the party receives from a subpoena recipient if and when the item is discoverable." Professor Hartnett supported adding the language "if and when" to clarify the intent to refer readers to Rule 16 on the timing of discovery. Both Judge Mosman and another judge member said that they did not see any downside to including the "if and when" language, although this language would not address the timing issue. Professor Garner added that as a matter of style, if the addition of "if and when" is adopted, the "only" should not be moved within the provision and should say "only if and when." He also offered two alternative language choices - that a party must disclose "as soon as the item becomes discoverable" or that a party "need not disclose to an opposing party an item receives from a subpoena's recipient unless and until the item becomes discoverable."

The judge member also raised concerns about use of the language "must" disclose in the beginning of the text to Rule 17(c)(6) (page 497, line 134), which he felt could raise an issue of reciprocal discovery that could be very concerning to both the government and the defense. Judge Mosman agreed that the word "must" could be removed.

The members also discussed whether reference to case law would be appropriate in the committee note to address the interplay between Rule 17 and Rule 16. A judge member asked whether reference to case law from judges who have already allowed pretrial subpoenas even without the amendments to Rule 17 would be helpful on the disclosure issue. Professor King said that there were districts where third-party subpoenas were allowed for non-trial hearings and judges had managed those situations as needed such as by allowing a recess if necessary to accommodate the other party or issuing a standing order addressing subpoenas for non-trial hearings. Professor Coquillette added that it was dangerous to reference case law to make a point in the committee note because the committee note could not be changed unless the rule was changed. If a case were overruled or changed in a significant way, the rule would still contain a clearly misleading committee note. Professor Capra added to this discussion by noting that the only case cited in the committee note was *Nixon*, which could not be avoided given the nature of the amendments. A lawyer member said that he thought the suggestion was not to add specific cases to the committee note, but to instead point out that there was case law governing the timing of discovery, which would not run afoul of the rule against citing cases.

Following this discussion, Judge Dever asked Professor Garner for his views on proposed revisions to the rule text to address the concerns discussed. Professor Garner responded that he understood the consensus to be that on page 497, line 134, the text in Rule 17(c)(6) would read, "party need not disclose to an opposing party an item the party received from a subpoena's recipient unless and until the item becomes discoverable." Alternatively, the rule could move "unless and until" to the beginning of the sentence, such that it would say that "unless and until it becomes discoverable, a party need not disclose . . ." A judge member however, felt that the

issue was the word "discoverable" in 17(c)(6), which does not answer the timing question. He did not think that adding "if and when" would solve the timing problem.

The members then discussed the committee note's language with respect to Rule 17(c)(6) and discovery. Professor Beale and Professor King then offered suggestions for revisions to the committee note based on the feedback. This included revising the committee note (page 511, line 530) to refer to "other discovery rules and applicable case law"; to add "and the timing of such disclosure" after "subpoena" on page 511, line 529; and to restate the sentence as "Rule 16, other discovery rules, and applicable case law" on line 530. A judge member also noted that the existing committee text (page 511, line 530) stating that "Rule 17 does not modify that carefully developed law" was not accurate because one of the purposes of the change to Rule 17 was to modify case law holding that parties must deliver subpoena responses to each other regardless of discovery obligations. Professor Beale agreed the language could be changed regarding Rule 16 to be clearer. Professor Garner also noted generally referencing "case law" was unclear as to whether that referred to case law as it existed as of the adoption of the rule or referred to an ongoing evolution of case law that would come after adoption of the rule. A consensus was then reached to delete reference to the words "case law" in the committee note.

Professor Sachs suggested that instead of case law, the committee note could reference "other applicable sources of law" to make the point that there are other authorities which govern this issue. Professor Beale responded that a general reference would not work because the rule change was intended to limit the ability of courts to require things that were not governed by existing discovery requirements, especially on the part of defendants. A judge member then asked if Rule 17(c)(6) was needed if the only purpose was to stop judges from ordering defendants to disclose things that they otherwise would not need to under Rule 16. The judge member suggested that if it needed to be included, it could say that the rule does not create disclosure obligations separate from those that already exist. With this feedback, Judge Dever suggested returning to this issue the next day to give the reporters time to develop revised language for Rule 17(c)(6).

Judge Mosman then directed the Committee's attention to the committee note to Rule 17(c)(3) (lines 422-436 on page 508 of the agenda book) regarding *ex parte* applications for subpoenas for personal and confidential information (a good cause standard to proceed ex parte) and the notice to victims requirement (required absent "exceptional circumstances"). The Advisory Committee revised language in this section of the committee note after it heard testimony from victims' rights advocates that the "exceptional circumstances" exception to the notice requirement, if satisfied by the disclosure of sensitive defense strategy, will be interpreted too broadly to almost always apply. In an effort to strengthen protections to victims, the Advisory Committee revised the committee note accompanying the new provision allowing an *ex parte* subpoena for good cause to emphasize the important distinction between the good cause requirement for an *ex parte* motion—which does require laying out defense strategy to some degree—and the mere notice requirement—which requires only notice there is a subpoena but not an explanation of what was requested in the subpoena. Professor Beale and Professor King that the *ex parte* provision was not intended to create "exceptional circumstances" or erode the notice requirement, and that the new committee note explains how the new provision on good cause for *ex parte* applications relates to the existing notice requirement for victims. Finally, Judge Mosman noted that on line 426 of the committee note to Rule 17(c)(3), the words "a

showing" appear in brackets as a stylistic suggestion he made for the Standing Committee to consider.

As a final post-publication change, Judge Mosman next turned to the committee note's discussion of Rule 17(c)(2)(B)(iii) (requiring that each item requested in the subpoena either be, or contain information that is, "likely to be admissible as evidence in the designated proceeding"), and revisions made to lines 326-328 on page 505. The Advisory Committee made changes to language in the committee note regarding the modified *Nixon* standard because the previous sentence had been wordy and unclear.

Judge Mosman then explained that the Advisory Committee recommended no change to the published rule on the expanded scope of proceedings in which subpoenas are available, despite hearing opposition from victims' advocates who argued it would greatly expand the use of subpoenas for victim information. Judge Mosman noted that a substantial number of districts already did not limit Rule 17 subpoenas to trial, many cases are resolved without any pretrial hearings, and few sentencing hearings involve third-party information that involves a subpoena. Two lawyer members asked whether the testimony from victims' advocates included specific examples of how expanded access to subpoenas in districts that allowed it had created a problem. Judge Mosman and Professor Beale responded that this question was asked at the hearings and no one could provide specific examples. The lawyer member then asked whether the victims' advocates had an alternative proposal for Rule 17. Judge Mosman answered that they offered an unworkable suggestion to restrict it to trials and to have a carve-out for victims or certain kinds of crimes if it were expanded beyond trials. Professor Beale added that while the victims' advocates opposed the amendments, if the rule were to be amended, they vociferously opposed the *ex parte* provisions, the expansion to proceedings other than trial, and the loosening of the *Nixon* standard.

A judge member then asked whether the Advisory Committee heard from any tribes on this issue. Professor Beale said that while the Advisory Committee had not heard from anyone in tribal government, when the Advisory Committee met in Phoenix at an earlier meeting to evaluate the proposed amendments, it heard from several local witnesses about their experiences with looser standards and more subpoena availability. Many of the people from Arizona, including the prosecutor, stated that they had not been applying *Nixon* strictly for years and had not had any difficulty. Judge Mosman added that the Advisory Committee heard from one witness from Oregon, whose responsibilities included working with tribal governments and victims from tribal cases, and the issue of tribes was not raised.

Judge Mosman then turned to another public comment that did not lead to a revision of the published rule. One commenter suggested that the Supreme Court precedent (*Carpenter*) regarding cell site location information suggested that the expansion of subpoenas would run afoul of the Fourth Amendment. Judge Mosman stated that while *Carpenter* may have been limited to its facts and not applicable to any kind of information that might be sought in Rule 17 subpoenas, the Advisory Committee was concerned about privacy interests in personal and confidential information. As a result, after a lengthy discussion, and as discussed on page 433 of agenda book, no text change was recommended for the rule, but the Advisory Committee added a short statement to the committee note about judicial oversight, reminding readers that judges have the ability in some instances to impose greater protections. The Advisory Committee also

suggested other approaches to protect privacy interests, including facilitating the development of best practices and working with the FJC to monitor the implementation of these amendments to see whether problems develop. Professor Beale added that the Advisory Committee expected that once the rule goes into effect, it would start to see the development of best practices, local options, and any problems that may arise and that by closely monitoring the situation, the Advisory Committee would be able to take appropriate action. Professor Coquillette expressed disagreement, however, with putting guidance in the committee note rather than a bench book. A lawyer member said that he supported the Advisory Committee's approach to privacy protection because personal and confidential information is now held by many third parties, and sometimes those third parties are not vigilant about protecting it. Judge Mosman also added that seeking personal and confidential information, independent of Rule 17, involved application of many state and federal privacy laws. A judge member also expressed support for the Advisory Committee's approach and noted that many judges look at the committee notes for guidance before exploring best practices. Judge Dever added that guidance in the committee note could remind judges that they also have the power to address issues in protective orders.

At the close of this discussion, a judge member spoke in favor of the proposed amendments and that hearing about how the current rule was being implemented in different ways across the country convinced him that significant amendments to Rule 17 were necessary. He also noted that there would likely still be variability in how judges approach it, but that this could be valuable as the Advisory Committee gained more information over time. He also stated his feelings that the rule did a careful job of balancing competing concerns.

With this feedback, and after adjourning until the next day to allow time to revise the rule, Judge Mosman presented a revised version to the text of Rule 17(c)(6) to solve the problem of judges who make Rule 17(c) subpoenas contingent upon disclosure to other parties. Judge Mosman added that the language in brackets was supported by the reporters but DOJ would like the bracketed language eliminated. Judge Mosman stated that the committee note, on page 510, line 512, quoted the former language in (c)(6), so that would need to be changed to match the new language.

The revised language to replace the text on page 497, lines 134-137, would read as follows:

> Disclosure and discovery requirements [established by the Constitution, statute, and other rules] are not altered by this rule, and govern the disclosure of produced items to a party that did not request the subpoena.

Professor Garner said that if the bracketed language were removed, the comma after "rule" should be removed. Professor Beale added that the title of (c)(6) would be revised to, "Disclosing to Other Parties the Items Produced." Professor Bartell said that the revised language essentially said that disclosure and discovery requirements govern disclosure, and questioned whether that was the intent. Professor King said that the word "discoverable" in the formerly proposed (c)(6) raised concerns about how this applied to non-trial proceedings. Inserting "disclosure" not only added a set of law to the discovery rules for trial, but also added disclosure rules imposed by the Constitution that were not part of discovery. Professor Bartell said that she understood this, but questioned whether the end of the provision should say "govern

the disclosure and discovery," or "govern the production of items to a party that is not requesting to see it."

A judge member asked for more information on concerns about including the bracketed language. Judge Mosman said that his concern with deleting the language was that, if the rule simply says that "disclosure and discovery requirements are not altered by this rule," it leaves open the possibility that a court order or other local rule might still remain in place. If the rule says that the only place a court can look for these requirements are the Constitution, statute, and other rules, it means that the court cannot find them in its own local rule requiring disclosure. Ms. Shapiro, on behalf of DOJ, stated her concern that by listing out sources in this new version, it would prevent judges from issuing orders with disclosure requirements that are not covered by the Constitution, statute, or other rules. A party might argue that the court cannot order something to be disclosed because it was not otherwise in the rule, statute, or Constitution.

Another judge member asked whether "other rules" in the bracketed language could be interpreted to mean "local rules." Ms. Shapiro said yes, this was another concern, whether "other rules" referred only to federal rules. Professor Sachs suggested changing "other rules" to "other law," given that there may be common law on this issue. He also suggested beginning the provision by saying "Any disclosure and discovery requirements," to avoid suggesting that there are such requirements. Professor Capra suggested ending the sentence after "rule," but committee members said that the second clause was the most important point in the provision. Professor Garner expressed his support for using "other law," to foreclose the possibility of including local rules, which he thought would arguably be included in "other rules." Other members argued that rules were law, and court orders would be considered law as well.

Another judge member had concern that about removing the strong language in the original draft stating that a party must disclose "only if" the information was discoverable. With the revised language, a judge could still conclude that revised Rule 17 did not change the parties' obligations, but those obligations existed now, and courts had issued orders saying that a party must turn over any information obtained in response to its subpoena. Professor Beale responded that those who discussed the revisions considered saying that a court "must not" order disclosure unless discovery was otherwise required. A lawyer member asked whether the point was not to say that courts cannot do something, but instead that this particular rule does not authorize them to impose a disclosure requirement other than those established by other laws. Professor Beale said that some judges already thought that they had this authority and that fairness requires disclosure to the other party. That authority was not previously in Rule 17, so these judges may still find that authority elsewhere, outside of Rule 17. The lawyer member said that this proposed language would not prevent those judges from doing so, because it would confirm that other existing law gives courts authority to require disclosure.

With this additional feedback another draft version of Rule 17(c)(6) was provided for the Committee's consideration:

> This rule does not
>
> (a) authorize the court to disclose—or require disclosure of—a produced item to a party that did not request the subpoena; or

(b) alter the disclosure requirements set by the Constitution, a statute, or other rule.

Professor Beale said that this language responded to the fact that if the material were produced to the court, the court could simply tell the clerk to send it to all parties. She thought, however, that the original language worked well. Ms. Shapiro, on behalf of DOJ, said that this language said that was incorrect, because it said that the rule did not authorize the court to disclose a produced item to a party that did not request it, but it may be that the item was discoverable, so the court should be ordering it disclosed. Professor Struve suggested that "other authorities" might be an option, rather than "other rules."

A judge member strongly opposed this proposed language because he felt it stated the opposite of what the original draft Rule 17(c)(6) had said, which was that a party "must disclose." The revised draft said that the rule did not even authorize the court to disclose. He suggested that the Committee focus instead on the first language suggested and debate whether to include the bracketed language. He favored removing the bracketed language so that courts retained whatever existing timing rules they had on reciprocal discovery. Professor Kimble added that the Standing Committee was trying to avoid saying that the court "must not," do something but there were 22 uses of "must not" in the Criminal Rules and there was no strict policy against saying that the court "must not" do something. Another judge member said that he had also found a few instances of the Criminal Rules stating that "the court must not," and those were situations where a statute explicitly prohibited the court from doing something. Here, however, the Committee would be saying that a court "must not" require disclosure, which would be difficult because it could not foresee all of the circumstances that could arise.

Taking this feedback, Judge Mosman agreed that neither revision completely accomplished what the Advisory Committee had hoped to accomplish, but the case law and the revised language and committee note would teach judges that they could not condition use of Rule 17 subpoenas categorically on disclosure of everything obtained through a subpoena. He then recommended moving forward with one of the two versions of the language first proposed this morning, either with or without the brackets. For further clarity, Judge Dever asked whether anyone other than DOJ was opposed to including the bracketed language and changing "rules" to "law." Two judge members said that they preferred not to include the bracketed language but were not opposed to it. A third judge member agreed and suggested saying, "This rule does not require the disclosure of produced items to a party that did not request the subpoena. Disclosure and discovery requirements are not altered by this rule." Professor Garner suggested instead saying, "Discovery and disclosure requirements, which are not altered by his rule, govern the disclosure." Judge Dever then suggested that Judge Mosman and the reporters settle on another revision.

After additional break, Judge Mosman presented the following language for Rule 17(c)(6):

Disclosing to Other Parties the Items Produced. This rule does not require the disclosure of produced items to a party that did not request the subpoena. Disclosure and discovery requirements are not altered by this rule.

He also proposed two changes to the committee note: first, to change the quoted text of (c)(6) to match the new language, and second to add "regulation and timing regarding" before

"disclosure" on line 527 on page 511. Judge Mosman said that this language made the point that use of Rule 17 subpoenas should not be conditioned upon automatic disclosure to other parties. It also changed the title of (c)(6) to match the usage elsewhere in the rule. Professor Sachs clarified that the language in the committee note would now say that "the regulation . . . is regulated by . . ." He suggested changing "regulated" to "governed," and others suggested changing "is" to "are," since there were multiple subjects (regulation and timing).

Professor Beale then set forth the proposed changes. On page 493, line 53, "seek" would be changed to "require production of[.]" On that same page, line 66, "(c)" would be inserted before "(3)[.]" On page 506, line 376, "(c)" would be added before "(3)" and at line 384, "(c)" would be inserted before "(2)[.]" On page 508, line 426, the brackets would be deleted. On pages 510 and 511, the committee note would be changed as just discussed. Paragraph (c)(6) would be revised as just discussed.

With no further discussion, upon a motion and a second, with no opposition, the Standing Committee gave final approval to the amendments to Rule 17— as revised to include the changes discussed in the prior three paragraphs and set forth in the Appendix to these minutes— and recommended their adoption.

2. *Preliminary Drafts for Publication and Public Comment*

a. Rule 11

Judge Mosman next presented the Advisory Committee's request for approval for publication for public comment on proposed amendments to Rule 11. The text of the proposed amendments begins on page 521 of the agenda book, and the written report begins on page 447. Judge Mosman began by explaining that the amendments to Rules 11(b)(1)(M) were driven by 2025 amendments to the U.S. Sentencing Guidelines, which eliminated the concept of departures. As a result, as Professor Beale added, the proposed changes would delete the language requiring the sentencing judge to inform the defendant of possible "departures under the Sentencing Guidelines." Judge Mosman further added that tying language in Rule 11 to the Sentencing Guidelines was impractical because it would require a change every time the Sentencing Guidelines changed.

The members then discussed the proposed amendments.

A judge member raised concerns that the proposed amendments went further than removing the reference to departures and deleted the language requiring the judge to inform the defendant that the court has an obligation to calculate the applicable Sentencing Guideline range. Professor Beale responded that under the new two-step process in the Sentencing Guidelines, after determining the Guideline range, the court must consider the other applicable factors in § 3553. The Rule 11 Subcommittee felt that the rule text should follow this simplified instruction. The judge member agreed but said that some case law provides that a judge has an independent obligation to calculate the range, and if the rule just refers to the Sentencing Guidelines, then this suggests the judge has a smaller obligation than to accurately determine what the Guideline range is before applying the § 3553(a) factors.

Draft

Other judges then discussed their views on this issue, some saying that there is no independent obligation outside of what § 3553(a) provides, and others supporting the idea that the judge does have an independent obligation that should be recited to the defendant. During this discussion, Judge Mosman reminded members that Rule 11 refers only to what the court must tell a defendant at a plea colloquy. Professor King responded that DOJ, the defense bar, the subcommittee, and the Advisory Committee felt that the language in Rule 11 should not include calculating the advisory guideline range because of the simplification process that the Guidelines were currently undergoing and the proposed amendments were designed to avoid having to change Rule 11 again. Judge Vance stated, however, that the proposed amendment may communicate to judges that they no longer had to actually calculate the range by assessing the Guidelines.

Following this discussion, the members discussed possible changes to the language in the proposed rule text. Judge Furman suggested that the language "including the Sentencing Guidelines" at the end of the proposed rule was unnecessary because that factor is listed in § 3553(a) and did not need to be repeated. Professor King responded that the Rule 11 Subcommittee had debated whether to include a reference to the Sentencing Guidelines at all because they are part of the statute but decided to leave it in because judges are accustomed to it.

The members, advisory committee chairs, and reporters then discussed potential revisions that could be made to address the concerns raised about informing defendants of the obligation to calculate the range. Suggestions included bracketing some words or omitting only the words "possible departures under the Sentencing Guidelines." A judge member suggested including more words in brackets so that the Advisory Committee could obtain more public feedback. Judge Mosman suggested that the Committee consider whether to approve the Advisory Committee's proposed language with the addition of bracketing "calculate the applicable Sentencing Guidelines." The provision would read, "in determining a sentence, the court's obligation to [calculate the applicable sentencing guideline range and] consider the factors under 18 U.S.C. § 3553, including the Sentencing Guidelines." Judge Furman asked whether it would be necessary to include two references to the Sentencing Guidelines. After further discussion, Judge Mosman said that he and the reporters would propose language for the Committee's consideration the following morning.

After the midmorning break on the second day, Judge Mosman proposed language for the Standing Committee's consideration that would remove "possible departures under the Sentencing Guidelines," from Rule 11(b)(1)(M), such that the rule would read:

> (M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range and other sentencing factors under 18 U.S.C. § 3553(a);

Following this discussion, upon a motion and a second, with no opposition, the Standing Committee approved the proposed amendments to Rule 11 as revised for publication and public comment.

b. Rule 32

Judge Mosman then presented the Advisory Committee's request for approval for publication for public comment on proposed amendments to Rule 32. The text of the proposed amendments begins on page 523 of the agenda book, and the written report begins on page 450. Judge Mosman explained that this proposed amendment, which relates to the amendment to Rule 11, addresses current language in Rule 32(h) referring to possible departure under the Guidelines. The amendment would strike the language in Rule 32(h) and mark it reserved in order to preserve the numbering system in the rule.

With no questions or further discussion, upon a motion and a second, with no opposition, the Standing Committee approved the proposed amendments to Rule 32 for publication and public comment.

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

Judge Furman presented the action items on behalf of the Advisory Committee on Evidence Rules, which last met on May 7, 2026, in Washington, D.C. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 525.

1. *Amendments for Final Approval*

a. Rule 609

Judge Furman presented the Advisory Committee's request for final approval of amendments to Rule 609. The text of the proposed amendments begins on page 572 of the agenda book, and the written report begins on page 526.

Judge Furman provided background on the proposed amendments to Rule 609, which governs impeachment through prior convictions. The proposed amendments add a single word, "substantially," to Rule 609(a)(1)(B), to make the balancing test a bit more favorable to a testifying defendant. The other proposed amendment was to address a split in authority under Rule 609(b) because the rule did not prescribe the endpoint of the ten-year period for older convictions. The proposed amendment to Rule 609(b) clarifies the end date to be the date trial begins.

During the public comment period, the Advisory Committee received fifteen comments, including comments from the Magistrate Judges Association, the American College of Trial Lawyers, the New York City Bar, the National Association of Criminal Defense Lawyers, and others. The comments were strongly supportive with the sole critical comment proposing a different endpoint under Rule 609(b), which the Advisory Committee had previously considered and rejected. Judge Furman also noted that one comment urged the Advisory Committee to address the Supreme Court decision that made the court's decision appealable only if the defendant took the stand, but the Advisory Committee had already decided not to do address that issue. With no changes after publication, the Advisory Committee recommended final approval of the amendments by a 7-2 vote, with DOJ in the majority.

The members then discussed the proposed amendments.

Draft

A judge member raised a question about language in the committee note and whether it would allow the prosecutor to explore details of the crime underlying the past conviction. Judge Furman responded that the rule amendment would not alter the existing law, but the committee note did address a problem in which some courts had allowed prosecutors to ask only about the fact of the conviction itself, which left the jury guessing what the nature of the felony was. Judge Furman said that the committee note did include, at the Standing Committee's suggestion, the language, "absent agreement by the parties," because there could be situations where the defendants preferred allowing more questions. Professor Capra added that there is substantial case law saying that the questioning cannot delve into the facts of the prior conviction, and the committee note states that Rule 608 cannot be used as an end-run around the limitations in Rule 609.

With no further discussion, upon a motion and a second, with no opposition, the Standing Committee gave final approval to the amendments to Rule 609 and recommended their adoption.

2. *Preliminary Drafts for Publication and Public Comment*

a. Rule 902(1)

Judge Furman next presented the Advisory Committee's request for approval of publication for public comment on a proposed amendment to Rule 902(1). The text of the proposed amendment begins on page 582 of the agenda book, and the written report begins on page 527.

Judge Furman reported that the proposed amendment would add federally-recognized Indian tribes and nations to the list of entities in Rule 902(1)(A) whose sealed and signed public documents are self-authenticating. Judge Furman noted that this amendment was suggested by Judge Frizzell in the Northern District of Oklahoma and has gained more significance after the Supreme Court's decision in *McGirt v. Oklahoma*, 591 U.S. 894 (2020), which expanded federal jurisdiction in Indian country. Judge Furman also noted that the Advisory Committee solicited input from the tribes themselves and Judge Furman wrote to the 578 federally recognized tribes and nations. Although only eight responses were received from the tribes and nations, all strongly supported the proposed amendment to recognize tribal sovereignty and dignity and address the burden and expense of sending people from the tribes long distances to authenticate records.

Judge Furman and Professor Capra then explained the difference of opinion on the issue expressed by Ms. Shapiro on behalf of DOJ in support of the amendment, and the Federal Defender, who opposes it and voted against moving forward with publication. The Federal Defender felt that such records could be admitted under either the business records exception or Rule 902(11) and that authentication problems in cases were the result of prosecutor problems and not the rules. The Federal Defender also cited inconsistent and problematic record-keeping among tribes and the fact that some tribes did not have robust FOIA-type disclosure rules and therefore restricted access to their records. Professor Capra added that the Federal Defender was concerned that a party would no longer receive a Rule 902(11) certificate signed by a real person that described how the records were kept. Judge Furman added that the FJC had done some research into how often this issue came up, and it was very rarely litigated.

The members then discussed the proposed amendment.

A lawyer member who practices in civil litigation added that federally recognized tribes are increasingly appearing as government entity plaintiffs in civil litigation, particularly environmental litigation. She supported the amendment for both symbolic dignitary inclusion and practical application to tribes as parties to civil cases because it would make the discovery burden they face equal to that of other government parties. Ms. Shapiro, on behalf of DOJ, expressed support for the rule to put federally-recognized tribes on the same footing as the smallest territories or municipalities. She also noted that the rule amendment would not prevent anyone from challenging the authenticity of these records at trial. Judge Furman added that the committee note underscored the point that the amendment did not preclude challenging the documents at trial.

With no questions or further discussion, upon a motion and a second, with no opposition, the Standing Committee approved the proposed amendment to Rule 902(1) for publication and public comment.

b. Rule 104

Judge Furman presented the Advisory Committee's request for approval of publication for public comment on proposed amendments to Rule 104. The text of the proposed amendments begins on page 584 of the agenda book, and the written report begins on page 528.

Judge Furman explained that the proposed amendment to Rule 104(a) is intended to codify the Supreme Court's decision in *Bourjaily v. United States*, 483 U.S. 171 (1987), which held that the preponderance of the evidence standard applies in deciding preliminary questions under the rule. The proposed amendment to Rule 104(b) would eliminate the confusing concept of conditional relevance and incorporate the standard for determining whether evidence is relevant from the Supreme Court's holding in *Huddleston v. United States*, 485 U.S. 681 (1988). Judge Furman further added that the Advisory Committee considered adding the *Huddleston* standard into Rule 401 insofar as it defines relevance. Because there is a great deal of case law interpreting Rule 104(b), however, the Advisory Committee decided to simply amend Rule 104(b).

Professor Capra added the amendment to Rule 104(a) was also necessary because one of the concerns with proposed new Rule 707 (governing opinions generated by artificial intelligence) was whether the preponderance of the evidence standard needed to be put in new Rule 707 as found in Rule 702. Amending Rule 104(a) to include the preponderance standard would eliminate the need for this addition to new Rule 707 if adopted, or to any other rule that is amended in the future. Judge Furman also noted that at the Advisory Committee meeting, a Standing Committee member had suggested amending Rule 104(a) and not 104(b), but the Advisory Committee decided that without the amendment to Rule 104(b) to include the proper standard, a court could inadvertently conclude that relevance questions are subject to the preponderance standard.

During his presentation, Judge Furman also called the Committee's attention to two stylistic changes that needed to be made to the committee note to change the word "relevancy" to "relevance" (page 587, lines 87 and 94). Professor Kimble also raised a style point and said that

on lines 6-7, "Unless otherwise provided in these rules" should instead say, "Unless these rules provide otherwise."

The members then discussed the proposed amendments.

A judge member asked whether there was a problem in courts applying the improper standard under Rule 104(b) that needed to be corrected. Professor Capra responded that there were many points of confusion in Rule 104(b), including that the term "condition" could be misinterpreted to mean any condition to admissibility, not just a conditional fact. Professor Capra also pointed to clarifying that the lower standard of proof applies.

Another judge member asked whether the explanation of relevance and examples set forth in the committee note (page 587, line 78) was necessary. Judge Furman said that it could be taken out, but said that this was only for publication, and was intended to explain the "common knowledge and experience" language set forth in the rule. A lawyer member said that he found the comment helpful to understand "common knowledge and experience." The judge member agreed that for purposes of publication, the example was fine.

Another judge member raised a concern about language in the committee note (page 587, line 88) stating that the judge "would" overrule the objection, but on line 92, the committee note said that the judge "would likely" reach a certain conclusion. At his suggestion, Professor Capra agreed to add the word "likely" to line 88 as well.

With no further questions or discussion, upon a motion and a second, with no opposition, the Standing Committee approved the proposed amendments to Rule 104 for publication and public comment, as revised to modify the rule text on page 584, line 6-7 (changing "Unless otherwise provided in these rules" to "Unless these rules provide otherwise"); and the committee note on page 587 (changing "relevancy" to "relevance" on lines 87 and 94, and adding "likely" after "would" on line 88).

4. INFORMATION ITEMS – REPORTS OF THE ADVISORY COMMITTEES

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

Judge Eid referred to the Advisory Committee's report, which begins on page 196 of the agenda book, for information items. She also highlighted and solicited feedback on the Advisory Committee's consideration of new Rule 12.2 governing intervention on appeal. Judge Eid summarized the information in the Advisory Committee's report, noting that whether to create a rule about intervention on appeal had been discussed for quite some time, and concerns had previously been raised that creating such a rule would incentivize people to move to intervene. The Advisory Committee decided, however, that a rule was necessary to give structure to the practice through a narrow rule that would also avoid an onslaught of meritless motions to intervene. She also described the structure of the proposed rule as set forth in the Advisory Committee report.

The members then discussed the proposal for new Rule 12.2.

A judge member suggested that the description of intervention as "disfavored" in subdivision (b) might be superfluous, given the language in that subdivision reserving intervention for exceptional cases. As for timing, the judge member also suggested that the proposed language "as soon as is practical after the appeal is docketed" in (c)(1) may prove difficult when administrations change, because the government may take a different position at that point. As for the choice of language between "legally protected" or "legally cognizable" interest stated in subdivision (e)(4)(B), the judge member said that he would remove both modifiers. Finally, he asked why (e)(3) referred to the United States' "foreign-relations interests" as a ground for intervention. Ms. Shapiro, on behalf of DOJ, later responded that subparagraph (e)(3) was proposed to accommodate specific government interests in things like state secrets privilege that can arise in private litigation, or protecting classified information, or uniquely governmental interest that relate to protection of national security.

The academic member raised the issue of whether this rule was truly necessary, given that courts of appeal had been using Civil Rule 24's provisions and given that intervention on appeal is rare. A lawyer member stated that while he had only had a few matters involving intervention on appeal and had learned that appellate courts are essentially using a modified Civil Rule 24, he did not think that this was ideal. Another lawyer member added that she had only seen a few intervention requests in civil appeals, but that recently there has been a significant uptick in AI-assisted pro se filings for intervention at the appellate level such that creating a strict rule would be helpful.

During the members' discussion, the reporters and consultants also provided suggestions. Professor Garner added that if the title of subdivision (d) were changed from "Grounds for Mandatory Intervention" to "Mandatory Intervention," then the title of subdivision (e) should be changed from "Other Grounds for Intervention" to perhaps "Permissive Intervention" to make it parallel. A lawyer member suggested not using the term "permissive intervention" because, in the Civil Rules, permissive intervention required a lesser showing. Another judge member suggested merging (d) and (e) in the proposed rule and titling the new subdivision, "Grounds for Intervention." Within that new subdivision, one paragraph could address when the court may permit intervention, and another paragraph could address when the court must permit intervention. Professor Sachs later clarified that Civil Rule 24 is much more flexible than what the Appellate Rules Advisory Committee was proposing and that the Committee had generally been averse to the concept of "permissive intervention" in appeals.

Professor Bartell suggested looking at Bankruptcy Rule 8013(g) on intervention on appeal. Professor Hartnett noted there are competing themes among circuit judges who either apply Civil Rule 24 on appeal and others who adhere to a more traditional notion that intervention on appeal was for rare and exceptional circumstances; the goal of the new rule would be to get ahead of this divide. Professor King pointed out that that the Rule 12.2 language proposed carving out § 2254 and § 2255 motions in subdivision (a) but should also include § 2241 motions.

Judge Eid thanked the Standing Committee members for their input on the draft proposed rule.

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

Judge Connelly referred to the information items from the Advisory Committee report, beginning on page 255 of the agenda book. She then highlighted one of the issues under consideration involving potential amendments to Bankruptcy Rule 9031, which provides that Civil Rule 53—which authorizes the use of masters—does not apply in a bankruptcy case. The Advisory Committee had received two suggestions to amend the rule to permit masters in a bankruptcy case. The Advisory Committee was considering a draft amendment to allow masters, but on March 17, 2026, the DOJ Office of Legal Counsel issued a published opinion suggesting that the use of masters by bankruptcy judges would be unconstitutional. The Advisory Committee has decided to defer further consideration of this issue until its fall meeting.

Judge Connelly then explained the nature of the DOJ objection. Bankruptcy judges, who are Article I judges, are referred cases that fall within the district court's original jurisdiction. If it is a core bankruptcy proceeding, the bankruptcy judge has the authority to issue a final ruling. If it is not a core proceeding, the bankruptcy judge may issue a ruling with the parties' consent. If the parties do not consent, the bankruptcy judge may issue proposed findings of fact and conclusions of law, and the district judge enters a final judgment. One concern was whether, in a non-core proceeding where the parties do not consent to the bankruptcy court's final authority, the bankruptcy judge could appoint a special master when the bankruptcy judge could not enter a final ruling. Professor Gibson added that the rule would also apply to district judges who are exercising bankruptcy jurisdiction, but the constitutional issues would not apply in those cases.

A judge member noted his general skepticism regarding masters because of cronyism and paying the master could leave less money available for the estate. Another judge member echoed those concerns and added that bankruptcy judges in his court were uniformly against the proposal. Professor Bartell observed, however, that having a rule that explicitly barred the appointment of a special master in bankruptcy cases but not civil cases seemed strange, especially as the cronyism argument could be applied to many areas of the law, and further, she did not think that the DOJ opinion was persuasive as to why there was a constitutional concern with this rulemaking.

C. Advisory Committee on Civil Rules – Judge Sarah S. Vance, Chair

Judge Vance reported on several information items detailed in the Advisory Committee report beginning on page 313 of the agenda book.

1. *Potential Amendments to Rule 43 on Remote Trial Testimony*

Judge Vance first highlighted the status of the Advisory Committee's work on potential amendments to Rule 43(c) regarding remote trial testimony, which the Standing Committee had already expressed concerns about loosening the standard for remote trial testimony at its January 2026 meeting.

Judge Vance reported that since that time, the Rule 43 Subcommittee had met three times to consider those concerns and had received research from Ms. Sraders, Counsel to the Civil Rules Committee. The research showed that judges were relying on the 1996 committee note to insist that unforeseeable last-minute developments were generally the only thing that could satisfy the

"compelling circumstances" standard in Rule 43. After much deliberation, the Rule 43 Subcommittee still favored removing the "compelling circumstances" requirement from the rule, but it had substantially revised the proposed committee note, found on page 316 of the agenda book. The revised note made clear that the rule does not authorize fully remote trials, and that the judge was not required to authorize remote testimony even if the parties agreed to it. A court can authorize remote testimony only on an individualized showing of good cause to a particular witness. The rule does not affect any other aspect of trial. The revised note stated that witness inconvenience alone was not grounds to authorize remote testimony, and emphasized that the good cause determination required an assessment of the circumstances in the particular case, always mindful of the importance of in-person testimony. The note explained why the 1996 requirement of "compelling circumstances" a term used nowhere else in the Civil Rules, warranted re-examination. It pointed out that when a witness cannot attend trial, the choice was not between in-court testimony and remote live testimony, but between remote live testimony and depositions.

A number of members expressed concern that removing the "compelling circumstances" language would be read as a softening of the rule to allow greater use of remote trial testimony. Judge Vance explained that one of the reasons to take it out was that the 1996 committee note explaining that language had been interpreted by some judges to confine remote testimony to last-minute emergencies. Other members did not feel that the language of Rule 43 was causing any problems, and that the practices of some judges who interpreted the rule strictly did not necessitate a rule change.

A judge member also offered specific feedback on the proposed committee note. First, he suggested explicit recognition in the rule text that allowing remote testimony is a case management issue in the trial judge's discretion and not to be reviewed on appeal under a "good cause" standard. Even if the parties agree to it, the judge is not required to allow it. Second, on page 317, the proposed committee note states that judges had found the "compelling circumstances" requirement too constricting, but he did not know any judges who felt this way. Third, the following paragraph said that some jurors found video testimony easier to view than in-person testimony, but the judge member suggested that this seemed like a courtroom configuration problem, not an issue with the rule. Fourth, he disagreed with the conclusion in the proposed committee note that designating portions of a deposition was a time-consuming process that would be obviated by live remote testimony. Finally, where the last sentence of the proposed committee states "Court approval is essential to management of remote trial testimony," the judge member questioned what it meant in the context of this rule amendment.

One member added that he supported a very limited amendment to the rule to address the concerns about interpretation of the 1996 committee note. He noted that the draft committee note on page 318 stated that remote testimony may be more acceptable for a less significant witness, and he agreed with this concept. He also asked whether any thought had been given to a preference for remote testimony in a more formal setting, such as a courthouse, compared to a witness's basement. Judge Vance noted that the parties generally work these issues out on their own.

Other members noted disagreement with the existing committee note because if a witness cannot be in person, live remote testimony is better than a video deposition or reading a deposition

transcript. Judge Dever added, however, that remote testimony would not save the district judges time from resolving deposition designation objections because every attorney would designate portions of the depositions in case the technology failed. Another judge stated that he would support changing the committee note to say that deposition transcripts are not superior to live remote testimony. As to the rule text, however, he thought that while most judges would prefer remote testimony to depositions, that should be left to the trial court's discretion.

Another lawyer member also expressed her preference for live in-court testimony, but noted that there had been a lot of experimentation and experience with hybrid trials and remote depositions since the COVID-19 pandemic. The rule change, however, would signal to practitioners that there may be more flexibility if they could show good cause in a given case. This standard could also make trials less expensive, more accessible, and shorter. Overall, the lawyer member supported publishing a rule for public comment to see whether the legal community would support a change to enable courts to have trials more efficiently and less expensively.

A judge member suggested that the Advisory Committee review the Texas Supreme Court's rule on remote testimony. Judge Vance responded that Justice Jane Bland from the Texas Supreme Court is on the Rule 43 Subcommittee and supports remote testimony in Texas because of the huge distances in Texas and the types of cases in state courts. Another judge member added that almost all state civil trials in Minnesota are now fully remote.

As a practical matter, a judge member asked for clarification as to when the Committee can change the committee note for a rule if there are no changes to the rule itself. Several of the reporters responded that an existing committee notes cannot be changed, and new committee notes are intended to explain a change in the rule text. Professor Hartnett added that the Committee could consider revising the text of the rule to say that compelling circumstances need not arise at the last minute, or that, in determining whether there were compelling circumstances, live remote testimony was generally preferable to a deposition. Professor Capra agreed with Professor Hartnett's suggestion, and proposed using the term "foreseeable." He also thought that it might be helpful to structure the rule to accommodate different choices in testimony available to the court; for example, the standards a court might use when deposition testimony is available versus when it is not. Professor Bartell added that Bankruptcy Rule 7043 bore on this same topic and recommended that the reporters look at the public commentary received for that rule when it was published.

c. Third-Party Litigation Funding

Judge Vance next directed the Committee's attention to the Advisory Committee's work on third-party litigation funding (TPLF), which is described on page 351 of the agenda book. Judge Vance reported that the TPLF Subcommittee continued to consider a disclosure rule for third-party litigation funding in Rule 26(a)(1) or including third-party litigation funding as a matter a court can consider and take action on under Rules 16 or 16.1. She also described the practice in the District of New Jersey, which requires certain disclosures and contemplates discovery under limited circumstances regarding the terms of the funding agreement. Judge Vance also noted that the FJC is currently studying the experience under the New Jersey rule and the TPLF Subcommittee continues to evaluate how to define the types of funding arrangements that would trigger disclosure, what should be disclosed to whom, whether it should go to the court alone or

to all parties, what the court can do with the information, and whether to authorize discovery. With that introduction, Judge Vance asked for the Standing Committee's views on the aforementioned issues.

A judge member asked for more information on the New Jersey disclosure rule. Judge Vance explained that both sides were told to make the disclosures, if any, on the record, and that judges were mostly concerned with knowing who had the power to settle and make decisions about case strategy. She added that in a class action or MDL case, the judges want to know whether any of the representatives have conflicts or would be compromised by funding arrangements. Later in the discussion, the academic member mentioned that he heard that it was not uncommon for funders to require their lawyer to approve the litigation strategy at every step.

Another judge member said that he issued a standing order based on the New Jersey rule, as had other districts. He added that the Northern District of California has a rule that essentially applies only to class actions; some Texas courts require disclosures; and more than 25% of appellate and district courts require some sort of real party in interest disclosure. He also shared that he had enforced the rule and uncovered real abuses and violations of professional conduct, such as aggregating a pool of clients to be represented by the same law firm. Later in the discussion, a lawyer member also raised ethical concerns in third-party litigation funding, adding that there was tremendous pressure for profitability within law firms, which is leading to more plaintiff-side contingency matters. At the same time, funders (as he understood the practice) would only provide funding if there were enough cases to aggregate (15-25). He thought this had negative effects on the lawyer's ethical duties in an individual case, and also wondered what judges thought about having a completely unrelated matter, with different parties and a different topic, potentially impacting the case in front of them. The judge member continued that he issued his standing order in 2022 and about 15% of his cases had made a disclosure of third-party litigation funding. The judge member also said that he had recently issued a standing order requiring anyone seeking pro hac vice to certify that they were complying with ABA Model Rule 5.4 that they were not sharing fees.

A lawyer member asked whether there was significant opposition to a disclosure rule. Judge Vance said that some funders had told her that they would not oppose a pure disclosure request, but the issue was with discovery. Another lawyer member noted that disclosure rules like the Northern District of California's rule had been in place for some time and that MDL transferee judges will often, as a matter of case management and selecting leadership, require at least disclosure in chambers of funding arrangements.

A judge member thought that it would be helpful to have something in the rule that specifically authorized the court to inquire about third parties. Professor Marcus responded that he did not think judges were currently unable to require disclosures of funding. Instead, Professor Marcus suggested that the question might be framed as whether disclosure should always be required even without a request from the presiding judge. Professor Marcus also noted that the EU was gradually moving towards regulating third-party funding.

With this feedback, Judge Vance thanked the Committee.

D. Advisory Committee on Criminal Rules – Judge Michael W. Mosman, Chair

Judge Mosman stated that the Advisory Committee's work on Rules 15 and 40 was summarized in the agenda book and he had nothing further to add.

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

Judge Furman reported on several information items contained in the Advisory Committee report, found beginning on page 530 of the agenda book.

1. *Artificial Intelligence*

Judge Furman first provided an update on the Advisory Committee's work concerning artificial intelligence in two areas: (1) the reliability of machine-generated output offered without an expert witness (either by a lay witness or pursuant to Rule 902(13)), and (2) the authenticity issue posed by "deepfakes."

On the first issue, Judge Furman reported that after publication of new Rule 707 on machine-generated opinions, the Advisory Committee received 59 written comments and about a dozen witnesses testified at two hearings. The feedback from the public was mixed between unqualified support, supportive with revisions, and opposed. Judge Furman described some of the criticisms of the proposed rule, which focused on issues ranging from overbreadth or vagueness of terms and exceptions, the interaction with Rule 702, and general concerns about the prematurity or lack of need for the rule. Another issue raised was the potential need for the civil and criminal rules to be modified to require disclosure of AI-generated opinion evidence in advance of trial. Judge Furman also advised the Committee that in response to this feedback, the Advisory Committee revised the rule (as set forth in the Committee Report beginning on page 534). At the Advisory Committee's spring meeting, however, and at the suggestion of Judge Dever, the Advisory Committee decided to take the potential rule amendment under further advisement and hold a mini-conference with panels of technical experts and experienced lawyers at its fall 2026 meeting.

On the second issue, Judge Furman reported that the Advisory Committee continues to consider a proposed amendment to Rule 901(c) to address authentication of an item of evidence that one side claims is a deepfake. Because the existing authenticity standard is relatively low, the Advisory Committee is considering a proposed amendment that would create a burden-shifting framework where the opponent of the evidence would have to make a threshold showing enough for a reasonable person to find that an item was fabricated or altered by generative artificial intelligence. If that showing were made, the burden would shift to the proponent of the evidence to show, by a preponderance of the evidence, that the item was authentic. Judge Furman also described the results of an FJC sent a survey at the request of the Advisory Committee. The survey results, discussed in the Advisory Committee's report, showed that 15 judges reported that they have encountered a deepfake challenge and a strong majority indicated that if such an issue arose, they would require a showing akin to what the proposed rule provides (even without a rule in place). Judge Furman and Professor Capra also discussed a recent New York Court of Appeals decision relating to deepfakes indicating that the issue is coming up in state courts as well. To gather more expert input, however, the Advisory Committee decided to address the

issue of deepfakes at the mini-conference at the fall meeting along with its consideration of new Rule 707.

Following this report, Judge Furman solicited the Standing Committee's views on the need for rule amendments and whether the working drafts took the right approach. Professor Capra added that this was the first time in his experience that a rule published for public comment did not go forward. He expressed that he had hoped that the public feedback would be an opportunity for the Advisory Committee to learn from the comments, but he did not believe the Advisory Committee learned much because most of the practicing lawyers were misunderstanding the rule. For this reason, refining the rule with the help of experts at a mini-conference would be very helpful in drafting a better rule.

A judge member supported the approach and thought information gathering was exactly what the Advisory Committee needed. Judge Furman noted that there was a concern that the technology was moving very quickly and the rules would not be adequate to address it given that the rulemaking process takes a long time. A lawyer member supported moving forward to demonstrate that the rules process is not merely reactive and suggested not waiting until the problem became unbearable to try to address it. Professor Marcus added that he and Professor Capra had discussed some coordination with the Civil Rules Advisory Committee on definitions and to determine if the civil disclosure rules would need to be amended if Evidence Rule 707 went forward in order to get those issues before the court in a timely fashion.

d. Rules 703 and 606(b)

Judge Furman concluded his report on information with an update on the Advisory Committee's consideration of two other potential amendments to address Supreme Court decisions potentially impacting the constitutionality of Rule 703 and Rule 606(b). First, the Advisory Committee is considering potential amendments to Rule 703 to add a "red flag" noting possible constitutional concerns in light of the Supreme Court's decision in *Smith v. Arizona*, 602 U.S. 779 (2024). The Advisory Committee is concerned that if construed broadly, it could prohibit reliance on a non-testifying expert, but is waiting to see if the Supreme Court takes up a circuit split on this issue. Second, in light of potential action on Rule 703, the Advisory Committee also revisited whether to add "red flag" language to Rule 606(b) in light of the Supreme Court's decision in *Peña-Rodriguez v. Colorado*, 580 U.S. 206 (2017), but decided that it was not warranted.

5. CONCLUDING REMARKS AND ADJOURNMENT

Judge Dever concluded by thanking the Standing Committee members for their hard work and adjourned the meeting. The next meeting would take place in Washington, D.C. on January 5, 2027.

Draft

APPENDIX

Summary of Standing Committee Revisions to Final Amendments

The following list identifies revisions made at the Standing Committee meeting to amendments presented for final approval, as set forth in the agenda book available on the uscourts.gov website.

Civil Rule 26(a)(3)

The proposed amendments to Civil Rule 26(a)(3) begin on page 391of the agenda book. The Standing Committee discussed and approved one change to the rule text:

1. Page 392, line 20: "it expects" was inserted before "whether" and the word "will" was changed to "to." Lines 20-21 as revised read "whether it expects the testimony to be in person or remote."

Civil Rule 45(b)(1)

The proposed amendments to Civil Rule 45(b)(1) begin on page 398 of the agenda book. The Standing Committee discussed and approved one change to the rule text:

1. Page 399, line 23: "by a person identified in (i) or (ii)" was inserted after "actual receipt."

Criminal Rule 17

The proposed amendments to Criminal Rule 17 begin on page 490 of the agenda book. The Standing Committee discussed and approved the following changes to the rule text:

1. Page 497, lines 133 through 137, were replaced with the following: "(6) *Disclosing to Other Parties the Items Produced.* This rule does not require the disclosure of produced items to a party that did not request the subpoena. Disclosure and discovery requirements are not altered by this rule."

The Standing Committee discussed and approved the following changes to the committee note:

1. Page 510, lines 512 through 515: "A party must disclose to an opposing party an item the party receives from a subpoena's recipient only if the item is discoverable under these rules" was replaced with "This rule does not require the disclosure of produced items to a party that did not request the subpoena. Disclosure and discovery requirements are not altered by this rule."

2. Page 511, line 527: "the regulation and timing regarding" was inserted before "disclosure."

3. Page 511, line 529: "is" was replaced by "are."

Draft

Agenda E-19 (Summary)
Rules
September 2026

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

1. Approve the proposed 2026 Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002, as set forth in Appendix A, and ask the Administrative Office Director to transmit it to Congress in accordance with the law ..... p. 4

2. Approve the proposed amendments to Appellate Rules 15, 29, and 32 and to the Appendix of Length Limits, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 5-8

3 a. Approve the proposed amendments to Bankruptcy Rule 2002, as set forth in Appendix C, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

   b. Approve, effective December 1, 2026, the proposed amendments to Bankruptcy Official Forms 101 and 106C, as set forth in Appendix C, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date ..... pp. 9-10

4. Approve the proposed amendments to Civil Rules 7.1, 26, 41, 45, and 81, as set forth in Appendix D, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 13-15

5. Approve the proposed amendments to Criminal Rule 17, as set forth in Appendix E, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 18-19

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

(Rev. 8/27/26)

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

- E-Filing and Service by Self-Represented Litigants..... pp. 2-3
- Privacy Rules for Taxpayer Information and Minors' Names.....p. 3
- Federal Rules of Appellate Procedure ..... pp. 8-9
- Federal Rules of Bankruptcy Procedure ..... pp. 10-13
- Federal Rules of Civil Procedure..... pp. 16-18
- Federal Rules of Criminal Procedure..... pp. 20-22
- Federal Rules of Evidence ..... pp. 23-26

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 3-4, 2026. All members participated. Representing the advisory committees were Judge Allison H. Eid (10th Cir.), chair, and Professor Stephen Sachs, Reporter, Advisory Committee on Appellate Rules; Judge Rebecca Buehler Connelly (Bankr. W.D. Va.), chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Sarah S. Vance (E.D. La.), chair, Professor Richard L. Marcus, Reporter, and Professor Andrew Bradt, Associate Reporter, Advisory Committee on Civil Rules; Judge Michael W. Mosman (D. Or.), chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Jesse M. Furman (S.D.N.Y.), chair, and Professor Daniel Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Edward Hartnett, Standing Committee Reporter; Professor Catherine T. Struve, Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Carolyn A. Dubay, Secretary to the Standing Committee; Sarah Sraders, Rules Committee Staff Counsel; Dr. Tim Reagan, Senior Research Associate, Federal Judicial Center (FJC); and Elizabeth J.

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

Shapiro, Deputy Director, Federal Programs Branch, Civil Division, Department of Justice, on behalf of the Deputy Attorney General.

In addition to its general business and consideration of the Advisory Committee reports and recommended action items as discussed below, the Committee also received an update on the work of its subcommittee concerning uniform attorney admissions in the trial courts and concluded that no further action on the project is warranted. The Committee further authorized the Chair, working with the Secretary of the Committee, to respond to the request of the Judiciary Planning Coordinator, Chief Judge Michael A. Chagares (3d. Cir.), to identify any agenda items of the Rules Committees that align with the Executive Committee's priority strategies and goals in the *Strategic Plan for the Federal Judiciary*. The Committee's views were communicated to Chief Judge Michael A. Chagares, the judiciary planning coordinator, by letter dated June 11, 2026.

E-FILING AND SERVICE BY SELF-REPRESENTED LITIGANTS

The Standing Committee unanimously approved, with minor revisions to the committee notes to make them more uniform, the recommendations of the Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules to publish for public comment proposed amendments relating to electronic service and filing by self-represented litigants (SRLs). The proposed amendments (collectively, "proposed SRL rules") seek to: (1) increase SRL access to a court's electronic-filing system (or allow a form of electronic filing by alternative means) to file pleadings and other court documents; and (2) after a complaint is filed and served, allow SRLs to achieve service of subsequently filed documents in the electronic-filing system through the electronic notice of filing or through a court-based electronic noticing program. The proposed SRL rules relate to Appellate Rule 25; Bankruptcy Rules 5005, 8011, 9006, and 9036; Civil

Rules 5 and 6; and Criminal Rules 45 and 49. With minor differences,[1] these proposed amendments are uniform across the four sets of rules. Each of these proposed amendments is discussed in more detail in the summaries of actions by the Advisory Committees in this report.

PRIVACY RULES FOR TAXPAYER INFORMATION AND MINORS' NAMES

The Standing Committee unanimously approved, with the addition of clarifying revisions in each of the committee notes, the recommendations of the Advisory Committees on Bankruptcy, Civil, and Criminal Rules to publish for public comment proposed amendments relating to the redaction of social security and individual taxpayer identification numbers and the use of pseudonyms to reference minors. The proposed amendments (collectively, the "proposed privacy amendments") seek to: (1) expand the redaction requirement of taxpayer identifying information in civil and criminal cases; (2) require the use of pseudonyms rather than initials when referencing minors in bankruptcy, civil, and criminal cases; and (3) clarify that these rules apply to exhibits and attachments to electronically filed court documents. The proposed privacy amendments relate to Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1.[2] Each of these proposed amendments is discussed in more detail in the summaries of actions by the Advisory Committees in this report.

[1]For example, the Bankruptcy, Civil, and Appellate Rules proposals use the term "unrepresented," while the Criminal Rule uses "self-represented." (Many existing Bankruptcy, Civil, and Appellate Rules already use "unrepresented.") The Civil, Criminal, and Appellate Rules use the term "parties," while the Bankruptcy Rules use the term "individual." (In the Bankruptcy context, there is a concern that some small business entities might think that the use of "parties" would enable them to proceed without counsel, while in the other contexts the greater worry is that nonparties might think that they could file in any case they want.) Finally, the Civil, Criminal, and Appellate Rules refer to "the party's case," while the Bankruptcy Rules refer simply to "the case." (In the Bankruptcy context, "the party's case" might suggest that only the debtor is covered by the amendment.)

[2]Any amendments to these rules will apply on appeal through existing Appellate Rule 25, which incorporates them by reference. As set forth in the information items for the Appellate Rules Advisory Committee, there is ongoing consideration of potential privacy amendments relating to certain aspects of appeals.

PRIVACY REPORT TO CONGRESS 2026

Following the Standing Committee's approval of the proposed privacy amendments for publication and comment, the Committee also considered a draft 2026 Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002 (the "2026 Privacy Report to Congress"). Section 205(c)(3)(C) of the E-Government Act directs that, every two years, "the Judicial Conference shall submit to Congress a report on the adequacy of [the privacy rules] to protect privacy and security." The most recent prior report was submitted to Congress in 2024.

The 2026 Privacy Report to Congress covers the period from June 2024 to June 2026. Part I of the report describes the proposed privacy amendments, as well as the status of other privacy-related proposals to amend the Rules of Practice and Procedure. Part II of the report describes ongoing judiciary implementation efforts by the Committee on Court Administration and Case Management (CACM Committee), the Administrative Office of the U.S. Courts, and the FJC to protect privacy in court filings and opinions. Part III of the 2026 report discusses the FJC's recent studies relating to privacy concerns in court filings.

The CACM Committee at its May 2026 meeting reviewed the draft 2026 Privacy Report to Congress and endorsed a recommendation from the Standing Committee to the Judicial Conference to approve the report (see Report of the Committee on Court Administration and Case Management, at Agenda E-6). The Standing Committee then approved the report at its meeting, to include any necessary changes to address the revisions to the privacy amendments approved by the Standing Committee or other minor stylistic or technical changes.

> **Recommendation:** That the Judicial Conference approve the proposed 2026 Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002, as set forth in Appendix A, and ask the Administrative Office Director to transmit it to Congress in accordance with the law.

FEDERAL RULES OF APPELLATE PROCEDURE

Amendments Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules recommended for final approval proposed amendments to Appellate Rules 15, 29, and 32 and to the Appendix of Length Limits. The Standing Committee unanimously approved the Advisory Committee's recommendations, with minor revisions correcting the placement of a sentence in the committee note to Rule 15 and correcting cross-references in Rules 29 and 32(g) and the Appendix of Length Limits.

Rule 15 (Review or Enforcement of an Agency Order—How Obtained; Intervention)

The proposed amendments to Rule 15 address issues that may arise when a petition for review or enforcement of an agency decision is filed prematurely. In circuits that apply the "incurably premature" doctrine, if a pending motion to reconsider an agency decision makes the decision unreviewable in the court of appeals, then a new petition to review that agency decision must be filed in the court of appeals once the agency decision becomes final. The proposed amendments to Rule 15 would eliminate the need to refile the petition by adding a subdivision providing that the original petition for review becomes effective upon the agency's disposition of the last reconsideration request. These changes would align Rule 15 with Rule 4(a)(4)(B)(i), which relates to the effectiveness of a notice of appeal filed after a judgment is entered or announced in the district court, but before the district court disposes of certain post-judgment motions authorized under the Federal Rules of Civil Procedure. The proposed amendment also makes clear that it applies only when the agency order is "otherwise reviewable."

Rule 29 (Brief of an Amicus Curiae)

At its September 2025 session, the Judicial Conference approved final amendments to Rule 29, together with conforming amendments to Rule 32 and the Appendix of Length Limits, and authorized their transmittal to the Supreme Court with a recommendation that they be

adopted by the Court and transmitted to Congress in accordance with the law (JCUS-SEP 2025, p. 20). The amendments addressed several issues with respect to the contents of amicus briefs, particularly as to required disclosures of relationships between the amicus and parties or nonparties. In particular, the amendments would have required disclosure of whether a party or its counsel has a majority ownership interest in or majority control of an amicus. In addition, whereas the current rule requires disclosure of whether any nonparty (other than the amicus, its members, or its counsel) contributed money intended to fund preparation or submission of the brief, the proposed amendments would have limited this disclosure requirement to instances in which the amount contributed or pledged to be contributed is greater than $100. The proposed amendments also would have added a broader disclosure concerning the background of the amicus—including its identity, history, experience, and interest. Finally, the proposed amendments would have imposed an express word limit of 6,500 words on amicus briefs at the initial merits stage rather than reference to "one half the maximum length authorized . . . for a party's principal brief."

After the amendments were transmitted to the Supreme Court, the Executive Committee of the Judicial Conference raised concerns about a provision in what was then proposed Rule 29(e) relating to disclosures as to new members of amicus organizations. That provision would have obligated amicus organizations to disclose brief-related contributions or pledges over $100 not only from nonmembers, as the current rules require, but also from relatively new members who joined the organization within the previous 12 months. The Executive Committee noted that this provision could interfere with the privacy of those organizations and of their members, who may be chilled from contributing to their organization's amicus briefs if they were required to announce their membership to the public. Additionally, after transmission to the Supreme Court, two other ambiguities or errors were separately identified in the proposed amendments:

first, a potential ambiguity in what was then proposed Rule 29(d) regarding what required disclosures a party or counsel must make when an amicus is required to disclose certain information but fails to do so; and second, an unrevised cross-reference in the Appendix of Length Limits. To address the Executive Committee's concerns and to make appropriate corrections, the Advisory Committee and the Standing Committee voted in March 2026 to withdraw the amendment package, and the proposed amendments were not forwarded to Congress.

After further consideration by the Advisory Committee and the Standing Committee, the revised proposed amendments to Rules 29 and 32 and the Appendix of Length Limits are presented for approval. Specifically, the Advisory Committee and Standing Committee removed the requirement of new-member contribution disclosure from the proposed amendments to Rule 29 and corrected the identified ambiguity by clarifying that the requirement that parties and counsel disclose information that an amicus must but has failed to disclose does not extend to information about nonmember contributions. The Advisory Committee further determined that republication of the amendments to Rule 29, with the conforming changes to Rule 32 and the Appendix of Length Limits, was not required given the extensive public comment on the issue of member disclosures and the technical nature of the additional revisions.

The remainder of the proposed amendments to Rule 29, as revised, are the same.

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

The proposed amendment to Rule 32 conforms Rule 32(g)'s cross-references to the updated sections of amended Rule 29. Similarly, the proposed amendment to the Appendix of Length Limits conform the length limits for amicus briefs identified in the Appendix to the proposed amendment to Rule 29.

Recommendation: That the Judicial Conference approve the proposed amendments to Appellate Rules 15, 29, and 32 and to the Appendix of Length Limits, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

Rule 25 (Filing and Service)

As part of the proposed SRL rules package, the Advisory Committee on Appellate Rules recommended that a proposed amendment to Rule 25 be published for public comment in August 2026. The Standing Committee unanimously approved the Advisory Committee's recommendation.

The proposed amendments to Appellate Rule 25 provide that an unrepresented party is presumptively authorized to use the court's electronic-filing system to file documents in the case and receive notice of case filings. The proposed amendments further provide that a court may set reasonable conditions on an unrepresented party's access to the court's electronic-filing system, but a court may not bar all unrepresented parties from using a court's electronic-filing system unless the court either includes reasonable exceptions to the prohibition or permits unrepresented parties to use another electronic method for filing documents and for receiving notice of court filings and orders. Finally, the proposed amendment would eliminate the requirement for an unrepresented party (who files other than through the court's electronic-filing system) to make a separate (paper) service on a litigant who is registered to receive notice of case activity from the court's electronic-filing system. Service by the notice of case activity is not effective if the filer learns that the filing did not reach the person to be served. In addition, the proposed amendment provides that a court may require by local rule or court order a different method of service for filings under seal and/or filings that initiate a proceeding in the court of appeals under Rule 5, 6(c), 15, or 21.

Information Items

The Advisory Committee met on April 16, 2026. In addition to the recommendations discussed above, the Advisory Committee discussed several other issues, including continuing its consideration of possible amendments to Rule 25 (Filing and Service) to require complete redaction of taxpayer identifying information and the use of pseudonyms for minors, so that some of the exemptions from privacy requirements at the trial level (Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1) would not carry forward on appeal. The Advisory Committee also continues its consideration of potential amendments to Rule 4 (Appeal as of Right—When Taken) regarding reopening the time to appeal, Rule 8 (Stay or Injunction Pending Appeal) regarding limits on administrative stays, and a possible new Rule 12.2 regarding intervention on appeal, as well as the treatment of tribes in the Appellate Rules. Finally, the Advisory Committee considered several new issues including a possible amendment to Rule 28 (Briefs) regarding introductions in briefs.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Amendments Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules recommended for final approval amendments to Bankruptcy Rule 2002 and amendments to Official Forms 101 and 106C. The Standing Committee unanimously approved the Advisory Committee's recommendations.

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 information required by Form 416B (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) rather than the more extensive information required under Rule 1005. As noted in the 2026 Privacy Report to

Congress, this change would mean that most Rule 2002 notices would no longer be required to include the last 4 digits of the debtor's social-security or individual taxpayer-identification number.

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

The proposed amendment to Official Form 101 relates to the prompt in Question 4 in Part 1 and clarifies 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 (such as the debtor's employer). The modification will help debtors avoid the error of providing their employer's EIN. Because multiple debtors 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.

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

The proposed amendment to Form 106C requires the debtor to add the total dollar value of the exemptions with a specific amount claimed under Column C in the form.

Recommendation: That the Judicial Conference:

a. Approve the proposed amendments to Bankruptcy Rule 2002, as set forth in Appendix C, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

b. Approve, effective December 1, 2026, the proposed amendments to Bankruptcy Official Forms 101 and 106C, as set forth in Appendix C, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

Rules Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Bankruptcy Rules 2003, 5005, 8011, 9006(f), 9036, and 9037 with a recommendation that they

be published for public comment in August 2026. The Standing Committee unanimously approved the Advisory Committee's recommendations.

Rule 2003 (Meeting of Creditors or Equity Security Holders)

The proposed amendments to Rule 2003 would allow more time to convene the meeting of creditors in chapter 12 and 13 cases, extending the deadline in chapter 12 cases from 35 to 60 days, and in chapter 13 cases, from 50 to 60 days, after the order for relief. The proposed amendments would also expressly authorize meetings of creditors to be "conducted in person or remotely" and would allow the U.S. trustee to designate in which manner a meeting would be conducted.

Rules 5005 (Filing Papers and Sending Copies to the United States Trustee), 8011 (Filing and Service; Signature), 9006(f) (Computing and Extending Time; Motions), and 9036 (Electronic Notice and Service)

As part of the SRL rules package, the proposed amendments to Rules 5005 and 8011 would provide that unrepresented individuals are presumptively authorized to use the court's electronic-filing system to file documents. The proposed amendments would permit courts to set reasonable conditions and restrictions on access by unrepresented individuals to the court's electronic-filing system. However, the proposed amendments would not permit a bar on all unrepresented individuals from using a court's electronic-filing system, unless the court also either includes reasonable exceptions to the prohibition, or permits unrepresented individuals to use another electronic method for filing documents and an alternative electronic means for receiving notice of court filings and orders.

In addition, the proposed amendments to Rule 8011 would make service via a court's electronic-filing system the primary means of service. The proposed amendments would eliminate the requirement of separate (paper) service (of papers filed other than through the court's electronic-filing system) on a litigant who is registered to receive a notice of case activity

from the court's electronic-filing system. However, service by a court's electronic-filing system is not effective if a filer learns that it did not reach the person to be served. Further, the proposed amendments provide that if a document is filed under seal, a court may provide an order or local rule that the document be served by other means.

The proposed amendments to Rule 9006 would change a cross-reference to conform the rule to match proposed amendments to Civil Rule 5.

The proposed amendments to Rule 9036 would address filings by unrepresented individuals, providing that because documents filed in paper form are uploaded by the court into the court's electronic-filing system, there is no need to require separate paper service by the filer on case participants who receive an electronic notice of the filing from the court's electronic-filing system. In addition, Rule 9036(d), like Rule 8011(c)(3), deals with the impact of delays between filing and uploading to the court's electronic-filing system.

Rule 9037 (Protecting Privacy for Filings)

As part of the package of proposed privacy amendments, the proposed amendments to Bankruptcy Rule 9037 share two features with the proposed amendments to Criminal Rule 49.1 and Civil Rule 5.2. First, the proposed amendments would make clear that the redaction requirement applies to attachments, exhibits, and all other documents in a court filing. Second, the proposed amendments would require the use of pseudonyms for minors. Because of the unique context of bankruptcy proceedings and practice, the proposed amendments do not adopt the complete redaction requirement for taxpayer identifying information or the extension of the redaction requirement to EINs that is proposed in the privacy amendments to the civil and criminal rules.

Information Items

The Advisory Committee on Bankruptcy Rules met on April 15, 2026. In addition to the recommendations discussed above, the Advisory Committee discussed several matters, including continued consideration of a suggestion to amend Rule 9031 (Using Masters Not Authorized) to permit the use of special masters in bankruptcy cases and new suggestions regarding possible amendments to Rule 4004 (Granting or Denying a Discharge) and possible amendments to Form 106C (Schedule C: The Property You Claim as Exempt (individuals)).

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules recommended for final approval proposed amendments to Civil Rules 7.1, 26, 41(a), 45(b), 45(c), and 81. After minor clarifying revisions to the proposed amendments to Rules 26 and 45(b), the Standing Committee unanimously approved the Advisory Committee's recommendations.

Rule 7.1 (Disclosure Statement)

The proposed amendment to the disclosures required under Rule 7.1(a)(1) requires any party or would-be intervenor that is a private business organization to disclose any publicly held business organization that "directly or indirectly" owns 10 percent or more of the party or intervenor. The proposal responds to concerns raised that the current rule, which requires disclosure only of "any parent corporation and any publicly held corporation owning 10 percent or more of its stock," may result in nondisclosure of a "grandparent" corporation. This change is intended to assist judges in evaluating if recusal is appropriate consistent with updated guidance in Committee on Codes of Conduct Advisory Opinion No. 57, which explains that corporate ownership of at least 10 percent of a party creates a rebuttable presumption of parental control and that a judge must recuse if they "conclude that a party is controlled by a corporation in which

the judge owns stock." Another change substitutes the term "business organization" for the word "corporation" to clarify that the disclosure requirement applies to different forms of business entities.

Rule 26 (Duty to Disclose; General Provisions Governing Discovery)

The proposed amendment to Rule 26(a) relating to pretrial disclosures requires disclosure of the party's expectation as to whether each of its witnesses' testimony will be in person or remote. The Committee made a minor revision to the language in the proposed amendment to clarify that it relates only to the party's expectations as to whether testimony will be in person or remote at the time the disclosure is made.

Rule 41(a) (Dismissal of Actions)

The proposed amendments to Rule 41(a) clarify that a plaintiff may obtain a voluntary dismissal of one or more claims raised in a complaint without dismissing the entire action. This change responds to decisions in some courts interpreting the current language to mean that only an entire case, that is, all claims against all defendants, or only all claims against one or more defendants, could be dismissed under the rule. The proposed amendments also provide that a stipulation of dismissal need be signed only by parties who remain in the action at the time of the dismissal.

Rule 45(b) (Subpoena—Service)

The proposed amendment to Rule 45(b) clarifies how a subpoena for testimony may be served and whether the witness fee must be tendered simultaneously with service. The proposed amendment borrows two methods of service from Rule 4(e)(2)'s methods for serving a complaint on an individual—personal service or leaving a copy at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there. The proposed amendment also adds an additional method of service through the mail or commercial carrier if confirmation

of actual receipt can be provided, and further authorizes the court to approve another means of service for good cause. The proposed amendment also includes two other changes: (1) relaxing the current requirement that witness fees be tendered at the time of service, and (2) providing a 14-day notice period (subject to shortening by the court for good cause) when the subpoena requires attendance at a trial, hearing, or deposition. The Committee made a minor revision to the language in the proposed amendment to move clarifying language in the committee note into the rule text relating to confirmation of actual receipt when a subpoena is served by mail or commercial carrier.

Rule 45(c) (Subpoena—Remote Testimony)

The proposed amendment to Rule 45(c) adds a new subsection (c)(2) to address subpoenas for remote trial testimony. The proposed new subsection clarifies that the "place of attendance for remote testimony is the location where the person is commanded to appear in person." Under new Rule 45(c)(2), the court's subpoena power for in-court remote testimony extends nationwide so long as the subpoena does not command the witness to travel farther than the distance authorized under Rule 45(c)(1). The proposed amendment does not affect the standards governing whether to permit in-court remote testimony.

Rule 81 (Jury Demand After Removal)

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. It would also set the time limit to make the required demand.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Civil Rules 7.1, 26, 41, 45, and 81, as set forth in Appendix D, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The Advisory Committee on Civil Rules submitted proposed amendments to Civil Rule 5 with conforming amendments to Rule 6(d), and Civil Rule 5.2, with a recommendation that they be published for public comment in August 2026. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rules 5 (Serving and Filing Pleadings and Other Papers) and 6(d) (Computing and Extending Time; Time for Motion Papers)

As part of the SRL rules package, the proposed amendments to Rule 5 are generally consistent with the proposed amendments to the Bankruptcy Rules and the Criminal Rules and would presumptively allow unrepresented parties in civil cases to use the court's electronic-filing system to file papers and receive notice of activity in the case, unless a court order or local rule provides otherwise. The courts would be expressly authorized to impose reasonable conditions and restrictions on electronic access. However, the proposed amendments would prevent a court from barring all self-represented litigants from using the court's electronic-filing system unless the prohibition either included reasonable exceptions or was paired with another electronic method for filing papers and receiving notice.

The proposed amendments to Rule 5 retain the existing authority to require electronic filing by a self-represented litigant by case-specific order or by local rule with reasonable exceptions. Additionally, Rule 5 would state that no certificate of service is required when service occurs through the court's electronic-filing system under the amended provisions, although service by a court's electronic-filing system is not effective if a filer learns that it did not reach the person to be served. Further, the proposed amendments provide that if a document is filed under seal, a court may provide by order or local rule that the document be served by other means. Finally, proposed amended Rule 5 would eliminate the need for separate paper service of post-complaint filings on persons who will receive a notice of case activity through the

court's electronic-filing system, and deals with the impact of delays between filing and uploading to the court's electronic-filing system.

The proposed amendments to Rule 6 would conform cross-references to Rule 5.

Rule 5.2 (Privacy Protections for Filings Made with the Court)

As part of the package of proposed privacy amendments, the proposed amendments to Civil Rule 5.2 are generally consistent with the changes to Criminal Rule 49.1 and require complete redaction of social security numbers (SSNs) and individual taxpayer identification numbers (ITINs), as well as EINs and adoption taxpayer identification numbers in civil cases. The proposed amendments to Rule 5.2 would further require the use of pseudonyms when a filed document references a person who is a minor at the time of filing. Finally, the proposed amendments would clarify that the redaction requirements apply to all documents in the court filing, including exhibits and attachments. The proposed committee notes make clear, however, that existing exemptions to the redaction requirement, or additional redactions required pursuant to a protective order, are not altered by the proposed amendment.

Information Items

The Advisory Committee on Civil Rules met on April 14, 2026. In addition to the matters discussed above, the Advisory Committee continued to discuss proposals to require disclosures regarding third-party litigation funding and to amend Rule 43 (Taking Testimony) to relax the standards governing permission for remote testimony. The Advisory Committee also continues to study suggestions relating to Rule 23 (Class Actions), Rule 35 (Physical and Mental Examinations), and Rule 58's "Separate Document" requirement.

The Advisory Committee decided to remove from its agenda proposals concerning Fair Labor Standards Act collective actions, artificial intelligence "hallucinations," algorithmic

spoliation of discoverable material, protective order templates, and mandatory assistance for self-represented litigants.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules recommended for final approval proposed amendments to Criminal Rule 17. The Standing Committee unanimously approved the Advisory Committee's recommendation after rephrasing proposed paragraph (c)(6), making a minor stylistic change to the rule, and clarifying the committee note (as described below).

Rule 17 (Subpoena)

The proposed amendments focus primarily on Rule 17(c), which governs subpoenas for production. The proposed amendments clarify that third-party subpoenas for production may be issued for proceedings in addition to trial. This includes proceedings where such subpoenas are most likely to be needed or are already used regularly in many districts, as well as proceedings for which there is statutory or rule authority for parties to present evidence (i.e., detention, revocation, suppression, and sentencing). With the court's permission, the rule also authorizes such subpoenas for other evidentiary hearings.

The proposed amendments also set forth a modified version of the test announced in *Nixon v. United States*, 418 U.S. 683 (1974), as the standard for the issuance of third-party subpoenas for production. The modified test as proposed is intended to provide both prosecution and defense with an adequate and more uniform opportunity across districts to obtain needed evidence from third parties.

Other proposed amendments to Rule 17 clarify when a party must file a motion requesting the court's permission to serve a subpoena for production of documents: when the subpoena requests personal or confidential information about a victim, when the subpoena is

requested by a self-represented party, or when a local rule or court order requires a motion. When no motion is required, a party may serve a subpoena for production on an ex parte basis. When a motion is required, the proposed amendments provide that the court "must" allow a party to file it ex parte if good cause is shown. The proposed amendments further address ex parte subpoena practice by setting a default rule that a party need not disclose its subpoena to another party if no motion is required.

The proposed amendments also state the circumstances under which the recipient of the subpoena must produce the designated items to the court rather than directly to the requesting party. In addition, the amendments address the disclosure of material produced in response to a subpoena, disapproving the practice in some courts in which all produced items must be provided to the opposing party, regardless of whether the items would otherwise be subject to discovery. By providing that the rule does not require the disclosure of produced items to a party that did not request the subpoena, the proposed amendments seek to ensure that Rule 17 is not interpreted to disturb the law regulating disclosure between the parties found in Rule 16 and elsewhere. Finally, the proposed amendments clarify, as to each subdivision of Rule 17, whether it applies to subpoenas for testimony, subpoenas for production, or both.

The Standing Committee rephrased proposed paragraph (c)(6) to make clear that Rule 17 does not require disclosure of produced items to a party that did not request them and does not alter existing disclosure and discovery requirements. It revised the corresponding section of the committee note to clarify that the amendments to Rule 17 do not modify existing law regarding the timing of any disclosures.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Criminal Rule 17, as set forth in Appendix E, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The Advisory Committee on Criminal Rules submitted proposed amendments to Rule 11 (with conforming amendments to Rule 32), Rule 49 (with conforming amendments to Rule 45(c)), and Rule 49.1, with a recommendation that they be published for public comment in August 2026. The Standing Committee unanimously approved the Advisory Committee's recommendations, with revisions to clarify language in the text of the rule (as described below).

Rule 11 (Pleas)

Rule 11(b)(1)(M) requires the court to advise the defendant at the plea proceeding of "the court's obligation to . . . consider . . . possible departures under the Sentencing Guidelines." However, the 2025 amendments to the U.S. Sentencing Commission Guidelines Manual deleted most of the provisions in Chapter Five, Part K (Departures), and revised U.S.S.G. § 1B1.1(a) to eliminate the requirement that the court consider departures at step two of a three-step sentencing process. As revised, § 1B1.1 now provides for a two-step process, considering at step one "the kinds of sentence and the guideline range as set forth in the guidelines," and at step two, "other applicable factors in 18 U.S.C. § 3553(a)." The proposed amendment to Rule 11(b)(1)(M) would remove the reference to "possible departures under the Sentencing Guidelines," thus reflecting the current two-step sentencing process. The Standing Committee revised the proposed rule text to ensure that defendants would continue to be advised of the court's obligation to calculate and consider the sentencing-guideline range.

Rule 32 (Sentencing and Judgment)

Rule 32(h) requires the court to provide the parties with reasonable notice of a possible departure from the Sentencing Guidelines range on a ground not identified for departure in the presentence report or in a party's prehearing submission. Because the Sentencing Guidelines no longer employ the concept of departures, the proposed

amendment to Rule 32 would eliminate subdivision (h). To avoid re-lettering the remainder of the rule, subdivision (h) would be reserved.

Rules 49 (Serving and Filing Papers) and 45(c) (Computing and Extending Time)

As part of the SRL rules package, the proposed amendments to Rule 49 and conforming amendments to Rule 45(c) are generally consistent with the proposed amendments to the Bankruptcy and Civil Rules regarding electronic filing and service by self-represented litigants. The proposed amendments to Rule 49 would allow self-represented parties to use the court's electronic-filing system to file papers and receive notice of activity in the case, unless a court order or local rule provides otherwise. They would expressly authorize courts to impose reasonable conditions and restrictions on electronic access. However, the proposed amendments would prevent a court from barring all self-represented litigants from using the court's electronic-filing system unless the prohibition either included reasonable exceptions or was paired with another electronic method for filing papers and receiving notice. Unlike the Bankruptcy and Civil Rules, and in accordance with the current Criminal Rule, proposed amended Rule 49 would not authorize a court to require self-represented litigants to file electronically.

The proposed Rule 49 amendments would eliminate the need for separate paper service of post-complaint filings on persons who will receive a notice of case activity through the court's electronic-filing system, although service by a court's electronic-filing system is not effective if a filer learns that it did not reach the person to be served. Further, the proposed amendments provide that if a document is filed under seal, a court may provide by order or local rule that the document be served by other means. The amendments also provide that no certificate of service is required when service occurs through the court's electronic-filing system under the amended provisions.

Criminal Rule 45(c) would be amended to conform cross-references to Rule 49.

Criminal Rule 49.1 (Privacy Protections for Filings Made with the Court)

As part of the package of proposed privacy amendments, the proposed amendments to Rule 49.1 addresses two privacy-related issues—redaction of taxpayer-identification information and the use of pseudonyms for minors—in criminal filings that are available to the public through the judiciary's electronic-filing system. These proposed amendments are consistent with the proposed amendments to the parallel privacy provisions in Civil Rule 5.2.

First, the proposed amendment requires complete redaction of taxpayer identifying information rather than redaction of all but the last four numbers. Second, the proposed amendments expand the covered taxpayer identifying information that must be redacted to include not only SSNs and ITINs, but also EINs. Third, the proposed amendment clarifies that the redaction requirement applies not only to pleadings and briefs, but also any attachments and exhibits. Fourth, the proposed amendment changes the requirement to provide initials for minors when they are referenced in filings and would now require the use of a pseudonym.

Information Items

The Advisory Committee on Criminal Rules met on April 29, 2026. In addition to the matters discussed above, the Advisory Committee continued its discussions regarding proposed amendments to Rule 40 (Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District). The Advisory Committee also formed a new subcommittee to consider proposed revisions to Rule 15, which governs depositions.

FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules recommended for final approval proposed amendments to Evidence Rule 609. The Standing Committee unanimously approved the Advisory Committee's recommendations.

Rule 609 (Impeachment by Evidence of a Criminal Conviction)

The proposed amendment to Rule 609(a)(1)(B) addresses the standard under which evidence of prior convictions not based on falsity may be introduced to attack a testifying criminal defendant's character for truthfulness. Under the proposed amendment, evidence of a non-falsity based prior conviction would not be admissible to impeach a criminal defendant unless its probative value "substantially" outweighs the risk of unfair prejudice to the defendant. The proposed amendment would result in the provision becoming more exclusionary, because many courts have erred in allowing broad impeachment with prior non-falsity based convictions, contrary to the original intent of the rule—a problem compounded by the fact that a ruling admitting convictions is not appealable unless the defendant takes the stand and gets impeached. With this amendment, the Advisory Committee aims to reduce the risk that Rule 609 will unduly deter criminal defendants from exercising their right to testify. In addition, the proposed amendment to Rule 609(b) would clarify that the 10-year time period for the rule's applicability is measured from the date of conviction or end of confinement, whichever is later, until the date of trial.

In August 2026, the Executive Committee, during its preparation of the proposed discussion and consent calendars for the September 2026 Judicial Conference session, called the Standing Committee's attention to several concerns with the proposed amendments and

requested further examination. The Executive Committee's concerns relate primarily to the explanations in the committee note for inserting the word "substantially" into the rule. If changes are made to the committee note to address those concerns, then the question becomes what justifies the proposed change to the rule. These concerns include the following:

- First, the Executive Committee raised concerns that Congress in enacting Rule 609(a) did not impose "a reverse balancing test" as stated in the committee note. Instead, Congress imposed a neutral balancing test allowing admissibility "if the probative value of the evidence *outweighs* its prejudicial effect" (emphasis added). In the Executive Committee's view, the proposed amendment would create a presumption of inadmissibility contrary to the intent of Congress reflected in the text of the rule adopted in 1975.
- Second, the Executive Committee raised concerns about language in the proposed committee note that the new proposed test "is more protective so as not to infringe on the accused's constitutional right to testify." The Executive Committee does not believe that the Supreme Court has held that impeachment by prior felony conviction infringes on a constitutional right to testify.
- Third, the Executive Committee raised concerns about the fourth paragraph of the proposed committee note, which may be perceived as setting forth rule-like guidance rather than explaining the proposed rule. Specifically, the paragraph purports to guide district courts on how to admit "evidence of a criminal conviction" without a rule to support the guidance.

In response to these concerns, the Standing Committee in August 2026 unanimously voted to withdraw the recommendation and to return the proposal to the

Advisory Committee on Evidence Rules to allow it to further consider the proposed amendments in light of these concerns.

Rules Approved for Publication and Comment

The Advisory Committee on Evidence Rules submitted proposed amendments to Rules 902 and 104 with a recommendation that they be published for public comment in August 2026. The Standing Committee unanimously approved the Advisory Committee's recommendations with a minor revision to Rule 104.

Rule 902 (Evidence That Is Self-Authenticating)

The proposed amendment to Rule 902 would add Indian Tribes and Nations to the list of entities in Rule 902(1)(A) whose public records are self-authenticating, as the Advisory Committee saw no reason to differentiate the Tribes and Nations from the many other government entities whose records are currently self-authenticating under the rule.

Rule 104 (Preliminary Questions)

The proposed amendment to Rule 104(a) would codify the holding in *Bourjaily v. United States*, 483 U.S. 171, 175 (1987), that preliminary questions of fact under Rule 104(a) are to be determined by a preponderance of the evidence. The proposed amendments to Rule 104(b) would eliminate the concept of "conditional" relevance and provide that the standard of proof for all questions of relevance is whether a jury could reasonably find that the evidence has a tendency to make a fact of consequence more or less probable than without the evidence. In addition, the proposed amendments would eliminate the phrase "proof sufficient to support a finding" from Rule 104(b); but the rule does not change the standard of proof established by the Supreme Court in *Huddleston v. United States*, 485 U.S. 681, 687 (1988), that the court must decide whether the "jury could reasonably find" that the evidence is relevant.

Information Items

The Advisory Committee met on May 7, 2026. In addition to the recommendations discussed above, the Advisory Committee discussed several other issues, including continued consideration of a possible New Rule 707 to address evidence that is the product of artificial intelligence and a possible new subsection (c) in Rule 901 (Authenticating or Identifying Evidence) to address deepfake evidence. Finally, the Advisory Committee considered the implications of *Smith v. Arizona* on Rule 703 (Bases of an Expert's Opinion Testimony).

Respectfully submitted,



James C. Dever III, Chair

Paul J. Barbadoro	Edward M. Mansfield
Todd Blanche	Troy A. McKenzie
Elizabeth J. Cabraser	Andrew J. Pincus
Louis A. Chaiten	Allison J. Rushing
Colm F. Connolly	Amul Thapar
Joan N. Ericksen	Bart H. Williams
Stephen A. Higginson	

* * * * *

Effective (no earlier than) December 1, 2026

Current Step in REA Process:

- Transmitted to Congress (Apr 2026)

REA History:

- Transmitted to Supreme Court (Oct 2025)
- Approved by the Judicial Conference (Sept 2025)
- Approved by Standing Committee (June 2025 unless otherwise noted)
- Published for public comment (Aug 2024 – Feb 2025 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP Form 4	The proposed amendments to Form 4 simplify the form to reduce 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.	BK 9006
BK 3018	The proposed amendments to Rule 3018(c) 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) provide an additional reminder notice to 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 Rule 9006 to the proposed amendments to Rule 1007.	BK 1007
BK 9014	The proposed amendments to Rule 9014(d) relax the standard for allowing remote testimony in contested matters to "cause and with appropriate safeguards." The existing rule imports Civil Rule 43(a), requiring a showing of "good cause in compelling circumstances and with appropriate safeguards") and applies in contested matters and adversary proceedings.	BK 7043; 9017
BK 9017	The proposed amendments to Rule 9017 remove the reference to Civil Rule 43 to conform to the proposed amendments to Rule 9014(d) and new Rule 7043.	BK 7043; 9014(d)
BK 7043	New Rule 7043 provides that the standard set forth in Civil Rule 43 applies to remote testimony in adversary proceedings.	BK 9014; 9017
EV 801	The proposed amendments to Rule 801(d)(1)(A) provide that all prior inconsistent statements admissible for impeachment are also admissible as substantive evidence, subject to Rule 403.	

Effective (no earlier than) December 1, 2027

Current Step in REA Process:

- Approved by Standing Committee (June 2026 unless otherwise noted)[1]

REA History:

- Published for public comment (Aug 2025 – Feb 2026 unless otherwise noted)
- Approved for publication by Standing Committee (June 2025 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 15	The proposed amendment to Rule 15 would remove the requirement that a party who files a petition for review of an agency order must refile or amend the petition after filing a request for rehearing before the agency.	
AP 29	The proposed amendments to Rule 29 set forth in renumbered Rule 29(a)-(d) would expand the disclosure obligations in amicus briefs filed at the initial stage of an appeal. Among other things, the amicus brief would be required to disclose whether the amicus is newly created and other information relating to its relationship to a party (such as whether a party has a majority ownership interest in the amicus) and nonparties (such as earmarked contributions to the amicus of more than $100). Rule 29(e) incorporates most of these expanded disclosures to amicus briefs filed during the rehearing stage. The proposed amendments also set the length limit for amicus briefs at the initial stage to a specific word limit of 6,500 words.	AP 32; Appendix of Length Limits
AP 32	The proposed amendments to Rule 32 conform to the proposed amendments to Rule 29.	AP 29; Appendix of Length Limits
AP Appendix of Length Limits	The proposed amendments to the Appendix of Length Limits conform to the proposed amendments to Rule 29.	AP 29; 32
BK 2002	The proposed amendment to Rule 2002(o) would provide that the caption of a notice given under Rule 2002 must include the information that Official Form 416B requires.	
BK Official Form 101	The proposed amendment to Question 4 in Part 1 of Form 101 would clarify that the requested EIN (employer identification number) is the debtor's EIN and not the EIN of any separate legal entity such as an employer, corporation, partnership, or LLC.	
BK Official Form 106C	The proposed amendments to Form 106C would amend Form 106C to provide a total of the specific-dollar exemption amounts	

[1] Proposed amendments to Evidence Rule 609 were approved by the Standing Committee in June 2026, but approval was subsequently withdrawn in August 2026 to allow the Advisory Committee on Evidence Rules to further consider the proposed amendments.

Effective (no earlier than) December 1, 2027

Current Step in REA Process:

- Approved by Standing Committee (June 2026 unless otherwise noted)[1]

REA History:

- Published for public comment (Aug 2025 – Feb 2026 unless otherwise noted)
- Approved for publication by Standing Committee (June 2025 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
CR 17	The proposed amendments to Rule 17address third-party subpoenas for production. Among other things, the proposed amendments would expand the availability of such subpoenas for proceedings other than trial; alter the standard for when such subpoenas may be obtained; and address when a motion and order are required for third-party subpoenas and when a party may make its request *ex parte*. The proposed amendments would further address the place of production, procedures when information regarding a victim is sought, and other issues.	
CV 7.1	The proposed amendments to Rule 7.1(a) would substitute "business organization" for the term "corporation" and require disclosure of business organizations that "directly or indirectly own 10% or more of" a party rather than disclosure based on ownership of "stock" in a party.	
CV 26	The proposed amendment to Rule 26 would require parties to state in their pretrial disclosures whether they expect any witness they call at trial to testify in person or remotely.	CV 45(c)
CV 41	The proposed amendments to Rule 41(a) would clarify that the rule permits the dismissal of one or more claims in an action rather than only allowing dismissal of the entire action and that only the signatures of active parties who remain in a case are required to sign a stipulation of dismissal.	
CV 45	The proposed amendments to Rule 45(b) would specify that the methods for service of a subpoena are personal delivery, leaving it at the person's abode with someone of suitable age and discretion who resides there, sending it by mail or commercial carrier if it includes confirmation of receipt, or another method authorized by the court for good cause. The amendment would also add a default 14-day notice period and provide that the tender of witness fees is not required to effect service of the subpoena so long as the fees are tendered upon the witness's appearance. The proposed amendments to Rule 45(c) would add a "place of compliance" for subpoenas for remote testimony and would specify that it is "the location where the person is commanded to appear in person."	CV 26
CV 81	The proposed amendment to Rule 81(c) would clarify whether and when a jury demand must be made after removal and makes clear that Rule 38 applies to removed cases. The proposed amendment also removes the prior exemption from the jury demand requirement in cases removed from state courts in which an express demand for a jury trial is not required.	

Effective (no earlier than) December 1, 2028

Current Step in REA Process:

- Published for public comment (Aug 2026 – Feb 2027 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (June 2026 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 25	The proposed amendments to Rule 25 would provide that an unrepresented party is presumptively authorized to use a court's electronic-filing system, subject to any reasonable conditions on access that a court may establish. This change would allow unrepresented litigants to file documents electronically and receive electronic notices of case activity. The proposed amendments would eliminate the requirement for an unrepresented party to make a separate (paper) service on a litigant who is registered to receive a notice of case activity from the court's electronic-filing system.	BK 5005, 8011, 9006, 9036; CV 5, 6; CR 45, 49
BK 2003	The proposed amendments would allow more time to convene the meeting of creditors in chapter 12 and 13 cases, extending the deadline in chapter 12 cases from 35 to 60 days, and in chapter 13 cases, from 50 to 60 days, after the order for relief. The proposed amendments would also expressly authorize meetings of creditors to be "conducted in person or remotely" and would allow the U.S. Trustee to designate in which manner a meeting would be conducted.	
BK 5005, 8011, 9006, & 9036	The proposed amendments to Rules 5005 and 8011 would provide that an unrepresented party is presumptively authorized to use a court's electronic-filing system in bankruptcy cases and bankruptcy appeals, subject to any reasonable conditions on access that a court may establish. In addition, the proposed amendments to Rule 8011 and Rule 9036 would eliminate the requirement of separate (paper) service on a litigant who is registered to receive electronic notices of case activity. Further, the proposed amendments would provide that if a document is filed under seal, a court may provide an order or local rule that the document be served by other means. In addition, Rule 8011(c)(3) and Rule 9036(d) would deal with the impact of delays between filing and uploading to the court's electronic-filing system. The proposed amendments to Rule 9006 would change a cross-reference to conform to the proposed amendments to Civil Rule 5.	AP 25; CV 5, 6; CR 45, 49
BK 9037	The proposed amendments to Rule 9037 would require the use of pseudonyms rather than initials when referencing minors in bankruptcy cases, and would clarify that the redaction and pseudonym requirements apply to exhibits and attachments to electronically filed court documents.	CV 5.2; CR 49.1
CV 5 & 6	The proposed amendments provide that an unrepresented party is presumptively authorized to use a court's electronic-filing system, subject to any reasonable conditions on access that a court may establish. This change would allow unrepresented litigants to both file documents electronically and receive notices of case activity and would eliminate the requirement for an unrepresented party to make a separate (paper) service on a litigant who is	AP 25; BK 5005, 8011, 9006, 9036; CR 45, 49

Effective (no earlier than) December 1, 2028

Current Step in REA Process:

- Published for public comment (Aug 2026 – Feb 2027 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (June 2026 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
	registered to receive a notice of case activity from the court's electronic-filing system.	
CV 5.2	The proposed amendments would require complete redaction of taxpayer identifying information, to include social security numbers, taxpayer identification numbers, employer identification numbers, and adoption taxpayer identification numbers, and would require the use of pseudonyms rather than initials when referencing minors. The proposed amendments would also clarify that these rules apply to exhibits and attachments to electronically filed court documents.	BK 9037; CR 49.1
CV 55	The proposed amendments to Rule 55(a) and (b)(1) would remove the requirement that the clerk "must" enter a default or default judgment, respectively, whenever the rules empower the clerk to do so. Instead, the proposed amendment would provide that the clerk "may either" enter default or default judgment, respectively, "or refer the matter to the court for directions." The proposed amendment also changes the reference to "the party" in Rule 55(b)(2) to "a party" for greater clarity.	
CR 11	The proposed amendments to Rule 11(b)(1)(M) would remove the requirement that the court inform the defendant of possible departures under the U.S. Sentencing Guidelines in light of 2025 changes to the Guidelines eliminating most provisions on departures and revising the sentencing process.	CR 32
CR 32	The proposed amendment to Rule 32 would eliminate in its entirety subdivision (h) regarding possible departure from the U.S. Sentencing Guidelines in light of the 2025 changes to the Guidelines.	CR 11
CR 45 & 49	The proposed amendments to Rule 45 and Rule 49 provide that an unrepresented party is presumptively authorized to use a court's electronic-filing system, subject to any reasonable conditions on access that a court may establish. This change would allow unrepresented litigants to both file documents electronically and receive notices of case activity and would eliminate the requirement for an unrepresented party to make a separate (paper) service on a litigant who is registered to receive a notice of case activity from the court's electronic-filing system.	AP 25; BK 5005, 8011, 9006, 9036; CV 5, 6
CR 49.1	The proposed amendments require complete redaction of taxpayer identifying information, to include social security numbers, taxpayer identification numbers, employer identification numbers, and adoption taxpayer identification numbers in criminal cases, and would require the use of pseudonyms rather than initials when referencing minors. The proposed	BK 9037; CV 5.2

Effective (no earlier than) December 1, 2028

Current Step in REA Process:

- Published for public comment (Aug 2026 – Feb 2027 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (June 2026 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
	amendments would also clarify that these rules apply to exhibits and attachments to electronically filed court documents.	
EV 104	The proposed amendments to Rule 104(a) would codify the holding in *Bourjaily v. United States* that preliminary questions of fact are to be determined by a preponderance of the evidence standard. The proposed amendments to Rule 104(b) would eliminate the concept of "conditional" relevance and provide that to establish that evidence is relevant, the proponent must demonstrate that the trier of fact could reasonably find that requirements of Rule 401 have been met.	
EV 902	The proposed amendment to Rule 902(1)(A) would add Indian Tribes and Nations to the list of entities whose signed and sealed public records are self-authenticating.	

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
Sunshine in the Courtroom Act of 2025	**S. 1133** *Sponsor:* Grassley (R-IA) *Cosponsors:* Klobuchar (D-MN) Durbin (D-IL) Blumenthal (D-CT) Markey (D-MA) Cornyn (R-TX)	CR 53	**Most Recent Bill Text:** https://www.congress.gov/119/bills/s1133/BILLS-119s1133is.pdf **Summary:** Would permit court cases to be photographed, electronically recorded, broadcast, or televised, notwithstanding any other provision of law, after JCUS promulgates guidelines.	• 6/23/2026: Placed on Senate Legislative Calendar under General Orders. Calendar No. 444 • 6/23/2026: Reported by Senator Grassley without amendment • 6/18/2026: Ordered to be reported without amendment favorably • 3/26/2025: Introduced in Senate; referred to Judiciary Committee
Protecting Our Courts from Foreign Manipulation Act of 2025	**H.R. 2675** *Sponsor:* Cline (R-VA) *Cosponsors:* 26 bipartisan cosponsors	CV 26	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr2675/BILLS-119hr2675ih.pdf **Summary:** Would require additional disclosures under Civil Rule 26(a) for any non-party foreign person, foreign state, or sovereign wealth fund that has a right to receive payment that is contingent on the outcome of a civil action. Would also prohibit third-party ligation funding by foreign states and sovereign wealth funds.	• 6/15/2026: Placed on the Union Calendar, Calendar No. 608 • 6/15/2026: Reported (Amended) by the Committee on Judiciary • 11/20/2025: Ordered to be Reported (Amended) • 11/20/2025: Committee consideration and mark-up session held • 11/18/2025: Committee consideration and mark-up session held • 4/7/2025: H.R. 2675 introduced in House; referred to Judiciary Committee
Protecting Our Democracy Act	H.R. 8831 *Sponsor*: Raskin (D-MD) *Cosponsors*: 108 Democratic cosponsors	CV – New Rule(s)	**Most Recent Bill Text:** https://www.congress.gov/bill/119th-congress/house-bill/8831/text **Summary:** Companion to S. 2838. Would require the Judicial Conference to create rules of procedure to ensure expeditious treatment of civil actions brought by Congress to enforce compliance with a subpoena.	• 5/14/2026: Introduced in House and referred to the Committee on Oversight and Government Reform, the Judiciary, House Administration, the Budget, Transportation and Infrastructure, Rules, Foreign Affairs, Ways and Means, and Intelligence

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Closing Bankruptcy Loopholes for Child Predators Act of 2026	**H.R. 8589** *Sponsor:* Ross (D-NC) *Cosponsors*: Tenney (R-NY) Sykes (D-OH) De La Cruz (R-TX)	BR 2004, 9018	**Most Recent Bill Text**: https://www.congress.gov/119/bills/hr8589/BILLS-119hr8589ih.pdf **Summary**: Would amend Rule 2004 to allow for examination of abuse allegations against the debtor in Chapter 11 cases related to the alleged sexual abuse of a child, and amend Rule 9018 to restrict the court's ability to seal evidence of alleged crimes relating to the sexual abuse of a child (other than to protect the individual alleging abuse).	• 4/29/2026: Introduced in House and referred to the House Committee on the Judiciary
No Free Passes for Cronies Act	**H.R. 8392** *Sponsor*: Scanlon (D-PA)	CR 48	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr8392/BILLS-119hr8392ih.pdf **Summary:** Would amend Criminal Rule 48(a) to clarify that federal judges have the authority to accept or reject the government's motion to dismiss in "the interests of justice."	• 4/20/2026: Introduced in House and referred to the House Committee on the Judiciary
Prohibiting Political Prosecutions Act of 2026	**H.R. 7575** *Sponsor*: Goldman (D-NY) *Cosponsors*: Norton (D-DC) Gomez (D-CA) Larson (D-CT)	CR 6, 16, 48	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr7575/BILLS-119hr7575ih.pdf **Summary:** Would amend Criminal Rules 6 (to require the government to inform the grand jury of exculpatory evidence and things that may impact a witness's credibility), 16 (to require the government to inform the defendant of the grand jury vote) and 48 (to allow dismissal based on politically-motivated prosecution).	• 2/13/2026: Introduced in House and referred to Committee on the Judiciary
Litigation Funding Transparency Act of 2026	**S. 3826** *Sponsor*: Grassley (R-IA) *Cosponsors*: Tillis (R-NC) Kennedy (R-LA) Cornyn (R-TX)	CV 26	**Most Recent Bill Text:** https://www.congress.gov/119/bills/s3826/BILLS-119s3826is.pdf **Summary:** Would require disclosure of third-party funding in MDL, class action, and other large litigations (100+ consolidated or coordinated cases). Disclosure of the identity of the funder and the agreement must be made to the court and the parties. Would also prohibit funders from exerting control over the litigation or viewing materials produced in discovery, unless ordered otherwise by the court.	• 2/11/2026: Read twice and referred to the Committee on the Judiciary

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Trafficking Survivors Relief Act	**H.R. 4323** *Sponsor*: Fry (R-SC) *Cosponsors*: 19 bipartisan cosponsors	CR 29	**Most Recent Bill Text:** https://www.congress.gov/119/plaws/publ73/PLAW-119publ73.pdf **Summary:** Permits a person convicted of certain federal offenses as a result of having been a victim of trafficking to move the convicting court to vacate the judgment of conviction, to enter a judgment of acquittal, and to order that references to the arrest and criminal proceedings be expunged from official records.	• 1/23/2026: Signed by President; became Public Law No. 119-73. • 12/18/2025: Passed Senate without amendment by unanimous consent. • 12/2/2025: Received in Senate; read twice. • 12/1/2025: Passed by voice vote • 10/17/2025: Placed on the Union Calendar, Calendar No. 299 • 9/10/2025: Committee Consideration and mark-up Session Held. Ordered to be Reported (Amended) by Voice Vote • 7/10/2025: Introduced in House and referred to Committee on the Judiciary
Protecting TPLF From Abuse Act	**H.R. 7015** *Sponsor:* Issa (R-CA) *Cosponsors*: Fitzgerald (R-WI) Baumgartner (R-WA) Flood (R-NE)	CV 26	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr7015/BILLS-119hr7015ih.pdf **Summary:** Would require a party or record of counsel in a civil action to disclose to the court and other parties the identity of any person that has a right to receive a payment or thing of value that is contingent on the outcome of the action or group of actions and to produce to the court and other parties any such agreement.	• 1/12/2026: Introduced in House; referred to Judiciary Committee
Sunshine for Regulatory Decrees and Settlements Act of 2025	**H.R. 6622** *Sponsor*: Cline (R-VA) *Cosponsor*: Tiffany (R-WI)	CV 24, 41	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr6622/BILLS-119hr6622ih.pdf **Summary:** Would impose additional requirements for consent decrees or dismissals pursuant to settlement agreements in agency actions. Would also create additional considerations for the court for motions to intervene in agency actions.	• 1/8/2026: Committee Consideration and Mark-up Session Held. Ordered to be Reported (Amended) by the Yeas and Nays: 18-8. • 12/11/2025: Introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Back the Blue Act of 2025	**S. 3366** *Sponsor*: Cornyn (R-TX) *Cosponsors*: 38 Republican cosponsors	§ 2254 Rule 11	**Most Recent Bill Text:** https://www.congress.gov/119/bills/s3366/BILLS-119s3366is.pdf **Summary:** Would amend Rule 11 of the Rules Governing Section 2254 Cases by adding: "Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code."	• 12/4/2025: Introduced in Senate; referred to Judiciary Committee
Litigation Transparency Act of 2025	**H.R. 1109** *Sponsor:* Issa (R-CA) *Cosponsors:* 28 Republican cosponsors	CV 5, 26	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr1109/BILLS-119hr1109ih.pdf **Summary:** Would require a party or record of counsel in a civil action to disclose to the court and other parties the identity of any person that has a right to receive a payment or thing of value that is contingent on the outcome of the action or group of actions and to produce to the court and other parties any such agreement.	• 11/19/2025: Committee consideration and mark-up session held • 11/18/2025: Committee consideration and mark-up session held • 2/7/2025: H.R. 1109 introduced in House; referred to Judiciary Committee
Protecting Our Courts from Foreign Manipulation Act of 2025	**S. 3180** *Sponsor*: Kennedy (R-LA) *Cosponsor*: Ricketts (R-NE)	CV 26	**Most Recent Bill Text:** https://www.congress.gov/119/bills/s3180/BILLS-119s3180is.pdf **Summary:** Would require additional disclosures under Civil Rule 26(a) for any non-party foreign person, foreign state, or sovereign wealth fund that has a right to receive payment that is contingent on the outcome of a civil action. Would also prohibit third-party ligation funding by foreign states and sovereign wealth funds.	• 11/18/2025: Introduced in Senate; referred to Judiciary Committee
Protecting Our Democracy Act	**S. 2838** *Sponsor*: Schiff (D-CA) *Cosponsors*: 10 Democratic and Independent cosponsors	CV – New Rule(s)	**Most Recent Bill Text:** https://www.congress.gov/119/bills/s2838/BILLS-119s2838is.pdf **Summary:** Would require the Judicial Conference to create rules of procedure to ensure expeditious treatment of civil actions brought by Congress to enforce compliance with a subpoena.	• 9/17/2025: Introduced in Senate; referred to Committee on Homeland Security and Governmental Affairs

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Lawsuit Abuse Reduction Act of 2025	**H.R. 5258** *Sponsor*: Collins (R-GA) *Cosponsors*: 6 Republican cosponsors	CV 11	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr5258/BILLS-119hr5258ih.pdf **Summary:** Would amend Civil Rule 11 to require the court to issue sanctions for Rule 11 violations, which shall consist of an order to pay the amount of the reasonable expenses incurred as a direct result of the violation.	• 9/10/2025: H.R. 5258 introduced in House; referred to Judiciary Committee
Restoring Artistic Protection Act of 2025	**H.R. 4678** *Sponsor*: Johnson (D-GA) *Cosponsors*: 21 Democratic cosponsors	EV 416	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr4678/BILLS-119hr4678ih.pdf **Summary**: Would create a new Evidence Rule (416, Limitation on Admissibility of Defendant's Creative or Artistic Expression) that would make a defendant's creative or artistic expression inadmissible unless the government proves by clear and convincing evidence that one of several exceptions applies.	• 7/23/2025: H.R. 4678 introduced in House; referred to Judiciary Committee
Rape Shield Enhancement Act of 2025	**H.R. 3596** *Sponsor:* Mace (R-SC)	EV 412; CV 26; CR 16	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr3596/BILLS-119hr3596ih.pdf **Summary:** Would require the Judicial Conference to submit to Congress reports reviewing Evidence Rule 412, Civil Rule 26, and Criminal Rule 16. Would also require the Judicial Conference to identify potential rules amendments that further limit the admissibility of or scope of discovery regarding information of an alleged sexual assault victim and that increase privacy protections for sexual assault victims.	• 5/23/2025: H.R. 3596 introduced in House; referred to Judiciary Committee
Supreme Court Ethics, Recusal, and Transparency Act of 2025	**S. 1814** *Sponsor*: Whitehouse (D-RI) *Cosponsors*: 35 Democratic and Independent cosponsors	AP 29	**Most Recent Bill Text:** https://www.congress.gov/119/bills/s1814/BILLS-119s1814is.pdf **Summary:** Would require the Judicial Conference to prescribe rules of procedure requiring certain amicus disclosures and for prohibiting the filing of or striking an amicus brief that would result in the justice, judge, or magistrate judge's disqualification.	• 5/20/2025: S. 1814 introduced in Senate; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
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.	• 1/28/2025: H.R. 780 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."	• 1/3/2025: H.R. 100 introduced in House; referred to Judiciary Committee

TAB 3

DRAFT MINUTES
CIVIL RULES ADVISORY COMMITTEE
Charlotte, NC
April 14, 2026

The Civil Rules Advisory Committee met at the United States District Courthouse for the Western District of North Carolina in Charlotte, North Carolina, on April 14, 2026. The meeting was open to the public. Members present included Judge Sarah Vance, Advisory Committee Chair; Advisory Committee Members Judge Cathy Bissoon, Justice Jane Bland (remotely), David Burman, Judge Annie Christoff, Dean Zachary Clopton, Mark Lanier, Jocelyn Larkin, Judge Hannah M. Lauck, Judge R. David Proctor, Judge Marvin Quattlebaum, Judge Manish Shah (remotely), and David Wright. Professor Richard L. Marcus participated as Reporter, Professor Andrew D. Bradt as Associate Reporter, and Professor Edward H. Cooper as Consultant (remotely). Judge James Dever III, Chair, Professor Edward Hartnett, Reporter, and Professor Catherine Struve, Consultant (remotely), represented the Standing Committee. Judge Catherine P. McEwen participated as liaison for the Bankruptcy Rules Committee. Clerk Liaison Thomas Bruton also participated. The Department of Justice was represented by Joseph Bosen and Betsy Shapiro. Judge Robert Conrad, Director of the Administrative Office of the U.S. Courts (AO), was also in attendance. The Administrative Office was also represented by Carolyn Dubay, Sarah Sraders, and Rakita Johnson. Dr. Emery Lee and Dr. Tim Reagan (remotely) represented the Federal Judicial Center (FJC).

Welcoming Remarks

Judge Vance opened the meeting by welcoming Advisory Committee members, other participants, and observers, and thanking them for their participation and interest in the rulemaking process. Judge Vance noted that several members will be leaving the Advisory Committee before its Fall 2026 meeting. Each of them will be missed.

Judge Godbey chaired the Discovery Subcommittee and shepherded amendments designed to improve the handling of "privilege logging" in compliance with Rule 26(b)(5)(A), now in effect, and (as addressed in the agenda book) revising the method for serving subpoenas in Rule 45(b)(1).

Judge Proctor chaired the Multidistrict Litigation (MDL) Subcommittee, which produced new Rule 16.1, now in effect, and has also chaired the Third-Party Litigation Funding (TPLF) Subcommittee, which has made substantial progress in dealing with possible Civil Rule treatment of this topic.

David Burman may have set a record for subcommittee service, since he actively served on almost all of the subcommittees during his tenure on the Advisory Committee. In particular, he was a member of the Discovery Subcommittee, the MDL Subcommittee, and the Rule 43/45 Subcommittee.

Judge Vance also thanked Chief Judge Martin Reidinger, Clerk of Court Katherine Simon, and the staff of the Western District of North Carolina for their great help in organizing this meeting. In addition, she thanked the hard-working Rules Committee staff members whose arrangements ensured that the Advisory Committee could smoothly address its work.

Draft

Opening Business

Report of the Rules Committee Staff

Carolyn Dubay reported that a new rules amendment package was delivered to the Supreme Court, but also that it did not include any civil rules. Rule 16.1 and the "privilege logging" amendments (shepherded by Judge Godbey's subcommittee) went into effect on December 1, 2025.

Sarah Sraders called attention to the legislative report beginning on page 65 of the agenda book for the meeting and noted that there had been considerable legislative activity regarding TPLF, but that this topic would be taken up in the report of the TPLF Subcommittee.

Before turning to the action items, Judge Vance reported that in January the Standing Committee approved for publication the proposed amendment to Rule 55 on default judgments. Judge Vance congratulated the Advisory Committee on its work on this proposal.

Action Items

Approval of Minutes

The draft minutes of the Advisory Committee's October 2025 meeting were in the agenda book, beginning at page 71. On motion, the Advisory Committee unanimously approved them.

Items for Final Approval

Judge Vance noted that the next six action items recommend that the Advisory Committee seek final approval of the amendments to Rules 7.1, 41(a), 45(c), 26(a)(3)(A), 45(b)(1), and 81(c)(3), all of which were published for public comment in August 2025.

Rule 7.1

The pertinent provisions of the amendment to Rule 7.1 were introduced by Judge Vance. It substitutes "business organization" for "corporation," which appears in the current rule. It also calls for disclosure when such an entity "indirectly" owns more than 10% of a party to the case. This change was a response to the "grandparent" corporation problem that caused concerns under the current rule.

The proposed amendment received few comments during the public comment period, and all but one were favorable. There was a suggestion that disclosure of third-party litigation funding be added to Rule 7.1, but that is the topic of the TPLF Subcommittee. These changes to Rule 7.1 are principally designed to assist judges in determining whether they should consider recusal.

The Rule 7.1 Subcommittee, chaired by Justice Jane Bland, recommended final adoption of preliminary draft as published. On motion, the Advisory Committee voted unanimously to recommend final adoption of the amendments to Rule 7.1 as published for public comment.

Draft

Rule 41(a)

The proposed amendment makes it clear that the rule authorizes timely dismissal without prejudice of one or more claims even if the dismissing party does not dismiss the entire action. In addition, the amendment changes the participation required for stipulated dismissal to require stipulation only by the parties that "have appeared and remain in the action."

Judge Bissoon (Chair of the Rule 41(a) Subcommittee) noted that the rule revision proved very popular during the public comment period. During the public comment period there were, however, a number of suggested tweaks to the amendment. The subcommittee considered these proposed changes and concluded that they were unnecessary and could actually complicate practice under the amended rule. The subcommittee therefore recommended final adoption of preliminary draft as published.

On motion, the Advisory Committee voted unanimously to recommend final adoption of the amendments to Rule 41(a) as published for public comment.

Rule 45(c)

Judge Vance introduced the discussion. The proposed amendments are largely designed to reverse the outcome in the Ninth Circuit decision in *In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023). The amended rule clarifies that a subpoena for remote trial testimony can be served nationwide, so long as the witness is not required to appear at a location farther than the distance authorized in Rule 45(c)(1) to give the remote testimony. The Rule 43/45 Subcommittee recommends only one change to the published amendment proposal, and that only in the note. The note, which appears at lines 69-80 on page 119 of the agenda book, would be revised as follows:

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

Judge Hannah Lauck, Chair of the Rule 43/45 Subcommittee, noted that this small change in the note avoids the risk that the amendment might be read to place new limits on the use of remote testimony for proceedings other than trials. The question whether to revise Rule 43(a)'s current "compelling circumstances" requirement for remote testimony remains before the Rule 43/45 Subcommittee and appears later in the agenda for this meeting.

Judge Lauck outlined the subcommittee's consideration of the public comments on Rule 45(c). Various wording changes were urged, as noted in the agenda book for this meeting at pages 113-15. Except for the revision of one paragraph of the note, the subcommittee did not favor any of these changes.

Draft

One proposal made during public comment was to defer action on this change until after the question whether Rule 43(a) would be revised is finished. Those who favored this delay did not voice opposition to the Rule 45(c) change but thought it should not happen until the Rule 43(a) revision question was resolved. But doing that would be risky and leave open the possibility that the *Kirkland* decision might cause difficulties.

There were also recommendations that the rule itself require advance approval by the court as a precondition for serving a subpoena for remote trial testimony. But that seems unnecessary; remote trial testimony is always subject to the court's approval under Rule 43(a). In addition, the proposed amendment to Rule 26(a)(3) (discussed next) alerts the parties that a party intends to call a trial witness by remote means, which should often call attention to the need for court approval. Though there may be situations in which a last-minute unforeseen problem causes the need for remote testimony (the main focus of current Rule 43(a)), except in that situation the remote trial testimony issue should not be a surprise to the court or the parties.

On motion, the Advisory Committee voted unanimously to recommend final approval of the proposed amendment to Rule 45(c) as published for public comment, with the change noted above to one paragraph of the committee note.

Rule 26(a)(3)(A)

As noted above in regard to the Rule 45(c) amendment, the preliminary draft of proposed amendments included a small change to Rule 26(a)(3)(A)(i) directing each party to specify whether any of the witnesses it "expects to present [at trial] and those it may call if the need arises" will provide remote testimony. Though there may be emergency situations in which this advance notice is impracticable, this change should be useful generally.

The amendment proposal received little comment during the public comment period, most of it favorable.

On motion, the Advisory Committee voted unanimously to recommend final approval of the proposed amendment as published.

Rule 45(b)(1)

Judge Vance introduced the proposed amendment as addressing uncertainty that sometimes resulted from the directive in current Rule 45(b)(1) that a subpoena be "delivered" to the witness. The current rule does not specify how that delivery is to occur. The amendment borrows methods authorized for service of original process under Rule 4(e)(2)(A) and (B) and adds the possibility of service by U.S. mail or commercial carrier, providing that "the selected method provides confirmation of actual receipt." In addition, the amendments would add a 14-day notice requirement (subject to change by the court) and relax the current requirement that the witness fee be tendered at the time of service, offering the alternative of tendering the fee "at the time and place the person is commanded to appear."

Judge Christoff represented the Discovery Subcommittee in the absence of Judge Godbey (who was out of the country). Many comments came from process servers, expressing misgivings about adverse consequences of adopting the amended rule.

Draft

Judge Christoff noted that a number of public comments were considered by the subcommittee but not found to justify changes in the published amendment proposal.

Some comments raised specific issues. Some seemed to find the invocation of the terms in Rule 4(e)(2)(A) and (B) to create uncertainty. One question was whether the proposed amendment directing that "delivering a copy [of the subpoena] to the named person personally" created uncertainty—is that hand delivery or something else? But this locution had been approved by the Standing Committee Style Consultants.

Other comments worried that the term "confirmation of receipt" might cause difficulty under the proposed new Rule 45(b)(1)(A)(iii). But trying to be more specific about what exact method of confirming receipt suffices could fail to anticipate advances in technology or otherwise that would make various new methods of service suitable. (As noted below, other concerns led to a revision of the committee note discussion concerning who must be shown to have received the subpoena via U.S. mail or commercial carrier.)

Some comments expressed misgivings about the relaxation of the current requirement that the witness fee be tendered as part of the process of serving the subpoena. Some worried that—particularly in depositions—serving parties might withhold tender of the fee until satisfied with the witness's testimony. But the amended rule says that, if not tendered at the time of service, the fee must be tendered "at the time and place the person is commanded to appear." Waiting until the end of the deposition would not comply with that directive.

It was also noted that ordinarily parties serving subpoenas want the witness to appear and therefore want to be of assistance in ensuring that happens.

Regarding the 14-day notice period introduced by these amendments, there was one suggestion that the period be increased to 21 days, but the subcommittee did not decide that should be adopted.

A question was raised about the provision of (iii) that the selected method must provide "confirmation of actual receipt"—does that only apply to commercial-carrier delivery, or also to U.S. mail. The answer was that it applies to any method authorized under (iii).

A different concern about (iii) was raised, however—receipt by whom? The answer was that it should be a person on whom service is authorized under (i) or (ii); the goal of the amendment is to offer an alternative means of serving a person who must receive the subpoena under (i) or (ii).

A different question was raised about a citation in the committee note—"*Cf.* Rule 45(b)(4) (proving service of subpoena)." But Rule 45(b)(4) says that proof of service "must be certified by the server." How does that work with FedEx?

Yet another question was raised—Rule 5(b)(2)(A) says service in general involves "handing it to the person." Is that different from the proposed amendment in (i)—"delivering a copy to the named person personally"? One response was that the Rule 45(b)(1) amendments were modeled on Rule 4, not Rule 5, and Rule 4(d)(2)(A) says "delivering a copy * * * to the

Draft

individual personally." This language (approved by the Standing Committee Style Consultants) is parallel.

Another comment raised concerns about the uncertainty about who must receive service under (iii) when done by U.S. mail or commercial carrier.

These concerns prompted the suggestion that the subcommittee caucus during the lunch break and determine how best to proceed.

During the lunch break, the subcommittee met (along with reporters and the Advisory Committee Chair). After the lunch break, Judge Christoff reported the subcommittee's views.

First, given the parallelism with Rule 4, the published rule language "delivering a copy to the person personally" seemed clear, and changing the rule amendment seemed unnecessary.

But with regard to the committee note paragraph at lines 63-71 of the agenda book, the subcommittee believes it should be changed to state explicitly that the person who must receive notice is a person identified in (i) or (ii), and also to delete the unnecessary Cf. reference to Rule 45(b)(4). Accordingly, the subcommittee recommended that paragraph should be revised as follows:

> The amendment also adds another option—service by United States mail or commercial carrier to the person's last known address, if the selected method provides confirmation of actual receipt <u>by a person identified in Rule 45(b)(1)(A)(i) or (ii)</u>. The rule does not prescribe the exact means of confirmation, but courts should be alert to ensuring that there is reliable confirmation of actual receipt. ~~*Cf.* Rule 45(b)(4) (proving service of subpoena).~~ Experience has shown that this method regularly works and is reliable.

On motion, the Advisory Committee voted to unanimously recommend final approval of the amendment as published, with the above revision to the note.

<u>Rule 81(c)(3)</u>

The amendment seeks to clarify the timing and need for a jury demand in removed cases. Presently, unless a jury demand was made before removal, a demand must be made within the time limits of Rule 38 unless "state law did not require an express demand for a jury trial," in which case a demand must be made only if the district court so orders. This provision introduced uncertainty about when a demand is required because there may be uncertainty about whether a given state is one that requires such a demand. Informal inquiry revealed that some very experienced federal judges were not certain whether such a demand is required by the state courts in their states.

The amendment requires a demand in accordance with Rule 38 unless a demand has been made before removal. But as noted in the committee note the court may, under Rule 39(b), order a jury trial even though no timely demand was made.

The proposed amendment attracted few comments, all favorable.

Draft

On motion, the Advisory Committee unanimously voted to recommend final approval of the amendment as published for comment.

Items for Publication for Public Comment

Service and E-filing by Self-Represented Litigants

Judge Vance introduced the next item, which was a proposal that the Advisory Committee recommend for publication proposed amendments to Civil Rules 5 and 6 to address service and electronic filing by self-represented litigants. This proposal parallels proposals to be considered by the other rules committees, which, if approved, would be presented as a package to the Standing Committee in June. The proposed amendment to Civil Rule 5 would flip the default presumption from one of non-access to one of access by self-represented litigants to the court's electronic-filing system. The proposals as set out in the agenda book include bracketed language in two places.

Judge Vance first highlighted bracketed language in the committee note to proposed Civil Rule 5(d)(2)(B), agenda book page 211, lines 220-223, which states an example of a "reasonable exception" to a general rule permitting electronic filing: "For example, local provisions that require unrepresented parties who seek to use the court's electronic-filing system to obtain permission from the judge to whom the case is assigned would count as including reasonable exceptions, so long as such permission is not unreasonably withheld in practice." This language was included in the draft at the suggestion of a member of the Criminal Rules Committee. In essence, it means that a court could prohibit all self-represented parties from using the court's electronic-filing system if the court has a provision requiring self-represented litigants to obtain permission from the presiding judge—so long as that permission is not unreasonably withheld in practice. The language would recognize practices in the many district and appellate courts that now permit self-represented litigants to request permission to use the court's e-filing system. But it has been pointed out it could be difficult for a self-represented litigant to show that a court unreasonably withholds permission as a matter of practice, and it has been suggested that the language could be used to bless denying electronic-filing access to self-represented litigants in general.

Professor Marcus observed that the proposed amendments are the product of years' worth of coordinated work. What is needed at this point is public comment. Picking up on Judge Vance's observation that the proposed amendment to Civil Rule 5 would flip the default presumption from one of non-access to one of access, Professor Marcus observed that the bracketed note language made it sound as though a given judge could decide to flip the default presumption back to one of non-access. If the bracketed language stays in the draft for purposes of public comment, it could draw a lot of fire. It does not sit well with the text of the proposed rule as shown on page 207, lines 80-86. On the other hand, if the bracketed language is removed, people might argue it should be put back. Professor Marcus suggested that ultimately, the Standing Committee would need to make the judgment call.

Judge Vance requested comment on the bracketed note language. The Clerk of Court Representative suggested that the Advisory Committee should delete the bracketed language.

Draft

The text of the rule is clear, but the bracketed note language would cause confusion among clerks of court.

A judge member asked what kind of local rule might be adopted as a prohibition on self-represented litigants' access to the court's electronic-filing system, other than the type of local rule described in the bracketed note language. Professor Marcus observed that the bracketed note language referred to "local provisions"; he said that a local rule would count as a local provision, and he observed that a court could order that a particular self-represented litigant not be allowed to use the electronic-filing system, but he suggested that the rule would not permit an individual judge (in the absence of a local rule) to adopt an individual practice of disallowing use of the electronic-filing system by all self-represented litigants appearing before that judge. Judge Vance noted that the bracketed note language pertained to proposed Civil Rule 5(d)(2)(B)(ii), which would state that

> A court may set and enforce reasonable conditions and restrictions on unrepresented parties' access to the court's electronic-filing system (including by denying or revoking access for a particular unrepresented party). But the court may not prohibit all unrepresented parties from using the system unless that prohibition includes reasonable exceptions or the court permits the use of another electronic method for filing papers and receiving electronic notice of activity in the party's case.

The bracketed note language goes to the question of what constitutes a reasonable exception. The judge member who had asked about possible local rules suggested that the note language seemed to be consistent with what the rule text is trying to accomplish.

The academic member observed that, throughout the proposed rule text, there are references to "court order or local rule," except that on page 207, lines 85-86, the proposed rule text says that a self-represented litigant "may be required to file electronically only by order in a case or by a local rule that includes reasonable exceptions." He observed that district courts manage procedure through various means, including court-wide standing orders, individual judge standing orders, and orders in a case. The language at lines 85-86, he noted, seems to permit local rules and orders in a case but not standing orders, and he wondered whether the rule text was intended to exclude the use of standing orders.

Professor Struve responded that the language was intentionally used. The current rule says that a self-represented litigant may be required to file electronically "only by court order, or by a local rule that includes reasonable exceptions." She thought it would be quite unusual for courts to be requiring unrepresented parties to file electronically in federal court, and that is something that the rules have been cautious about for years. Criminal Rule 49 does not even have the provision permitting courts to require self-represented litigants to file electronically. If a court feels that they need to be able to use a general order to require self-represented litigants to file electronically, in order to preserve the spirit of the existing rule it would need to be a general order that includes reasonable exceptions. But, she noted, none of the project participants had hitherto asserted that a court needed more flexibility to be able to compel self-represented litigants to file electronically. The provision is deliberately designed to be protective—that is, if the court is not adopting such a requirement by means of a provision that includes reasonable exceptions, then it can only do so by order in a case. By contrast, the rule text at line 83 refers to

Draft

"a court order or local rule" because—when the question is the court's ability to opt out of the new presumption of access to the electronic-filing system—the rule is designed to afford courts flexibility to comply with the new rule in the way that best fits their circumstances, and in many courts the topic of access to the court's electronic-filing system is addressed in the court's CM/ECF order rather than solely by local rule.

On the general policy choice about whether to include the bracketed note language, Professor Struve noted that the current landscape of district-court practices includes some courts that provide self-represented litigants with access to the electronic-filing system as a matter of course; many courts that say self-represented litigants can use the electronic-filing system if they get permission; and perhaps 15 percent of courts that say self-represented litigants can never use the court's electronic-filing system. So the question is how much of the current landscape the rulemakers wish to alter. If the current note language is retained, it could reassure potential opponents of the overall change by evincing an intent to outlaw only the most extreme practice of saying, "don't even try to apply for access." The thought was that there could be more opposition to the electronic-filing amendments absent this type of reassurance to courts that are currently operating a by-permission system that they can continue using their current practice so long as they, in fact, are in good faith generally giving permission when it seems reasonable to do so. But, Professor Struve noted, the Clerk Representative's prediction that the bracketed note language could cause confusion in clerks' offices should be taken seriously. She noted that either way, there would likely be public comment on this point.

A judge liaison noted that an example of a local rule that she would consider useful would be one that says that a person will lose their right to use the court's electronic-filing system if they use the system to purport to tender payment of a mortgage, or purport to pay fake money through the system, or file a picture of a dead body that has no connection to the case.

A judge member stated that he had no strong feelings about whether to keep the bracketed note language in for purposes of publication. He stated that the language did not directly contradict the text's "reasonable exceptions" language, but that the two were in some tension: If someone were strictly following the rule text, he was not sure that they would arrive at the approach described in the bracketed note language.

Judge Vance pointed out that the draft included one other bracketed item, this one being non-controversial. It was on lines 21-22 on pages 204-05 of the agenda book, and the proposal was to include the bracketed language "by a notice of case activity" in the sentence addressing when service is complete for deadlines that run from the date of service. She asked whether anyone objected to including that language; no objection was raised.

Judge Vance asked whether there was a motion to recommend that the Standing Committee approve for publication and public comment the proposed amendments to Rules 5 and 6 as they appeared on pages 204-211 of the agenda book, including the bracketed language on lines 21-22 on pages 204-205 and including the bracketed language in the committee note on lines 220-223 on page 211 of the agenda book. The motion was made and seconded and passed unanimously.

Draft

Privacy-Related Amendments to Rule 5.2

Judge Vance introduced this inter-committee proposal to publish proposed amendments to Rule 5.2 on privacy protections for court filings. This proposed amendment is expected to correspond with an anticipated proposal from the Criminal Rules Committee regarding Criminal Rule 49.1. Similar to the amendments related to filings by self-represented litigants, these proposals result from a project initiated by the Standing Committee in 2022 to develop updated privacy protections in parallel across the various rule sets. The other rules committees will consider whether to approve their respective privacy proposals at their spring meetings.

Sarah Sraders, Counsel to the Rules Committees, then presented the proposed amendments, which are substantially the same as those that appeared in the agenda book for the Advisory Committee's October 2025 meeting. The main thrust of the amendments is to enhance privacy protections by requiring complete redaction of Social Security numbers (SSNs), Individual Taxpayer Identification Numbers (ITINs), Adoption Taxpayer Identification Numbers (ATINs), and Employer Identification Numbers (EINs). This redaction requirement would also apply to filed exhibits and attachments. The proposed amendments would also require the use of pseudonyms rather than initials for minors. The civil, criminal, and appellate rules committees are all apparently in agreement that these proposals should go forward so that an aligned proposal covering all three rule sets may be considered for publication by the Standing Committee at its upcoming meeting in June.

The Criminal Rules Committee has taken the lead on drafting these amendments, and its subcommittee had just recently resolved a question over whether the redaction requirement should apply to EINs. The DOJ had opposed such redaction, deeming it unnecessary, but the subcommittee was persuaded that inclusion of such numbers in filings could present potential for fraud and concluded that they should be redacted. A lawyer member of the advisory committee sought more information on that decision, noting that disclosure of EINs is often required in various non-litigation settings. Ms. Sraders elaborated that EINs had sometimes been misused in an effort to commit fraud against the government. Chief Counsel to the Rules Committees Carolyn Dubay added that sometimes individuals have EINs they must use when paying household employees, and they are more vulnerable to identity theft than corporations. She added that the Bankruptcy Rules Committee may conclude that redaction of EINs is not necessary. Professor Bradt added that the Criminal Rules subcommittee had also noted that the Social Security Administration and Tax Court have begun requiring full redaction of EINs, suggesting that there may be broader concerns. Mr. Bosen, on behalf of the DOJ, noted the Department's disagreement with the decision to require redaction of the full EIN, but that this disagreement should not stand in the way of moving the proposed amendments toward publication.

A judge member asked whether there had been discussion of how to treat cases where parents bring a case on behalf of a minor, since the minor's name would be easily identifiable under such circumstances even if a pseudonym were used. Ms. Dubay reported that she was unaware of such a discussion but that she would note the issue.

Another judge member suggested making clear in the committee note that the clerks' office is not responsible for correcting a party's failure to redact personal information. Professor

Draft

Marcus noted that failure to redact that information serves to waive the protection under Rule 5.2(h). Any other concerns are likely to come up during the public-comment period.

After a motion, the Advisory Committee unanimously voted to recommend that the Standing Committee approve the amendments for publication.

Information Items

Subcommittee Reports

Rule 43(a) Remote Trial Testimony

Judge Lauck (Chair of the Rule 43/45 Subcommittee) introduced the topic of remote trial testimony by thanking the members of the subcommittee for their untiring work on the project. The subcommittee had met four times since the Advisory Committee's October 2025 meeting and had made substantial progress.

Judge Lauck noted that at first, this project may have seemed like an easy task, since technology has changed dramatically since the current rule was adopted in 1996, when telephone was the likely mode of providing remote testimony. The caution reflected in the rule's current insistence on "compelling circumstances" to justify remote testimony reflects not only the system's central commitment to in-person, in-court testimony at trial, but also the extent to which the use of telephonic means would deprive the jury of critical information needed to evaluate that testimony. This technological state of affairs is even reflected in the dated language used in the current Rule 43(a)—"contemporaneous transmission from a different location." The amendment draft substitutes "contemporaneous remote testimony," reflecting contemporary usage.

But the subcommittee's deliberations focused on how current alternatives to the telephone now offer something much more like in-person witness testimony. And the pandemic beginning in 2020 prompted and in some instances required courts to employ the new technology in situations in which in-court proceedings would have been assumed in the past. This change was particularly notable in non-trial proceedings including motion proceedings governed by Rule 43(c).

So the subcommittee's initial approach, presented at the Advisory Committee's October 2025 meeting, sketched out in its draft committee note an appreciation that the tethers of the "compelling circumstances" standard could be loosened.

At the Standing Committee's January 2026 meeting, several members of that committee voiced serious concerns about the approach the subcommittee had presented to the Advisory Committee during the October 2025 meeting, which was included in the Advisory Committee's report to the Standing Committee. Among the concerns were (1) that the rule change could make entirely remote trials routine or the new norm; (2) that jurors cannot reliably assess credibility based on the image of the witness on a screen; (3) that coaching of the witness could be enabled; (4) that more generally there was an increased risk of improper actions that could not occur in a courtroom; (5) that some jurors might feel put upon if they had to show up in court but the witness did not; and (6) that judges would be besieged with requests for remote testimony.

Draft

Since the Standing Committee meeting, the subcommittee has reflected carefully on these concerns. It continues to favor the same change to the rule but has significantly recast the note. From the start, the note makes clear that the amendment does not represent a retreat from the Rules' commitment to the centrality of live in-person trial testimony. It provides that the decision whether to permit remote trial testimony is entirely up to the court, even if the parties stipulate to permit remote trial testimony. The amendment does not authorize fully remote trials; rather, it provides that remote testimony should be allowed only from specific witnesses when the court finds sufficient justification, and the amendment has no effect on other aspects of trial. The note also makes clear, as was clarified in the revision to the committee note to the Rule 45(c) amendment the Advisory Committee recommended for final adoption, that the requirements of Rule 43(a) do not apply to proceedings governed by Rule 43(c).

It is important also to appreciate that ordinarily the choice between remote trial testimony and in-court trial testimony is not the real choice the court must make. Instead, that choice is between live remote testimony and deposition testimony, either by video means or by reading a transcript of a deposition. And there may be important access to justice issues in making this choice. For some litigants, the cost of a video deposition may be an obstacle in a way that remote testimony would not.

There may be questions on whether the "compelling circumstances" requirement of current Rule 43(a) has caused judges who found good cause for permitting remote trial testimony nevertheless to refuse to permit such testimony. Sarah Sraders did research on the application of that provision of Rule 43(a), and her memo is in the agenda book. She did not find case reports in which judges said the requirement prevented them from permitting remote trial testimony when they would otherwise have done so. But she did find cases in which courts said that remote testimony should not be allowed because the need for it was foreseeable, something stressed in the 1996 committee note. Judge Lauck raised the question of the weight to be given to foreseeability in determining whether to permit remote testimony.

It also bears noting that it appears that "compelling circumstances" are not required anywhere else in the Civil Rules.

The rule's separate requirement of "appropriate safeguards" would be unaffected by the removal of the "compelling circumstances" requirement. That was introduced in 1996, and the courts have now had three decades of employing it. Lawyers report that the parties are often able to agree (subject to the court's approval) on safeguards that would be appropriate in a given case. Judge Lauck reported that the subcommittee considered more than a dozen potential safeguards, only to conclude that safeguards are best determined on a case-by-case basis in light of the particularities of each case. The subcommittee thus opted not to include a list of safeguards in the note.

Judge Lauck reported that the question of juror preferences has not pointed all in one direction or the other. Some jurors may favor in-person testimony to assist them in judging credibility. But some might actually feel they can see the witness better on a screen. And in different courtrooms these factors might play out differently.

Draft

The bottom line is that the focus of the amendment draft is on ensuring judges have discretion to make appropriate case-specific decisions about remote trial testimony. And many have said the relying on depositions as an alternative to remote live testimony—particularly if that involves reading to the jury from a written deposition transcript—is often a "jury attention killer."

The subcommittee then sought reactions from the Advisory Committee members on its recast approach to this amendment idea, particularly in light of the concerns raised by members of the Standing Committee.

An attorney member with broad trial experience reacted that "I always want to present my witnesses live in the courtroom. If the other side wants some other arrangements, I will resist." Video remote testimony is better than relying on a deposition, however. And it may be that jurors are now more comfortable with interactions via Zoom and Teams and similar methods.

A concern was raised: The draft committee note seems to invite the judge to authorize remote testimony as a way to avoid the chore of resolving disputes about what portions of the deposition testimony to admit. Specifically, the draft says that "the task of designating portions of the deposition can prove contentious, often involving the court in time-consuming review that would largely be obviated by live remote testimony." Is this an appropriate observation? The proposed change to the rule should be applauded, but the explanation should be carefully crafted.

A judge member observed that live remote testimony is preferable to trying to rely on a deposition at trial.

Another judge member observed that the proposal is a good one. In part, that is because there are not many civil trials anymore. But there are logistical concerns about safeguards. All the same, it is important to facilitate civil trials. And in-person trials should remain the gold standard. The rule's use of the verb "may" (as in the current rule) may not sufficiently stress that point.

Another concern was whether the draft note adequately makes the point that the main choice is not between in-person testimony and remote testimony, but rather between live remote testimony and relying instead on deposition testimony. That should be stressed in the note.

A judge noted that it may often be necessary to complete the process of designating deposition testimony even when the witness is expected to provide remote testimony. So there may not be that much judicial time or effort saved by authorizing remote testimony. For example, if problems of technology impede or prevent the remote testimony the parties may have to revert to relying on the depositions even though the court had authorized remote testimony.

Regarding safeguards, an attorney member reported never having had any trouble working out safeguards with opposing counsel. But the choice of appropriate safeguards differs vastly depending on the circumstances of a given case. For example, one might ask a number of questions: Should lawyers be in the room? Should the court reporter be in the room? How should the equipment be tested? Can the witness (for example, a treating doctor) be assured that the

Draft

testimony will occur at a specific time (rather than having to wait outside the courtroom until called)?

Another attorney member noted that, due to the COVID experience, many depositions now occur remotely. As a consequence, there is now much more experience with safeguard issues than was true in 1996, although perhaps mainly for depositions. That experience ought to inform the handling of remote trial testimony, even though that is a different creature from a deposition.

Another attorney member observed that these safeguard issues get worked out. Indeed, they are commonplace in arbitrations, which are increasingly popular.

Another concern was raised—the "apex witness" concern. Could this amendment invite strategic use of the remote testimony option to pressure a company or governmental agency with the prospect that the CEO would have to provide remote testimony? An attorney responded that a lawyer seeking to justify such testimony will have to win that battle, and also that if the court is unpersuaded by the company's argument that the testimony ought not be required (i.e., that the subpoena be quashed) the company may "beg" to have to CEO provide the testimony remotely rather than in person in the courtroom.

A final point was that three footnotes in the agenda book call attention to issues on drafting of the note that the subcommittee will continue to ponder as it moves forward. The subcommittee will continue its work.

Third Party Litigation Funding (TPLF)

Judge Proctor (Chair of the TPLF Subcommittee) introduced the topic of third-party litigation funding by thanking Professor Marcus and the subcommittee members, who have been working continuously since the subcommittee was created in October 2024. He specifically cited Dean Clopton's effort at ensuring that a diverse subset of the subcommittee has undertaken a "listening tour" to various conferences, events, and symposia on this subject. Judge Proctor also cited the assistance and support of the Rules Committee staff.

As Judge Proctor noted, to varying degrees, the issue of TPLF has been before the Advisory Committee for over a decade, including in connection with various disclosure rules and multidistrict litigation. Moreover, Congress has remained interested in the topic, though no legislation has yet passed. Some districts have also been experimenting with rules requiring disclosure of TPLF, including the District of New Jersey, whose experience Emery Lee is helping the subcommittee to understand.

For its part, the subcommittee's work has been vigorous and intentional when it comes to developing an understanding of how the funding industry works. One thing it learned is that this industry is constantly and rapidly evolving, and the subcommittee has received helpful assistance from many knowledgeable parties to understand how it operates today and how it might change.

That said, unlike Congress or state legislatures, the Advisory Committee's focus is not on whether TPLF is "good or bad," since such a policy judgment would be beyond its ambit. Rather, the subcommittee has been focused on a potential disclosure rule and what it might look like. As

Draft

the agenda book notes, however, even a disclosure rule presents challenging questions about its scope. Among such questions are: what sorts of agreements should trigger disclosure, what should be disclosed and to whom, and what discovery should be available following such disclosure? The challenge is to draft a rule that accounts for all of the nuances and varying circumstances of TPLF while also anticipating how rapidly the industry is changing. Judge Proctor then turned to subcommittee members for any additional comments.

One lawyer member noted that any rule should be tailored to the real-world problem it seeks to solve. We have heard many different concerns about TPLF, including interference by foreign funders, provisions that wrest control of cases from lawyers and their clients, and whether lawyers reliably have the authority to settle cases when funders are involved. In this member's view, it is important that the Advisory Committee focus on whether a rule will actually facilitate better case management or instead makes a policy judgment about the desirability of TPLF.

An academic member of the subcommittee added a concern about whether a trans-substantive procedural rule can adequately address the particular issues TPLF raises in different kinds of cases. The problem may be different, for instance, in patent versus mass-tort cases.

Professor Marcus then added his observation from both his research and attendance at various conferences that the subcommittee has encountered "diametrically opposed narratives from the defense bar on the one hand and the commercial funding industry on the other. Here we are in the crossfire." He also added that there is activity in state legislatures addressing this problem, including in California.

Judge Proctor then turned to the full Advisory Committee members for their thinking on the subject to assist the subcommittee in developing next steps. One judge member responded that the subcommittee is on the right track and expressed interest in what a disclosure rule might look like but added that anything beyond disclosure is likely beyond the committee's rulemaking authority.

Judge Proctor then sought feedback on a more specific question: under a proposed disclosure rule, to whom should the disclosure be made? To the court, the court and the parties, to the public on the docket? A judge member responded that, in her view, such a disclosure should be to both the court and the parties so everyone can know who the relevant players are when it comes to settlement discussions. Professor Marcus followed up by asking whether the disclosure should lead to discovery related to the evolution of the terms of the funding agreement. The judge responded that this should not be a worry, and if there is a reason the facts surrounding the agreement are relevant, they should be discoverable.

An attorney member then raised a different issue: if the agreement is disclosed, the opposing party may learn how much money is available, knowledge that can provide substantial leverage in settlement negotiations and potential for abuse. A judge member noted, however, that all litigation has potential for an unlevel playing field that could affect results, and it is not the judge's role to try to correct for that.

Draft

A lawyer member noted that a similar dynamic is created by the requirement that insurance contracts be disclosed, though TPLF is somewhat different. One concern, however, is what the judge should be expected to do with the disclosure, as it does not affect the merits of the case and could lead to "picking sides" between the parties.

Judge Vance then inquired whether the committee members could comment on their experience with respect to the allegation that, in mass-tort cases, TPLF leads to the filing of large numbers of unvetted and frivolous claims. An attorney member responded that the landscape was more complex than a funder providing funds for a particular litigation. Rather, a funder might provide an attorney funding for a litigation, but the collateral might be an interest in other litigations in that attorney's portfolio. This creates complexity when it comes to disclosures— in the attorney's cases that serve as the collateral for the funder's loan, must the agreement be disclosed? Must the entire funding scheme for the firm be disclosed?

Judge Proctor recounted a lawyer's anecdote of funders' providing millions to a small firm to file cases in mass tort litigation that the lawyers had no idea how to handle. Judge Proctor said there were situations like that and the control question is one argument for disclosure because judges may not be aware of these issues in their cases.

Another judge member asked whether a disclosure rule would serve as a deterrent from seeking TPLF, and if so, whether that is a proper goal for rulemaking? Judge Proctor responded that encouraging or deterring TPLF has never been the goal of this effort, though either could be an effect of a disclosure rule. Another judge member of the subcommittee added that whether the rule causes more or less TPLF has never been a topic of discussion of the subcommittee.

Professor Marcus then asked whether there is any question that under current law, a judge may require disclosure of a TPLF agreement in an individual case. One judge member responded that it is clear that a judge may order such disclosure because of ethical considerations, and a judge may require a funder to be available for a settlement conference if need be. Judge Proctor agreed that the judge can always ask questions about such agreements.

The subcommittee will continue its efforts and report its progress at the October meeting.

Other Matters Under Consideration

Rule 23—Class Actions

Professor Bradt explained that the reporters had been monitoring developments on the three Rule 23 proposals that the Advisory Committee had discussed at its October 2025 meeting and remain on the agenda: service awards for class representatives, pre-certification approval of settlements by putative class representatives, and whether the superiority requirement of Rule 23(b)(3) should be amended to include explicit consideration of privately administered out-of-court remedies. He added that there had been two developments since the October meeting that the Advisory Committee should be apprised of: the reaction of the Standing Committee to these proposals at its most recent meeting, in January 2026; and the several recent submissions to the Advisory Committee in support of amending the superiority requirement that have been received since the agenda book was published.

With respect to the Standing Committee, Professor Bradt reported that its enthusiasm for these particular projects was limited, in part because members recognize the potential scope of a Rule 23

Draft

project and the time and resources it would consume. It is illustrative that one lawyer member of the Standing Committee who typically represents plaintiffs and another lawyer member who typically represents defendants agreed on this score, while also noting that if the Advisory Committee were to take up Rule 23 each would have several more issues with the rule they considered more important to examine than the three already on the Advisory Committee's agenda. Professor Bradt noted that in light of the continuous debate about Rule 23, which has moved in new directions since the Supreme Court's decision regarding nationwide injunctions in *Trump v. CASA*, it may be difficult to cabin a Rule 23 project to any discrete set of proposals. He also noted, however, that the Advisory Committee had received several suggestions regarding the specific "superiority" question, indicating some momentum in favor of close study of that issue.

In light of these developments, Professor Bradt sought Advisory Committee feedback on its enthusiasm for taking on Rule 23 now, as opposed to continuing to monitor developments on these and other related issues in order to potentially return to them later. Professor Marcus added, as a "caution," that any Rule 23 project would be "work-heavy," but history suggests that such work might not yield significant results. A judge member of the committee noted that if there are other Rule 23 issues that practitioners feel are more important, perhaps the Advisory Committee's time would be better spent on those. A lawyer member agreed. An academic member did, too, adding his view that "I've got five other Rule 23 issues I'd put in front of these."

Another lawyer member cautioned, however, that this is an important area of law that "has significant impacts nationwide" and that class actions should remain on our agenda. But this member also opined that the Advisory Committee should focus on wrapping up its work on third-party litigation funding before tackling Rule 23. Professor Bradt noted that he and Professor Marcus, as co-authors of a casebook on Complex Litigation, would be monitoring the area closely. He added that the new edition of the Manual for Complex Litigation would likely soon be published, and that, too, might provide clarity on the path forward for Rule 23. The reporters will continue to monitor these proposals and will report again at the fall meeting.

Fair Labor Standards Act Collective Actions

Professor Bradt reported on a proposal submitted by former Advisory Committee member Judge Michael Baylson (E.D. Pa.) focused on providing guidance for "hybrid" actions that include collective-action claims brought under the federal Fair Labor Standards Act (FLSA) and class-action claims brought under state law and governed by Rule 23. There are numerous differences between collective actions and class actions that create management challenges, but the most important is that parties to collective actions under the FLSA must "opt in," while members of a class certified under Rule 23(b)(3) are bound unless they timely "opt out." The reporters sought feedback from the committee regarding how much of a challenge these cases create, whether such challenges can be handled using the case-management tools available under Rules 16, 16.1, and 23, and whether a rule-based solution seemed worth investigating. Advisory Committee members did not view such a project as promising at this time, and, after a motion, the Advisory Committee unanimously voted to drop this item from the agenda.

Right of Representative at Rule 35 Examinations

Professor Marcus reported on a proposal from the American Association for Justice that would entitle a party subject to an examination under Rule 35(a) to have a representative present at the examination or to record the examination. Several states have modified their rules in a similar manner, allowing a representative of the examined party to have a representative present who may observe, but not disrupt, the examination, and/or record it. These changes respond to complaints of harassment or bias by

Draft

the examiner selected by the opposing party. Professor Marcus sought feedback from committee members on the importance of the issue and whether to investigate a rule change.

One judge member reported that the issue had never come up in 22 years on the bench; another judge member agreed that the issue had not come up in 33 years. But a lawyer member disagreed, having recently tried a case in California, which allows a lawyer to observe the examination, which is also recorded by a court reporter. This member expressed gratitude for the opportunity to have a lawyer in the room for his client's examination by the opposing party's psychiatrist, who had strategized with counsel for 15 hours, read from a script, and asked leading questions. In this case, the party had been a victim of abuse, and the doctor was "going after her." The member reported that, due to the recording, he was able to use the transcript to cross-examine the doctor and "help rehabilitate the plaintiff on redirect." Another lawyer member added that examinations sometimes happen in state courts "by ambush" without a lawyer present. Judge Vance noted that Rule 35 would prevent such an ambush in a federal case, but the lawyer member responded that for very vulnerable parties, being examined without a lawyer present could be traumatizing and without a recording there is no record.

Professor Bradt noted that any such project would also necessarily require reexamining the provisions of Rule 35(b) addressed to exchange of examiners' reports and the effect on any applicable privilege.

Another lawyer member noted that under the current rule, a judge could make an individualized determination to allow a lawyer to be present or record the examination, so perhaps this would be an example of making a new rule that informs a judge of a power that already exists.

Given the level of interest in this topic, Professor Marcus suggested that the next step would be research on the various approaches taken by the states. Emery Lee of the FJC volunteered to reach out to the National Center for State Courts to see if they have any information. Further research on Rule 35 in the federal courts will be useful, as well. The reporters will further update the committee at the fall meeting.

Draft

Artificial Intelligence Hallucinations

Professor Marcus presented the next item, two proposals to the Advisory Committee addressed to "hallucinations" of cases by Artificial Intelligence (AI) that lawyers erroneously insert into court filings. This has become a widespread issue in these early days of legal AI, and several such incidents have been widely reported (as they have in all sorts of other fields grappling with the introduction of AI technology). Professor Marcus noted that the Evidence Rules Committee had been focusing on AI with respect to its own potential new Rule 707, which remains under study. The basic question for this committee is whether AI hallucinations of nonexistent authority require a new rule, or whether current Rule 11(b)(2), which requires a certification that "after an inquiry reasonable under the circumstances . . . legal contentions are warranted by existing law or by a nonfrivolous argument" for changing the law. Professor Marcus added that after publication of the agenda book, the Fifth Circuit reported that it had considered and declined to adopt a specific rule related to AI on the ground that sanctions for such "hallucinations" are adequately covered by Federal Rule of Appellate Procedure 46(c). *See Fletcher v. Experian Info. Solutions, Inc.*, 168 F.4th 231 (5th Cir. 2026).

The Advisory Committee agreed that rulemaking would not be appropriate at this time, while also recognizing that AI may return to the agenda as warranted. After a motion, the Advisory Committee unanimously voted to drop this item from the agenda.

Rule 58—Separate Document Requirement

Judge Vance then turned to Professor Bradt and Professor Cooper to discuss a proposal to add district-court orders appealable under the collateral-order doctrine to the list of orders exempt from the "separate document" requirement of Rule 58. Professor Bradt noted that this was an especially complex problem that the Advisory Committee had last addressed in 2002 in concert with the Appellate Rules Committee.

In short, the problem is this: Rule 54(a) defines a "judgment" to include "any order from which an appeal lies." In order to avoid confusion about when the 30-day time window for filing a notice of appeal under Appellate Rule 4(a) opens, Rule 58(b) requires that a "separate document" be entered on the docket. For a final judgment after a jury verdict or otherwise disposing of a case, Rule 58(c) is straight-forward—the window for filing a notice of appeal opens when the separate document is entered on the docket. If the district court entirely fails to comply with the separate document requirement, then the 30-day clock to appeal does not start running until 150 days after the entry of the judgment (that is, the appealable order) on the docket.

In 2002, this committee and the Appellate Rules Committee undertook a joint project to deal with what the subsequent committee note referred to as "horridly confused problems" created by the interaction between time limits for post-trial motions, Appellate Rule 4, and the separate document requirement. The result of that multi-year project was amended Rule 58(a), which exempts certain orders from the separate-document requirement, such that the 30-day clock to appeal starts running when these orders are entered on the docket. These exempt orders are those disposing of a motion: for judgment under Rule 50(b); to amend or make additional findings under Rule 52(b); for attorney's fees under Rule 54; for a new trial, or to alter or amend the judgment, under Rule 59; or for relief under Rule 60.

The proposed amendment would add interlocutory orders that are appealable under the collateral-order doctrine to the list of orders exempt from the separate-document requirement. In particular, the concern is with orders denying defendants' dispositive motions asserting a defense of qualified immunity. Although such orders are immediately appealable, district courts rarely file a "separate document" on the docket, meaning it is unclear when the 30-day window to appeal begins to run. The proponent of the amendment brought a circuit split to the Advisory Committee's attention on this question, though Professor Bradt noted that his research had revealed few such cases addressing the issue in the district or circuit courts, perhaps because it is rarely in such a defendant's interest not to appeal immediately in order to capture the benefits of the collateral-order doctrine, including often a stay of the litigation in the district court.

As the committee note to the 2002 amendments to Rule 58 explains, this is not a new problem, and "[d]rastic surgery on Rules 54(a) and 58 would be required to address this and related issues." Professor Cooper then elaborated on his experience as reporter during the effort that resulted in the 2002 amendments. He first noted that any effort to amend Rule 58 must be undertaken with the Appellate Rules Committee, and that any such effort should be based on real-world problems and not the more theoretical issues with the rule, which have long been apparent. Professor Cooper also noted that reopening the Rule 58 question would require

Draft

rethinking questions of forfeiture of such an appeal from a final judgment. All told, Professor Cooper noted, "it's a messy swamp."

Judge Vance then turned to the committee to seek feedback on the degree to which these problems had arisen in practice. One appellate judge member noted that he had not had occasion to address any timeliness questions when it comes to immunity defenses. Professor Hartnett suggested that, in his view, the issues with the rule may be solvable, but the effort is worthwhile only if there is a big enough problem. He suggested reaching out to the reporter of Appellate Rules to solicit his views. Professor Bradt agreed to do so and report back to the Advisory Committee.

Attorney Admissions

Judge Vance then turned to Professors Struve and Bradt for an oral report on the intercommittee subcommittee considering proposals for unified district-court bar admission. Professor Bradt reported that the subcommittee had most recently met in February. He reported that after three years' worth of research, outreach, and deliberation, the subcommittee had unanimously voted to recommend to the Standing Committee that it not move forward with this proposal. Reaction to the proposals in the various advisory committees was mixed at best, and in some cases quite negative. As a result, the subcommittee concluded that the time had come to suggest dropping the proposal from the Standing Committee agenda. A judge member of the Advisory Committee who was also a member of the attorney-admissions subcommittee added her view that this was a "tremendous effort" and that the subcommittee "explored it extremely thoughtfully."

Recommendations to Drop From the Agenda

"Algorithmic Spoliation"

Professor Marcus noted that this proposal focuses on how certain data systems' algorithms might delete or alter data automatically—a kind of spoliation without specific intent. The proposal is vague but appears to suggest changing Rule 37(e) to account for this phenomenon in some way. Professor Marcus noted, however, that current Rule 37(e) and its accompanying committee note were drafted in order to adapt to new technology and currently equip a district judge to respond to this concern in a specific case, should it arise. After a motion, the Advisory Committee unanimously voted to drop this item from the agenda.

Protective Order "Templates"

This proposal raises a concern about templates for protective orders provided by the Northern District of California and other districts intended to assist litigants. The proponent views such forms as coercive and beyond the power of districts to provide. The proponent also raises more familiar concerns about alleged overuse of protective orders generally. One attorney member noted that the template appeared to be both legally accurate and carefully crafted. Professor Marcus agreed and noted that such forms and templates are likely to be especially useful for self-represented litigants. After a motion, the Advisory Committee unanimously voted to drop this item from the agenda.

Draft

Mandatory Assistance for Pro Se Litigants

Professor Marcus presented this proposal, which would create a new Rule 83.1 that would provide mandatory administrative assistance to self-represented litigants in complying with procedural rules and deadlines. Although it may be desirable to improve and increase legal services available to civil litigants who cannot afford an attorney, it would be difficult to fit this proposal within the limits imposed by the Rules Enabling Act and would likely be regarded by district courts as an unfunded mandate. While this proposal does identify a serious problem, it does not seem to be one that this committee can solve through a rule amendment. After a motion, the Advisory Committee unanimously voted to drop this item from the agenda.

Update

Report from the Federal Judicial Center

Tim Reagan, the FJC liaison to the Standing Committee, reported (via Teams) to the Advisory Committee on recent FJC activities. He referred members to the agenda materials but highlighted a forthcoming video on how some district courts facilitate electronic filing by self-represented litigants, whether through CM/ECF or other means. Emery Lee, the FJC liaison to the Advisory Committee, added that the FJC is available to provide assistance or information about materials and programs. Judge Vance thanked the FJC for its important contributions to the Advisory Committee's work.

Judge Vance then adjourned the meeting.

Draft

TAB 4

Rule 43(a)—Remote Trial Testimony

At the April 2026 Advisory Committee meeting, the Rule 43/45 Subcommittee brought forward a revised proposal for amending Rule 43(a) that would remove the "compelling circumstances" provision but emphasize that remote trial testimony should not be the norm. During the January 2026 meeting of the Standing Committee, several members of that committee had expressed reservations about the orientation of the Subcommittee's proposal that was presented during the Advisory Committee's October 2025 meeting.

In response to the concerns of some Standing Committee members during the January meeting, the Subcommittee spent considerable effort reorienting the proposed amendment but still removing the "compelling circumstances" provision. After discussion during the April Advisory Committee meeting, that revised proposal went forward as an information item for the Standing Committee's June 2026 meeting.

As reflected in the Standing Committee minutes of the June 2026 meeting (included in this agenda book), there was an extended discussion of the revised approach presented to this committee during its April meeting. Even though this was not an action item on the Standing Committee's agenda, there was again considerable pushback against removing "compelling circumstances" from the rule.

But on some points, there seemed to be agreement even though the removal of "compelling circumstances" prompted misgivings. Specifically, a middle ground emerged—an amendment that would preserve "compelling circumstances" but also provide a foundation for a committee note that would reject the two main constraints on remote testimony in the 1996 Note. These are whether the need for remote testimony was foreseeable and the Note's seeming endorsement of a deposition as a preferable alternative for obtaining trial testimony. The new note would recognize that technological developments and experience with remote participation in court proceedings have brought about critical changes that make these constraints inappropriate in the 21st century.

Having received this Standing Committee feedback, the Subcommittee met again on August 4, 2026, and on August 28, 2026, to consider whether to pursue an alternative amendment route retaining "compelling circumstances." Notes of those two Subcommittee meetings are included in this agenda book.

Below is the revised approach that has emerged from the Subcommittee's work since the June Standing Committee meeting. For purposes of comparison, the agenda book also includes the approach presented to the Standing Committee at its June meeting.

It bears emphasis that several Standing Committee members agreed during the June meeting that using a deposition is not as good as live remote testimony, though the 1996 Note said a deposition is preferred. That point can be made clear by using the amendment approach sketched below.

One reaction to the Standing Committee concerns raised during the January 2026 meeting was to have library research done to see whether reported cases show that the "compelling circumstances" standard was cited as a ground for denying motions to permit remote testimony.

Sarah Sraders' January 28, 2026, research memo on reported cases applying the present Rule 43(a) standard was included in the April agenda book. It is also included in this agenda book. The memo did not show that judges were issuing orders that say they would grant the motion if only "good cause" were required, but could not because "compelling circumstances" must also be present. But it did indicate that courts have invoked the 1996 Note's foreseeability criterion in rejecting remote testimony because it could be foreseen that the witness would not be able to testify in person at trial, sometimes when the witness could not obtain a visa to enter this country.

Having twice received Standing Committee feedback regarding amendment proposals that remove "compelling circumstances," the Subcommittee concluded that a revised approach retaining that term but addressing the main concerns about the 1996 Note could be an effective way of addressing the constraints that Note (but not the rule) adopted. That draft is presented below.

The draft below has the word "specific" in brackets because (as revealed in the notes of the Subcommittee's August 28 meeting in this agenda book) Subcommittee members had differing views on whether including that word in the rule would be productive or problematical. Among the points raised were whether saying "specific" would suggest a findings requirement or whether adding that word would usefully signal that the amended rule does not confer complete discretion on the court to permit remote trial testimony. In addition, retaining "specific" could be desirable because it avoids the possible redundancy of saying "circumstances" twice in the same sentence and makes clear that the specific circumstances of this action are critical to this decision rather than some generalized notion of what are "compelling circumstances."

Given the repeated efforts to address this set of issues, it seems to the Subcommittee that the time has arrived for the Advisory Committee to urge the Standing Committee to publish a draft amendment for public comment. The Advisory Committee could re-present the proposal from April 2026, urging that public comment would be valuable in evaluating it, but it may be more prudent instead to pursue the new approach the Subcommittee has developed.

Members of the Subcommittee may present their views on (a) whether to return to the prior approach of removing "compelling circumstances" from the rule, and (b) if not, whether to include the word "specific" now in brackets. It seems time for the Advisory Committee to make its decision on what to present.

Subcommittee's Revised Rule 43(a) approach

Rule 43. Taking Testimony

(a) ~~**In Open Court**~~ **At trial.** At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances, taking account of the [specific] circumstances of the action,[1] and with appropriate

[1] The word "specific" is in brackets because the Subcommittee did not reach consensus on whether to include this word in the rule-amendment proposal during its August 28 meeting.

safeguards, the court may permit contemporaneous remote testimony in open court ~~by contemporaneous transmission from a different location~~.

COMMITTEE NOTE

In-person trial has been central from the beginning of the federal court system. It remains critical, particularly to determination of credibility. But the fast pace of technological change has provided alternative methods for live witness testimony at trial.

This amendment recognizes the court's discretion to permit remote trial testimony from a specific witness by weighing all the circumstances of the given case; even party agreement to remote testimony is not dispositive. In some cases, permitting remote testimony may be critical for access to justice when a party is not able to present live in-court testimony from a particular witness.

In 1996, Rule 43(a) was amended to authorize remote trial testimony when "compelling circumstances" support permitting live witness testimony from another location. But the committee note accompanying the 1996 amendment suggested that compelling circumstances could be found only when the need for remote trial testimony was not foreseeable and—given the technology available at that time—that reliance on deposition testimony would be superior to remote live testimony. Since 1996, some courts have found the 1996 committee note to constrain use of remote trial testimony. But advances in technology and experience from the 2020-22 pandemic have shown that those constraints are no longer warranted. Live remote testimony is often superior to reliance at trial on deposition testimony.

The amended rule continues to require appropriate safeguards. Experience gained since 1996 can assist the court in evaluating safeguards, but the burden is on the proponent to satisfy the court that safeguards will be in place. The parties may be able to reach a stipulation on appropriate safeguards for the court's consideration.

When a party wants to provide remote testimony at trial, it must timely obtain court approval for doing so. As amended in 2027, Rule 26(a)(3)(A)(i) should often call attention to this issue well in advance of trial, though on occasion last-minute developments may justify remote testimony, even if they arise only during trial. Court control is essential to management of remote trial testimony.

Draft amendment proposal presented to Advisory Committee in April 2026 and to Standing Committee in June 2026

Rule 43. Taking Testimony

(a) ~~**In Open Court**~~ **At trial.** At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause ~~in compelling circumstances~~ and with appropriate safeguards, the court may permit contemporaneous remote testimony in open court ~~by contemporaneous transmission from a different location~~.

COMMITTEE NOTE

In-person trial testimony has been central from the beginning of the federal court system. It remains critical, particularly to determination of credibility. Relying on face-to-face evaluation of testimony is the time-honored method for evaluating credibility.

This amendment does not in any way represent a retreat from the rules' commitment to the centrality of live in-person witness testimony, which remains true under this amendment. The court is not required to authorize remote trial testimony even if the parties all agree to proceeding in that manner. Remote testimony should be allowed only from specific trial witnesses when the court finds that a sufficient justification has been offered. The amendment has no effect on any other aspects of trial or the availability of remote testimony under Rule 43(c).

Sometimes critical trial witnesses are simply unable to appear in person in the courtroom, however. In 1996, Rule 43(a) was therefore amended to permit remote trial testimony when good cause was shown and appropriate safeguards were in place. The 1996 amendment also required "compelling circumstances." That very demanding requirement reflected the ongoing centrality of in-person witness testimony. Judges have found this requirement too constricting in some cases.[2]

This amendment removes the "compelling circumstances" requirement, but in no way retreats from the traditional importance of in-person interaction at trial between the finder of fact and the witness and in-person interaction between the witness and the lawyers, particularly the cross-examiner.

Developments since 1996 have prompted reexamination of that requirement at trial. Critically, technology has made important advances. While telephonic testimony may have been the only method available in 1996, 21st century technology offers a substitute much closer to in-person witness testimony. Many people, including jurors, have experience using this technology for business meetings and other important interactions. There are also reports that some jurors find live video a better method than in-person witness testimony. Not all courtrooms enable all jurors a view of an in-person witness that is equal to well-presented remote testimony.

In addition, the 2020-22 pandemic prompted, and sometimes forced, the courts to employ this new technology to manage cases and, sometimes, to receive remote witness testimony at trial. That judicial experience supports removing the "compelling circumstances" constraint. There have been many reports that this flexibility around remote participation has served the goal of Rule 1 to "secure the just, speedy, and inexpensive determination of every action" and also increased access to justice for all litigants, irrespective of their means.

When witnesses cannot attend trial, the choice is not between in-court testimony and remote testimony, but between remote live testimony and depositions taken before trial. When Rule 43(a) was amended in 1996, technology for remote testimony was in its infancy and the committee note suggested that deposition testimony would often be superior. Experience has shown that providing witness testimony by deposition at trial often has a negative effect on juror

[2] The prior version began by saying "numerous" or "some" judges had felt constrained. Sarah Sraders' research sheds some light on this. Perhaps it's best not to try to quantify.

attentiveness. In addition, it may be that the deposition was taken long before trial and the testimony is as a consequence stale. And the task of designating portions of the deposition can prove contentious, often involving the court in time-consuming review that would largely be obviated by live remote testimony.

In making the choice whether to authorize remote trial testimony, the court properly may take account of many factors. A starting point is that witness inconvenience alone is not a reason for excusing in-person testimony. Good cause requires assessment of the circumstances of the case, never losing sight of the central importance of in-person testimony. [But the court may consider whether the testimony of this particular witness is central to the case and whether assessment of credibility of this witness's testimony will be important.][3] [It may be that remote testimony raises fewer concerns in court trials than in jury trials.][4]

Technological difficulties may sometimes prove important. When the witness is at a remote location, there could be lapses in technology both at the witness's location and in the courtroom. The proponent of the testimony must satisfy the court that technological impediments will not intrude and that electronic transmission will be secure.

Besides evaluating the justification for relying on remote testimony and potential technological issues, the court must demand appropriate safeguards to protect the reliability of the remote testimony. This requirement has remained unchanged since 1996. Experience gained since 1996 can assist the court in evaluating safeguards, but the burden is on the proponent to satisfy the court that safeguards will be in place. The parties may be able to reach a stipulation on appropriate safeguards for the court's consideration.

When a party wants to provide remote testimony at trial, it must timely obtain court approval for doing so. As amended in 2027, Rule 26(a)(3)(A)(i) should often call attention to this issue well in advance of trial. Court approval is essential to management of remote trial testimony.

Attachment(s):

- Notes of August 28, 2026 Subcommittee Meeting
- Notes of August 4, 2026 Subcommittee Meeting
- S. Sraders January 28, 2026 Memorandum

---

[3] This bracketed sentence is designed to highlight something featured in prior drafts of the note and hinted at by the reference in the third paragraph of the draft note to "critical" witnesses. For example, a witness located far away may only be authenticating an exhibit. True, a Rule 36 request for admission could often solve such problems, as could deposition testimony. But having a witness travel across the country for 15 minutes on the stand to authenticate, for example, an exhibit offered only to counter a surprise development at trial seems exceedingly wasteful. Even if the witness could take two days off from work and the cost of last-minute transcontinental travel could be paid, a court might well conclude that under the circumstances good cause has been established to permit this witness to testify remotely.

[4] Is this bracketed sentence worth including?

Notes of Teams Meeting
Rule 43/45 Subcommittee
August 28, 2026

The Rule 43/45 Subcommittee met by Teams on August 28, 2026. Participants included Judge Hannah Lauck (Chair of the Subcommittee), Judge Sarah Vance (Chair of the Advisory Committee), Bankruptcy Judge Benjamin Kahn (liaison to the Bankruptcy Rules Committee), Justice Jane Bland, David Burman, Jocelyn Larkin, and Mark Lanier. Also participating were Reporter Richard Marcus, Associate Reporter Andrew Bradt, and Consultant Edward Cooper. Emery Lee represented the Federal Judicial Center. Carolyn Dubay represented the Rules Office. Also attending was Taylor Hall-Debnam (Judge Lauck's law clerk).

This meeting was a follow up on the discussions during the Subcommittee's August 4 meeting, which considered a way forward in light of the concerns from some Standing Committee members about removing "compelling circumstances" from the rule. The focus evolved to considering a rule amendment retaining "compelling circumstances" but providing a platform for moving away from the 1996 Committee Note's assertions that only unforeseeable circumstances precluding live in-court testimony would suffice under that standard, and expressing a preference for using deposition testimony at trial rather than remote live trial testimony. The memo before the Subcommittee is attached to these notes as an Appendix. The primary focus of the meeting was on whether to change the material in the attached memo.

The new approach was introduced as designed to satisfy concerns of some Standing Committee members about removing the "compelling circumstances" phrase from the current rule but also provide a foundation for making clear some of the obstacles that the 1996 Committee Note—not the rule itself—have presented to use of remote trial testimony should no longer be impediments. Research already done for the Advisory Committee has shown that some courts feel they cannot permit remote trial testimony even from witnesses who are outside this country and cannot obtain visas to enter the country to testify at trial, since their inability to testify at trial was foreseeable. The amendment would affirm that in-person testimony remains strongly preferred, but authorize the judge to permit remote trial testimony when appropriate.

The footnotes to the draft raise some issues. The first footnote mentions the possibility that the rule itself could cite "evolving technology" as bearing on Rule 43(a) decisions whether to permit remote trial testimony. The second footnote offers a way to build into the rule itself reference to the two problem areas that have sometimes emerged—foreseeability and the alternative of deposition testimony. The third footnote offers alternative words to describe when obstacles to in-person testimony are justified (that it would not be "possible," "feasible," or "appropriate"). The last footnote offers the possibility of including references in the note to some of the circumstances that in a given case might support remote trial testimony.

The question for this meeting is what should be brought to the full Advisory Committee at its October meeting. Though the Subcommittee's original conclusion was that removing "compelling circumstances" from the rule would be desirable, that approach does not seem to offer a viable path forward.

A first reaction to the added rule language was that it might be better to say, "totality of the circumstances," rather than "specific circumstances," as the current draft says. Might saying "specific" circumstances suggest some sort of finding requirement or provide support for reversal on appeal of decisions under Rule 43(a) to permit remote trial testimony? In addition, the draft note says that it recognizes the court's discretion to permit remote trial testimony. Perhaps it would also be important to add that the court has discretion to "prohibit" remote trial testimony.

A reaction was that Rule 43(a) already says trial testimony must be in person but that the court "may permit" remote testimony. In that sense, absent court action permitting remote trial testimony the witness must testify in person. On "specific" circumstances, one point is that any Rule 43(a) order should be tailored to the circumstances of the given case. One suggestion was to take out the word "specific" before "circumstances," but not add "totality of" the circumstances. That suggestion drew support.

Another possibility was suggested. In order to emphasize the court's latitude, might it be useful to say in the note that the court need not permit remote testimony even if compelling circumstances are shown? But the rule does not say the court "must" permit remote trial testimony in compelling circumstances, only that it "may" permit remote testimony. And it might seem odd that the court would not permit remote testimony despite the presentation of compelling circumstances that support permitting such testimony.

Another concern was raised: The last sentence of the third paragraph of the draft note says flatly that: "Live remote testimony is ordinarily superior to reliance at trial on deposition testimony." This may be too broad, though the 1996 Note seemed to say the reverse: "Ordinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena." Perhaps the substitution of "often" for "ordinarily" before "superior" in the draft note would be a good idea.

Another participant noted that since the rule says "may permit" there is no need to add "or prohibit" because there cannot be remote trial testimony unless the judge permits it. This participant continues to think the best solution is to remove "compelling circumstances," but retaining "specific" may be useful to satisfy those concerned about inviting entirely remote trials. The use of "specific" can apply not only to this case, but also to this witness. The first sentence of the second paragraph of the draft note refers to "remote trial testimony from a *specific* witness."

Another participant said that retaining "specific" would make clear that the rule does not grant complete discretion to authorize remote trial testimony. In addition, it would somewhat cure the possible redundancy of saying "circumstances" twice in the same sentence—these must be case-specific circumstances.

Another participant agreed with retaining "specific." This participant also said that the concerns raised in the third footnote could be addressed by putting a period after "trial" and deleting the remainder of the sentence in the draft for this meeting—"when in-person testimony is not [possible] {feasible} [appropriate]." This participant suggested also that the flat statement about the superiority of live remote testimony could be softened by adding "often" before "superior."

Another participant likewise favored retaining "specific" in the rule, and said that the addition of "often" before "superior" would suffice to blunt the statement in the 1996 Note about the possibility of a deposition usually being better than remote testimony (using the technology then available—usually the telephone).

Another participant urged taking out "specific" because it could be said to be redundant since the new rule language refers to the "circumstances of the action." One might urge moving "specific" up to before "action"—"of the *specific* action"—but that would not seem to add much to "circumstances of the action." Removing "specific" would reassure those judges concerned that they would face more motions that would require them to cite "specific" circumstances in deciding whether to permit remote trial testimony.

Concerns were raised about the note's assertion that "even party agreement to remote testimony is not dispositive." Some would drop this comment in the note. On the other hand, it reinforces the point of the paragraph that the amendment "recognizes the court's discretion" because it says the court need not acquiesce even to unanimous party preference for remote trial testimony from a certain witness. This idea received support. The 1996 Committee Note said that compelling circumstances could be established with "relative ease" if all parties agree to remote testimony, but added: "The court is not bound by a stipulation." It may be valuable to retain this recognition that the question whether to permit remote trial testimony is ultimately the court's discretionary decision.

Another participant was not opposed to "specific circumstances" but also offered "all of the circumstances" as an alternative. The point is that the court should consider any features of the case that matter in making this decision. But it might not be clear that "all of" the circumstances actually adds much to "the circumstances."

The second footnote offered possible rule language addressing two of the topics included in the 1996 Committee Note. And the fourth footnote noted that at least some other things might be important in a given case—suggesting "centrality" of the testimony of this witness, the nature of the proceeding, etc. A reaction was that listing some specifics could suggest that others, not mentioned, are not as important. Another reaction was that caselaw, and evolving technology, would be more important and useful to judges asked to permit remote testimony than whatever list of factors we might devise now for a rule change that would not go into effect until December 2029.

A participant observed that some judges do not want to deal with this technology. But a rule change can't overcome that; our draft nowhere says the court must permit remote trial testimony, but only that the judge may as to a given witnesses in the circumstances of the given case.

The meeting was summed up as having reached consensus on most points. For the October Advisory Committee meeting, the presentation should, as far as possible, be a draft without footnotes or language choices. The agenda book should include these notes and the Appendix presenting the choices discussed in this meeting, but the draft to the Advisory Committee should be "clean," if possible. Advisory Committee members would, of course, be free to raise issues like the ones addressed in this meeting.

In addition, the Subcommittee report should urge that the Advisory Committee recommend, at the Standing Committee's January meeting, that the draft approved by the Advisory Committee be published for public comment in August 2027 (the usual time for publishing each year's package of proposed amendments for comment).

APPENDIX

Memo discussed during August 28 Subcommittee meeting

Based on the discussion in the August 4 Subcommittee meeting, this memo sketches what could be presented to the Advisory Committee during its October meeting, along with the approach it saw during the April meeting. It will likely be important to emphasize to the Advisory Committee the resistance of some Standing Committee members to the version the Advisory Committee saw in April.

Rule 43. Taking Testimony

(a) ~~**In Open Court**~~ **At trial.** At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances, taking account of the specific circumstances of the action,[5] and with appropriate safeguards, the court may permit contemporaneous remote testimony in open court ~~by contemporaneous transmission from a different location~~.[6]

---

[5] It might be useful to mention technology in the rule itself, but changing technology is mentioned in the first paragraph of the note. One way to make the point in the rule could be as follows:

> For good cause in compelling circumstances, taking account of the specific circumstances of the action [including available technology], and with appropriate safeguards, . . .

It seems that the lawyers should be relied upon to raise and address issues of technology, including appropriate safeguards, mentioned later in the note.

[6] Alternative 1 before the Subcommittee on August 4 attempted to address the commentary about foreseeability and relying on depositions in the 1996 Note, but there is reason for uneasiness about including that in the rule itself rather than the note. If there is continued support for including something in the rule, a more compact alternative might be:

> For good cause in compelling circumstances, taking account of the specific circumstances of the action, the court may permit contemporaneous remote testimony in open court even if the need for the remote testimony was foreseeable or a deposition was available.

It may be that simply saying "foreseeable" is too ambiguous. Foreseeable when? Should that depend on whether the prospect of remote trial testimony was included in the pretrial disclosures under Rule 26(a)(3)? The main point seems to be that it should not matter much whether the need for remote testimony was foreseeable.

COMMITTEE NOTE

In-person trial has been central from the beginning of the federal court system. It remains critical, particularly to determination of credibility. But the fast pace of technological change has provided alternative methods for live witness testimony at trial when in-person testimony is not [possible] {feasible} [appropriate].[7]

This amendment recognizes the court's discretion to permit remote trial testimony from a specific witness by weighing all the circumstances of the given case; even party agreement to remote testimony is not dispositive.[8] In some cases, permitting remote testimony may be critical for access to justice when a party is not able to present live in-court testimony for a particular witness.

In 1996, Rule 43(a) was amended to authorize remote trial testimony when "compelling circumstances" support permitting live witness testimony from another location. But the committee note accompanying the 1996 amendment suggested that compelling circumstances could be found only when the need for remote trial testimony was not foreseeable and—given the technology available at that time—that reliance on deposition testimony would be superior to remote live testimony. Since 1996, some courts have found the 1996 committee note to constrain use of remote trial testimony. But advances in technology and experience from the 2020-22 pandemic have shown that those constraints are no longer warranted. Live remote testimony is ordinarily superior to reliance at trial on deposition testimony.

The amended rule continues to require appropriate safeguards. Experience gained since 1996 can assist the court in evaluating safeguards, but the burden is on the proponent to satisfy the

---

Similar difficulties might attend saying "a deposition was available." Surely that does not mean that remote trial testimony is not permitted if the witness was deposed a year or two ago (and before there was much additional discovery or other important developments). And it is possible, with the court's permission, to take a deposition even though the trial is already under way. That would be hard to square with the last sentence of the third paragraph of the note, which says that live remote testimony is ordinarily preferable to relying on a deposition.

It may be that this discussion reveals the difficulties that could result from trying to identify and define what "circumstances of the action" deserve attention when the court makes a Rule 43(a) decision.

[7] To say "possible" might be too demanding, but to say "appropriate" could be too loose. It may be possible that the busy surgeon on the opposite coast could come to the courtroom for brief non-controversial trial testimony but that insisting on such a trip would be difficult to justify. An alternative approach might be: "when requiring in-person testimony is not possible or reasonable under the circumstances."

[8] Other considerations might be mentioned. For example, one could add that the "centrality" of the witness's testimony, whether assessing credibility would be important, the nature of the proceeding (e.g., an MDL bellwether trial), etc., can come into play. But perhaps it is best to leave it to the lawyers to bring such things up instead of including prompts in the note. In the same vein, it may be unnecessary to mention party agreement, but possible some parties would contend that their agreement to remote testimony should be dispositive, which might make mention in the note useful.

court that safeguards will be in place. The parties may be able to reach a stipulation on appropriate safeguards for the court's consideration.

When a party wants to provide remote testimony at trial, it must timely obtain court approval for doing so. As amended in 2027, Rule 26(a)(3)(A)(i) should often call attention to this issue well in advance of trial, though on occasion last-minute developments may justify remote testimony, even if they arise only during trial. Court approval [control] is essential to management of remote trial testimony.

Notes of Teams Meeting
Rule 43/45 Subcommittee
August 4, 2026

The Rule 43/45 Subcommittee met by Teams on August 4, 2026. Participants included Judge Hannah Lauck (Chair of the Subcommittee); Judge Sarah Vance (Chair of the Advisory Committee), Bankruptcy Judge Benjamin Kahn (liaison to the Bankruptcy Rules Committee), Justice Jane Bland, David Burman, and Jocelyn Larkin. Also participating were Reporter Richard Marcus and Consultant Edward Cooper. Emery Lee represented the Federal Judicial Center. Sarah Sraders represented the Rules Office. Also attending were Matt Bailey (Judge Vance's law clerk) and Madison Weiner (A.O. summer intern).

The meeting began with an introduction about the reaction of some Standing Committee members to the revised proposal the Advisory Committee had endorsed at its April 2026 meeting. The revisions made in the Advisory Committee's discussion draft from the April 2026 meeting were designed to respond to concerns of several Standing Committee members while still removing the phrase "compelling circumstances" from the rule. The note, in particular, was revised to emphasize the centrality of in-person trial testimony in the U.S. federal courts.

At its June 2026 meeting, however, there was continued opposition from several Standing Committee members. Several of the lawyer members expressed serious misgivings about expanding flexibility for receiving remote trial testimony. Among the judicial members, there was also opposition to removing "compelling circumstances" from the rule. It was reported that in the state courts of at least one state almost all proceedings, including trials, were remote.

At the same time, several judicial members of the Standing Committee expressed agreement with the particular concerns that the Subcommittee has focused upon. They agreed that the fact that the need for remote trial testimony was foreseeable early on should not, of itself, prevent its use. And the superiority of live remote testimony over reliance at trial on deposition testimony—even video deposition testimony—seemed to be recognized by judicial members of that committee. At the same time, there was judicial concern about judges being inundated by requests for leave to present remote trial testimony.

It thus seemed that the Rule 43(a) situation is somewhat the opposite of the Rule 45(c) situation that the subcommittee had already completed. The Ninth Circuit decision on Rule 45(c) acknowledged that the committee note to the 2013 amendment said that a subpoena could command a distant witness to attend and provide trial testimony so long as the witness did not have to travel a great distance to do so. But it said the note did not matter because the court was obliged to follow the rule, which it took to forbid such a subpoena, making the note irrelevant.

With Rule 43(a), one could say that the principal difficulty has arisen not from the rule's language but instead from what the 1996 Note said—that a foreseeable need for remote trial testimony is not sufficient and that in any event a deposition is superior.

During the Standing Committee meeting, these observations gave rise to an idea: a rule change (perhaps even an "innocuous" one) that could form the foundation for a committee note that abandoned the constraints expressed in the 1996 Note.

The materials for the current meeting therefore offered three alternative ways of retaining the "compelling circumstances" rule language but signaling that courts should not be constrained by the foreseeability or deposition considerations included in the 1996 Note.

An initial question was about issuing a new and improved note without also amending the rule. The response was that a note cannot be amended. A note can explain a rule change, but there must be a rule change to support a note.

There is also room in the current rule to recognize judicial discretion in handling requests to present trial testimony by remote means. The rule says such testimony "may" be presented under specified circumstances, and "may" is ordinarily a verb signifying discretion.

Another reaction was that judges are not likely to be overwhelmed by requests to permit remote testimony. Ordinarily there should be at least 14 to 30 days' notice of such a request. That should be workable.

In general, it seemed from reports received by the Subcommittee that there was greater support for relaxing constraints on remote trial testimony among plaintiff lawyers, but that defense counsel may often prefer to have their witnesses appear in that manner.

Given the circumstances, members of the Subcommittee were not enthusiastic about insisting that "compelling circumstances" be removed from the rule. There seems to be reason to think that remote testimony will be accepted more and more widely, so there could be an argument for letting the matter percolate for a couple of years. But a less aggressive rule change could go a long way toward overcoming the constraints that have troubled at least some judges under the current rule. That would probably be superior to "dying in a ditch" (a favored expression of a past Advisory Committee member) on the approach presented to the Standing Committee.

The preferred course would be to present the Advisory Committee with alternatives at its October meeting. Since that committee has already seen the approach presented to the Standing Committee it should be presented again. But the subcommittee need not also urge insisting on the prior version despite the reception it received from the Standing Committee. In addition, support was expressed for using a generalized emphasis on judicial discretion in the rule amendment rather than specifically addressing the foreseeability and deposition issues raised in the 1996 Note.

The Subcommittee intends to meet again in about two weeks (Judge Lauck would try to identify a convenient date). Before that, Professor Marcus would circulate a discussion memo and also relatively brief notes of this meeting.

MEMORANDUM

TO: Rule 43/45 Subcommittee

FROM: Sarah Sraders, Counsel, Rules Committee Staff

DATE: January 28, 2026

RE: "Good Cause in Compelling Circumstances" Under Rule 43(a)

The Rule 43/45 Subcommittee is considering whether and how to amend Federal Rule of Civil Procedure 43(a), which currently allows a court to permit remote testimony at trial "[f]or good cause in compelling circumstances and with appropriate safeguards[.]" This memorandum analyzes how courts have applied this standard, and whether the case law suggests that it has prevented judges from authorizing remote testimony in situations in which such testimony is warranted.

Research did not uncover a wealth of (or even any) cases where judges expressed a desire to allow remote testimony that was thwarted by the current standard in Rule 43(a). (There are cases where the court notes that it is "sympathetic" to the witness's circumstances as it denies the motion, but whether this truly indicates a desire to side with the movant is difficult to say.) However, the case law does show that courts closely follow the guidance in the Advisory Committee Note to the 1996 Amendments to Rule 43 (the 1996 Note) and view this as setting forth the applicable criteria for whether a movant has satisfied the Rule 43(a) standard. A review of these cases may help the Subcommittee determine whether this is still guidance that the Civil Rules Advisory Committee believes should be followed.

I. The 1996 Note

"Courts are guided by the Advisory Committee Notes on the 1996 Amendment to Rule 43 in determining whether a movant has demonstrated good cause and compelling circumstances." *Clowdus v. Am. Airlines, Inc.*, No. 1:21-cv-23155-KMM, 2022 WL 6497311, at *2 (S.D. Fla. Sept. 21, 2022); *see also Halig v. Nat'l Bd. of Examiners of Optometry*, No. 22-2118-BAH, 2025 WL 2661785, at *3 (D. Md. Sept. 17, 2025) ("The Fourth Circuit Court of Appeals has not stated a test for determining what constitutes 'good cause' or 'compelling circumstances,' but the Advisory Committee Notes to the 1996 Amendments to Rule 43(a) provide some guidance.") (quotations omitted); *Barbuto v. Ronquillo-Horton*, No. 22-C-569, 2024 WL 4212857, at *2 (E.D. Wis. Sept. 17, 2024) ("The court concludes from the text of Rule 43(a) and the Advisory Committee's comments that [defendant's] motion should be denied.").

There are several key features in the 1996 Note that are worth exploring in further detail.

A. Foreseeability

The 1996 Note explains that

> [t]he most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place. . . . A party who could reasonably foresee the circumstances offered to justify transmission of testimony will have special difficulty in showing good cause and the compelling nature of the circumstances.

Courts have paid close attention to this statement—the phrase "unexpected reasons, such as accident or illness" appears in more than 100 decisions citing Rule 43. Foreseeability is a driving factor in many courts' Rule 43(a) decisions, and "courts often deny leave to testify remotely when the proponent of the witness has long known of the reasons for its motion yet failed to file it until the eve of trial." *Savinova v. Nova Home Care, LLC*, No. 3:20-cv-01612 (TOF), 2025 WL 1279076, at *3 (D. Conn. May 4, 2025).

Thus, courts have denied motions to testify remotely when the moving party "cannot reasonably argue that they did not know where these witnesses reside and/or work. They do not assert any late-breaking reasons rendering their presence at trial unusually inconvenient or impossible." *J.D. v. Price*, 619 F. Supp. 3d 523, 530 (W.D. Pa. 2022). Conversely, courts tend to allow remote testimony when the motion is based on unforeseen developments. *See, e.g.*, *Gonzalez v. US Human Rights Network*, No. CV-20-00757-PHX-DWL, 2023 WL 5333261, at *2 (D. Ariz. Aug. 18, 2023) (finding good cause in compelling circumstances where witness's "ability to travel to Arizona to testify at trial has been impaired by a late-breaking medical condition").

Some courts have refused to allow witnesses facing immigration or visa difficulties to testify remotely where these issues were long known. In *Goodman v. Goodman*, for example, the court denied the plaintiff's opposed motion to testify at trial by video due to his inability to enter the United States, reasoning in part that "[b]ecause Mr. Goodman has known of his visa difficulties for years, there is nothing 'unexpected' or 'compelling' about the circumstances rendering him unable to testify in-person at trial." No. 1:21-cv-10902-GHW, 2026 WL 18630, at *9 (S.D.N.Y. Jan. 2, 2026); *see also Carvajal v. Mijelum, L.L.C.*, No. EP-23-CV-00245-RFC, 2025 WL 2110013, at *1 (W.D. Tex. July 24, 2025) ("Courts have denied requests for remote testimony in cases where foreseeable visa issues have arisen."); *Mobu Enters. Pty Ltd. v. John Galt Solutions, Inc.*, No. 3:23-cv-617-BN, 2025 WL 1426450, at *2 (N.D. Tex. May 16, 2025) (denying plaintiff's opposed motion for Australia-based witness to testify remotely where plaintiff "offers no facts from which the Court may reasonably infer that [the witness's] inability to travel to the United States is a new or sudden development"); *Li v. Walsh*, No. 9:16-cv-81871-KAM, 2024 WL 6887134, at *2 (S.D. Fla. Mar. 1, 2024) (finding that Chinese and other foreign plaintiffs seeking to testify remotely "have not come close to meeting the 'good cause in compelling circumstances' standard" where they "have had several years to make travel preparations and obtain visas to travel to the United States" but apparently failed to do so); *but see Zamora v. Ljubica Contractors LLC*, No. 18-CV-419 (VSB), 2025 WL 2494271, at *4 (S.D.N.Y. Aug. 29, 2025) ("Courts in this Circuit have found an exception to Rule 43(a) to be proper . . . where [plaintiffs] are unable to legally enter the United States due to their immigration status.") (collecting cases); *Medina v. Angrignon*, No. 15-CV-427-RJA-MWP, 2024 WL 108669, at *3 (W.D.N.Y. Jan. 10, 2024) (allowing plaintiff to testify remotely when he was his sole witness, had been deported to the Dominican Republic, and the parties agreed that he could not re-enter the United States).

B. Mere Inconvenience

Courts also heed the 1996 Note's guidance that contemporaneous remote transmission "cannot be justified merely by showing that it is inconvenient for the witness to attend the trial." This analysis routinely overlaps with the foreseeability concern, as courts denying motions to testify remotely due to distance or other obligations often emphasize that these were known to the movant in advance.

Courts have therefore denied requests for remote testimony where the movant argued that the witness would face professional or personal hardship by having to testify. *See Halig*, 2025 WL 2661785, at *1, *4 (finding no good cause in compelling circumstances where expert witness would be "required to request formal administrative leave [from work] for all days of travel," noting that although the court "is sympathetic to the difficulties presented by travelling to provide trial testimony and any compensation for lost work that may result," this is the case with every trial); *Savinova*, 2025 WL 1279076, at *4 (denying plaintiff's opposed motion to testify remotely at trial where "she provides no authority for the proposition that caregiving responsibilities constitute 'good cause' or 'compelling circumstances'" and had "known about these responsibilities for at least a year"); *Barbuto*, 2024 WL 4212857, at *2 (denying defendant's motion to testify remotely where defendant was unable to take time off from a new job in the U.K., as defendant "should have made arrangements with her new employer to attend the previously scheduled trials"); *Maslic v. ISM Vuzem d.o.o.*, No. 21-cv-02556-BLF, 2024 WL 3279524, at *2 (N.D. Cal. June 14, 2024) (denying motion for witness to testify remotely where he "has an active practice as an orthopedic surgeon," as a "scheduling conflict alone does not constitute good cause," particularly where the case schedule was set two years prior).

On the other hand, some courts have found that such hardships provided the necessary justification given the circumstances of the particular case. *See, e.g.*, *Rock v. Cummings*, No. CV-20-01837-PHX-DWL, 2025 WL 1270748, at *1 (D. Ariz. May 1, 2025) (finding good cause and compelling circumstances to allow remote testimony from disinterested witness who was being compelled to testify by subpoena where he was "scheduled to be on trauma call for a very busy level one trauma center" and failure to do so "would adversely compromise the health and safety of trauma patients"); *Childers v. TTI Consumer Power Tools, Inc.*, No. 3:23-cv-00547-HZ, 2025 WL 392462, at *7-8 (D. Or. Feb. 4, 2025) (denying motion for new trial based on court's decision to allow remote testimony, where witness lived and worked in Michigan, had three children, and the need for his impeachment testimony arose during trial); *Foster v. United States*, No. 6:19-cv-164-REW-HAI, 2024 WL 5683137, at *2 (E.D. Ky. Feb. 23, 2024) (granting plaintiffs' opposed motion for two expert witnesses to testify remotely due to "familial responsibilities" and a "scheduling conflict," respectively, and noting that because the court had already assessed their expert credentials, "their remote testimony does not pose the same credibility concerns as, for example, remote testimony from fact witnesses").

The costs of attendance, whether to the witness or to the party, are also often raised by parties as a ground to allow remote testimony. "[F]inancial hardship isn't the type of unexpected reason that is typically required in a showing of good cause for telephonic testimony." *Gil-Leyva v. Leslie*, 780 Fed. App'x 580, 587 (10th Cir. 2019) (cleaned up); *see Savinova*, 2025 WL 1279076, at *4 (denying motion for two plaintiffs who are "minimum wage earners who do not have the funds to travel to Connecticut for trial" to testify remotely, noting among other things that they

were voluntary parties to the case and could have raised claims of indigence a long time ago); *Monera v. Datis*, No. 24-80958-CIV-CANNON, 2025 WL 3776652, at *1 (S.D. Fla. Feb. 5, 2025) (holding that neither "the costs of foreign travel" nor "the purported difficulty associated with obtaining travel visas for [petitioner's] non-party witnesses" established, on the existing record, compelling circumstances for witnesses to testify remotely); *Halig*, 2025 WL 2661785, at *4 (expressing sympathy that costs of in-person expert witness testimony "present a significant financial hardship for Plaintiff," but noting that "this was obviously a risk known to Plaintiff when she secured [the witness's] services as an expert witness"); *cf. Kanuszewski v. Shah*, 650 F. Supp. 3d 575, 577 (E.D. Mich. 2023) (finding that parties' joint request for remote testimony based on "circumstances that they could reasonably foresee: the witnesses live in other states, and it will cost them money to come to the trial" did not warrant leave to testify remotely, but nonetheless finding "the recent uncertainty of air travel" due to "strange winter conditions and unknown technological issues" to be an unexpected compelling circumstance warranting remote testimony).

On a similar note, parties have also requested permission for remote testimony where witnesses would have to travel a great distance to attend the trial, including internationally. In *High School Servicos Educacionais, LTDA v. Choi*, defendants sought to have two expert witnesses living more than 5,000 miles away in Brazil testify remotely. No. 4:21-cv-00029-DGK, 2023 WL 7346452, at *1 (W.D. Mo. Nov. 7, 2023). The court denied the motion, concluding that "[m]ere inconvenience of travel . . . is not a compelling circumstance . . . The geographic distance between Brazil and Kansas City was neither unknown nor unexpected and cannot support Rule 43(a)'s limited exception to live testimony." *Id.; see also Video Artography LTD v. Champagne Cowgirl, LLC*, No. 3:24-cv-120-BN, 2025 WL 1116864, at *5 (N.D. Tex. Apr. 15, 2025) ("Rule 43(a) is not satisfied by the inconvenience caused by compelling that [plaintiff's owner/officer witnesses who reside in Scotland] travel to Dallas" to testify); *but see Blackmore v. Ramirez*, No. 4:21-cv-00026-AMA-PK, 2025 WL 1311121, at *2 (D. Utah May 6, 2025) (finding good cause in compelling circumstances to allow fact witness in Palau to testify remotely even though his "residence in Palau is certainly not unexpected," noting that travel from Palau to Utah "is not a situation of mere inconvenience"); *Virtual Architecture, Ltd. v. Rick*, 09 Civ. 5866 (SHS), 2012 WL 388507, at *2 (S.D.N.Y. Feb. 7, 2012) (citing cases where courts have found good cause "where the witness would have to face international travel, with its attendant costs of time and money," and allowing witness residing in the Seychelles—8400 miles and a 20 hour and 40 minute flight from New York City—to testify remotely).

C. Preference for Depositions

The 1996 Note also provides that "[o]rdinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena, or of resolving difficulties in scheduling a trial that can be attended by all witnesses." Some courts have also followed this guidance when determining whether to allow remote testimony. *See Mobu Enterprises*, 2025 WL 1426450, at *2 ("As the Advisory Committee Notes to Rule 43 reflect, depositions are ordinarily superior to remote testimony."); *see also Nagel v. Global Growth Holdings, Inc.*, No. 6:23-cv-2256-JSS-UAM, 2025 WL 417969, at *2 (M.D. Fla. Feb. 6, 2025) (noting, when granting motion to introduce deposition transcript in lieu of witness's live testimony, that "[t]he Advisory Committee Notes to Rule 43 express a preference for deposition transcripts over testimony by remote means"); *but see Foster*, 2024 WL 5683137, at *2 (stating that live video testimony from expert witnesses "is preferable to their deposition

testimony," as it "will allow the parties and the Court to obtain proper follow-up or clarity from the experts on technical and complex issues").

II. Other Notable Aspects of Rule 43(a)

There are a few other noteworthy points that came up during this research.

First, several courts have applied the Rule 43(a) standard to non-trial proceedings. In *United States v. Thrift*, No. 2:14-cr-0308 DJC DB P, 2023 WL 5672862, at *1-2 (E.D. Cal. Sept. 1, 2023), the court analyzed whether the requirements of Rule 43(a) applied to an evidentiary hearing in a petitioner's section 2255 proceeding. The petitioner sought to have a witness testify remotely from Germany, and argued that Rule 43(c) applied, which did not necessitate a good cause finding. *Id.* at *1. The court disagreed, reasoning that "the application of subsection (c) is explicitly limited to when a motion relies on facts outside the record. Section (a) of Rule 43, in contrast, applies in open court and 'at trial,' but the court does not find it is necessarily limited to trials as movant argues." *Id.* at *2. The court nonetheless found that the Rule 43(a) standard had been met. *Id.* Other courts have similarly applied Rule 43(a) in non-trial proceedings. *See, e.g.*, *Noshirvan v. Couture*, No. 2:23-cv-1218-JES-KCD, 2025 WL 1374954, at *1 (M.D. Fla. May 13, 2025) (applying Rule 43(a) standard to plaintiff's opposed motion for out-of-state nonparty witnesses to appear remotely for an evidentiary sanctions hearing); *Jefferson Street Holdings, LLC v. Otter Prods., LLC*, No. 1:23-cv-01514-RMR-SBP, 2023 WL 11196897, at *1 (D. Colo. Oct. 27, 2023) ("[a]ssuming that Federal Rule of Civil Procedure 43—concerning the taking of testimony at trial—applies to pretrial hearings with equal weight" and determining whether movant had satisfied Rule 43(a) standard for remote testimony on a motion to disqualify counsel).

Second, several opinions in multi-district litigation (MDL) cases have imposed something of an alternative test for remote testimony, based on factors first set forth in *In re Washington Public Power Supply System Securities Litigation*, No. MDL NO. 551, 1988 WL 525314 (W.D. Wash. Aug. 9, 1988), which predated even the 1996 amendments to Rule 43. These factors, generally known as the "*Vioxx* factors" after their adoption in *In re Vioxx Products Liability Litigation*, are:

> (1) the control exerted over the witness by the defendant; (2) the complex, multi-party, multi-state nature of the litigation; (3) the apparent tactical advantage, as opposed to any real inconvenience to the witness, that the defendant is seeking by not producing the witness voluntarily; (4) the lack of any true prejudice to the defendant; and (5) the flexibility needed to manage a complex multi-district litigation.

439 F. Supp. 2d 640, 643 (E.D. La. 2006). Although courts in MDL cases have found these factors instructive when determining whether good cause exists to allow remote testimony, *see, e.g.*, *In re 3M Combat Arms Earplug Products Liability Litigation*, No. 3:19-md-2885, 2022 WL 504451, at *3 (N.D. Fla. Feb. 18, 2022), other courts have found that they have limited use outside of the MDL context, *see Blue Cross & Blue Shield of Florida, Inc. v. Davita, Inc.*, No. 3:10-cv-574-BJD-MCR, 2022 WL 18492515, at *2-3 (M.D. Fla. May 27, 2022) ("Other district courts have indicated . . . that the *Vioxx* factors are reserved for Rule 43 motions in multidistrict litigation only. . . [T]his Court instead turns to the advisory notes from Rule 43(a) to determine whether 'good cause in

compelling circumstances' exist[.]"). Given the unique circumstances present in MDL cases, it is not clear that these factors reflect trial court considerations in non-complex cases.

Finally, as may be expected given the trial court's discretion concerning remote testimony, research generally did not uncover appellate reversals of trial court decisions permitting or denying remote testimony. *See Gil-Leyva*, 780 Fed. App'x at 587 (finding no error with magistrate judge's decision to deny request to testify remotely, nor with the magistrate judge's subsequent decision to allow remote testimony); *Thomas v. Anderson*, 912 F.3d 971, 977 (7th Cir. 2018) (in case implicating trial court's authority to issue writ of habeas corpus as well as Rule 43(a), holding that trial court's decision to allow inmate witnesses to testify only by video "was well within his discretion"); *Draper v. Rosario*, 836 F.3d 1072, 1082 (9th Cir. 2016) (concluding that district court did not abuse its discretion in denying motion for inmate to testify remotely where court "expressed reasonable concern over [the witness's] ability to testify safely, even by contemporaneous video transmission"); *Eller v. Trans Union, LLC*, 739 F.3d 467, 478 (10th Cir. 2013) (remarking that "[appellant] cites no case in which an appellate court has held that a trial court abused its discretion by *not* allowing remote testimony" and holding that district court did not abuse its discretion by refusing to allow telephonic testimony from two witnesses); *cf. Rodriguez v. Gusman*, 974 F.3d 108, 114 (2d Cir. 2020) (vacating district court's decision to administratively close case after plaintiff was deported to the Dominican Republic, since Rule 43(a) would allow plaintiff to appear remotely).

TAB 5

Third-Party Litigation Funding Subcommittee

The Third-Party Litigation Funding (TPLF) Subcommittee is continuing its work in considering a disclosure rule. TPLF is currently the subject of at least five bills pending in Congress, and was the focus of four recent submissions to the Advisory Committee. These bills before Congress and recent submissions can be accessed via links at the end of this report.

The current focus is on a possible disclosure requirement in Rule 26(a)(1), or perhaps adding some mention of TPLF in the judicial management provisions in Rule 16 or Rule 16.1. In addition, as reflected in the New Jersey local rule (discussed below), a Rule 7.1 approach might be adopted.

Meanwhile, the environment for litigation funding seems to continue to evolve. In at least some states, nonlawyer investment in law firms is now permitted. Some push-back has emerged in other states. In California, for example, a bill has been proposed in the state legislature to forbid investor influence on litigation decisions. *See* Emily Siegel, *Private Equity Control in Law Firms Bill Advances in California*, BLOOMBERG LAW NEWS, Apr. 7, 2026 (reporting on AB 2305); *see also* Emily Siegel, *Colorado Passes Bill Banning Fee Sharing With Non-Lawyers*, BLOOMBERG LAW NEWS, May 14, 2026. In addition, a new arrangement called a "managed service organization" has been employed in some tort litigation. *See* Emily Siegel, *Litigation Funder Certum Launches MSO Aimed at Mass Tort Firms*, BLOOMBERG LAW NEWS, Dec. 4, 2025.[9]

Some states are considering or have adopted legislation specifically regulating litigation funding as described briefly below. Some of these bills likely go beyond what the Rules Enabling Act authorizes the committee to do via rule changes.

The original disclosure proposal was made in mid-2014, and the Advisory Committee has been monitoring the evolution of these issues over the years. The TPLF Subcommittee was formed at the Advisory Committee's October 2024 meeting. On the day before the Advisory Committee's October 2025 meeting, the George Washington University National Law Center convened a full-day conference on TPLF issues that provided important background for the subcommittee, but also revealed considerable contention about these issues. At the request of the subcommittee, the Federal Judicial Center has prepared a detailed report on experience under the District of New Jersey local rule requiring funding disclosure, which was adopted in 2021. The FJC report is included in this agenda book.

Though this work is ongoing, it seems safe to offer some initial reactions based on the last decade of discussion of a TPLF disclosure rule including (a) a sense that requiring disclosure of the fact of funding ought not often pose problems; but that (b) requiring disclosure of all details of the funding arrangement (including communications between counsel and the funder about

[9] Outside the rulemaking and legislation realm, some private actors are trying by contract to respond to TPLF. *See* Emily Siegel, *Uber Targets Litigation Funders in Rider, Driver Agreements*, BLOOMBERG LAW NEWS, July 9, 2026. Uber reportedly requires drivers and customers who sue the company to disclose details of the funding arrangements. A law professor is quoted in the story as saying: "No rational funder is going to inject themselves into a case where they have to disclose basically their due diligence and their work product." *See also* Emily Siegel, *Amazon Wants to Know Funders Behind Mass Arbitration Cases*, BLOOMBERG LAW NEWS, Aug. 26, 2026.

counsel's request for funding) could raise very serious (opinion) work product problems; and (c) that there remain serious questions about what the court can do with the information about funding arrangements that a disclosure rule could provide.

Existing models
Original rule proposal

The original proposal in 2014 (14-CV-B) was to add the following new (v) to Rule 26(a)(1)(A):

> (v) for inspection and copying as under Rule 34, any agreement under which any person, other than an attorney permitted to charge a contingent fee for representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise.

The proponents analogized this proposed new provision to the longstanding discovery (and now disclosure) provision about insurance coverage in Rule 26(a)(1)(A)(iv). That analogy is not airtight. For one thing, the insurance disclosure directive is limited to an "insurance agreement" from "an insurance business." It may also be relevant that insurance companies are highly regulated in many places. California, for example, has a pretty substantial Insurance Code.

A second difference that may matter is that the main interest in the insurance policy was probably the indemnity feature, not the insurer's undertaking to provide a defense (which may be somewhat analogous to what a litigation funder provides, although that funding relates to the prosecution rather than the defense of a claim). It does not seem that litigation funders have indemnified the parties they fund, even as to litigation-related sanctions, and usually the funded party is seeking a money award. Hence the proposal seems not to be directed at finding out about something that plays as prominent a role in resolving the action as the indemnity issue. But the committee note accompanying the addition of discovery of insurance coverage in 1970 did mention not only that "insurance is an asset ordinarily created specifically to satisfy a claim," but also that "the insurance company ordinarily controls the litigation."

When it first addressed this proposal in Fall 2014, the Advisory Committee did not pursue it, in part because litigation funding was new and was changing and growing, making its contours and importance unclear.

From 2014 to 2026, there were several further submissions to the Advisory Committee. Some of those urged that the 2014 proposal be adopted. Some funders submitted opposing arguments, occasionally contending that the Advisory Committee's limited fact-gathering constituted "findings" that no action was needed. Some of the submissions and inquiries came from members of Congress.

Representative Issa Bill

In January 2025, Representative Issa introduced H.R. 1109, which proposed a new § 1660(a) for the Judicial Code (Title 28) requiring counsel of record to:

(1) disclose in writing to the court and all other named parties to the civil action the identity of any person (other than counsel of record) that has a right to receive any payment or thing of value that is contingent on the outcome of the civil action or a group of actions of which the civil action is a part; and

(2) produce to the court and to each other named party to the civil action, for inspection and copying, any agreement creating a contingent right referred to in paragraph (1), including any ancillary agreement or document, except as otherwise stipulated or ordered by the court.

This proposal differs from the 2014 submission in several ways. It speaks of receiving "any payment or thing of value" contingent on the outcome of the civil action. So it might also apply to a suit for non-monetary relief. That might be even broader. Consider the famous suit by Hulk Hogan against Gawker, which was reportedly funded by Silicon Valley billionaire Peter Thiel. It may be that, though Hogan got a money judgment, Thiel had no right to a share of that money. If he was seeking to harm Gawker, that might be the "thing of value" for him. And in a suit for injunctive relief or other non-monetary relief, that might be the "thing of value."

The Issa bill also speaks of a "group of actions of which the civil action is a part." This provision sounds like it is about multidistrict litigation (MDL) proceedings and similar coordinated actions, perhaps including actions in a state court. Consider, for example, state court Roundup actions in relation to the pending MDL in federal court about the same substance. Given the reported emergence of "inventory funding," this might also apply in that sort of situation, though it is less clear how that would work.

The Issa bill also contains a section (b) which would exclude from the disclosure requirement any instance in which the funding agreement entitles the funder to receive only repayment, or repayment plus interest at a relatively low rate specified in the statute, or for reimbursement of attorney's fees.

This bill also has a section (c), which expressly addresses timing—disclosure must occur within ten days of execution of the funding agreement or at the time of the filing of the action, whichever is later. Finally, in section (d) it requires supplementation or correction of prior disclosures.

Foreign Funding

Also pending in the House is H.R. 2675, the Protecting Our Courts from Foreign Manipulation Act of 2025. As originally proposed, this bill (which was later amended) would add a different § 1660 to the Judicial Code. It focused on funding from a "foreign person," as defined in the Foreign Intelligence Surveillance Act of 1978, or a foreign state, or a sovereign wealth fund. It required disclosure not only to the court and other parties to the action, but also to the Attorney General and the Principal Deputy Assistant Attorney General for National Security of details about the "foreign person" that has "a right to receive any payment that is contingent in any respect on the outcome of the civil action by settlement, judgment, or otherwise."

This bill required disclosure also of agreements providing a "right to receive any payment that is contingent in any respect on the outcome of any matter within a portfolio that includes the

civil action and involves the same counsel of record." This provision seems to reach the portfolio funding situation but not to address "malign" U.S. litigation brought to disrupt the defendant's activities rather than obtain a money judgment.

Proposed section (c) of this § 1660 (entitled "Prohibition on Third-Party Funding Litigation by Foreign States and Sovereign Wealth Funds") would make it unlawful for any party or counsel of record to enter into a funding agreement with such a "foreign party."

Possible Rule 16 or 16.1 approach

Rule 16 might be a place to add a provision about TPLF. It calls for the court to become involved early on in managing the action. Suggesting that this judicial oversight include consideration of funding arrangements might facilitate a response tailored to the particular case.

Rule 16.1 addresses only MDL proceedings. But at least some who have commented on TPLF issues contend that funding is common in some MDL proceedings. Eight years ago, funding did not seem to be particularly prominent in MDL proceedings, but circumstances may have changed. So another approach might be to try to identify sorts of proceedings in which funding issues often appear and limit a rule to those proceedings. On the other hand, if patent infringement proceedings are also commonplace funding targets, such a "sectoral" approach might not be promising.

District of New Jersey Local Rule

Effective June 21, 2021, the District of New Jersey added its Local Rule 7.1.1, requiring disclosure of Third-Party Funding:

> (a) Within 30 days of filing an initial pleading or transfer of the matter to this district * * * all parties, including intervening parties, shall file a statement (separate from any pleading) containing the following information regarding any person or entity that is not a party and is providing funding for some or all of the attorneys' fees and expenses for the litigation on a non-recourse basis in exchange for (1) a contingent financial interest based upon the results of the litigation or (2) a non-monetary result that is not in the nature of a personal or bank loan, or insurance:
>
> > 1. The identity of the funder(s), including the name, address, and if a legal entity, its place of formation;
> >
> > 2. Whether the funder's approval is necessary for litigation decisions or settlement decisions in the action and if the answer is in the affirmative, the nature of the terms and conditions relating to that approval; and
> >
> > 3. A brief description of the nature of the financial interest.
>
> (b) The parties may seek additional discovery of the terms of any such agreement upon a showing of good cause that the non-party has authority to make material litigation decisions or settlement decisions, the interests of parties or the class (if

applicable) are not being promoted or protected, or conflicts of interest exist, or such other disclosure is necessary to any issue in the case.

(c) Nothing herein precludes the Court form ordering such other relief as may be appropriate.

The adoption of this local rule generated considerable controversy (somewhat along the lines of submissions received by the Advisory Committee).

This provision adheres to the Civil Rules format, but treats this disclosure as akin to Civil Rule 7, not part of Rule 26(a)(1)(A). Presumably, that means that the sanctions of Rule 37(c)(1) would not apply to failure to disclose. It is not clear what enforcement mechanism applies to instances of failure to comply with the disclosure requirement.

This provision applies to funding for attorneys' fees and expenses, but would not seem to apply to the "consumer" situation in which the funding is for the party's living expenses.

This provision addresses both a "financial interest" and a "non-monetary result" in the litigation, and therefore could apply in situations in which there is no contemplated pay-out of settlement proceeds to the funder. Though it requires a "brief description of the nature of the financial interest," it seems not to require any disclosure of the "non-monetary result."

This provision keys on control of the litigation or settlement of the action. It focuses only on influence on "material" decisions, though it is not clear which decisions are not "material."

In section (b) the provision permits "additional discovery." It is not clear that this is discovery, particularly since it is a Rule 7 analogue (though there could be discovery in situations now addressed by Rule 7, such as the existence of diversity). Arguably, the authorization for further discovery is limited to issues of control or a showing of conflicts of interest, but the discovery is also authorized if "necessary to any issue in the case."

More detailed information about the actual experience under this rule is provided in the FJC report in this agenda book.

State court provisions

Several years ago, Wisconsin adopted a funder disclosure requirement as a part of legislative tort reform legislation. An informal effort by the reporter (contacting Wisconsin law professors) did not indicate that this disclosure provision produced waves.

Ohio recently adopted a relatively pervasive set of regulatory provisions regarding litigation funding. *See* Emily Siegel, *Ohio to Join Growing List of States Regulating Litigation Funding*, BLOOMBERG LAW NEWS, June 11, 2026. Ohio HB 105 fills nine single-spaced pages. It begins with two full pages of definitions of what it is regulating. It creates a cause of action for a consumer "injured" by a violation of the act, and authorizes the state attorney general to enforce the act. It forbids funders to pay commissions for referrals, and prohibits false advertising about the funder's products or services. It also forbids funders from colluding to induce plaintiffs to make "fabricated" claims in court. It requires eventual disclosure of funding agreements to the state

attorney general, and directs the attorney general to "promptly publish the contents of the consumer legal funding agreements." It forbids funding by "a person or entity not domiciled in the United States," and directs funders to register with the state attorney general when they "commenc[e] any business activity in this state."

In June 2026, North Carolina became "the first state in the country to ban outside investors from funding civil litigation." Hayley Fowler, *NC Becomes First State to Ban Outside Funding of Civil Suits*, LAW360, June 23, 2026. *See* Session Law 2026-14, House Bill 315. It contains a definition of litigation funding, with nine enumerated exceptions. It then provides in § 66-513: "It is unlawful for a person to engage in litigation investment in this State or to furnish litigation investment to a party or counsel of record in a civil proceeding in this State." A contract in violation of this prohibition is void. The state attorney general may sue to enjoin violations of the act and seek imposition of a civil penalty of up to $50,000. A person injured by violation of the act may sue to recover "treble the amount of the full potential litigation investment contemplated by the investor." The act also provides that a person who has furnished funding to a party in a civil action in the state be deemed to have "purposefully availed itself of the privileges of conducting business in this State," making the person subject to suit in North Carolina.

There has not been any submission to the Advisory Committee recommending adoption of rule provisions like the ones found in recent state enactments. Many of those would probably be difficult to fit within the Advisory Committee's Rules Enabling Act authority.

ELI/UNIDROIT disclosure approach

Below there will be some mention of EU proposals that go beyond disclosure. Regarding disclosure, it seems worth mentioning Rule 245(1) of the proposed Model European Rules of Civil Procedure, promulgated by the European Law Institute (modeled on the American Law Institute) and the International Institute for the Unification of Private Law (UNIDROIT):

> A party who receives funding for the proceedings from a professional third-party funder or from a crowd-funder shall disclose this fact and the identity of the funder to the court and the other party at the commencement of proceedings. The details of such a third-party funding arrangement are, however, not subject to this requirement.

This provision is only a proposal to EU member states. It offers several notable features. First, it focuses on "a professional third-party funder." That would seem to exclude Uncle Fred who supports his niece after her car crash. But it includes "a crowd-funder." It requires disclosure "at the commencement of proceedings," and thus would not seem to include funders who only fund costs on appeal after success in the trial court. It says nothing about litigation control by the funder. It also does not seem to focus on whether the funding is recourse or non-recourse. The NAACP Inc. Fund would seemingly be subject to this disclosure requirement. It calls for disclosure to the opposing party, not just the court. But it excludes the "details of such a third-party funding arrangement" from the disclosure directive, and does not authorize discovery probing for more information. (It bears noting that discovery in EU legal systems is vastly more limited than American discovery. For discussion, *see* Richard Marcus, *Reflections of an Outlier: An American Reaction to the EU Rules on Evidence*, 11 INT'L J. PROCEDURAL LAW 106 (2021).)

Drafting issues going forward

The introduction above (and the very helpful October 23, 2025, conference at George Washington University National Law Center) suggest a lot of drafting issues that might first be addressed in determining what we want a rule to do.

Scope—What arrangements must be disclosed?

Except for mass torts, there seems not to be much appetite for disclosure of funding of personal injury claims. An early session on TPLF in Berkeley in about 2016 included a representative of what might be called the funding of "car crash" cases, and that seemed to be a high-volume activity in which funder control would not be an issue because the funder would not know enough about all the cases it was funding to exercise control, even over settlement.

Nonetheless, defining what must be disclosed in light of the manifold accusations directed towards TPLF activity is a challenge, and drafting something that is workable, while presenting the usual drafting challenges, begins by deciding what one wants to include. It seems that the definition of what triggers the disclosure requirement is the biggest obstacle. Here are at least some of the issues.

Focus only on funding for attorney fees and litigation expenses: The District of New Jersey rule seems to exclude cases that involve funding of plaintiff's living expenses, sometimes called "consumer funding," by focusing on funding for "some or all of the attorney's fees and expenses for the litigation." That would seem to exclude the "Uncle Fred" situation in which Fred loans money to his niece to pay living expenses while her claim progresses, but expects to be paid back if the case pays off.

Exclude funding that does not seem designed to make the funder a profit: Another approach is suggested by the Representative Issa's bill—exclude any instance in which the payout is either only repayment or repayment plus a modest interest add-on. Much "social justice" funding probably would be excluded even though this is funding for litigation costs. Much of the lobbying for disclosure assumes that there is a big profit to be had for the funder; excluding instances in which that is not part of the deal could be a good idea, though figuring out what interest rate or profit is acceptable could get tricky.

Include crowd funding?: There is some indication that this activity has been involved in litigation funding in the United States. How exactly it works not clear to this reporter. Mentions of crowd funding in the press usually seem to deal with financial support for people who have suffered catastrophic injuries or other serious harms (including possible eviction). It is not clear how the provider of such funding would seek or obtain repayment of the amount provided.

Address litigation seeking non-monetary relief?: The original proposal seemed only to address large judgments or settlements. Others have taken account of additional litigation outcomes that would benefit funders in other ways. To the extent, however, that one is concerned about malicious litigants trying to use American litigation to bring down American companies that compete with foreign competition, there may be no payout contemplated; the goal could be simply to make trouble, not win money. Whether that really happens in litigation (possibly putting aside *Hulk Hogan v. Gawker*) is unclear. But maybe a variant could happen if Big Pharma Company A

finances patent holder's suit against Big Pharma Company B to achieve a commercial objective by sullying the reputation of Company B or tying it up in court. Similarly, perhaps, environmental litigation might be funded by competitors of the company accused by the "stooge" of environmental violations. In California, for example, litigation under the California Environmental Quality Act is sometimes characterized as principally designed to hamstring proposed projects in the hope that the developer will eventually give up.

Limit disclosure to "funders": As mentioned below, in the EU it has been proposed that litigation funders be licensed. That might be more analogous to disclosure of insurance by "an insurance business." Others who provide indemnity need not disclose. But as noted above, the insurance situation seems a special case. The EU Model Rules focus on "a professional third-party funder." Maybe that is to be linked to licensing of such entities.

Exclude "social justice" funders?: The NAACP Inc. Fund might be an example of a "social justice" funder. In the present day, there are many groups that seem to fund "cause" litigation. For example, it seems that the Chamber of Commerce funds such litigation, at least at the appellate level. Indeed, that current reality appears to be one reason for considering expanded disclosures in the Appellate Rules regarding amicus filings in the appellate courts. Probably most or all such funding could be exempted under something like the exclusion in H.R. 1109 for arrangements that do not call for a profit beyond a low percentage rate.

A special rule for patent infringement cases?: This sort of litigation surely has gotten a lot of attention. But the Civil Rules supposedly govern all cases, not only cases of a certain type. About a decade ago, there were stirrings in Congress about legislation to address the problem of "patent trolls." Some of that legislative effort focused directives to the rules process to develop rules to solve the reported problems.

Funding only appeals: In the United States, some funders focus mainly or solely on appeals. Thus, if plaintiff wins a whopping verdict at trial the funder will provide funding to cover defendant's appeal for a share of the proceeds if the appeal does not wipe out the judgment. But that cannot be known until the trial court litigation is over or nearly over.

Address "portfolio funding"?: Particularly with mass torts, but perhaps with patent infringement cases also, one notion is that funders may not limit themselves to a single case. Instead, they may fund a law firm's portfolio of cases of a certain sort (e.g., Camp Lejeune claims). In the Camp Lejeune example, there have been reports that millions were spent on lobbying Congress to get what claimants' lawyers wanted in the bill that has led to the outburst of claims. Where all that money came from is not clear, but it is difficult to see how a funder could be funding not-yet-existing claims. Ongoing recruitment of claimants for some MDL mega-proceedings (e.g., Roundup and Zantac) are clearly widespread and must pay off in some way.

Including only non-recourse funding: A recurrent feature of the push for disclosure is that the funder gets nothing back unless the litigation is successful. The "portfolio funding" wrinkle is related to this concern. If the funder has provided funding for a share of all Camp Lejeune claims the firm has, and 50% are unsuccessful but the other 50% are successful, is that non-recourse funding, or more like a law firm line of credit, in which the firm has pledged all its receivables as collateral? (True, the line of credit might also call for personal guarantees by the partners of the

firm, but we are moving closer to a bank line of credit.) The claim that funders fund patent infringement claims hoping for a few big strikes alongside many failures may be similar.

Disclosure of what?

Fact of funding and identity of funder: The District of New Jersey local rule requires disclosure of the fact of funding (however defined) and the identity of the funder. That alone might avoid difficulties. In 2019, for example, a funder so suggested. *See* Michael German, *Sensible Disclosure Rule for Litigation Finance is Right Balance*, U.S. LAW WEEK, Mar. 15, 2019.

Control: The District of New Jersey local rule also requires disclosure of what it considers control (i.e., requiring funder approval of litigation or settlement decisions). If one wants to exempt those funding arrangements that do not include such features, one would need a definition (going to the scope of the disclosure obligation). Otherwise, one could insist on disclosure of all covered funding arrangements and add this sort of disclosure feature. But defining what constitutes control could be difficult. Must the funding be a blank check because otherwise the funder can control the litigation by refusing further funding? Presumably the funder could condition further funding on adopting certain litigation tactics. One concern expressed by some proponents of disclosure is that funders will press claimants to settle for less than they could get by persisting in the litigation effort, and that their lawyers would disobey their duty of loyalty to the client to please the funder. On the other hand, the notion that getting funding may be critical to the ability of some claimants to pursue their claims at all suggests that, by definition, there is an element of control—the initial decision whether to provide funding. (Commercial funders say they provide funding in only a small percentage of the applications they receive.)

Additional details?: The District of New Jersey local rule also requires disclosure of "a brief description of the nature of the financial interest." It is not immediately clear what that adds to disclosure of control. Perhaps it means whether this is non-recourse funding (if that is not a part of the definition of what arrangements must be disclosed). As suggested by the much more aggressive EU ideas on regulating litigation funding (briefly described below), it might also key on whether the funder has the financial wherewithal to provide the promised funding.

Adding Rule 7.1 types of disclosures regarding the funder: The Advisory Committee has recently dealt with expanding the Rule 7.1 disclosure requirements to identify corporate "grandparents," etc. It has often been asserted that disclosure is required to alert judges to the possible need to recuse. Rule 7.1 focuses on parties to litigation, not the funder of those parties. If one regards the recusal issue as important, some disclosure about corporate affiliations of the funder might be in order. There is an undercurrent in some writing expressing concern about patent infringement litigation that cleverly-contrived and interlocked funders are hiding from sight. Trying to devise a rule that would ferret them out would be a challenge.

The entire funding agreement: The original disclosure provision mirrored the insurance disclosure provision already in the rules and called for the disclosure of the entire agreement. That could pinpoint things about control and other things that might justify authorizing further investigation via discovery. But one can say that this disclosure is different from insurance disclosure because, in the insurance situation, one is likely focused on "settlement for the policy limits." That, of course, lies behind tort claims against insurers for bad faith refusal to settle. In the

TPLF context, on the other hand, unless litigation funding must be a blank check, disclosure of details may provide the opposing party with a guide to exhausting its opponent's resources (perhaps via expensive discovery forays about funding arrangements).

Communications leading up to execution of the funding agreement: As noted above, funders say they provide funding in response to only a small proportion of the requests for funding they receive. Commercial funders often say they have expert in-house lawyers who can assess the claim and know what to ask of the lawyers requesting funding. That would often include core opinion work product. But eliciting details about the assurances, etc., that led to the agreement might also shed light on control issues.

Disclosure to whom?

The court alone: There seems to be little question that the court may direct disclosure, particularly on a case-specific basis. The District of New Jersey local rule has not been challenged as violating the strictures of Rule 83 (so far as has been reported to us). So it is not at all clear that a rule saying courts may direct disclosure would add significant authority to what already exists. Perhaps adding this possibility to Rule 16 would be a way to flag the question for the court. If so, one might add it to the laundry list in Rule 26(f) as well.

To other parties: Ordinarily proponents of disclosure insist on disclosure to other parties. They are thinking about the adverse parties, and they claim that disclosure to the court alone is a forbidden "ex parte" communication. Disclosure proponents sometimes say that they can identify topics that the court needs to pursue but may not recognize. On this score, it has not been said, but comes to mind, that funding might be of interest to co-parties. For example, suppose some plaintiffs have funding and others do not. Of course, co-parties are fully free to make disclosures to one another. (Compare the common-interest exception to waiver of privilege when attorney-client or work-product materials are shared among co-parties.) So probably the focus should be on adverse parties, but if disclosure is required to them, it presumably would be made to co-parties as well.

To bar associations, etc.: Proponents of disclosure often suggest that plaintiff attorneys who receive funding may be tempted to breach their duty of loyalty to their clients because they are beholden to the funders. Maybe there are sometimes concerns that would warrant disclosure to regulators of lawyer ethics. To date, despite these intimations from disclosure advocates, this has not been an included ingredient.

Explicitly authorizing further discovery

The District of New Jersey local rule explicitly alerts the judge about possible discovery. It permits discovery on a showing of control or a conflict of interest, or if it is necessary for any other issue in the case. Perhaps that expands the scope of discovery on the notion that funding arrangements are not within Rule 26(b)(1). But one might expect that if disclosure to adverse parties is required, they would seek discovery on whatever ground they could devise. For example, in terms of discovery of communications between the funder and the attorney seeking funding, one argument might be that there are Rule 11 issues that call for further revelations. Unless there is some concern that—absent a provision authorizing discovery—courts might consider

themselves constrained by the scope of discovery from ordering it in appropriate cases, it is not clear why this sort of provision is needed.

Alternatively, it might be that a rule could explicitly *forbid* certain sorts of discovery. By way of comparison, Rule 26(b)(3)(B), which applies when the court concludes that a party has made a sufficient showing to justify discovery of fact work product, directs that the court "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." *Compare* Cal. Code Civ. Proc. § 2018.030(a) ("A writing that reflects an attorney's impressions, conclusion, opinions, or legal research or theories is not discoverable under any circumstances.").

The EU regulatory contrast

The introduction includes the disclosure provision included in the ELI/UNIDROIT Model European Rules of Civil Procedure (2020). The EU has moved on beyond that as discussed in Richard Marcus, *The "Advanced" Systems Grapple With Third Party Litigation Funding*, 29 ZZPINT. 129 (2025). In 2022, the EU Parliament adopted a resolution on "Responsible private funding of litigation." *See* European Parliament resolution of 13 September 2022 with recommendation to the Commission on Responsible private funding of litigation (2020/2130 (INL)) (2022 Resolution). In early 2025, an agency of the EU released a 700-page study entitled "Mapping Third Party Litigation Funding." This study does not show that most EU member states have yet taken up the cudgel recommended in the 2022 document. But it may be useful to describe elements of that 2022 set of proposals for purposes of comparison:

Definition of covered activities: The 2022 proposal was that a "litigation funder" be a commercial entity "which has the primary aim of receiving a return on an investment it makes[.]" 2022 Resolution, Art. 3(a). That might well exclude the deal between Peter Thiel and Hulk Hogan, and funding by malign foreign governments trying to use American litigation to achieve malign purposes but not to make money directly from the litigation. But unless the funder is primarily or solely engaged in litigation funding (as opposed, perhaps, to "hedge funds" looking for profit-making activities of whatever sort), such a definition might not catch some the proponents of disclosure would prefer that a rule identify.

Regulation of funders: The EU 2022 resolution also urges that member states "create a system for the authorisation and monitoring of the activities of litigation funders within their territory." *Id.* Art. 4.2. This sounds like the way most or all states treat insurers. This regulatory setup would include "an independent supervisory department or authority tasked with granting, suspending, or withdrawing authorisations for litigation funders and supervising the activities of litigation funders." *Id.*

Registration of funders: The EU resolution also urges that member states provide that funders "conduct their business through a registered office in a Member State." *Id.* Art. 5.1(a). That is probably true of insurers in the U.S. to some extent, under existing state regulation of insurers.

Adequate financial resources: Member state regulation should require that a funder demonstrate "adequate financial resources to * * * fund all stages of any proceedings they have

committed to[.]" *Id.* Art. 6.1(b). Regulatory authorities should ensure that their supervisory authorities can verify the funder's financial capacity, and the regulators may "set up a specific insurance fund to cover all the outstanding costs of claimants * * * in case a litigation funder becomes insolvent[.]" *Id.* Art. 6.4.

Acting in the best interests of claimants: The 2022 resolution also proposes that the regulators require funders to adhere to "a fiduciary duty of care requiring them to act in the best interests of a claimant." *Id.* Art. 7.1. This recommendation seems to focus on the risk the funder would pressure the lawyer to violate the lawyer's duty of loyalty to the client by imposing a similar duty on the funder.

Contents of funding agreements: The 2022 resolution calls for member states that permit litigation funding to direct that funding agreements not include any provision that gives the funder control. *Id.* Art. 14.2. Such agreements may not guarantee the funder a minimum return before the claimant can receive their share, nor (absent "exceptional circumstances") include anything that would dilute the share paid through to the claimant below 60% of the total award. *Id.* Art. 14.3, 4.

Withdrawing funding: Agreements should provide that the funder cannot withdraw funding unless the court has authorized termination of the agreement. *Id.* Art. 15. It is not entirely clear if this sort of provision would give the funding recipient a blank check.

Judicial authority to modify the funding agreement: Disclosure to the court is also required, and the court is to be given authority to modify the agreement so that it conforms to the requirements mentioned above. *Id.* Arts. 16.1, 17(b). The court would be authorized to determine whether the agreement would give the funder "an unfair, disproportionate or unreasonable share of any award," and to take account of "the value of a litigation funder's financial contribution." *Id.* Art. 17(d)(iii).

* * * * *

In a sense, one might say that this list of detailed requirements and prohibitions with regard to the funding agreement resembles the sort of regulation states often impose on insurers. It is difficult to imagine that the Rules Enabling Act authorizes the Advisory Committee to propose rules along these lines. This thumbnail description is not offered to suggest that this committee can do these things, but it may provide a context for evaluating what this committee can propose.

Moving forward from here

One conclusion that might be said to flow from various discussions of TPLF disclosure was put into words by litigation funders:

> Neutral bodies attempting to objectively evaluate disclosure proposals are perpetually presented with the diametrically opposed narratives of the defense bar, on the one hand, and the commercial funding industry, on the other.

Dai Wai Chin Feman & William Weisman, *Litigation Funders Seek Transparency in Disclosure Debate*, LAW360, Nov. 23, 2022.

One might say there is a lot of underbrush to clear away to devise a possible rule amendment proposal. Ideally, reviewing all these ideas and assertions will enable choices to be made about what should be included and what need not be included.

Attachment(s):

- Emery Lee, Fed. Judicial Ctr., Third-Party Funding Disclosures in the District of New Jersey, June 2021-June 2026 (2026).

Reference Material Link(s):

- Litigation Transparency Act of 2025, H.R. 1109, 119th Cong. (2025)
- Protecting Our Courts from Foreign Manipulation Act, H.R. 2675, 119th Cong. (2025)
- Protecting TPLF from Abuse Act, H.R. 7015, 119th Cong. (2026)
- Litigation Funding Transparency Act of 2026, S. 3826, 119th Cong. (2026)
- Tackling Predatory Litigation Funding Act, S. 1821, 119th Cong. (2025)
- Suggestion 26-CV-33 (Contingency Capital)
- Suggestion 26-CV-32 (Robinson Helicopter Company)
- Suggestion 26-CV-31 (214 Companies)
- Suggestion 26-CV-30 (Lawyers for Civil Justice & U.S. Chamber of Commerce)
- Suggestion 26-CV-16 (Todd Presnell)
- Suggestion 26-CV-8 (Lawyers for Civil Justice & U.S. Chamber of Commerce)
- Suggestion 25-CV-T (American Association for Justice)
- Suggestion 25-CV-R (12 Attorneys and Advisors)
- Suggestion 25-CV-P (Alliance for Responsible Consumer Legal Funding)

Third-Party Funding Disclosures in the District of New Jersey, June 2021–June 2026

Prepared for the Judicial Conference Advisory Committee on Civil Rules

Emery G. Lee III

Federal Judicial Center

September 2026

The Federal Judicial Center offers education and research for informational use. Center content does not direct case decisions or court practices or represent federal judicial policy or the views of the Center's Board.

Executive Summary
Third-party litigation finance (TPLF) has grown into a multibillion-dollar industry largely outside the view of courts. In June 2021, the District of New Jersey adopted a TPLF disclosure rule with respect to the existence of third-party funding. Local Civil Rule 7.1.1 requires parties to identify any non-party providing them with non-recourse funding, describe the nature of the funder's financial interest, and disclose whether the funder's approval is required for litigation or settlement decisions. This Federal Judicial Center report examines disclosures filed pursuant to the local rule from June 2021 through June 2026, to inform Advisory Committee on Civil Rules discussions regarding the desirability of a nationwide TPLF disclosure rule.

Overall, Center researchers identified TPLF statements disclosing receipt of third-party funding ("positive TPLF disclosures") in a small number of civil cases (104) in the District of New Jersey during the study period.[1] Treating non-duplicative positive TPLF disclosures filed in a single MDL proceeding as separate observations, the report analyzes 106 positive TPLF disclosures; the bulk of these were identical disclosures filed in related cases (69, or 65% of all TPLF disclosures included in the report). In terms of an estimated filing rate, this translates to about one filing per 1,000 civil cases in the district.

Positive TPLF disclosures were filed primarily in civil rights and patent cases, usually by plaintiffs. Most positive TPLF disclosures stated that funder approval was not required for settlement or litigation decisions. In a few instances, however, the disclosing party indicated that funder approval was necessary for such decisions; these disclosures raise definitional questions about both the scope of the local rule and the relationship of TPLF disclosures to other procedural rules. These findings are more suggestive than conclusive, given the small number of positive TPLF disclosures identified during the study period.

[1] Center researchers gratefully acknowledge the invaluable assistance of the clerk's office in the District of New Jersey, which provided information on TPLF disclosures drawn from the district's CM/ECF system.

Background

At present, there is no federal statute or nationwide procedural rule requiring parties to disclose third-party funding in civil cases. Individual judges have entered standing orders requiring disclosure as a matter of case management,[2] pretrial orders requiring third-party litigation finance (TPLF) disclosure in MDL proceedings are not uncommon,[3] and a few districts have promulgated local rules related to the issue. On June 21, 2021, the District of New Jersey adopted a local rule (L. Civ. R. 7.1.1, Disclosure of Third-Party Litigation Funding) requiring parties to disclose the existence of TPLF.[4] The Advisory Committee on Civil Rules asked the Federal Judicial Center (Center) to report on the District of New Jersey's experience with its local disclosure rule.

Pursuant to L. Civ. R. 7.1.1, TPLF disclosure in the District of New Jersey is limited to the identity of the funder, whether the funder's approval is necessary for settlement or litigation decisions, and a brief statement of the funder's financial interest. The rule, in full, states the following:

> Civ. RULE 7.1.1 DISCLOSURE OF THIRD-PARTY LITIGATION FUNDING
> (a) Within 30 days of filing an initial pleading or transfer of the matter to this district, including the removal of a state action, or promptly after learning of the information to be disclosed, all parties, including intervening parties, shall file a statement (separate from any pleading) containing the following information regarding any person or entity that is not a party and is providing funding for some or all of the attorneys' fees and expenses for the litigation on a non-recourse basis in exchange for (1) a contingent financial interest based upon the results of the litigation or (2) a non-monetary result that is not in the nature of a personal or bank loan, or insurance:
>
> 1. The identity of the funder(s), including the name, address, and if a legal entity, its place of formation;
> 2. Whether the funder's approval is necessary for litigation decisions or settlement decisions in the action and if the answer is in the affirmative, the nature of the terms and conditions relating to that approval; and
> 3. A brief description of the nature of the financial interest.
>
> (b) The parties may seek additional discovery of the terms of any such agreement upon a showing of good cause that the non-party has authority to make material litigation decisions or settlement decisions, the interests of parties or the class (if applicable) are not being promoted or protected, or conflicts of interest exist, or such other disclosure is necessary to any issue in the case.

---

[2] *See*, *e.g.*, Standing Order Regarding Third-Party Litigation Funding Arrangements (Connolly, C.J.), https://www.ded.uscourts.gov/sites/ded/files/Standing%20Order%20Regarding%20Third-Party%20Litigation%20Funding.pdf.

[3] *See*, *e.g.*, Pretrial O. #16, *In re* Zantac (Ranitidine) Prods. Liab. Litig., No. 9:20-md-2924, ECF No. 557 (S.D. Fla. Apr. 3, 2020) (Rosenberg, J.), https://www.flsd.uscourts.gov/sites/flsd/files/20md2924/show_temp_5.pdf.

[4] In re Amending of Local Rules (Order, June 21, 2021), https://www.njd.uscourts.gov/sites/njd/files/Order7.1.1%28signed%29.pdf.

(c) Nothing herein precludes the Court from ordering such other relief as may be appropriate.
(d) This Rule shall take effect immediately and apply to all pending cases upon its effective date, with the filing mandated in Paragraph 1 to be made within 45 days of the effective date of this Rule.[5]

A subsequent notice to the bar clarified that parties need not file disclosures in cases in which they are not receiving third-party funding,[6] but many parties persist in filing such negative disclosures. When this report refers to "positive TPLF disclosures," it means that a party filed an L. Civ. R. 7.1.1 statement disclosing receipt of third-party funding.

The advisory committee has considered several definitional issues with respect to TPLF and what must be disclosed, with an eye toward heading off unnecessary disputes over disclosure obligations. As of this writing, evidence of disputes over the requirements of L. Civ. R. 7.1.1 is limited. An informal survey of magistrate judges in the district suggests that they generally handle few, if any, disputes arising under the local rule. Moreover, there is little case law in the District of New Jersey about parties' compliance with their disclosure obligations under the local rule.[7] In at least one instance, the question was how funders' involvement as owner of the plaintiff-assignee should be characterized for purposes of the local rule (i.e., do disclosure requirements apply to the assignment of claims to funder-controlled entities?).[8] Treating TPLF disclosure as analogous to Fed. R. Civ. P. 7.1 corporate disclosures, rather than Fed. R. Civ. P. 26(a) disclosures, also makes enforcement uncertain, because Fed. R. Civ. P. 37(c)(1) sanctions may be unavailable as a result.[9] In at least one instance, a plaintiff filed a motion for relief, including sanctions, under L. Civ. R. 7.1.1(c) ("appropriate relief"), because defendants had not filed a TPLF disclosure; because the court found the motion moot, the issue is still unresolved.[10]

---

[5] D.N.J. L. Civ. R. 7.1.1 (effective date June 21, 2021), https://www.njd.uscourts.gov/sites/njd/files/CompleteLocalRules.pdf#page=27.

[6] Notice to the Bar, Clarification of L. Civ. R. 7.1.1, Third-Party Litigation Funding, https://www.njd.uscourts.gov/sites/njd/files/NoticetoBarreL.Civ_.R.7.1.1clarification.pdf (clarifying that the local rule "requires the filing of a statement only where third-party litigation funding exists").

[7] *See* MSP Recovery Claims Series, LLC v. Sanofi-Aventis U.S. LLC, ECF No. 362-1 (Certification of Jorge Lopez), No. 2:18-cv-2211 (D.N.J. May 17, 2023), https://ecf.njd.uscourts.gov/doc1/119119895465 (denying that plaintiff had received nonrecourse funding in a case where litigation funder was a member of an LLC that was a party).

[8] *See* MSP Recovery Claims Series, LLC v. Sanofi-Aventis U.S. LLC, No. 2:18-cv-2211, 2024 WL 4100379 (D.N.J. Sept. 6, 2024), at *2 (describing dispute over Civ. L.R. 7.1.1). This issue seems to have been raised in a Zoom scheduling conference. However, note that the *MSP Recovery* court did order discovery into funding documents on, among other things, the question of the real party in interest. *See id.* at *6 ("With respect to the litigation funding documents, the Court finds that these too are responsive . . . and . . . relevant in determining the real party in interest in this litigation and likewise are relevant to Defendant's defenses of champerty and maintenance."). The Rule 17(a) real-party-in-interest issue is raised again *infra*.

[9] *See* Reporter's Memo, Advisory Committee on Civil Rules, Agenda Book, April 2026, at 289. It is not clear, as of this writing, whether, in providing for "appropriate relief," L. Civ. R. 7.1.1(c) authorizes sanctions.

[10] *See* Harish v. Arbit, ECF No. 140 (Order of August 1, 2025), at 2, No. 2:21-cv-11088 (D.N.J. May 11, 2025), https://ecf.njd.uscourts.gov/doc1/119121601500. The letter requesting leave to file the motion, and the letter in response, however, are both sealed. *Harish* provides an example of the court ordering *in camera* review of "documents produced in discovery by Defendants reflecting a litigation funding relationship." *See id.* at 2.

Findings

Center researchers compiled each positive TPLF disclosure filed in the District of New Jersey from the effective date of the local rule, June 21, 2021, through June 30, 2026, a roughly five-year period. For the most part, the list of positive TPLF disclosures is based on information generously provided by the District of New Jersey clerk's office from its CM/ECF system. In reviewing the district's list, however, researchers noted that a few of the cases listed in the appendix of a recent article by Professor Anderson[11] were omitted. In the interest of looking at as many positive TPLF disclosures as possible, the list of cases for this report was compiled from both sources, i.e., it includes information on any positive TPLF disclosure identified by either source and confirmed by Center researchers.

Frequency. For the five years in which the local rule has been in effect, positive TPLF disclosures were identified in 104 civil cases in the district. In addition, three positive TPLF disclosures (after eliminating duplicates) were filed on the master docket of *In re Johnson & Johnson Talcum Powder Products Sales Practices, Marketing and Products Liability Litigation* (MDL No. 2738).[12] With only one exception—where the disclosure itself was sealed—Center researchers reviewed each of these 106 positive TPLF disclosures, listed in the Appendix.

In a busy district like New Jersey, 106 positive TPLF disclosures is not a terribly large number. The Administrative Office of the U.S. Courts has not yet published, as of this writing, the number of civil cases commenced in the District of New Jersey for the 12-month period ending June 30, 2026; however, extrapolating from previous years' data (using the figures for the 12-month periods ending June 30 of 2022, 2023, 2024, and 2025),[13] this likely translates to a rate of positive TPLF disclosure in about one civil case in every thousand commenced in the district during the study period. However, most of these positive TPLF disclosures (69 identical positive disclosures) were filed in related cases in the Daniel's Law litigation[14] in 2024; without those related disclosures, the overall figure would be even lower (4–5 per 10,000). Other than the 2024 spike because of the Daniel's Law litigation, there is simply no trend upward or downward in filings of positive TPLF disclosures. Several positive TPLF disclosures were made immediately

[11] *See* J. Jonas Anderson, *Demystifying Third-Party Litigation Funding*, 94 George Washington L. Rev. 392, at 445–46 (2026) (appendix). That is, Professor Anderson's appendix includes cases not included in the district's list, and vice versa, despite the former's thoughtful search strategy. *See id.* at 414–15 (describing search method).

[12] TPLF disclosures in MDL proceedings may cover multiple claimants represented by the same law firm.

[13] *See* Table C-1, U.S. District Courts—Civil Cases Commenced, Terminated, and Pending During the 12-Month period Ending June 30, various years. For the four years of available data, the district averaged more than 17,000 new civil cases *per year*.

[14] In the Appendix, these are the cases brought by plaintiff Atlas Data Privacy Corp. "Daniel's Law was enacted in response to the tragic death of Daniel Anderl, the son of Judge Esther Salas and Mark Anderl. The law prohibits disclosure of the residential addresses of certain persons covered by the law ("Covered Persons") on websites controlled by New Jersey state, county, and local government agencies." State of New Jersey, "Daniel's Law," https://danielslaw.nj.gov.

after the local rule's effective date (because it applied to pending cases), and a small number have been made each year since (outside of the Daniel's Law litigation). According to court records, for example, a total of four positive TPLF disclosures were filed in the first six months of 2026.

Care should be exercised in drawing conclusions from such a small number of observations—especially such a small number of *independent* observations. (The Daniel's Law cases are not the only related cases, as a review of party names in the case captions in the Appendix shows.) This report draws upon the available information in making provisional statements about TPLF in the District of New Jersey. But it would be rash to draw any sweeping conclusions about TPLF more generally from that information.

Case Types. Because cases in the Daniel's Law litigation were chiefly classified in the court data as civil rights (other) (Nature of Suit (NOS) 440), most of the positive TPLF disclosures (71, or 67%) were filed in civil rights cases. The next largest group of cases in which positive TPLF disclosures were made was classified as patent (NOS 830): 10 cases (9%). The prevalence of patent cases is not surprising, given the literature on TPLF.[15] Seven positive TPLF disclosures (7%) were filed in other contract actions (NOS 190). No other case type appeared more than three times; the three positive TPLF disclosures in the *Johnson & Johnson* MDL proceeding were coded as health care/pharmaceutical personal injury product liability (NOS 367). It is noteworthy that there were positive TPLF disclosures in a range of case types, including a taxpayer's suit (NOS 870), an Administrative Procedure Act case (NOS 899), and a qui tam action (NOS 376).

Funded Side. Most positive TPLF disclosures were filed by plaintiffs (101, 95%), although five were filed by defendants (including one each by an intervenor-defendant and a defendant-counterclaimant).[16]

---

[15] *See*, *e.g.*, U.S. Gov't Accountability Off., GAO-25-107214, Intellectual Property: Information on Third-Party Funding of Patent Litigation 14–15 (2024) (identifying patent litigation as the largest single case type for commercial litigation funding).

[16] Although it is less common, there is commercial TPLF on the defendant side. *See* Emily Samra, *The Business of Defense: Defense-Side Litigation Financing*, 83 U. Chi. L. Rev. 2299, 2303–04 (2017). However, the defendant positive TPLF disclosures in New Jersey tended to involve preexisting relationships (parent company, insurer) instead of arm's-length commercial funding. (The sealed TPLF disclosure was filed by a defendant, so the nature of that funding arrangement is unclear.) For example, in both *Delaware Riverkeeper Network v. Army Corps of Engineers* and *Delaware Riverkeeper Network v. Delaware River Basin Commission*, defendant Delaware River Partners, LLC (which intervened on the defense side in the *Army Corps of Engineers* case) disclosed that funding was being provided by Fortress Transportation and Infrastructure Investors LLC, which, through "indirect ownership" was the party's ultimate parent company. *See*, *e.g.*, Delaware Riverkeeper Network v. Army Corps of Engineers, ECF No. 49 (Delaware River Partners LLC's Disclosure Statement Pursuant to Rule 7.1.1), at 2, Aug. 5, 2021, 1:20-cv-04824 (D.N.J. Apr. 20, 2020), https://ecf.njd.uscourts.gov/doc1/119117748052. In short, some defendant positive TPLF disclosures were arguably not required by the terms of the local rule or were not the types of arrangements that were contemplated by the local rulemakers. The same is true on the plaintiff side, as discussed *infra*.

Contents. Disclosures filed in response to the local rule tend to be terse, a mere three sentences responding to the local rule's prompts, identifying the funder, typically specifying non-recourse funding, and denying that funder's approval is necessary for settlement. Because the local rule requires disclosure only of non-recourse funding, it makes sense that most positive TPLF disclosures specified non-recourse funding. The approval point is more interesting; the overriding issue in the TPLF literature is whether third-party funders exercise control over litigation decisions, such as when and whether to settle.[17]

Funders. On the plaintiff side, several major commercial third-party funders (or their subsidiaries) were disclosed—for example, Burford Capital, Omni Bridgeway, Longford Capital, Parabellum Capital, Bench Walk Advisors, and Augusta Ventures Ltd. Given the nature of current policy debates over third-party funding, it is noteworthy that funders from outside the United States (i.e., "place of formation" given as the United Kingdom, Canada, and Israel) were disclosed in the study period. The list of funders in the Appendix illustrates the complexity of funding structures, including multiple funds, subsidiaries, and special-purpose vehicles (SPVs).

Not all third-party funding was provided by commercial litigation funders. In *Morrill v. Fulop*, for example, plaintiffs disclosed funding from the Yale Law School Media Freedom and Information Access Clinic,[18] and in *Rachlin v. Baumann*, plaintiffs disclosed funding from the Firearms Policy Foundation, Inc.[19] It appears that in both instances the funders expected reimbursement from any attorney fees awarded by the court, but neither is an investor in the asset value of the underlying claims. Similar non-investors include a union providing initial support for individual plaintiffs in *Newark Teachers Union Local 481 v. City of Newark Board of Education*[20] and a pro bono law firm (Institute for Justice) backing the plaintiffs in *Lovaglio v. Baston*.[21] In *Eastern Appliances Inc. v. Brother Appliances*, plaintiffs disclosed that a third-party warehouse provider LLC was backing its litigation in order to protect the LLC's own commercial interests.[22] Insurance companies were disclosed as third-party funders in two cases discussed

---

[17] *See*, *e.g.*, Seth Katsuya Endo, *Preventive Transparency in Third-Party Litigation Funding*, 120 Nw. L. Rev. 501 (2025).

[18] *See* Morrill v. Fulop, ECF No. 12 (Plaintiff's Rule 7.1.1 Disclosure Statement), at 2, Jan. 1, 2024, 2:23-cv-23197 (D.N.J. Dec. 18, 2023), https://ecf.njd.uscourts.gov/doc1/119120813156.

[19] *See* Rachlin v. Baumann, ECF No. 6 (Notice of Disclosure of Third-Party Litigation Funding Pursuant to Local Civ. Rule 7.1.1), at 1, Sept. 21, 2021, 3:21-cv-15343 (D.N.J. Aug. 16, 2021), https://ecf.njd.uscourts.gov/doc1/119117928545.

[20] Newark Teachers Union Local 481 v. City of Newark Bd. of Educ., ECF No. 24 (L.Civ. R. 7.1.1 Third Party Litigation Funding Disclosure), at 1, Dec. 28, 2022, 2:22-cv-00271 (D.N.J. filed Jan. 20, 2022), https://ecf.njd.uscourts.gov/doc1/119119384284 ("The NTU funded an initial total retainer of Six Thousand Dollars ($6,000.00) -$2,000.00 on behalf of each individual Plaintiff to be reimbursed out of any settlement and/or recovery."). Given that the union local was also a party, the terms of the local rule probably did not apply here.

[21] Lovaglio v. Baston, ECF No. 9 (Rule 7.1.1 Third-Party Litigation Funding Disclosure), at 2, Dec. 1, 2023, 3:23-cv-21803 (D.N.J. Nov. 2, 2023), https://ecf.njd.uscourts.gov/doc1/119120668321 ("The Institute is providing that funding as part of its mission to secure greater constitutional protections for all New Jersey residents.").

[22] *See* Eastern Appliances Inc. v. Brother Appliances, ECF No. 3 (Rule 7.1.1 Disclosure Statement), at 1, Dec. 12, 2022, 2:22-cv-07228 (D.N.J. Dec. 12, 2022), https://ecf.njd.uscourts.gov/doc1/119119342749 ("Frontier is funding the litigation in order to protect its interest in the 'Appliances 4 Less' Distribution Network.").

infra. It is not for this report to determine whether these third-party interests satisfy the local rule's definition of "(1) a contingent financial interest based upon the results of the litigation or (2) a non-monetary result that is not in the nature of a personal or bank loan, or insurance." But rulemakers considering how to frame possible disclosure obligations may be interested to learn that these types of funding arrangements are disclosed under the district's local rule.

Funded entity. One issue that arises in the TPLF policy debate is whether third-party funding is provided to a party or to a law firm. In a handful of disclosures, a law firm rather than a party (client) is identified as the recipient of third-party funding. In *Pogona, LLC v. Merck, Sharp & Dohme LLC*, for example, the disclosure states that the plaintiff "does not receive any funds directly."[23] In *United Healthcare Services v. Celgene Corp.*, the disclosure states that the funding is non-recourse "receivables financing provided" to the law firm and that the party is "not in privity" with the funder.[24] Many disclosures do not make clear whether funding is received by a law firm or a party. This may be a drafting issue: L. Civ. R. 7.1.1 requires the funder's identity, whether approval is required, and the nature of the financial interest but not explicitly the identity of the funder's counterparty—although identifying the counterparty is arguably part of describing the nature of the financial interest.

Control. A handful of TPLF statements disclosed that a third-party funder had approval rights over settlement or litigation decisions. However, the third-party funders in these cases were not commercial litigation funders but rather insurance companies,[25] an interest group,[26] a business competitor,[27] and a strategic investor.[28] These examples indicate that control plays out differently in some disclosure cases, where the issue is less about investors, otherwise strangers to the underlying litigation, and more about identifying the real party in interest under Fed. R.

---

[23] Pogona, LLC v. Merck Sharp & Dohme, ECF No. 29 (Plaintiff Pogona, LLC's Rule 7.1.1 Disclosure Statement), at 2, Feb. 18, 2026, 2:25-cv-15294 (D.N.J. Sept. 5, 2025), https://ecf.njd.uscourts.gov/doc1/119123598338.

[24] United Healthcare Services Inc. v. Celgene Corp., ECF No. 98 (Plaintiff's Local Rule 7.1.1 Statement), at 2, August 27, 2021, 2:20-cv-18531 (D.N.J. filed Dec. 8, 2020), https://ecf.njd.uscourts.gov/doc1/119117834581.

[25] *See* The Urology Clinic, P.C. v. Sharp Elecs. Corp., ECF No. 13 (Plaintiff's Local Rule 7.1.1 Disclosure of Third Party Litigation Funding), at 1, Mar. 3, 2022, No. 2:21-cv-18053 (D.N.J. filed Oct. 4, 2021), https://ecf.njd.uscourts.gov/doc1/119118466851 (disclosing that insurer is subrogee and "retains some control on decisions pertaining to litigation and settlement in this suit"); Campoverde v. Pringle, ECF No. 2 (Local rule 7.1.1 Statement of Third-Party Litigation Funding), at 2, Feb. 2, 2026, 2:25-cv-18097 (D.N.J. Dec. 2, 2025), https://ecf.njd.uscourts.gov/doc1/119123536249 (disclosing that "approval is necessary for litigation decisions or settlement decisions in the action pursuant to the terms of the insurance policy").

[26] *See Rachlin*, Notice of Disclosure, at 1 (disclosing that the Firearms Policy Foundation's "approval is necessary for litigation decisions in the action").

[27] *See Eastern Appliances*, Rule 7.1.1 Disclosure, at 1 ("Frontier's approval is necessary for litigation decisions or settlement decisions in this action, pursuant to an informal arrangement between Frontier and Eastern. There is no written agreement governing the arrangement.").

[28] This one is complex. One plaintiff in the action, RareGen, had arrangements with two separate funders, the latter of which was disclosed to "control[] the litigation." Sandoz Inc. v. United Therapeutics Inc., ECF No. 314 (Disclosure Regarding Third-Party Litigation Funding), at 2, Aug. 5, 2021, 2:19-cv-10170 (D.N.J. April 16, 2019), https://ecf.njd.uscourts.gov/doc1/119117748517. Moreover, plaintiff RareGen was, per the terms of the agreement, "not . . . entitled to any proceeds resulting from, or bear any financial or other liability for, this litigation." *Id.*

Civ. P. 17(a).[29] This plays out in the assignment context, where the funded-assignee is often the named plaintiff—most prominently in the many related Daniel's Law litigation cases during the study period[30] but also in the cases brought by WinView, Inc., against online gambling platforms, in which the original plaintiff requested that defendants "stipulate to the substitution of WinView IP Holdings, LLC [assignee] into the case."[31] In short, both Fed. R. Civ. P. 17(a) and 25(c) are more relevant to the discussion of TPLF in a rulemaking context than they may at first appear.

The takeaway point, perhaps, is one that has been raised in past meetings of the advisory committee. There are various ways in which investors may seek a return from litigation, just as there are different goals that third parties seek through supporting litigation. The operation of L. Civ. R. 7.1.1 in the District of New Jersey shows that, even if disclosures are made in a relatively small number of civil cases, funding arrangements take many forms; this is relevant in any consideration of national rulemaking.

[29] *Cf.* Nimitz Techs. LLC v. CNET Media, Inc., No. 21-1247, 2023 WL 8187441, at *3 (D. Del. Nov. 27, 2023) (concluding that non-parties were perpetrating an elaborate fraud on the court, concealing "real parties in interest in the patents in these cases, including a foreign government" from "the PTO, defendants, or the Court").

[30] *See*, *e.g.*, Atlas Data Privacy Corp. v. We Inform, LLC, 758 F. Supp. 3d 322, 332–33 (D.N.J. 2024) (involving challenge to privacy lawsuits brought by assignee of privacy rights, which was receiving TPLF).

[31] WinView Inc. v. DraftKings Inc., ECF No. 72 (Local Rule 7.1.1 Disclosure Statement), at 2 n.1, Jan. 21, 2025, 3:21-cv-13405 (D.N.J. July 7, 2021), https://ecf.njd.uscourts.gov/doc1/119122128050.

Appendix: Positive TPLF Disclosures

Year	Case Caption	Docket Number	Funder
2021	Delaware Riverkeeper Network v. Army Corps of Engineers	1:20-cv-04824	Fortress Transportation and Infrastructure Investors LLC
2021	Delaware Riverkeeper Network v. Delaware River Basin Comm'n	1:21-cv-01108	Fortress Transportation and Infrastructure Investors LLC
2021	Absorption Pharms., LLC v. Reckitt Benckiser, LLC	2:17-cv-12872	Omni Bridgeway (Fund 1) LLC
2021	Sandoz Inc. v. United Therapeutics Corp.	2:19-cv-10170	Henderson SPV, LLC and PBM RG Holdings, LLC
2021	Pedoto v. Seton Hall Univ.	2:20-cv-15831	Legalist Fund III, LP
2021	United Healthcare Servs., Inc. v. Celgene Corp.	2:20-cv-18531	PBNHPM Finance LLC
2021	Evolve Interactive LLC v. LG Elecs. USA, Inc.	2:21-cv-18412	Endpoint IP LLC
2021	Wurth USA, Inc. v. Thompson	2:21-cv-19877	Winzer Corporation
2021	Intervet, Inc. v. Mileutis Ltd.	3:15-cv-01371	[under seal]
2021	In re Johnson & Johnson Talcum Powder Products Marketing, Sales Pracs. and Prods. Liab. Litig. (MDL No. 2738) (Morelli)	3:16-md-2738	TR Global Funding II, LLC & TR Global Funding II Follow-On, LLC
2021	In re Johnson & Johnson Talcum Powder Products Marketing, Sales Pracs. and Prods. Liab. Litig. (MDL No. 2738) (Potts)	3:16-md-2738	Virage Capital Management, LP
2021	In re Johnson & Johnson Talcum Powder Products Marketing, Sales Pracs. and Prods. Liab. Litig. (MDL No. 2738) (Segal)	3:16-md-2738	Segal Law Firm co-counsel (identity withheld via privilege claim)
2021	Rachlin v. Baumann	3:21-cv-15343	Firearms Policy Foundation, Inc.
2022	Guy A. Shaked Investments, LLC v. Ontel Prods. Corp.	1:20-cv-09901	Mossco Capital Inc. (Canada)
2022	The Urology Clinic, PC v. Sharp Elecs. Corp.	2:21-cv-18053	Great American Insurance Group ("GAIG")
2022	Newark Teachers Union Local 481 v. City of Newark Bd. of Educ.	2:22-cv-00271	Newark Teachers Union Local 481
2022	Hulse v. Aucta Pharms., Inc.	2:22-cv-04628	Legalist Fund III, LP

2022	Eastern Appliances Inc. v. Brother Appliances	2:22-cv-07228	Frontier Investment Group LLC
2023	Microspherix LLC v. Merck Sharp & Dohme Corp.	1:17-cv-03984	Law Finance Group and Zepata SPV, LLC
2023	Rochester Drug Coop. Inc. v. Eli Lilly & Co. [In re Insulin Pricing]	2:20-cv-03426	Legalist Fund III, LP
2023	Jawbone Innovations, Inc. v. Sony Elecs. Inc.	2:23-cv-01161	Longford Capital Fund III, LP
2023	Local No. 1 Health Fund v. Eli Lilly & Co. [In re Insulin Pricing]	2:23-cv-21160	Legalist Fund III, LP
2023	M. Cohen and Sons, Inc. v. Platte River Ins. Co.	3:20-cv-02149	Bench Walk 23R, L.P.
2023	Royzenshteyn v. Onyx Enters. Canada Inc.	3:22-cv-07514	VF Asset Holdings, LLC
2023	Lovaglio v. Baston	3:23-cv-21803	Institute for Justice
2024	Atlas Data Privacy Corp. v. Blackbaud, Inc.	1:24-cv-03993	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Whitepages, Inc.	1:24-cv-03998	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Hiya, Inc.	1:24-cv-04000	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. We Inform, LLC	1:24-cv-04037	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Infomatics, LLC	1:24-cv-04041	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. The People Searchers, LLC	1:24-cv-04045	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Corporate Real Estate Exchange, Inc.	1:24-cv-04073	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. DM Group, Inc.	1:24-cv-04075	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Carco Group Inc.	1:24-cv-04077	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Deluxe Corp.	1:24-cv-04080	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Twilio Inc.	1:24-cv-04095	Atlas Litigation Support LLC (Parabellum Capital LLC)

2024	Atlas Data Privacy Corp. v. Delvepoint, LLC	1:24-cv-04096	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Quantarium Alliance, LLC	1:24-cv-04098	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Yardi Systems, Inc.	1:24-cv-04103	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. 6Sense Insights, Inc.	1:24-cv-04104	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Lightbox Parents, LP	1:24-cv-04105	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Search Quarry, LLC	1:24-cv-04106	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Acxiom LLC	1:24-cv-04107	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Digital Safety Prods., Inc.	1:24-cv-04141	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Civil Data Research	1:24-cv-04143	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Scalable Commerce, LLC	1:24-cv-04160	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Epsilon Data Mgt., LLC	1:24-cv-04168	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. People Data Labs, Inc.	1:24-cv-04171	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Labels & Lists, Inc.	1:24-cv-04174	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Claritas, LLC	1:24-cv-04175	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Innovis Data Solutions Inc.	1:24-cv-04176	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Accurate Append, Inc.	1:24-cv-04178	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Data Axle, Inc.	1:24-cv-04181	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Remine Inc.	1:24-cv-04182	Atlas Litigation Support LLC (Parabellum Capital LLC)

2024	Atlas Data Privacy Corp. v. Lusha Systems, Inc.	1:24-cv-04184	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Teltech Systems, Inc.	1:24-cv-04217	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Peopleconnect, Inc.	1:24-cv-04227	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. CoreLogic, Inc.	1:24-cv-04230	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Black Knight Techs., LLC	1:24-cv-04233	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Zillow, Inc.	1:24-cv-04256	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Equimine, Inc.	1:24-cv-04261	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Thomson Reuters Corp.	1:24-cv-04269	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Choreograph, LLC	1:24-cv-04271	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Transunion, LLC	1:24-cv-04288	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Melissa Data Corp.	1:24-cv-04292	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Equifax Inc.	1:24-cv-04298	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Spokeo, Inc.	1:24-cv-04299	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Restoration of America	1:24-cv-04324	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. i360, LLC	1:24-cv-04345	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Telniyx LLC	1:24-cv-04354	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. GoHunt, LLC	1:24-cv-04380	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Accuzip, Inc.	1:24-cv-04383	Atlas Litigation Support LLC (Parabellum Capital LLC)

2024	Atlas Data Privacy Corp. v. Synaptic Tech., LLC	1:24-cv-04385	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Joy Rockefeller Enterprises, Inc.	1:24-cv-04389	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Fortnoff Financial, LLC	1:24-cv-04390	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. MyHeritage, Ltd.	1:24-cv-04392	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. E-Merges.com Inc.	1:24-cv-04434	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Wiland, Inc.	1:24-cv-04442	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Atdata, LLC	1:24-cv-04447	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Precisely Holdings, LLC	1:24-cv-04571	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Nuwber, Inc.	1:24-cv-04609	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Rocketreach LLC	1:24-cv-04664	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Outside Interactive, Inc.	1:24-cv-04696	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Valiassis Digital Corp.	1:24-cv-04770	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. The Lifetime Value Co. LLC	1:24-cv-04850	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Belles Camp Comms. Inc.	1:24-cv-04949	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. First Am. Fin. Corp.	1:24-cv-05334	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. PropertyRadar, Inc.	1:24-cv-05600	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. The Alesco Group, LLC	1:24-cv-05656	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. SearchBug, Inc.	1:24-cv-05658	Atlas Litigation Support LLC (Parabellum Capital LLC)

2024	Atlas Data Privacy Corp. v. Amerilist, Inc.	1:24-cv-05775	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. LexisNexis Risk Mgt., LLC	1:24-cv-06160	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. US Data Corp.	1:24-cv-07324	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	Atlas Data Privacy Corp. v. Smarty, LLC	1:24-cv-08075	Atlas Litigation Support LLC (Parabellum Capital LLC)
2024	PBF Holding Co. LLC v. United States	2:23-cv-21546	Ryan Excise Tax Service, LLC
2024	Morrill v. Fulop	2:23-cv-23197	Yale Law School Media Freedom and Information Access Clinic; Weissman & Mintz (counsel as funders)
2024	Seward v. Ludden	3:24-cv-06295	PHDS 1 LLC
2025	United States ex rel. Bolinger v. 24th St., Inc.	3:18-cv-15446	JADEA, LLC
2025	WinView Inc. v. DraftKings Inc.	3:21-cv-13405	WIN IP Finance, LLC
2025	WinView Inc. v. FanDuel, Inc.	3:21-cv-13807	WIN IP Finance, LLC
2025	WinView IP Holdings, LLC v. DraftKings Inc.	3:25-cv-01143	WIN IP Finance, LLC
2025	WinView IP Holdings, LLC v. FanDuel Inc.	3:25-cv-01146	WIN IP Finance, LLC
2026	OOVEE, Ltd. v. S3D Interactive, Inc.	2:25-cv-14932	Augusta Ventures Ltd. (UK)
2026	Pogona, LLC v. Merck Sharp & Dohme LLC	2:25-cv-15294	Subsidiary of Burford Capital Limited (Guernsey)
2026	Campoverde v. Pringle	2:25-cv-18097	United Financial Casualty Co.
2026	Bullpup Scientific Ltd. v. Becton, Dickinson & Co.	2:26-cv-00839	LitiVest Fund 1, Limited Partnership (Israel)

TAB 6

Rule 23—Superiority; "Service" Awards; Pre-Certification Settlement Approval

Various proposals to amend Rule 23, first discussed during the October 2025 Advisory Committee meeting, remain on the agenda:

- a provision to resolve a circuit split on the legality of service awards to class representatives;
- a provision that would expand judges' authority to review settlements between a class representative and a defendant prior to class certification; and
- a provision that would explicitly allow judges to consider privately administered out-of-court remedies (such as refunds and recalls), as opposed to only "other methods for fairly and efficiently adjudicating the controversy," when applying the superiority requirement of Rule 23(b)(3).

In the weeks leading up to the April 2026 meeting, the committee also received several submissions in support of amending the "superiority" requirement.[1] At that meeting, there was a consensus that the reporters should continue monitoring these issues, but that work on them should await resolution of other matters that are further along, in particular, the projects involving remote testimony and third-party litigation funding.

Committee members expressed their awareness of the importance of these issues and the potential broad scope of an effort to revise Rule 23 due to the number of potential reform proposals such an effort would attract. As two Standing Committee attorney members noted at the January 2026 meeting, and an Advisory Committee member repeated at our April 2026 meeting: "I've got five other Rule 23 issues I'd put in front of these." It may therefore be difficult to cabin a Rule 23 project to the three proposals we have already received. Moreover, several committee members suggested that investigation of Rule 23 should wait until the eventual publication of the revised Manual for Complex Litigation by the FJC.

As a result, the reporters have been monitoring incoming submissions and developments in Rule 23 case law, should the Advisory Committee eventually decide to undertake a Rule 23 project.

In either case, the reporters continue to monitor Rule 23-related issues for future consideration.[2]

[1] Suggestions 26-CV-9 (Amazon), 26-CV-10 (Fred Burnside), 26-CV-11 (DRI Center for Law and Public Policy), 26-CV-13 (General Motors LLC), 26-CV-14 (Shell USA, Inc.), 26-CV-15 (Proctor & Gamble Company), and 26-CV-17 (Ford, Toyota, Volkswagen, and Hyundai) were received in March and April 2026 and each supports the proposed amendment.

[2] One new suggestion regarding Rule 23 (26-CV-19) is covered later in this agenda book at Tab 14.

TAB 7

Right of Representative to Attend Rule 35 Examinations

The American Association for Justice (AAJ) proposes that Rule 35(a) be amended to add new paragraphs entitling the party subject to examination to have a representative present at the examination and/or to record the examination. The proposed changes are as follows:

Rule 35. Physical and Mental Examinations

(a) Order for an Examination

(1) ***In General.*** The court where the action is pending may order a party whose mental or physical condition—including blood group—is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.

(2) ***Representative at Examination.*** The party being examined may have a representative present at the examination, who may observe but not disrupt the examination.

(3) ***Recording of Examination.*** Unless otherwise ordered by the court, the party being examined or that party's representative may record the examination by video or alternative means, which shall be made in an unobtrusive manner.

(42) * * * * *

The AAJ proposal urged that Rule 35 be "updated" in keeping with the practices in some states that provide such measures in connection with court-ordered medical examinations.

During the Advisory Committee's April 2026 meeting, an interest was expressed in further analysis of this proposal, and the resolution was to obtain more information about the state practices mentioned in the submission and also about federal-court practice under current Rule 35. This memorandum reports on that work.

Since the April meeting, significant follow-up investigation has occurred. The Federal Judicial Center determined that the National Center for State Courts has no studies regarding physical or mental examinations. The FJC has, however, prepared a chart identifying state provisions that differ from Rule 35. That chart is included in this agenda book. A review of that chart indicates that state court rules are not uniform in what they permit or require.

The FJC's chart reveals that most states appear to have no rule provisions for attendance of right by a representative or recording of right. States that provide some right for a representative to attend appear to permit that only in focused circumstances. For example, if the person to be examined is a minor, Louisiana permits a parent, tutor or legal guardian to be present. Though Nevada permits the party to be examined to request that the court condition the order to submit to the examination, it also forbids attendance of an observer for a neuropsychological, psychological, or psychiatric examination unless the court so orders. In New Jersey, if the observer will be an

expert witness, the observer's CV must be provided. In South Carolina, the party's physician is permitted to be present.

Other differences between state law provisions and current Rule 35 may warrant mention. Under an amendment to Rule 35 in 1991, the court may order an examination by a "suitably licensed or certified examiner," not just a physician. But the North Carolina rule permits an order only for an examination by a physician. At least some defense-side lawyers suggest that, when there may be a reason to want a psychological examination of the plaintiff, that need could be a reason to remove the case to federal court, where such court-ordered examinations are permitted.

In short, though some states have provisions like the ones the submission endorses, most states do not and some states (e.g., North Carolina) have provisions that are not as broad in significant ways as Rule 35.

Moreover, Rule 35 itself contains significant disclosure provisions. Plaintiffs can obtain the report of the examination and take the deposition of the examiner. Defendants can depose plaintiff's treating physicians and expert witnesses.

Sarah Sraders has done research on the handling of requests under Rule 35 for having an observer present or permitting a recording. The federal courts have not developed a general standard favoring or forbidding such measures, but instead have made individualized decisions about whether to direct that an observer be present or that a recording be allowed. Sarah Sraders' research memo is also included in this agenda book.

There does not seem to be a serious question about whether federal judges have authority to direct that an observer be present or that the examination be recorded. The Sraders memo does not indicate that judges are misusing that authority in making case-by-case decisions when a request is presented. Unless a rule amendment precluded a judicial order that no representative be present, or that recording not be permitted, it is not clear how much change in practice pursuing this submission would cause.

The decision at present is whether to pursue this submission. If further work is done, there will be subsidiary questions to be addressed. Some of them are listed in the footnote.[10]

---

[10] A number of potential questions have already emerged:

(1) Who may the party designate? Cal. Code Civ. Pro. § 2032.510(a) says that an "attorney for the examinee or for a party producing the examinee, or that attorney's representative" may attend. It does not mention parents, guardians, plaintiff's doctor, etc. Other states authorize only a limited category of observers.

(2) Should advance notice be required? Idaho Rule of Civil Procedure 35(a)(3) says that the examined party may have a representative "of his or her choice" present "[u]pon reasonable notice." In general, one would expect the parties to discuss the need for a court order before moving for one; having some sort of representative present would seem likely to be a part of such a meet-and-confer session.

(3) Should a rule prefer recording or the presence of a representative? The proposal seems to provide a right to do both simultaneously.

Attachment(s):

- Suggestion 26-CV-1 (American Association for Justice)
- Federal Judicial Center Report on State Practice
- S. Sraders August 26, 2026 Memorandum

---

(4) If there is a right for the examinee's lawyer to be present, should there also be a right for the adverse party's attorney or other representative to be present?

(5) Rather than create an absolute right, would it be preferable to "switch the default"? Arizona Rule of Civil Procedure 35(c)(1) says that the person examined has a right to have a representative present "[u]nless the presence of the representative may adversely affect the examination's outcome." Under *Lunceford v. Florida Central R.R., Inc.*, 728 So. 2d 1239, 1240 (Fla. Dist. Ct. App. 1999), the burden is on the party opposing presence of the third-party observer to establish grounds for excluding this person. Under *Metropolitan Property & Casualty Insurance Co. v. Overstreet*, 103 S.W.3d 31, 40 (Ky. 2003), one of the factors the court should consider is evidence that the examination might be conducted in an unfair manner. It is not clear that this is significantly different from current practice under Rule 35.

(6) Should a rule focus on having a medical professional present? Under *Rochen v. Huang*, 558 A.2d 1108, 1110-11 (Del. Super. 1988), a patient may have the patient's own health care practitioner present as witness at a psychological examination.

AMERICAN ASSOCIATION FOR JUSTICE®
The Association for Trial Lawyers

January 12, 2026

Carolyn A. Dubay, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

RE: Proposed Amendment to Rule 35: Physical and Mental Examinations

Dear Committee on Rules of Practice and Procedure:

The American Association for Justice ("AAJ") submits this suggestion to amend Rule 35 regarding compulsory medical examinations ("CMEs")[1] after hearing extensive complaints about discrepancies in the application of the rule by the courts, especially when compared to similar state rules. Rule 35 has not been amended since 2007, when the Advisory Committee on Civil Rules ("Advisory Committee") completed its general restyling of the Federal Rules of Civil Procedure. The last substantive change to the rule was made by amendment in 1991. It seems timely to review Rule 35 and issues in its application that have arisen in the decades since it was last amended. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury and wrongful death actions, employment rights cases, civil rights cases, consumer cases, class actions, and other civil actions, and regularly represent clients who are subjected to improper questioning and abuse during CMEs.

I. A Medical Exam Under Rule 35 Differs from a Patient Seeking Medical Care

Under Rule 35, a court may order a party whose mental or physical condition is in controversy to undergo a physical or mental examination by a licensed or certified examiner chosen by the party to the litigation. This medical examination has been referred to by many different names, including an independent medical examination ("IME") and a defense medical examination ("DME"). But these terms are inapt and imprecise. For instance, using the term "independent" is inaccurate, as the medical examiner is retained by the requesting party and is not truly providing an independent opinion.[2] While these examinations disproportionately affect

[1] Courts in Clay County, Florida, refer to the medical examinations as "compulsory medical examinations" or "CMEs" because the physician or healthcare provider was not chosen by the court" and thus, cannot be referred to as "independent" to the jury. CLAY COUNTY CLERK OF COURT, GUIDELINES FOR COUNSEL REGARDING COMPULSORY MEDICAL EXAMINATIONS (CME) CONDUCTED PURSUANT TO FLA. R. CIV. P. 1.360(A)(1)(A) & IF ORDERED (B), AS WELL AS 1.360(B) AND 1.390(B) & (C) (Nov. 2, 2020).

[2] The independent nature of the medical evaluation is especially questionable when insurers hire the evaluators. Shanil Ebrahim et al., *Ethics and Legalities Associated with Independent Medical Evaluations*, 186(4) CAN. MED. ASS'N J. 248 (Mar. 4, 2014); Robert F. Spencer, Letter to the Editor, *Are Independent Medical Examiners Truly Independent?*, PAIN PHYSICIAN J., 2010, at 92 ("When physicians receive a substantial portion of their income from

plaintiffs bringing personal injury claims, they can be ordered for any party; thus, DME is too narrow a term.[3] AAJ believes that compulsory medical examination or "CME" accurately captures the nature of these examinations, which are outside the scope of a standard doctor-patient relationship and are not voluntary.

II. Federal Courts Have Applied the Rule Narrowly, Resulting in Unfair and Traumatizing Treatment of Injured Plaintiffs

Unlike many state court rules, there is no requirement in Rule 35 that a plaintiff be accompanied to a medical examination by a representative[4] or that the examination be recorded[5]. Frequently, this results in an examination well beyond the scope authorized in the court's order under Rule 35(a)(2)(B). If the plaintiff, who is subjected to the examination, questions the medical professional performing the examination, they are often met with disparagement, belittling, and worse. In some instances, the plaintiff may be afraid to question the authority of the medical professional or may not have the confidence, language skills, or fortitude to do so. For plaintiffs who suffer from a variety of serious injuries, including traumatic brain injuries, post-traumatic stress disorders, or psychological disorders, these hostile interactions can inflict additional harm. Inappropriate, aggressive medical examination questions are designed to confuse and even trap plaintiffs, who just want the examination to stop but are unable to interrupt the relentless nature of certain medical professionals.

Importantly, the medical examination is not performed by a neutral third party, but by an examiner engaged by an adverse party—completely different from medical treatment sought by the plaintiff. There is considerable risk that the exam could become a de facto deposition, where privileged and irrelevant subjects may be discussed and reported without any knowledge of plaintiff's counsel. Additionally, some medical professionals repeatedly are engaged by defense interests, such as insurance companies, to perform CMEs. Whereas an individual plaintiff is only undergoing the examination due to a court order, the medical professional has an existing relationship with opposing counsel.[6]

If the plaintiff attorney brings the matter of the improper medical exam to limit evidence outside the scope of the order, it is often not well-received and properly limited by the court. Even worse, juries are often more inclined to believe a well-spoken and well-dressed medical

---

performing IMEs (or if their hourly rate for IMEs is significantly greater than their hourly rate for patient care), they will not be independent.").

[3] *Schlagenhauf v. Holder*, 379 U.S. 104, 113 (1964) ("Rule 35, on its face, applies to all 'parties,' which, under any normal reading, would include a defendant.").

[4] *See* Samuel D. Hodge, Jr., Melissa Thomas, & Connor Lacy, *A Guide to the Independent Medical Examination*, 25(2) ALB. L.J. SCI & TECH 339, 358 (2015) ("The federal courts have been largely uniform in rejecting the right for an attorney to be present at an IME.").

[5] *Id.* at 366 ("The federal district courts generally hold that recording devices will not be allowed unless good cause for its use is shown.").

[6] Dorothy Sims, Chris Dove, & Richard Frederick, *Transparency in Forensic Exams*, 24 NEV. L.J. 531, 537 (2024) ("Because the expert is paid by the defendant, the expert can expect future business or referrals if her testimony is successful at defeating the claim or suppressing the settlement value of the claim in the event the jury goes with the defense expert's opinion.").

professional—even one who denies wrongdoing on the stand—than a plaintiff from a lower socioeconomic background who may have difficulty articulating the harm caused by a barrage of questioning. This is especially true when the plaintiff is already suffering from underlying physical or mental injury let alone understanding the medical terminology used by the medical professional.

III. Two Proposed Rule Changes Would Solve the Problem

AAJ proposes two changes to the rules that would address these troubling issues. The first change would allow for a representative of the party being examined to be present at the medical examination. Not only does the presence of representative prevent disparagement of the plaintiff, but it would also ensure that the plaintiff's attorney can properly assess whether the medical examination was properly given and reported.[7] Second, AAJ recommends adding an option in the rule to record the examination. The changes would ensure that any inconsistencies on what transpired at the examination can be reviewed and resolved by the court while maintaining any privacy concerns of the person being examined.

A. Add an optional representative for the party being examined

The presence of the representative would be discretionary to ensure that the party undergoing the medical exam is comfortable with the presence of an additional person during the medical examination. The proposed text (attached) would make clear that the representative may not disrupt the examination. If the medical examination is conducted properly, there should be no disruption whatsoever. However, if the CME results in disparagement or beratement of the party being examined, the representative can assist in stopping the harassment. The accompanying Committee Note could provide examples of individuals who are considered appropriate representatives, including the counsel of record and other persons designated by the counsel of record. Importantly, the parent or guardian of a minor child should *not* be considered the designated representative under this amendment, as that individual may also need to attend a medical examination with the child to provide care and comfort.[8]

B. Add a recording option

The second change would permit the party being examined—or that party's representative—to record the examination. Again, the recording is a discretionary option, but may be especially helpful for the plaintiff who does not wish for a representative to be present during a psychological examination. A recording ensures accountability and impartiality in the medical examination and deters a medical professional from conducting an exam where the plaintiff is manipulated, exposed to severe distress or psychological exploitation, or treated in an

[7] *Id.* at 540 ("When courts deny an injured party's request to videorecord their examination by a defense medical or psychological expert, the court deprives the injured party of a meaningful way of determining whether the expert properly administered the test and then correctly reported the results.").

[8] *See, e.g.*, Fla. R. Civ. P. 1.360(a)(1)(C) (providing that "[a]ny minor required to submit to examination pursuant to this rule shall have the right to be accompanied by a parent or guardian at all times during the examination, except upon a showing that the presence of a parent or guardian is likely to have a material, negative impact on the minor's examination").

unprofessional manner. Recordings could be audio only or video, depending on the type of examination with the option of allowing the party to select the type of recording.

Studies of recorded CMEs reveal a number of disturbing behaviors by medical professionals, even by those who knew they were being recorded. These documented failures include: (1) tests that were never administered by a trained professional; (2) misrepresentation of tests, including falsely claiming that tests were performed; (3) complete abandonment of standardized procedures; and (4) changing or improperly influencing test answers.[9] A recording can document whether the medical examination was properly conducted and whether the reported results comport with the examination and even help determine whether the medical professional was competent to perform the exam.[10]

C. Privacy concerns are adequately addressed with the proposal

Privacy concerns are not a valid reason to oppose this suggestion. While AAJ strongly supports privacy protections for plaintiffs, the recording would be optional for the party undergoing the examination and is designed to ensure transparency. The privacy interest belongs to the person undergoing the examination, not the medical professional conducting the examination.[11]

Some arguments against video recording (and a representative attending the examination) ignore the realities of modern litigation as well as expectations regarding video recordings. At numerous stages in a case, including depositions, hearings, and trial, parties are questioned and recorded with multiple people present.[12] People are aware that mobile phones and cameras are capturing their movements and are aware that their images are frequently captured on camera. Precluding a party from recording the exam affords the medical professional more protection than if they simply walked across the street and were video recorded by CCTV cameras or other people.[13]

---

[9] The article details a litany of problems with medical exams, including medical examinations that were not actually conducted, a medical examination conducted by a secretary instead of a licensed medical professional, stating that the results of the medical examination were normal when the video recording indicated otherwise, altering the answers provided by the examinee, conducting the examination next to a construction site, and providing prompts to the plaintiff to answer the question. *See* Sims et al., *supra* note 6, at 549–55.

[10] A recent article regarding examinations performed in Washington state documented problems with the medical examinations, including over-reliance on doctors well-past retirement age: "In a recording of Lorick's [injured truck driver's] most recent exam in September 2024, the examiner appears to urinate on himself. The doctor, in his late 80s, is shown standing over Lorick during the exam. As the doctor turns to the camera, a dark spot on his pants can be seen where there was not a spot before. The doctor then quickly exits the room, returning shortly afterward to finish the exam. 'He seemed to be so mentally out-of-it that he didn't even notice it was a concern,' said David Lauman, a lawyer at the firm representing Lorick." Lizz Giordano, *Retired Docs Earn Millions Examining Injured Washington Workers*, Cascade PBS, Aug, 22, 2025.

[11] Hodge, Jr., et al., *supra* note 4, at 364 ("The privacy interest at an independent medical examination is that of the patient's and not the doctor's privacy right. Therefore, it is the patient's decision to waive their privacy right and allow the exam to be videotaped.").

[12] Sims et al., *supra* note 6, at 581.

[13] *Id.*

IV. State Courts Rules Provide Successful Examples

Many state courts have updated their rules and provide a template for modernizing Rule 35.[14] One state to consider is California, which authorizes both an "observer" and the recording of the proceeding:

> (a) The attorney for the examinee or for a party producing the examinee, or that attorney's representative, shall be permitted to attend and observe any physical examination conducted for discovery purposes, and to record stenographically or by audio technology any words spoken to or by the examinee during any phase of the examination.
>
> (b) The observer under subdivision (a) may monitor the examination, but shall not participate in or disrupt it.[15]

The California rule also affirmatively permits a motion for a protective order if either the medical examiner or the observer become abusive.[16]

Washington state has a similar rule which provides for both an observer and an opportunity to make an audiotape recording of the examination with a videotape recording available by consent of the parties or order of court:

> Unless otherwise ordered by the court, the party being examined or that party's representative may make an audiotape recording of the examination, which shall be made in an unobtrusive manner. A videotape recording of the examination may be made on agreement of the parties or by order of the court. [17]

More updated state rules permit video recordings as the optimal method to record medical examinations. Some states may specify that, "The plaintiff also has the right to designate an additional person to be present and video record the examination."[18] These rules provide greater flexibility for who accompanies the party to the medical examination. Arizona's rule similarly specifies that the person recording the examination may be a different person than the representative attending on behalf of the person to be examined.[19] Finally, while Florida's rule[20] is similar to the federal rule, extensive local rules provide for both representatives to

---

[14] *See, e.g.*, OKLA. STAT. ANN. tit. 12, § 3235); Ariz. R. Civ. P. 35(b)–(c); Idaho R. Civ. P. 35(a)(3); 735 ILL. COMP. STAT. ANN. 5/2-10039(d); and Pa. R. Civ. P. 4010(a)(4)–(5).

[15] Cal. Civ. Proc. Code § 2032.510.

[16] While this language might serve as a deterrent, it is not needed at the federal level where Rule 26 would already permit a party to seek a protective order.

[17] Wash. Super. Ct. Civ. R. 35.

[18] 735 ILL. COMP. STAT. ANN. 5/2-10039(d).

[19] Ariz. R. Civ. P. 35(b)–(c) (requiring 30 days' notice of the examination, including whether, how, and by whom it will be recorded).

[20] Fla. R. Civ. P. 1.360.

examinations and recordings to be made by the party undergoing examination.[21] These rules provide additional protections to the party undergoing examination, such as prohibiting questions from the medical examiner to the party being examined regarding fault and prohibiting the defense attorney from recording the examination.[22] While this section is not a comprehensive review of state rules, it may provide the Advisory Committee with some helpful guidance on the success of some states in addressing the problems caused by traumatizing CMEs.

V. Conclusion

AAJ urges the Advisory Committee to revise Rule 35 to protect parties from abusive and traumatizing treatment when undergoing court-ordered medical examinations through two simple, discretionary changes: (1) providing for a representative to attend with the party, and (2) allowing for a recording of the examination that would protect the party from traumatic or inappropriate treatment while ensuring flexibility when it may be needed. Please direct any questions regarding these comments to Susan Steinman, Senior Director of Policy & Senior Counsel, at susan.steinman@justice.org.

Respectfully submitted,



Bruce Plaxen
President
American Association for Justice

[21] *See* SEVENTH JUDICIAL CIRCUIT COURT OF FLORIDA, GUIDELINES REGARDING COMPULSORY MEDICAL EXAMINATIONS CONDUCTED PURSUANT TO FLA. R. CIV. P. 1.360(A)(1)(A) AND 1.360(B) (April 2017), ("One of Plaintiff's counsel, or a representative thereof, a videographer, a court reporter, an interpreter, if necessary, and, if a minor, a parent or guardian may attend the compulsory medical examination. No other persons may attend without specific order of the Court.").

[22] Order Compelling 1.360 Examination, Hon. Paul L. Huey, 13th Judicial Circuit, Hillsborough Cnty. Fla. (last visited Dec. 17, 2025) (requiring "all parties involved" to observe enumerated conditions, such as "2. …. Questions pertaining to fault, when the Plaintiff hired his/her attorney, who referred the Plaintiff to any doctor, and what the Plaintiff to his attorney or any investigators are NOT permitted" and "6. Neither Defendant's attorney nor any of Defendant's representatives may attend, or observe, record or video the exam.").

ATTACHMENT

Rule 35. Physical and Mental Examinations

(a) Order for an Examination.

(1) *In General.* The court where the action is pending may order a party whose mental or physical condition—including blood group—is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.

(2) *Representative at Examination.* The party being examined may have a representative present at the examination, who may observe but not disrupt the examination.

(3) *Recording of Examination.* Unless otherwise ordered by the court, the party being examined or that party's representative may record the examination by video or alternative means, which shall be made in an unobtrusive manner.

(4)(~~2~~) *Motion and Notice; Contents of the Order.* The order:

(A) may be made only on motion for good cause and on notice to all parties and the person to be examined; and

(B) must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.

(b) Examiner's Report.

(1) *Request by the Party or Person Examined.* The party who moved for the examination must, on request, deliver to the requester a copy of the examiner's report, together with like reports of all earlier examinations of the same condition. The request may be made by the party against whom the examination order was issued or by the person examined.

(2) *Contents.* The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

(3) *Request by the Moving Party.* After delivering the reports, the party who moved for the examination may request—and is entitled to receive—from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them.

(4) *Waiver of Privilege.* By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have—in that action or any other action involving the same controversy—concerning testimony about all examinations of the same condition.

(5) *Failure to Deliver a Report.* The court on motion may order—on just terms—that a party deliver the report of an examination. If the report is not provided, the court may exclude the examiner's testimony at trial.

(6) *Scope.* This subdivision (b) applies also to an examination made by the parties' agreement, unless the agreement states otherwise. This subdivision does not preclude obtaining an examiner's report or deposing an examiner under other rules.

MEMORANDUM

TO: Judicial Conference Advisory Committee on Civil Rules

FROM: Emery G. Lee III, Senior Research Associate
Federal Judicial Center

DATE: September 18, 2026

RE: State Statutes and Rules Related to Physical and Mental Examinations

At its April 2026 meeting, the Advisory Committee on Civil Rules considered a proposal from the American Association for Justice to amend Fed. R. Civ. P. 35 to entitle any party subject to a physical or mental examination under the rule to have a representative present at, or to record, the examination. The submission from AAJ relied, in part, on state statutes or "updated" state rules supporting its argument for a federal rule amendment.[1] At the meeting, questions were raised about the state courts' experiences with physical and mental examinations and about the states' rules on the issue. I volunteered to contact colleagues at the National Center for State Courts (NCSC) to check whether they had any information on the issue. Soon after the conclusion of the meeting, I reviewed the NCSC website for relevant information. Finding none, I communicated with both an active and a retired NCSC researcher, neither of whom was aware of any NCSC work on the issue.

Next, I began to collect information on the state-level equivalents of Fed. R. Civ. P. 35, which may be court rules or statutes. The AAJ submission, which cited several relevant rules or statutes, was helpful here, as was (to a more limited extent) a law review article cited in the submission.[2] I reviewed each state's equivalent rule or statute to determine whether it provided for either the right to a representative at the examination or to record (by any means) the examination. My findings are compiled in the following table. Rule or statutory text is included in the table if the source material touched upon the proposed rights. For states with cells that read "No provision," I could not identify any text that touched upon the proposed rights; this does not mean that the state lacks an equivalent of Fed. R. Civ. P. 35, only that the rule or statutory text is

[1] Reporter's Memo, "Right of Representative to Attend Rule 35 Examinations," Advisory Committee on Civil Rules, Agenda Book, April 2026, at 426.

[2] Dorothy Sims, Chris Dove, & Richard Frederick, *Transparency in Forensic Exams*, 24 Nev. L.J. 531 (2024).

silent with respect to the rights to representation at, or to record, the examination. State rule text was included in the table even if the quoted language is discretionary; for example, the Michigan rule states that the order "*may* also provide that the attorney for the person to be examined may be present at the examination."[3] I note, in a few cells, where a right is governed by case law, when, for example, case law helps to distinguish what the rule text authorizes from what it leaves to the trial judge's discretion. There is (almost certainly) case law on the issues of representation at, or recording of, physical and medical examinations in every jurisdiction,[4] but I did not attempt to sort out the relevant case law of the 50 states plus Washington, D.C.

Most states seem to follow Fed. R. Civ. P. 35 in leaving the question of representation or recording examinations to the discretion of the trial judge. Beyond that, it is difficult to summarize the information in the table concisely. States vary in how they confer a right to representation at an examination and may distinguish between rights at physical versus mental examinations.[5] Some states provide specifically for who may (or may not) be present at the examination. Louisiana, for example, provides that a parent, tutor, or guardian may be present at an examination of a minor.[6] Similarly, South Carolina provides that "the physician of the party to be examined may be present at the examination."[7] Nevada permits observers at examinations but "not . . . the party's attorney or anyone employed by the party or the party's attorney."[8] Other states confer a broader right—for example, Idaho by rule provides that the examinee "must have the right to have a representative of his or her choice present for the examination."[9]

State rules with respect to recording also vary, distinguishing between different types of examinations (physical or medical versus mental or psychological)[10] and different types of recording (audio or video).[11]

---

[3] Mich. Ct. R. 2.311(A)(1).

[4] For example, Oklahoma statute provides for the right to a representative at the examination, 12 Okla. Stat. § 3235 (Physical and Mental Examinations of Persons), but the right to record a medical examination is based in case law. *See* Boswell v. Schultz, 175 P.3d 390, 399 (Okla. 2007) ("Accordingly, we hold that a party to a lawsuit who is required to submit to a medical examination pursuant to 12 O.S.2001 § 3235 is permitted to videotape the examination.").

[5] *See*, *e.g.*, Cal. Code Civ. P. § 2032.510(a) (providing that the party's attorney is "permitted to attend and observe any *physical* examination conducted for discovery purposes") (emphasis added).

[6] La. Code Civ. P. art. 1464(C).

[7] S.C.R. Civ. P. 35.

[8] Nev. R. Civ. P. 35.

[9] Idaho R. Civ. P. 35(a).

[10] *See*, *e.g.*, Mich. Ct. R. 2.311(A)(2) ("Upon request of a party, the order may also provide that [] a *mental* examination be recorded by video or audio.") (emphasis added).

[11] *See*, *e.g.*, Nev. R. Civ. P. 35(a)(3) ("On request of a party or the examiner, the court may, for good cause shown, require as a condition of the examination that the examination be *audio* recorded.") (emphasis added).

State	Rule/Statute	Representative present	Recording
Alabama	Ala. R. Civ. P. 35 (Physical and Mental Examinations of Persons)	No provision	No provision
Alaska	Alaska R. Civ. P. 35 (Physical and Mental Examination of Persons)	No provision	No provision
Arizona	Ariz. R. Civ. P. 35(b)-(c) (Physical and Mental Examinations)	"(b) Attendance of Representative. The party or person to be examined may have a representative present during the examination unless the presence of the representative may adversely affect the examination's outcome."	"(c) Recording. Any party or the person to be examined may audio-record or video-record an examination, unless the recording may adversely affect the examination's outcome. The person recording the examination may be a different person from the representative described in Rule 35(b). A copy of the recording of an examination must be provided to any party upon request." Right of any party to audio/video record; court may only *limit* by least restrictive means, not prohibit (*Clayton v. Kenworthy*, 475 P.3d 310, 313 (Ariz. Ct. App. 2020))

Arkansas	Ark. R. Civ. P. 35 (Physical and Mental Examinations of Persons)	No provision	No provision
California	Cal. Code Civ. P. § 2032.510 (physical); § 2032.530 (mental)	"The attorney for the examinee or for a party producing the examinee, or that attorney's representative, shall be permitted to attend and observe any physical examination conducted for discovery purposes, and to record stenographically or by audio technology any words spoken to or by the examinee during any phase of the examination." Cal. Code Civ. P. § 2032.510(a). Attorney or representative right at physical exams; mental exams governed by case law (*Toyota Motor Sales v. Superior Court (Golfland)*, 108 Cal. App. 4th 739, 747 (2003))	Audio recording right at physical exams (attorney) and mental exams (examiner and examinee); video by court order (*Randy's Trucking, Inc. v. Superior Court*, 91 Cal. App. 5th 818 (2023)) "The examiner and examinee shall have the right to record a mental examination by audio technology." Cal. Code Civ. P. § 2032.530(a)
Colorado	Colo. R. Civ. P. 35 (Physical and Mental Examination of Persons)	No provision	No provision
Connecticut	Conn. Prac. Book, § 13-11	No provision	No provision
Delaware	Del. Super. R. Civ. P. 35 (Physical and mental examination of persons)	No provision	No provision

District of Columbia	D.C. R. Civ. P. 35 (Physical and Mental Examinations)	No provision	No provision
Florida	Fla. R. Civ. P. 1.360 (Examination of Persons)	"If the examination is to be recorded or observed by others, the request or response shall also include the number of people attending, their role, and the method or methods of recording." Fla. R. Civ. P. 1.360(a)(1)(A)	"If the examination is to be recorded or observed by others, the request or response shall also include the number of people attending, their role, and the method or methods of recording." Fla. R. Civ. P. 1.360(a)(1)(A)
Georgia	Ga. Code § 9-11-35 (Physical and mental examination of persons)	No provision	No provision
Hawaii	Haw. R. Civ. P. 35 (Physical and Mental Examination of Persons)	No provision (rules reverse for Workers Comp)	No provision
Idaho	Idaho R. Civ. P. 35(a)(3) (Physical and Mental Examinations)	"Representative at Examination. Upon reasonable notice, the party being examined or the person having custody or legal control of the person being examined, must have the right to have a representative of his or her choice present for the examination." Idaho R. Civ. P. 35(a)(3)	No separate provision, but Idaho R. Civ. P. 35(b)(3) mentions recordings made by a party

Illinois	735 Ill. Comp. Stat. 5/2-1003(d)	"(d) Whenever the defendant in any litigation in this State has the right to demand a physical or mental examination of the plaintiff pursuant to statute or Supreme Court Rule, relative to the occurrence and extent of injuries or damages for which claim is made, or in connection with the plaintiff's capacity to exercise any right plaintiff has, or would have but for a finding based upon such examination, the plaintiff has the right to have his or her attorney, or such other person as the plaintiff may wish, present at such physical or mental examination. . . ."	"(d) . . . . The plaintiff also has the right to designate an additional person to be present and video record the examination."
Indiana	Ind. R. Trial Proc. 35(A) (Physical and mental examinations of persons)	No provision	No provision
Iowa	Iowa Ct. R. 1.515 (Physical and Mental Examination of Persons)	No provision	No provision
Kansas	Kan. Stat. 60-235 (Physical and mental examinations)	No provision	No provision
Kentucky	Ky. Civ. R. 35.01 (Order for examination)	No provision	No provision

Louisiana	La. Code Civ. P. art. 1464 (Order for an additional medical opinion for physical or mental examination of persons)	"A minor subject to examination under the provisions of this Article shall have the right to have a parent, tutor, or legal guardian present during the examination. If such person cannot be present, the court shall order the examination to be videotaped at the expense of the party being examined. The court shall consider the best interests of the minor and may impose conditions upon videotaping, including that it be done in a manner least harmful to the minor and without disclosure to the minor." Art. 1464(C)	"A minor subject to examination under the provisions of this Article shall have the right to have a parent, tutor, or legal guardian present during the examination. If such person cannot be present, the court shall order the examination to be videotaped at the expense of the party being examined. The court shall consider the best interests of the minor and may impose conditions upon videotaping, including that it be done in a manner least harmful to the minor and without disclosure to the minor." Art. 1464(C)
Maine	Me. R. Civ. P. 35 (Physical and mental examination of persons)	No provision	No provision
Maryland	Md. Rules, Rule 2-423 (Physical or Mental Examination of Persons)	No provision	No provision
Massachusetts	Mass. R. Civ. P. 35 (Physical and mental examination of persons)	No provision	No provision

Michigan	Mich. Ct. R. 2.311 (Physical and Mental Examination of Persons)	"Upon request of a party, the order may also provide that [] the attorney for the person to be examined may be present at the examination." Mich. Ct. R. 2.311(A)(1). This is a 2024 amendment (effective date, Jan. 1).	"Upon request of a party, the order may also provide that [] a mental examination be recorded by video or audio." Mich. Ct. R. 2.311(A)(2). Note that subpart (B) requires the videorecording to be complete and unobtrusive.
Minnesota	Minn. R. Civ. P. 35 (Physical, Mental, and Blood Examination of Persons)	No provision	No provision
Mississippi	Miss. R. Civ. P. 35 (Physical and mental examination)	No provision	No provision
Missouri	Mo. Rev. Stat. § 510.040 (Court may order physical and mental examinations)	No provision	No provision
Montana	Mont. R. Civ. P. 35 (Physical and Mental Examination)	No provision	No provision
Nebraska	Neb. Ct. R. of Disc'y in Civ. Cases § 6-335 (Physical and mental examinations)	No provision	No provision
Nevada	Nev. R. Civ. P. 35 (Physical and Mental Examinations)	"Observers at the Examination. The party against whom an examination is sought may request as a condition of	"Recording the Examination. On request of a party or the examiner, the court may, for good cause

		the examination to have an observer present at the examination. When making the request, the party must identify the observer and state his or her relationship to the party being examined. The observer may not be the party's attorney or anyone employed by the party or the party's attorney. (A) The party may have one observer present for the examination, unless: (i) the examination is a neuropsychological, psychological, or psychiatric examination; or (ii) the court orders otherwise for good cause shown. (B) The party may not have any observer present for a neuropsychological, psychological, or psychiatric examination, unless the court orders otherwise for good cause shown. (C) An observer must not in any way interfere, obstruct, or participate in the examination." Nev. R. Civ. P. 35(a)(4)	shown, require as a condition of the examination that the examination be audio recorded. The party or examiner who requests the audio recording must arrange and pay for the recording and provide a copy of the recording on written request. The examiner and all persons present must be notified before the examination begins that it is being recorded." Nev. R. Civ. P. 35(a)(3)
New Hampshire	N.H. Super. Ct. R. 21(a) (in list of discovery tools); R. 28A (Medical	No provision	No provision

	Injuries and Special Damages)		
New Jersey	N.J. R. Civ. P. 4:19-2 (Observation and Recording of Physical and Mental Examination of Persons)	"Once a notice for exam has been issued pursuant to Rule 4: 19-1, the receiving party must, within fourteen (14) days, inform the party serving notice of any intent to utilize a third-party observer or to record the examination, set forth the identity and address of the third-party observer, advise if the third-party observer will serve as an expert or fact witness, provide the third-party observer's curriculum vitae if that person is an expert witness, and, if any recording will be taken, state the method of recording. If the party seeking the exam objects, the parties shall confer orally and if they cannot come to an agreement, the party seeking the exam may move for a protective order under Rule 4:10-3."	"Once a notice for exam has been issued pursuant to Rule 4: 19-1, the receiving party must, within fourteen (14) days, inform the party serving notice of any intent to utilize a third-party observer or to record the examination, set forth the identity and address of the third-party observer, advise if the third-party observer will serve as an expert or fact witness, provide the third-party observer's curriculum vitae if that person is an expert witness, and, if any recording will be taken, state the method of recording. If the party seeking the exam objects, the parties shall confer orally and if they cannot come to an agreement, the party seeking the exam may move for a protective order under Rule 4:10-3."
New Mexico	N.M. R. Civ. P. 1-035 (Physical and Mental	No provision	No provision

	Examinations of Persons)		
New York	N.Y. C.P.L.R. § 3121 (Physical or Mental Examination)	No provision (case law)	No provision (case law)
North Carolina	N.C. Gen. Stat. Ann. § 1A-1, Rule 35 (Physical and mental examination of persons)	No provision	No provision
North Dakota	N.D. R. Civ. P. 35 (Physical and Medical Examination)	No provision	No provision
Ohio	Ohio R. Civ. P. 35 (Physical and mental examination of persons)	No provision	No provision
Oklahoma	12 Okla. Stat. § 3235 (Physical and Mental Examinations of Persons); *Boswell v. Schultz*, 175 P.3d 390 (Okla. 2007)	"REPRESENTATIVE MAY BE PRESENT. A representative of the person to be examined may be present at the examination." 12 Okla. Stat. § 3235(D)	No provision (case law) *See* Boswell v. Schultz, 175 P.3d 390, 399 (Okla. 2007) ("Accordingly, we hold that a party to a lawsuit who is required to submit to a medical examination pursuant to 12 O.S.2001 § 3235 is permitted to videotape the examination.")
Oregon	Or. R. Civ. P. 44 (Physical and Mental Examination of Persons)	No provision	No provision

Pennsylvania	Pa. R. Civ. P. 4010(a)(4)(i), (a)(5)(i) (Physical and Mental Examinations of Persons)	"The person to be examined shall have the right to have counsel or other representative present during the examination. The examiner's oral interrogation of the person to be examined shall be limited to matters specifically relevant to the scope of the examination." Pa. R. Civ. P. 4010(a)(4)(i)	"The party who is being examined or who is producing for examination a person in the party's custody or legal control may have made upon reasonable notice and at the party's expense a stenographic or audio recording of the examination. Upon request and payment of reasonable cost, the party who caused the recording to be made shall provide each other party with a copy of the recording." Pa. R. Civ. P. 4010(a)(5)(i)
Rhode Island	R.I. Super. Ct. R. Civ. P. 35 (Physical and Mental Examination of Persons)	No provision	No provision
South Carolina	S.C. R. Civ. P. 35 (Physical and Mental Examinations)	"The physician of the party to be examined may be present at the examination."	No provision
South Dakota	S.D. Codified Laws § 15-6-35(a) (Order for examination)	No provision	No provision
Tennessee	Tenn. R. Civ. P. 35.01 (Order for Examination)	No provision	No provision
Texas	Tex. R. Civ. P. 204 (Physical and	No provision	No provision

	Mental Examinations)		
Utah	Utah R. Civ. P. 35(a) (amended 2016–17) (Physical and Mental Examination of Persons)	No provision	"The person being examined may record the examination by audio or video means unless the party requesting the examination shows that the recording would unduly interfere with the examination." Utah Civ. P. 35(a) Committee note: "The committee has determined that the benefits of recording generally outweigh the downsides in a typical case. The amended rule therefore provides that recording shall be permitted as a matter of course unless the person moving for the examination demonstrates the recording would unduly interfere with the examination."
Vermont	Vt. R. Civ. P. 35 (Physical and Mental Examination of Persons)	No provision	No provision
Virginia	Va. Sup. Ct. R. 4:10 (Physical and Mental Examination of Persons)	No provision	No provision

Washington	Wash. Super. Ct. Civ. R. 35 (Physical and Mental Examination of Persons)	"Representative at Examination. The party being examined may have a representative present at the examination, who may observe but not interfere with or obstruct the examination." Wash. Super. Ct. Civ. R. 35(a)(2)	"Recording of Examination. Unless otherwise ordered by the court, the party being examined or that party's representative may make an audiotape recording of the examination, which shall be made in an unobtrusive manner. A videotape recording of the examination may be made on agreement of the parties or by order of the court." Wash. Super. Ct. Civ. R. 35(a)(2)
West Virginia	W. Va. R. Civ. P. 35 (Physical and mental examinations)	No provision	No provision
Wisconsin	Wis. Stat. § 804.10(1). (Physical and mental examination of parties; inspection of medical documents)	No provision	No provision
Wyoming	Wyo. R. Civ. P. 35 (Physical and Mental Examinations)	No provision	No provision

MEMORANDUM

To:	Civil Rules Advisory Committee
From:	Sarah Sraders, Counsel, Rules Committee Staff
Re:	Rule 35 Examination Research
Date:	August 26, 2026

This memorandum provides a broad overview of how federal courts currently examine a party's request to allow an observer (including counsel) or a recording of a physical or mental examination under Federal Rule of Civil Procedure 35.

Rule 35 permits the court to "order a party whose mental or physical condition . . . is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner." Fed. R. Civ. P. 35(a)(1). The court's order "may be made only on motion for good cause," and "must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it." Fed. R. Civ. P. 35(a)(2)(A)-(B).

Federal courts generally employ a good cause standard to determine whether third-party observers or recordings should be permitted at a Rule 35 examination:

> Although Rule 35 is silent on who may attend a physical or mental examination, such examinations, like all other forms of discovery, are subject to the general provisions of Federal Rule of Civil Procedure 26(c). Under that Rule 26(c), a court may issue any order 'to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . ..' Mental examinations, by their nature, are intrusive and implicate sensitive matters. Nonetheless, the party seeking the presence of a third party at a Rule 35 examination still sustains the burden or convincing the court that good cause exists for a protective order and that such a third-party presence is necessary. In this context, broad allegations of harm unsubstantiated by specific examples does not suffice to meet the Rule 26(c) test. Rather, the inquiry becomes whether special circumstances are present which call for a protective order tailored to the specific problems presented.

Ornelas v. S. Tire Mart, LLC, 292 F.R.D. 388, 395 (S.D. Tex. 2013) (internal citations and quotations omitted); *Maldonado v. Union Pac. R.R. Co.*, No. 09-1187-EFM, 2011 WL 841432, at *3 (D. Kan. Mar. 8, 2011) ("Case law establishes that the party seeking the condition must make a good cause showing why the Court should impose it."). "Most courts analyze a request to record an examination the same way they evaluate whether to permit the presence of an attorney at a Rule 35 examination," *Kellar v. Union Pac. R.R. Co.*, No. 21-2045, 2023 WL 9744179, at *3 (E.D. La. Oct. 17, 2023), reasoning that a recording is a "variation[] of the same condition, *i.e.* the presence of a 'third party,'" *Hertenstein v. Kimberly Home Health Care, Inc.*, 189 F.R.D. 620, 628 (D. Kan. 1999).

Allowing third-party observers or recordings in Rule 35 examinations is generally disfavored, except in special circumstances. *See, e.g.*, *Pepe v. Casa Blanca Inn & Suites, LLC*,

Civ. No. 18-cv-476 JCH/JFR, 2019 WL 10960399, at *2 (D.N.M. July 11, 2019); *Smolko v. Unimark Lowboy Trans., LLC*, 327 F.R.D. 59 (M.D. Pa. 2018) ("The majority rule adopted by the federal courts is that the court may, and often should, exclude third-party observers, including counsel, from medical or psychiatric evaluations."); *Favale v. Roman Catholic Diocese of Bridgeport*, 235 F.R.D. 553, 556 (D. Conn. 2006) ("[M]ost courts start with a presumption against the presence of third persons, and then go on to consider whether special circumstances have been demonstrated in a particular case.") (quoting *Baba-Ali v. City of N.Y.*, No. 92CIV.7957(DAB)(THK), 1995 WL 753904, at *2 (S.D.N.Y. Dec. 19, 1995)).

The reasons that courts have provided for refusing to permit a representative or recording include:

Impact on the examination. "Courts have recognized that the presence of third parties during mental examinations may be distracting and may alter the results of the testing." *Newman v. San Joaquin Delta Cmty. Coll. Dist.*, 272 F.R.D. 505, 513-14 (E.D. Cal. 2011) (allowing plaintiff to have a "support person" nearby to visit with her during breaks, but not allowing that person into the exam room); *see also Tomlin v. Holecek*, 150 F.R.D. 628, 632 (D. Minn. 1993) ("[T]he presence of third parties would lend a degree of artificiality to the interview technique which would be inconsistent with applicable, professional standards."); *Favale*, 235 F.R.D. at 557 ("[T]he presence of an extra person at the examination could reduce the independent nature of the examination by inhibiting [plaintiff's] likelihood to provide candid responses to sensitive questions.").

Fairness. Courts have reasoned that allowing third parties to attend examinations would "subvert the purpose of Rule 35, which is to put both the plaintiff and defendant on an equal footing with regard to evaluating the plaintiff's [medical] status." *Duncan v. Upjohn Co.*, 155 F.R.D. 23, 27 (D. Conn. 1994). "Plaintiff was examined by her expert outside of the presence of observers, and the defendant should be afforded the same opportunity." *Favale*, 235 F.R.D. at 557; *see also Tomlin*, 150 F.R.D. at 633 ("Plaintiff suffers no disadvantage by his inability to tape-record [the Rule 35] interview that is not shared by the Defendants who . . . are without a recording or a transcript of the interviews of the Plaintiff that were conducted by his psychologists."). In *Tomlin*, the court rejected the plaintiff's characterization of a Rule 35 examination as "a maligned, but Court-sanctioned means" by which the defendants can select an expert to fully absolve them of any responsibility, and instead described it as "a forthright attempt to provide a 'level playing field' between the parties in their respective efforts to appraise the Plaintiff's psychological state." 150 F.R.D. at 632.

Maintaining impartiality. "[W]e are hesitant—absent a compelling reason—to condition a Rule 35 examination upon restrictions which will foster a greater degree of advocacy in the conduct of such examinations than is, already, unavoidably present." *Tomlin*, 150 F.R.D. at 633; *see also Stoner v. N.Y.C. Ballet Co.*, No. 99Civ.0196(BSJ)(MHD), 2002 WL 31875404, at *5 (S.D.N.Y. Dec. 24, 2002) (presence of plaintiff's treating physician at examination "can only threaten to turn the examination into a more adversarial process than it should be"); *but see Gensbauer v. May Dep't Stores Co.*, 184 F.R.D. 552, 553 (E.D. Pa. 1999) (allowing a third-party representative *because* Rule 35 examinations can be adversarial and "[t]he party being examined may have to respond to limitless questions by a trained representative of the opposing side without check. Legal representation seems appropriate in such a circumstance").

Ethical considerations. In cases where a party's attorney requests to attend the examination, "the presence of a lawyer creates a potential ethical problem since he becomes a possible witness and might therefore have to withdraw as trial counsel." *Hertenstein*, 189 F.R.D. at 629 (quoting *Dodd-Anderson v. Stevens*, Nos. 92-1015-MLB and 92-1016-MLB, 1993 WL 273373, at *2 (D. Kan. May 4, 1993)).

Despite the general presumption against allowing observers or recordings, some federal courts have found that circumstances warranted permitting these accommodations. For example, the court allowed a video recording, but no third party presence, at the examination of a plaintiff who had "a lengthy history of serious mental issues that kept him institutionalized for a significant portion of his life," where the court had "serious doubts as to whether plaintiff [would] be capable of providing any assistance to his attorney in understanding what took place during the examination." *Schaeffer v. Sequoyah Trading & Transp.*, 273 F.R.D. 662, 664 (D. Kan. 2011). The court in *Maldonado* allowed a recording where the plaintiff had "a third-grade education and [was] a non-English speaker" who would require a translator, and his "memory and other cognitive abilities [were] impaired." 2011 WL 841432, at *3. In an unusual case where the *defendant* sought to have the examination videotaped and the plaintiff—an 8-year-old autistic child—objected, the court allowed the videotaping without informing the child of the recording (but informing his mother). *T.B. ex rel G.B. v. Chico Unified Sch. Dist.*, No. CIV S-07-0926-GEB-CMK, 2009 WL 837468, at *2 (E.D. Cal. Mar. 26, 2009). The examining expert said that he "routinely uses a small video camera as part of his diagnostic technique" to later review the child's facial expressions and body language. *Id.* The court also granted defendant's request, over the plaintiff's objection, that the plaintiff's mother be required to participate in the examination to the extent necessary to assist the examiner. *Id.* at *4. And in *Greenhorn v. Marriott International, Inc.*, the court allowed a recording of the examination but no representative, after the plaintiff argued that the examiner was "abusive and [had] a predilection for ignoring court orders imposing conditions upon his examinations," based on the examiner's disqualification from participation in other cases. 216 F.R.D. 649, 652, 654 (D. Kan. 2003).

Finally, courts do not categorically distinguish between physical or mental examinations when considering whether to allow a third-party observer or a recording. In *Smolko*, the plaintiff argued that the case law prohibiting third-party observers arose in the context of psychiatric examinations, "where the dangers of outside influences on the examination process are greater," not physical examinations. 327 F.R.D. at 62. The court acknowledged that many Rule 35 cases did involve psychiatric exams, but "numerous cases have extended this principle, barring third party observers from medical examinations, to physical examinations as well." *Id.* (collecting cases). "Thus, the distinction between physical and psychiatric examinations urged by the plaintiff has not been embraced by the courts." *Id.* The court further stated that the rationale for disfavoring third-party observers, as described above in this memorandum, "seems equally applicable to both physical and psychiatric examinations since both examinations involve an effort to find objective evidence relating to subjective symptoms, and the presence of on-lookers at an examination may distract from this exercise in either case." *Id.* at 62-63; *but see Gensbauer*, 184 F.R.D. at 553 (acknowledging rulings that parties have no right to third-party observers during Rule 35 examinations, but distinguishing those cases as involving psychological, rather than physical, examinations, and agreeing with Pennsylvania state court rule which recognizes the right of a party to have an attorney present during a medical examination).

TAB 8

Rule 58 "Separate Document" Requirement

At its April 2026 meeting, the Advisory Committee considered a proposal by Professor Brad Baranowski (25-CV-Q) to amend Rule 58 to include orders subject to appeal under the collateral-order doctrine among the list of orders that are not required to be set out in a "separate document."

In brief, Rule 54(a) has long defined a "judgment" as "any order from which an appeal lies." Rule 58(a) requires that "[e]very judgment and amended judgment must be set out in a separate document." Per Rule 58(c)(2), entry of this separate document on the docket starts the 30-day window to file a notice of appeal under Appellate Rule 4. But, if the court fails to enter the required separate document on the docket, the judgment is not considered entered until 150 days have run from the entry on the docket of the order that may be appealed. In sum, if a separate document is required, and the court fails to enter it, the window to appeal is extended by 150 days.

Under Rule 58(a), some appealable orders are exempted from the requirement to enter a separate document, so the 30-day window to appeal opens when the order is entered on the docket. The most salient examples are orders disposing of post-trial motions, like a motion for judgment under Rule 50(b), or for a new trial under Rule 59.

The judge-made collateral-order doctrine is an exception to the final-judgment rule and allows immediate appeal of some interlocutory orders that conclusively determine a disputed question, are entirely separable from the merits of the action, and are effectively unappealable. Courts often overlook the "separate document" requirement for an appealable collateral order, in part because it is not what one would colloquially consider a "judgment" (Rule 54(a)'s more technical—and circular—definition notwithstanding), and because the collateral-order doctrine is open-ended (that is, any order that meets the requirements might be appealable, so the court might not know whether a particular order qualifies when it is entered).

Professor Baranowski proposes that any order "that results in an appealable collateral order" should be exempt from the separate-document requirement, such that the window to appeal would open immediately upon entry of the order on the docket. Suggestion 25-CV-Q at 8. He is motivated by some confusion among courts regarding orders granting or denying the defense of qualified immunity, which qualify as immediately appealable collateral orders. The question that has divided some courts is whether the appeals clock should be 30 days (as it would be if a separate document is not required) or 180 days (if a separate document is required but not entered).

This is not a new problem. It was identified and addressed by both the Appellate and Civil Rules Advisory Committees jointly when Rule 58 and Appellate Rule 4 were amended in 2002. The committee note for that round of amendments both noted that the interaction of Rule 54's definition of a "judgment" and the deadlines for appeal inherently present "many and horridly confused problems." The two advisory committees considered whether collateral orders should be exempted from the separate-document requirement and concluded that "there is little reason to force trial judges to speculate about the potential appealability of every order, and there is no means to ensure that the trial judge will always reach the same conclusion as the court of appeals." The committee note to Rule 58 recommends that the appeal clock run from the entry of the appealable collateral order and notes that to solve the problem in a rule would require "[d]rastic surgery on

Rules 54(a) and 58 . . . and it is better to leave this conundrum to the pragmatic disregard that is its present fate."

At the Advisory Committee's April meeting, members expressed little enthusiasm for taking on such "drastic surgery." As Professor Cooper noted at the meeting, "It's a messy swamp," in part because it would raise challenging questions about when and whether an appeal of a collateral order is forfeited. Also, it is unclear to what degree this is a real-world problem; few cases address the issue. Members noted that, based on their experience, parties subject to an appealable collateral order tend to move quicky. This appears to be especially likely in cases where a qualified-immunity defense is denied, since it is well known that such orders are appealable, the litigation in the district court is often stayed while the appeal is pending, and winning a reversal would end the case.

Members asked the Associate Reporter to confer with the Reporter of the Appellate Rules Advisory Committee to gauge the interest of that committee in pursuing this project, which, as in 2002, would require intercommittee collaboration. Such consultation revealed a similar lack of enthusiasm on the part of the Appellate Rules committee to take this project on at this time, for similar reasons to those expressed at our April 2026 meeting.

As a result, it is recommended that this item be dropped from the agenda.

Attachment(s):

- Suggestion 25-CV-Q (Brad Baranowski)

BRAD BARANOWSKI
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(440) 645-9044 • bbaranow@bu.edu

October 13, 2025

Carolyn A. Dubay, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE, Room 7-300
Washington, D.C. 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: Proposed Amendment to Federal Rule of Civil Procedure 58(a)
(Requirements of Separate Documents for Every Judgment)

Dear Secretary Dubay:

I encourage the Advisory Committee on Civil Rules ("Advisory Committee") to consider amending Federal Rule of Civil Procedure 58(a). A split has emerged among the United States courts of appeals over whether an appealable order denying qualified immunity must be separately docketed under that Rule. Some courts say yes, another says no, and others have yet to weigh in on the issue.[1]

This merits rulemaking. Because denials of requests for qualified immunity are both common in the district courts and implicate the jurisdiction of appellate courts, and because both sides of the circuit split are grounded either in the Rule's text or Notes, ambiguity about what Rule 58(a) demands here has led to real-world confusion about when a defendant must file a notice of appeal. The Advisory Committee should clarify that a denial of qualified immunity is not a "judgment" under Rule 58(a) and that a district court does not need to docket a separate document before a defendant can appeal such a denial.

I. The Problem

As with other provisions of the Federal Rules of Civil Procedure ("FRCP"), Rule 58(a) can affect litigants' appeal rights.[2] It all comes down to timing. Prospective

[1] *See infra* Part II (describing the split in more detail). Others have noticed this split, too. *See* Bryan Lammon, *The Month in Federal Appellate Jurisdiction: August 2025*, FINAL DECISIONS PLLC (Sept. 9, 2025), https://finaldecisions.org/the-month-in-federal-appellate-jurisdiction-august-2025/.

[2] *See generally* Brad Baranowski & Emery G. Lee III, *Remaking Rulemaking: Lessons from the History of Federal Rule of Civil Procedure 54(b)*, 73 CLEV. ST. L. REV. 617, 620, 675–82 (2025) (discussing instances when district court procedures affect appellate finality).

appellants in civil suits must file their notice of appeal "within thirty days" of the district court's "*entry*" of the "*judgment*, *order* or *decree*."[3] That requirement is jurisdictional.[4] Barring certain statutory exceptions, the failure to file a notice of appeal within this thirty-day period will extinguish a litigant's right to appeal.[5] Simple enough.

Understanding what a litigant must do to preserve these rights when the district court denies a request for qualified immunity is more complicated. Whether decided at the motion-to-dismiss or summary-judgment stage, such denials are a subset of interlocutory orders. Interlocutory orders normally are not immediately appealable, so they normally do not create a timing issue.[6] But qualified-immunity denials are different. Because qualified immunity is immunity from suit, orders denying defendants this immunity fall within the collateral order doctrine.[7] Thus, these denials are immediately appealable upon their entry.[8]

When, however, does their "entry" occur? Enter the complexity. Rule 58 governs the procedures for entering judgment in the district court.[9] Relevant here, Rule 58(a) reads:

> (a) SEPARATE DOCUMENT. Every *judgment* and amended judgment must be set out in a separate document, but a separate document is not required for an order disposing of a motion:
>
> (1) for judgment under Rule 50(b);
> (2) to amend or make additional findings under Rule 52(b);
> (3) for attorney's fees under Rule 54;
> (4) for a new trial, or to alter or amend the judgment, under Rule 59; or
> (5) for relief under Rule 60.[10]

---

[3] 28 U.S.C. § 2107(a) (emphases added); *see also* FED. R. APP. PRO. 4(a)(1)(A)("In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.").

[4] Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 61 (1982) (per curiam) ("It is well settled that the requirement of a timely notice of appeal is 'mandatory and jurisdictional.'" (quoting Browder v. Dir., Dep't. of Corr., 434 U.S. 257, 264 (1978))).

[5] *See* Bowles v. Russell, 551 U.S. 205, 208 (2007) (detailing alternative scenarios); *see also* 28 U.S.C. § 2107(c) (the statutory basis for said alternatives).

[6] *E.g.*, Dupree v. Younger, 598 U.S. 729, 734 (2023) ("Interlocutory orders—those that do not dispose of the whole case, like denials of summary judgment—are typically not immediately appealable under § 1291.").

[7] *See generally* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546–47 (1949) (explaining requirements of the collateral-order doctrine).

[8] Mitchell v. Forsyth, 472 U.S. 511, 530 (1985) (holding that denials of qualified immunity are appealable under the collateral-order doctrine).

[9] FED. R. CIV. P. 58.

[10] *Id.* at 58(a) (emphasis added).

At first glance, this Rule shouldn't cause any trouble for an unlucky, qualified-immunity-seeking defendant. A denial of that request is an *order*, not a *judgment*.[11] Unlike a judgment, which is a final determination of the parties' rights, interlocutory orders like qualified-immunity denials do not terminate the litigation.[12] Therefore, the district court need not enter a separate document with the denial under Rule 58(a), and the defendant need not—and probably should not if they want to preserve their rights—wait until the court does so to appeal.

Yet looks deceive. Elsewhere, the FRCP provide their own definition of judgment: "'Judgment' as used in these rules include a decree and *any order* from which an appeal lies."[13] A denial of qualified immunity fits that definition. After all, those orders are appealable.

Because these decisions are not listed as one of the exceptions to Rule 58(a)'s separate-document requirement, a defendant appears to have three options. First, wait until the district court enters such a document before appealing.[14] Or, if 150 days have passed and the district court hasn't entered this document,[15] appeal within 30 days of then.[16] Or if antsy, the defendant can waive the separate-document requirement altogether and appeal within 180 days of when the district court issued its decision.[17] Should the defendant need to, they can also request that the district

---

[11] *See, e.g.*, Behrens v. Pelletier, 516 U.S. 299, 311 (1996) ("As we have said, an *order* denying qualified immunity, to the extent it turns on an 'issue of law,' is immediately appealable." (emphasis added) (quoting *Mitchell*, 472 U.S. at 530)).

[12] *See* 10 MARY KAY KANE & ADAM N. STEINMAN, FEDERAL PRACTICE AND PROCEDURE § 2651 (4th ed. 2025) ("A judgment is the final determination of an action and thus has the effect of terminating the litigation."); *Judgment*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("A court or other tribunal's final determination of the rights and obligations of the parties in a case; also, the act or action of making such a determination."); *see also* Catlin v. United States, 324 U.S. 229, 233 (1945) ("A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."). *But see* FED. R. CIV. P. 54(b) ("When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.").

[13] FED. R. CIV. P. 54(a) (emphasis added).

[14] FED. R. APP. P. 4(a)(7)(A)(ii).

[15] *Id.*; *see also* FED. R. CIV. P. 58(c)(2)(B) (same period).

[16] FED. R. APP. P. 4(a)(1)(A).

[17] Even if a separate document is necessary, a district court's failure to enter one "does not affect the validity of an appeal from that judgment or order." FED. R. APP. P. 4(a)(7)(B). That provision codified the Supreme Court's holding that "the separate-document requirement of Rule 58 [is not] such a categorical imperative that the parties are not free to waive it." Bankers Tr. Co. v. Mallis, 435 U.S. 381, 384 (1978). *See also* Peng v. Mei Chin Penghu, 335 F.3d 970, 975 n.4 (9th Cir. 2003) ("The [2002] amendments [to Federal Rule of Appellate Procedure 4] further clarify that the decision to waive the entry of a separate document is for the appellant alone so that an appellee cannot object and require the appellant to go back to district court to get a final judgment entered."). Defendants could also request that the district court enter a separate document. FED. R. CIV. P. 58(d).

court extend the period to appeal.[18] In short, the text of the relevant Rules appear to provide ample time to file a notice of appeal.

But the picture is messier still. In 2002, the Advisory Committee amended Rule 58 to harmonize it with Federal Rule of Appellate Procedure 4(a).[19] The Committee almost seemed to have qualified-immunity denials in mind when it drafted the accompanying Note. "Appealability under [the] collateral-order doctrine should not be complicated by failure to enter the order as a judgment on a separate document," the Note states.[20] Rather, "[a]ppeal time should start to run when the collateral order is entered without regard to creation of a separate document and without awaiting expiration of the 150 days provided by Rule 58(b)(2)."[21] Whereas the timeline for appeal above could run up to 180 days without seeking an extension, this one is only 30 days.

Thus, while the Rules seem to require a separate document before a defendant can appeal a denial of qualified immunity, the Notes say otherwise. In essence, the Notes appear to modify the Rules' meaning by making collateral orders one of Rule 58(a)'s exceptions without adding it to the list of exceptions. That is inappropriate. The Notes should not say something different than the Rules.[22] Rather, the two should be in sync. So much for simplicity.

II. The Split

Faced with these ambiguities, the United States courts of appeals have split on whether Rule 58(a) applies to qualified-immunity denials. Notably, in reaching opposite conclusions about whether the separate-document requirement applies, lower courts have emphasized the different aspects of the Rule sketched above:

- **The Text-of-Rule-58(a)-Applies Approach.** In *Ueckert v. Guerra*, the Fifth Circuit picked this approach.[23] The Court wasn't exactly pleased with this outcome, complaining that "[a]ppellants now have an enormous 180-day window to file interlocutory appeals unless the district court engages in time-wasting paper-pushing, entering separate 'judgments' containing their holdings on every interlocutory motion that might be

[18] FED. R. APP. P. 4(a)(5).

[19] *See* FED. R. CIV. P. 58 advisory committee's note to 2002 amendment ("Rule 58 is amended . . . to address a problem that arises under Appellate Rule 4(a).").

[20] *Id.*

[21] *Id.*

[22] *Cf.* Edward H. Cooper, *Restyling the Civil Rules: Clarity without Change*, 79 NOTRE DAME L. REV. 1761, 1784 (2004) ("[T]he Advisory Committee cannot change a note without amending the rule.").

[23] Ueckert v. Guerra, 38 F.4th 446, 453, 454–55 (5th Cir. 2022).

susceptible to appeal."[24] But the court felt bound to reach this result by the Rules' text.[25]

- **The Note-Alters-Rule-58(a) Approach.** More recently, the Ninth Circuit parted ways with the Fifth Circuit.[26] According to the Ninth Circuit in *McNeil v. Giettere*, the interaction of FRCP 54(a), 58(a), and Federal Rule of Appellate Procedure 4(a)'s text would create a time for appeal that conflicted with 28 U.S.C. § 2107(a)'s deadline.[27] Because jurisdictional statutes trump procedural rules, the court opted to follow the approach behind Rule 58(a)'s Note and not require that denials of requests comply with the separate-document requirement.[28]

As explained further below, both paths are reasonably guided by either the FRCP's text or Rule 58(a)'s accompanying Notes as each are currently drafted. For those courts which have yet to face the issue, the decision of which route to choose will come down to differences of opinion over broader interpretative philosophies.[29] That bolsters the case for rulemaking here.

III. The Implications

Although a circuit split may not always justify rulemaking, this split leaves the appeal rights of litigants uncertain in an important area of federal jurisdiction.[30] Section 1983 and, to a lesser extent, *Bivens* litigation is a sizable portion of the federal district courts' dockets. For example, in 2024, there were 16,476 non-prisoner, federal

---

[24] *Id.* at 455.

[25] *See id.* ("We have instead applied the separate order requirement to interlocutory appeals because that is what the plain meaning of the rules requires.").

[26] McNeil v. Gittere, 150 F.4th 1205, 1207 (9th Cir. 2025). The Ninth Circuit didn't note this fact, but the fact remains that it created a split. *See* Lammon, *supra* note 1 ("Unmentioned in *McNeil* is that the decision splits from the Fifth Circuit, which held that Rule 4(a)(7) applies to qualified-immunity appeals.").

[27] *McNeil*, 150 F.4th at 1209.

[28] *Id.* at 1210.

[29] The D.C. Circuit once took the Fifth Circuit's approach, but under an older version of Federal Rule of Appellate Procedure 4(a). Abdulwali v. Wash. Metro. Area Transit Auth., 315 F.3d 302, 303–04 & n.1 (D.C. Cir. 2003).

[30] The Advisory Committee has, however, justified rulemaking based on circuit splits in the past. *See, e.g.*, ADVISORY COMMITTEE ON CIVIL RULES, AGENDA BOOK 36 (Oct. 2024) (concluding that Rule 41 should be revised to resolve a circuit split over its application), https://www.uscourts.gov/sites/default/files/2024-10_civil_rules_agenda_book_final_10-6.pdf. So too with outlier decisions. *See* ADVISORY COMMITTEE ON CIVIL RULES, AGENDA BOOK 226 (Oct. 2025), https://www.uscourts.gov/sites/default/files/document/2025-10-civil-agenda-book-final.pdf ("[T]he Advisory Committee did recently undertake such an effort in response to the Ninth Circuit's decision in *In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023).").

question "Other Civil Rights" cases filed in federal court.[31] The numbers are higher for analogous prisoner filings.[32] It is safe to say that thousands of the filings from these two groups were § 1983 and *Bivens* cases.

Requests for qualified immunity are ubiquitous in these cases. So too are appeals of these decisions. "From 2010 through 2020, at least 5,526 cases before federal appellate courts raised qualified immunity on appeal, an average of about 500 cases a year."[33] And these appeals have only grown in frequency over time.[34] In other words, the circuit split could affect a sizeable number of litigants, creating different time frames for appeal in different circuits.

And the split isn't limited just to denials of requests for qualified immunity. Although *Ueckert* and *McNeil* were qualified-immunity cases, any order subject to appeal under the collateral-order doctrine could be subject to their logics. Again, any appealable collateral order will be both a "judgment" as defined by Rule 54(a) *and* clearly not what the Advisory Committee intended Rule 58(a) to cover.

Moreover, the split is intractable. Rule 58(a)'s current text is at odds with its accompanying Note. Rule 58(a) follows a classic rule-exception structure: first, it states the rule ("[e]very judgment . . . must be set out in a separate document"), then it lists exceptions to the rule (five of them in all). Under the canon of *expressio unius est exclusio alterius*, that list can reasonably be interpreted as the entirety of the exceptions to the separate-document requirement.[35] And because a judgment under the FRCP is anything that is appealable, there are strong textualist reasons for a denial of qualified immunity needing to follow the separate-document requirement.

Then there are the Notes. Those state the opposite of what the Rules' text suggest. And understandably so. As the Committee detailed, "there is little reason to force trial judges to speculate about the potential appealability of every order, and there is no means to ensure that the trial judge will always reach the same conclusion

---

[31] United States Courts, Table C-2—U.S. District Courts–Civil Judicial Business (September 30, 2024), JUDICIAL BUSINESS, September 2024, at 2, https://www.uscourts.gov/sites/default/files/2024-12/jb_c2_0930.2024.pdf (last visited Oct. 13, 2025).

[32] *Id.* at 3.

[33] JASON TIEZZI ET AL., UNACCOUNTABLE: HOW QUALIFIED IMMUNITY SHIELDS A WIDE RANGE OF GOVERNMENT ABUSES, ARBITRARILY THWARTS CIVIL RIGHTS, AND FAILS TO FULFILL ITS PROMISES 16 (2024), https://ij.org/report/unaccountable/ (last accessed Oct. 3, 2025).

[34] As the study previously cited details:

> In the first half of our study period (2010 through 2015), the courts decided an average of 458 qualified immunity appeals a year. But in the second half (2016 through 2020), that figure jumped to 555, an increase of roughly 20%. Over that same timeframe, the total number of civil appeals in the circuit courts dropped by 10%, indicating that qualified immunity appeals are growing in both absolute and comparative terms.

Id. The driver of this growth appears to have been excessive-force claims. *Id.*

[35] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107–11 (2012) (discussing canon).

as the court of appeals."[36] On the whole, the collateral-order doctrine is too unpredictable to base appealing under it on a "mechanical" requirement like the separate-document requirement.[37] Courts are thus forced to choose between text and purpose, with reasonable minds differing on that choice.[38]

In 2002, the Advisory Committee predicted that lower courts would approach any issue about whether collateral orders needed to comply with Rule 58(a)'s separate-document requirement with "pragmatic disregard."[39] That prediction hasn't aged well. Because the Rule's text and Note lead to different interpretative choices, because the scenario that will force courts to make these choices is a common one, and because lower courts have already made different choices here, the Advisory Committee should amend Rule 58(a) to clarify what, if anything, it demands when a district court denies a defendant's request for qualified immunity.

IV. The Solution

Between the two approaches taken by lower courts, the Ninth Circuit's is better. The Committee should codify that approach in the Rules' text.

Rule 58(a) was drafted to deal with a particular problem. Before the Rule, there was confusion about when a district court issued a judgment. Sometimes, a court would issue an opinion with directive language and the clerk did not think a separate document was needed. Sometimes, there was a separate document. Considering these disparate practices, courts of appeals had to adjudicate which document constituted the judgment and started the time to appeal, with some litigants losing out because they identified the wrong docket entry.[40]

Denials of qualified immunity do not present this which-document-governs problem. Unlike judgments, such collateral orders do not resolve the rights of the parties. They just resolve the issue at hand. And they are otherwise immediately appealable. Indeed, these denials create timing problems only insofar as it is unclear whether Rule 58(a)'s separate-document requirement seems to apply to them, which is exactly what the Advisory Committee sought to avoid when it amended the

---

[36] FED. R. CIV. P. 58 advisory committee's note to 2002 amendment.

[37] United States v. Indrelunas, 411 U.S. 216, 222 (1973) (per curiam); *see also* Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1243 (2007) (calling the collateral order doctrine a "cumbersome-yet-unhelpful framework").

[38] *See generally* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006). That divide tracks different jurists' views of the Notes. *Compare* United States v. Vonn, 535 U.S. 55, 64 n.6 (2002) (explaining how the Notes are "a reliable source of insight into the meaning of a rule"), *with* Krupski v. Costa Crociere S. p. A., 560 U.S. 538, 557 (2010) (Scalia, J., concurring) ("[T]he Committee's *intentions* have no effect on the Rule's meaning.").

[39] FED. R. CIV. P. 58 advisory committee's note to 2002 amendment.

[40] Bankers Tr. Co. v. Mallis, 435 U.S. 381, 385 (1978) (detailing history that led to Rule 58(a)'s separate-document requirement).

Rule. By not requiring a separate document be entered on the docket for qualified-immunity denials, the Ninth Circuit captured the spirit, if not the letter, of what Rule 58(a) was trying to accomplish.

Rule 58(a)'s language should embody this spirit. That would avoid the Notes improperly modifying the meaning of the Rules. And it would avoid other Circuits adopting the understandable—but, in my view, unfortunate—reading that the Fifth Circuit recently adopted. To achieve this goal, the Advisory Committee could add language like the following to the end of Rule 58(a):

"(6) that results in an appealable collateral order."

Such language would enshrine in the Rule's text what the Note otherwise makes clear: denials of qualified-immunity requests and other orders subject to the collateral-order doctrine need not be separately docketed before being appealed. Such a change would also place no additional work on district court judges' shoulders, avoiding the concern raised in the Note about forcing them "to speculate about the appealability of every order."[41] On the contrary, placing the exclusion of appealable collateral orders makes life easier for district courts as it avoids courts adopting the Fifth Circuit's approach and its application of the separate-document requirement to these orders.[42]

Alternatively, the Advisory Committee could revisit the confusing definition of "judgment" in Rule 54(a). In general, the FRCP do not define terms. Avoiding exceptions to this rule may be well founded, at least here. Rule 54(a)'s definition of "judgment" is part of the reason for the circuit split. That said, the Advisory Committee appeared to consider this option in 2002 and decided that it would amount to "[d]rastic surgery."[43] A simpler solution is for the Advisory Committee to adopt the language advocated here or some similar language as Rule 58(a)(6).

Thank you for your consideration.

Respectfully submitted,

Brad Baranowski
Visiting Assistant Professor
Boston University School of Law

---

[41] FED. R. CIV. P. 58 advisory committee's note to 2002 amendment.

[42] Although appellants can sidestep this requirement even under the Fifth Circuit's approach, *see* FED. R. APP. P. 4(a)(7)(B), the extended window to file a notice of appeal remains an issue.

[43] FED. R. CIV. P. 58 advisory committee's note to 2002 amendment. For example, Rule 79(b), which requires that the clerk "keep a copy of every *final judgment* and *appealable order*" could be among the operations that the Advisory Committee would need to perform given that both a final judgment and an appealable order are judgments under Rule 54(a)'s definition. FED. R. CIV. P. 79(b) (emphases added).

TAB 9

Filing in Court Under Seal

Three very prominent law professors and three others associated with the Deborah Rhode Center at Stanford Law School submitted 26-CV-24. It proposes the adoption of a new Rule 5.3 on sealing judicial records. The proposed amendment appears on pp. 11-13 of their submission, which is included in this agenda book. It is supported by a 72-page article destined for publication in the Duke Law Journal: Nora Freeman Engstrom, et al, *[Sealed Document]: An Empirical Study of Sealing Orders in the Federal Courts*, 76 DUKE L.J. ___ (2026). The agenda book contains a link to this article.

This is not a new topic on the Advisory Committee's agenda. On the contrary, from 2020 until its Fall 2025 meeting, the Committee had on its agenda a study of filing under seal prompted initially by the submission in 2020 of a proposal for a new Rule 5.3 on sealing from Professor Eugene Volokh. Since 26-CV-24 was received, there have been at least two submissions supporting the current effort. *See* 26-CV-26 (from Public Justice); 26-CV-27 (from Professor Volokh).

After Professor Volokh's 2020 submission, the Advisory Committee received a number of supporting submissions, including one that contained a 95-page listing of local rules dealing with filing under seal in all or almost all district courts. The extensive consideration already given these issues is detailed below with excerpts from earlier agenda books.

As the excerpts from prior agenda books below show, these proposals received very considerable examination during the period from 2020 to 2025. Like the current submission, this work included drafts of amendments to Rule 5.2 and also a possible amendment to Rule 26(c) designed to clarify the relationship between orders granting a protective order and orders authorizing filing under seal.

The Discovery Subcommittee ultimately concluded that adopting a rule regulating matters routinely handled by district courts in accordance with their local procedures was not warranted. The Subcommittee noted that the courts of appeals recognize (as the current submission says) that the granting of a protective order did not, by itself, provide a ground for filing "confidential" materials under seal. And Advisory Committee discussion over the years also emphasized that the dockets of different districts presented significantly different concerns in terms of permitting sealed filings. Imposing nationally uniform procedures for handling motions to seal could intrude on those local practices.

The 72-page law review article accompanying the current submission provides, as the submission says, the "most comprehensive picture to date of how the federal courts actually adjudicate motions to seal." Suggestion 26-CV-4 at 2. It is based on review of more than two million civil dockets, and hand-coding a sample of over 600 sealing orders. As the submission puts it, this extraordinary study "documents a sustained and substantial gap between (a) the rigorous standards for judicial sealing that the federal Circuits announce and (b) the lower standard that trial courts, in fact, apply." *Id.*

This exceptional empirical research effort does provide detail the Advisory Committee did not have when it eventually decided to drop the Volokh 2020 submission from the agenda in

October 2025. But the Committee's work—while lacking the immense detail provided by the current study—reached the same conclusion the current submission reached—that the courts of appeals had widely recognized that the standard for granting a Rule 26(c) protective order and the standard for granting a motion to seal are not the same. As reflected in the excerpt below from the agenda book for the October 2025 meeting, the Committee well understood that point and did not see a reason to amend Rule 26(c) to repeat this widely-accepted reality.

The Committee also considered the Knight First Amendment Institute's submission (21-CV-T) providing a compendium of local rules drawn from all, or almost all, the districts. The submission stressed that different districts had different methods of handling filing under seal. It urged that nationally-uniform criteria for filing under seal should be substituted for most or all these local provisions. During Advisory Committee meetings, members noted that these differences reflected in part the differing nature of caseloads in different districts.

As detailed in the agenda book report for the October 2025 meeting (excerpted below), drafting such a uniform rule would pose many challenges. For one thing, there are a number of statutory provisions calling for filing under seal. For another, several other Civil Rules also call for filing under seal. And various other challenges (such as what to do if material were filed "provisionally" under seal and the court later denied the motion for leave to file under seal) would have to be surmounted. It is worth noting that the current submission does not seem to take account of these other Civil Rules requiring filing under seal even though they were considered by the Advisory Committee while it was addressing the 2020 amendment proposal. It might also be noted that proposed amendments fortifying protections for privacy in court filings are presently out for public comment.

Given the relative uniformity of the court of appeals standards for sealing and the problems posed across districts by mandating uniform national sealing procedures, the Discovery Subcommittee concluded in a meeting on October 7, 2025, that the best course was to drop the topic from the Committee's agenda. The notes of that meeting are included in this agenda book. The full Committee agreed during the October 2025 meeting.

The current submission in large measure echoes conclusions the Subcommittee reached before the matter was dropped from the agenda. It says that the courts of appeals establish a "high bar" for filing under seal and that the circuits "agree that when granting an order to seal, the trial court must show its work." Suggestion 26-CV-24 at 2, 3. The law of the circuits is "in accord" on these topics. *Id.* at 4 n.3.

The problem, the submission says, is that "district courts deviate from the above requirements," something demonstrated by the study to be published in the Duke Law Journal. *Id.* at 5. The submission concludes:

> The proposal promotes lower court obedience, rather than disobedience, to higher law. We aren't saying what the sealing standard should be. Rather, we are saying that appellate courts have said, repeatedly and emphatically, what the sealing standard should be *and is*, and trial courts should obey—rather than ignore—those commands.

Id. at 11. The submission also quotes Judge Jennifer Elrod: "The problem is not so much because of a lack of guiding standards but because courts often do not apply the standards." *Id.*

Ordinarily the job of insisting that district courts apply the legal principles laid down by appellate courts is not the job of the Advisory Committee. In the words of the submission, "lower court obedience" seems an appellate function rather than the objective of a rule change. Indeed, one might doubt a rule change could accomplish what the courts of appeals reportedly have not been able to accomplish by stressing the sealing standard we are told the courts of appeals have articulated. It seems that the submission's solution is that the rules command district courts to do more work:

> [W]hen granting an order to seal, the trial court must show its work. The trial court must explain why sealing is warranted, and, in so doing, vague or conclusory assertions are insufficient.

Id. at 3-4.

Perhaps a rule commanding that the district courts "show their work" would produce that result even though the courts of appeals have not succeeded in doing so. Perhaps, on occasion, busy district courts conclude that permitting filing under seal without extensively explaining why they are doing so makes sense due to the press of other business (e.g., immigration cases and other emergency matters).

If the Committee decides to go forward, several other challenges will be presented. Many of them are detailed in the agenda book report from October 2025, reproduced below. For example, the proposal (pp. 11-13 of the submission) nowhere recognizes that other Civil Rules command sealing or redaction under certain circumstances, and instead seems to command that judges disregard those other Civil Rules. It also seems to override Rule 24 on intervention by saying that "any person" who objects to sealing "is treated as having intervened for the limited purpose of securing their rights to access judicial records." It does, in proposed 5.3(i), seem to make good on the "show your work" objective, something that is not required in general by the Civil Rules with regard to pretrial motions. For example, the rules do not command a district court to provide findings and conclusions when granting a Rule 12(b)(6) motion to dismiss or granting or denying a discovery motion.

For present purposes, the basic issue is whether the Committee should return to this topic which it removed from its agenda a year ago after considering it for five years. Further background on that decision is provided by the excerpt below from pages 122-33 of the October 2025 agenda book and the notes of the October 7, 2025, Subcommittee meeting that occurred after the agenda book was compiled and were included in the digital agenda book at pages 413-14.

Attachment(s):

- Excerpt from the October 24, 2025 Agenda Book for the Advisory Committee on Civil Rules
- Excerpt from the April 1, 2025 Agenda Book for the Advisory Committee on Civil Rules
- Notes of October 7, 2025 Discovery Subcommittee Meeting
- Excerpt from Suggestion 26-CV-24 (Nora Freeman Engstrom), pages 1-16

Reference Material Link(s):

- [Sealed Document]: An Empirical Study of Sealing Orders in the Federal Courts (as included in Suggestion 26-CV-24)

Excerpt from the Agenda Book for the Advisory Committee on Civil Rules, October 24, 2025, at 122-33

Discovery Subcommittee Report—Filing Under Seal

The following memorandum offers four possible avenues for moving forward. The second approach itself offers four variations. Finding the most appropriate way to say in the rules something that can seem easy to say otherwise has proved somewhat daunting; hence the four possible locutions. The third approach recognizes that, because there is little uncertainty about the reality that filing under seal is governed by a more exacting legal standard than issuing a protective order limiting the use of confidential materials obtained through discovery, it might be best simply to leave these rules as they are. Finally, the fourth approach involves taking on the multiple difficulties that would result from prescribing in the national rules a binding set of procedures for ruling on motions to seal. Unless there is support for taking on that task, it may be best to conclude that an amendment proposal is not needed.

The Discovery Subcommittee may be able to meet before the full Committee's October 2025 meeting and refine its recommendation for considering a new rule on sealing court records. This memorandum introduces the options as of the time of preparation of the agenda book. If there is full Committee consensus, it may be possible to approve a proposal for submission to the Standing Committee during its January 2026 meeting for publication for public comment. Alternatively, the matter can be presented at the Spring 2026 meeting, and if there is full Committee consensus, it may be possible to submit a rules proposal to the Standing Committee at its June 2026 meeting. If the full Committee decides that there really is no need to amend the rules, the matter could be dropped from the agenda.

The Discovery Subcommittee has since 2020 been considering a proposal (originally made by Professor Volokh and the Reporters' Committee for Freedom of the Press) to recognize in the Civil Rules that granting a motion for a protective order does not automatically justify filing under seal for any materials produced through discovery that are deemed "confidential" under the protective order's provisions. It seems widely recognized that the standards for sealing court files are considerably more demanding than the standards for ordering protection of materials produced through discovery. But that distinction does not appear explicitly in the rules. Having considered the issues, the Subcommittee brings forward four possible approaches.

The original proposal, and some supporting submissions, urged in addition that the rules be amended to impose nationwide procedural requirements for the handling of motions to seal. Presently there is considerable variety among districts in the way they handle motions to seal. Some districts employ local practices that are quite rigorous, while others are not so exacting. After reflection, the Subcommittee tentatively concluded that requiring nationwide adherence to a single method for resolving motions to file under seal is not worth pursuing. Imposing more exacting requirements in all districts might create difficulties for attorneys seeking to meet filing deadlines. Requiring all districts to handle motions to seal in a manner different from other motions could unnecessarily interfere with the operation of some district courts. And—as mentioned during the Advisory Committee's April 2025 meeting in Atlanta—there is a possibility that there would be an impulse in nationwide rules to adopt the strictest rules, which might make things more difficult for judges and attorneys in many districts.

Meanwhile, questions have been raised both about whether a rule amendment is needed at all, and also whether it might be more prudent to limit the amendment to Rule 26(c).

Accordingly, the Subcommittee brings before the full Committee the following questions, and provides explanatory material about them.

1. Should Rules 26(c) and 5(d) both be amended?

2. Would amending only Rule 26(c) suffice? [There are four alternatives on this score.]

3. Given general recognition that the standard for issuing a protective order regarding material exchanged through discovery is less stringent than the standard for filing documents under seal, is there really a need to put an acknowledgement of that difference into the rules?

4. If some change is needed for rule provisions on the standard for filing under seal, is there any value to considering adding procedural directives?

This memorandum also includes the additional submission we received on this general topic in July 2025 from the American Association for Justice and Public Justice, which is included in the agenda book (25-CV-K). Although this submission endorses a rule change to clarify that the standard for filing under seal is different from the protective-order standard, it does not endorse going further and imposing nationwide procedures for resolving motions to seal.

(1) Amending both Rule 26(c) and 5(d)

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(c) Protective Orders.

* * * * *

(4) ***Filing Under Seal.*** Filings may be made under seal only under Rule 5(d)(5).

COMMITTEE NOTE

Rule 26(c) is amended to recognize what many court decisions confirm—that the standards for filing in court under seal are more exacting than the "good cause" standard for issuance of a protective order under Rule 26(c). An amendment to Rule 5(d) makes clear that the more exacting standard applies when leave is sought to file materials in court under seal.

Rule 5. Serving and Filing Pleadings and Other Papers

* * * * *

(d) Filing.

* * * * *

(5) ***Filing Under Seal.*** Unless filing under seal is authorized by a federal statute or by these rules, no paper [or other material][11] may be filed under seal unless [the court determines that][12] filing under seal is consistent with the applicable common law and First Amendment rights of public access to court [filings] {records}.

COMMITTEE NOTE

Rule 5(d)(5) is added to recognize in the rules that granting a protective order under Rule 26(c) for good cause involves a decision that is different from the decision whether to authorize filing under seal in court. Both common law and First Amendment considerations apply to filing under seal. The courts have recognized this difference, but it is not specifically acknowledged in the rules. This amendment provides that acknowledgement. An amendment to Rule 26(c) recognizes this difference.

The amendment does not affect filing under seal when authorized by a federal statute or by these rules. A statutory example is the False Claims Act, 31 U.S.C. § 3730(b)(2). Examples of rules that authorize filing under seal include Rules 26(b)(5)(B), 26(c)(1)(F), 45(e)(2)(B), G(3)(c)(ii)(B), and G(5)(a)(ii)(C)(1).[13]

The standards to be applied to a motion to file under seal have been articulated in slightly different ways in different circuits. This amendment does not seek to displace those caselaw

---

[11] The introduction of electronic filing has raised the question how to describe what we are talking about. Rule 5(d)(1) refers to "[a]ny paper after the complaint." So one might say the added phrase "or other material" is needed to include electronic filings. Rule 5.2(a), on the other hand, uses "an electronic or paper filing." It seems better to stick with the Rule 5(d) approach in Rule 5(d), and that should make the bracketed phrase unnecessary. On that score, it's worth noting that Rule 5(d)(2) refers to "[a] paper not filed electronically." So "paper" as used in Rule 5(d) includes electronic filings.

[12] The bracketed phrase might be unnecessary. It sounds like a findings requirement. One would think that a saying filing under seal is "consistent with the common law and First Amendment rights of public access to court filings" suffices to say that the court must so determine before authorizing filing under seal. The bracketed phrase could be removed. The draft Committee Note makes the point.

[13] One might consider including Rules 5.2(d) or (e) on this list. Rule 5.2 is about "privacy protections" for court filings, and addresses such things as Social Security numbers, the year of an individual's birth, the initials of a minor, and the last four digits of a financial-account number.

Rule 5.2 was adopted to comply with the E-Government Act of 2002. See 4B Fed. Prac. & Proc. Civ. § 1155 (4th ed). It has not received much attention since adoption in 2007. Rule 5.2(e) authorizes a protective order requiring redaction of additional information on a showing of good cause. That might be regarded as inconsistent with the proposed amendments; perhaps someone might argue that 5.2(e) somehow nullifies the change being proposed for Rule 26(c). But Rule 5.2 is directed only to very limited concerns that seem quite different from the sorts of materials that have been the source of concerns about filing under seal. Accordingly, it is not included on this list; to cite it in the Note might invite difficulty. And the Note only says that examples of rules that permit filing under seal include the listed rules; it does not claim these are the only such rules.

interpretations of the common law or First Amendment rights of public access to court files.[14] Accordingly, it calls attention to the "applicable common law and First Amendment rights," meaning the articulation used by the circuit in which the court sits. Unless the court determines that the pertinent standards have been satisfied it should not authorize filing under seal. [The parties' stipulation to filing under seal does not itself satisfy the common law or First Amendment standards.][15]

(2) Amending only Rule 26(c)

It may be unnecessary to amend Rule 5 to achieve the desired objective of calling attention to the existing divergence between the standards for a protective order and for filing under seal. And perhaps there is a potential risk in seeming to adopt a nationwide standard for deciding whether sealing is appropriate, thereby possibly displacing the locutions adopted by some circuits. It may be that such a risk can be avoided by amending only rule 26(c). Here is a possible model:

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(c) Protective Orders.

* * * * *

Alternative 1

(4) ***Filing Under Seal.*** Good cause that supports issuance of an order under Rule 26(c)(1) does not itself provide a ground for filing under seal.

Alternative 2

(4) ***Filing Under Seal.*** A order under Rule 26(c)(1) does not support filing under seal unless [the court determines that] filing under seal is consistent with the applicable common law and First Amendment rights of public access to court filings.

Alternative 3

[14] In some cases, there have been suggestions that "discovery" motions or "non-merits" motions are not subject to the same exacting scrutiny appropriate for "merits" motions like motions for summary judgment or a preliminary injunction. Trying to define in a rule whether there are motions that do not invoke public access rights would probably be quite difficult and might conflict with at least some court of appeals decisions. It seems best to leave that to caselaw development.

[15] Is it worth adding this point to the Note? There has been some controversy under Rule 26(c) about whether the court ought often treat the parties' stipulation to entry of a protective order as sufficient to support entry of the order. Some contend that courts should nevertheless insist on rigorous application of the good cause standard applicable there, and grant the protective order only when that standard is affirmatively justified. But requiring the court to undertake a rigorous review under Rule 26(c) may often not be justified. Filing under seal seems different.

(4) ***Filing Under Seal.*** A order under Rule 26(c)(1) must not provide for filing under seal unless [the court determines that] filing under seal is consistent with the applicable common law and First Amendment rights of public access to court filings.

Alternative 4

(4) ***Filing Under Seal.*** An order under Rule 26(c)(1) that limits the use of information obtained in discovery does not alone warrant filing under seal unless the court orders sealing.

COMMITTEE NOTE

Alternative 1

A wide range of concerns may support a finding of good cause for issuing a protective order against disclosure of some materials exchanged though discovery. But filing such materials in court implicates additional considerations concerning the public right of access to court records. These considerations include both common law and the First Amendment rights that have been widely recognized. There may be some divergence in articulation of these limits on filing under seal among various circuits, but it is agreed that [different] {higher} standards must be met to authorize filing under seal. This amendment explicitly recognizes those differences in the Civil Rules.

At the same time, it is important to recognize that various statutory or rule provisions outside Rule 26(c) may authorize filing under seal without regard to the criteria for granting a protective order. A statutory example is the False Claims Act, 31 U.S.C. § 3730(b)(2). Examples of rules that authorize filing under seal include Rules 26(b)(5)(B), 26(c)(1)(F), 45(e)(2)(B), G(3)(c)(ii)(B), and G(5)(a)(ii)(C)(1).

Alternative 2

The concerns that affect a decision whether to permit filing in court under seal are distinct from the good cause criteria of Rule 26(c). This amendment recognizes that a decision to permit filing under seal implicates additional considerations concerning the public right of access to court records. These considerations include both common law and the First Amendment rights that have been widely recognized. There may be some divergence in articulation of these limits on filing under seal among various circuits, but it is agreed that [different] {higher} standards must be met to authorize filing under seal. This amendment explicitly recognizes those differences in the Civil Rules.

At the same time, it is important to recognize that various statutory or rule provisions outside Rule 26(c) may authorize filing under seal without regard to the criteria for granting a protective order. An example is the False Claims Act, 31 U.S.C. § 3730(b)(2). Examples of rules that authorize filing under seal include Rules 26(b)(5)(B), 26(c)(1)(F), 45(e)(2)(B), G(3)(c)(ii)(B), and G(5)(a)(ii)(C)(1).

Alternative 3

Rule 26(c)(1) protective orders are distinct from orders permitting filing under seal. Without regard to Rule 26(c), various statutory or rule provisions authorize or direct filing under seal without regard to the criteria for granting a protective order. An example is the False Claims Act, 31 U.S.C. § 3730(b)(2). Examples of rules that authorize filing under seal include Rules 26(b)(5)(B), 26(c)(1)(F), 45(e)(2)(B), G(3)(c)(ii)(B), and G(5)(a)(ii)(C)(1).

When those provisions apply, there is no need to resort to Rule 26(c) to support filing under seal. When a statute or rule does not apply, a Rule 26(c)(1) protective order does not itself provide a warrant for filing under seal. Filing such materials in court implicates additional considerations concerning the public right of access to court records. These considerations include both common law and the First Amendment rights that have been widely recognized. There may be some divergence in articulation of these limits on filing under seal among various circuits, but it is agreed that [different] {higher} standards must be met to authorize filing under seal. This amendment explicitly recognizes those differences in the Civil Rules, and directs that orders for filing under seal may be granted only when the [more exacting] standards for such filing are met.

Alternative 4

Though an order under Rule 26(c)(1) supported by good cause may impose limitations on uses of confidential information obtained through discovery, the good cause standard is different from the standard for filing under seal. Without regard to Rule 26(c), various statutory or rule provisions authorize or direct filing under seal without regard to the criteria for granting a protective order. An example is the False Claims Act, 31 U.S.C. § 3730(b)(2). Examples of rules that authorize filing under seal include Rules 26(b)(5)(B), 26(c)(1)(F); 45(e)(2)(B), G(3)(c)(ii)(B), and G(5)(a)(ii)(C)(1).

When those provisions apply, there is no need to resort to Rule 26(c) to support filing under seal. When a statute or rule does not apply, a Rule 26(c)(1) protective order does not itself provide a warrant for filing under seal. Filing such materials in court implicates additional considerations concerning the public right of access to court records. These considerations include both common law and the First Amendment rights that have been widely recognized. There may be some divergence in articulation of these limits on filing under seal among various circuits, but it is agreed that [different] {higher} standards must be met to authorize filing under seal. This amendment explicitly recognizes those differences in the Civil Rules, and directs that orders for filing under seal may be granted only when the [more exacting] standards for such filing are met.

(3) Leaving the rules unamended

Given that it seems almost universally recognized that protective orders may be granted on grounds that would not also support filing materials deemed confidential under Rule 26(c) under seal, it may be that there is no real need to amend the rules at all. As noted below, the somewhat elaborate sealing procedures endorsed by some submissions do not seem to be worth pursuing. It seems worth noting that proposals to modify Rule 26(c) regarding protective orders—particularly

stipulated protective orders—have in the past prompted much controversy.[16] If an amendment merely recognizes the status quo under existing caselaw, it may be best to drop this topic from the agenda rather than invite controversy.

It bears note that, if the full Committee decides to limit its proposed amendment to Rule 26(c) there would seem to be no need to consider procedures for motions to seal.

(4) Adding procedural requirements

Many of the submissions to the Committee have gone well beyond urging that the rules recognize the diverging standards for protective orders and filing under seal. Indeed, since most recognize that the courts are already aware of this difference in standards, one might say that the main objective of the current proposals is to promote nationally uniform procedures for deciding whether to authorize filing under seal.

At least some judges initially seemed receptive to efforts to standardize the handling of decisions whether to permit filing under seal. Nonetheless, the Subcommittee has tentatively concluded that any advantages that could be achieved by trying to devise a set of mandatory procedures that every district would have to follow are outweighed by the difficulties that would result. The discussion below, therefore, is designed only to acquaint the full Advisory Committee with the issues the Subcommittee has previously discussed. If the full Advisory Committee favors trying to develop such nationwide procedures, the Subcommittee can go back to the drawing board.

[16] In the 1990s, a proposal addressing stipulated protective orders was ultimately withdrawn.

Excerpt from the Agenda Book for the Advisory Committee on Civil Rules, April 1, 2025, at 241-246

These proposals contain a variety of procedures for handling sealed filings. One submission (22-CV-A, from the Sedona Conference) contains a model rule that is about seven pages long. Another (21-CV-T, from the Knight First Amendment Institute at Columbia University) attaches a 95-page compilation of local rules regarding sealing from all or almost all district courts. Some of the local rules are quite elaborate, and other districts give little or no attention to sealed court filings in their local rules.

Thus, there does presently seem to be considerable variety in local rules and practices on filing under seal. Adopting a set of nationally uniform procedures could introduce more consistency in the treatment of such issues, but also would likely conflict with the local rules of at least some courts. * * * * *

Perhaps for such reasons, the Subcommittee has been uncertain how far to venture into prescribing uniform procedures. Although the various proposals received so far have urged the adoption of a new Rule 5.3 on filing under seal, the Subcommittee's inclination is instead to treat these procedural issues within the framework of existing Rule 5(d). Though there are rules addressed to only one kind of motion (e.g., Rule 37 on motions to compel; Rule 50 on motions for judgment as a matter of law; Rule 56 on motions for summary judgment; and Rule 59 on motions for a new trial), motions to seal do not seem of similar moment, so that a whole rule devoted to them does not seem warranted.

At the same time, the Rule 5(d) approach sketched above could be adapted to include various features suggested by submissions received by the Committee. The following offers a variety of alternative provisions on which the Subcommittee hopes to receive reactions from the full Committee, building on the sketch presented above. * * * * *

Rule 5. Serving and Filing Pleadings and Other Papers

(d) Filing.

* * * * *

(5) ***Filing Under Seal.*** Unless filing under seal is directed by a federal statute or by these rules, no paper [or other material] may be filed under seal unless [the court determines that] filing under seal is justified and consistent with the common law and First Amendment rights of public access to court filings. The following procedures apply to a motion to seal:

(i) [Unless the court orders otherwise,] The motion must not be filed under seal;

Many urge that motions to seal themselves be included in the public docket and open to public inspection. But there may be circumstances in which even that openness could produce unfortunate results. The bracketed phrase would take account of those situations while retaining

the presumption that motions to seal should not themselves be under seal. One example is provided by Rule 5.2(d), which calls for a court order to authorize sealing to protect personal privacy.

The rule could specify something more about what the motion should include, but that seems unnecessary given the rule's invocation of common law and First Amendment limitations in filing in court under seal. A number of submissions provide that sealing orders be "narrowly tailored." But that seems implicit in the invocation of the existing limitations on filing under seal.

In the same vein, the proposal by some that there be "findings" to support an order to seal seems an unnecessary addition. Except for court trials governed by Rule 52, there are few findings requirements in the rules. (Rule 26(b)(3) [sic] does seem to have such a requirement because the court may certify a class only if it finds that the predominance and superiority prongs of the rule are satisfied.) Again, once the common law and First Amendment standards are specified as criteria for deciding a motion to seal, adding a findings requirement seems unnecessary. Perhaps it would be useful were frequent appellate review anticipated, but appellate review of discovery-related rulings is rare, and there are no similar findings requirements for such rulings.

A potential problem here is that the party that wants to file the materials may not itself be in a position to make the showing required to justify sealing. For example, if the party that wants to file the materials obtained them through discovery from somebody else, the entity capable of making the required showing is not the one that wants to file these items. (This may often be true.)

One possibility might be to direct that the parties confer about the motion to seal before presenting it to the court, as is presently required for a motion to compel under Rule 37(a)(1). But the motion to seal situation may be quite different from the motion to compel situation. Party agreement is not sufficient to support sealing if the common law or First Amendment requirements are not met, while party agreement is almost always sufficient to resolve discovery disputes. Indeed, party agreement was a motivating factor behind the certification requirements of Rule 37(a)(1).

In a sense, there may often be two antagonistic parties wanting different things. Often the party that wants to make the filing is indifferent to whether it is under seal, perhaps even favoring public filing. It's another party (or perhaps a nonparty that responded to a subpoena) that wants the court to seal the confidential materials. Conferring might simplify the court's task in such circumstances, but it does not promise to relieve the court of the ultimate duty to make a decision on the motion to seal.

> **(ii)** Upon filing a motion to seal, the moving party may file the materials under [temporary] {provisional} seal[, providing that it also files a redacted version of the materials];

Some of the proposals forbid a court ruling on a motion to seal for a set period (say 7 days) after the motion is filed and docketed. But it appears that the reality is that many such filings are in relation to motions or other proceedings that make such a "waiting period" impractical. For example, a seven-day waiting period would seem to dilute the authority Rule 5.2(d) provides for a court order authorizing filing personal identifying information under seal. The filing of a redacted

version of the materials sought to be sealed may sometimes provide some measure of public access, however.

> **(iii)** The moving party must give notice to any person who may claim a confidentiality interest in the materials to be filed;

This provision is designed to permit nonparties to be heard on whether the confidential materials should be sealed. Perhaps it should be a requirement of (i) above, and it might also include some sort of meet-and-confer requirement.

Alternative 1

> **(iv)** If the motion to seal is not granted, the moving party may withdraw the materials, but may rely on only the redacted version of the materials;

Alternative 2

> **(iv)** If the motion to seal is not granted, the [temporarily] {provisionally} sealed materials must be unsealed;

The question of what should be done if the motion to seal is denied is tricky. One answer (Alternative 2) is that the temporary seal comes off and the materials are opened to the public. Unless that happens, it would seem that the court could not rely on the sealed portions in deciding the motion or other matter before the court. On the other hand, it seems implicit that if the motion is granted the court can consider the sealed portions in making its rulings. Whether that might somehow change the public access calculus might be debated.

Things get trickier if the motion is denied and the party claiming confidentiality is not the one that wanted to file the materials. To permit that party (or nonparty) claiming confidentiality to snatch back the materials would deprive the party that filed them of the opportunity to pursue the result it sought in filing the materials in the first place. * * * * *

> **(v)** The motion to seal must indicate a date when the sealed material may be unsealed. Unless the court orders otherwise, the materials must be unsealed on that date.

This is a recurrent proposal. It cannot reasonably be adopted along with the alternative (below) that the materials must be returned to party that filed them, or to the one claiming confidentiality, at the termination of the litigation.

> **(vi)** Any [party] {interested person} [member of the public] may move to unseal materials filed under seal.

Various proposals have been submitted along these lines. One caution at the outset is that such a provision seems to overlap with Rule 24's intervention criteria. Rule 24 has been employed to permit intervention by nonparties to seek to unseal sealed materials in the court's files. See 8A Fed. Prac. & Pro. § 2044.1.

Such intervention attempts may sometimes raise standing issues. A recent example is *U.S. ex rel. Hernandez v. Team Finance, L.L.C.*, 80 F.4th 571 (5th Cir. 2023), a False Claims Act case in which the district court denied a motion to intervene by a "health care economist." The intervenor sought to unseal information about health care pricing in an action alleging that defendant routinely billed governments for doctor examinations and care services that did not actually occur. The court of appeals concluded that "violations of the public right to access judicial records and proceedings and to gather news are cognizable injuries-in-fact sufficient to establish standing." But the court also remanded for a determination whether the application to intervene was untimely under Rule 24(b).

Indeed, it is interesting to note that Prof. Volokh (the source of the original submission to the Committee) seems himself to be a rather active intervenor. See, e.g., *Mastriano v. Gregory*, 2024 WL 40003343 (W.D. Okla., Aug. 26, 2024) (Volokh granted leave to intervene to move to unseal two exhibits that were filed under seal, and motion to unseal granted); *Sealed Appellant v. Sealed Appellee*, 2024 WL 980494 (5th Cir., March 7, 2024) (Prof. Volokh intervened to challenge the sealing of the file after "this case came to his attention after one of the district court's orders turned up in a scheduled daily Westlaw search for cases mentioning sealing and the First Amendment"); *Doe v. Town of Lisbon*, 78 F.4th 38 (1st Cir. 2023) (Prof. Volokh granted intervention to seek identity of police officer who sued seeking to have his name removed from list of officers found guilty of misconduct, but motion to unseal denied).

Because there is an existing body of precedent on intervention for these purposes, providing some parallel right by rule looks dubious. On the one hand, the proposal that every "member of the public" can intervene may be too broad. Rule 24(b)(1), which is ordinarily relied upon for such intervention to unseal, also has other requirements that might not be included in a new rule.

The role of nonparty confidentiality claimants (mentioned above) seems distinguishable. Particularly if their confidential information was obtained under the auspices of the court (e.g., by subpoena), it would seem to follow that they should have some avenue to protect those interests when a party sought to file those materials in court. (It might be mentioned that most of the submissions seem to take no notice of the possibility that nonparties might favor filing under seal.)

> (**vii**) Upon final termination of the action, any party that filed sealed materials may retrieve them from the clerk.

A proposal made in at least one submission is that all sealed materials be unsealed within 60 days after "final termination" of the action. If that "final termination" is on appeal, it may be difficult for the district court clerk's office to know when to unseal. Imposing such a duty on the clerk's office, rather than empowering the party that filed the material to request its return based on a showing that final termination of the action has occurred seems more reasonable.

The question what is a "final termination of the action" might create uncertainty. At least in the district court, that might be said to be the entry of judgment. But not all judgments end the litigation in the district court. For one thing, Rule 54(a) says that "'[j]udgment' as used in these rules means any order from which an appeal lies." So a partial final judgment under Rule 54(b) would seem to be included. And under 28 U.S.C. § 1292 a variety of interlocutory decisions are

reviewable immediately. In addition, Rule 23(f) permits a party displeased with a ruling on class certification to seek immediate discretionary review of that decision in the court of appeals. Presumably those interlocutory reviews are not necessarily the "final termination of the action."

Alternatively, as reflected in at least one local rule, the clerk could be directed to destroy the sealed materials after final termination of the action. That would also present the monitoring problem mentioned just above. * * * * *

As noted above, these proposals have also prompted at least one submission opposing adoption of any such rule amendments. See 21-CV-G from the Lawyers for Civil Justice, arguing that such amendments would unduly limit judges' discretion regarding confidential information, conflict with statutory privacy standards, and stoke unprecedented satellite litigation.

Discussions during the Advisory Committee's October 2023 meeting stressed the reality that many litigations involve highly confidential technical and competitive information; making filing under seal more difficult could prove very troublesome.

But attorney members of the committee stressed the extreme variety of practices in different districts, sometimes making the lawyers' work much more difficult. Some districts have very elaborate local provisions on filing under seal, and others have few or almost no provisions dealing with the topic. But it was also noted that this divergence might in some instances reflect the sorts of cases that are customary in different districts. There was discussion of the tension between recognizing the need for local latitude in dealing with handling these problems and also recognizing that concerns about perceptions of excessive sealing of court records have continued.

Notes of Discovery Subcommittee Meeting
October 7, 2025

The Discovery Subcommittee held a meeting via Microsoft Teams on Oct. 7, 2025. Participating were Judge David Godbey (Chair of the Subcommittee), Judge Sarah Vance (Chair of the Advisory Committee), Magistrate Judge Annie Christoff, David Burman, David Wright, Thomas Bruton (Clerk Liaison), Carolyn Dubay and Sarah Sraders (Rules Committee Staff), Emery Lee (FJC), Richard Marcus and Andrew Bradt (Reporters), and Edward Cooper (Consultant).

This subject has been intensely investigated since it was originally proposed in 2020 that a new Civil Rule be adopted to deal with motions to seal and direct nationally-binding procedures for the handling of such motions. An extensive FJC study showed that there was considerable divergence in local practices on motions to seal. Various submissions to the Committee proposed rather lengthy and detailed procedures for such motions. Yet most submissions also acknowledged that the courts recognize that the standard for authorizing filing under seal is different from—and more demanding than—the "good cause" standard for granting a protective order under Rule 26(c). In July 2025, submission 25-CV-K the American Association for Justice and Public Justice (included in the agenda book) urged adoption of rule amendments clarifying that the standards are different, but did not urge adoption of nationally-binding procedures for handling motions to seal.

The meeting was introduced as involving four alternatives, identified in the Subcommittee's report in the agenda book for the full Committee's October 24 meeting. The fourth approach—adopting nationally-binding procedures for handling motions to seal—was not favored during the full Committee's April 1, 2025, meeting, as reflected in the minutes of that meeting (in the agenda book for the October meeting). The firm consensus of all participants in the Oct. 7 Subcommittee meeting was that this option should not be pursued. As explored in the Subcommittee's report in the agenda book, the variety of procedures adopted in various districts made it apparent that adopting one set of nationwide procedures would call for invalidating procedures used in some districts and mandating procedures in other districts that differed from actual procedures in those courts. The caseload differences and other differences among districts could readily reflect local circumstances, which may vary widely among districts.

A further note was that submission 25-CV-K concluded (p. 4) that "there is a consensus that the standard required for sealing is higher than the good cause standard required for a protective order," but that a rule amendment would be desirable to "remind both litigants and the court" of this difference. It also reported (ftn. 9) that an extensive recent study of thousands of dockets showed that more than half of "stipulated protective order merits-based denials were traceable to the fact that the orders contained provisions that required the court to automatically seal court filings." That finding seems to confirm that the courts are already adhering to the existing caselaw.

Besides mandating national procedures, the Subcommittee had before it three other possible approaches: (1) amend both Rule 5 and Rule 26(c); (2) amend only Rule 26(c) (with four alternatives); and (3) remove the topic from the agenda.

An initial thought was that alternative (2) might be desirable as a clarification matter. But the consensus view of Subcommittee members was that even this approach would invite controversy and might upset established circuit law on standards for filing under seal. For one thing, that would be "a rule that says nothing," since it professes not to change established caselaw but only serves as a reminder of that caselaw. As one member put it, "in my practice it's pretty well known that the standards are different." And a rule change might be invoked as indicating that the new rule—rather than the pre-existing caselaw—should henceforth be the source of guidance on standards for filing under seal. The draft Committee Notes attempt to blunt such arguments, but sometimes courts treat the Committee Notes as nonbinding. The consensus was to favor alternative (3)—remove this topic from the Committee's agenda.

One concern was whether, given all the effort already invested in this project (including the extensive FJC study), it would be problematical to drop the topic at this point. Yet this would not be the first time the Committee has put considerable effort into examining a proposed rule change and then decided the change was not worth pursuing. A recent example arose during the work of the MDL Subcommittee, which eventually led to the adoption of new Rule 16.1 (to go into effect on Dec. 1, 2025). One of the provisions strongly endorsed in submissions to the Committee about a possible MDL rule was adopting an analogue to Rule 23(f) to authorize interlocutory appeals in such proceedings. Very considerable effort was spent on this possibility, leading ultimately to the conclusion that it should not be pursued. As eventually proposed (and promulgated), that rule does not have any interlocutory review features.

Given the consensus to recommend alternative (3), there was also the question whether or how to reflect that in the agenda book. The response was that the possibility of a further report from this subcommittee was noted in the report in the agenda book for the upcoming meeting. So an addendum to the agenda book could be added, and Committee members could be alerted to this addition (and perhaps that these notes could be sent to them as well as being added to the agenda book). Because the addendum would be at the end, it should not affect page numbering in the agenda book, and perhaps a notation could be made on p. 2 or p. 122 of the agenda book about the addendum (without affecting the pagination). That would change the item (on p. 2) from being only a subcommittee report to being an action item, like the Cross-Border Subcommittee action item recommending removing that topic from the agenda. In the current agenda book, the Discovery Subcommittee item comes right after the Cross-Border Discovery item; it should be a seamless transition.

Another reaction was that removing this specific topic from the agenda does not mean that there will be no further issues related to filing under seal. To the contrary, quite separately there is an ongoing study of whether sufficient precautions have been taken to guard against cybersecurity threats of access to sealed court filings. Those serious concerns are not primarily responsibilities of the Advisory Committee, which does not participate prominently in the design or security of CM/ECF. And in a sense they point in a different direction from the topic the Discovery Subcommittee has been addressing and now proposes to remove from its agenda. These cybersecurity concerns are about worries that when materials are filed under seal, malign actors may nevertheless be able to gain access to them. Similar concerns may arise with regard to the Criminal Rules, Bankruptcy Rules, and Appellate Rules. It is clear that this set of concerns is not focused on whether materials are filed under seal too frequently, but whether materials filed under seal are really fully sealed and immune to hacking threats.

Stanford Law School

Nora Freeman Engstrom
Ernest W. McFarland Professor of Law
Co-Director, Deborah L. Rhode Center on the Legal Profession

Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610
Tel 650 736-8891
Fax 650 725-0253
nora.engstrom@law.stanford.edu
www.law.stanford.edu

July 1, 2026

Carolyn A. Dubay, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, D.C. 20544

Re: Suggestion for a New Federal Rule of Civil Procedure Governing the Sealing of Judicial Records

Dear Members of the Advisory Committee on Civil Rules:

I, along with my colleagues, respectfully suggest that the Advisory Committee on Civil Rules consider proposing a new federal rule to govern the sealing of judicial records in civil cases.[1]

Currently, there is no Federal Rule of Civil Procedure that governs the sealing of judicial records. And though many local rules provide standards, these standards are neither uniform, comprehensive, nor consistently reflective of the law on the books.[2]

[1] My colleagues include David Freeman Engstrom (LSVF Professor in Law and Co-Director of the Deborah L. Rhode Center on the Legal Profession, Stanford Law School), Jonah B. Gelbach (Herman F. Selvin Professor of Law, University of California, Berkeley School of Law; Non-Resident Fellow, Deborah L. Rhode Center on the Legal Profession), Matthew Brundage (Associate Director, Deborah L. Rhode Center on the Legal Profession, Stanford Law School), Othman Bensouda Koraichi (Data Scientist, Deborah L. Rhode Center on the Legal Profession, Stanford Law School), and Amy Cass (Law Student Fellow, Deborah L. Rhode Center, Stanford Law School). All of these individuals have joined me in conducting research on sealing in the federal courts.

[2] *See* David S. Ardia, *Sealed Justice: Federal Courts' Inconsistent Record-Sealing Rules and their Impact on Judicial Transparency*, 6 J. FREE SPEECH L. 211, 211 (2025) (conducting a sustained empirical study of local rules and reporting that "[n]early half of all districts lack general sealing rules, many fail to reference the controlling legal standard, and basic procedural safeguards—such as public notice, consideration of alternatives to sealing, and case-specific identification of harms—are frequently absent").

Our proposal would address these deficiencies by creating a *uniform* federal standard that reflects and codifies the well-established presumption of public access. We offer specific proposed language below in Part III.

Our proposal is grounded in our forthcoming empirical study—Nora Freeman Engstrom, David Freeman Engstrom, Jonah B. Gelbach, Austin Peters, Matthew Brundage, Othman Bensouda Koraichi, & Amy Cass, *[Sealed Document]: An Empirical Study of Sealing Orders in the Federal Courts*, 76 DUKE L.J. (forthcoming 2027) (the "Study")—which supplies the most comprehensive picture to date of how the federal courts actually adjudicate motions to seal. Drawing on more than 2 million civil dockets and a hand-coded sample of over 600 sealing orders, the Study documents a sustained and substantial gap between (a) the rigorous standards for judicial sealing that the federal Circuits announce and (b) the lower standard that trial courts, in fact, apply. Those findings, we submit, demonstrate the need for a focused, sealing-specific federal rule, and they go directly to the question this Committee recently posed: whether sealing-related problems are "so widespread that an effort to develop a national rule is warranted." Advisory Comm. on Civil Rules, Agenda Book at 370 (Oct. 16, 2020).

I. The Empirical Reality: District Courts Usually Apply the Wrong Sealing Standard

A. The Demanding Law on the Books

The law, as the Circuits articulate it, establishes a high bar for judicial sealing. Importantly, this standard is "substantially the same across circuits." *DePuy Synthes Prods., Inc. v. Veterinary Orthopedic Implants, Inc.*, 990 F.3d 1364, 1369 (Fed. Cir. 2021).

There is, first, a strong consensus that no motion to seal should be granted unless it is supported by a compelling reason. *See, e.g., FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410, 412 (1st Cir. 1987) (explaining that the presumption of access may be overcome only by "the most compelling reasons" and that any sealing "must be based on a particular factual demonstration of potential harm, not on conclusory statements") (citations omitted); *In re Avandia Mktg., Sales Pracs. & Prods. Liab. Litig.*, 924 F.3d 662, 672–73 (3d Cir. 2019) (explaining that, before sealing a judicial record, the court must "articulate the compelling, countervailing interests to be protected" and "make specific findings on the record concerning the effects of disclosure") (citations and internal quotations omitted); *Gonzalez v. Cuccinelli*, 985 F.3d 357, 376–77 (4th Cir. 2021) ("A sealing involving 'judicial records and documents' can be accomplished

without violating First Amendment rights only if (1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, that compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect that compelling interest.") (quotation omitted); *Binh Hoa Le v. Exeter Fin. Corp.*, 990 F.3d 410, 421 (5th Cir. 2021) ("The secrecy of judicial records, including stipulated secrecy, must be justified and weighed against the presumption of openness that can be rebutted only by compelling countervailing interests favoring nondisclosure."); *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 305–06 (6th Cir. 2016) (emphasizing that "[o]nly the most compelling reasons can justify non-disclosure of judicial records," and holding that, before sealing a judicial record, a court must explain "why the interests in support of nondisclosure are compelling, why the interests supporting access are less so, and why the seal itself is no broader than necessary") (citations omitted); *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002) (recognizing a "strong presumption" of public access that can be overridden only by a "compelling interest in secrecy") (citations omitted); *In re Neal*, 461 F.3d 1048, 1053 (8th Cir. 2006) (clarifying that an order to seal must be supported by "only the most compelling reasons") (quotation omitted); *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178–79 (9th Cir. 2006) (explaining the "compelling reasons" standard, which requires the movant to "articulate[] compelling reasons supported by specific factual findings") (quotation omitted); *cf. Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119–20, 124 (2d Cir. 2006) (explaining that, before sealing, a court must make "specific, on the record findings" that closure is narrowly tailored to serve higher values) (quotation omitted); *United States v. Bacon*, 950 F.3d 1286, 1293 (10th Cir. 2020) (recognizing that there is a "strong presumption of openness [that] can be overcome [only] where countervailing interests heavily outweigh the public interests in access to the judicial record" such that district courts, when assessing requests to seal "must weigh the interests of the public, which are presumptively paramount, against those advanced by the parties") (quotation and alteration omitted); *In re Leopold to Unseal Certain Elec. Surveillance Applications & Ords.*, 964 F.3d 1121, 1127, 1131 (D.C. Cir. 2020) (recognizing "a strong presumption in favor of public access to judicial proceedings" and applying a six-factor balancing test under which the proponent of sealing bears the burden of articulated justification) (citations and quotation omitted). *But see Chi. Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1312–13 (11th Cir. 2001) (applying, for sealing at least certain judicial records, something akin to the Rule 26(c) "good cause" standard); *Romero v. Drummond Co.*, 480 F.3d 1234, 1246 (11th Cir. 2007) (applying a common-law "good cause" balancing test).

Second, the Circuits agree that, when granting an order to seal, the trial court must show its work. The trial court must explain why sealing is warranted, and, in so doing, vague

or conclusory statements are insufficient. In the words of the Ninth Circuit, district courts must "base [their] decision on a compelling reason and articulate the factual basis for [the] ruling, without relying on hypothesis or conjecture." *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1182 (9th Cir. 2006) (citation omitted).[3]

Third, and relatedly, with a couple of exceptions, Circuits agree that the sealing order standard differs from the protective order standard.[4] For protective orders granted per Rule 26(c), good cause is good enough. Not so for sealing orders. As the Fifth Circuit explains: "That a document qualifies for a protective order under Rule 26(c) for discovery says nothing about whether it should be sealed once it is placed in the *judicial record*." *June Med. Servs., L.L.C. v. Phillips*, 22 F.4th 512, 521 (5th Cir. 2022).[5]

---

[3] The law of other Circuits is in accord. *See, e.g.,* FTC v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 412 (1st Cir. 1987) (requiring sealing to rest on "a particular factual demonstration of potential harm, not on conclusory statements") (quoting Anderson v. Cryovac, Inc., 805 F.2d 1, 7 (1st Cir. 1986)); *In re* Cendant Corp., 260 F.3d 183, 194–96 (3d Cir. 2001) (requiring "specific findings on the record concerning the effects of disclosure") (citing Miller v. Indiana Hosp., 16 F.3d 549, 551 (3d Cir. 1994)); Va. Dep't of State Police v. Wash. Post, 386 F.3d 567, 576 (4th Cir. 2004) (clarifying that, before granting a sealing motion, a court must state its reasons on the record); United States v. Ahsani, 76 F.4th 441, 452 (5th Cir. 2023) (requiring that sealing orders be supported by "detailed, clear, and specific findings") (quotation omitted); Signature Mgmt. Team, L.L.C. v. Doe, 876 F.3d 831, 836 (6th Cir. 2017) ("A district court must set forth specific reasons explaining its decision to keep judicial records confidential.") (citation omitted); Rudd Equip. Co. v. John Deere Constr. & Forestry Co., 834 F.3d 589, 594 (6th Cir. 2016) (requiring trial courts to "analyze in detail, document by document, the propriety of secrecy, providing reasons and legal citations") (quoting *Shane Grp., Inc*., 825 F.3d at 305–06).

[4] As the text explains, there are two caveats. First, the Eleventh Circuit is an outlier: It applies something akin to the Rule 26(c) "good cause" standard to at least certain judicial records. *See* Chi. Tribune Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1312–13 (11th Cir. 2001); Romero v. Drummond Co., 480 F.3d 1234, 1246 (11th Cir. 2007). Second, several Circuits carve out a more lenient regime for material filed in connection with non-merits discovery disputes. *See, e.g.,* United States v. Kravetz, 706 F.3d 47, 55–56 (1st Cir. 2013); Brown v. Maxwell, 929 F.3d 41, 50 (2d Cir. 2019); Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1097 (9th Cir. 2016). As we explain in footnote 7, our empirical analysis accounts for these complexities.

[5] With the exceptions set forth in footnote 4, the other Circuits are in accord. *See, e.g., In re* Avandia Mktg., Sales Pracs. & Prods. Liab. Litig., 924 F.3d 662, 675–77 (3d Cir. 2019) (vacating sealing order because the district court erroneously applied the protective-order standard); Shane Grp., Inc. v. Blue Cross Blue Shield of Mich., 825 F.3d 299, 307 (6th Cir. 2016) (vacating sealing where the district court "conflated the standards for entering a protective order under Rule 26 with the vastly more demanding standards for sealing off judicial records from public view"); Kamakana v. City & Cnty. of Honolulu, 447 F.3d 1172, 1180 (9th Cir. 2006) (similar); 9C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2042 (4th ed. 2025 update) (collecting authority).

Fourth and finally, sealing orders must be narrowly tailored. As the Sixth Circuit has put it, these orders can be "no broader than necessary." *Shane Grp., Inc.,* 825 F.3d at 305. Or, in the words of the Third Circuit:

> If the First Amendment right of access applies, there is a presumption that the proceedings will be open to the public. The party seeking closure may rebut the presumption of openness only if able to demonstrate an overriding interest in excluding the public based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.

In re Avandia Mktg., Sales Pracs. & Prods. Liab. Litig., 924 F.3d 662, 673 (3d Cir. 2019) (cleaned up).[6]

B. The Lax Law in Action

Practice, our data show, looks nothing like that.

There is plenty of anecdotal evidence that district courts deviate from the above requirements. Our Study explains:

[6] Other Circuits are in accord. *See, e.g., In re* Providence Journal Co., 293 F.3d 1, 15 (1st Cir. 2002) (recognizing courts' "obligation to consider all reasonable alternatives" before sealing, including redaction on a document-by-document basis); Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 124 (2d Cir. 2006) (requiring sealing orders to be "narrowly tailored"); Va. Dep't of State Police v. Wash. Post, 386 F.3d 567, 576 (4th Cir. 2004) (stating that, before granting a motion to seal, the court must "consider less drastic alternatives"); Binh Hoa Le v. Exeter Fin. Corp., 990 F.3d 410, 420–21 (5th Cir. 2021) (stating that any sealing order must be "congruent to the need"); Grae v. Corr. Corp. of Am., 134 F.4th 927, 932 (6th Cir. 2025) ("[E]ven when a party can show a compelling reason why certain documents or portions thereof should be sealed, the seal itself must be narrowly tailored to serve that reason.") (quotation omitted); In re Nat'l Prescription Opiate Litig., 927 F.3d 919, 939 (6th Cir. 2019) (instructing that, before sealing a judicial record, a trial court must explain "why the seal itself is no broader than necessary") (internal quotation marks omitted); In re Associated Press, 162 F.3d 503, 506 (7th Cir. 1998) (discussing the First Amendment right of access and requiring that any "suppression" be "narrowly tailored") (internal quotation marks omitted); United States v. Garner, 39 F.4th 1023, 1024 (8th Cir. 2022) ("A proper motion to seal should be narrowly drawn . . . ."); United States v. Pickard, 733 F.3d 1297, 1304 (10th Cir. 2013) (concluding that the district court erred by failing to "consider whether unsealing redacted versions of the . . . records would adequately serve" the asserted interest before sealing); *see also* Francis H. Hare, Jr., et al., Confidentiality Orders 156 (1988) (explaining that orders to seal "must be narrowly drawn and precise").

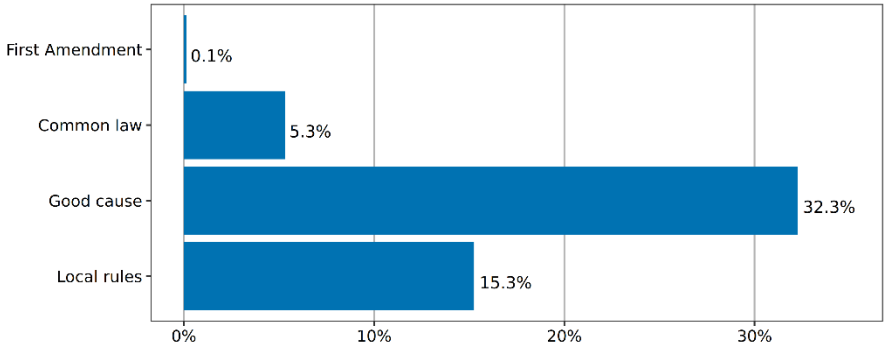
> In one [recent case], a judge sealed documents that were already in widespread circulation, including a "an arrest report from a police department's public website [and] articles from *The New York Times*." In another, the trial court let the parties place 8,000 pages under seal. When the parties' positions were tested on appeal, however, they sought to protect only a single page. In a third, the plaintiff convinced the trial court to greenlight the sealing of its class certification motion and all 90 attachments thereto based on arguments that the appellate court derided as "brief, perfunctory, and patently inadequate."

Nora Freeman Engstrom et al., *[Sealed Document]: An Empirical Study of Sealing Orders in the Federal Courts*, 76 DUKE L.J. (forthcoming 2027), at 5 (citations omitted). *See also* Hon. Jennifer Walker Elrod, Hon. Don Willett & Brian M. Miller, *Walking in the Light: On the Overuse of Sealing in Court Records*, 100 ADVOC. 27, 27 (2022) (lamenting that "sealing is overused" and "[t]oo often . . . employed liberally and without much thought—as if waving a broadsword at a problem demanding a scalpel"); Gustavo Ribeiro, *(Marked Confidential): Negative Externalities of Discovery Secrecy*, 100 DENV. L. REV. 171, 194 (2022) (observing that judges "seem increasingly willing to grant, often in an uncritical fashion, parties' requests to seal"); Hon. Gregg Costa, *Federal Appellate Judge: Too Many Sealed Documents*, NAT'L L.J. (Feb. 15, 2016) (charging that trial judges frequently seal judicial records notwithstanding formal commands: "what the law books say is one thing; how the law is enforced is another").

Our findings validate these concerns. Among other deficiencies, we find that only roughly half of sealing orders cite *any* legal standard at all, and most of those that do cite the incorrect one. In particular, although it is well established that the standard that governs sealing is different from the standard that governs the grant of a protective order, of the roughly half of sealing orders that furnished a standard, the standard most frequently cited was "good cause."[7]

[7] Recognizing the wrinkles set forth in footnote 4, we re-ran our analysis excluding the Eleventh Circuit and excluding sealing requests tied solely to discovery disputes. We found that, even with those key exclusions, the misapplication persisted. And even when we further zeroed in on summary-judgment filings, 32% of sealing orders nonetheless invoked "good cause." *See* Nora Freeman Engstrom et al., *[Sealed Document]: An Empirical Study of Sealing Orders in the Federal Courts*, 76 DUKE L.J. (forthcoming 2027), Part III.D.

Legal Standard Cited in Sealing Orders
(*roughly half of sealing orders cite no legal standard*)



Beyond that, we find that, although the Circuits require district courts to apply the governing legal standard to the facts of the particular case before them, only 10% of sealing orders make any effort to do so. And, although the Circuits demand particularized factual findings, a mere 3% of sealing orders contain them.

Last but not least, although courts are supposed to use the least restrictive means available—employing redaction or other narrower interventions in lieu of wholesale sealing whenever possible—more than half of the orders we coded sealed entire filings, including summary-judgment briefs and their exhibits. Fewer than 1% of motions were denied on the ground that targeted redaction or another less restrictive means would suffice.

How District Courts Handle Motions to Seal[8]

Sealing orders that …	**Share**
Cite any legal standard	~50%
Of those that cite a legal standard, cite the wrong standard (e.g., Rule 26(c) "good cause")	Majority
Apply the legal standard to the facts	~10%
Contain a particularized factual finding	~3%
Seal entire filings, rather than tailored portions or targeted redactions	>50%
Are denied on less-restrictive-alternative grounds	<1%

II. Why a Federal Rule, and Why Now

Calls for a federal sealing rule are not new. In August 2020, Professor Eugene Volokh, joined by the Reporters Committee for Freedom of the Press and the Electronic Frontier Foundation, submitted Rules Suggestion 20-CV-T, which proposed a new Rule 5.3 governing sealing standards, public notice, and post-judgment unsealing. *See* Letter from Eugene Volokh, Reporters Comm. for Freedom of the Press & Elec. Frontier Found. to Fed. Rules Advisory Comm. (Aug. 7, 2020), at 2. A comparable suggestion

[8] All reported findings are from our hand-coded review of more than 600 sealing orders. The claims that roughly 50% of orders cite any standard, that roughly 10% apply the standard to facts, and that roughly 3% contain a particularized finding correspond to Figure 10 of the Study. The "wrong standard" finding corresponds to Figure 14 and accompanying discussion. The wholesale-sealing (>50%) and less-restrictive-alternative (<1%) findings are reported in the same Part III.D. *See* Nora Freeman Engstrom et al., *[Sealed Document]: An Empirical Study of Sealing Orders in the Federal Courts*, 76 DUKE L.J. (forthcoming 2027), Part III.D.

followed in 2021. *See* Heather Abraham, Alex Abdo & Jonathan Manes, Rules Suggestion 21-CV-T (Sept. 3, 2021).

The Committee's decision not to advance those proposals did not turn on the Committee's principled disagreement with the proponents' substantive aims. Quite the opposite: the Committee acknowledged that "inappropriate sealing of court records is an important concern," but observed that "it is not clear that the problem is so widespread that an effort to develop a national rule is warranted." Oct. 16, 2020 Agenda Book, *supra*, at 370. Understandably, the Committee did not want to create a rule if any change would just be "cosmetic." Advisory Comm. on Civil Rules, Agenda Book at 137 (Mar. 28, 2023) (discussing a variant of the proposed Rule 5.3 and questioning the need for reform: "If [a proposal] adopts what the courts are already doing, it might be regarded as somewhat 'cosmetic.'").

This hesitation perhaps stemmed from assurances—offered by, among others, the Judicial Conference of the United States and the Lawyers for Civil Justice—that the current system is working fine and that trial judges already grant motions to seal only "sparingly" after conducting the requisite document-by-document review. *See, e.g.*, *Federal Judiciary in the 21st Century: Ensuring the Public's Right of Access to the Courts: Hearing Before the H. Subcomm. on Cts., Intellectual Prop., & the Internet of the Comm. on the Judiciary*, 116th Cong. 43–44 (2019) (statement of The Honorable Richard W. Story on behalf of the Judicial Conference of the United States) (reassuring Congress that "judges throughout the Federal Judiciary are acutely aware of their responsibility and duty to protect the public's access to all aspects of judicial proceedings—including access to court records—and approach motions to seal with the public's interest in mind"); *id*. at 43 (emphasizing that, in practice, "[c]ourts are careful to seal only the portions of the record that require sealing"); Lawyers for Civil Justice, Comment to the Advisory Comm. on Civil Rules at 1–2 (Mar. 24, 2021) (assuring the Committee that "the current rules are working" and that "federal courts continue to enforce a strong presumption in favor of disclosure, granting sealing orders sparingly"); *id*. at 3 (emphasizing that "this system functions as it is intended to, primarily due to judges' discretion and their proximity to the facts and issues of a specific case"); Advisory Comm. on Civil Rules, Agenda Book at 29 (Oct. 24, 2025) (stating that a judge "expressed skepticism of national standards because the methods courts have already developed are working well for them").

Similarly, in past discussion, a member of your body cautioned restraint when fashioning a rule of sealing because, in his words, "district . . . courts understand well that the standard for filing under seal is more demanding than what is required to issue

a protective order." Advisory Comm. on Civil Rules, Agenda Book at 87 (Oct. 10, 2024) (summarizing the views of the Reporter). And ultimately, it seems, a view took hold that, since district courts were not laboring under any misimpression, it was "unnecessary" to take steps to dispel one. Report of the Advisory Committee on Civil Rules, from Hon. Sarah S. Vance, Chair, to Hon. James C. Dever III, Chair of Committee on Rules of Practice and Procedure (Dec. 5, 2025), at 14 (reporting that sealing was dropped from the Advisory Committee's agenda in part because there was a sense that "[a]mending the rules to clarify that the standard for filing under seal is more demanding than the standard for granting a protective order under Rule 26(c)" was "unnecessary"); Advisory Comm. on Civil Rules, Agenda Book at 128 (Oct. 24, 2025) ("If an amendment merely recognizes the status quo . . . it may be best to drop this topic from the agenda rather than invite controversy.").

Until now, no one had the data to test those impressions and assurances.

With the benefit of our Study, we respectfully submit that action *is* warranted. When approximately half of orders cite no standard and only 3% contain a particularized factual finding, when the most frequently invoked standard is the wrong one, and when more than half of orders seal entire filings rather than portions thereof, the predicate of the Committee's prior deferral no longer holds.

Furthermore, our study meshes with work by David Ardia, published in 2025. Analyzing the local rules governing sealing in all 94 federal districts, Professor Ardia found:

> Nearly half of all districts lack general sealing rules, many fail to reference the controlling legal standard, and basic procedural safeguards—such as public notice, consideration of alternatives to sealing, and case-specific identification of harms—are frequently absent. These deficiencies have created a patchwork of inconsistent, often toothless rules that enable secrecy to spread largely unchecked.

David S. Ardia, *Sealed Justice: Federal Courts' Inconsistent Record-Sealing Rules and their Impact on Judicial Transparency*, 6 J. FREE SPEECH L. 211, 211 (2025).

Our findings are also broadly consistent with recent work by Professor Elizabeth A. Rowe. Parsing data from Lex Machina, Professor Rowe reports that "in the last five years, there were over thirty thousand cases in which motions to seal were filed, and each of those cases often contained, on average, seven docket entries related to a request

to seal." Elizabeth A. Rowe, *Judicial Secrecy*, 59 U.C. DAVIS L. REV. 227, 235–36 (2025).

And, our findings support the views of Judge Jennifer Elrod and co-authors, who recently observed that a "steady flow" of sealings had brought "about a gradual, sub silentio erosion of public access to the judiciary" and lamented: "The problem is not so much because of a lack of guiding standards but because courts often do not apply the standards." Elrod et al., *supra* at 27–28 (quotation omitted).

Again: Given these recent developments, we respectfully submit that the Advisory Committee should reconsider its recent decision to drop the matter from its agenda.

A final note is that the Committee might be tempted to see our proposal as promoting transparency, rather than privacy. As you consider the proposal, however, it might be useful to see it as reflecting a different set of values: The proposal promotes lower court obedience, rather than disobedience, to higher law. We aren't saying what the sealing standard should be. Rather, we are saying that appellate courts have said, repeatedly and emphatically, what the sealing standard should be *and is*, and trial courts should obey—rather than ignore—those commands.

III. Proposed Rule Text and Committee Note

Our proposal, set forth below, would translate into either a freestanding Rule 5.3 (the path Professor Volokh proposed) or a subdivision of Rule 5 paired with a coordinating clarification to Rule 26(c). We have drafted this proposal in the plain, restyled idiom the Committee has used since 2007, and we have tried, where possible, to mirror the structure of existing Rules 5.1 and 5.2.

> **Rule 5.3. Sealing Judicial Records.**
>
> (a) *Scope*. This rule governs a request to seal or redact a filing made with the court. It does not apply to material that a statute permits or requires to be filed under seal. Nor does it apply to protective orders, governed by Federal Rule of Civil Procedure 26(c).
>
> (b) *Presumption of Public Access*. A filing made with the court is presumptively open to public inspection. The court may seal or redact a filing only as provided by this rule or by federal statute.

(c) *Motion*. A party seeking to seal or redact a filing must file a motion that:

(1) identifies each filing, or each portion thereof, the party seeks to seal or redact;

(2) states the interest that supports sealing or redaction;

(3) states the injury that would result from public access; and

(4) explains why a less restrictive alternative would not adequately protect the party's interest.

(d) *Procedure: Public and Sealed Versions*.

(1) The motion described in subdivision (c), along with any accompanying memorandum, must be filed publicly unless public filing would disclose the information sought to be sealed. If some of the information in the motion is itself private or confidential, the movant should file a redacted version of the motion or memorandum.

(2) When filing a motion pursuant to subdivision (c), the movant must submit under seal the unredacted filing and must clearly mark the portion(s) for which sealing or redaction is sought.

(3) If a redacted version of the filing can be filed without disclosing the private or confidential information sought to be protected, the movant must submit the redacted version on the public docket contemporaneously with the motion to seal or redact.

(e) *Procedure*: *Temporary Sealing Pending Decision*. When material is filed under seal pursuant to subdivision (d)(2), the clerk must maintain that material under seal pending disposition of the accompanying motion unless the court orders otherwise.

(f) *Procedure: Temporary Sealing Following Denial of Motion*. If the court denies a motion to seal or redact, the material filed pursuant to subdivision (d)(2) must remain under seal for 7 days after entry of the denial unless the court orders otherwise. During that 7-day period, the

movant may withdraw the filing, file a renewed motion to seal, seek other relief, or file the material publicly. Absent such activity, after the expiration of the 7-day period, the unredacted filing (submitted pursuant to subdivision (d)(2)) must be posted on the public docket.

(g) *Standard*. The court may grant a motion to seal or redact only if it finds that the movant has shown that the sealing or redaction is supported by a compelling interest that outweighs the presumption of public access and is narrowly tailored to serve that interest. Pursuant to this narrow tailoring requirement, a court may not grant a motion to seal an entire document if a redaction adequately protects the party's interest.

(h) *Consent and Protective Orders*. Party consent, stipulation, or non-opposition does not relieve the court of its duty to apply the standard set forth in subdivision (g). A protective order entered under Rule 26(c), or a confidentiality designation made under such an order, does not by itself satisfy subdivision (g).

(i) *Order*. An order granting a motion to seal or redact must identify:

(1) the privacy, confidentiality, trade secret, national security, or other interest that justifies sealing or redaction;

(2) why that interest outweighs the presumption of public access;

(3) why the order is no broader than necessary; and

(4) whether the order expires on a specified date or remains in effect until further order.

(j) *Right to Oppose or Unseal*. Any person may oppose a motion to seal filed pursuant to subdivision (c) or move to unseal or unredact a filing. If not already a party to the litigation, such a person is treated as having intervened for the limited purpose of securing their rights to access judicial records. The proponent of sealing or redaction, or the continuation thereof, bears the burden of justifying protection under subdivision (g).

We further suggest adding the following clarifying sentence to Rule 26(c), either as a new subparagraph (5) or as the final sentence of subdivision (c)(1):

Coordinating Amendment to Rule 26(c).

A protective order entered under this rule does not authorize the sealing of materials filed with the court. Sealing of judicial records is governed by Rule 5.3.

We further propose the following draft Committee Note.

Draft Committee Note (Rule 5.3).

New Rule 5.3 supplies, for the first time, a uniform federal standard for the sealing of judicial records in civil cases. It codifies the well-established presumption of public access to judicial records. *See Nixon v. Warner Commc'ns, Inc*., 435 U.S. 589, 597 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."); *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) ("The common law right of public access to judicial documents is said to predate the Constitution.").

Subdivision (h) reiterates the well-established principle that protective orders, governed by Rule 26(c), are subject to different standards than sealing orders.

Subdivision (g) codifies the "compelling reasons" standard already articulated, in substantially similar terms, by the supermajority of the federal courts of appeals. *See, e.g., FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410, 412 (1st Cir. 1987); *In re Avandia Mktg., Sales Pracs. & Prods. Liab. Litig.*, 924 F.3d 662, 672–73 (3d Cir. 2019); *Gonzalez v. Cuccinelli*, 985 F.3d 357, 376–77 (4th Cir. 2021); *Binh Hoa Le v. Exeter Fin. Corp*., 990 F.3d 410, 421 (5th Cir. 2021); *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 305–06 (6th Cir. 2016); *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002); *In re Neal*, 461 F.3d 1048, 1053 (8th Cir. 2006); *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178–79 (9th Cir. 2006).

The rule responds to the translational failure documented by Nora Freeman Engstrom, David Freeman Engstrom, Jonah B. Gelbach, Austin Peters, Matthew Brundage, Othman Bensouda Koraichi, & Amy Cass, *[Sealed Document]: An Empirical Study of Sealing Orders in the Federal*

Courts, 76 DUKE L.J. (forthcoming 2027), by placing the controlling standard in a single, accessible place; by requiring the showing the vast majority of appellate courts already demand to be made on the front end; and by clarifying that party consent does not, without more, satisfy the court's independent obligation.

The rule does not displace or otherwise affect categorical statutory protections, *see* subdivision (a), nor does it disturb the long-recognized authority of trial courts to enter discovery-stage protective orders under Rule 26(c). For categorical statutory protections, see, e.g., 31 U.S.C. § 3730(b)(2) (requiring qui tam complaints under the False Claims Act to be filed under seal for at least 60 days while the United States decides whether to intervene); 15 U.S.C. § 1116(d)(8) (directing courts entering ex parte seizure orders under the Trademark Act to keep the order sealed until the target has an opportunity to contest it); 50 U.S.C. § 1802(a)(3) (requiring the Attorney General to transmit Foreign Intelligence Surveillance Act certifications to the FISC under seal); 18 U.S.C. § 2339B(f) (authorizing courts to seal classified information and permit ex parte government submissions in civil proceedings involving material support to designated foreign terrorist organizations); 28 U.S.C. § 657(b) (directing that the contents of court-annexed arbitration awards remain sealed from the assigned judge until the district court enters final judgment).

We would welcome the opportunity to provide additional information, to share the underlying data, or to participate in any hearing or public-comment process the Committee may convene. We thank the Committee for its consideration.

Respectfully submitted,



Nora Freeman Engstrom
Ernest W. McFarland Professor of Law
Co-Director, Deborah L. Rhode Center on the Legal Profession
Stanford Law School

on behalf of the following additional authors of [*Sealed Document]: An Empirical Study of Sealing Orders in the Federal Courts*:

David Freeman Engstrom, LSVF Professor in Law and Co-Director of the Deborah L. Rhode Center, Stanford Law School

Jonah B. Gelbach, Herman F. Selvin Professor of Law, University of California, Berkeley School of Law; Non-Resident Fellow, Deborah L. Rhode Center, Stanford Law School

Matthew Brundage, Associate Director, Deborah L. Rhode Center, Stanford Law School

Othman Bensouda Koraichi, Data Scientist, Deborah L. Rhode Center, Stanford Law School

Amy Cass, Law Student Fellow, Deborah L. Rhode Center, Stanford Law School

Attachment: *[Sealed Document]: An Empirical Study of Sealing Orders in the Federal Courts*.

TAB 10

Electronic Access to Immigration Cases

The Advisory Committee has recently received three submissions in support of amending Rule 5.2(c) to provide for remote public access to electronic records in immigration cases. These submissions were made by: John Hawkinson, a freelance reporter (26-CV-12), the Reporters Committee for Freedom of the Press (26-CV-20), and Roger Parloff, a senior editor at Lawfare Media (26-CV-29).[3]

Currently, Rule 5.2(c) provides as follows:

> **Rule 5.2. Privacy Protections For Filings Made with the Court**
>
> ***
>
> (c) LIMITATIONS ON REMOTE ACCESS TO ELECTRONIC FILES; SOCIAL-SECURITY APPEALS AND IMMIGRATION CASES. Unless the court orders otherwise, in an action for benefits under the Social Security Act, and in an action or proceeding relating to an order of removal, to relief from removal, or to immigration benefits or detention, access to an electronic file is authorized as follows:
>
> (1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record;
>
> (2) any other person may have electronic access to the full record at the courthouse, but may have remote electronic access only to:
>
> (A) the docket maintained by the court; and
>
> (B) an opinion, order, judgment, or other disposition by the court, but not any part of the case file or the administrative record.

The upshot of the current rule is that anyone who would like to view the record materials (other than the docket or court orders) in an immigration case must travel to the courthouse where the case is pending.

As the committee note from 2007, when this provision was added to our rules, notes:

> Subdivision (c) provides for limited public access in Social Security cases and immigration cases. Those actions are entitled to special treatment due to the prevalence of sensitive information and the volume of filings. Remote electronic access by nonparties is limited to the docket and the written dispositions of the court unless the court orders otherwise. The rule contemplates, however, that nonparties

[3] Messrs. Hawkinson and Parloff also suggest similar amendments to Appellate Rule 25(a)(5), which provides that cases covered by our Rule 5.2(c) are "governed by the same rule on appeal." Mr. Parloff's submission is primarily focused on the Appellate Rule.

> can obtain full access to the case file at the courthouse, including access through the court's public computer terminal.

In essence, although most records are publicly available on PACER, albeit with some "personal data identifiers" redacted, Social Security and immigration case files may only be viewed at the courthouse. The evident goal is to balance the interest in public access to records of court proceedings with the privacy interest of the parties, which may be elevated in these cases due to the likelihood that they will contain especially sensitive information.

With immigration proceedings recently coming under increased nationwide public scrutiny, the proponents contend that increased access is crucial to the press's ability to cover these matters. The burden of traveling to the courthouse where the action is pending results, according to the Reporters Committee, in "practical obscurity for many of the filings in these matters . . . Thus the press and the public are effectively denied timely insight into what may be significant legal developments." Suggestion 26-CV-20 at 2. Noting the substantial recent increase in immigration-related habeas cases, Mr. Hawkinson asserts that "[a]lthough it is theoretically possible for a local reporter covering a single district to keep on top of all immigration cases in that district . . . it is thoroughly impractical for anyone to visit the scores of courthouses required to comprehensively review immigration actions on a national level." Suggestion 26-CV-12 at 3. Moreover, he notes, the inability to collect documents electronically in bulk inhibits "harnessing of automated tools" to review the documents en masse. *Id.*

In sum, the proponents of increased electronic access claim that the balance struck by the current rule in 2007 is obsolete. In their view, members of the press need immediate remote access to files in immigration cases to effectively report on them, and this interest outweighs the privacy interest of the parties to these cases. As the Reporters Committee contends, "[t]hese types of cases often move quickly, making real-time access essential for both reporters covering a major and contested area of public policy and the public seeking to stay informed about the government's immigration enforcement actions." Suggestion 26-CV-20 at 2. The Reporters Committee appears to seek deletion of immigration cases from Rule 5.2(c); Hawkinson offers a series of less drastic suggestions, including exempting certain cases like habeas petitions or class actions, and allowing individual parties to opt out of the restriction.

Although attention to immigration cases has recently increased, the concerns underlying these new proposals are not new. As the minutes of the Advisory Committee meeting in May 2006, after Rule 5.2(c) had gone out for public comment, reflect, the committee noted "that it is important to allow convenient and full electronic access at the courthouse by public media and scholarly researchers, particularly to court files bearing on the troubled practices in immigration matters." Minutes of May 22-23, 2006, Meeting of the Advisory Committee on Civil Rules, at 3. The committee understood that the rule might lead to a kind of "practical obscurity" since "only the most determined or the most academic will undertake the effort." *Id.*

The exceptions in Rule 5.2(c) appear to have been initially motivated by concerns raised by the Department of Justice regarding the burdens of comprehensively and accurately redacting files in immigration cases, particularly the administrative record. Administrative records, however, were exempted from such redaction requirements by Rule 5.2(b)(2) (which emerged from the intercommittee deliberations over privacy protections more generally). In any event, in its

submission, the Reporters Committee asserts that redaction technology has improved significantly since 2007, so concerns about any burden on the Department of Justice in redacting the administrative records and filings in these cases may now be less pertinent. Suggestion 26-CV-20 at 3.

But, in 2006, the committee also was concerned with "data miners" who might "gather vast amounts of personal information, including identifiers, financial information, and health information." Minutes of May 22-23, 2006, Meeting of the Advisory Committee on Civil Rules, at 3. Perhaps these concerns would be lessened, though not eliminated, if the other proposed amendments to Rule 5.2, currently published for public comment, to enhance redaction requirements of personal financial identifiers and require the use of pseudonyms for minors are ultimately adopted. Because administrative records would remain exempt from these new redaction requirements, concerns about information from the administrative record that become part of the court's docket would remain.

Notably, the District of Massachusetts has fashioned a general standing order addressed to public access to immigration cases. Apparently drawing on the "[u]nless the court orders otherwise" proviso in the current rule, its order, General Order 19-02, adopted in June 2019, provides that "restrictions on remote access to the full electronic record shall be removed except for redactions required pursuant [to] Rule 5.2(a) to protect confidential information (i.e., social security numbers)." *Standing Procedural Order Re: Public Access to Immigration Cases Restricted by Federal Rules of Civil Procedure 5.2(c)*, General Order 19-02, ¶ 1 (D. Mass. June 1, 2019). The order also allows any party to object to the removal of restrictions on remote access to the full electronic record within 14 days of the case filing, and such restrictions will not be lifted until the court rules on the objections. *Id.* ¶ 2. The proponents of the proposed amendments, however, view the District of Massachusetts policy as not going far enough to provide immediate access.

Ultimately, in assessing these proposals, the Advisory Committee is asked to consider whether the balance struck in 2007 remains the right one, or what additional information would be useful in making that assessment. Any amendment to the current rule would not go into effect until December 2029, at the earliest, so even with committee action immediate remote access to electronic case files is not forthcoming. On the other hand, the desire for increased scrutiny of immigration proceedings may be unlikely to diminish in light of the issue's perennial salience.

Going forward, the Advisory Committee might consider pursuing a potential amendment, keeping the item on the agenda while studying developments in this area, or deciding not to pursue the issue further.

Attachment(s):

- Suggestion 26-CV-12 (John Hawkinson)
- Suggestion 26-CV-20 (Reporters Committee for Freedom of the Press)
- Suggestion 26-CV-29 (Roger Parloff)

John A. Hawkinson, freelance news reporter
Box 397103
Cambridge, MA 02139-7103
617-797-0250, *jhawk@alum.MIT.EDU*

March 27, 2026

Advisory Committee on Civil Rules
Honorable Sarah S. Vance, Chair

Advisory Committee on Appellate Rules
Honorable Allison H. Eid, Chair

Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544
BY ELECTRONIC MAIL: *rulescommittee_secretary@ao.uscourts.gov*

Re: Proposed immigration case changes to Civil Rule 5.2(c) and Appellate Rule 25(a)(5)

Dear Judge Vance, Judge Eid, and
members of the Civil and Appellate advisory rules committees:

I am a Boston-based freelance journalist, and my ambit covers immigration cases in federal court, and has for the past eight years.

I write, hopefully prior to the decision to publish changes to the privacy rules, to request both the Civil and Appellate advisory committees take a look at the current rules that effectively bar electronic access to documents in immigration cases, especially including immigration *habeas corpus* cases — cases which are increasingly of significant import and public interest that transcends the private interest of individual litigants.

I propose changes both to Civil Rule 5.2(c), which limits access at the district court level; as well as to Appellate Rule 25(a)(5), which in practice restricts access to appellate cases even where district courts have removed the restriction below. For both rules, I have concerns about whether they are operated as intended, as well as whether the en-

vironment has changed such that what appropriate in 2007 may not be appropriate in 2026.

This letter builds on comments previously offered in June of 2020 in the context of emergency COVID-19 procedures; said comments which were docketed as `20-CIV-29`[1], so may feel familiar, but here are offered in a different posture. (Those comments were written when some courthouses were inaccessible to the public, heightening the concerns with documents being only available at courthouses.)

Civil Rule 5.2(c)

As a general matter, remote PACER access to civil immigration case documents is barred by Fed. R. Civ. P. 5.2(c), which seeks to strike a balance the privacy interest of litigants against the public interest, and is written with the presumption that there is generally not a lot of public interest in such cases. The public is required to go to the courthouse during clerk's office business hours to view or obtain a filing.

With the increased prevalence of "impact" immigration litigation over the past decade, that balance becomes more questionable. When a civil immigration action affects many people, such as in a class action, or where it defines a critical area of law that impacts other subsequent cases, that balance increasingly seems problematically tilted against the public interest.[2]

And with this past year's recent explosion in immigration *habeas corpus* actions [3], the

[1] and may be found on pp. 150–162 of `appellate_and_civil_comments.pdf` available at `https://www.uscourts.gov/file/28159/download`.

[2] Morawetz. *A Better Balance for Federal Rules Governing Public Access to Appeal Records in Immigration Cases*. 69 Hastings L.J. 1271 (2018). Available at: `https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3223569`

[3] *See* Cheney, Kyle. POLITICO. "Hundreds of judges reject Trump's mandatory detention policy, with no end in sight: Judges have ruled against the administration in more than 1,600 cases." `https://www.politico.com/news/2026/01/05/trump-administration-immigrants-mandatory-detention-00709494` January 5, 2026 05:55 AM EST. *See also* Cheney, Kyle. POLITICO. "Our running list of judges who have ruled on ICE's mass detention

inability to track them comprehensively at a national level and to review filings is a real problem. Although it is theoretically possible for a local reporter covering a single district to keep on top of all immigration cases in that district (but still quite challenging), it is thoroughly impractical for anyone to visit the scores of courthouses required to comprehensively review immigration actions on a national level. Nor does it permit harnessing of automated tools to review the full text of documents, or harnessing an army of graduate students or document review attorneys to do the same. Although the restriction does not apply to opinions of the court nor to review of the docket report in a case, those are insufficient to get a full view into what is going on in a case.

Since 5.2(c) was adopted in 2007, generalized expectations for access to court documents have changed. The pace of public interest and news is measured in seconds and minutes, not days. Important timely filings occur during hours and weekends when courthouses are closed and even the most diligent reporter could not possibly get to the courthouse to get a filing. The legal community expects to be able to retrieve filings electronically quickly and easily, and access to immigration cases feels like it is left in the pre-electronic filing era.

Although Rule 5.2(c) allows an "unless the court orders otherwise" carveout, it is challenging to obtain public access that way. For a journalist to seek such an order from a judge can be intimidating and challenging, whether by letter or non-party motion or intervention. With limited resources, many cases go unreviewed by the press.

And even when reporters are prepared to retain counsel and seek to lift 5.2(c) restrictions, they are not always successful. *See, e.g.*, *U.H.A. et al v. Bondi*, ECF No. 125, "ORDER denying 92 Motion to Intervene," February 18, 2026. D. Minn. No. 0:26-cv-00417-JRT-DLM at 2: "First, Law Dork seeks to intervene in this case to obtain public access to the

policy: POLITICO is keeping track of the federal judges who have ruled on the administration's effort to systematically lock up thousands of people." `https://www.politico.com/news/2026/02/18/trump-judges-immigration-detention-00784614`
February 18, 2026 05:00 AM EST, Updated March 24, 2026 04:45 PM EDT.

docket in this case. It states that it is a news agency, and granting unrestricted electronic access to court records will protect the public's right of access to court proceedings. (Doc. 94 at 2-3.) But the public may already access filings in this case through the public terminals available at each federal courthouse in the district."

That is, a Washington-DC -based legal reporter retained counsel and moved to intervene to lift 5.2(c) restrictions and was denied because the documents were accessible at the courthouse in Minneapolis — true, but thoroughly impractical for a national reporter.

Furthermore, Rule 5.2(c) is not clear on access to *hardcopies*. Most district courts appear to allow the public to pay for and print copies of immigration filings, but not all. The language of the rule, despite being titled "Limitations on remote access to electronic files" and speaking only to "remote electronic access" has been interpreted by some clerks to bar access to hardcopies (which are neither remote nor electronic). Specifically, in D. Massachusetts, prior to 2019, printing was prohibited; and at present, it is permitted only while at the same time requiring the public to sign an agreement to comply with the court's general order to not publish them within thirty days. (See "The D. Massachusetts compromise," below).

Rule 5.2(c) covers social security appeals and immigration cases, but this heightened public interest appears to only affect a narrower slice — Nature of Suit (NOS) code 463 *habeas corpus* petitions. I am not aware of either social security cases or other kinds of immigration cases (*e.g.* NOS 462 Naturalization or NOS 465 Other Immigration Actions) where there is widespread public interest in case documents.

The D. Massachusetts compromise

In 2018 and 2019, when my attention first turned to this issue, I adopted a practice of seeking to remove access restrictions in *habeas* cases that seemed potentially newsworthy within my home district, the District of Massachusetts. Generally speaking, that was

through motion practice.

In 2019, D. Mass entered a General Order intended to allow general public access to such cases after a 30-day period to allow time for the parties to object[4].

It was signed by sixteen of the court's seventeen active judges as the time.[5]

That compromise has had the effect of reducing the volume of motion practice to remove access restrictions, but it has not been a panacea. Most newsworthy *habeas* cases are newsworthy within their first 30 days, and indeed, many are fully resolved within their first 30 days, meaning the time period of public access under the compromise does not align well with the time period of public interest.

Also, for immigration cases to which there is no significant public interest (historically that is most of them), it has had the effect of making those cases public in the absence of any objection filed, and objections are almost never filed[6]. This burden falls unfairly on solo practitioners or small immigration firms who may not realize the import of the general order on their client's privacy, even though it is docketed in every applicable case[7].

Proposed revisions:

(1) A revised Rule 5.2(c) should make clear that the public has an unrestricted right to print or obtain hardcopies of immigration case documents at a courthouse to resolve

---

[4] *General Order 19-02: Standing Procedural Order Re: Public Access to Immigration Cases Restricted by Federal Rules Of Civil Procedure 5.2(c)*, June 1, 2019, `http://www.mad.uscourts.gov/caseinfo/pdf/general/General%20Order%2019-2%20w%20Electronic%20Signaure.pdf`. The order also includes a so-called gag provision on Internet publication of case documents within the first 30 days of case filing.

[5] Despite covering related issues in depth since 2019, it was only in 2026 that I became aware that one D. Mass judge withheld his signature from the order, and that was because he declined to adopt the practice of automatically removing restrictions in his cases.

[6] Following hundreds of these cases for the past six years, I can only recall one instance of an objection being filed to the automatic removal of restrictions.

[7] It is not rare to find personally identifying information in a *habeas* petition that was seemingly never needed for adjudication of the petition. I suspect that many practitioners rely on 5.2(c)'s protections as a crutch to avoid removing private information that should never have been included, and operate in ignorance of the D. Mass general order, despite it being docketed in each of their cases.

problematic interpretations of the rule. It should also be clear that blanket prohibitions and prior restraints on publication of those documents are inappropriate[8].

(2) Petitioners should be allowed to opt-out of 5.2(c) restrictions at the time of filing. In practice, CM/ECF automatically imposes access restrictions based on the NOS code of the filing, but, *e.g.*, even when petitioner's counsel files a *habeas* action under NOS 530 (Habeas Corpus: General), clerk's office staff will generally review and change it to NOS 463 (Immigration: Habeas Corpus – Alien Detainee), automatically imposing the restriction. The rule should make clear that this sort of opt-out is permissible. (In some cases, judges have not consented to remove access restrictions at the sole request of *habeas* petitioners.)

(3) Class certification should presumptively terminate any 5.2(c) restriction. If a case merits class consideration, there should be no blanket ban on access to its materials. If appropriate to the case, the proper mechanism would be sealing and all that entails.

(4) The committee should look at whether some further weakening of the 5.2(c) restrictions for *habeas* cases makes sense. Whether excluding *habeas* cases from 5.2(c) entirely, permitting an automatic lifting of restrictions after a 7-day period (shorter than the D. Mass 30-day period) in the absence of objection, or any easier and less burdensome process for the public to request the lifting of restrictions.

Appellate Rule 25(a)(5)

At the circuit level, Appellate Rule 25(a)(5) provides that "an appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal."

In practice, the many circuits interpret this rule to restrict access on appeal, even

[8] (they feel offensive to the First Amendment)

in cases where the District Court has entered an order lifting the restrictions. The rule should be revised to make clear that when restrictions are lifted below, they should not be automatically reimposed at the appellate level. Reporters should not have to engage in motion practice at the appellate level that is duplicative of motion practice at the district court level.[9]

Furthermore, it is undersigned's experience in both the Tenth Circuit and the First Circuit that unopposed motions seeking public access are resolved by granting access solely to the movant, not to the public at large[10]. On the other hand, the Second Circuit and Third Circuit have allowed access more generally.[11]

Guidance in the rule or in the Committee Note as to the appropriate breath of a resolution of a motion for public access would be appreciated.

But furthermore, the privacy interests that FRCP 5.2(c) is designed to protect don't generally arise during appellate litigation that arises out of the district court. The briefing is generally legal rather than fact-bound, and where it references facts, does not include private personally identifying information.

It would be a boon for public access if legal briefing in immigration *habeas* cases were public in PACER at the appellate level, even if the record appendix below were restricted. Doing so would not compromise the interest of most petitioners.

It may well be that such a relaxation of the rule make sense for cases that originated

[9] As the Committee considers the prudence of a rule for intervention on appeal, I will note that at present intervention in the district court is the appropriate mechanism for adjudicating these media requests for access within the First Circuit, but at the appellate level the mechanism is a non-party motion. It is substantially more difficult to obtain consent of the parties to intervene than it is to file a non-party motion (because of the rights intervenors receive), and I fear that a rule prescribing the process for intervention on appeal would channel what is now an easy non-party motion into a more complicated intervention-on-appeal. The committee should think about whether a rule for intervention-on-appeal makes sense without a concomitant rule for non-party motions on appeal.

[10] *See, e.g., Doe v. Tompkins*, No. 19-1368, 1st Cir., Order of April 14, 2020. Furthermore, the pace of resolution may be discordant with the pace of public interest and of other docket activity. The unopposed motion seeking relief in that case was filed on August 12, 2019.

[11] *See, e.g., Öztürk v. Hyde*, No. 25-1019, 2nd Cir., Order of May 9, 2025.

in the district court as *habeas* cases, but not for other immigration cases such as petitions for review from decisions of the Board of Immigration Appeals. I am insufficiently experienced with them to know, although in at least one case I followed a BIA case after the petitioner's *habeas* case drew attention, and subsequently successfully sought relief in the court of appeals for access to the case's documents.

An appellate frustration outside the scope of the rules[12] is that the Judicial Conference fee schedules charges 50¢ per page for hardcopies at the Court of Appeals, compared to 10¢ at the district court or through PACER. Although not huge, that 5x increase can really add up.

I have further been advised by one circuit court clerk in a different part of the country that were I to send a request for a document by postal mail with an accompanying check, they would not be able to return the document to me by mail. Rather, my only choices were to file a motion seeking access or travel to the courthouse myself (or engage a representative to do so).

Proposed revisions:

(1) Drop the automatic restriction of immigration cases at the appellate level if they have been unrestricted below.

(2) Drop the automatic restriction of anything other appendices and addenda that are copies of the record below.

(3) Drop the applicability of FRAP 25(a)(5) to immigration *habeas* (NOS 463) cases from the district court, while retaining it for other immigration cases as well as social security and railroad retirement cases.

[12] I am not sure of the appropriate forum for this concern.

Closing

I thank the Committees very much for their time and attention to this matter. Please do not hesitate to contact me if desired.

Very truly yours,

/s/ John A. Hawkinson
John A. Hawkinson

REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

PO Box 34176
Washington, DC 20043
(202) 795-9300 • www.rcfp.org

PRESIDENT
Bruce D. Brown

STEERING COMMITTEE CHAIR
STEPHEN J. ADLER
VICE CHAIR
MARGARET LOW
WBUR
SECRETARY-TREASURER
MASSIMO CALABRESI
The New York Times
EXECUTIVE COMMITTEE MEMBERS
DAVID BOARDMAN
Temple University
THEODORE J. BOUTROUS, JR.
Gibson, Dunn & Crutcher LLP
GAIL GOVE
NBCUniversal
LAURA HANDMAN
Davis Wright Tremaine
DIEGO IBARGÜEN
Hearst
THOMAS C. RUBIN
OpenAI
STEERING COMMITTEE MEMBERS
MARTY BARON
Ret., The Washington Post
SEWELL CHAN
USC Annenberg
LYNETTE CLEMETSON
University of Michigan
JASON CONTI
Dow Jones
NIKHIL DEOGUN
Brunswick Group
ALIX FREEDMAN
Reuters
MANNY GARCIA
Florida International University
EMILIO GARCIA-RUIZ
The San Francisco Chronicle
JOSH GERSTEIN
POLITICO
ALEX GIBNEY
Jigsaw Productions
JAMES GRIMALDI
National Catholic Reporter
JEFFREY GOLDBERG
The Atlantic
KAREN KAISER
Clooney Foundation for Justice
KIMBRIELL KELLY
Chicago Public Media
ALEX MACCALLUM
CNN
MATT MURRAY
The Washington Post
NORMAN PEARLSTINE
New York, New York
RANDY SHAPIRO
Bloomberg L.P.
CHARLIE SAVAGE
The New York Times
ADAM SYMSON
The E.W. Scripps Company
MATT THOMPSON
The New York Times
VICKIE WALTON-JAMES
NPR
Affiliations appear only for purposes of identification.

By email

May 20, 2026

Carolyn A. Dubay, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, D.C. 20544
RulesCommittee_Secretary@ao.uscourts.gov

RE: Rules Suggestion - Fed. R. Civ. P. 5.2

Dear Committee on Rules of Practice and Procedure:

The Reporters Committee for Freedom of the Press ("Reporters Committee") writes to respectfully request that the Committee revise Federal Rule of Civil Procedure 5.2(c) to remove its restrictions on electronic access to records in immigration cases in federal court.

Currently, Rule 5.2(c) bars the press and public from "remote electronic access" to a federal court "action or proceeding relating to an order of removal, to relief from removal, or to immigration benefits or detention." In practice, this means that members of the public may only view the full judicial record—including critical records such as a noncitizen detainee's habeas petition, and dispositive briefing litigating a noncitizen's constitutional rights—by going to the courthouse in-person during business hours of the Clerk's office. This restriction prevents timely public access to fast-moving legal proceedings and impedes the ability of the press to report on critical, newsworthy matters. It also unnecessarily burdens clerks of court with requests for paper copies of filings in these matters. The Reporters Committee urges this Committee to remove the language of Rule 5.2(c) that applies the restriction to immigration matters.

The Reporters Committee is an unincorporated nonprofit association of reporters and editors dedicated to defending the First Amendment and newsgathering rights of the news media. Founded by journalists and media lawyers in 1970, when the nation's press faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources, the Reporters Committee today provides pro bono legal representation, amicus curiae support, and other resources to protect the legal rights of journalists.

Timely public access to judicial records is both good public policy and a matter of constitutional importance. As the Supreme Court has recognized, the public's understanding and oversight of the judiciary plays a fundamental role in democratic self-government. *See, e.g., Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 604 (1982) (public access "serves to ensure

that the individual citizen can effectively participate in and contribute to our republican system of self-government"); *Valley Broad. Co. v. U.S. Dist. Ct. of Nev*., 798 F.2d 1289, 1293 (9th Cir. 1986) (access to court records "helps the public keep a watchful eye on public institutions and the activities of government"). As a result, the First Amendment and the common law provide a qualified right of access to court proceedings and records. *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13 (1986); *Nixon v. Warner Commc'ns, Inc.,* 435 U.S. 589, 597 (1978); *Courthouse News Serv. v. Planet*, 947 F.3d 581, 586 (9th Cir. 2020). Moreover, "[a] necessary corollary of the right to access is a right to *timely* access." *Planet*, 947 F.3d at 589 (emphasis added). The press often carries out this essential function on behalf of the public by reviewing judicial filings as soon as they are submitted and reporting on court proceedings as they unfold.

Rule 5.2(c) runs counter to this crucial interest by blocking the public's electronic access to judicial records in immigration cases. *See* Fed. R. Civ. P. 5.2(c). In most federal cases, PACER provides immediate online access to the public for all filings. To limit access, a party must generally request sealing and demonstrate that its privacy interests outweigh the public's right of access. *See, e.g.*, *In re Knight Publ'g Co.,* 743 F.2d 231, 235 (4th Cir. 1984) (*"*[A] court, in its discretion, may seal documents 'if the public's right of access is outweighed by competing interests.'"). Not so in immigration cases; Rule 5.2(c) strips the public's electronic access to records as a default.

The Rule's obstacles to access produce harmful consequences on a nationwide scale. As of April 27, 2026, more than 40,000 immigration habeas cases have been filed in federal court since January 2025, representing a dramatic uptick from prior months. *See* Ruth Talbot, Pratheek Rebala & Carla Astudillo, *Tracking Habeas Cases*, ProPublica (updated Apr. 27, 2026), https://perma.cc/3587-MMNY. These types of cases often move quickly, making real-time access essential for both reporters covering a major and contested area of public policy and the public seeking to stay informed about the government's immigration enforcement actions. As the leading pro bono legal services organization for journalists in the United States, the Reporters Committee regularly hears from reporters who struggle to cover these cases due to Rule 5.2(c). The Rule forces journalists—and any interested members of the public—to travel to the courthouse during business hours to review filings in print. The result is practical obscurity for many of the filings in these matters, as it is highly burdensome for reporters to go to all the various courthouses across the country where immigration matters are pending, and it is practically impossible for them to do so as soon as a document is filed. Additionally, in cases that capture significant public attention, clerks' offices are likely to be overwhelmed by members of the public and the press arriving at the courthouse seeking print copies of filings. Thus, the press and the public are effectively denied timely insight into what may be significant legal developments.

Further, the Rule's restriction on access is both too broad and too narrow to reasonably serve its purported goal of protecting sensitive information. The Judicial Conference implemented the Rule in 2007, citing the "prevalence of sensitive information and the volume of filings" in immigration cases. Fed. R. Civ. P. 5.2 advisory committee's note. Records from the committee meeting where this version of the Rule was adopted,

however, reveal that the specific concern presented was the burden that the Department of Justice faced in redacting administrative records when cases were appealed to federal court from immigration court. *See* Meeting Minutes, Civil Rules Advisory Committee, 3:110-112 (May 22-23, 2006), https://perma.cc/SZ3A-ENBJ. But redaction technology has improved dramatically since 2007, and in any event the Rule is not limited to administrative records—it sweeps in all records in any case "relating to an order of removal, to relief from removal, or to immigration benefits or detention," Fed. R. Civ. P. 5.2(c), including habeas petitions where the administrative record (if there is one) may not be filed at all.

The broad scope of the Rule no longer makes sense. Individuals with immigration cases in federal court certainly have valid privacy interests in some filings—but not every page of all filings, which is the current scope of Rule 5.2(c). Litigants in proceedings from criminal prosecutions to patent infringement actions have a similarly substantial interest in privacy over certain material, and those interests are adequately protected by requiring individualized motions to seal. The same is true for noncitizens. Plus, though it is ostensibly designed to safeguard privacy, the Rule still allows in-person viewing of records—including any administrative file—at the courthouse. Sensitive, unredacted information can still be disclosed, just through a slower and less transparent process. As written, Rule 5.2(c) is simply ineffective as well as overly broad.

District courts have repeatedly exercised their discretion to lift the Rule's access limitations in specific cases. *See, e.g.*, *Hernandez Garcia v. Ladwig*, No. 3:25-cv-00605, ECF No. 29 (E.D. Tenn. Feb. 20, 2026) ("[T]he Clerk of Court is directed to lift Federal Rule of Civil Procedure 5.2(c)'s restriction on all the filings in the record."); *Kordia v. Noem*, No. 3:25-cv-01072, ECF No. 47 (N.D. Tex. June 2, 2025) ("[T]he Court directs the Clerk of Court to lift all viewing restrictions on the docket-i.e., to make all prior filings electronically available to the public."); *Mahdawi v. Trump*, No. 2:25-cv-00389, ECF No. 73 (D. Vt. May 23, 2025) (ordering that "[t]he docket and filings in the case are open to the public"); *Khalil v. Joyce*, No. 1:25-cv-01935, ECF No. 29 (S.D.N.Y. Mar. 12, 2025) ("With the consent of both parties, the Court orders that the limitations on remote access to electronic files otherwise applicable in this case, see Fed. R. Civ. P. 5.2(c), are lifted."). Appellate courts have done the same. *See, e.g.*, *Suri v. Trump*, No. 25-1560, ECF No. 26 (4th Cir. June 26, 2025); *Mahdawi v. Trump*, No. 25-1113, ECF No. 88 (2nd Cir. May 9, 2025). This is unsurprising, given the mismatch between the Rule's supposed purpose and its practical effects.

The District of Massachusetts has gone even further, enacting an alternative policy where the Rule's access restrictions are automatically lifted after 30 days unless a party objects. D. Mass. Gen. Order 19-02 (June 1, 2019), https://perma.cc/C637-S8WB. This policy change underscores the need for a different approach to immigration cases that provides greater transparency and public access. That said, even a 30-day window of restricted access is unnecessarily long given that there are often dozens of important filings submitted during that time. In one high-profile immigration case in the District of Massachusetts, there were 47 docket entries within the first 30 days of the proceeding—including extensive briefing on the petitioner's habeas claims and key jurisdictional issues. *See Ozturk v. Hyde*, No. 1:25-cv-10695 (D. Mass.). The press and public were deprived of

electronic access to those filings for weeks, for essentially no reason at all—the restrictions have since been lifted, without objection by any party.

This case-by-case and court-by-court approach of departing from Rule 5.2(c) is not sufficient to vindicate the public's right of access. Requiring the press or public to move for access in every individual case exacts a significant cost—both for movants and for courts who must rule on those motions—and improperly shifts the burden onto those seeking transparency. Rule 5.2(c) has made comprehensive monitoring of these immigration cases across the country practically impossible. This lack of access simply does not square with key principles of transparency and openness that have long prevailed in the federal court system.

Because of the importance of timely public access to immigration cases in federal court, we respectfully urge this Committee to revise Rule 5.2(c)'s restrictions on electronic access to these cases by removing the Rule's reference to immigration cases, such that immigration cases are treated the same as the many other types of matters that come before a federal court and may involve some sensitive information. This solution would promote more accurate and contemporaneous reporting on immigration proceedings in federal court, while also simplifying the process of access and ensuring greater uniformity in the openness of judicial records in federal court civil matters.

Please do not hesitate to contact the Reporters Committee's President Bruce D. Brown with any questions at bruce.brown@rcfp.org.

Thank you for your consideration.

Sincerely,

Reporters Committee
for Freedom of the Press

From: Roger Parloff
Sent: Tuesday, September 8, 2026 2:22 PM
To: RulesCommittee Secretary
Subject: Rules suggestion re Fed. R. Civ. P. 5.2(c) and Fed. R. App. P. 25(a)(5)

Roger Parloff
Senior Editor
Lawfare Media
Washington, D.C.
roger.parloff@lawfaremedia.org

Carolyn A. Dubay, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, D.C. 20544
RulesCommittee_Secretary@ao.uscourts.gov

RE: Rules Suggestion regarding Fed. R. Civ. P. 5.2(c) and Fed. R. App. P. 25(a)(5)

Dear Ms. Dubay:

I cover court proceedings in my capacity as a senior editor at Lawfare Media. I endorse the letter submitted by the Reporter's Committee for Freedom of the Press requesting removal of restrictions on electronic access to records in immigration cases in federal court. Alternatively, I recommend amending and narrowing the existing rules to require only narrow redactions of truly private and sensitive personal information. Specifically, I am seeking removal or narrowing of Fed. R. Civ. P. 5.2(c) and Fed. R. App. P. 25(a)(5). My understanding is the U.S. Supreme Court also follows Rule 5.2(c) in its own guidelines for electronic filings.

Although these rules have created numberless problems for me in trying to cover important immigration cases of great public moment in the district courts, I would like to highlight here certain anomalies in the way the rules currently operate at the appellate level, where their operation is particularly indefensible. The first example concerns cases involving mandatory immigration detention without bail, an issue of enormous current importance to the public, the courts, the individuals involved, and their families. The legal issue is how to interpret 8 U.S.C. § 1225(b)(2). More than 10,000 district court cases have issued rulings on this question, and at least ten circuit courts of appeals have weighed in. The circuit courts are split, and at least two petitions for certiorari review—one by the United States and another by two detained noncitizens—are pending before the Supreme

Court. See Putra v. Lopez-Campos, No. 25-1415 and Buenrostro-Mendez v. Blanche, No. 26-43.

Although these petitions address one of the most important legal issues now being litigated in the country and involve only pure questions of law that pose no conceivable threat to the privacy interests of any of the petitioners, none of the briefs or amicus briefs in either of the dockets is currently available on public court sites. The Supreme Court public information officers appear to recognize that disseminating these documents is innocuous. If one writes to them, as I have, to request a digital copy of a brief in these dockets, they will happily send one without noting any limitations on use. In both of these cases, for instance, I have requested digital copies of the certiorari petitions and have then posted them online as a service for readers. But this is a pointlessly cumbersome process. It also doubtless leaves many members of the public who have an interest in seeing these documents in the dark as to whether they are entitled to see them and, if so, how they should go about gaining access to them.

I wanted to highlight one other recent example of an anomaly that the current rules caused, unnecessarily confusing the public. It occurred in Sosnava Rodriguez v. Oretega, Docket No. 25-50183, a Fifth Circuit case that addresses issues adjacent to—but not identical to—those involved in the mandatory immigration detention cases mentioned above. The panel in the Sosnava Rodriguez cases found that the detentions of noncitizens held pursuant to the interpretation of 8 U.S.C. § 1225(b)(2) that the U.S. Court of Appeals for the Fifth Circuit had earlier adopted could quickly become unconstitutional after a certain length of time.

That controversial panel ruling came down on July 2, 2026. On July 10, acting on its own motion, the full Fifth Circuit granted rehearing en banc, vacating the panel decision. The same day, the government asked the en banc court to stay three district court judgments implicated in the consolidated panel ruling. On July 21, that motion was granted in a one-line order with no reasoning.

Assistant Attorney General Brett Shumate then issued a post on X stating: “The full Fifth Circuit has issued an extraordinary precedential order making clear that illegal aliens do not have a constitutional right to roam free in the United States during their removal proceedings.”

Exceedingly few people knew what Shumate was talking about. I did not, for instance, although I am a journalist and retired-lawyer who has been following these issues. A one-line order with no reasoning does not ordinarily make precedent. It developed that Shumate was referring to the fact that the government had included a line in its motion—which was not available on the public court docket due to Fed. R. Civ. P. 5.2(c) and Fed. R.

App. P. 25(a)(5)—that requested the Fifth Circuit to "issue a precedential order staying the district court's judgments pending rehearing by the full Court." (The motion was later posted online by the American Immigration Council.) Shumate was interpreting the en banc Fifth Circuit's one-line order as having granted that request. Others, of course, took issue with Shumate's interpretation. But the point here is that the general public had no idea what Shumate was even talking about, because the text of the brief he was referring to was not even available online.

And, again, for no good reason. The issues were purely legal, and no private or sensitive personal information was in danger of being divulged.

Thank you very much for your time and attention.

Roger Parloff
Senior Editor
Lawfare Media
roger.parloff@lawfaremedia.org

TAB 11

Standardizing Prior-Testimony Disclosures for Expert Witnesses

John Shook submitted 26-CV-22, proposing an addition to Rule 26(a)(2) calling for a "standardized set of identifying fields" for each prior case in which the retained expert has testified. The proposal is to add a new (v) to Rule 26(a)(2)(B) in place of current (v):

> **(B)** *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure [of expert testimony] must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:
>
> * * * * *
>
> ~~**(v)** a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and~~
>
> **(v)** for each case in which the witness testified as an expert at trial or by deposition during the previous 4 years:
>
> (A) the case caption;
>
> (B) the court and docket number;
>
> (C) the date of the testimony and whether it was given at trial or by deposition;
>
> (D) the party for whom the witness testified; and
>
> (E) the general subject matter of the testimony.
>
> If the witness cannot provide an item of information for a case because the information is protected by statute, by a court order, or by a sealing order, the witness must so state and must identify the protected item rather than omit the case.

Mr. Shook explains that frequently these disclosures lack important information, or have mistakes. Examples include cases identified by name but without any court or docket number; lists without dates, so the recipient cannot tell whether the testimony was recent; case names with mistakes including misspellings; and situations in which the same expert describes the same prior case differently in different matters. He urges that when a rule's directive has resulted in ambiguous compliance the Advisory Committee "has repeatedly cured that kind of recurring ambiguity by specifying contents in a short vertical list rather than leaving the contents to case-by-case litigation." Suggestion 26-CV-22 at 2.

He also proposes as a topic for longer term study "[w]hether a national expert-testimony locator could improve enforcement" of the disclosure rule. *Id.* at 4. On this topic, he suggests that

an FJC study be undertaken to evaluate a variety of issues, including privacy, sealing, protective orders, transcript ownership, expert availability, and the feasibility of a limited district-level test of such a rule. *Id.* at 5.

Expert disclosure was introduced in the 1993 amendment package. Before 1993, the only method the rules provided to disclose expert testimony was by interrogatory. The committee note accompanying the 1993 amendment observed:

> The information disclosed under the former rule in answering interrogatories about the "substance" of expert testimony was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert and often was even of little help in preparing for a deposition of the witness.

As the committee note also observed, the risk of exclusion under Rule 37(c)(1) provided an incentive for full disclosure. The note also expressed the hope that full disclosures would make expert depositions unnecessary in many cases.

There have been instances in which expert witnesses were precluded because they did not provide a sufficient list. *See, e.g.*, *Pineda v. City and Cnty. of San Francisco*, 280 F.R.D. 517 (N.D. Cal. 2012) (expert precluded due to failure to provide updated list); *Jennings v. Thompson*, 792 F. Supp. 2d 1 (D.D.C. 2011) (expert precluded because updated list was provided too late); *compare Casares v. Bernal*, 790 F. Supp. 2d 769 (N.D. Ill. 2011) (defendant police officers' testimony would not be excluded even though they omitted details about earlier testimony until plaintiff moved to compel further disclosures). One might think that the prospect of exclusion would suffice to prompt adequate disclosure, and also that the retaining lawyer would have an incentive to get fully informed about prior testimony by the retained expert.

It is not clear that the frequency or duration of expert depositions changed markedly after the 1993 amendments. Perhaps it is implicit in this submission that parties do routinely comply with the other requirements of Rule 26(a)(2)(B). One of those, (iv), is "a list of all publications authored in the previous ten years."

For the present, the question is whether members of the Advisory Committee favor pursuing this amendment proposal. If so, a further question is how to gather data to evaluate whether to list specifics that must be disclosed.

In the course of such consideration, suggestions might be made to add a list of specifics to (i) and (ii)—which now require a complete statement of all opinions the witness will express and the facts or data considered in reaching those opinions.

Attachment(s):

- Suggestion 26-CV-22 (John Shook)

SHOOK & STONE
INJURY LAWYERS

June 16, 2026

Carolyn A. Dubay, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle NE
Washington, DC 20544

Re: Suggested Amendment to Federal Rule of Civil Procedure 26(a)(2)(B)(v) - Standardizing the Required Prior-Testimony List for Retained Experts

Dear Secretary Dubay:

I respectfully suggest that the Advisory Committee on Civil Rules consider a narrow amendment to Federal Rule of Civil Procedure 26(a)(2)(B)(v). The current rule requires a retained expert to provide a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition. The rule does not, however, specify what identifying information that list must contain. As a result, the lists served in practice are often incomplete, inconsistent, or practically unusable, and they generate avoidable discovery disputes. The amendment proposed below would require a short, standardized set of identifying fields for each listed case. It would improve the quality of a disclosure the rule already mandates. It would not require any party to file a deposition transcript, expert report, or other discovery material; it would not disturb Rule 5(d)(1)'s limits on filing discovery; and it would not create any new public database or impose any new technology burden on the courts.

1. The problem the amendment addresses

Rule 26(a)(2)(B)(v) was designed to let an opposing party locate an expert's prior testimony so that it can be evaluated and, where appropriate, used for impeachment. That purpose fails when the list omits the information needed to find the testimony. In practice, the lists vary widely. Common defects include:

- a case identified only by a short or informal name (for example, “Smith v. Jones”) with no court and no docket number;
- a list of case names with no dates of testimony, so the reader cannot tell when the expert testified or which testimony is recent;
- case names that cannot be reliably matched to any record because the caption is abbreviated, misspelled, or inconsistent with how the case is indexed;
- the same expert describing the same prior case differently across disclosures in different matters; and

shookandstone.com • ph. (702) 385-2220 • fax. (702) 384-0394
710 S. 4th St
Las Vegas, NV 89101
9455 W. Russell Rd
Suite 100
Las Vegas, NV 89148
338 Ryland Street
Reno, NV 89501

- a case identified without any indication of the subject on which the expert testified, so the reader cannot tell whether the prior testimony is relevant.

Each defect forces the requesting party to spend time and money reconstructing information the disclosing party already possessed. The expert knows the cases in which the expert testified; the marginal burden of identifying each case completely is slight. The burden of running down an incomplete list falls on the opposing party and, when the parties cannot resolve the dispute, on the court.

2. Why text, rather than case-by-case enforcement, is the right fix

A reasonable question is whether existing tools already address the problem. A court can compel a more complete list under Rule 37, and a diligent party can raise the deficiency at a meet-and-confer. Those tools exist, but they operate only after a dispute has formed, one matter at a time, and only when a party has the resources to pursue the issue. They do not prevent the recurring, low-grade friction that the rule's silence creates in the first place.

The defects described above recur precisely because the rule states a duty ("a list of all other cases") without stating the content of the list. Where a rule names a required disclosure but not its required contents, drafters of the disclosure fill the gap inconsistently, and the resulting disputes are about what the rule requires rather than about the facts of the case. The Committee has repeatedly cured that kind of recurring ambiguity by specifying contents in a short vertical list rather than leaving the contents to case-by-case litigation. The proposed amendment does only that. It does not expand the universe of experts covered, change who must disclose, or add a new category of disclosure; it states the contents of a list the rule already requires.

An initial review of expert-designation materials located in the proponent's case files showed that prior-testimony information is not presented in a standardized format. Several designations referenced attached testimony lists, deposition logs, or curriculum vitae materials, but the searchable designation text did not itself provide a usable, fielded list. In the entries reviewed, prior-testimony information sometimes included case caption, date, court, and case number, but did not consistently identify whether the testimony occurred at trial or deposition, the party for whom the expert testified, or the testimony's general subject matter.

3. Proposed amendment to Rule 26(a)(2)(B)(v)

The amendment replaces the single sentence now in subparagraph (v) with a sentence that foreshadows a vertical list of required fields. Proposed new language is shown in the rule text below; the surrounding subparagraphs of Rule 26(a)(2)(B) are unchanged.

(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report — prepared and signed by the witness — if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

* * *

(v) for each case in which the witness testified as an expert at trial or by deposition during the previous 4 years:

(A) the case caption;
(B) the court and docket number;
(C) the date of the testimony and whether it was given at trial or by deposition;
(D) the party for whom the witness testified; and
(E) the general subject matter of the testimony.

If the witness cannot provide an item of information for a case because the information is protected by statute, by a court order, or by a sealing order, the witness must so state and must identify the protected item rather than omit the case.

Drafting choices reflected above: The list uses "must" to state the duty, a colon to foreshadow the vertical list, items placed at the end of the sentence, and the serial "and" after the penultimate item — consistent with the style of the restyled Civil Rules. The fields are deliberately stated without a "to the extent known" or "if known after reasonable inquiry" qualifier: such a qualifier would reintroduce the very vagueness the amendment is meant to cure, because a disclosing party could treat every field as optional. A witness who genuinely lacks an item for a protected reason is covered by the final sentence, which keeps a sealed or protected case visible on the list (as an acknowledged omission) instead of silently dropping it.

4. Proposed Committee Note

Rule 26(a)(2)(B)(v) is amended to standardize the information that the existing prior-testimony list must contain. The former rule required "a list of all other cases" in which the witness testified as an expert during the previous four years but did not specify the contents of the list. The amendment identifies the items the list must include so that an opposing party can locate and evaluate the prior testimony.

The amendment does not require a party to file an expert report, a deposition transcript or recording, or any other discovery material, and it does not change Rule 5(d)(1)'s limits on filing discovery materials. It does not require disclosure of information protected by statute, by a court order, or by a sealing order; when such information cannot be provided for a case, the witness states that the information is protected rather than omitting the case, so that the existence of the prior testimony remains disclosed.

The amendment does not expand the category of witnesses subject to Rule 26(a)(2)(B). It does not apply to witnesses who do not provide a written report under Rule 26(a)(2)(C).

5. Anticipated objections and responses

Objection. Rule 5(d)(1) bars filing discovery materials.

Response. The amendment requires no filing of any kind. It standardizes the contents of a disclosure that Rule 26 already requires the expert to provide to the other party. Nothing is filed with the court, and Rule 5(d)(1) is untouched.

Objection. The proposal invades expert or third-party privacy.

Response. The required fields are case-identifying information already within the scope of the existing prior-testimony disclosure — caption, court and docket number, date, retaining party, and subject. The amendment requires no home address, contact information, or personal data, and its final sentence expressly preserves statutory protections, court orders, and sealing orders.

Objection. Private testimony databases already solve this.

Response. Commercial databases assist the lawyers who can afford and access them; they vary by side and practice area and do not reach every expert or every case. Rule 26 should still require the testifying expert to provide a usable disclosure to the opposing party regardless of whether that party subscribes to a private service.

Objection. This burdens experts.

Response. The amendment standardizes a list retained experts must already prepare. The expert is the person best positioned to identify the cases in which the expert testified, and the marginal effort of stating the caption, court, docket number, date, party, and subject for each case is small relative to the cost the opposing party now bears in reconstructing an incomplete list.

Objection. This is a meet-and-confer problem, not a rulemaking problem.

Response. Case-by-case enforcement addresses individual disputes after they arise but does not prevent the recurring ambiguity that the rule's silence creates. Specifying the contents of a required list is a classic drafting fix and is the kind of clarification the Committee has often made by adding a short list of required items.

6. A separate, longer-term question for study

A standardized list improves the disclosure that already exists between the parties. It does not, by itself, make prior expert testimony searchable across cases. Whether a national expert-testimony locator could improve enforcement of Rule 26(a)(2)(B)(v) — and whether such a

locator could operate without requiring the filing of discovery materials, exposing sealed matters, or imposing unfunded technology costs — is a separate and harder question that this suggestion does not ask the Committee to resolve.

I raise it only to be candid about the larger problem and to keep the present suggestion narrow. If the Committee were ever to take up that question, the appropriate course would be an empirical study by the Federal Judicial Center addressing cost, privacy, sealing, protective orders, transcript ownership, expert availability, public access, and the feasibility of a limited district-level test. I am prepared to develop that question separately, through the appropriate channels, and I am not asking that it be coupled to the modest amendment proposed here.

7. Enclosures

This suggestion is accompanied by:

- Attachment 1 — Proposed rule text (Section 3 above, in clean form).
- Attachment 2 — Proposed Committee Note (Section 4 above).

Thank you for considering this suggestion. I would be glad to provide additional examples or to respond to any questions from the Advisory Committee on Civil Rules.

Respectfully submitted,

SHOOK & STONE, CHTD.

John B. Shook

shookandstone.com • ph. (702) 385-2220 • fax. (702) 384-0394
710 S. 4th St
Las Vegas, NV 89101
9455 W. Russell Rd
Suite 100
Las Vegas, NV 89148
338 Ryland Street
Reno, NV 89501

Attachment 1
Proposed Rule Text

Federal Rule of Civil Procedure 26(a)(2)(B) would read as follows. New language appears in italics; all other text is the current rule, shown for context. Subparagraphs (i)–(iv) and (vi) are unchanged and are omitted here for brevity, as indicated by the ellipsis.

(a) Required Disclosures.

* * *

(2) Disclosure of Expert Testimony.

* * *

(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report — prepared and signed by the witness — if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

* * *

(v) *for each case in which the witness testified as an expert at trial or by deposition during the previous 4 years:*

(A) the case caption;

(B) the court and docket number;

(C) the date of the testimony and whether it was given at trial or by deposition;

(D) the party for whom the witness testified; and

(E) the general subject matter of the testimony.

If the witness cannot provide an item of information for a case because the information is protected by statute, by a court order, or by a sealing order, the witness must so state and must identify the protected item rather than omit the case.

* * *

Note on numbering: The amendment adds subitems (A)–(E) within Rule 26(a)(2)(B)(v). The pre-existing item formerly designated (v) is preserved as the introductory clause; no later subparagraph is renumbered. If the Committee prefers, the same content could instead be set out in a new subparagraph (vi) to avoid nested lettering within (v); the substance is identical.

Attachment 2
Proposed Committee Note

Rule 26(a)(2)(B)(v) is amended to standardize the information that the existing prior-testimony list must contain. The former rule required "a list of all other cases" in which the witness testified as an expert during the previous four years but did not specify the contents of the list. The amendment identifies the items the list must include — the case caption; the court and docket number; the date and type of testimony; the party for whom the witness testified; and the general subject matter — so that an opposing party can locate and evaluate the prior testimony.

The amendment responds to a recurring problem: because the former rule named the disclosure without specifying its contents, the lists served in practice were often incomplete or inconsistent. A case might be identified by an informal name with no court or docket number, without a date, or without the subject of the testimony, leaving the opposing party unable to find the prior testimony the disclosure was meant to reveal. Standardizing the required fields reduces these disputes without altering the scope of the disclosure obligation.

The required items are stated without a qualifier such as "to the extent known." A retained expert is ordinarily able to identify the cases in which the expert testified and the basic information about each. A qualifier permitting the omission of any field at the discloser's discretion would reintroduce the inconsistency the amendment is designed to cure.

The amendment does not require a party to file an expert report, a deposition transcript or recording, or any other discovery material, and it does not change Rule 5(d)(1)'s limits on filing discovery materials. It does not require disclosure of information protected by statute, by a court order, or by a sealing order. When such information cannot be provided for a particular case, the final sentence directs the witness to state that the information is protected and to identify the protected item rather than omit the case, so that the existence of the prior testimony remains disclosed even when a specific field cannot be completed.

The amendment does not expand the category of witnesses subject to Rule 26(a)(2)(B). It does not apply to witnesses who do not provide a written report under Rule 26(a)(2)(C).

TAB 12

Procedure for Recusal Motions

Submission 25-CV-M, from Sai, proposes the adoption of a new Rule 72.1, as follows:

> Upon receiving a motion for recusal or disqualification, under 28 U.S.C. §§ 144 or 455 or otherwise, the judge to whom the motion is presented shall immediately refer the motion to a randomly selected magistrate judge who has not participated in the case except under this rule. Any successive motions for recusal or disqualification in the same case shall be referred to the same magistrate judge.
>
> The magistrate judge to whom the motion was referred shall promptly conduct any required proceedings and publicly file a recommended disposition, including, if appropriate, proposed findings of fact, and may consult the Judicial Conference on Codes Committee on Codes of Conduct for an advisory opinion.
>
> Upon receiving the findings and recommendations, the judge to whom the motion was presented shall, without further briefing, issue an order disposing of the motion.

Sai invites this Committee to "improve on my proposed text."

A starting point is that legislation already seems to address important features of this proposal, in ways that the proposal would alter or override. 28 U.S.C. § 455 directs a judge to recuse under a variety of circumstances detailed in the statute. It calls for judges to alert themselves to possible grounds for recusal. The recent amendment to Rule 7.1 regarding corporate "grandparents" is designed to assist that judge in making that determination. The statute does not call for the judge to refer the question of recusal to another judge. Yet this proposal would seemingly alter the statute and require such a referral.

The other statute referred to in the submission, 28 U.S.C. § 144, does call for referral to another judge when a party to a case files an affidavit asserting judicial bias. But the statute also provides that the affidavit "shall state the facts and the reasons for the belief that bias or prejudice exists" and sets a time limit. And referral to another judge is required only if the party files "a timely and sufficient affidavit[.]" Questions about the adequacy and timeliness of the affidavit would ordinarily be resolved in the first instance by the assigned judge, and before referring the matter to another judge. The statute also says that a party may file only one such affidavit of prejudice in a case.

It is also worth noting that § 455(a) refers to "[a]ny justice, judge, or magistrate judge," while § 144 refers to "any proceeding in a district court" when a party files an affidavit about "the judge before whom the matter is pending." If the affidavit is adequate, this statute says the matter should be assigned to "another judge," without mentioning magistrate judges.

This submission alters or overrides those statutory provisions. It would direct every judge presented with a "motion for recusal" to "immediately" refer that motion to a magistrate judge without any scrutiny of the adequacy of the affidavit or motion. And there is no prohibition on repeat motions. Indeed, it would seem to apply if a party made a motion in the middle of trial, and also to apply to the magistrate judge who received the referral if the party then moved to recuse that judge (and the judge next on the referral list).

Not only does this submission not fit within the statutory framework, it also does not readily fit within the rules framework. Rule 72 does provide some system-wide directions for decisions by magistrate judges. It distinguishes between "dispositive" and "nondispositive" matters, and prescribes different standards of review of magistrate judge decisions or recommendations depending on which category a given motion falls into.

Rule 73, meanwhile, permits parties to consent to proceeding before a magistrate judge for all purposes; an appeal from the magistrate judge's judgment in such actions is to the court of appeals. Under Rule 73, questions have arisen about the constitutionality of such reference for all purposes, the required method of consent, and whether the reference to the magistrate judge can be vacated. *See* 12 C. Wright, A. Miller & R. Marcus, Federal Practice and Procedure §§ 3071.1 – 3071.3 (3d ed.). The proposal does not take into account circumstances in which a magistrate judge is sitting for all purposes under Rule 73.

Rule 72 presently does not seem to prevent a district judge from assigning a recusal motion to a magistrate judge, if needed. It addresses all sorts of "pretrial" matters, without special treatment for certain types of motions except as to whether they are "dispositive" or "nondispositive." It would seem odd to create a new rule that is only for recusal motions, particularly since neither "recusal" nor "disqualification" appears anywhere in the Civil Rules.

Adopting such a special rule for recusal motions could also create practical problems. In order for a magistrate judge to pass on a motion to recuse, presumably the district judge would have to cease presiding over the action until the magistrate judge makes a decision. And the magistrate judge would need to get up to speed to evaluate the motion. It is difficult to see how such a process could fail to cause litigation delays. For example, what if the recusal motion were made in the second week of a projected three-week jury trial? Should the jury be instructed to go home and return after the magistrate judge has rendered a decision?

Beyond that, it seems odd for a rule to command that an Article I judge pass on whether to disqualify an Article III judge. True, it seems that a district judge (an Article III judge) would then review the magistrate judge's recommendation, but there nevertheless could be an upside-down aspect to such an arrangement.

And these problems need not be one-shot affairs. The submission notes "the recurring situation where litigants, particularly *pro ses* who perceive adverse judgments as evidence of personal bias, come to accuse a growing roster of judges of bias." Though the proposal is that further motions for recusal in the case be assigned to the same magistrate judge, what if the litigant then moves to recuse that magistrate judge?

The proposal also creates the apparent anomaly that while a district judge would have to refer a recusal motion to a magistrate judge, a magistrate judge performing the function of a district judge under Rule 73 would not. Indeed, the proposal does not require magistrate judges ever to refer their own recusal motions to another judge. If a magistrate judge is sitting under Rule 73, should a motion to recuse the magistrate judge be randomly reassigned to another magistrate judge? Does the magistrate judge sitting under Rule 73 then review the recommended disposition?

It is recommended that this submission be dropped from the agenda.

Attachment(s):

- Suggestion 25-CV-M (Sai)

Dear FRCvP Committee,

Under current law and precedent, motions for recusal need not be (and nearly always are not) referred to a different judge. *See e.g.* FJC, Recusal: *Analysis of Case Law Under 28 U.S.C. §§ 455 & 144* (2002) at p. 44, and the cases it cites.

Simultaneously, there is necessarily at least a *perception* of impropriety when a judge rules, solo, on their own recusal.

Furthermore, it is unavoidably personally stressful for any judge to handle motions for recusal, who — like journalists — are not used to being, as it were, part of the story which they are merely reporting (let alone the defendant).

By way of example — merely because I happened to be reading it just now, whence I was inspired to make this proposal — *see e.g.* *Perkins Coie LLP v. DoJ*, No. 1:25-cv-716 (D.D.C.):

- gov't motion to disqualify J. Beryl Howell, ECF No. 34 (*filed* Mar. 21, 2025) (no opposition filed)
- opinion & order denying motion, ECF No. 36 (Mar. 26, 2025)
- *amicus* brief of Gun Owners of America et al., ECF No. 131 (*filed* Apr. 10, 2025) at p. 3 n. 3 (objecting to judge having decided her own recusal, citing the Bible as authority for *nemo judex in sua causa*)
- opinion granting MSJ & permanent injunction, ECF No. 185 (May 2, 2025), at p. 27 n. 23 (referring to that exact footnote in the *amicus* brief)

Judge Howell is of course an excellent judge, and in my humble opinion the rather extraordinary motion for her recusal by the government was quite properly denied. Reading between the lines a

bit, I suggest that her reference, in her final judgment over a month later, to the exact citations used in that one footnote taking moral issue with her having decided recusal herself, displayed a lingering (albeit judicially restrained) personal frustration with the accusation.

Even so, I suggest that that *amicus* could hardly be faulted for viewing a judge deciding her own disqualification, entirely by herself, as inevitably biased. That she made a correct decision on it *despite* her bias does not alleviate the fact that there was at least some bias — both actual, and perhaps more swayingly to the Committee, *perceived*.

Such *perception* of bias inevitably undermines trust in the Judiciary.

To my reading, 28 U.S. Code § 455 puts the onus on the judge at issue to personally take the action to recuse themselves ("shall [...] disqualify *himself*"). However, § 144 is in passive voice, and does not say who must decide; that seems to be a lacuna.

I therefore propose a new rule that would finesse between the two positions "the judge decides it entirely on their own" and "a different judge decides it":

(proposed) FRCvP 72.1 Motions for recusal or disqualification

Upon receiving a motion for recusal or disqualification, under 28 U.S.C. §§ 144 or 455 or otherwise, the judge to whom the motion is presented shall immediately refer the motion to a randomly selected magistrate judge who has not participated in the case except under this rule. Any successive motions for recusal or disqualification in the same case shall be referred to the same magistrate judge.

The magistrate judge to whom the motion was referred shall promptly conduct any required proceedings and publicly file a recommended disposition, including, if appropriate, proposed findings of fact, and may consult the Judicial Conference Committee on Codes of Conduct for an advisory opinion.

Upon receiving the findings and recommendation, the judge to whom the motion was presented shall, without further briefing, issue an order disposing of the motion.

This proposed language blends FRCvP 72(a) and (b)(1), because like Rule 72(a) a motion for recusal is not dispositive, but like Rule 72(b) at least some such motions (ones that fall within § 455), the judge accused must personally make the ruling.

My reasoning for this blend is, first, to provide for a plainly neutral adjudicator: a random magistrate judge not involved in the case (other than to decide motion(s) for recusal/disqualification) would give a first pass opinion. And, second, to ensure this is a very lightweight provision, in the same manner as Rule 72(a) — precluding any mini-appeal, like Rule 72(b)(2–3) or even the last two sentences of 72(a) — so the judge could and would, in the *vast* majority of situations, immediately rubber-stamp the neutral MJ's R&R and move on.

My proposed rule would serve several goals:

- ensuring fast and efficient disposal of such motions
- ensuring the *appearance* of genuine neutrality in deciding motions for disqualification or recusal, *see e.g.* Code of Conduct for U.S. Judges Canons 2(A) & 3(A)(4)(c)
- improving *actual* neutrality in deciding such motions, by giving the judge a genuinely neutral opinion to base their decision on, and making that neutral opinion public (so that the judge, in the very unlikely event that they disagree with the independent magistrate, will have to explain why, and if an appeal is made over this, the court of appeals will be able to consider both views)
- insulating the accused judge from the emotional toll of primary adjudication of such motions
- preventing abuse of multiple disqualification/recusal motions eating through the available roster of previously-uninvolved DJs/MJs, by limiting it to one MJ whose only role is such

motions in that case

- limiting the recurring situation where litigants, particularly *pro se*s who perceive adverse judgments as evidence of personal bias, come to accuse a growing roster of judges of bias, since the MJ assigned would *only* be adjudicating disqualification/recusal and have no other involvement in the case at all (and, in particular, they would not have been the source of the substantive ruling against the movant which typically provokes the accusation of bias)
- limiting the self-harm done to the movant by making such a motion, by ensuring that a judge deciding substantive issues is only minimally involved in deciding recusal/disqualification
- offloading nearly all of the time in dealing with such motions to a MJ (since most such motions are against DJs, whose time is more limited due to their smaller number)
- complying with 28 U.S.C. § 455's requirement that the judge to be disqualified must act personally, and being compatible with § 144's silence

As always, please do improve on my proposed text; it is only intended as a starting point for discussion and revision.

I hope that my proposal is of service to the Judiciary, and that you will notify me of any action or questions on this proposal.

Sincerely,
Sai
President, Fiat Fiendum

TAB 13

Status-Based Indexing Bias in Judicial Records

Submission 26-CV-18, from Terrance Walker, is about "status-based indexing." It seems that Mr. Walker is a pro se litigant. He says that the federal judiciary relies on private vendors—Thomson Reuters and LexisNexis—to index and disseminate judicial records. Those private vendors, in turn, have "an editorial policy of systematically excluding *pro se* briefs and successful advocacy materials from their search indices." This "status-based filtering" creates a "blind spot" in American jurisprudence.

Mr. Walker says he has attached an example from the Ninth Circuit (No. 26-2424), which appears to be a Ninth Circuit filing by Mr. Walker. A Westlaw search for that case number, however, produces the report that there are no responsive materials. (Note that the example is Mr. Walker's opening brief in a litigation he is pursuing from his home or office in Vietnam.)

The Civil Rules do not address the practices of private vendors like Thomson Reuters or LexisNexis. The official reports created by Thomson Reuters include those cases submitted by the judges who decided them. (It might be noted that Westlaw also reports some judicial decisions not sent in for publication by the rendering judges; perhaps counsel have submitted them.) There seems no role for the Civil Rules in regard to the indexing practices of these private vendors.

Even if there were a role for the Civil Rules, it would presumably not address filings in the courts of appeals, like Mr. Walker's example.

It is recommended that this submission be removed from the agenda.

Attachment(s):

- Excerpt from Suggestion 26-CV-18 (Terrance Walker), pages 1-2

Reference Material Link(s):

- Attachments to Suggestion 26-CV-18 (Terrance Walker)

Terrance Walker

RE: Suggestion for Rule Amendment / Administrative Study – Addressing Status-Based Indexing Bias in Judicial Records

Dear Mr. Secretary:

I am writing to submit a formal suggestion for the Committee's consideration regarding a systemic threat to the "just, speedy, and inexpensive determination of every action" as mandated by **Federal Rule of Civil Procedure 1**.

The Issue: Procedural "Information Redlining" While the federal judiciary relies on private vendors—primarily Thomson Reuters (Westlaw) and LexisNexis—to index and disseminate judicial records, these vendors have adopted an editorial policy of systematically excluding *pro se* briefs and successful advocacy materials from their search indices. This status-based filtering creates a "blind spot" in American jurisprudence that specifically undermines the recent mandate of the Supreme Court in ***Berk v. Choy*, 607 U.S. ___ (2026)**.

Impact on Rule 8 and Rule 1 The Supreme Court clarified in *Berk* that **Federal Rule 8** serves as the uniform ceiling for pleading requirements, displacing more restrictive state-level "merit-screening" hurdles. However, when the very briefs that secured these procedural victories—authored by *pro se* litigants—are "disappeared" from the commercial indices used by the Bench and Bar, the "blueprints" for compliance are lost.

This creates a dual-class system of justice:

1. **Status-Based Discrimination:** It suggests that *pro se* advocacy is inherently non-precedential, despite clear evidence to the contrary (see, e.g., ***Terrance Walker v. Yellow Book*, 791 N.W.2d 429 (Iowa App. 2010)**).
2. **Artificial Cost Inflation:** It forces litigants and the judiciary to "reinvent the wheel" for procedural challenges that have already been successfully navigated, directly obstructing the **Rule 1** mandate for "inexpensive" determinations.

Proposed Action I respectfully suggest that the Committee:

1. **Conduct a Study:** Evaluate the extent to which private indexing bias suppresses relevant *pro se* precedents and whether this bias creates a "chilling effect" on the Right to Petition.
2. **Amend Rule 79 (Books and Records Kept by the Clerk):** Propose an amendment or a "Committee Note" clarifying that the "official record" of a case must include an accessible, searchable index of all substantive briefs, regardless of the filer's professional status, to ensure that private vendors cannot arbitrarily curate the public's access to the law.

The judiciary's reliance on private gatekeepers must not come at the expense of the equal application of the Federal Rules. I have attached an example of the current exclusion practice, where my own successful Ninth Circuit filings (Case No. 26-2424) remain unindexed despite their direct relevance to the *Berk v. Choy* realignment.

Sincerely,

Terrance Walker

TAB 14

"Asymmetry" Between Opting Out of Class Actions and Not Opting Out

Submission 26-CV-19, from Karolis Doniela, urges that Rule 23 be "updat[ed]" to address the "asymmetry" between electronic claim submission and the methods for opting out.

By way of background, it may be noted that the opt-out provisions of Rule 23(b)(3) differ from the collective action practices in many other countries (and from Fair Labor Standards Act (FLSA) collective actions), where opting in is required. (Note that there is no requirement in Rule 23 to permit opting out in Rule 23(b)(1) or (b)(2) class actions.) One argument for the American setup is that in class actions for small claims it does not make sense to require class members to opt in (sometimes called the "just not worth it" feature). At the same time, failure to opt out may not have great significance for those who hold small claims, even though the class-action litigation may be res judicata barring them from asserting their claims in a separate litigation.

Mr. Doniela evidently thinks the American opt-out arrangement should be changed because it means those within the class as defined are "included in the class unless they affirmatively opt out." No similar effort is required to remain a member of the class; hence the "asymmetry."

In addition, Mr. Doniela worries that notices of the right to opt out delivered by email often end up in spam folders, meaning class members do not actually learn of their right to opt out or file a claim. He asserts that "[t]he right to opt out is a fundamental due process protection," so that it should be made as easy as possible if opting out is required. True, one who fails to opt out is bound by a class-action judgment. But the opt-out arrangement partly reflects the imposition on class members that would result if they were included only if they affirmatively opted in, which would be particularly irksome in the (many) class actions in which the individual recovery is small. Hence, there is reason to favor the current opt-out arrangement.

Mr. Doniela also urges that the 2018 amendments to Rule 23(e), which expanded potential use of digital means to give notice—coupled with sophisticated online systems often employed in class-action settlements—show that facilitating opt-outs would be desirable. Though it would be valuable for a court to focus on these issues when reviewing a proposed settlement or class certification notice program, attempting by rule to direct that the court take certain steps seems dubious, particularly because (as Mr. Doniela emphasizes) technological change creates new dynamics and possibilities.

It is recommended that this submission be dropped from the agenda.

Attachment(s):

- Suggestion 26-CV-19 (Karolis Doniela)

From: Karolis Doniela
To: RulesCommittee Secretary
Subject: Suggestion for Rule 23 Amendment or Guidance Regarding Electronic Requests for Exclusion in Class Action Settlements
Date: Monday, May 18, 2026 11:04:09 AM

Dear Members of the Advisory Committee on Civil Rules,

I am writing as a frequent recipient of class action settlement notices to respectfully suggest that the Committee consider updating Rule 23 (or issuing guidance) to address the current asymmetry between electronic claim submission and the process for requesting exclusion (opting out).

In many recent class action settlements, class members can submit claim forms and additional information **entirely electronically** through online portals. However, when a class member wishes to exercise their right to opt out and be excluded from the settlement, they are often required to send a physical letter by mail. This creates an unnecessary burden: the person must print the letter, pay for postage, and ensure timely delivery by mail.

This imbalance is problematic for several reasons:

1. **Automatic inclusion by default** — Under Rule 23(b)(3), individuals are included in the class unless they affirmatively opt out, even if they never asked to participate or had no prior relationship with the litigation.
2. **Notice delivery problems** — Settlement administrators frequently send notices by email. A large percentage of these emails land in spam or junk folders, meaning many class members are unaware they are part of a class action and unaware of their right to opt out or file a claim.
3. **Unequal accessibility** — It is inconsistent to make participation (filing a claim) simple and electronic while making exclusion more difficult and costly. The right to opt out is a fundamental due process protection. Creating friction around exercising that right undermines the fairness of the process.
4. **Outdated in the digital age** — Rule 23 was amended in 2018 to explicitly allow electronic notice. Many settlements already use sophisticated online claim systems. It is reasonable to expect that requests for exclusion should also be permitted through the same or similarly convenient electronic means (such as a dedicated online form, email submission of a signed request, or verified portal) when the settlement administrator already has the class member's email address or other digital contact information.

I respectfully request that the Advisory Committee consider:

- Amending Rule 23(c)(2) or Rule 23(e) to require or strongly encourage that requests for exclusion be permitted by electronic means when the notice and claim processes are conducted electronically; or
- Issuing best practices or guidance for courts and settlement administrators that the method for requesting exclusion should be no more burdensome than the method for

submitting a claim.

Modernizing the opt-out process would improve access to justice, reduce the risk that class members unknowingly lose important rights due to spam filters or mailing requirements, and increase public confidence in class action procedures.

Thank you for your time and for the important work the Committee does in maintaining fair and effective civil rules. I would be happy to provide additional examples or participate in any public comment process or hearing on this issue.

Sincerely,

Karolis Doniela
Lemont, IL

TAB 15

Amending Rule 11 to Address the Problem of Reliance on Artificial Intelligence (AI)

Magistrate Judge Patricia Barksdale has submitted 26-CV-21, recommending the addition of a new Rule 11(b)(5), which would say that by submitting something to the court the submitting person certifies that "(5) the legal authorities exist and are accurately cited."

As discussion of AI "hallucinations" during the April 2026 meeting (in regard to previous submissions) indicated, Rule 11(b) already treats a signature on a filing as certifying that "(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law."

Though it might be urged that specifying that legal authorities are "accurately cited" adds clarity, it does not seem that the courts have had difficulty concluding that when AI produces unwarranted assertions or provides imaginary quotations, Rule 11 provides a basis for sanctions or other judicial response.

The difficulties that can result from reliance on various AI systems will likely challenge the federal courts for some time, perhaps particularly with self-represented litigants. But for now it seems that current Rule 11 is sufficient to support appropriate judicial action.

It is suggested that this submission be dropped from the agenda.

Attachment(s):

- Suggestion 26-CV-21 (Hon. Patricia Barksdale)

From: Patty Barksdale
Sent: Friday, May 29, 2026 11:59 AM
To: RulesCommittee Secretary
Subject: Rules Suggestion: Rule 11(a), Federal Rules of Civil Procedure

To address the use of generative AI and preempt the entry of additional standing orders by judges who discern a gap in Rule 11 (see, for example, one of two standing orders in the MDFL), please consider adding a fifth subsection to Rule 11(a) akin to what the Florida Supreme Court has done here. Comments to the Florida Supreme Court's action, due by August 11, 2026, may be helpful in deciding whether to pursue this suggestion.

By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; ~~and~~
(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information~~.~~; and
(5) the legal authorities exist and are accurately cited.

Thank you for your consideration.

Patricia D. Barksdale
United States Magistrate Judge
Bryan Simpson United States Courthouse
300 North Hogan Street
Jacksonville, FL 32202

TAB 16

Motion for Order Requiring Sworn Governmental Explanation in Liberty Constraint Cases

This proposal, submitted by independent researcher Donald Cottman (26-CV-23),[4] proposes an amendment to Rule 12 that would add a new subsection (a)(5). It would allow plaintiffs "[i]n cases alleging that governmental inaction has permitted private conduct to materially constrain a fundamental liberty interest protected by the Fourteenth Amendment" to move within 14 days of filing the complaint for a court order "requiring the governmental defendant to file a sworn statement explaining the reasoning behind its action or inaction." Suggestion 26-CV-23 at 4. Cottman also suggests a "conforming amendment" to Rule 12(a)(4) extending the period to file an answer to 14 days after the required sworn statement is served. *Id.* at 6. The proposal would also allow the court to order limited discovery "to test the accuracy or completeness of the sworn statement." *Id.*

The suggestion is motivated by the proponent's concern that governmental "defendants can currently move to dismiss under Rule 12(b)(6) before providing any explanation of their actual decision-making." *Id.* at 4. In particular, the proponent is concerned by cases stemming from the Supreme Court's decisions in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), and *Town of Castle Rock, Colorado v. Gonzales*, 545 U.S. 748 (2005). In each of these cases, the local governmental defendant was accused of failing to act to protect the plaintiff, and the Supreme Court ultimately held that the defendants' failure to act did not give rise to a claim upon which relief can be granted. As a result, defendants often successfully move to dismiss similar claims under Rule 12(b)(6) prior to discovery.

This suggestion would create a significant exception to Rule 12(b), which "encourages a defending party to attempt to bring an early end to the lawsuit and thereby avoid being forced to prepare for a trial on the merits when the case should be dismissed because of a threshold or technical matter[.]" Arthur R. Miller & A. Benjamin Spencer, 5B Federal Practice and Procedure § 1349 (4th ed. Apr. 2026). As the Supreme Court has noted, Rule 12(b)(6) serves an important screening function by dismissing claims "at the point of minimum expenditure of time and money by the parties and the court." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (citations omitted). Under the proposal, a defendant may be required to submit a sworn statement, under penalty of perjury, explaining its conduct before it is able to submit or obtain a decision on its 12(b)(6) motion. The proposed amendment's "purpose is to address one discrete procedural gap: the frequent absence of any requirement that the government articulate its actual decision-making before a case is resolved on threshold grounds." Suggestion 26-CV-23 at 44.

Accompanying the suggested amendment are three papers authored by Cottman,[5] each of which develops his underlying disagreement with the substantive law providing that state and local governmental actors typically do not have an affirmative duty to protect private parties from harm. He proposes a new statute, the Liberty Constraint Review Act, that would require review of governmental inaction for reasonableness. Absent passage of such a statute, or new Supreme Court

[4] Cottman, a non-lawyer, reports that he holds a Doctor of Pharmacy degree and developed his submission "through an iterative process of independent analysis and AI-assisted drafting . . . refining the legal framing through structured collaboration with AI tools." Suggestion 26-CV-23 at 11.

[5] Also drafted with the assistance of AI, *supra* n.4.

case law expanding the duties of government actors, however, the proposed civil-rules amendment "is not a demand for substantive protection," but only a "demand for basic transparency at an early stage of litigation" and "an opportunity for the plaintiff to be heard on whether the government's inaction was reasonable in light of the facts known to it, and an opportunity for the court to have that information before deciding whether the case should proceed." *Id.* at 49.

Setting aside the complex and time-consuming motion practice that would accompany requests for such sworn statements, without the underlying change in the substantive law Cottman supports, the proposal amounts to an immediate demand for legally irrelevant information that would not affect the court's decision on the question underlying the 12(b)(6) motion (i.e., whether the defendant owed any duty at all). In cases where the court does need additional factual information to decide such a motion, it may of course convert the motion to one for summary judgment under Rule 12(d) and order discovery under Rule 56(d). An exception to regular practice under Rule 12 therefore appears unwarranted and inappropriately burdensome on courts and defendants.

Is it suggested that this submission therefore be removed from the agenda.

Attachment(s):

- Excerpt from Suggestion 26-CV-23 (Donald Cottman), pages 1-6

Reference Material Link(s):

- Enclosures to Suggestion 26-CV-23 (Donald Cottman)

June 20, 2026

Donald M. Cottman
Independent Researcher

Rules Committee Secretary
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: Proposal for Amendment to Federal Rule of Civil Procedure (FRCP)– New Paragraph 12(a)(5)

Dear Rules Committee Secretary and Member of the Advisory Committee on Civil Rules:

I respectfully submit the attached proposed new rule, *"FRCP Rule 12(a)(5) – Motion for Order Requiring Sworn Governmental Explanation in Liberty Constraint Cases"*, for consideration by the Advisory Committee on Civil Rules.

This rule would create a limited procedural mechanism allowing plaintiffs in certain constitutional cases to seek a court order requiring a governmental defendant to provide a sworn explanation of its action or inaction at an early stage of litigation.

This proposal arises from a three-paper scholarly study, included with this submission, examining a persistent procedural gap in Fourteenth Amendment litigation. The original paper identifies a doctrinal asymmetry in how the Constitution treats state action versus state inaction when fundamental liberty interests are at stake. The subsequent rebuttal analyzes the institutional barriers to resolving that asymmetry through constitutional adjudication and recommends a

legislative solution. This Surrebuttal offers a complementary, rules-based approach that can operate immediately within existing civil litigation without requiring new legislation or constitutional innovation.

The proposed Rule 12(a)(5) is deliberately narrow in scope and strictly procedural. It applies only to cases involving fundamental liberty interests materially constrained by private conduct, requires strong judicial gatekeeping, and imposes no substantive obligation on the government beyond providing a sworn explanation of its existing reasoning.

The mechanism is designed to integrate cleanly with the current structure of Rule 12(a), particularly through a conforming amendment to the "Effect of a Motion" provision in Rule 12(a)(4).

I have included with this letter an Executive Summary of the proposed rule, the precise blackline text of the recommended rule, and three papers with supporting analysis. I am available to provide any additional information the Committee may require and would welcome the opportunity to discuss the proposal further, if it would be helpful.

Thank you for the Committee's consideration.

Respectfully submitted,

Donald M. Cottman
Independent Researcher

Enclosures:

Executive Summary

Text of Proposed Rule 12(a)(5)

Abstract: “The Right to Invoke Protection: A Mechanism for Individual Invocation of State Authority Under the Fourteenth Amendment”

Abstract: “Rebuttal to ‘The Right to Invoke Protection’’: A Legislative Maturation of The Right to Invoke Protection”

Abstract: “Surrebuttal to ‘The Right to Invoke Protection': A Procedural Path Forward: From Constitutional Diagnosis to Rule-Based Implementation” with proposed rule text

Executive Summary

New FRCP Rule 12(a)(5) – Motion for Order Requiring Sworn Governmental Explanation in Liberty Constraint Cases

This submission proposes a narrowly tailored amendment to Rule 12(a) of the Federal Rules of Civil Procedure. The amendment would add a new paragraph (a)(5) that creates an early, plaintiff-initiated procedural mechanism in a limited category of constitutional cases.

The Problem

In cases alleging that governmental inaction has permitted private conduct to materially constrain a fundamental liberty interest protected by the Fourteenth Amendment, defendants can currently move to dismiss under Rule 12(b)(6) before providing any explanation of their actual decision-making. This pattern is illustrated by cases such as DeShaney v. Winnebago County and Town of Castle Rock v. Gonzales, where claims were resolved on threshold grounds without any requirement that the government articulate the factual and legal basis for its inaction.

The Proposal

The new Rule 12(a)(5) would allow a plaintiff, within 14 days of service of the complaint, to move for a court order requiring the governmental defendant to file a sworn statement explaining the reasoning behind its action or inaction. The court would act as gatekeeper and grant the motion only upon finding that:

- The complaint presents a non-frivolous, colorable claim involving a protected fundamental liberty interest materially constrained by private conduct;
- The governmental defendant possesses discretionary authority to address the constraint; and
- Requiring an explanation would serve the interests of justice without undue burden.

If granted, the defendant would have up to 30 days to file the sworn statement. The defendant's deadline to file a motion to dismiss or answer would be extended accordingly. The mechanism is strictly procedural—it requires only an explanation and creates no substantive right to protection or resource allocation.

Key Safeguards

- Strong judicial gatekeeping
- Short filing window and sanctions for frivolous motions
- Narrow scope limited to fundamental liberty interests
- No stay of discovery or other proceedings by default
- Full preservation of qualified immunity and existing substantive doctrines

Purpose

This proposal offers a modest, immediately available procedural tool that can operate within existing litigation.
It complements, rather than replaces, broader legislative approaches such as the Liberty Constraint Review Act discussed in the attached scholarly work.

It seeks to provide greater transparency at an early stage without expanding substantive rights or imposing significant new burdens on courts or government defendants.

For individuals, it allows for meaningful scrutiny of the State where personal liberties are potentially being infringed while empowering judiciaries to prevent abuses of the process.

The trio of papers provide context of existing scholarly work on the Fourteenth Amendment and development of the concept of a right to invoke protection and a potential mechanism to address a constitutional gap through new procedural rules.

Proposed New Rule 12(a)(5) – Motion for Order Requiring Sworn Governmental Explanation in Liberty Constraint Cases

by Donald Cottman, June 2026

Rule 12(a)(5). Motion for Order Requiring Governmental Explanation in Liberty-Constraint Cases.

(a) Scope. In a civil action in which the complaint alleges that a governmental defendant's action or inaction has materially constrained a fundamental liberty interest protected by the Fourteenth Amendment (or an equivalent federal constitutional provision), the plaintiff may move for an order requiring the governmental defendant to file and serve a sworn statement setting forth the factual and legal reasoning for its action or inaction.

(b) Timing. The plaintiff must file the motion no later than 14 days after service of the complaint, unless the court orders otherwise for good cause.

(c) Standard for Granting. The court may grant the motion only if it finds that:

(1) the complaint presents a non-frivolous, colorable claim that a protected fundamental liberty interest has been materially constrained by private conduct;

(2) the governmental defendant has discretionary authority to address the constraint; and

(3) requiring a sworn statement would serve the interests of justice and judicial economy without imposing undue burden.

(d) Content of Order. If the court grants the motion, it must specify a reasonable time—not to exceed 30 days unless extended for good cause—within which the governmental defendant must file and serve the sworn statement. The statement must be made under penalty of perjury.

(e) Effect on Other Proceedings. Filing a motion under this paragraph does not stay discovery or other proceedings unless the court orders otherwise. The court may permit limited discovery, in its discretion, solely to test the accuracy or completeness of the sworn statement.

(f) Sanctions. The court may impose appropriate sanctions, including fee-shifting, if it determines that a motion under this paragraph was filed in bad faith or is frivolous.

Conforming Amendment to Rule 12(a)(4) by adding new subparagraph (C)

(C) If the court grants a motion under paragraph (a)(5), the time for the defendant to serve a motion under subdivision (b) or an answer is extended until 14 days after the sworn statement is served, unless the court orders a different time. //

TAB 17

"Case Progress" Specification in Rule 16 Scheduling Orders

This proposal, submitted by Ms. Jay Price (26-CV-25), suggests amendments to Rules 16 and 40 that would require judges to issue detailed orders specifying, "for each material stage of the action," the deadline for the "next procedural action reasonably required." Suggestion 25-CV-25 at 1. Although little explanation accompanies the proposal, the upshot is that it would mandate more detailed and regular scheduling orders (including trial dates), explanations for "administrative inactivity," and "periodic review of civil actions that have no scheduled next event or unresolved deadline." *Id.* The proposed amendment would also provide for prioritized review "when delay creates a substantial risk of unlawful detention, loss of housing, child-safety harm, denial of necessary medical access, destruction or loss of evidence, or other imminent or irreversible injury." *Id.*

The proposal's animating concern is delay in cases where there is no "clearly identified next action"; "[r]esponsibility for that action is unclear or shifts without documentation"; a "deadline passes without a recorded extension, stay, or review"; and "[d]elay continues after a matter is procedurally ready for the next step." *Id.* at 2. The essence of the proposal is to require judges to issue regular and detailed orders defining each next step in the litigation process, who (including the judge and the clerk) is to accomplish it and by when, and to regularly review cases that are "inactive." In other words, the proposal would demand more instructions than are currently required under Rule 16(b)(3), which already mandates that the judge issue a scheduling order that "limit[s] the time to join other parties, amend the pleadings, complete discovery, and file motions."

It is not clear from the proposal to what degree lack of clarity about procedural next steps or "administrative inactivity" are problems. Rule 16 provides significant discretion to judges to manage cases as warranted by their circumstances, and the benefit of adding obligations demanding more specificity in these orders is uncertain.

Nor is it clear that current provisions that address failure to comply with scheduling orders, such as Rule 16(f)(1)(C) (authorizing sanctions for failing to obey a scheduling or other pretrial order) or Rule 41(b) (permitting involuntary dismissal for failure to prosecute or comply with court orders) are insufficient. Moreover, the Civil Justice Reform Act, 28 U.S.C. § 476, requires the Administrative Office to report semiannually on all motions pending more than six months. Most often cited as the primary reasons for the pending motions are heavy civil and criminal case loads and/or complexity of the case or volume of materials on the motions. *See* United States Courts, March 2026 Civil Justice Reform Act Report (Mar. 31, 2026), *available at* https://www.uscourts.gov/data-news/reports/statistical-reports/civil-justice-reform-act-report. It appears, therefore, that in general judges are sufficiently monitoring their dockets, and adding additional case-management burdens is unwarranted.

It is recommended that this proposal be dropped from the agenda.

Attachment(s):

- Suggestion 26-CV-25 (Jay Price)

From: Jay P
Sent: Tuesday, July 21, 2026 11:31 AM
To: RulesCommittee Secretary
Subject: RE: Request for Review: Continuous Case Progress and No Idle Case Time Standards

Rules Committee Staff,

Thank you for clarifying the Committee's jurisdiction and inviting a rule-specific submission. Please treat this response as a written suggestion for referral to the Advisory Committee on Civil Rules. I am narrowing the initial proposal to procedural amendments addressing documented case ownership, unexplained administrative inactivity, deadline visibility, and escalation when a required next action is not taken.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

I. Rule 16 — Pretrial Conferences; Scheduling; Management

Proposed addition to Rule 16(b):

"Case-Progress Information. A scheduling order must identify, for each material stage of the action: (A) the next procedural action reasonably required; (B) the party, judicial officer, clerk, or other authorized participant responsible for that action; and (C) the applicable date, deadline, or event that will trigger further review. The court may modify this information for good cause."

Proposed addition to Rule 16(f):

"Administrative Inactivity. If a required procedural action is not completed by the applicable date and no extension, stay, or other lawful basis for delay has been entered, the court must review the matter within a reasonable time and enter an order that: (A) identifies the reason for the inactivity; (B) assigns responsibility for the next action; and © establishes a new date or event for review. This subdivision does not require the court to decide a disputed matter before the record is sufficient or alter any party's rights to notice, response, discovery, hearing, or appellate review."

II. Rule 40 — Scheduling Cases for Trial

Proposed amendment:

"Each court must provide by rule or order for scheduling cases for trial and for periodic review of civil actions that have no scheduled next event or unresolved deadline. Priority may be given when delay creates a substantial risk of unlawful detention, loss of housing, child-safety harm, denial of necessary medical access, destruction or loss of evidence, or other imminent or irreversible injury."

III. Committee Note — Proposed Purpose and Limits

"The amendments are intended to reduce administrative delay that occurs when no participant is clearly responsible for the next procedural action. They do not establish outcome deadlines,

require premature adjudication, restrict lawful judicial discretion, or alter substantive rights. A continuance, stay, extension, or period of deliberation supported by law and reflected in the record is not administrative inactivity under these provisions.

The amendments are technology-neutral. They do not require a particular case-management platform. Courts may comply through existing docketing systems, scheduling orders, local procedures, or other reliable methods. The amendments are also not intended to permit automated systems or artificial intelligence to make final decisions affecting liberty, legal status, or substantive rights without the review and authority otherwise required by law."

IV. Basis for the Suggestion

Federal Rule of Civil Procedure 1 directs that the Rules be administered to secure the just, speedy, and inexpensive determination of every action and proceeding. The proposed language operationalizes that directive without imposing a fixed timetable for judicial decisions. It distinguishes necessary process from preventable administrative inactivity by requiring only that an inactive matter have a documented reason, an identified next action, and a future review point.

The proposal addresses four recurring procedural failures:

1. A matter has no clearly identified next action.
2. Responsibility for that action is unclear or shifts without documentation.
3. A deadline passes without a recorded extension, stay, or review.
4. Delay continues after a matter is procedurally ready for the next step.

V. Requested Committee Action

Please:

1. Docket this submission as a rule-change suggestion.
2. Refer it to the Advisory Committee on Civil Rules.
3. Provide the assigned suggestion or agenda number when available.
4. Advise whether the Committee prefers separate follow-on submissions for the Appellate and Criminal Rules.
5. Advise whether empirical examples, model local-rule language, constitutional analysis, or implementation criteria would assist the Advisory Committee's initial review.

For accuracy in future correspondence, my title is Ms. Jay Price.

Respectfully,

Jay Price
Founder, JayPVentures LLC
JPV-OS Justice System Modernization Initiative

TAB 18

Federal Judicial Center

Date: August 27, 2026

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 a Rules Committee

Deepfakes and Authenticity

The Evidence Rules Committee has been exploring whether the authenticity standard should be made more stringent than it is now for potentially fabricated evidence created by artificial intelligence. The committee asked the Center to survey all federal judges to ascertain their experiences and views. In a memorandum submitted to the committee in time for its spring 2026 meeting, the Center reported fifteen occurrences of a deepfake challenge.

Current Research for Rules Committees

Depositions in Criminal Litigation

The Criminal Rules Committee is considering amendments to Rule 15 on depositions in criminal litigation following suggestions that the rule should facilitate more depositions. The Center has been asked to prepare research protocols.

Subpoenas in Criminal Litigation

The Criminal Rules Committee has asked the Center to prepare research on Rule 17 subpoenas in light of amendments approved by the Standing Committee that are expected to go into effect in December 2027.

Discharge in Bankruptcy Rule 4004(a) and (c)

The Bankruptcy Rules Committee is considering a suggestion that the current wording of Bankruptcy Rule 4004(a) and (c) may lead to disparate applications of the rule. A subcommittee has approved a research plan to gather information on current interpretations and implementations of the rule.

Third-Party Litigation Funding

The Center is providing the Civil Rules Committee with research support as the committee considers possible rules amendments on disclosure of litigation funding by third parties.

Temporary Administrative Stays in the Courts of Appeals

The Appellate Rules Committee has requested research on temporary administrative stays issued by courts of appeals following motions for stays pending appeals.

Completed Research for Other Judicial Conference Committees

Unredacted Personally Identifiable Information in Federal Court PACER Documents

At the request of the Committee on Court Administration and Case Management, the Center (1) enumerated, in a large sample of public filings, unredacted Social Security numbers, individual taxpayer identification numbers, birthdates, minors' names, financial account numbers, and, in criminal cases, individuals' home addresses; (2) determined whether unredacted personally identifiable information is more common in particular types of court filings and proceedings, especially pro se filings, guardian ad litem documents, filings in Social Security actions, notices of removal from state court, and proof-of-claim filings in bankruptcy cases; and (3) assessed how often full nongovernment party names are included in opinions and orders in Social Security and immigration cases (www.fjc.gov/content/399402/unredacted-personally-identifiable-information-federal-court-pacer-documents).

Case Weights for Bankruptcy Courts

The Center has completed 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 the Administration of the Bankruptcy System. The weights were approved by the Judicial Conference in March.

Current Research for Other Judicial Conference Committees

Pro Se Parties in Bankruptcy Litigation

The Center is providing the Committee on the Administration of the Bankruptcy System with research on pro se participation in bankruptcy litigation.

Potential Adjustment to the Case Weight for Mega Chapter 11 Cases

Following the Center's recently updated bankruptcy-court case weights, which are used when assessing the need for judgeships, the Committee on the Administration of the Bankruptcy System asked the Center to conduct a targeted study to determine whether the weight for mega Chapter 11 cases should be modified to address the level of activity in those cases and to account for the number of jointly administered cases under a lead mega Chapter 11 case.

Harm to Cooperators

At the request of the Committees on Court Administration and Case Management, Criminal Law, and Defender Services, the Center is updating its 2016 research on harm and threats of harm to government cooperators in criminal prosecutions (www.fjc.gov/content/310414/survey-harm-cooperators-final-report).

Evaluation of a Pilot Program in Which Comparative Sentencing Information Is Included in Presentence Investigation Reports

At the request of the Committee on Criminal Law, the Center is evaluating a two-year pilot program in which selected districts incorporated comparative sentencing information from the Sentencing Commission's Judiciary Sentencing Information (JSIN) platform into presentence investigation reports.

JUDICIAL GUIDES

Completed Judicial Guide

Manual on Recurring Issues in Criminal Trials

The seventh edition of what previously was called *Manual on Recurring Problems in Criminal Trials* was published in July (www.fjc.gov/content/400176/ manual-recurring-issues-criminal-trials). The manual addresses seven topics: Sixth Amendment rights, jury issues, witness statements and exculpatory evidence, enforcement of trial orders, trial performance of counsel, multiple defendants, and jury verdicts.

Judicial Guide 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).

HISTORY

Court of Appeals in Cases of Capture, 1780–1789

The Center's history webpages include information about various special federal courts, including the local courts for the District of Columbia, the Foreign Intelligence Surveillance Court, and the U.S. Court for Berlin (www.fjc.gov/history/courts/other-federal-courts). Recently added is information about the first federal court, the Court of Appeals in Cases of Capture, which heard appeals from state-court cases seeking maritime prizes (www.fjc.gov/history/courts/court-appeals-in-cases-capture-1780-1789).

Spotlight on Judicial History

Since 2020, the Center has posted twenty-seven short essays about judicial history on a variety of topics (www.fjc.gov/history/spotlight-judicial-history). Recently posted is "Early Radio in the Federal Courts" (www.fjc.gov/history/spotlight-judicial-history/early-radio-in-federal-courts).

Summer Institute for Teachers

In June 2026, the Center collaborated with the ABA to present a weeklong professional-development conference for teachers, focusing on three famous historical trials: Sedition Act Trials, *U.S. v. Guiteau*, and *Clay v. United States*. The Center presents information about these and other famous federal trials on its website (www.fjc.gov/history/cases/famous-federal-trials).

EDUCATION

Specialized Workshops

Workshop on Science-Informed Decision Making

This three-day workshop provided judges and probation and pretrial-services officers with insights from behavioral sciences on decision making in ordinary criminal cases.

The Constitution and the Courts at the 250th

This two-day workshop offered in collaboration with the National Constitution Center explored a variety of perspectives in the early national period about the best approach to interpret and implement the Constitution.

Search and Surveillance Warrants in the Digital Age

This three-day workshop recruited national experts from the technology industry and the legal community—judges, academics, and practitioners—to provide magistrate judges with instruction on the application of evolving Fourth Amendment law to digital search and surveillance warrants.

Antitrust Judicial Law and Economics Institute for Federal Judges

This two-day workshop provided judges with instruction on various antitrust issues, including market definition, market power, competitive effects, horizontal and vertical restraints, and monopoly power.

Distance Education

Court to Court: Access to the Courts—Electronic Filing for Pro Se Litigants

In this episode of the Center's periodic series of short documentaries, the District of Maryland and the Northern District of Illinois share their experiences with electronic filing by pro se litigants. A supplemental compilation of all ninety-four district courts' related local rules and procedures was published in 2025: "United States District Courts' Local Rules and Procedures on Electronic Filing by Self-Represented Litigants" (www.fjc.gov/content/391989/united-states-district-courts-local-rules-and-procedures-electronic-filing-self).

Court Web

This periodic webcast included as recent episodes "Generative Artificial Intelligence and the Federal Judiciary" (featuring Professor Gary Marchant, Arizona State University Sandra Day O'Connor College of Law Center for Law, Science and Innovation and Southern District of West Virginia Chief Judge Frank W. Volk), "Commemorating the 75th Anniversary of Judge J. Waties Waring's Visionary Dissent in *Briggs v. Elliott*" (featuring District of South Carolina Judge Richard Gergel), and "Navigating the Labyrinth: Immigration Court Fundamentals" (featuring District of Utah Magistrate Judge Dustin B. Pead).

Supreme Court Term in Review for Bankruptcy Judges

This annual webcast discusses some of the most significant Supreme Court decisions, including key bankruptcy cases.

Consumer Case-Law Update for Bankruptcy Judges

This quarterly webcast features discussions of consumer-bankruptcy case-law updates prepared by retired Western District of Tennessee Bankruptcy Judge William H. Brown.

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. A recent workshop for bankruptcy judges included the session "How the Federal Judicial Center's Research Division Supports the Bankruptcy Courts."

Mid-Career Seminar for U.S. Magistrate Judges

In partnership with the University of California, Berkeley Law School, the Center has developed this two-day program for magistrate judges with roughly eight to twelve years of experience.

Circuit Workshops for U.S. Appellate and District Judges

The Center has recently put on a three-day workshop for Article III judges in the Eleventh Circuit.

Orientation Programs

Orientation Programs for New Trial-Court Judges

The Center invites newly appointed trial-court judges to attend two one-week conferences focusing on skills unique to judging. The first phase includes sessions on trial practice, case management, and judicial ethics. In addition, district judges learn about the sentencing process, magistrate judges learn about search warrants, and bankruptcy judges learn about the bankruptcy code. The second phase includes sessions on such topics as civil-rights litigation, employment discrimination, security, self-represented litigants, relations with the media, and ethics.

Orientation for New Circuit Judges

Orientation programs for new circuit judges include a three-day program hosted by the Center and a program at New York University School of Law for both state and federal appellate judges.

Orientation for New Term Law Clerks

The Center offers online orientation to new term law clerks. Phase I is offered before the clerkship begins, and phase II is offered after the clerkship has begun.