

AZ JUDICIAL CONFERENCE

*Protecting, Defending
and Uplifting the
Judiciary: Strategies
for Strengthening
Public Trust and
Judicial
Independence*



**PROTECTING, DEFENDING AND UPLIFTING THE JUDICIARY: STRATEGIES FOR
STRENGTHENING PUBLIC TRUST AND JUDICIAL INDEPENDENCE**

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To Know Courts Is to Love Them?

Jury Duty and Confidence in the Courts

Patterson · Murray · Levendusky · Holbert · Jamieson

Annenberg Public Policy Center, University of Pennsylvania

VOLUME 109 NUMBER 3

DUKE UNIVERSITY SCHOOL OF LAW

Judicature

BOLCH JUDICIAL INSTITUTE

To Know Courts Is to Love Them?

*New research shows jury service
and civic education may boost
public understanding — and
public opinion — of courts.*

MEXICO'S JUDICIAL ELECTIONS • THE MIXED QUESTION OF LAW & FACT • COLLEGIALLY IN THE COURTS • AI BIAS AND LEGAL PRACTICE • and more

The Headline

Trust in the U.S. Supreme Court has decreased significantly — and attitudes toward judges and their ethics have followed

The Insight

“To know courts is to love them”:
knowledge about the judiciary fosters
institutional trust

The Finding

Jury service is the *only* predictor that boosts legitimacy, trust, and positive views of judges

The Problem

Jury participation has fallen from ~9% to 4% of U.S. adults

The Path Forward

Multi-institutional civics education —
K–12, workplace, military, and courts

Declining Trust in the Supreme Court

Trust in the Supreme Court Has Decreased

March 2025:

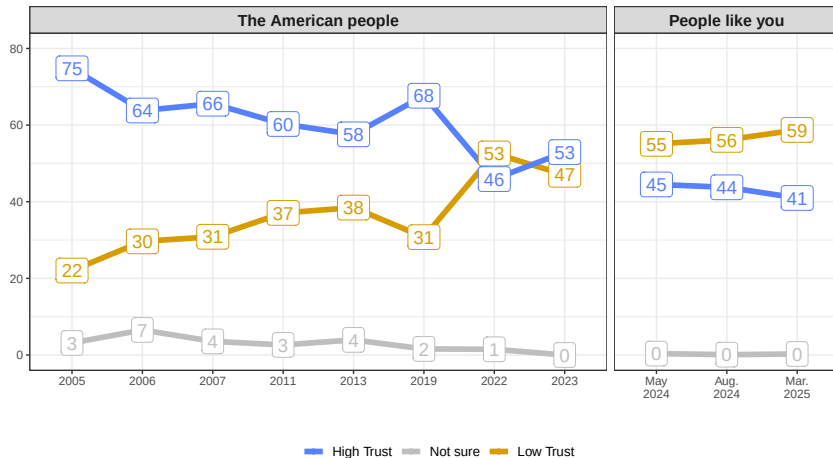
- Only 41% trust the Court to act in the best interests of “people like you”
- 59% report little or no trust
- Down 27 percentage points from 68% in 2019

Twenty-year shift (2005 → 2025):

- High/moderate trust: 75% → 41%
- Low/no trust: 22% → 59%
- Trust declined after *Dobbs* (2022) and has not recovered

Trust in the U.S. Supreme Court

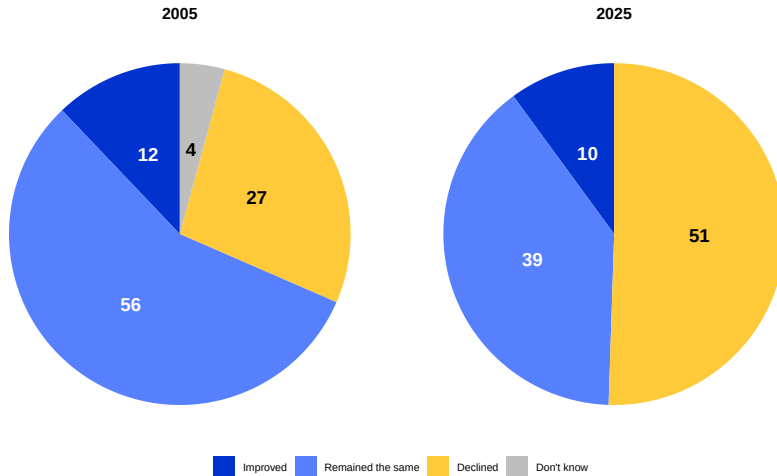
How much do you trust the Supreme Court to operate in the best interests of...



Source: APPC Constitution Day Surveys 2006 – 2025
Note: Wording change in 2024
High Trust: A great deal, A lot, A fair amount, A moderate amount
Low Trust: Not too much, A little, Not at all
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Change in Supreme Court Opinion

In general, has your opinion of the Supreme Court improved, declined, or remained the same in the past 10 years?



Source: AIOD National Panel March 2025, APPC Constitution Day Survey 2005
Omits refused responses, may not sum to 100
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Views on Impartiality and Ethics Have Also Declined

Perceived impartiality

Only 37% are very/somewhat confident a new Trump-appointed justice would decide cases without considering personal views

Down from 59% in 2005 (when the question referenced President Bush)

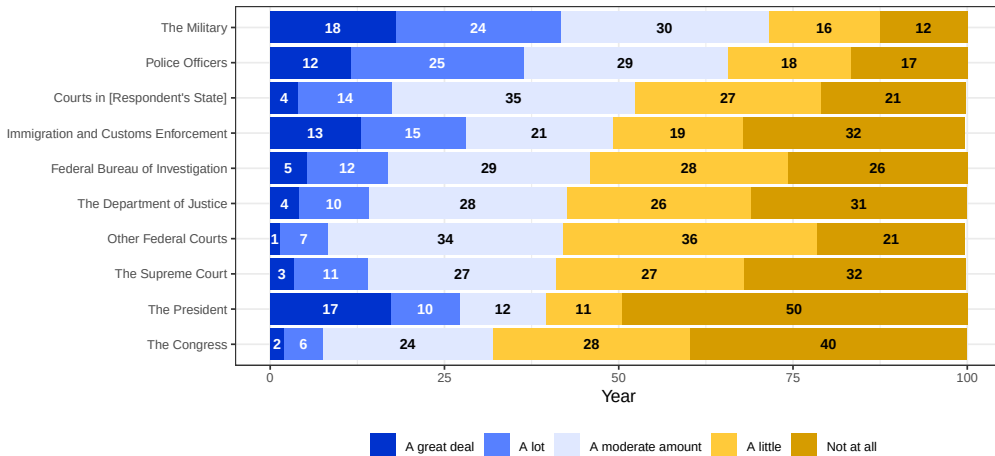
Perceived ethics

Only 44% now say ethical practices are good, down from 72% in 2006

In 2006, just 19% considered them bad — a strongly positive view that has since declined

Trust in Institutions

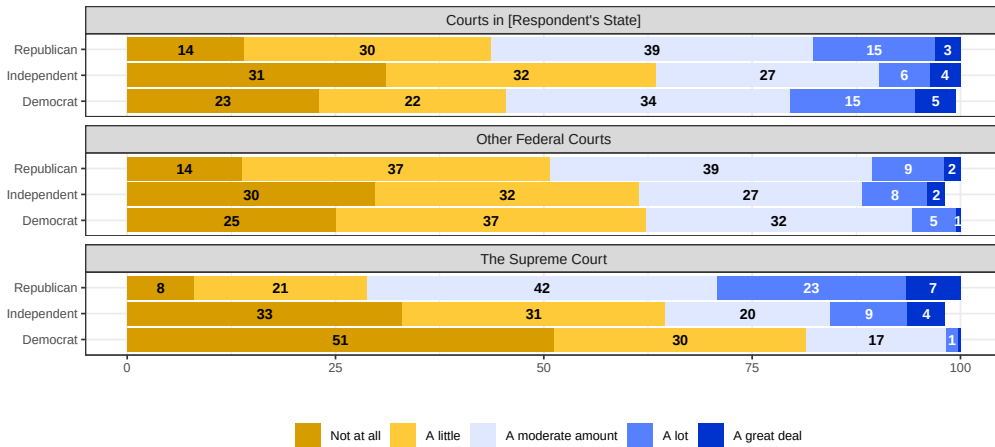
How much, if at all, do you trust _____ to act in the best interest of people like you?



Source: AIOD National Panel March 6–16, 2025
Omits don't know and refused responses, may not sum to 100
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Trust in Institutions by Party Identification

How much, if at all, do you trust _____ to act in the best interest of people like you?



Source: AIOD National Panel March 6–16, 2025
Independents who lean toward one party are included in that party
Omits don't know and refused responses, may not sum to 100
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A Relative Bright Spot: State Courts Remain Less Polarized

- Courts in respondents' states are viewed *significantly* more favorably than SCOTUS or other federal courts
- 57% of Republicans and 54% of Democrats have at least moderate trust in their state courts — a rare partisan convergence
- Compare to SCOTUS: 72% of Republicans vs. only 18% of Democrats have moderate-or-higher trust
- Other federal courts are now viewed similarly to SCOTUS, reflecting their rising political salience
- This asymmetry suggests a greater opportunity to restore trust in state and local courts

“To Know Courts Is to Love Them”

Building on APPC's 2024 study, "The Withering of Public Confidence in the Courts" (Gibson et al.; Patterson et al.; Levendusky et al.):

Core Argument

Understanding the judiciary's unique role in American government fosters greater trust and support for courts — especially compared to the political branches

Our 2024 work focused on *civics knowledge*. Here we ask: what about *direct experience* with the courts through jury service?

Prior Literature: Benefits of Jury Service

1. **Increased trust** (Pennington & Dolliver 2022)

Surveys before and after jury service in criminal cases: deliberation, respectful treatment by legal authorities, and alignment with personal legal attitudes significantly enhanced jurors' trust in courts

2. **Enhanced voter participation** (Gastil et al. 2010)

Infrequent voters who served on a jury were 4–7% more likely to vote in subsequent elections

3. **Development of democratic skills** (Gastil et al. 2010)

Jurors paid increased attention to news and were more likely to discuss community issues with neighbors

Our Design: Three Outcomes, Five Predictors

Court Attitude Outcomes

1. **Legitimacy**

7-item scale on courts' independence, fairness, and political insulation

2. **Trust**

Average trust in SCOTUS, other federal courts, and state courts

3. **Traits of Judges**

Average of corrupt / trustworthy / biased / competent / fair ratings (5 items)

Predictors Tested

1. Civics knowledge

2. **Jury service** (past 5 years)

3. Legal/court TV viewership

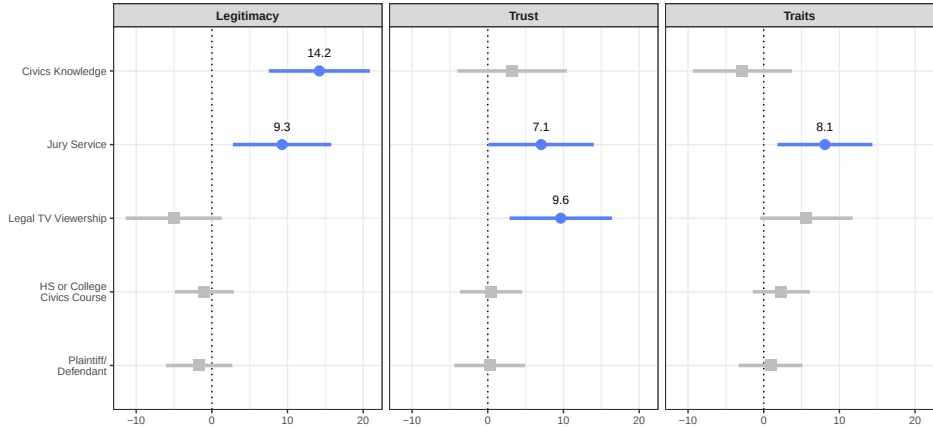
4. HS or college civics course

5. Plaintiff or defendant in court (past 5 years)

Controls: age, education, gender, income, party ID, race/ethnicity

$N = 1,363$; MoE = ± 3.5 pp

Predictors of Court Attitudes



Source: AIOD National Panel March 6-16, 2025
 N=1363, Margin of Error = +/- 3.5pp
 Each coefficient estimated separately, blue estimates are statistically significant
 All models control for age, education, gender, income, party ID, and race/ethnicity
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Special thanks to Abby Murray for her work on this section.

Jury Service Stands Apart

- **Jury service is the only predictor** significantly associated with all three outcomes: legitimacy (+9.3), trust (+7.1), and positive judge traits (+8.1)
- **Civics knowledge** predicts legitimacy (+14.2) but *not* trust or judge traits
- **Legal TV viewership** predicts trust (+9.6) but *not* legitimacy or traits
- **Civics courses**: no significant effects on any outcome
- **Plaintiff/defendant**: no significant effects — litigation without the jury role does not help

Key Takeaway

It is not merely “knowing about” courts — it is experiencing the role they play firsthand that most consistently builds trust

The Decline of Jury Participation

Jury Trials Have Become Less Common

Federal courts:

- Civil jury trials: 5.5% of cases (1962) → 0.8% (2013)
- Criminal jury trials: 8.2% (1962) → 3.6% (2013)

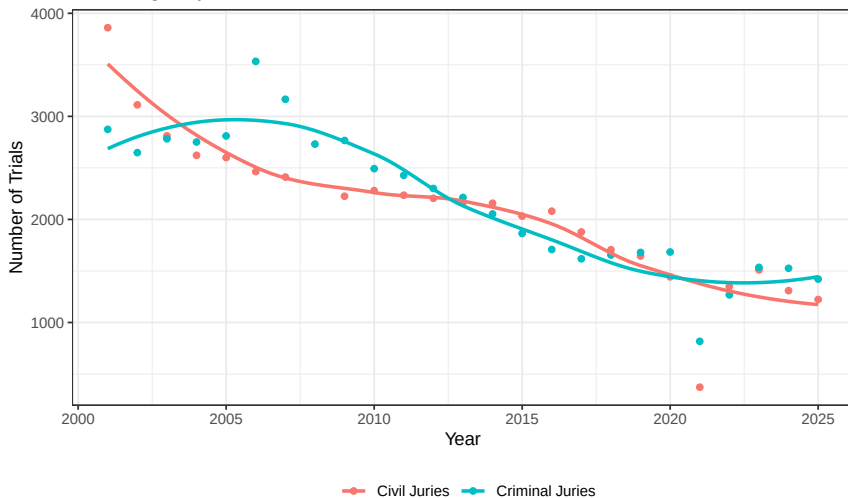
State courts:

- Civil jury trial rate: ~1.8% (1976) → 0.6–0.9% (2019)
- Total state jury trials fell 66%: 148,558 (2007) → 48,764 (2021)

Jury summons (federal, Pew Research, 2006–2016):

- People summoned: 307,204 → 194,211 —37%
- People selected: 71,578 → 43,697 —39%

Declining Jury Trials in the U.S. 2001–2025



Source: U.S. Courts. "Caseload Statistics Data Tables", Tables C-4, D-5, 2001–2025.

Structural Drivers of the Decline

Civil cases

- Mandatory arbitration clauses divert disputes out of court
- Damage caps reduce incentive to go to trial
- Summary judgment rules resolve cases before jury
- Settlement culture and litigation costs

Criminal cases

- Plea bargaining dominates: ~98% of federal convictions resolved by guilty plea (2020)
- Sentencing guidelines create strong pressure to plead
- Prosecutors' charging leverage

These mechanisms systematically redirect disputes away from jury trial, reducing citizens' direct experience with the courts

Survey Evidence: Public Jury Participation in Decline

Using nationally representative APPC surveys of U.S. adults, 2006–2025:

Period	% Served on a Jury (Past 5 Years)
2006–2019 (average)	~9%
2025	4%

A ~55% relative decline in self-reported jury service over the past five years

Given jury service's effects on legitimacy, trust, and perceptions of judges, this decline has implications for the judiciary's public standing

Expanding Civic Education

A Multi-Institutional Approach (1/2)

K–12 as a community platform

- Use classrooms as entry points for *families*, not just students
- Take-home materials, school events bridge classroom and community
- Build civic knowledge around constitution, separation of powers, and courts

Workplace civics

- Employer modules on government structure, individual rights, public institutions
- U.S. Chamber of Commerce *Civics@Work*: nonpartisan, scalable toolkits
- Normalize civic dialogue where adults spend most of their time

A Multi-Institutional Approach (2/2)

Military & public institutions

- Civic instruction currently *absent* from basic training
- ABA “Strengthening Democracy” series (APPC Leonore Annenberg Institute) as a model
- Adaptable for other public-sector contexts and community partnerships

Courts, nonprofits, and advocacy

- Coordinated, nonpartisan civic literacy campaigns
- Content tailored to varying levels of civic awareness and engagement
- Goal: raise baseline civic literacy and empower meaningful democratic participation

Conclusion

The Headline

Trust in the Supreme Court has fallen 27 points since 2019; jury participation has halved since 2020

The Finding

Jury service — uniquely among five predictors — boosts court legitimacy, trust, and positive perceptions of judges' character

The Implication

The structural decline of jury trials removes an important mechanism through which citizens build trusting, legitimate relationships with the judiciary

The Path Forward

Expanded civic education across K–12, workplaces, and public institutions is not merely an educational priority — it is a democratic necessity

Future Collaborations

Some questions we could explore:

- Do specific procedural reforms affect public trust?
- Does trust vary meaningfully across circuits, districts, or court types?
- What explains the gap between SCOTUS and state court trust?
- How do court communications shape public legitimacy?

What APPC can offer:

- Nationally representative surveys, fielded quickly
- Survey experiments to test specific court communications or reforms
- Longitudinal panels to track attitude change
- Partnerships for court-administered data collection

What questions are most pressing from where you sit?

To Know Courts Is to Love Them?



New research shows jury service and civic education boost public understanding — and opinion — of courts.

BY SHAWN PATTERSON JR., ABBY MURRAY,
MATTHEW LEVENDUSKY, R. LANCE HOLBERT
& KATHLEEN HALL JAMIESON

The ability of the judiciary to function well relies on the public's understanding of and confidence in the courts. When the public views the courts as legitimate sources of authority, it is more likely to adhere to even unpopular rulings. This adherence is crucial because, as Alexander Hamilton notes in Federalist #78,

the judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgement; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgements.¹

But public trust in the judiciary is lower than it once was and continues to decline, according to our data here at the Annenberg Public Policy Center (APPC). Any loss of confidence in the judicial system makes the rule of law

more vulnerable.² It increases the risk that, in these polarized times, decisions will be viewed as partisan — and possibly ignored.

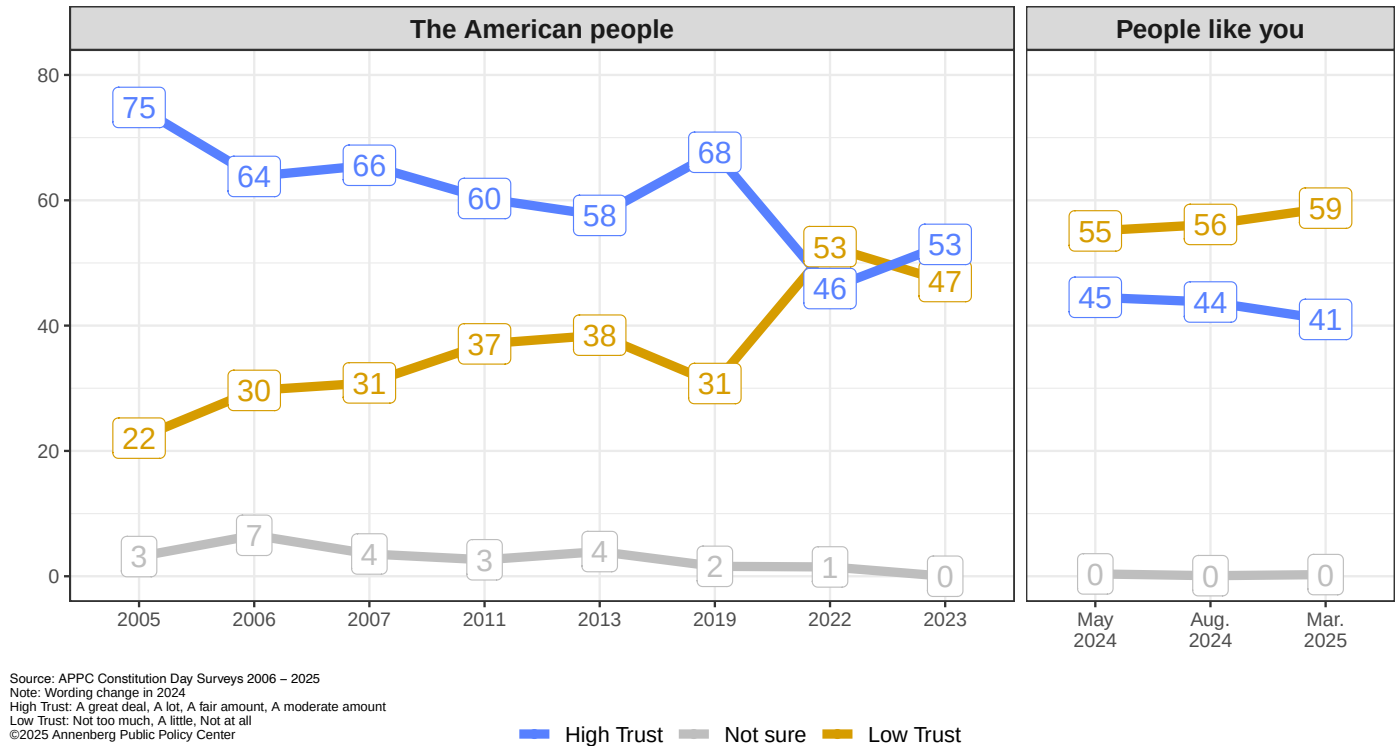
With public trust in the judiciary on the decline, jury service could stand as a bulwark of confidence. So important is the jury to our system of government that it is enshrined in the Seventh Amendment as the right to a “jury trial” and in the Sixth Amendment right, in criminal prosecutions, to an “impartial jury of the state and district wherein the crime shall have been committed.”

Jury service not only gives ordinary citizens a firsthand look at the justice system at work, but also involves them in the administration of justice. The effects are measurable. Our surveys show that after serving on a jury, people see courts as more legitimate, trust courts more, and view judges more positively. But a drop in the likelihood that a citizen will sit on a jury magnifies the reasons for concern. With the number of jury trials in decline, new mechanisms may be needed to help citizens “know” and appreciate their courts.

Our surveys show that after serving on a jury, people see courts as more legitimate, trust courts more, and view judges more positively. . . . With the number of jury trials in decline, new mechanisms may be needed to help citizens “know” and appreciate their courts.

Figure 1: TRUST IN THE U.S. SUPREME COURT

How much do you trust the Supreme Court to operate in the best interests of:



ATTITUDES TOWARD COURTS ON THE DECLINE

The U.S. Supreme Court

Trust in the Supreme Court has declined in recent years. In March 2025, 59% of those surveyed reported having little (27%) or no (32%) trust in the U.S. Supreme Court to operate in the best interests of “people like [them].” Just 41% expressed some confidence that the Court is operating in their best interests, with 27% reporting “a moderate amount” of trust, 11% “a lot,” and only 3% “a great deal.”³

APPC has been surveying on this question since 2005, when 75% had “high” or “moderate” trust in the Supreme Court, and only 22% had “low” or “no” trust.⁴ Prior APPC research⁵ found that trust

in the Court plummeted most drastically following the 2022 *Dobbs* decision that overturned *Roe v. Wade*. As seen in Figure 1, Americans’ trust in the Court — which was 68% in 2019⁶ — has now fallen 27 percentage points to 41%.⁷

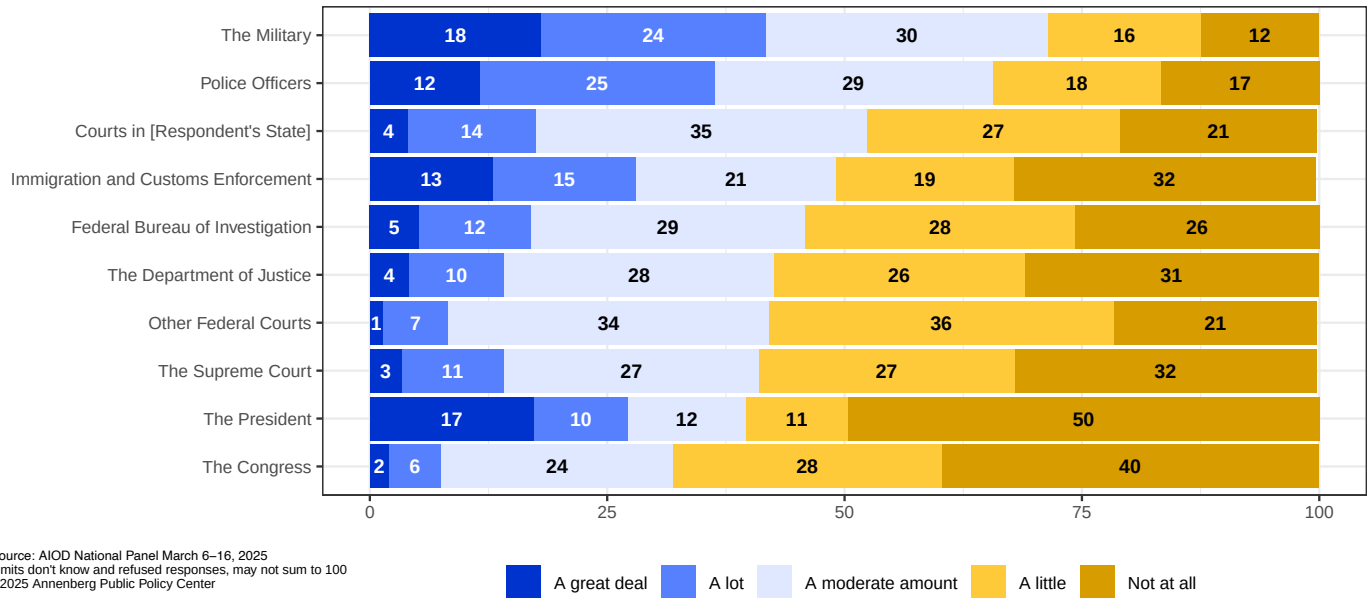
The share of people reporting low levels of trust in the Supreme Court continues to grow. In May 2024, 55% of those surveyed reported having little or no trust in the Court.⁸ In March 2025, this figure grew to 59%.⁹ At the same time, the proportion of those with high or moderate trust continues to fall.¹⁰ And — compared to 20 years ago — nearly twice as many people say their “opinion of the Supreme Court” has declined in the past 10 years: Today, 51% report that their opinion of the Court has declined, compared with 27% in 2005.¹¹

Americans are also much less confident that U.S. Supreme Court justices make judicial decisions without considering the justices’ own personal views than in the past. Just 37% are “very” or “somewhat” confident that a new justice appointed by President Donald Trump would make decisions without considering their own personal views — down from 59% in 2005 (when the question referenced President George W. Bush). Nearly two-thirds (63%) are “not too” or “not at all” confident that a new justice would make decisions without considering their personal views, up from 37% in 2005.¹²

The public also now views Supreme Court justices’ ethics more dimly than it has in the past, though views are mixed: 44% of respondents now say the justices’ ethical practices are “very” or

Figure 2: TRUST IN INSTITUTIONS

How much, if at all, do you trust _____ to act in the best interest of people like you?



“somewhat” good — far more than those who considered them “very” or “somewhat” bad (19%).¹⁴

LOWER FEDERAL COURTS AND STATE COURTS

While prior research showed that courts other than the U.S. Supreme Court were usually granted a higher degree of trust,¹⁵ that picture has become more complicated. While “courts in [respondent’s state]” are viewed as significantly more trustworthy, there is now little difference in trust between “other federal courts” and the U.S. Supreme Court. These findings, drawn from an Annenberg Institutions of Democracy (AIOD) National Panel in March 2025 and shown in Figure 2, may reflect the increasing salience of other federal courts in contemporary politics. And, like the Supreme Court, there has been a decline in support over time, albeit it a smaller one. Whereas 62%

expressed confidence in courts in their state in 2006,¹⁶ only 53% felt similarly in 2025.¹⁷

However, unlike attitudes toward the Supreme Court, which have divided starkly along lines of political party identification, attitudes toward lower federal courts and state courts are less polarized. For example, Figure 3 shows that 72% of Republicans and Republican-leaning independents but only 18% of Democrats and Democratic-leaning independents have at least a “moderate” amount of trust in the U.S. Supreme Court. In contrast, 57% of Republicans and 54% of Democrats felt similarly about the courts in their state. Given these differences, courts other than the Supreme Court may offer a more promising starting point for rebuilding trust.¹⁸

THE EFFECT OF JURY SERVICE

How can we help protect and reaffirm the public’s trust in the judiciary? In

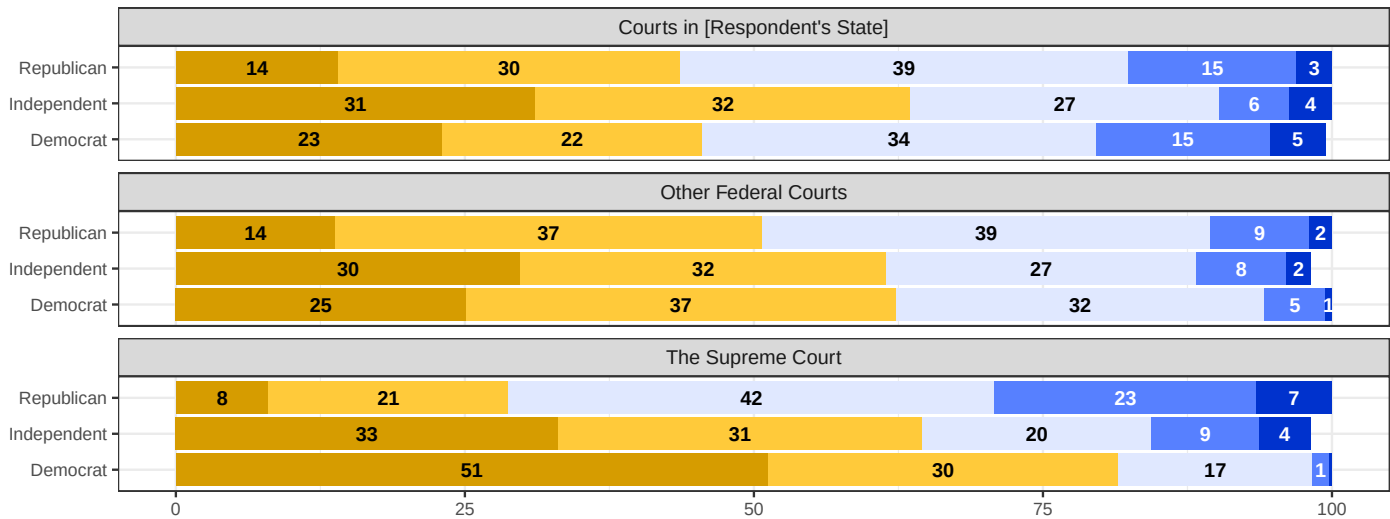
The Withering of Public Confidence in the Courts (2024), APPC researchers summarized studies suggesting that “to know courts is to love them” — that is, that understanding the workings of the judiciary and the unique role courts play in U.S. government may help foster greater trust in and support for the institution of the courts, especially compared to the political branches.¹⁹ In that piece, we focused on the connection between civic knowledge and attitudes toward the courts. Here, we concentrate on another means of getting to “know the courts”: jury service.

Several academic studies have found that jury service affects the attitudes and behaviors of jurors themselves:

- **Increased Trust in the Legal System:** Pennington and Dolliver conducted surveys with jurors before and after their service in criminal cases. They found that engaging in jury deliberation and experiencing respectful treatment by legal

Figure 3: TRUST IN INSTITUTIONS BY PARTY IDENTIFICATION

How much, if at all, do you trust _____ to act in the best interest of people like you?



Source: AIOD National Panel March 6–16, 2025.
Independents who lean toward one party are included in that party.
Omits don't know and refused responses, may not sum to 100.
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Not at all A little A moderate amount A lot A great deal

authorities significantly enhanced jurors' trust in courts.²⁰

- Enhanced Voter Participation:**

Gastil et al. found that individuals who were infrequent voters prior to serving on a jury were 4% to 7% more likely to vote in subsequent elections, suggesting that jury service may foster greater political participation.²¹

- Development of Democratic Skills:**

This research also found that those who served on juries paid increased attention to news media and were more frequent participants in conversations with neighbors about community issues.²²

APPC has also found numerous positive benefits of jury service. Our March 2025 study compared survey respondents who had and had not served on a jury in the past five years on three different sets of attitudes toward courts and judges.

First — to measure the level of **legitimacy** citizens ascribe to the courts in their state — we averaged respondents' answers to seven survey items. We asked: "Thinking about the courts in [your state], please indicate how much you agree or disagree with the following statements":

1. Courts tend to favor wealthy people over poor people;
2. Courts get too mixed up in politics;
3. If the courts started making a lot of rulings that most people in [respondent's state]²³ disagree with, it might be better to do away with them altogether;
4. The right of the courts to decide certain types of controversial issues should be reduced;
5. The courts ought to be made less independent so that they listen more to what the people want;
6. Judges who consistently make unpopular decisions should be re-

moved from their position as judges; and

7. The courts are legislating from the bench rather than interpreting the law.

We assume that those who *disagree* more strongly with more of these items grant the courts *greater* legitimacy — that is, grant them "a widely accepted mandate to render judgments for a political community."²⁴

Second, we measured how much the public **trusts the courts** "to act in the best interest of people like [them]." In order to determine how much a respondent trusts courts generally, we averaged their responses to this question when it comes to the U.S. Supreme Court, lower federal courts, and courts in the respondents' respective states.

Finally, we asked respondents to report how corrupt, trustworthy, biased, competent, and fair they think judges are in general. We averaged the

responses to these five items (reversing the negative traits) to determine generally how positively respondents view the **traits of judges**.

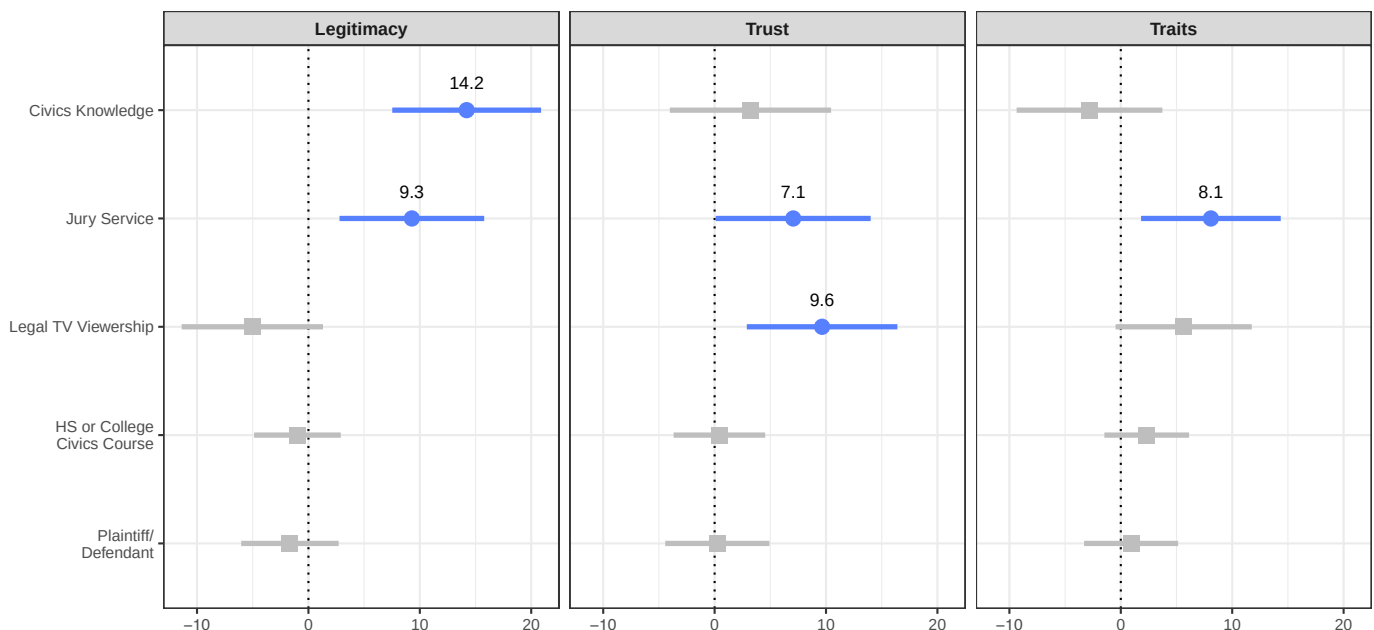
Figure 4 shows the extent to which jury service is associated with these three attitudes in our 2025 survey. Respondents who reported jury service viewed the courts as more legitimate, trusted the courts more overall, and were more likely to attribute positive traits to judges (all findings control for age, education, gender, income, party identification, and racial and ethnic identity).²⁵ We also compared the effects of jury service with the effects of: higher levels of civic knowledge²⁶; higher exposure to TV programming such as *Law and Order* or *Judge Judy* that feature law and court themes; self-reported high school and college civics courses; and

whether the respondent was a plaintiff or defendant in a court proceeding over the past five years.²⁷

Of the five explanations, only jury duty was positively associated with an increase in all three of these positive attitudes (i.e., increased legitimacy, increased trust, and more positive views of judge traits). In Figure 4, the color blue indicates a statistically significant positive difference, the point within each blue bar indicates the estimated effect of a given item, and the bar indicates the 99% confidence interval around that estimate. For example, moving from least to most civic knowledge increases legitimacy by approximately 14 percentage points, while moving from having no experience with jury service to having served on a jury increases legitimacy by approximately 9 percentage points.

Respondents who reported jury service viewed the courts as more legitimate, trusted the courts more overall, and were more likely to attribute positive traits to judges.

Figure 4: PREDICTORS OF COURT ATTITUDES



Source: AIOD National Panel March 6–16, 2025
 N=1363, Margin of Error = +/- 3.5pp
 Each coefficient estimated separately, blue estimates are statistically significant
 All models control for age, education, gender, income, party ID, and race/ethnicity
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These findings suggest that the dramatic decline in the numbers of jury trials, both in civil and criminal cases, is particularly problematic. . . . Fewer jury trials means fewer jurors being summoned or serving.

DECLINE IN JURY SERVICE

These findings suggest that the dramatic decline in the numbers of jury trials, both in civil and criminal cases, is particularly problematic. At the federal level, the number of civil cases going to trial dropped from 5.5% in 1962 to 0.8% by 2013, while federal criminal jury trials shrank from 8.2% to 3.6% in the same period.²⁸ In state courts, the rate of civil jury trials declined from around 1.8% in 1976 to between 0.6% and 0.9% by 2019.²⁹ And those trends have continued in recent years — dropping by 68% for civil trials and 51% for criminal trials between 2001 and 2025.³⁰ Jury trials have become exceptions — not the norm — in U.S. litigation.

Part of this decline stems from structural changes. In civil matters, mandatory arbitration clauses, damage caps, and procedural rules such as summary judgment divert cases from trial.³¹ And, with litigation costs rising, alternative dispute resolution is an increasingly popular way to handle cases out of court.³² In criminal cases, the widespread use of plea bargaining has led to fewer jury trials. By early 2020, nearly 98% of federal convictions were resolved by guilty pleas rather than trial,³³ up from 96.4% in 2013.³⁴ Similarly, in state court, plea bargaining accounts for 95% of criminal convictions.³⁵ These mechanisms reduce public exposure to jury service. Additionally, lawyers increasingly lack experience with jury trials and are less prepared to litigate them (and eventually to oversee them as judges).³⁶ This may lead to even fewer trials and greater pressure to settle or plead out.³⁷

Fewer jury trials means fewer jurors being summoned or serving. Pew Research found that between 2006 and

2016, the number of people called for federal jury duty decreased by 37%, from 307,204 to 194,211.³⁸ The number of people actually selected for jury duty dropped by 39%, from 71,578 to 43,697.³⁹ Separately, the National Center for State Courts has reported that, in 2021, total jury trials across participating state courts had declined by 66%, from 148,558 trials in 2007 to 48,764 in 2021.⁴⁰ Even before the COVID-19 pandemic, the trial rate per 100,000 population had fallen by 26% between 2007 and 2019.⁴¹

Nationally representative surveys of U.S. adults between 2006 and 2025 show a similar pattern. While, prior to 2020, an average of 9% of adults reported serving on a jury in the past five years, only 4% reported doing so in 2025. Together, these figures confirm a significant decline in jury participation — a critical means of getting to “know the courts” in the U.S. legal system.

MOVING FORWARD: EXPANDING CIVIC EDUCATION

As jury service continues to decline, identifying alternative ways for the public to learn about the courts becomes increasingly important. As shown in Figure 4, jury service is associated with higher perceived legitimacy, greater trust, and more favorable evaluations of judicial traits. Yet citizens have fewer opportunities to serve as jury trials become less common. And although television viewership is positively associated with trust in the courts, it is almost negatively associated with perceptions of court legitimacy. By contrast, civic knowledge has consistently been shown to correlate with support for judicial legitimacy.⁴² To this end, we urge that public education about the judicial system — and our system of

government, as a whole — should be an essential focus.

Efforts to expand civic education should begin by rethinking the traditional divide between K-12 instruction and adult civic learning. For too long, these domains have been treated separately, limiting the broader reach and long-term impact of civic education. A more integrated approach would recognize that schools can serve as critical entry points for not only students, but also for their families. Civic learning should be understood as a lifelong process that begins in the classroom but continues well beyond it.

One promising strategy is to use K-12 classrooms as platforms for community-wide civic engagement. When students study topics such as U.S. government, citizens' rights and responsibilities, and the structure of democratic institutions, parents and caregivers can be invited to engage alongside them. Through shared assignments, take-home materials, or school-hosted events, families can deepen their understanding of foundational civic concepts such as the separation of powers and the rights guaranteed by the First Amendment. This multigenerational approach can reinforce civic knowledge at home while building stronger connections between schools and communities. To the extent that improvements in attitudes associated with jury service may have been related to interactions with people in the system, such as judges, educational programs might also consider including exposure to those personnel as part of their programming.

Outside the school system, private industry also plays an important role in strengthening civic education for adults. Employers can offer workplace civics modules on topics such as gov-

ernment structure, individual rights, the duties of citizenship, and the function of public institutions. These offerings can help normalize civic dialogue in settings where adults spend much of their time — particularly as membership in traditional venues for civic engagement, such as unions, neighborhood associations, and fraternal organizations, has declined. In doing so, employers can contribute to a more informed, civically engaged workforce.

Although U.S. military personnel take oaths of service and receive training in military law and conduct, formal civic instruction is not typically included in basic training. Yet there is growing recognition that civic knowledge is essential not only for effective military service but also for engaged citizenship. One example is the American Bar Association's "Strengthening Democracy" video series, developed with support from the Leonore Annenberg Institute for Civics at APPC. This initiative aims to improve service members' understanding of democratic institutions, legal frameworks, and civic responsibilities. Similar programs could be adapted for use in other public institutions or through community-based partnerships, advancing both professional development and civic understanding.

Another example can be found in the courts themselves. The Breyer Community Learning Center in Boston, the Justice and Democracy Center of Minnesota, and the Judicial Learning Center in St. Louis are just three of a growing number of civics learning centers spearheaded by the federal courts. At these centers, children and adults alike can learn about the role courts play in U.S. life through educational materials on the Constitution, landmark cases, and careers in the

[C]ivic knowledge has consistently been shown to correlate with support for judicial legitimacy. To this end, we urge that public education about the judicial system — and our system of government, as a whole — should be an essential focus.

Whatever the route, the ultimate goal should be to raise baseline civic literacy and empower all individuals to participate meaningfully in democratic life. In a time of polarization and misinformation, this is not merely an educational priority — it is a democratic necessity.

justice system. In Hawai'i, the PACE (Commission to Promote and Advance Civic Education) Commission partners with the courts to run the Kauai Law & Justice Academy — a three-day intensive program that culminates in a mock trial before sitting state judges. And in the Eastern and Southern Districts of New York, judges hosted more than 300 high school students in 2025 for a Summer Justice Institute, where participants heard from federal judges, law enforcement officials, attorneys, and law professors. These are but a small sample of the efforts being undertaken by our courts. Together, these efforts create opportunities to expose not only students but also their families to the vital role courts play in U.S. society.

Ultimately, expanding civic education will require the coordinated efforts of a wide range of institutions, including the courts, nonprofit organizations, workplaces, and advocacy groups. Through initiatives like Civics@Work, the U.S. Chamber of Commerce provides employers with toolkits and training to integrate civic learning into the workplace, focusing on rights, democratic processes, media literacy, and cross-community collaboration. The Bolch Judicial Institute's Civics Break program provides ready-made presentations about courts and the rule of law designed for lawyers, judges, and others to share in community group or workplace settings. These scalable, nonpartisan modules offer a low-cost, high-impact way to promote civic knowledge. By delivering content tailored to varying levels of civic awareness and engagement, such efforts can help broaden the reach of civic education. Whatever the route, the ultimate goal should be to raise baseline civic literacy and empower all individuals to participate meaningfully in democratic life. In a time of polar-

ization and misinformation, this is not merely an educational priority — it is a democratic necessity.



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- 1 THE FEDERALIST NO. 78 (Alexander Hamilton).
- 2 David F. Levi et al., *Losing Faith: Why Public Trust in the Judiciary Matters*, 106 JUDICATURE 71, 72 (2022).
- 3 Annenberg Public Policy Center, *Americans' Knowledge of Civics Increases, Annenberg Survey Finds*, ANNENBERG PUB. POL'Y CTR. (Sep. 11, 2025) [hereinafter *Knowledge of Civics*], <https://duke.is/Annenberg-2025-survey-civics-knowledge>.
- 4 *Id.*
- 5 See Matthew Levendusky et al., *Has the Supreme Court Become Just Another Political Branch? Public Perceptions of Court Approval and Legitimacy in a Post-Dobbs World*, 10 SCI. ADVANCES 1,1 (2024) ("The year 2022 saw the lowest levels [of approval] ever recorded by Gallup in the 50-year history of this question.").
- 6 See *Knowledge of Civics*, *supra* note 3 (citing Annenberg Public Policy Center, *Most Americans Trust the Supreme Court, But Think It Is 'Too Mixed Up in Politics.'* ANNENBERG PUB. POL'Y CTR. (Oct. 16, 2019), <https://duke.is/Annenberg-court-mixed-up-in-politics>).
- 7 *Id.*
- 8 See *id.* (citing previously unreported data from May 2024).
- 9 *Id.*
- 10 See *id.* (summarizing Americans' survey responses since 2005 regarding how much they trust the Supreme Court to operate in the best interests of the American people and people like themselves).
- 11 See *id.* (referencing survey responses from 2025 and 2005).
- 12 Annenberg Public Policy Center, *Most Americans Support Checks on Presidential Power*, ANNENBERG PUB. POL'Y CTR. (Apr. 22, 2025) [hereinafter *Checks on Presidential Power*], <https://duke.is/Annenberg-checks-on-presidential-power>.
- 13 *Id.*
- 14 See *id.* (explaining results from a 2006 survey regarding justices' ethical practices).
- 15 See, e.g., Shawn Patterson et al., *The Withering of Public Confidence in the Courts*, 108 JUDICATURE 23, 25 (2024) ("Generally, the public has held the judicial branch as a whole in higher esteem than the Supreme Court.").
- 16 See Shawn Patterson et al., *To Know the Courts Is to Love Them*, OPEN SCI. FRAMEWORK (Jan. 6, 2026) [hereinafter *Data Repository*], <https://duke.is/Patterson-data-repository> (showing original data gathered for this article) (on file with author), <https://osf.io/k2ebu/overview>.
- 17 See Figure 2 (indicating the percentage of people who expressed "a great deal," "a lot," and "a moderate amount" of trust in the U.S. Supreme Court); *id.*
- 18 See *Knowledge of Civics*, *supra* note 3 ("There is a remarkable, nearly 60-point gap between the two major parties on trust in the Supreme Court — 75% of Republicans have at least a moderate amount of trust, but only 18% of Democrats and 38% of independents do."); *Data Repository*, *supra* note 16 (showing original data gathered for this article). Note that those respondents described in the *Knowledge of Civics* article, see *supra* note 3, who identified as Independents who lean Republican or Democrat are not included in either party for purposes of over-time comparisons.
- 19 Patterson et al., *supra* note 15, at 24; Levendusky et al., *supra* note 5, at 9 ("Those who are the most knowledgeable about the Court see it as the most legitimate . . ."); James L. Gibson et al., *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 344 (1998).
- 20 Liana Pennington & Matthew J. Dolliver, *Understanding the Effects of Jury Service on Jurors' Trust in Courts*, 56 LAW & SOC'Y REV. 580, 580–600 (2022).
- 21 JOHN GASTIL ET AL., THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION 48 (2010).
- 22 *Id.* at 10.
- 23 [your state] is replaced with the survey respondent's home state.
- 24 James L. Gibson, *The Legitimacy of the U.S. Supreme Court in a Polarized Polity*, 4 J. EMPIRICAL LEGAL STUD. 507, 510 (2007); see *id.* at 532–33 (concluding that recent findings reinforce rather than challenge prior research that determined the majority of Americans trust the U.S. Supreme Court and accept its legitimacy regardless of respondents' political ideology).
- 25 See generally *Checks on Presidential Power*, *supra* note 12 (explaining the positive effects of jury service on trust in the "institution of the courts").
- 26 See generally Patterson et al., *supra* note 15 (discussing the relationship between civic knowledge and public trust in the judiciary).
- 27 See *Data Repository*, *supra* note 16 (showing original data gathered for this article).
- 28 Emanuella Evans, *Jury Trials Are Disappearing. Here's Why.*, INJUSTICE WATCH (Feb. 17, 2021), <https://duke.is/disappearing-jury-trials-study>.
- 29 THE CIVIL JUSTICE RESEARCH INITIATIVE, THE CIVIL JURY: REVIVING AN AMERICAN INSTITUTION 10 (2021), <https://duke.is/civil-jury-revive>.
- 30 See ADMIN. OFFICE OF THE U.S. COURTS, CASELOAD STATISTICS DATA TABLES C-4 & D-4 (summarizing civil cases terminated in U.S. district courts and "criminal defendants disposed of" in U.S. district courts, respectively), <https://duke.is/uscourt-tables>.
- 31 THE CIVIL JUSTICE RESEARCH INITIATIVE, *supra* note 29, at 4.
- 32 David Joseph Scriven-Young, *ADR and the Increasing Popularity of Collaborative Law*, ABA: LITIGATION RADIO (Feb. 7, 2023), <https://duke.is/ADR-Collaborative-Law-Popularity>.
- 33 Evans, *supra* note 28.
- 34 See *id.* ("Between 1962 and 2013, . . . use of jury trials in federal criminal cases declined from 8.2% to 3.6% . . .").
- 35 Lucian E. Dervan, *Fourteen Principles and a Path Forward for Plea Bargaining Reform*, ABA: CRIMINAL JUSTICE MAGAZINE (Jan. 22, 2024), <https://duke.is/fourteen-principles-plea-bargaining>.
- 36 Paula Hannaford-Agor et al., *Preserving the Future of Juries & Jury Trials*, NAT'L CTR. FOR STATE CTS. 6 (2024), <https://duke.is/preserving-future-of-juries>.
- 37 *Id.*
- 38 John Gramlich, *Jury Duty Is Rare, but Most Americans See it as Part of Good Citizenship*, PEW RSCH. CTR. (Aug. 24, 2017), <https://duke.is/jury-duty-good-citizenship>.
- 39 *Id.*
- 40 Paula Hannaford-Agor & Morgan Moffett, *2023 State-of-the-States Survey of Jury Improvement Efforts*, NAT'L CTR. FOR STATE CTS. (2024), <https://duke.is/2023-state-of-states>.
- 41 *Id.*
- 42 See Kathleen Hall Jamieson & Michael Hennessy, *Public Understanding of and Support for the Courts: Survey Results*, 95 GEO. L.J. 899 (2006); Kathleen Hall Jamieson & Bruce W. Hardy, *Will Ignorance & Partisan Election of Judges Undermine Public Trust in the Judiciary?*, 137 DAEDALUS 11 (2008); Gregory A. Caldeira & Kevin T. McGuire, *What Americans Know About the Courts and Why it Matters*, in INSTITUTIONS OF AMERICAN DEMOCRACY: THE JUDICIAL BRANCH 262 (Kermit L. Hall & Kevin T. McGuire eds., 2005); James L. Gibson & Gregory A. Caldeira, *Knowing the Supreme Court? A Reconsideration of Public Ignorance of the High Court*, 71 J. POL. 429 (2009).

DEMOCRATIZING THE JUDICIARY: WHY JUDGES SHOULD ENGAGE “WE THE PEOPLE” THROUGH SOCIAL-MEDIA PLATFORMS

Stephen Louis A. Dillard*

Judges are different, but we are not special. And for far too long, many judges have acted as if being a neutral interpreter of the law somehow makes them a different *and* special kind of public servant—one that should, out of supposed necessity, be largely detached from and inaccessible to the public.

The cultural relationship between American judges and the people they serve, then, has typically been one at arm’s length.¹ Judges—unlike other public officials—

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1. *See* Morgan Christen, *We Can Do Better*, JUDGES’ J., Summer 2024, at 20, 20 (noting that “[a]lthough it is understandable and perhaps unavoidable that

have been (rightly, I think) viewed as nonpartisan public servants; and, as a result, we have mostly been exempt from the usual expectations of accessibility and transparency the public has for executive and legislative officials.² So, unsurprisingly, judges are “far less likely to interact with their constituents on a regular basis.”³ Indeed, judges typically “toil away in cloistered courthouses in relative anonymity, making decisions in civil and criminal matters of the utmost importance.”⁴ This approach to public service does little to engender the trust of the people we serve. But things are starting to change. Many of us—read: elected state court judges—have little choice but to venture out into the real world and engage with the people we serve. And while these public-facing appearances are, undoubtedly, “motivated by a commitment to civic responsibility, elected judges

judges are somewhat removed from their communities, there is also little room to doubt that the public would have more confidence in the judiciary if the public knew more about how courts operate”); Michael L. Boyer, *Contract As Text: Interpretive Overlap in Law and Literature*, 12 S. CAL. INTERDISC. L.J. 167, 172 (2003) (characterizing judges as “arguably an interpretive community removed from society at large”).

2. See Elisha Carol Savchak & Amanda Ross Edwards, *Why Are State Judges Among Us?* JUDICATURE, Summer 2016, at 20, 21 (“Events that bring together public officials and citizens have traditionally been the purview of legislators, governors, and presidents. . . . Public service involves judges’ goals to educate the public, while self-interest includes the desire to both enhance institutional legitimacy and secure reelection prospects for those who must face elections. A better understanding of judicial outreach practices may also provide insight into how such activities impact conventional aspects of judicial work.”); Joseph W. Hatchett & Annette Boyd Pitts, *A Balancing Act*, FLA. BAR J., Nov. 2006, at 27, 29 (noting that “[l]ack of public understanding of the courts and judicial isolation—lack of contact with the public—were identified as high priorities critical to building trust and confidence”); see also *In re Paternity of B.J.M.*, 944 N.W.2d 542, 570 n.1 (Wis. 2020) (Hagedorn, J., dissenting) (“Judges must be careful [in using social media], but we are elected officials and members of civil society. Social media can be an important platform to inform citizens of who judges are as people, to educate the citizenry regarding the judicial role, and to promote candidacy for public office. The dangers are not significantly greater than those attendant to judicial involvement in non-profit work, participation in community-wide justice initiatives, and shaking hands at the town Fourth of July parade.”).

3. Stephen Louis A. Dillard & Bridget Mary McCormack, *The Robed Tweeter: Two Judges’ Views on Public Engagement*, 20 J. APP. PRAC. & PROCESS 179, 179 (2019).

4. *Id.*

feel a unique pressure to [do so].”⁵ This pressure—of feeling the need to stay connected to the public—is a good and healthy thing for a representative democracy.

But there is obviously a significant distinction between a judge giving prepared remarks to a legal group or civic organization and engaging in the kind of fiery rhetoric one typically sees at a political rally. And there is something undeniably indecorous about “nonpartisan interpreters of the law campaigning in much the same way as candidates running for legislative and executive office.”⁶ Instead, the expectation—for most of our history as a country—has been that judges should be “stuffy, technologically challenged, and light on personality.”⁷ I am not so sure this is still the case.

For a variety of reasons, the people we serve are starting to demand greater accountability and transparency from the judiciary.⁸ And rightly so. Again,

5. *Id.*

6. *Id.*

7. David Lat, *Judges on Twitter: Is this a Problem?*, ABOVE THE LAW (Sep. 30, 2014, at 14:18 ET), <https://abovethelaw.com/2014/09/judges-on-twitter-is-this-a-problem/> [<https://perma.cc/EU39-G6KH>]; see *id.* (“Judges who are formal, dry, and tight-lipped off the bench convey a strong sense of objectivity to the public and to the litigants who appear before them. These judges might not have much personality, but presumably they don’t have personal biases that would interfere with the impartial administration of justice. You might not want to have a beer with such judges, but you would want them handling your case.”).

8. See, e.g., Matt Reynolds & Meghann Cuniff, *Keeping Up Appearances: Courts Struggle to Manage in-Person and Virtual Trials Amid Pandemic Safety Concerns*, ABA J., Feb.–Mar. 2021, at 44, 46 (highlighting the “New York City-based group Fix the Court, which advocates for transparency at the Supreme Court and livestreaming and virtual hearings in state and federal courts”); Gabe Roth, *The Federal Courts Have a Transparency Problem. Here’s How We Can Fix It.*, NAT’L L.J. (Mar. 19, 2021), <https://www.law.com/nationallawjournal/2021/03/19/the-federal-courts-have-a-transparency-problem-heres-how-we-can-fix-it/?slreturn=20250102174316> [<https://perma.cc/GWW6-U8CW>] (“At a time when faith in all three branches of government is low, government officials should favor more sunshine. There’s no better time than Sunshine Week to enact changes in judiciary policy—shedding light where there’s been none for far too long.”); Savchak & Edwards, *supra* note 2, at 22 (“Any judicial involvement in public politics might potentially harm the perceived legitimacy and impartiality of their decisions, as both ideals rest on public confidence in the institution itself. Accordingly, desires for increasing judicial independence call for judges to adhere strictly to their basic roles in the courtroom rather than engaging in public activities. At the same time, many scholars agree that judges’ ability to

judges are different, but we are not special. We are different because the nature of the judicial role is, out of necessity, neutral and nonpartisan—even in states where judges are forced to run under an uneasy partisan banner. But the inherently nonpartisan nature of our position does not absolve us from being as transparent and accessible as possible to the people we serve. As public servants, we can and must do better; and social-media platforms—when used carefully and effectively—are transformative vehicles for educating the public about our work and democratizing the courts.

Even so, many elected judges shy away from participating on social-media platforms because they see it as a form of campaigning, which they intensely dislike. This is understandable. Elected judges do not typically view themselves as politicians. Instead, we see ourselves as nonpartisan interpreters of the law who just happen to be subject to elections; so, campaigning like a candidate running for a legislative or executive office seems instinctively wrong and unseemly. Put another way, the notion that “campaigning is antithetical to holding a judicial office is [but] one iteration of a broader view that judges shouldn’t be actively engaging the public except in limited circumstances.”⁹ It is hardly surprising, then, that judges are much less inclined than other public officials to directly engage the public.

I believe it is time to shake things up a bit—for the sake of the courts and the rule of law. In a relatively short period of time, the public’s faith in the American judiciary has decreased significantly.¹⁰ Even so, the

maintain judicial independence is now dependent on their ability to maintain public confidence through their involvement in the community, rather than disengagement from it.” (emphasis added)).

9. Dillard & McCormack, *supra* note 3, at 179–80.

10. See, e.g., Shawn Patterson Jr. et al., *The Withering of Public Confidence in the Courts*, 108 JUDICATURE, no. 1, 2024, at 22, 24 (noting that the percentage of Americans who express either “a great deal” or “a fair amount” of trust and confidence in the judicial branch has fallen from seventy-five percent in 2005 to under fifty percent in 2022). *But see* NAT’L CTR. FOR STATE CTS., STATE OF THE STATE COURTS: 2024 POLL 4 (2024), <https://www.ncsc.org/sites/default/files/media/document/State-of-the-State-Courts-2024.pdf> [https://perma.cc/8REP-

public remains keenly interested in understanding the inner workings and culture of the judiciary; and modern technological advancements have provided courts and judges with “unique, cost-effective tools to [*directly*] engage and educate the public.”¹¹ There is no reason a judge’s public appearances or outreach should resemble anything approaching what might be considered traditional political campaigning. It is certainly not how I have conducted myself during fifteen plus years as a gubernatorial-appointed and then thrice elected public official in Georgia. Instead, I have engaged in what I refer to as “soft campaigning,” which is a form of outreach to voters that (hopefully) does not come across as campaigning at all—because it really isn’t. I use speaking events, legal conferences, and other public appearances—and yes, social-media platforms—to educate the public about the work of the Court of Appeals of the State of Georgia, and to highlight my more personalized approach to public service (which relies heavily on social media). Every event I attend as a judge is an opportunity to educate the people I serve and increase their trust and confidence in the work I do as a state intermediate appellate judge—and to humanize the judiciary. I believe it is the right thing to do, and it also happens to be “good politics.” I firmly believe more judges should embrace social media¹² as one of the *primary* vehicles for educating the people we serve about the third branch of government, and that we should drastically rethink how we engage our fellow citizens in the modern age.

To be blunt, judges are making a serious and harmful miscalculation by staying largely disconnected from the people we serve. And as far as I can tell, many

FK7V] (noting that “[p]ublic trust in state courts is showing small gains for the second year in a row”).

11. Dillard & McCormack, *supra* note 3, at 180; *see also* Katherine Beaumont Kern, *Be the Change*, JUDGES’ J., Fall 2019, at 15, 15 (noting that “[j]udicial outreach is a public service whereby judges educate the public about the courts and, in a larger sense, aim to erase the divide between those on the bench and those in front of it”).

12. *See infra* Part II.

of them have done so because they firmly believe being overly visible to the public or too “out there” is unbefitting of a judge. I strongly disagree. Without assessing the substance of a judge’s public remarks and appearances, this objection strikes me as merely an unpersuasive appeal to tradition—a tradition that, quite frankly, comes across to many citizens as deeply rooted in elitism, arrogance, and entitlement. Again, if a judge is educating the public about his or her duties and responsibilities, the inner workings and culture of the judiciary,¹³ or engaging citizens in a manner that enhances the public’s faith in the judiciary,¹⁴ how is that demeaning to the office?¹⁵ It isn’t—not in the slightest.

Judges need to thoughtfully reconsider how they participate in and engage their respective communities. It is vital that we educate the people we serve on a consistent (indeed, unrelenting) basis. And it is difficult to do that when judges rarely, if ever, leave the familiar confines of our secluded courthouses.¹⁶ We *serve* the

13. See, e.g., Stephen Louis A. Dillard, *Open Chambers Revisited: Demystifying the Inner Workings and Culture of the Georgia Court of Appeals*, 68 MERCER L. REV. 1, 2–3 (2016).

14. See, e.g., THE LEGAL ACCOUNTABILITY PROJECT, *Judge Dillard and Judge Nazarian on the Importance of Transparency and Accountability in Clerkships* (YouTube, June 13, 2024), <https://www.youtube.com/watch?v=IJi6gYUIYn8>; APPROACH THE BENCH: Judge Stephen Dillard (Apple Podcasts, June 8, 2024); SUPREME MYTHS: *Episode 9: Judge Stephen Dillard* (Amazon Music, Sep. 3, 2022); LAWYERIST PODCAST: *Tweeting Judges & Access to Justice, with Judge Stephen Dillard* (Lawyerist, Feb. 20, 2019); see also Christen, *supra* note 1 (noting that “[t]he public’s perception of the judiciary would be boosted by greater familiarity with the rules and practices that courts routinely employ, including those used to screen for conflicts and randomly assign cases to judicial officers”).

15. See, e.g., *In re Slaughter*, 480 S.W.3d 842, 849–52 (Tex. Spec. Ct. Rev. 2015) (noting that a judge’s social-media post was intended to educate the public about certain events occurring in the courtroom, which was entirely consistent with the Preamble to Texas’s Code of Judicial Conduct).

16. See Carolina A. Del Campo, *To Friend or to Unfriend?: It’s Time to Update the Status on What It Means to Be Facebook Friends*, 32 ST. THOMAS L. REV. 53, 57 (2019) (noting that “social interaction with the community can be beneficial to judges and can diminish the impression that judges are isolated figures that are out of touch with the community’s wants and needs”); Peter M. Reyes Jr., *To Post or Not to Post: Judges on Social Media*, JUDGES’ J., Summer 2019, at 20, 22 (“One of the benefits of social media is that it can extend the reach of judges and allow a judge to communicate about his or her activities. And if judges are

public. We are not cloistered, black-robed philosophers or rulers, and “the public has a right to know who we are and what we do.”¹⁷ Indeed, I believe the most effective—indeed transformative—way to meaningfully educate the people we serve about the judiciary’s work is to fully take advantage of the social-media platforms used by our fellow citizens on a daily basis.¹⁸ State-court judges in particular—because of their direct connection to the people they serve (via elections or limited appointments)—have a unique opportunity to humanize the judiciary¹⁹ and increase the public’s waning confidence in the American judicial system.²⁰ Contrary

encouraged to be engaged in the community and don’t want to be thought of as isolated and out of touch, then judges should consider appropriately using social media to communicate their activities to the public to further public understanding of and respect for courts and the judicial system. Moreover, such communications, when used appropriately, can promote public confidence in the independence, integrity, and impartiality of the judiciary” (footnotes & citations omitted); Shazia Singh, *Friend Request Denied: Judicial Ethics and Social Media*, 7 CASE W. RESERVE J.L. TECH. & INTERNET 153, 172 (2016) (noting that “[f]orcing judges to predict who *may* someday appear in their courtroom places an undue burden on the judges” and that “[j]udges are allowed to have lives outside of their professional obligations and should be entrusted to maintain the same ethical obligations they do outside the virtual forum on social media sites”).

17. Dillard & McCormack, *supra* note 3, at 180; *see also* John G. Browning, *The Judge as Digital Citizen: Pros, Cons, and Ethical Limitations on Judicial Use of New Media*, 8 FAULKNER L. REV. 131, 154 (2016) (noting that “unless we want them to be philosopher-priests cloistered in their jurisprudential temples, judges need to be connected to society, with their work reflecting accessibility to the citizens they serve”); *Green v. Pinnix*, 890 S.E.2d 397, 401–02 (Ga. App. 2023) (Dillard, Presiding J., concurring) (“Judges are neither seers nor black-robed philosophers.”).

18. *See* John G. Browning, *Judged by the (Digital) Company You Keep: Maintaining Judicial Ethics in an Age of Likes, Shares, and Follows*, 12 ST. MARY’S J. LEGAL MAL. & ETHICS 222, 224 (2022) (noting that “[m]ore than 72% of adult Americans use social media to connect with one another, engage with news content, share information, and entertain themselves”).

19. *See* Aislinn R. Klos, *The Separate Opinions of Judge James A. Wynn*, 100 N.C. L. REV. FORUM 282, 282 (2022) (noting that “despite what their lack of social media profiles would suggest, judges are people with thoughts and feelings and personal narratives that inform those thoughts and feelings” and yet “there is a tension in the judiciary” because “it is staffed with thinking, feeling, human beings, but in order to avoid any appearance of impropriety those individuals maintain a careful and dignified silence as to themselves . . . [which] can, in turn, shroud the humanity that is so fundamental to the fairness of justice”).

20. *See* Bruce A. Green & Rebecca Roiphe, *Public Confidence, Judges, and Politics on and off the Bench*, 87 LAW & CONTEMP. PROBS. 183, 183 (2024) (noting

to what the legal cognoscenti might think, it is possible for judges to remain neutral in the cases that come before us without being entirely detached from those we serve.

Many of my fellow judges will take issue with my somewhat unorthodox approach to public outreach. They are deeply skeptical of and worried about their colleagues using social media, and they understandably wonder whether the accompanying risks far outweigh the benefits achieved from using these platforms. I understand and appreciate this sentiment. And I will do my best to thoughtfully and respectfully address it in this article.²¹

In Part I, I will discuss a judge's crucial role as a digital citizen in the modern age²²—individually and as a member of a court that should also be directly engaging the public. In Part II, I will attempt to make the case for increased (and more effective) judicial outreach through social-media platforms. Then, in Part III, I will address many of the common objections to judges using social media as a form of public outreach. And in Part IV, I will

that “public confidence in the U.S. Supreme Court appears to have reached a low-water mark, and public confidence in state-court judges and lower-court federal judges has also ebbed (footnote omitted)”); Tessa L. Dysart, *Confession*, 24 J. APP. PRAC. & PROCESS v, vi (2024) (“I also started paying more attention to the work that state court judges did across the country. I am impressed that the impact many state judges are making on the legal profession—from tweeting about important lawyering topics, to writing practice-oriented articles, to issuing important decisions. Many of these judges are also increasingly accessible to the public through social media and speaking events. They want the non-legal world to better understand the work that they do.”); Kathryn Tucker, *Georgia House Names @JudgeDillard [Tweeter] Laureate*, THE FULTON CNTY. DAILY REP. (Jan. 18, 2019), <https://www.law.com/dailyreportonline/2019/01/18/georgia-house-names-judgedillard-twitter-laureate/?slreturn=20241230-45508> [<https://perma.cc/Y3RU-PXPY>] (noting that “[t]he Georgia House of Representatives gave Dillard that title in its first week of business for the year” when “House Resolution 35 was read and adopted . . . , ‘commending Chief Judge Dillard on his use of social media as a tool of civic engagement’”).

21. See Agnieszka McPeak, *The Internet Made Me Do It: Reconciling Social Media and Professional Norms for Lawyers, Judges, and Law Professors*, 55 IDAHO L. REV. 205, 217 (2019) (noting that the high ethical standards imposed on judges has created extremely “narrow confines” within which judges may operate, specifically in the context of social-media platforms).

22. I credit Professor (and former judge) John G. Browning for his inspired use of the term “digital citizen.” See Browning, *supra* note 17, at 132–33.

briefly discuss the nature and efficacy of certain popular social-media platforms and then highlight some of the noteworthy ethical issues and pitfalls judges are likely to face when using those platforms. Finally, in Part V, I will provide my own ideas about best practices—based on over fifteen years of experience on social-media platforms as a judge—and discuss how judges can and should use these platforms to make the judiciary more transparent and accessible and increase the public’s confidence in the American judicial system. My overarching goal is to provide a comprehensive account of the costs and benefits of judges using social media as a means of public outreach, as well as outlining “best practices” for judges who choose to engage the people they serve on these mediums. In the end, I hope to convince at least some of my more pessimistic colleagues to consider using social-media platforms as a way of effectively engaging, educating, and communicating with the public at large. After all, it’s hard to serve others from a place of seclusion.

I. DIGITAL ENGAGEMENT BY JUDGES AND COURTS

Judges are rarely (if ever) viewed as leaders or innovators when it comes to technology.²³ But the COVID-19 pandemic forced many judges and courts to embrace certain technological advancements out of sheer necessity—like “electronic filing (e-filing) of legal documents, virtual platforms that allowed people to appear before judges over the internet, and electronic notarization (e-notarization).”²⁴ And my hope is that the judiciary’s newfound (and far more in-depth) experience with at least some modern technologies will make it far

23. See, e.g., Eric J. Magnuson & Samuel A. Thumma, *Prospects and Problems Associated with Technological Change in Appellate Courts: Envisioning the Appeal of the Future*, 15 J. APP. PRAC. & PROCESS 111, 113 (2014) (noting that appellate court use of technology has generally ranged from “none to some”).

24. Qudsiya Naqui & Erika Rickard, *Pandemic Spurs Technology Revolution in State Civil Courts*, 105 JUDICATURE, no. 3, 2021, at 2, 3.

more amenable to using others—like social media—to help demystify the judicial process and make our courts more transparent and accessible to the public.

There is something deeply disconcerting about “the least understood branch of government”²⁵—the judiciary—also being the one that “most people directly interact with and are personally impacted by on a daily basis.”²⁶ For example, Georgia’s varied trial courts—superior, state, magistrate, probate, juvenile, and municipal—handle approximately 2,500,000 cases a year;²⁷ and our state’s appellate courts are also extremely busy (even by national standards),²⁸ disposing of almost 4,000 cases a year.²⁹ Needless to say, each case that comes before Georgia’s courts involves parties directly impacted by our decisions, as well as the families, friends, neighbors, and employees of those litigants. No case, then, is an island. Indeed, there are often far-reaching implications from any judicial decision, and the citizens who interact with the judiciary need to have confidence that the judges making these

25. Stephen Louis A. Dillard, *#Engage: It’s Time for Judges to Tweet, Like, & Share*, JUDICATURE, Spring 2017, at 10, 11.

26. Dillard & McCormack, *supra* note 3, at 181.

27. Data & Statistics, GA. ADMIN. OFF. OF THE CTS., <https://research.georgiacourts.gov/data-and-statistics/> [<https://perma.cc/TC87-ZUCJ>] (last visited Dec. 17, 2025) (showing all classes of Georgia trial courts handling 2,951,374 cases for 2023).

28. See Chief Justice Michael P. Boggs, State of the Judiciary 9 (Feb. 7, 2024) (transcript available at <https://www.gasupreme.us/wp-content/uploads/2024/02/State-of-the-Judiciary-2024-FINAL.pdf> [<https://perma.cc/JP3P-MG93>]) (noting that “[o]thers have long recognized our state’s appellate courts as among the busiest in the nation, taking in thousands of appeals and other matters and issuing hundreds of opinions each year, all within our constitutionally mandated deadline of two terms of court—the equivalent of about six to eight months”); Dillard, *supra* note 13, at 3 (noting that “[t]he Georgia Court of Appeals is one of the busiest intermediate appellate courts in the United States, and the court’s considerable caseload is only exacerbated by the two-term rule mandated by the Georgia Constitution” (footnotes omitted)).

29. See Caseload Statistics—Five Year Trend, CT. OF APPEALS OF THE STATE OF GA., <https://www.gaappeals.us/caseload-statistics-five-year-trend/> [<https://perma.cc/B54B-TXSY>] (last visited July 28, 2025) (handling 2,475 cases for 2023); Telephone Interview with Chief Justice Peterson, Supreme Court of Georgia (Oct. 18, 2024) (confirming that the Supreme Court of Georgia disposed of 1,412 cases in 2023).

difficult decisions are people deeply committed to the rule of law and heavily invested in the communities they serve. Unfortunately, there remains a troubling and unnatural separation between the judiciary and the public. This can and must change.

To state the obvious, the law intimidates and frightens many people—and for good reason.³⁰ Unfortunately, judges have not always helped matters. To the contrary, we have “long been criticized for being inaccessible and a source of mystery to the public.”³¹ Stated differently, the judiciary is often viewed as “a wise but entirely detached body of individuals who sit on elevated benches, adorn themselves in majestic black robes (with gavels in hand), and dispassionately rule on the various and sundry disputes of the day (and do so largely out of the public eye).”³² Again, we can and should strive to be far more accessible and transparent to the people we serve.

Judges serve the public, and we have “a duty to educate the public about the judiciary’s unique role in our democracy, its decisionmaking processes, and what the public has a right to expect in our courthouses.”³³ But in order to do this in an effective and meaningful way, judges (and our respective courts) must thoughtfully reconsider how we engage the public, move beyond our collective discomfort with technology and social media, and “fully embrace the . . . platforms those we serve use every day.”³⁴ The people we serve desperately want

30. See Dillard, *supra* note 25.

31. Browning, *supra* note 17, at 131; see also Bridget M. McCormack, *The Disruption We Needed: Accelerated Innovation in Courts and Access to Justice*, 99 N.Y.U. L. REV. 1, 6 (2024) (noting that “justice solutions are delivered primarily through courts—a branch of government funded by another branch of government and staffed by elected judges in many places” and that “[t]hose government systems are structurally complicated, organizationally bureaucratic, and often impenetrable”).

32. Dillard, *supra* note 25.

33. Dillard & McCormack, *supra* note 3, at 182; see also Dillard, *supra* note 25.

34. Dillard & McCormack, *supra* note 3, at 182.

direct, meaningful engagement by judges and the judiciary, and they are entitled to it.³⁵

There are many ways for judges to directly engage the public outside the familiar confines of the courthouse. And the more traditional methods that judges and courts often use as means of public outreach should certainly continue. Judges should be meaningfully involved in their respective communities and other spheres of influence. They can and should regularly visit and speak to schools and civic groups, “as well as attend[] events where they will have an opportunity to stay connected to the people they serve.”³⁶ Judges are also, understandably, committed to spending a considerable amount of time with law-minded high school students (usually as part of a high school mock trial program), pre-law undergraduate students, law students, and lawyers of all ages. This is as it should be. Judges should strive to be public-facing, community-involved leaders. But unfortunately, there are “only so many [in-person] events a judge can attend, only so many hands a judge can shake, and only so much time in the day.”³⁷ And as important as it is to have a positive and meaningful relationship with the bench and bar, a judge’s public appearances should not be limited to the legal community. So, how can judges make their courts “widely accessible to the public and effectively communicate and build relationships with as many of his or her constituents as possible?”³⁸ More precisely (and personally), how can a statewide intermediate appellate judge meaningfully engage with millions of

35. *Id.* In 2018, sixty percent of respondents to a survey by the National Center for State Courts agreed with the following statement: “Too many judges in (STATE) courts don’t understand the challenges facing people who appear in their courtrooms and need to do a better job of getting out into the community and listening to people.” NAT’L CTR. FOR ST. CTS., THE STATE OF STATE COURTS 2018 POLL 7 (2018), <https://nationalcenterforstatecourts.app.box.com/s/iutble2gncavd9x5n34xoa6xg0xzgatx/file/365894469721?sb=/details> [<https://perma.cc/ABD7-PDCZ>].

36. Dillard & McCormack, *supra* note 3, at 182.

37. *Id.* at 182–83.

38. *Id.* at 183.

constituents?³⁹ Prior to the widespread use and availability of social-media platforms, this would have been an exercise in futility.⁴⁰ Indeed, the newfound ability of judges and courts to “use technology and social media to communicate with the public is [nothing short of] revolutionary.”⁴¹ Even so, a judge’s reputation as a good and faithful “digital citizen” necessarily begins with ensuring that his or her court is easily accessible and transparent to the public.⁴² And this is far more likely to happen when a court’s official website provides “citizens with increased access to the judicial process” through “effortless access to court records,”⁴³ implements an “effective digital marketing strategy” to ensure that

39. See Anna Stolley Persky, *Judging the Judges: State Judicial Oversight Often Lacks Consistency and Transparency*, ABA J., June–July 2024, at 50, 57 (“One issue is that judges are on social media in many states because they are elected and need to campaign. Social media can be an inexpensive way to reach potential voters.”); M. Sue Kurita, *Electronic Social Media: Friend or Foe for Judges*, 7 ST. MARY’S J. LEGAL MAL. & ETHICS 184, 196–97 (2017) (noting that “[j]udicial elections are usually last on the ballot and of minimal political interest to the average voter, so the massive outreach provided by [social media] is essential for a candidate”); Savchak & Edwards, *supra* note 2, at 22 (“[J]udicial outreach provides judges with an outlet for pursuing self-presentation goals. Improving the judiciary’s image and raising a judge’s visibility among the public for reelection purposes may be intertwined with otherwise benevolent outreach efforts Judicial outreach serves as a means of enhancing public respect and acceptance for their judicial decisions. Judges can also use their outreach work to promote their own names in the hopes of securing reelection . . .”).

40. See Safiyat Naseem, *To Post or Not to Post: Judges’ Social Media Predicament*, COLUMBIA J. OF TRANSNATIONAL L. (Aug. 19, 2021), <https://www.jtl.columbia.edu/bulletin-blog/to-post-or-not-to-post-judges-social-media-predicament> [<https://perma.cc/GT5L-UDVS>] (noting that “[j]udges may use social media to make legal declarations in the same way they do in traditional venues, as long as they carefully consider what they want to post and monitor responses”).

41. Dillard & McCormack, *supra* note 3, at 183; see also Browning, *supra* note 17, at 131.

42. See ABA Comm. on Pro. Ethics & Grievances, Formal Op. 462, at 1 (2013); see also Browning, *supra* note 17, at 154; Elizabeth Thornburg, *Twitter and the #So-Called Judge*, 71 SMU L. REV. 249, 259 (2018).

43. *Court Website Design Resource Guide*, NAT’L CTR. FOR ST. CTS., <https://web.archive.org/web/20180708170943/https://www.ncsc.org/Topics/Media/Court-Websites/Resource-Guide.aspx> [<https://perma.cc/L39J-C7CZ>] (last visited July 28, 2025).

citizens “find a court’s website when they need it,”⁴⁴ and makes the website as easy as possible to navigate.⁴⁵ A modern, easily accessible, user-friendly court website “benefits judges and court staff, as well as the public, and informed litigants make legal processes more efficient and effective.”⁴⁶

Consider some of the important and helpful features offered by my Court’s website:

- Important announcements are highlighted at the top of the page.
- There is a “Helpful Documents” section prominently displayed, with links to a Citizen’s Guide, Pauper’s Affidavit, Inmate Petition for Mandamus Form, Frequently Asked Questions, and the Constitution of the State of Georgia.
- There is a “Visitor Information” section, which provides detailed information about oral arguments, the Court’s masking policy, attorney admission, media access, and a human-trafficking notice.
- Information about the Clerk’s Office and hours of operation, making records requests, Court rules, media access, Court history and videos of historical significance, internship inquiries, a citizen’s guide, e-filing

44. JTC RESOURCE BULLETIN: MARKETING A COURT WEBSITE: HELPING THE PUBLIC FIND THE COURT ONLINE, NAT’L CTR. FOR ST. CTS. 1 (July 22, 2018), <https://ncsc.contentdm.oclc.org/digital/collection/tech/id/905/rec/1> [<https://perma.cc/3YB4-8GMF>].

45. See, e.g., *Navigation and Design*, NAT’L CTR. FOR ST. CTS., <https://web.archive.org/web/20220423064826/https://www.ncsc.org/services-and-experts/areas-of-expertise/technology/web-best-practices/navigation-and-design> [<https://perma.cc/72TY-QFZ2>] (last visited July 28, 2025).

46. Dillard & McCormack, *supra* note 3, at 183; see also Julie J. Bernard & Keith R. Fisher, *Some Pitfalls and Perils of Judicial Social Media Use*, BOSTON B.J., Fall 2023, at 42, 42 (noting that because “most people consume their information online, courts are now connecting with the public in real time on social media to increase public awareness and understanding of the judicial system,” and that “[t]he Massachusetts Trial Court uses X and has a Facebook page to share public information, resources, and announcements”).

instructions, and a frequently asked questions page.

- Photos of all current judges, along with links to their respective biographies.
- Various calendars, Court term dates, and Court holidays.
- Docket and opinion search features, including a “Show Today’s Opinions” button, which was added at the request of a lawyer via social media.
- A dedicated page for livestreaming the Court’s oral arguments, as well as a page with links to all the Court’s archived arguments (going back to September 2016).⁴⁷

There is, then, a wealth of information provided on the Court of Appeals of the State of Georgia’s website, and it is presented to the public in an easily accessible and digestible format.

But in my view, the most important feature of our Court’s website is the livestreaming and *permanent* archiving of our oral arguments, which we have done since September 2016⁴⁸ (and to its credit, the Supreme Court of Georgia has been livestreaming its arguments since January 2005).⁴⁹ This was a high priority of mine from the time I joined the Court, and I was thankfully able to bring that idea to fruition during my tenure as the vice chief of our Court based on the steadfast support of my colleagues. One of the best ways to enhance the

47. See generally *Court of Appeals of the State of Georgia*, CT. OF APPEALS OF THE STATE OF GA., <https://www.gaappeals.gov/> [<https://perma.cc/V6AV-Y6MF>] (last visited July 28, 2025) (including announcements, helpful documents, visitor information, various administrative resources, photos and biographies of current judges, calendars and dates, dockets and opinions, and livestreaming capabilities); see also Supreme Court of Georgia, <https://www.gasupreme.us/> [<https://perma.cc/X2YN-KL85>] (last visited July 28, 2025) (containing similar features).

48. See *Oral Argument Video Archive*, CT. OF APPEALS OF THE STATE OF GA., <https://www.gaappeals.gov/oral-arguments/oral-argument-video-archive/> [<https://perma.cc/YPG8-M8G9>] (last visited July 28, 2025).

49. Telephone Interview with Kathleen Joyner, Public Information Officer, Supreme Court of Georgia (Oct. 23, 2024) (confirming that the Supreme Court of Georgia has livestreamed oral arguments since January 2005).

public's faith in the judiciary is "to open the virtual doors of the courthouse . . . by livestreaming trial proceedings and appellate oral arguments."⁵⁰

I am proud to be part of a judicial system that greatly values and emphasizes transparency and accessibility. And the response from the legal community (and general public) in Georgia has been resoundingly positive.⁵¹ Now, this doesn't mean the viewership for our oral arguments will set records anytime soon. Indeed, there are occasions when only a dozen or so people watch our livestream, which is fine by me. Our appellate courts are not trying to compete with College Gameday or Bravo. What our judges and justices care about is that the people we serve must no longer brave Atlanta traffic

50. Dillard & McCormack, *supra* note 3, at 183–84; *see also* Lisa Schultz Bressman, *The Rise and Fall of the Self-Regulatory Court*, 101 TEX. L. REV. 1, 69 (2022) ("Live audio enhances the transparency of the judicial process, a modest version of cameras in the courtroom, which never took hold among the Justices."); Christen, *supra* note 1, at 23 ("Allowing remote access also can make the difference between litigants being able to see their cases presented to the court and having to wait to hear about it after the fact because even where long-distance travel is not required to attend a court proceeding, missing time from work inevitably is. Remote access allows litigants to see their cases presented, hear counsel's arguments, and observe engaged judges questioning and considering the merits of the parties' positions in real time. In this way, allowing remote access can level the economic playing field, promote access to justice for those living outside urban areas, and dramatically increase the likelihood that litigants will come away from the process knowing that their side of the story was heard. Whether they win or lose, litigants' confidence in the judiciary is enhanced when the public can watch cases aired in court and recognize that legal principles control the outcomes."); Magnuson & Thumma, *supra* note 23, at 119–20 (noting that "[p]ublic video access is another example of how technology can enhance transparency in appellate courts," and that "[u]sing technology to broaden the ability of the public to see what happens in an appellate courtroom is a paradigm of furthering transparency"); Federalist Society Panel, *Technology, Social Media, and Professional Ethics*, 45 U. DAYTON L. REV. 61, 84 (2020) (including the remarks of Professor Josh Blackman, in which he encouraged courts to "live stream your arguments," and noted that while he understands "there are arguments, pros and cons, . . . enough courts have tried this, [and] it doesn't change the dynamics," and that "[t]here's so much disinformation that you can help fix by putting your own arguments live").

51. *See, e.g.*, Amy Howe, *Courtroom Access: Laboratories for Live-Streaming?*, SCOTUSBLOG (Apr. 29, 2020), <https://www.scotusblog.com/2020/04/courtroom-access-laboratories-for-live-streaming/> [<https://perma.cc/L4CN-RQSE>] (noting that "[a]ccording to the state supreme court justices involved, the use of live video and audio has been an unqualified success").

to see us in action. Instead, they can watch our proceedings in their homes, offices, or even the local coffee shop; be informed about the civil or criminal cases we are hearing on a particular day; and determine for themselves whether we are worthy of serving on Georgia's appellate courts.

Unsurprisingly, easily accessible, user-friendly court websites and livestreaming of judicial proceedings are widely supported by many judges; but there is far "less enthusiasm" in the judiciary for "more direct engagement with the public via social-media platforms."⁵² Even so, social media has "dramatically altered the way public officials and political candidates engage with the public," and judges have been painfully slow to "embrace this new technological frontier."⁵³ I hope to convince at least some of my leery colleagues that the benefits of judges using social media to engage and educate the public far outweigh any potential risks.⁵⁴

II. ENGAGING THE PEOPLE WE SERVE THROUGH SOCIAL-MEDIA PLATFORMS

I am known as one of the more enthusiastic champions for judges and courts directly engaging the public through social-media platforms. I do so primarily to promote transparency, accessibility, confidence and trust in the American judiciary, and civics education, as well as to humanize and demystify the judiciary. In my

52. Dillard & McCormack, *supra* note 3, at 184.

53. *Id.* But see Katrina Lee, *Your Honor, on Social Media: The Judicial Ethics of Bots and Bubbles*, 19 NEV. L.J. 789, 790 (2019) ("Increasingly, judges sitting in county, state, and federal courts in the United States have joined the ranks of social media users.").

54. See M. Sue Kurita, *Judges Should Social Distance—on Social Media*, LITIG., Spring 2023, at 32, 32 (reviewing the discipline summaries in the *Judicial Conduct Reporter*, which are published quarterly by the National Center for State Courts' Center for Judicial Ethics, and noting that "[t]here has been a marked increase in the number of reports of discipline orders issued to judges for social media misuse when comparing the three years pre-COVID (2017, 2018, and 2019) with the number reported during COVID (2020, 2021, through October 2022)").

view, judges owe the citizens we serve information about “the role of the judiciary in our tripartite system of government (as well as the separation of powers), our system of appointing and electing judges, the training judges receive, the structure and operation of our judicial system, the judicial decision-making process, and what rights ‘we the people’ have in relation to the judicial system.”⁵⁵ The judiciary plays an essential role in upholding and safeguarding the rule of law, and the people we serve are entitled to this crucial civic information. By directly engaging citizens on social-media platforms, judges can begin the difficult process of demystifying the judicial branch.⁵⁶ Even more importantly, when judges do this in a meaningful and authentic way, we can increase the public’s waning faith in the judiciary—which is critical these days. Indeed, Gallup recently released a poll noting that “Americans’ confidence in their nation’s judicial system and courts dropped to a record-low 35% in 2024,” a “sharp decline” of “24 percentage points” in the past four years, which is “among the steepest declines Gallup has measured globally on this metric.”⁵⁷ It is hard to see this as anything but a serious crisis of faith in the American judiciary.

So, what to do? I don’t have all the answers, and the varied reasons behind the public’s significant loss of confidence in the judiciary are well beyond the scope of this article; but I am confident the answer isn’t for judges and courts to stay largely disconnected from the people we are so fortunate to serve. What may help is for the judiciary to seriously rethink how it engages with the public and embrace (at least to some degree) the social-media platforms used daily by our fellow citizens.

55. Dillard, *supra* note 25.

56. See Thornburg, *supra* note 42 (“[Social Media] . . . provides judges with a higher profile, allows outreach to voters, helps make judges (and thus courts) seem more accessible . . .”).

57. Benedict Vigers & Lydia Saad, *Americans Pass Judgment on Their Courts*, GALLUP (Dec. 16, 2024), <https://news.gallup.com/poll/653897/americans-pass-judgment-courts.aspx> [<https://perma.cc/B8RX-47ZR>].

Social-media platforms can effectively and meaningfully educate the public about the judiciary. For example, I use these platforms to advise Georgians when my Court is holding an oral argument, and I typically provide a link to our livestream shortly before those arguments begin (often by quote-tweeting or retweeting our Court's official Twitter account).⁵⁸ I also often highlight press releases and job announcements issued by my Court and the Supreme Court of Georgia. Additionally, I make a point of regularly explaining my Court's internal processes and constitutional deadlines, posting links to scholarly articles and essays, sharing other civic-minded writings, as well as posting photos and information about interesting court-related events that I attend—like Georgia's State of the State and State of the Judiciary speeches. This only increases the public's understanding of and appreciation for the work of Georgia's judicial system, thus serving as a “high-octane tool to boost civic awareness.”⁵⁹

58. See, e.g., Judge Stephen Dillard (@JudgeDillard), X (Sep. 5, 2023, at 10:23 ET), <https://x.com/JudgeDillard/status/1699065634431312361?s=20> [<https://perma.cc/P3SE-LDG4>] (“For those who want to watch our oral arguments this morning, you can do so via the link below.”). In addition to X/Twitter, I have a personal Facebook account, official page, and a campaign page; a LinkedIn account; a Bluesky account; and Instagram and Threads accounts. Georgia's appellate courts and many of my colleagues also have a presence on some of these social-media platforms.

59. Shoshana Weissmann, *Online and on the Bench, the ‘Tweeter Laureate of Texas’ Is All About Judicial Engagement*, WASH. EXAM’R (Sep. 17, 2015, at 15:09 ET), <https://www.washingtonexaminer.com/weekly-standard/online-and-on-the-bench-the-tweeter-laureate-of-texas-is-all-about-judicial-engagement> [<http://perma.cc/9FTX-4L2H>].

 **Judge Stephen Dillard**  @JudgeDilla... · 4d
It's about that time.



 **AppealsCourtGA** @AppealsCour... · 4d
Division 4 will hear oral arguments this morning, Tuesday, February 4, at 10:30 a.m. Click "Watch Oral Arguments Live" on our homepage gaappeals.us. Presiding Judge Stephen Louis A. Dillard, @JudgeD...

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Judge Stephen Dillard 
@JudgeDillard

**Here is an interesting (and recent) article
advocating the establishment of an
intermediate appellate court in Nevada**
lasvegassun.com/news/2013/mar/...

9:39PM · 3/23/13

In sum, greater transparency, accessibility, public education, and increased confidence in the judiciary are the driving forces and primary motivations behind my social-media presence. That said, I have received other (tremendous) benefits from actively participating on social-media platforms. I have built meaningful, long-term, lifelong friendships with justices and judges in other jurisdictions, been invited to speak at national and international conferences and events, and been given opportunities for unique and enriching learning experiences that almost certainly would not have been possible in the absence of my active participation on social media. I have also been fortunate enough to have numerous online and in-person conversations with my colleagues from other areas of the country. These delightful and frank discussions have led to more efficient, creative, and modern methods of doing certain aspects of my job as an appellate judge. Indeed, there have been several times when I have learned about another appellate judge or court's practices or traditions, shared that information with my colleagues, and then used this shared knowledge to help us refine our own practices and procedures. Put another way, "judicial relationships developed through social-media platforms have created a live national learning lab."⁶⁰

And the ability to mentor students and lawyers through social media has also been especially rewarding. As Justice Bridget McCormack and I have previously emphasized, "[b]ecause social media interaction and

60. Dillard & McCormack, *supra* note 3, at 186.

reach is scalable to infinity, it creates opportunities for mentorship that are otherwise not achievable.”⁶¹ For example, judges can share interesting articles that provide helpful information to students, lawyers, and other civic-minded individuals. We can also conduct online question-and-answer sessions on various topics of general interest (e.g., brief writing, oral-argument tips, clerkship and career advice, and professionalism issues), or just offer general encouragement to our friends in the legal community. Students and young lawyers hunger for this kind of direct engagement with judges, which would have been almost unthinkable even twenty years ago. I firmly believe judges have a solemn duty to mentor and educate the next generation of lawyers, and social-media mediums enable and empower us to do this in a revolutionary and transformative way.

Judges can also use social-media platforms to promote important nonpartisan issues to the bench, bar, and public writ large. For instance, my views about civility, kindness, and professionalism reach a much larger audience when I express them on social-media platforms than in any public speaking appearance I might make. And these views are then promoted, echoed, or endorsed by others—reaching audiences that might have otherwise been inaccessible to me (and other judges). Indeed, there is even the possibility of these positive, confidence-inspiring views going viral for all the *right* reasons. Social-media platforms—when used properly and skillfully—can be a powerful civic tool for the common good; and, more specifically, as a means of increasing the public’s confidence in the judicial branch. Similarly, positive stories about our profession and the judiciary can be relayed to the public far more efficiently and effectively through social media.

61. *Id.*



Judge Stephen Dillard ✓
@JudgeDillard

I've said this before, but it bears repeating: It costs nothing to be kind.

There's no way to know what others are going through, and every day is an opportunity to impact someone's life for the better with an act of kindness.

We'll never be perfect, but we can be kind.

8:23 PM · 9/5/23 · 21K Views



Judge Stephen Dillard ✓
@JudgeDillard

Promote

I hope all of you have a wonderful and relaxing weekend. And as always, please be good to each other.



And here's the thing: I am convinced—like many of my colleagues—that my engagement on social-media platforms greatly enhances my ability to more effectively do my job. There's simply no escaping these platforms. They are ubiquitous and raise a host of issues that judges will face even more frequently than they already do—e.g., applying traditional Fourth Amendment concepts in cases involving social-media platforms. So, in addition to staying connected to the daily musings of law students, lawyers, and judges throughout the United States (and

the world), it is vital for judges to have at least some basic idea of how these platforms work and are used by the people they serve.⁶² As Professor (and former judge) John G. Browning has rightly emphasized:

[W]hile a judge's misuse of such new media can violate canons of ethics and focus the harsh glare of public perception, so can other, more traditional communications or relationships formed by judges. Neither depriving judges of technical familiarity that can inform their handling of cases nor isolating judges from something viewed as so vital to the community they serve is hardly desirable. Judges should be encouraged to embrace social media, albeit with caution, education, and guidance.⁶³

Put another way, there is a basic competency reason for judges to familiarize themselves with social-media platforms.⁶⁴ Indeed, given “the plethora of technological

62. See Christopher R. Torikoglu, *Personal Jurisdiction Has (Kind of) Been Keeping Up with the Kardashians*, 7 ARIZ. L.J. EMERGING TECHNOLOGIES 6, 24 (2024) (noting “Judge Stephen Dillard, who presides over the Georgia Court of Appeals . . . opined [that] judges will undoubtedly come across cases that will ‘turn on’ the ‘dynamics and the different personalities of social media platforms’ . . . [and] it is imperative for judges to be sophisticated about social media because the way people communicate has vastly changed” (citation omitted)); John G. Browning & Xavier Rodriguez, *Should Judges Have A Duty of Tech Competence?*, 83 TEX. B.J. 254, 254 (2020) (“From overseeing technology being used in courtroom presentations, to ruling on discovery and evidentiary issues involving digital sources, to ethically using technology like social media themselves, a judge’s role demands tech competence.”).

63. Browning, *supra* note 17, at 137.

64. See, e.g., Hailey Limbrick, *Hate Speech, Insurrections, and Fake News: “No Problems Here,” Says the Fifth Circuit: A Split on Free Speech and Content Moderation*, 73 DEPAUL L. REV. 1131, 1163 (2024) (criticizing the federal circuit court for assuming that all “social media platforms are essentially the same,” and specifically taking issue with the court’s attempt to “analogize a social media platform to a telephone communication service” when “[s]ocial media plays many roles in American’s lives today, and to group each individual platform into one pool would be unintelligible” because “[e]ach platform attracts a different type of user, and often times, users from varying platforms utilize social media for different reasons” and thus “the idea of treating all platforms as if they all serve one purpose and one market is simply irrational”); Torikoglu, *supra* note 62, at 23 (“With the constant evolution of social media, courts should refrain from assuming websites like Facebook and Instagram ‘do not intrinsically implicate commercial activity.’ The reality is, they now do. Modern precedent is lagging in confronting the commercial spirit of social media websites. This can be attributed to judges lacking sophistication about social media platforms or

issues before our courts and the pervasive use of social media by most Americans, how can a judge effectively do his or her job without having [at least] some basic understanding of how social media works?”⁶⁵

There is also another rarely discussed benefit of justices and judges having accounts on the most popular social-media platforms, even for those who are only “lurking”:⁶⁶ constructive criticism and feedback from the public. While judges should *never* allow external commentary to unduly influence them or keep them from faithfully doing their job, it is not unusual to see thoughtful critiques about the tone of judicial opinions, the use of humor or pop-culture references in judicial opinions, judicial temperament, and the like. And for judges who often live in criticism-free bubbles of unending praise, I think occasionally reading honest

even being afraid of modernizing old precedent that could single handedly eliminate personal jurisdiction.”); Alexandra Heyl, *Anything You Say (or Like, Repost, and Quote Post) Can Be Used Against You*, 73 CATH. U. L. REV. 27, 37 n.66 (2024) (noting that “social media evidence has become more common in litigation, calling judges to consider a new form of ambiguous, nonverbal conduct—‘liking’ and ‘reposting’”); Emily R. O’Hara, *Extrajudicial Statements and Prejudice in the Digital Age: Creating Factors to Preserve the Balance Between Attorney and State Interests in Trial Litigation*, 61 WM. & MARY L. REV. 887, 893 n. 26 (2020) (noting that “[j]udges may be unfamiliar with how information spreads on social media, or the precautions users take to prevent dissemination of statements on social media, because many judges do not have social media accounts”); see also Raffi Melkonian, *Presenting Yourself on Social Media*, LITIG., Spring 2023, at 31, 33 (noting that “many judges use Twitter and other forms of social media, usually through anonymous accounts”); Ralph Artigliere et al., *Face-Off on Facebook: Judges and Lawyers As Social Media “Friends” in A Post-Herssein World*, FLA. B.J., July/Aug. 2019, at 18, 23 (noting that “lawyers and judges no longer have the luxury of considering whether to learn about technology and social media,” and that “[t]he time has come for all to catch up and stay caught up with these important areas, because behavior, decisions, and conduct, personal and professional, necessarily takes place in the world we live in, not what we would like the world to be”).

65. Dillard & McCormack, *supra* note 3, at 186–87; see also *Moody v. NetChoice, LLC*, 603 U.S. 707, 789 (2024) (Alito, J., concurring) (noting that “[s]ocial-media platforms are diverse, and each may be unique in potentially significant ways”).

66. Perhaps the most famous judicial lurker on social media is Justice Elena Kagan. See Melkonian, *supra* note 64 (noting that Justice Elena Kagan operates a secret Twitter account).

opinions about your work product is a nice—and maybe even helpful—reality check.

Finally, and perhaps most importantly, social media provides elected judges with an extraordinary means of networking, connecting with the public, forming new relationships, and messaging.⁶⁷ Indeed, in my experience, the people who follow me on social-media platforms feel much more invested in my judicial career than they otherwise would through a traditional, more-detached campaign or outreach approach.⁶⁸ And a judge's social-media profile can—when done correctly—enhance and amplify other public appearances and outreach efforts. Public speeches, podcast interviews, and articles written by judges can all be shared with a far wider audience through social-media platforms.

The technological revolution brought about by social-media platforms may end up fundamentally reshaping—both inside and outside the legal profession—how the public perceives the American judiciary. For the longest time, federal courts and federal court judges have had an outsized influence on how the judiciary in the United States is generally perceived,

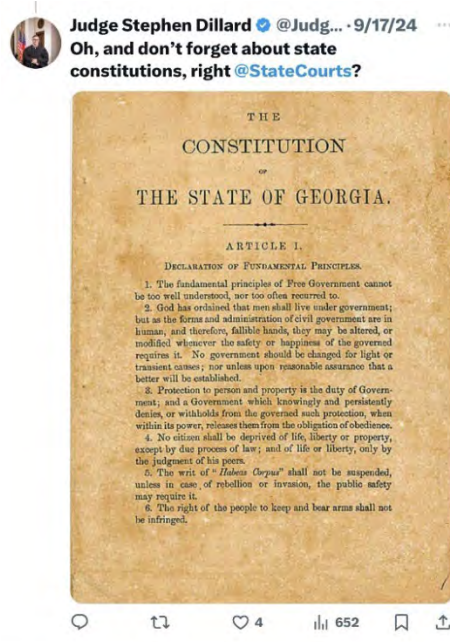
67. See Browning, *supra* note 17, at 131–32 (“One reason for the increased use of social media by judges may be the growing importance of these platforms in political races. With thirty-nine states using some form of election to select their trial judges, and thirty-nine states using some form of election to select their appellate court judges, use of social networking platforms as a political tool in the United States has become necessary to professional survival.” (footnote omitted)); John G. Browning & Don Willett, *Rules of Engagement: Exploring Judicial Use of Social Media*, 79 TEX. B.J. 100, 101 (2016) (“With judges elected in 39 states (including Texas), social media is a fruitful way to engage with the community as well as an invaluable means of raising visibility, building awareness, and leveraging the support of key influencers and opinion leaders.”).

68. See Rashaad J. Hannah, “Noisier, Nastier, and Costlier”: *Shoring Up Institutional Legitimacy in Judicial Elections Using A Legal Ethics Framework*, 35 GEO. J. LEGAL ETHICS 463, 480–81 (2022) (noting that elected judges can “better engage the public who will hold them accountable at the ballot box” by posting regularly on social media, which will allow them to “leverage an effective and inexpensive way to engage their electorates,” and that “elected judges do not use Twitter in the same way that elected politicians do, preferring to engage in ‘self-personalization’ activity rather than ‘policy-based campaigning’ activity when they post to the online platform,” which “allows elected judges to indirectly advance their reelection goals through self-promotion while avoiding more ‘overtly political’ forms of [social media] usage”).

even though nearly all cases take place in and are resolved by state courts.⁶⁹ This is reflected in our media coverage, the intense political focus our profession places on federal judicial nominations, and the tremendous emphasis law schools and law firms place on federal clerkships—to list just a few examples. But the times, they are changing. And you can see the growing importance of state courts every day on social media.⁷⁰

69. See Penny J. White, *The Other Costs of Judicial Elections*, 67 DEPAUL L. REV. 369, 381 (2018) (noting that because “state courts handle the vast majority of legal disputes in the country—some ninety-seven percent of cases—they play an influential role in shaping and stabilizing citizens’ lives and commercial interests,” and that “[a] state court’s interpretation of state constitutions, statutes, and the development of the common law is essential to enable citizens and businesses to conform their conduct to the law”); see generally Jeffery S. Sutton, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018) (emphasizing the importance of state courts and state constitutions).

70. Miriam Seifter (@MiriamSeifter), X (Feb. 6, 2025, at 09:00 MST), <https://x.com/MiriamSeifter/status/1887531805810594094> [<https://perma.cc/66EQ-67U5>] (describing a new state constitutional law textbook); National Center for State Courts (@StateCourts), X (Dec. 20, 2024, at 09:44 MST), <https://x.com/StateCourts/status/1870148235592880598> [<https://perma.cc/SWH9-TFQF>] (noting survey trends that demonstrate increased trust in state courts); Dan Gibson (@dangibsonatty), X (Oct. 2, 2023, at 08:37 MST), <https://x.com/dangibsonatty/status/1708853837941858376> [<https://perma.cc/3T6N-HQRB>] (noting that the Supreme Court may start sending policy decisions back to states, which would implicate state law, state constitutions, and the work of state courts).



It should come as no surprise, then, that judges who actively participate on social-media platforms are far more likely to establish national reputations. Consider Judge Don Willett of the United States Court of Appeals for the Fifth Circuit, who has been on a hiatus from social media for several years now.⁷¹ Before he joined the federal judiciary, Willett was arguably the most followed (and celebrated) judge on *any* social-media platform.⁷² That may not have been a particularly difficult bar to clear, but Willett's national popularity is well-documented.⁷³ And while Willett frequently (and

71. See Ken Herman, *Herman: Twitter Silence from Texas Tweeter Laureate*, AUSTIN AM. STATESMAN (Oct. 17, 2017), <https://www.statesman.com/story/news/2017/10/17/herman-twitter-silence-from-texas-tweeter-laureate/10150953007/> [<https://perma.cc/E5JX-5FR7>]. But see Judge Don Willett (@JusticeWillett), X (Dec. 31, 2024, at 13:36 ET), <https://x.com/JusticeWillett/status/1874162794943410432> [<https://perma.cc/WB3N-8DUG>].

72. See Thornburg, *supra* note 42, at 299–300.

73. See, e.g., Barbara A. Jackson, *To Follow or Not to Follow: The Brave New World of Social Media*, JUDGES' J., Fall 2014, at 12, 13 (noting that “Justice Don Willett of the Texas Supreme Court may be the most well-known member of the

jokingly) referred to himself as the “most avid judicial tweeter in America” or “the tallest munchkin in Oz,” his tweets were “smart, humorous, and informative.”⁷⁴ As a result, Willett “quickly established a national reputation on social media as a result of his ability to strike the proper balance between accessibility and appropriate judicial decorum.”⁷⁵ Indeed, during his tenure on the Supreme Court of Texas, then-Justice Willett had approximately 105,000 followers on Twitter and more than 20,000 followers on Facebook.⁷⁶ These are truly astounding numbers for a state judge, even one serving on the highest civil court of Texas; and he has retained a sizeable following on both X/Twitter (77,500) and Facebook (17,000) during his hiatus.⁷⁷ Importantly, this exposure gave Willett a national platform to promote civics education—a cause near and dear to his heart (and mine).⁷⁸ He was—and in many respects remains—the gold standard for judicial social media.

After Judge Willett, the follower count for judges on social media goes down considerably. As far as I can tell, I have the most followers of any *active* American judge on X/Twitter with just over 38,000.⁷⁹ I also have 5,600 friends or followers on my personal Facebook page;⁸⁰ over 1,000 followers on my professional Facebook

judiciary using one popular form of social media: Twitter” and that “Justice Willett’s participation in social media is ‘a look into the future of the judiciary’” (citation omitted)).

74. Dillard, *supra* note 25.

75. *Id.*

76. Thornburg, *supra* note 42, at 260 n.49; Justice Don Willett (@JusticeDonWillett), FACEBOOK, <https://www.facebook.com/justicedonwillett> [<https://perma.cc/QK8T-B3P5>] (last visited Dec. 17, 2025).

77. See Judge Don Willett (@JusticeWillett), X, <https://twitter.com/JusticeWillett> [<https://perma.cc/8LGZ-7QQR>] (last visited July 28, 2025).

78. See Chuck Lindell, *Texas Judge Laments Civic Illiteracy*, MIDLAND REP.-TELEGRAM (Jan. 14, 2017), <https://www.mrt.com/news/education/article/Texas-judge-laments-civic-illiteracy-10856651.php> [<https://perma.cc/3BUV-A8GH>].

79. See Judge Stephen Dillard (@JudgeDillard), X, <https://twitter.com/JudgeDillard> [<https://perma.cc/83JQ-RWL8>] (last visited July 28, 2025).

80. See Stephen Dillard (@steve.dillard), FACEBOOK, <https://facebook.com/steve.dillard> [<https://perma.cc/5MNF-VWP8>] (last visited July 28, 2025).

account;⁸¹ 5,900 followers on BlueSky;⁸² 1,900 followers on Instagram;⁸³ over 1,200 followers on Threads;⁸⁴ and almost 7,000 connections on LinkedIn.⁸⁵ Importantly, even at these rather modest levels of support, I have a national (and sometimes international) voice on nonpartisan issues near and dear to my heart—like civility, professionalism, best practices for appellate advocates, access-to-justice issues, and judicial transparency and accessibility, as well as the benefits and virtues of judges using social-media platforms to

81. See Presiding Judge Stephen Dillard (@judgedillard), FACEBOOK, <https://facebook.com/judgedillard> [<https://perma.cc/5GBG-J4KJ>] (last visited July 28, 2025).

82. See Judge Stephen Dillard (@judgedillard.bsky.social), BLUESKY, <https://bsky.app/profile/judgedillard.bsky.social> [<https://perma.cc/H8YR-NJSR>] (last visited July 28, 2025); see also Avalon Zoppo, ‘Stake Out My Space’: Attorneys, Law Professors Flock From X to Bluesky, THE NAT’L L.J. (Dec. 9, 2024), <https://www.law.com/nationallawjournal/2024/12/09/stake-out-my-space-attorneys-law-professors-flock-from-x-to-bluesky/> [<https://perma.cc/FG9F-SCBU>] (“Judge Stephen Dillard said he always makes a point to get acquainted with emerging social media platforms. So last May, he signed up for the then-invitation only microblogging app Bluesky ‘A lot of people that I’ve developed friendships with over the years, and a lot of lawyers in Georgia are moving over [to Bluesky],’ said Dillard, one of only a few judges on the site. ‘And I want to be able to communicate with all my constituents as much as possible. So when there’s that much of a migration to a new platform, I want to stake out my space and be accessible to the folks on that platform as well.’ . . . Dillard, however, said he plans to maintain his presence on X, in addition to Bluesky, to stay connected with as many people as possible. ‘My goal is to represent all Georgians and to reach all Georgians,’ Dillard said. ‘I’m on a lot of different platforms, and I think it’s important because you’re going to reach different audiences on different platforms.’”).

83. See Judge Stephen Dillard (@judge.dillard), INSTAGRAM, <https://www.instagram.com/judge.dillard/> [<https://perma.cc/Q2JJ-YVBL>] (last visited July 28, 2025).

84. See Judge Stephen Dillard (@judge.dillard), THREADS, <https://www.threads.net/@judge.dillard> [<https://perma.cc/D7TT-CTTA>] (last visited July 28, 2025).

85. See Stephen Dillard, LINKEDIN, <https://www.linkedin.com/in/stephen-dillard-3635291> [<https://perma.cc/JBZ8-2GAR>] (last visited July 28, 2025); see also Federalist Society Panel, *supra* note 50, at 79 (observing that “it may very well be—in five years from now that Twitter is gone by the wayside or is no longer as prominent, but there are going to be new platforms,” and “[t]his form of digital communication is not going away, and judges, in my mind, need to understand this in order to effectively represent the people they serve”).

engage and educate the public.⁸⁶ And because federal judges almost universally abstain from actively using social-media platforms (they often lurk instead),⁸⁷ state

86. See, e.g., THE NATIONAL CENTER FOR STATE COURTS, *Georgia Judge Stephen Dillard to Receive William H. Rehnquist Award for Judicial Excellence* (September 26, 2025), <https://www.ncsc.org/news/georgia-judge-stephen-dillard-receive-william-h-rehnquist-award-judicial-excellence>; Stephen Dillard, LINKEDIN (Jan. 19, 2025, at 17:56 ET), https://www.linkedin.com/posts/stephen-dillard-3635291_i-am-truly-honored-to-be-the-2025-calgary-activity-7286864112410587137-7bNt [https://perma.cc/HY88-A78C] (noting receipt of 2025 Milvain Visiting Chair in Advocacy from the Calgary Law Faculty and Calgary Bar Association); THE LEGAL ACCOUNTABILITY PROJECT, *Judge Stephen Dillard on Transparency and LAP's Clerkships Database* (YouTube, Dec. 6, 2023), <https://www.legalaccountabilityproject.org/media/v/kdagskdycxzrmpm2mmtzpzwxs2sg3> [https://perma.cc/ZD Y9-WT84]; UNODC—UNITED NATIONS OFFICE ON DRUGS AND CRIME, *How to Use Social Media to Bring the Public Closer to the Court* (YouTube, Apr. 28, 2021), https://www.youtube.com/watch?v=_FD3EaYmi40 (panel discussion featuring, among others, Presiding Judge Stephen Dillard and Chief Judge Bridget McCormack); Stephen Dillard, *I Wish I'd Known*, ABA L. STUDENT DIV. (Nov. 1, 2019), https://www.americanbar.org/groups/law_students/resources/student-lawyer/professional-development/judge-stephen-dillard-i-wish-id-known/ [https://perma.cc/XKB3-EFCY]; HIGHSCHOOLSCOTUS, Interview: Chief Judge Stephen Dillard, WORDPRESS (Apr. 24, 2019), <https://highschoolscotus.wordpress.com/2019/04/24/interview-chief-judge-stephen-dillard/> [https://perma.cc/X9NB-XWR6]; William Vogeler, *Real Judges Use Social Media*, FINDLAW (Mar. 21, 2019), <https://www.findlaw.com/legalblogs/strategist/real-judges-use-social-media/> [https://perma.cc/V4EG-A4JL] (noting that “[Judge Dillard] uses social media to explain how the court works, to mentor new lawyers and law students and to let people know how he is—at the courthouse and outside it”); ALM Media, *‘The Public Has a Right to Know Who You Are,’ Dillard Says in Bar Interview*, LAW.COM (Jan. 3, 2019), <https://finance.yahoo.com/news/public-know-dillard-says-bar-042148245.html> [https://perma.cc/37LK-YA6B]; Adam Feldman, *An Alternative Take on Trump’s Potential Supreme Court Nominees*, EMPIRICAL SCOTUS (Nov. 14, 2016), <https://empiricalscotus.com/2016/11/14/trump-court/> [https://perma.cc/G8M8-GBAV] (mentioning Justice Don Willett and Judge Stephen Dillard as potential Supreme Court nominees, in part, because of their national presence on social media); Tracie Morris, *Trick or Treat? Will Our Next Supreme Court Justice be on Twitter?*, LINKEDIN (Oct. 26, 2015), <https://www.linkedin.com/pulse/trick-treat-our-next-supreme-court-justice-twitter-tracie-morris> [https://perma.cc/XNV3-WAAV] (noting that “[a]rguably the two most prolific judicial tweeters, Justice Don Willett of the Texas Supreme Court and Judge Stephen Dillard of the Court of Appeals of Georgia, regularly cite Twitter as a way for them to educate the public and increase transparency about their respective courts”).

87. See generally Barbara Berenson & Douglas Nazarian, *To Tweet or Not to Tweet*, 101 JUDICATURE, Winter 2017, at 70, 70 (suggesting that federal judges are discouraged from social media engagement by Judicial Conference Committee on Code of Conduct Advisory Opinion No. 112, issued in April 2017); D. Brock Hornby, *Federal Judges and Public Attention*, JUDICATURE, Autumn

judges “can and do occupy the field.”⁸⁸ As a result, state judges have a tremendous influence on issues of great significance to the judiciary and legal profession.⁸⁹

But perhaps the most compelling reason for judges to actively participate on social-media platforms is to offer the public shining examples of civic engagement during a time when there is a concerted effort by many to undermine the independence and integrity of the judiciary, as well as the rule of law.⁹⁰ If judges are

2016, at 64, 73 (noting that “[r]ejecting and avoiding the methods of how new generations communicate put federal judges at a huge disadvantage in trying to preserve cultural mores and constitutional values” and advising to “[t]ake it from a journalist who has seen her media world completely up-ended: [c]hange will occur despite you”); *see also generally* Comm. on Codes of Conduct, *Advisory Opinion No. 112: Use of Electronic Social Media by Judges and Judicial Employees*, in 2B GUIDE TO JUDICIARY POL’Y 225 (2017), <https://www.uscourts.gov/file/document/published-advisory-opinions-1> [<https://perma.cc/7HJ5-DJAQ>].

88. Dillard & McCormack, *supra* note 3, at 188.

89. *See id.* (noting that “state judges are far more likely than our federal counterparts to have national voices on issues of great importance to the legal profession”); Browning & Willett, *supra* note 67 (noting that “[w]ith judges elected in 39 states (including Texas), social media is a fruitful way to engage with the community as well as an invaluable means of raising visibility, building awareness, and leveraging the support of key influencers and opinion leaders”); Thornburg, *supra* note 42, at 272–73 (recognizing that state judges generally maintain greater flexibility in commenting on, or responding to comments about, allegations concerning the judge’s conduct in different contexts); *cf. Republican Party of Minnesota v. White*, 536 U.S. 765, 784 (2002) (“[C]omplete separation of the judiciary from the enterprise of ‘representative government’ might have some truth in those countries where judges neither make law themselves nor set aside the laws enacted by the legislature. It is not a true picture of the American system. Not only do state-court judges possess the power to ‘make’ common law, but they have the immense power to shape the States’ constitutions as well Which is precisely why the election of state judges became popular.”).

90. *See* JOHN G. ROBERTS, JR., 2024 YEAR END REPORT ON THE FEDERAL JUDICIARY 7 (2024) (“Disinformation, even if disconnected from any direct attempt to intimidate, also threatens judicial independence. This can take several forms. At its most basic level, distortion of the factual or legal basis for a ruling can undermine confidence in the court system. Our branch is peculiarly ill-suited to combat this problem, because judges typically speak only through their decisions. We do not call press conferences or generally issue rebuttals [T]he modern disinformation problem is magnified by social media, which provides a ready channel to ‘instantly spread rumor and false information.’ I endorsed a renewed emphasis on *civic education* as the best antidote for combatting the epidemic of misinformation.” (emphasis added)), <https://www.supremecourt.gov/publicinfo/year-end/2024year-endreport.pdf> [<https://perma.cc/C83C-Y962>]; Ray J. Koenig III, *The Role of Young Lawyers in Protecting the Rule of Law*, CBA REC., Mar./Apr. 2024, at 6, 6 (noting that “frequent criticism

unwilling to thoughtfully engage and educate the public about the judiciary, then the public square is likely to be dominated by those attempting to politicize and denigrate our courts. We cannot allow this to happen.

III. ADDRESSING LEGITIMATE CONCERNS

That said, there are serious, understandable concerns by the bench, bar, and public surrounding the use of social media by judges.⁹¹ To be sure, instances of judicial misconduct can and do erode public confidence in the judiciary; and this danger is exponentially increased when that damaging behavior takes place on a social-media platform—where the news of judicial misconduct can spread quickly.⁹² There is also no doubt that social-media platforms can and do “encourage oversharing and

of judges and judicial decisions, often via social media, undermines the perceived independence and integrity of the judiciary by suggesting that judges should align with a political agenda rather than uphold the law impartially”); Paul L. Friedman, *Federal Judge Addresses Vanishing Trials, Declining Public Respect for Judiciary*, MONT. LAW., Feb./Mar. 2024, at 14, 15 (noting that “[w]idely disseminated personal attacks on judges by politicians and candidates for office, as magnified through social media . . . are not just reprehensible; they don’t just undermine the reputations of judges who have dedicated themselves to the administration of justice . . . [but are] ‘nothing less than an attack on our system of government.’”); Lee, *supra* note 53, at 799 (noting that Judge Steve Leben of the Kansas Court of Appeals has expressed approval of “[j]udicial tweeting” in a “day and age” when many Americans get their news from social-media platforms and “those platforms are being used to delegitimize the judiciary”).

91. See Thornburg, *supra* note 42, at 287–89 (providing an overview of concerns associated with a judge’s use of social media).

92. See Bernard & Fisher, *supra* note 46 (“Individual judges can partake in the social media conversation, too, if their actions are consistent with the [judicial canons] Wearing a robe is an honor but also entails certain responsibilities to the judiciary as an institution. Judges’ personal use of social media can cause problems by creating an appearance of bias or impropriety, and erode public trust and confidence in the judicial system.”); Erik Ortiz, *Reprimand of Judges for Social Media Misconduct Warrants Updated Guidelines, Experts Say*, NBC NEWS (July 8, 2021, at 04:32 ET), <https://www.nbcnews.com/news/us-news/reprimand-judges-social-media-misconduct-warrants-updated-guidelines-experts-say-n1273179> [<https://perma.cc/Q333-AYE3>] (“While the frequency of which judges are accused of breaching online ethics protocols is not regularly tracked, a review of dozens of these cases reveals a serious lapse in judgment among many of them, which judicial ethics experts believe is being stoked, in part, by the nation’s political divide and the pervasiveness of social media.”).

disinhibition” and that their “very design steers users to communicate in ways that deviate from real-world behavior.”⁹³ So, I understand the underlying concerns behind these objections, and I share them to some degree. But a viral moment or lapse in judgment can happen to anyone; and this is true regardless of whether someone is actively participating on social media.⁹⁴ And given the all-pervasive use of cellphones in modern society, the likelihood is that a misbehaving judge will end up as fodder for discussion on social-media platforms.

The “solution” to these legitimate concerns is not to shun the transformative technological advancements in communication and pressure judges to avoid social-media platforms altogether.⁹⁵ This approach is both

93. McPeak, *supra* note 21, at 206; *see also* Steve Klepper, *Judges Should Blog More But Learn from Judge Kopf's Mistakes*, MD. APP. BLOG (July 10, 2015), <https://mdappblog.com/2015/07/10/judges-should-blog-more-but-learn-from-judge-kopfs-mistakes/> [<https://perma.cc/LTF9-G3GN>] (noting that “[t]he greatest risk in [using social media] is its immediacy” because it is “easy to post one’s thoughts, without time for reflection, whenever the urge strikes” and acknowledging that “there have been success stories, including Texas Supreme Court Justice Don Willett, Georgia Court of Appeals Judge Stephen Dillard, and U.S. Magistrate Judge Paul Grewal (N.D. Cal.)”).

94. *See* Dillard & McCormack, *supra* note 3, at 188–89; Thornburg, *supra* note 42, at 290–91 (citing John C. Blue, *A Well-Tuned Cymbal? Extrajudicial Political Activity*, 18 GEO. J. LEGAL ETHICS 1, 59–60 (2004)).

95. *See* Federalist Society Panel, *supra* note 50, at 78 (noting that “[j]udges are supposed to be experts in language and communication, yet when we consider the reactions of many state bar associations to judges using social media, as well as the comments frequently made by judges about social media, there is . . . a lot of resistance to change and technology”); Sharon G. Lee, *To Tweet or Not to Tweet: And If You Do, Do It Right*, TENN. B.J., Sep./Oct. 2021, at 20, 25 (noting that while “ethical missteps by others may have prospective tweeters looking nervously toward the exit doors,” the “social media genie is already out of the bottle, and the greater danger may be that judges and lawyers will sit on the sidelines and not engage . . . [even though they have] an opportunity through social media to communicate with the public—truthfully—about the law, the legal profession and our system of justice” and to “serve by example—viewing information with a wary eye before sharing it, promoting trusted sources, and consciously diversifying our own content diet with a wide range of perspectives”); Dillard & McCormack, *supra* note 3, at 179–80 (“The view that campaigning is antithetical to holding a judicial office is one iteration of a broader view that judges shouldn’t be actively engaging the public except in limited circumstances. And unsurprisingly, judges are far less inclined to engage the public than other elected officials.”).

shortsighted and unwise. Judges are already far less inclined than other elected officials to engage the people we serve, and that is not a net positive for the public's perception of the judiciary. Now, perhaps more than ever before, "citizens are interested in understanding and following the judiciary; and technology has given judges unique, cost-effective tools to engage and educate the public."⁹⁶ So, my advice is for judges to be proactive and thoughtfully consider having an established, positive presence on at least some of the most popular social-media platforms—or, at the very least, encourage their courts to do so. As Justice McCormack and I have previously emphasized, the best defense for judges will often be a good offense; and a robust, well-established social-media presence will help safeguard your reputation with the public.⁹⁷ As one technology and brand management expert has astutely noted:

Today, social media is not just a platform for casual interactions; it is a powerful tool that can significantly enhance your . . . reputation through effective online reputation management. When used

96. Dillard & McCormack, *supra* note 3, at 180; *see also* John G. Browning, *Ethical Risks in Judicial Use of Social Media*, GPSOLO, Jan./Feb. 2022, at 55, 56 (noting that "[u]sing social media platforms can be a tremendous positive for judges to demystify the judiciary, display their humanity, and remove distance from the communities they serve"); Browning, *supra* note 18, at 224 (noting that "[j]udges are hardly immune to the siren song of social media use, and in many ways that's a positive thing" because "social media platforms can be a vital political tool for those judges who must run in partisan elections, a useful means of engagement with the communities they serve, and an important asset in educating the public about the judiciary's role and fostering confidence in the integrity of the judiciary"). *But see* Sarah Stula, *Coffee Break with Justices Marla Luckert and Caleb Stegall*, J. KAN. B. ASS'N, Oct. 2019, at 13, 14 (quoting Justice Stegall as having scaled back his participation in social media after an "initial foray," and despite respecting friends who regularly tweet "as a means of public outreach and education," noting that he has "grown more and more skeptical of the medium as a fruitful conduit for communicating the values the judiciary is meant to embody—respect, fairness, thoughtfulness, deliberation[,] and impartiality").

97. *See* Dillard & McCormack, *supra* note 3, at 189 ("[T]he best way to stop any attempt to take our words or actions out of context is to have an established, positive presence on social media. That is, the best defense is a good offense. A strong social-media presence allows you to help control and protect your reputation and image as a public official.").

strategically, social media can help you engage with and inform your target audience, leading to a stronger and more positive brand presence online The reach of social media is unparalleled. It provides immediate access to both potential and current [constituents], allowing [users] to interact in real-time, gather . . . feedback, and build lasting relationships. Tracking and engaging in online conversations is crucial for gathering . . . feedback and fostering stronger relationships. A well-executed social media strategy can transform your online reputation, making your brand more approachable and trustworthy in the eyes of [constituents].⁹⁸

In sum, judges can use social media to humanize themselves to the people they serve, help demystify the judiciary, and increase the public's confidence in the judiciary. Rather than being a random, faceless public servant, a judge's social-media presence can—when done intentionally and skillfully—create an *authentic* personality for your online “brand,” which is essential “for building trust with your audience.”⁹⁹ Indeed, when you directly engage your constituents “transparently and personably” on social media, “by sharing stories, values, and behind-the-scenes content, you foster a deeper connection with your audience, making them more inclined to [support] you.”¹⁰⁰

Another frequent objection to judges actively participating on social-media platforms is that doing so somehow degrades the office they hold.¹⁰¹ But in my view, this objection is based on a fundamental misunderstanding of social media. It is not the platform,

98. Roz Sheldon, *Using Corporate Social Media to Improve Your Online Reputation*, IGNIYTE (Aug. 26, 2024), <https://www.igniyte.co.uk/blog/using-social-media-to-improve-your-corporate-online-reputation/> [<https://perma.cc/BH6M-9DFS>].

99. *Id.*

100. *Id.*

101. Browning, *supra* note 17, at 135 (observing that courts have warned that certain conduct, especially on social media, “can easily be misconstrued and create an appearance of impropriety” (quoting *State v. Thomas*, 376 P.3d 184, 198 (N.M. 2016))).

but the substance posted to the medium that can be demeaning to the judge and the judiciary. Judges are (or should be) in complete control of the content they post on social-media platforms. If judges can dictate the substance of a speech given to a local civic club, they should likewise be able to show similar restraint and discipline in making online remarks. The bottom line, then, is this: If a judge's online content is educational, informative, civil, and authentic, it will only enhance the public's faith in the judiciary.¹⁰² And importantly, unlike the traditional and customary events attended by most judges (which typically involve only other members of the legal community), a judge's social-media posts are (or should be) accessible to *everyone*. I think the latter approach to outreach has a certain Jeffersonian, town-hall purity to it and is far more likely to increase public confidence in the judiciary than the clubby confines of the former. As for *ex parte* communications made via social media (which is a fear many judges understandably have), the solution is the same as it would be in real life: report them immediately.¹⁰³ In the end, the "responsible use of social media is really just about exercising good judgment,"¹⁰⁴ which should come naturally to judges.

Along these same lines, many legal traditionalists claim that having a social-media presence undermines the public's confidence in judges being impartial. As social-media savant David Lat has previously noted:

Judges who are formal, dry, and tight-lipped off the bench convey a strong sense of objectivity to the public and to the litigants who appear before them. These judges might not have much personality, but

102. *Id.* at 154 ("[T]here is nothing wrong with a judge sharing true and publicly available information about proceedings via social media, so long as the judge otherwise adheres to judicial canons and refrains . . . from making any comment that might call into question the judge's impartiality.").

103. In my time on social-media platforms as a judge, I can only recall a handful of instances in which I received an *ex parte* communication from a party in a case before me. And in each case, I immediately reported the unsolicited communication to our Clerk of Court, who then advised the parties of it.

104. Federalist Society Panel, *supra* note 50, at 74.

presumably they don't have personal biases that would interfere with the impartial administration of justice.¹⁰⁵

And in all fairness, I think that is certainly how many in the older generations (i.e., the Silent Generation, the Boomers, and even a significant percentage of Gen Xers) feel about how judges should behave, but my sense—from having actively participated on many social-media platforms for over 15 years now—is that the younger generations (i.e., the Millennials, Gen Z, and the upcoming Gen Alphas) do not feel this way at all. There is an increasing demand from the public for its elected and appointed public servants to be more accessible, transparent, and humble. I believe they are right to demand all these things.

Again, this type of objection is really fear-based. The concern is that judges may eventually say something on social media that is wildly inappropriate and end up embarrassing themselves, as well as the courts on which they serve.¹⁰⁶ To be sure, judges should do everything in their power to promote an impartial and independent judiciary. So, any unseemly or controversial remark by a judge who undermines that value is extremely damaging to the public's perception of and confidence in the judiciary. But there is also a serious risk of reputational and institutional harm when judges remain almost entirely isolated from the people they serve. And there is something a little disquieting and strange about premising an objection on the presumed inability of judges to behave in a professional and restrained manner on social-media platforms. If there are indeed genuine concerns about certain judges using social media, then maybe we need to consider replacing them with better judges. In the end, "[t]ransparency reveals

105. Lat, *supra* note 7.

106. See Bernard & Fisher, *supra* note 46 ("Wearing a robe is an honor but also entails certain responsibilities to the judiciary as an institution. Judges' personal use of social media can cause problems by creating an appearance of bias or impropriety, and erode public trust and confidence in the judicial system.").

what it reveals,”¹⁰⁷ and it won’t always be a pretty sight—even if it is ultimately illuminating.

That said, there are obviously certain inflammatory topics that judges should avoid.¹⁰⁸ But discussing issues and concerns that do not call into question a judge’s impartiality or independence can actually *increase* the public’s trust and confidence in the judiciary.¹⁰⁹ Social media is simply another—and far more effective—way for judges to engage and communicate with the people they serve; and if the substance of a judge’s commentary on social media is positive, uplifting, or informative, then it is hard to see why these platforms should be avoided.¹¹⁰ The stark reality is that social-media platforms are the primary means of communication for most citizens; and judges ignoring this reality would be a serious and costly mistake.¹¹¹ It is imperative for judges to make every effort to be transparent and accessible to the public; and social-media platforms enable and empower us to do that in a transformative and meaningful way.¹¹²

Finally, many judges are rightly concerned that actively participating on social-media platforms creates

107. See Dillard, *supra* note 25, at 12.

108. See Thornburg, *supra* note 42, at 269 (“While there are few [judicial] rules [of ethics] that specifically address social media use, the rules governing judicial speech apply to digital media just as they would to a speech to the local chamber of commerce.”).

109. See Browning, *supra* note 17, at 153–54.

110. *Id.* (detailing a case study of a Special Court of Review’s order recognizing that “communications and interaction via social media are no different . . . than more traditional forms of communication” (quoting *In re Slaughter*, 480 S.W.3d 842, 849 (Tex. Spec. Ct. Rev. 2015))).

111. *Id.* at 133 (“Punishing judges for reaching out to and connecting on social media with the community they serve is not the answer . . .”).

112. See *id.* at 154; see also Joe Forward, *Derek Mosley: Connecting Cultures and Community*, WIS. LAW., Apr. 2023, at 10, 10 (noting that, as a municipal judge in Milwaukee County, Judge Derek Mosley often used social media to offer his almost 5,000 followers on Instagram and nearly 15,000 followers on Facebook “tips on how to stay safe and how to stay out of trouble”—such as mentioning that New Year’s Eve is “one of the worst nights for drunk driving” and urging followers to use ride-share apps and programs rather than drive while impaired).

unique security risks.¹¹³ To be sure, social media has often been “weaponized to allow extremists to identify where judges live, where their children go to school, and what cars they drive, and to share these specifics on social media while encouraging toxic online communications to threaten judges and commit acts of violence.”¹¹⁴ Unfortunately, much of this same information can be obtained about a judge even when he or she has no active presence on any social-media platform.¹¹⁵ Even so, there are several common-sense measures a judge can take while using social-media platforms that will (hopefully) help minimize your security risks as a public official:

- If you want to post about a specific event at a specific location on social media, consider doing so after the event is over. (This is often called a “Latergram” on the social-media platform Instagram).¹¹⁶
- Make sure you thoroughly understand the privacy settings for any social-media platform on which you participate.¹¹⁷

113. See Herbert B. Dixon Jr. & James L. Anderson, *The Evolving Nature of Security Threats to Judges*, JUDGES’ J., Summer 2023, at 8, 10 (noting that “[a]ttacks [on judges] increased calls in recent years for measures to protect judges’ personal information, which can often be easily accessed through the internet”).

114. Timothy S. Tomasik, *Judicial Security: The Judicial System Is Blinking Red*, CBA REC., Sep./Oct. 2022, at 6, 7.

115. See, e.g., David McKeague, *Modernizing Security Measures to Protect Federal Judges and Their Families*, JUDICATURE, Fall/Winter 2020–21, at 3, 3 (noting that “judges and law enforcement authorities do not have a sufficient warning system for threats that arise through the internet,” and “[t]he prevalence of personally identifiable information on the internet that can be used to distinguish or trace an individual’s identity . . . includes home addresses, phone numbers, and even information about immediate family members”).

116. Herbert B. Dixon, Jr., *Tech and No-Tech Security Considerations for Judges*, JUDGES’ J., Summer 2021, at 36, 37 (noting that “[o]n social media and other online interfaces, judges should opt out of providing personal information to the public and avoid making advance announcements of planned trips and events to be attended,” and that “[e]ven comments on social media about trips or vacations in progress should be avoided as this advises the public that you are not at home”).

117. See Bernard & Fisher, *supra* note 46 (noting that “[j]udges using social media should acquaint themselves with the security and privacy policies, rules,

- Be sure to “[u]se caution when posting to social media, particularly when it comes to personally identifiable information,” because “once information has been posted to a social networking site, that information can no longer be considered private.”¹¹⁸
- Report any remotely threatening message or post on social media to the appropriate law enforcement agency, and often do searches for your name on social-media platforms to determine whether there are any possible or emerging threats.

It should go without saying that this isn’t nearly an exhaustive list of the security measures a judge can or should take when using social media; and all judges should be in constant communication and consultation with the law-enforcement officers charged with their safety and protection. In the end, each judge must assess their own security risks and situation and determine how much information they are willing to (or deem prudent to) share on social-media platforms.

IV. GETTING STARTED ON SOCIAL-MEDIA PLATFORMS AND AVOIDING COMMON MISTAKES

The preceding Parts of this article have identified the benefits and costs of judges using social-media platforms as a form of public outreach, and (hopefully) have made the case that the benefits far outweigh those costs. Still, to help mitigate the downsides often associated with judges using social media, Parts IV and V of this article will be more prescriptive in nature and make suggestions for judges who are interested in

and settings, periodically review them, and exercise caution”); Kurita, *supra* note 54 (noting that judges “should monitor all activity on his or her account and frequently review the social media privacy settings”).

118. NAT’L CTR. FOR STATE CTS, PERSONAL SAFETY TIPS FOR JUDGES AND COURT STAFF 6 (Oct. 2023), <https://www.ncsc.org/sites/default/files/media/document/personal-safety-tips-judges-court-staff-2023.pdf> [<https://perma.cc/PG4H-KUDM>].

engaging and educating the people they serve on social-media platforms.

So, how do you go about deciding what type of content to post on social-media platforms and how do you engage with the public online? What are some helpful rules of the virtual road for interacting with those you serve? What are the most common (and costly) mistakes you are likely to make on social media? And with so many social-media platforms, which ones should you choose to use to meaningfully and effectively connect with your fellow citizens? These are all legitimate and fair questions asked by judges who are interested in—but understandably cautious about—joining these ubiquitous, ever-evolving online communities.

Now, when I first became a judge, I did not give a great deal of thought about the best way to use social-media platforms beyond simply informing the public about my speaking engagements, court-related activities, and campaign events.¹¹⁹ I was worried about being misconstrued, misunderstood, and upholding the dignity and integrity of my office. As a result, my approach to social media continues to evolve as my experience on these platforms grows. That said, I have developed some guidelines for my online engagement with the public, which I hope my judicial colleagues will find useful and instructive.

But before detailing the substance of what judges should or should not post on social media, let's briefly discuss choosing the right platforms to use. Your instinct will be, understandably, to choose the most popular social-media mediums; and in many cases, that will almost certainly be the right call. In my view, Facebook is probably the best (and safest) place for a novice to begin establishing a social-media presence. Most judges already have a personal Facebook account, and so they have at least some familiarity and comfort with that

119. See, e.g., Judge Stephen Dillard (@JudgeDillard), X (Apr. 15, 2011, at 20:56 ET), <https://twitter.com/JudgeDillard/status/59057475231563776> [<https://perma.cc/9Q3P-3VRY>] (“[I am] looking forward to speaking to the West Metro GTLA on April 28th.”).

platform. You also have (or will likely have) a built-in audience on Facebook that primarily consists of family members, friends, and friendly acquaintances. And while you can certainly use your personal account for “soft” outreach as a judge (i.e., a more personalized approach to educating your mostly in-real-life friends about what you do as a judge), you should probably consider setting up a separate, official governmental page, which can then be used exclusively for judicial outreach. You may even want to establish an account solely dedicated to your campaign. Importantly, although I have often mentioned work or campaign-related events on my personal Facebook page, I *never* mention campaign-related matters on my official, governmental Facebook page. I strongly suggest you don’t either.

Another relatively safe social-media platform for judges is LinkedIn. My guess is that many of you already have LinkedIn accounts; so, like Facebook, you should already have some familiarity with this platform and how it works. Unlike Facebook, most judges often use LinkedIn to post about work or career-related matters. And while LinkedIn appears to be moving toward an environment where users share more personal information (I’ve even done this in the past few years), it is still, in my view, the most “formal” of the social-media platforms. And unlike other mediums, my experience has been that LinkedIn typically has *fewer* hostile commentators and trolls.

So, if you’re looking to dip your toe into the choppy waters of social media, Facebook (3 billion monthly users)¹²⁰ and LinkedIn (1 billion monthly users)¹²¹ are probably the best platforms to begin your online public outreach journey. After that, I would recommend establishing accounts on other social-media platforms to get a feel for those online communities. There are numerous mediums to choose from, but my

120. *Facebook*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Facebook> [<https://perma.cc/PFF9-35C5>] (last visited July 28, 2025).

121. *LinkedIn*, WIKIPEDIA, <https://en.wikipedia.org/wiki/LinkedIn> [<https://perma.cc/5UAH-VSPK>] (last visited July 28, 2025).

recommendation would be to open accounts on X/Twitter (between 318 and 600 million monthly users), Bluesky (24 million users), Instagram (over 2 *billion* monthly users), and Threads (275 million monthly users).¹²² You can establish accounts using your name and title (e.g., @JudgeDoe), just your name (e.g., @JohnDoe), or you can start with a “lurker” account (e.g., @JD12345) until you are comfortable being public and active on any of these platforms. But in my experience,¹²³ these mediums can be a bit trickier to navigate than Facebook and LinkedIn, especially in the politically charged times we are living through.

Currently, X/Twitter is arguably the most controversial of the social-media platforms I recommend that judges use. I won’t rehash that controversy here,¹²⁴ but you should be aware it exists and that at least some of the people you serve are outwardly hostile toward this platform and its owner. That may be enough for many of you to choose not to establish a public account on X/Twitter, but I would, at the very least, recommend setting up a lurker account just to have some familiarity with how this widely used medium works. I opened my @JudgeDillard Twitter account the day Governor Sonny Perdue announced my appointment to the Court of Appeals of the State of Georgia, so I have been using this platform for over fifteen years. And as I previously

122. See CJ Haddad, *Why X’s New Terms of Service are Driving Some Users to Leave Elon Musk’s Platform*, CNBC (Nov. 22, 2024, at 11:00 ET), <https://www.cnbc.com/2024/11/22/why-x-new-terms-of-service-driving-some-users-to-leave-elon-musk-platform.html> [<https://perma.cc/83XN-SVMS>]; Robin Geuens, *How Many Users Does Instagram have?*, SOAX (Feb. 5, 2025), <https://soax.com/research/how-many-users-does-instagram-have#:~:text=Research%20highlights%3A%20Instagram%20has%20an,most%20popular%20social%20media%20platform> [<https://perma.cc/22K2-56CZ>]; Zoppo, *supra* note 82 (noting that Bluesky had more than 24 million users as of December 2024).

123. I don’t mean to suggest that Facebook and LinkedIn are completely free of turmoil, or that you won’t ever receive a nasty comment on your pages on these platforms. That said, my experience has been that the vast majority of the drama on these platforms tends to take place in the comment sections of public posts by media or corporate entities.

124. See, e.g., *Twitter Under Elon Musk*, WIKIPEDIA, https://en.wikipedia.org/wiki/Twitter_under_Elon_Musk [<https://perma.cc/XEY3-AXN9>] (last visited July 28, 2025).

mentioned, in that time, I've amassed a significant following of over 38,000 accounts. This is by far my largest following on any social-media platform, so I am hesitant to just pack up and leave. Indeed, even with the ongoing controversy surrounding this medium, many of the people I serve continue to actively use X/Twitter; and again, my goal is to reach as many of my fellow Georgians as possible. So, I don't plan to leave X/Twitter anytime soon.

I am also actively posting now on BlueSky (@judgedillard.bsky.social), which is a relatively new platform that saw its user numbers skyrocket in the wake of the 2024 presidential election.¹²⁵ And as I mentioned in an interview, I like Bluesky “just from a design and functionality standpoint.”¹²⁶ It's easy to use, intuitive, and “I have seen a lot less spam [on this platform].”¹²⁷ I have also seen a rather large contingent of the former #AppellateTwitter community migrate over to Bluesky (now known as #AppellateSky),¹²⁸ and I want to stay in touch with those friends who have chosen to leave X/Twitter altogether. That said, the ongoing criticism of Bluesky is that it is overwhelmingly populated with progressive and left-leaning accounts and lacks diverse viewpoints—i.e., that it's an echo chamber.¹²⁹ But again, any controversy or criticism surrounding Bluesky is beyond the scope of this article. My point is simply to apprise you of the general (or perceived) nature of Bluesky, so that you have some idea of what you are getting into if you choose to set up an account on this medium.

125. See Bobby Allyn, *Traffic on Bluesky, an X competitor, is up 500% since the election. How will it handle the surge?*, NPR TECH. (Nov. 19, 2024, at 17:15 ET), <https://www.npr.org/2024/11/19/g-s1-34898/bluesky-traffic-surge-after-election> [<https://perma.cc/S3PG-93DV>].

126. See Zoppo, *supra* note 82.

127. *Id.*

128. *Id.*

129. See, e.g., Daniel W. Drenzer, *Is Bluesky an Echo Chamber?*, DREZNER'S WORLD (Sep. 25, 2024), <https://danieldrenzer.substack.com/p/is-bluesky-an-echo-chamber> [<https://perma.cc/3U64-FV5H>] (noting that “compared to Twitter That Was, Bluesky is more politically homogenous and more progressive”).

Next, I want to briefly discuss the Instagram and Threads platforms together because they are inextricably intertwined. Instagram has been around since 2010,¹³⁰ and for many of those years, I viewed it as a younger person's platform (along with YouTube, TikTok, and Snapchat).¹³¹ And like many other social-media platforms geared for use by a younger audience, Instagram is generally a "photo and short-form video sharing social networking service" used to post images and videos publicly or privately.¹³² As a result, I have used this platform considerably less than the more substantive platforms. Even so, I do think Instagram is a safe social-media platform for judges to use as a means of public outreach (with an emphasis on imagery, rather than substance); and with an exponential audience, I think it would be a mistake not to create an account on this medium. As for Threads, this micro-blogging platform (as it currently exists) was launched by Instagram in 2023¹³³ to allow Instagram users to "share text updates and participate in public discussions"¹³⁴ like they are able to do on X/Twitter and Bluesky; and it is directly linked to your Instagram account, so the two platforms work together in a fairly seamless fashion. To date, Threads and Bluesky appear to be the most likely platforms to compete with X/Twitter. Although, interestingly, my experience has been that I receive far greater engagement from Bluesky than Threads (and sometimes even more than X/Twitter).

130. See Raisa Bruner, *A Brief History of Instagram's Fateful First Day*, TIME (July 16, 2016, at 06:44 ET), <https://time.com/4408374/instagram-anniversary/> [<https://perma.cc/G3YC-9B42>].

131. See Monica Anderson, Michelle Faverio, & Jeffrey Gottfried, *Teens, Social Media and Technology*, PEW RSCH. CTR. (Dec. 11, 2023), <https://www.pewresearch.org/internet/2023/12/11/teens-social-media-and-technology-2023/> [<https://perma.cc/G3PK-587E>] (noting that YouTube, TikTok, Snapchat, and Instagram "remain the most widely used online platforms among U.S. teens").

132. *Instagram*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Instagram> [<https://perma.cc/9Q2X-5WGH>] (last visited July 28, 2025).

133. *Threads (social network)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Threads_\(social_network\)](https://en.wikipedia.org/wiki/Threads_(social_network)) [<https://perma.cc/KR7J-6RNP>] (last visited July 28, 2025).

134. *Threads*, INSTAGRAM, <https://about.instagram.com/threads> [<https://perma.cc/Y8VB-TG78>] (last visited July 28, 2025).

There are, as previously mentioned, other social-media platforms available for use by judges to engage the people they serve; but, in my experience, those mediums—e.g., Snapchat and YouTube—are not as conducive or successful to my style of judicial outreach.¹³⁵ This doesn't mean those platforms won't necessarily work for you though, and I would still encourage you to consider establishing accounts on them (or using one of your family member's accounts), so that you will have some understanding of how these wildly popular mediums function. It is also important to stay informed about new or emergent social-media platforms and determine whether you should add one of them as part of your social-media outreach portfolio. I am doing exactly that with the medium Substack, which seems to be picking up steam with those who wish to convey their thoughts and musings in more of a long-form format.¹³⁶

Once you have chosen your preferred social-media platforms, you will then need to decide how active you wish to be. But the first thing you need to understand is that your remarks on social media should be as intentional and restrained as those you make during in-person appearances. The canons of judicial conduct apply to judges engaging the public on social-media platforms

135. I also established accounts on Mastodon and Clubhouse, but neither platform seemed to catch on or work well with my style of outreach. I had a TikTok account for a relatively brief period, but I deleted it due to security concerns with the platform. See, e.g., David Vergun, *Leaders Say TikTok is Potential Cybersecurity Risk to U.S.*, DEPT. OF DEF. NEWS (Aug. 6, 2023), <https://www.defense.gov/News/News-Stories/Article/article/3354874/leaders-say-tiktok-is-potential-cybersecurity-risk-to-us/> [<https://perma.cc/6YZ3-4AQG>] (“The problem with TikTok is that a large number of Americans use it, and China may have the ability to direct misinformation through it, as well as collect data from it The scale and scope of the platform is problematic.”).

136. See *Substack*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Substack> [<https://perma.cc/2KAL-E6JZ>] (last visited July 28, 2025) (describing this social-media platform as “an American online platform that provides publishing, payment, analytics, and design infrastructure to support subscription-based content, including newsletters” and “allows writers to send digital content directly to subscribers”); see also *Judge Dillard’s Substack*, <https://judgestephen-dillard.substack.com/> [<https://perma.cc/LP24-39TZ>] (last visited July 28, 2025).

just as they do in the “real world.”¹³⁷ As a result, this makes many of my content decisions on social media relatively straightforward.¹³⁸ For example, I never

137. See ABA Comm. on Pro. Ethics & Grievances, *supra* note 42, at 1–2 (noting that, subject to the judicial canons, judges may participate on social-media platforms and that the existence of a social media connection does not necessarily mean a judge is inappropriately biased); Torikoglu, *supra* note 62 (noting that “[t]he first area of criticism concerns judges and their level of sophistication when it comes to understanding social media features” and that “[j]udges are not subjected to any per se law preventing them from having social media accounts, with the understanding that their activity does not violate the canons of judicial conduct”); Thornburg, *supra* note 42, at 269; Artigliere et al., *supra* note 64, at 22 (noting that “[j]udges need guidance and information on how they may ethically connect with others via social media,” and that “[t]hose who decide to use social media must learn and remain current as to conduct that complies with the judicial canons, as well as social media relationships that may lead to recusal or disqualification from cases”).

138. See ABA Comm. on Pro. Ethics & Grievances, *supra* note 42 (“A judge may participate in electronic social networking, but as with all social relationships and contacts, a judge must comply with relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge’s independence, integrity, or impartiality, or create an appearance of impropriety.”).

In October 2018, the Supreme Court of California added this instructive commentary to Canon 2A of its state code of judicial ethics:

A judge must exercise caution when engaging in any type of electronic communication, including communication by text or email, or when participating in online social networking sites or otherwise posting material on the Internet, given the accessibility, widespread transmission, and permanence of electronic communications and material posted on the Internet. The same canons that govern a judge’s ability to socialize in person, on paper, or over the telephone apply to electronic communications, including use of the Internet and social networking sites. Those canons include, but are not limited to Canons 2B(2) (lending the prestige of judicial office), 3B(7) (ex parte communications), 3B(9) (public comment about pending or impending proceedings), 3E(2) (disclosure of information relevant to disqualification), and 4A (conducting extrajudicial activities to avoid casting doubt on the judge’s capacity to act impartially, demeaning the judicial office, or frequent disqualification).

CAL. CODE OF JUD. ETHICS Canon 2A cmt. (CAL. JUDGES ASS’N amended 2018).

And in July 2022, the Supreme Court of Illinois formally adopted a new Code of Judicial Conduct, including in its preamble and scope “a warning related to potential misconduct in misusing social media,” which provides that the Code applies when:

a judge uses the internet, including social networking sites, to post comments or other materials such as links to websites, articles, or comments authored by others, photographs, cartoons, jokes, or any other words or images that convey information or opinion. Violations may occur even if a judge’s distribution of a communication is restricted

discuss any internal deliberations that go on with my Court, pending cases, or issues I may possibly be called upon to consider in the future.¹³⁹ Just as in any real-life setting, judges should exercise good judgment and faithfully abide by the judicial canons.¹⁴⁰ Relatedly, judges should not discuss cases they have already decided or any internal deliberations related to those specific controversies.¹⁴¹ Judges should also refrain from criticizing “political figures, lawyers, or litigants,” providing “legal advice,” posting anything “relating to [non-campaign-related] fundraising,” or making any statement that can be viewed as discriminatory, showing a “strong bias or possible influence,” or displaying “inappropriate humor.”¹⁴² In Georgia, the only type of

to family and friends and is not accessible to the public. Judges must carefully monitor their social media accounts to ensure that no communication can be reasonably interpreted as suggesting a bias or prejudice; an *ex parte* communication; the misuse of judicial power or prestige; a violation of restrictions on charitable, financial, or political activities; a comment on a pending or impending case; a basis for disqualification; or an absence of judicial independence, impartiality, integrity, or competence.

Jasmine V. Hernandez & Trisha M. Rich, *Illinois Supreme Court Ushers in Substantial Change with Enactment of New Code of Judicial Conduct*, CBA REC., Nov./Dec. 2022, at 18, 18.

139. See Thornburg, *supra* note 42, at 269–73; Browning & Willett, *supra* note 67, at 102 (noting that “judges shouldn’t discuss pending cases—period”); see also *United States v. Sierra Pac. Indus., Inc.*, 862 F.3d 1157, 1175–76 (9th Cir. 2017) (noting that “this case is a cautionary tale about the possible pitfalls of judges engaging in social media activity relating to pending cases, and we reiterate the importance of maintaining the appearance of propriety both on and off the bench”).

140. See *supra* notes 135–36 and accompanying text; see also GEORGIA CODE OF JUD. CONDUCT r. 2.10 (A) (amended 2016) (last visited July 28, 2025) (“Judges shall not make, on any *pending proceeding* or *impending matter* in any court, any *public comment* that might reasonably be expected to affect its outcome or impair its fairness or make any non-public *comment* that might substantially interfere with a fair trial or hearing.” (emphasis added)).

141. See Thornburg, *supra* note 42, at 271–72. In addition to not responding to commentary about my cases, I also strongly recommend that my judicial colleagues not highlight articles or other online commentary about those cases. *Id.* at 272–73 (“It is safer, perhaps, for one judge to defend another than for the judge under attack to exercise digital self-defense.”). I believe a judge’s opinions should speak for themselves.

142. Reyes Jr., *supra* note 16, at 24; see also Carolyn A. Dubay, *Public Confidence in the Courts in the Internet Age: The Ethical Landscape for Judges in the Post-Watergate Era*, 40 CAMPBELL L. REV. 531, 552–53 (2018) (noting that

fundraising a judge can mention or participate in on social media is for his or her own campaign.¹⁴³ I've done this occasionally, but I try to limit it as much as possible. My concern is that if a judge is frequently using social media for campaign purposes, this undermines the use of those platforms for civic engagement. It's far better, in my view, to have separate and explicit campaign social-media accounts.

Here is just a sampling of serious judicial missteps on social media over the past few years:

- A Philadelphia Court of Common Pleas judge was suspended for the remainder of his term on the bench due to his overtly political posts¹⁴⁴—e.g., bragging that he consistently received an “F” rating” from the National Rifle Association during his time as a legislator; criticizing a Republican congressman for opposing a piece of federal legislation, while simultaneously praising President Biden for supporting it; regularly praising Democratic politicians; engaging in commentary expressing support for raising the minimum wage.¹⁴⁵
- A New Jersey superior court judge was suspended for three months for “TikTok

“judicial disciplinary agencies and judicial ethics advisory committees have increasingly been confronted with potential threats to public confidence in the courts arising from the social media conduct of judges,” and that “[t]he range of misconduct occurring on social media includes ex parte communications with parties or witnesses, inappropriate sexual conduct, racially charged statements, inappropriate campaign or political conduct, or various other kinds of improper or undignified behavior”).

143. See, e.g., GEORGIA CODE OF JUD. CONDUCT r. 4.2 (B) (amended 2016) (noting that “[j]udicial candidates may *personally solicit campaign contributions and publicly stated support*”).

144. See Aleeza Furman, *Disciplinary Court Suspends Phila. Judge for Political Facebook Posts*, THE LEGAL INTELLIGENCER (Oct. 7, 2024, at 14:59 ET), <https://www.law.com/thelegalintelligencer/2024/10/07/disciplinary-court-suspe-nds-phil-a-judge-for-political-facebook-posts/?slreturn=20241230163649> [https://perma.cc/7LA6-Z245].

145. See *Judge Mark B. Cohen*, No. 1 JD 23, 2024 Pa. Jud. Disc. LEXIS 5, at 5, 8, 10–12, 18–19 (Pa. Ct. of Judicial Discipline 2024), [https://www.pa.courts.us/Storage/media/pdfs/20240503/141842-opinion\(may3,2024\).pdf](https://www.pa.courts.us/Storage/media/pdfs/20240503/141842-opinion(may3,2024).pdf) [https://perma.cc/7SWG-DT6K].

videos in which he lip-synced songs with ‘references to violence, sex, and misogyny.’”¹⁴⁶

- A municipal judge from Utah was suspended by the Supreme Court of Utah for, among other things, posting numerous critical remarks about President Trump, including one explaining that he planned to adopt a cat “before the President-elect grabs them all.”¹⁴⁷
- A Massachusetts housing court judge was publicly reprimanded by the state’s supreme judicial court for, among other things, posting or sharing numerous conservative-leaning political articles, opinion pieces, and memes, including some casting doubt on the legitimacy of the 2020 presidential election.¹⁴⁸
- A California superior court judge was publicly censured and disbarred for using Facebook to post “anti-Islam, anti-illegal immigrant, anti-Native American, anti-gay marriage and transgender, anti-liberal, and anti-Democrat” sentiments.¹⁴⁹
- A South Carolina probate judge was suspended for eighteen months for, among

146. Sean O’Driscoll, *US Judges Have a Social Media Problem*, NEWSWEEK (Oct. 20, 2024, at 03:00 ET), <https://www.newsweek.com/judges-posting-social-media-ethics-complaints-judicial-robos-new-jersey-philadelphia-1970494> [https://perma.cc/A6EW-L9PF].

147. See Dennis Romboy, *Utah Judge Who Criticized Donald Trump Online and In Court Suspended*, DESERETNEWS (May 24, 2019, at 16:19 ET), <https://www.deseret.com/2019/5/24/20674107/utah-judge-who-criticized-donald-trump-online-and-in-court-suspended/> [https://perma.cc/82QZ-3X4F]; see also *In Re Kwan*, 443 P.3d 1228, 1229, 1232 (Utah 2019).

148. Luis Fieldman, *Mass. Judge Joseph Michaud ‘publicly reprimanded’ for Facebook Posts, Memes*, MASS LIVE (Feb. 14, 2023, at 08:34 ET), <https://www.masslive.com/politics/2023/02/mass-judge-joseph-michaud-publicly-reprimanded-for-facebook-posts-memes.html> [https://perma.cc/QB5F-R5YR].

149. Bernard & Fisher, *supra* note 46, at 43; see also *Former Commissioner Joseph J. Gianquinto* (Cal. Comm’n Jud. Performance 2018), https://cjp.ca.gov/wp-content/uploads/sites/40/2018/08/Gianquinto_DO_Censure_8-22-18.pdf [https://perma.cc/J3XM-5B96].

other things, using Facebook to solicit hurricane-relief donations.¹⁵⁰

If judges do any of these things on social-media platforms in violation of the judicial canons, it will certainly result in the public questioning their neutrality, as well as their fitness to serve in a judicial capacity, and result in a loss of faith in the judiciary. To put it plainly, any such incident will call into question “the three core values in judicial ethics—impartiality, independence, and integrity.”¹⁵¹ It should go without saying, then, that judges actively using social media should do everything in their power to avoid embarrassing themselves or their courts.

Judges should also not engage in or even come close to participating in—directly or indirectly—partisan politics. To be sure, some states effectively force their judges to seek election by affiliating with a political party (not Georgia, thankfully); but a judge should still do everything to avoid being viewed as nakedly partisan by the public.¹⁵² This can undoubtedly be challenging at times.¹⁵³ Even in states like Georgia (which holds nonpartisan judicial elections), judges still need to campaign, fundraise, engage in extensive networking, and seek to connect with voters of every political stripe.

150. Debra Cassens Weiss, *Judge is Suspended Once Again for Social Media Posts—This Time for Soliciting Hurricane Donations*, ABA J. (Oct. 20, 2021, at 10:05 ET), <https://www.abajournal.com/news/article/once-again-judge-is-suspended-for-social-media-posts-this-time-for-soliciting-hurricane-donations> [<https://perma.cc/KCW3-MYKX>]; see also *In re Johns*, No. 2021-000994 (S.C. 2021), <https://www.sccourts.org/opinions/HTMLfiles/SC/28064.pdf> [<https://perma.cc/L369-N6FX>].

151. Dubay, *supra* note 143, at 553; see also Thornburg, *supra* note 42, at 287–88.

152. See John G. Browning, *It's 3 A.M.: Do You Know What Your Staff Just Posted? Social Media Ethics Pitfalls for Appellate Lawyers and Judges*, 22 J. APP. PRAC. & PROCESS 49, 76 (2022) (noting that “whether one attributes it to a more casual regard for social media or a misplaced sense of anonymity online, judges posting about politically or socially controversial matters on social media platforms is a growing problem”).

153. Browning, *supra* note 17, at 135 (observing that courts have warned that certain conduct, especially on social media, “can easily be misconstrued and create an appearance of impropriety,” especially in the context of judicial election campaigns (quoting *State v. Thomas*, 376 P.3d 184, 198 (N.M. 2016))).

But in the end, election strategies must give way to a judge's oath of office. Judges should not do anything during the course of a campaign (or at any other time) that would cause those who come before them to lose confidence in their ability to treat parties fairly.¹⁵⁴ It is imperative for judges to convey to the public that we are not duty-bound to any political organization or special-interest group—that our only duty is to uphold the rule of law without fear or favor.¹⁵⁵ So, how can judges best convey this crucial message to the people we serve?

To begin with, I never make public statements on political issues or criticize other public officials. Judges should scrupulously avoid anything resembling partisan political activity. Needless to say, a judge offering an opinion on divisive issues like tort reform, gun rights or control, abortion, immigration issues, the death penalty, or any other hotly debated political topic is squarely at odds with any version of the code of judicial conduct.¹⁵⁶ I also decline to comment on controversial legal matters like Supreme Court reform (e.g., “court packing”), confirmation hearings for federal judges or Supreme Court Justices, whether a particular opinion from the Supreme Court of the United States was rightly decided, or any other controversy involving another judge, justice,

154. See *The State of State Courts: A 2018 NCSC Public Opinion Survey*, NAT'L CTR. FOR STATE CTS., <https://web.archive.org/web/20241110143922/https://www.ncsc.org/consulting-and-research/areas-of-expertise/court-leadership/state-of-the-state-courts/2018-state-of-state-courts-survey> [https://perma.cc/8NM4-MSAH] (stating in a summary of its polling that “[c]onfidence in the state court system has reached a new high since the start of the State of the State Courts series [began in 2012]”) (last visited Dec. 17, 2025); see also NAT'L CTR. FOR ST. CTS., *supra* note 35, at 6 (noting that the number of respondents who said the words “fair and impartial” describe state courts well or very well increased seven percentage points from 2017 to 2018).

155. See Justin C. Van Orsdol, *Reining in Recusals*, 2023 WIS. L. REV. 1821, 1838–39 (2023) (noting that, as a result of the “rise of social media and public appearances” by judges, “we may soon see increases in recusal motions for public comments and ideological stances made by judges in editorials, social media, conventions, and law review articles”); Browning, *Ethical Risks in Judicial Use of Social Media*, *supra* note 96, at 55 (noting that a district court judge was almost forced to recuse from a case due to his activity on social media).

156. See Thornburg, *supra* note 42, at 290.

or court. Judges should resolve controversies, not create them.

That said, there is nothing wrong with a judge speaking out on nonpartisan issues of great importance to the legal profession. But judges still need to be extremely cautious in how they express their views on *any* topic, even when it is an important issue about the administration of justice.¹⁵⁷ Again, judges are rightly expected to exercise good judgment; and the words we use to express our opinions matter greatly. It will come as no surprise, then, that my advice to judges is to “pick your battles.” If you are going to speak out on an important issue involving the courts or the effective administration of justice (especially one that is perceived by many in the legal community to be somewhat controversial), you had better be sure that you are precise with your words and prepared to be publicly criticized for taking a stand on that issue. I have done just that with my repeated (but respectful) requests that the Supreme Court of the United States reconsider its decision not to livestream (with both video and audio) their oral arguments. In sum, I firmly believe justices and judges are directly accountable to the public (regardless of whether they are subject to elections or enjoy life tenure), and that the people are entitled to witness their Supreme Court Justices serving them in cases involving some of the most important issues faced by our country.¹⁵⁸

157. Browning, *supra* note 17.

158. I feel this way about the federal district and circuit courts as well; and in fact, my dear friend, former Supreme Court of Michigan Justice Bridget McCormack, submitted eloquent and compelling written testimony to the U.S. House of Representatives in support of such a change in policy. *See* Letter from Hon. Bridget M. McCormack, C.J., Mich. Sup. Ct., to U.S. House Comm. on the Judiciary (Sep. 24, 2019), <https://docs.house.gov/meetings/JU/JU03/20190926/110028/HHRG-116-JU03-20190926-SD002.pdf> [<https://perma.cc/BE5S-NXDY>].



Judge Stephen Dillard ✓
@JudgeDillard

This is fantastic news.

That said, my hope is that SCOTUS will eventually livestream its oral arguments—just like so many other federal and state courts across the nation.

The courts belong to the people.



Bloomberg Law 📺 @BLaw · 12/12/24

The public will soon be able to apply online to attend a Supreme Court argument live in person.

blawgo.com/OPI3pRT

But before I first made this public pronouncement,¹⁵⁹ I spent a long time thinking about whether it was appropriate or advisable for a state intermediate appellate judge to publicly opine on how another court—especially the highest court in our nation—operates. Ultimately, I used my high-profile social-media presence to respectfully and gently encourage the Supreme Court to revisit its policy because I strongly believe the civic benefits—e.g., transparency, accessibility, and education—achieved from airing such proceedings are far too important not to emphasize. Other judges might choose to sit this issue out (and that is fine); but I am confident that my commentary on this important civic issue was

159. See Judge Stephen Dillard (@JudgeDillard), X (Nov. 5, 2017, at 10:24 ET), <https://x.com/judgedillard/status/927179836040327168?s=46> [<https://perma.cc/P3KD-4DKB>]; see also Jonathan Evans, *U.S. Supreme Court's 'Next Big Thing': The Telephone*, VOICE OF AM. (Apr. 25, 2020), <https://learningenglish.voanews.com/a/us-supreme-court-s-next-big-thing-the-telephone/5386716.html> [<https://perma.cc/QY2X-URZC>] (noting that “[Judge] Stephen Dillard serves on the Georgia Court of Appeals,” “supports openness in the courts,” and “told The Associated Press, ‘This [live audio streaming of SCOTUS oral arguments] is a great first step, and I’m excited about it, but I hope they will go further in years to come and allow live video streaming’”).

appropriate and in line with the type of speech permitted (indeed encouraged) by the judicial canons.

Second, I highly recommend adopting a consistently applied, neutral, nonpartisan policy for following or connecting with people on social-media platforms. Although I think it is foolish for anyone to believe a lawyer or party will receive preferential treatment in a case simply because they have a tenuous social-media connection with a judge,¹⁶⁰ there are preventive measures a judge can take to provide assurances to the public that these online connections are (or should be) of little concern. For example, judges can allow anyone to follow their social-media accounts and follow back or accept connection requests from any individual residing in their jurisdiction or state (I do this with any requests from someone residing in Georgia).¹⁶¹ To paraphrase a line from one of my favorite movies, if everyone is special, then no one is special.¹⁶² Judges should also apply this state or jurisdiction-specific policy to political, policy, or other nonprofit groups. Indeed, my social-media followers include accounts from both major political parties and interest groups from almost every conceivable side of any issue.¹⁶³ Again, I want to be

160. Cari Sheehan, *Social Media and 'Friending' Judges, Jurors, and Other Parties*, RES GESTAE, July/Aug. 2023, at 28, 29 ("Unfortunately, there is no bright-line rule on whether a connection is proper or improper. Each connection is viewed on a case-by-case basis depending on the underlying relationships of those involved. It is always best to err on the side of caution and, if in doubt, do not friend.").

161. If a judge has a personal Facebook or Instagram account, my recommendation is to either keep the account relatively private and limited to family members and close friends or accept all requests from people who live in the judge's area of representation. The latter is my policy. I accept friend and follow requests on all social-media platforms from any self-identifying Georgian.

162. See *The Incredibles Quotes*, IMDB, <https://www.imdb.com/title/tt0317705/quotes/> [<https://perma.cc/M8RV-HB5P>] (last visited Feb. 14, 2025) ("Helen: Right now, honey, the world just wants us to fit in, and to fit in, we gotta be like everyone else. Dash: But Dad always said our powers were nothing to be ashamed of, our powers made us special. Helen: Everyone's special, Dash. Dash: [muttering] Which is another way of saying no one is.").

163. I take this approach with national accounts too. For example, I follow (and am followed by) the Federalist Society and the American Constitution Society on X/Twitter.

accessible to as many Georgians as possible, and to let them know that I am proud and honored to serve all of them as a judge on the Court of Appeals of the State of Georgia.

Judges (understandably) worry about who to follow quite a bit.¹⁶⁴ Indeed, many of my colleagues wrongly assume that having a lawyer as a social-media friend automatically requires recusal from a case when that lawyer appears before them.¹⁶⁵ This is simply not the case. As with any friendship, it is the nature of the relationship that determines whether a judge should disclose the connection or recuse from the case. But judges should be aware of the ethics and judicial opinions on this subject in their respective states or jurisdictions. Unsurprisingly, different judicial ethics committees have given different advice about whether judges may connect on social-media platforms with attorneys who are likely to appear before them in court.¹⁶⁶ State appellate courts have also cautioned against judges using social media improperly.¹⁶⁷

164. See generally John G. Browning, *Why Can't We Be Friends? Judges' Use of Social Media*, 68 U. MIAMI L. REV. 487 (2014).

165. *Id.* at 490 (comparing social media interactions—such as adding friends on Facebook or following on Twitter—to ex parte communications).

166. See Cynthia Gray, *Social Media & Judicial Ethics: Part 1*, JUD. CONDUCT REP., Spring 2017, at 2, 12, 14, <https://ncsc.contentdm.oclc.org/digital/collection/judicial/id/456> [<https://perma.cc/K6LQ-FUF3>] (noting that “the committees in Connecticut, Florida, Massachusetts, and Oklahoma have advised that judges should not add lawyers who may appear before them as ‘friends’ on Facebook or permit those lawyers to add them as ‘friends,’” but also noting that “the judicial ethics advisory committees in California, Kentucky, Maryland, New Mexico, New York, Ohio, and Utah concluded that whether a judge may connect on social media with a lawyer who appears before her depends on an analysis of the nature and scope of the specific relationship”); see also *id.* at 17–20 (concluding that disqualification based on a social media connection between the judge and a lawyer in a case is not automatically required but that the “connection is one factor a judge should consider in deciding whether her impartiality might reasonably be questioned” and that other actions, such as disclosure of the relationship and un-friending the attorney, might be required).

167. See, e.g., *State v. Thomas*, 376 P.3d 184, 198 (N.M. 2016) (noting that “[w]hile we make no bright-line ban prohibiting judicial use of social media, we caution that ‘friending,’ online postings, and other activity can easily be misconstrued and create an appearance of impropriety”); see also *L. Offices of Herssein & Herssein, P.A. v. United Servs. Auto. Ass’n*, 271 So. 3d 889, 899 (Fla.

Third, judges need to be especially careful about what they like, favorite, or repost on social-media platforms. When you like or favorite a tweet or post, most mediums will then publicize your favorable treatment of that content to other users on those platforms.¹⁶⁸ As a result, your impartiality can be reasonably questioned simply by liking political posts, even if you are not directly making those comments.¹⁶⁹ I highly recommend regularly (if not daily) checking to make sure that you haven't mistakenly liked a controversial statement on social media, which can easily happen on almost any social-media platform.¹⁷⁰ It is also vital to keep in mind that you cannot like or repost a statement that you are prohibited from making directly as a judge. If you do, it will fairly be seen as an endorsement of that viewpoint. It should go without saying that you cannot do indirectly what you are forbidden from doing directly.¹⁷¹

2018) (disagreeing with state ethical committee's 2009 opinion that judges cannot add attorneys who practice before them as "friends" on Facebook and concluding that such a relationship, standing alone, does not warrant disqualification). *But see id.* at 899–900 (Labarga, J., concurring) (agreeing with the majority opinion, but encouraging judges to forego using Facebook at all because maintaining Facebook friendships with attorneys appearing before the judge is "quite simply, inviting problems"); *id.* at 900 (Pariante, J., dissenting) (asserting that "a judge's involvement with social media is fraught with risk that could undermine confidence in the judge's ability to be a neutral arbiter," and advocating for a strict rule that judges must always disqualify themselves from cases in which an attorney with whom the judge is Facebook friends appears before her or him).

168. Browning, *supra* note 17, at 136 ("Judges are also cautioned to regard all social media postings as public communications and not to be lulled into complacency by reliance on privacy settings.").

169. *See* Browning, *Ethical Risks in Judicial Use of Social Media*, *supra* note 96, at 55 ("It is important to note that it's not just overt activity that can spell trouble for judges. Even more benign conduct, such as clicking a 'like' or 'heart' icon in response to someone else's post or tweet, can raise doubts about a jurist's impartiality. So can sharing or retweeting a link to what someone else has posted . . .").

170. *See How to Like a Post*, X, <https://help.x.com/en/using-x/liking-posts-and-moments> [<https://perma.cc/3WJS-SG6P>] (last visited July 28, 2025).

171. Bernard & Fisher, *supra* note 46, at 44 (noting that judges "must be wary of endorsing posts by others through 'some affirmative action' which can create the impression that the judge has adopted the comments," that "[i]f something written online by someone else would be inappropriate for you to say as a judge, then it's wrong to 'like,' 'follow,' repost, or otherwise endorse it," and that

Finally, judges need to understand and assume that anything they post on a social-media platform can be or will be eventually seen by everyone; and this is true even if you only have personal or private social-media accounts. As the American Bar Association's Formal Opinion 462 aptly explains:

Judges must assume that comments posted to a [social-media platform] will not remain within the circle of the judge's connections. Comments, images, or profile information, some of which might prove embarrassing if publicly revealed, may be electronically transmitted without the judge's knowledge or permission to persons unknown to the judge or to other unintended recipients. Such dissemination has the potential to compromise or appear to compromise the independence, integrity, and impartiality of the judge, as well as to undermine public confidence in the judiciary.¹⁷²

To loosely quote a famous phrase from the *Harry Potter* novel series, a judge's creed on social-media platforms should be "constant vigilance."¹⁷³ You must always, *always* assume that people are watching you, whether it is online or in real life—because they are.

V. MAKING THE MOST OF YOUR ONLINE PRESENCE

Having discussed the things judges should avoid doing on social-media platforms, I will now cover what they can and should do with their online public engagement. In my view, it is crucial for your social-media presence to closely resemble who you are as a person. As in real life, it is a horrible idea to try to be someone you are not. Even so, there is certainly nothing wrong with using your social-media accounts to offer up

"[p]osting a heart, a 'thumbs up,' or some similar type of emoji will be deemed endorsement or adoption of the comment or statement in question.").

172. ABA Comm. on Pro. Ethics & Grievances, *supra* note 42, at 1–2.

173. J.K. ROWLING, *HARRY POTTER AND THE GOBLET OF FIRE* 217 (2000) ("You've got to appreciate what the worst is. You don't want to find yourself in a situation where you're facing it. CONSTANT VIGILANCE! . . .").

the best version of yourself to the public. For example, you can promote civility, kindness, and professionalism, even though you lose your cool from time to time. I often stress the importance of being kind and charitable to others on social media because I also need to be reminded of that timeless virtue.



Judge Stephen Dillard 
@JudgeDillard

This is a difficult time of year for many of our friends. Be kind. Love your neighbor. Live your faith. Take the time to make someone feel special.

9:06 PM · 12/16/24 · 13K Views

I also often share my interests outside the law with those who follow me on social media. Again, I think it is worthwhile for judges to reveal aspects of their personal lives with those they serve. It humanizes the judiciary and is a subtle way of reminding lawyers not to allow their work (important as it is) to consume them. As one of my colleagues, Justice John J. Ellington of the Supreme Court of Georgia, is fond of saying, “There’s life outside of a courtroom—get one.”¹⁷⁴ The people you serve are genuinely “interested in knowing what kind of person you are when you take off the robe; so share your hobbies and passions with them.”¹⁷⁵

174. Charles McNair, *A deep bench*, UNIV. OF GA. (Nov. 30, 2023), <https://www.terry.uga.edu/a-deep-bench/> [https://perma.cc/YED8-FZJP].

175. Dillard & McCormack, *supra* note 3, at 195.

 **Judge Stephen Dillard** 
@JudgeDillard

There are 66 days until the return of college football.



 **Judge Stephen Dillard** 
@JudgeDillard

Old Man Dillard!



Now, I fully recognize that some of my colleagues may find it unorthodox for judges to disclose aspects of their personal lives to the public. Indeed, I think for many judges, lawyers, and even some citizens, there is a sincere fear that judicial use of social media will ultimately undermine the public's respect for the judiciary. Again, I respectfully disagree. I believe that when judges responsibly use social media to engage the people we serve it humanizes the judiciary, makes judges far more accessible and transparent to the public, and promotes greater confidence in the judicial branch.¹⁷⁶ As one legal scholar has aptly and eloquently noted,

While separate extrajudicial speech can demonstrate that judges are members of a larger community, judges nonetheless continue to be seen as symbols and representatives of the law and justice. The potential impact of their separate speech goes beyond public perceptions of an individual judge, and has implications for the integrity of the court. When a judge is defending the integrity of the judicial institution or engaging in public outreach and education, this might strengthen the judiciary and safeguard the integrity of judicial decision-making process, rather than undermine it. As is the case in the United States, greater public awareness of a court's activities may in fact help build its institutional legitimacy. Particularly in an era of backlash against the judiciary—both domestically and internationally—external deliberation through separate judicial speech may be the last line of defense of the rule of law.¹⁷⁷

My social-media accounts all take a more personalized approach to online engagement in an effort to make the judiciary more transparent and accessible to the public, as well as (hopefully) increasing confidence in the judiciary. But not every judge can or should bear that

176. See Dillard & McCormack, *supra* note 3, at 195.

177. Cosette D. Creamer & Neha Jain, *Separate Judicial Speech*, 61 VA. J. INT'L L. 1, 53 (2020) (footnote omitted).

burden immediately. It takes time and maybe even expert help to skillfully use social media as a means of public engagement. I certainly had a slow start on social media. Indeed, my social-media presence has evolved, in part, as a result of follower feedback and suggestions. In fact, shortly after I began using social-media platforms as a means of public outreach, a law student sent me a “direct message” strongly encouraging me to tell my followers more about who I am as a person off the bench. This excellent suggestion was well received (and greatly appreciated), and I began to develop a more personal form of online engagement with the public.

To be sure, some of my tweets are fairly typical of what you’d expect to see from any elected official using social media to engage in outreach to those they serve—highlighting speaking events or CLEs, announcing official proceedings (e.g., oral arguments), general civic engagement, job openings, news profiles of the Georgia judicial system, work or campaign-related announcements, and the like. These posts can range from being fairly conventional to (hopefully) clever. It really depends on how you, as a judge, want to hold yourself out to the public—i.e., what kind of “brand” you are seeking to cultivate. In this respect, I think it helps (at least initially) to place different types of online content into buckets. And while there are more “content buckets” than those mentioned in this article, it is helpful for judges interested in engaging the public on social media to have some sense of what constitutes appropriate online commentary along with some accompanying examples. So, here are my six go-to buckets of content for social media: (A) transparency and accessibility; (B) civility and professionalism; (C) civics; (D) educational; (E) mentoring; and (F) personalization/humanization. And what follows are numerous examples of each category—with the caveat that there will naturally be some overlap between these content buckets.

A. Transparency and Accessibility

One of the most important things judges and courts can do to engender trust and confidence in the judiciary is to be as transparent and accessible as possible.¹⁷⁸ And for this reason, many of my tweets are geared toward providing the public with a peek behind the curtain of Georgia’s appellate courts. For example, I frequently post about our constitutional “distress” periods/deadlines,¹⁷⁹ livestreams to oral arguments, appointments to our Court or the Supreme Court of Georgia, job opportunities, retirement ceremonies, important committee work, and other newsworthy court-related matters and events.



Judge Stephen Dillard 
@JudgeDillard

This is a friendly reminder that both the @SupremeCourtGA and the Court of Appeals of Georgia livestream oral arguments. You can watch them at these links:

gasupreme.us/court-informat...

media.swagit.com/gaappeals/

9:43 PM · 1/2/18

178. See Elizabeth D. Walker, *Social Media for the Bench and Bar*, W. VA. LAW., Spring 2019, at 24, 26 (“Chief Judge Dillard and I agree that public servants like judges need to be connected, accessible and transparent”).

179. See generally Stephen Louis A. Dillard, *Open Chambers Revisited: Demystifying the Inner Workings and Culture of the Georgia Court of Appeals*, 68 MERCER L. REV. 1, 2–7 (2016) (explaining how Georgia’s constitutional two-term rule impacts the internal operations of the Court of Appeals and creates “distress” deadlines for the Court).



B. Civility and Professionalism

Judges must lead by example. If we fail to demonstrate professionalism and civility in our interactions on and off the bench, how can we expect lawyers or other members of the public to do so? And we

can use social-media platforms to highlight and emphasize the crucial role civility and professionalism play in our chosen vocation. For example, a judge can post about civility-related initiatives, notable examples of civility by prominent justices and judges, engaging anecdotes that highlight the importance of civility and professionalism, as well as links to writings and speeches on civility and professionalism.



Judge Stephen Dillard ✓
@JudgeDillard

Speaking of civility, here are Justice Kagan's wonderful remarks about J. Scalia at the @georgemasonlaw dedication:
m.youtube.com/watch?t=4m05s&...



Judge Stephen Dillard ✓
@JudgeDillard

Mine is when opposing counsel—in a hotly contested case—agreed to join my motion seeking to vacate and reissue an order that I had never received from the trial court so I could file a timely appeal. I'll never forget his kindness and professionalism.



Fmr. Justice Sarah Beth Landau @Ju... · 4/6/21

In honor of Day of Civility in the Law (4/16) what is your favorite story of civility or professionalism? One of mine is when opposing counsel and I were both at our first 5th Cir. argument, v. nervous. When no one filled the wa...

C. Civics

Now, more than ever before, it is essential for judges and courts to promote civics education. I find myself increasingly discussing the dire need for our country to heavily invest in civics education. And in doing so, I

regularly post about civics organizations and initiatives—like iCivics,¹⁸⁰ Civics Break (by the Bolch Judicial Institute of Duke University Law School),¹⁸¹ ConSource,¹⁸² the Center for Civic Education,¹⁸³ and the like. It is crucial for judges to carry on Justice Sandra Day O'Connor's tremendous legacy of enthusiastically supporting civics education for the next generation of Americans.



Judge Stephen Dillard ✓
@JudgeDillard

**“The late Justice Sandra Day O’Connor named
2024 Bolch Prize recipient for foundational
work in civics education”**
[judicialstudies.duke.edu/2023/12/the-la...](https://judicialstudies.duke.edu/2023/12/the-late-justice-sandra-day-oconnor-named-2024-bolch-prize-recipient/) via
@BolchJudicial



The late Justice Sandra Day O'Connor named 2024 Bolch Prize...
From judicialstudies.duke.edu

180. See ICIVICS, <https://vision.icivics.org/> [<https://perma.cc/6XCT-FT6U>] (last visited Dec. 2, 2025).

181. See *Civics Break*, BOLCH JUD. INST. OF DUKE L. SCH., <https://judicialstudies.duke.edu/civics-break/> [<https://perma.cc/UKS2-C8FK>] (last visited Dec. 2, 2025).

182. See CONSOURCE, <https://www.consource.org/> [<https://perma.cc/4ART-TKRT>] (last visited Dec. 2, 2025).

183. See CENTER FOR CIVIC EDUCATION, <https://www.civiced.org/> [<https://perma.cc/ZY54-CHUF>] (last visited Dec. 2, 2025).



Judge Stephen Dillard
@JudgeDillard

**“‘Worked Out Great’: Judges, Others Praise
Civics Academy for Improving Offenders’
Lives” [at.law.com/fjDCiP?cmp=sha...](https://www.law.com/fjDCiP?cmp=sha...) via
@DailyReport**



D. Educational

One of the best things judges can do on social-media platforms is educate the public about the inner workings and culture of the judiciary, as well as other aspects of our profession. You can do this by using social media to amplify writings and speeches that you have already completed or shared (I frequently do this), or you can answer general questions about your court, law school, law practice, and similar matters in real time by holding question and answer sessions with your followers (I do this less often) or just answering questions from followers as they are posed to you (I do this regularly).



Judge Stephen Dillard 
@JudgeDillard

On this day in history, SCOTUS was expanded from seven to nine justices. [#appellatetwitter](#)



National Center for State Courts · 4/10/23

On this day in 1869, Congress increased the number of justices on the [#SupremeCourt](#) from seven to nine. That number has remained the same ever since.

(📺 : [@NatGeo](#)) [#SCOTUS](#)





Judge Stephen Dillard 
@JudgeDillard

On this day in history, February 1, 1790, the Supreme Court of the United States assembled for the first time in the Exchange Building in New York City. [#appellatetwitter](#)
[supremecourt.gov/about/institut...](#)



Judge Stephen Dillard
@JudgeDillard

It's great to see @NoahRFeldman on this @AJEI_Summit panel discussing "The Ethical Tightrope: Navigating Media Influence and Judicial Integrity." #AJEI2024



3:36 PM · 11/16/24 · 3K Views

E. Mentoring

Social media provides judges with a unique and powerful way to mentor the next generation of lawyers. You can do this by providing the kind of educational material previously mentioned, but you can also move from the general to the specific with student members of your audience and provide career advice, help with goal setting, offer encouraging words, and give an insider's view of the profession or the judiciary.



Judge Stephen Dillard
@JudgeDillard

You shouldn't argue in your statement of facts, but you should craft an overarching narrative that supports your argument. Tell your client's story in such a way that the judge reading your brief is already predisposed to rule for you when he or she gets to your argument. t.co/9YefnyZcOI



Judge Stephen Dillard ✓
@JudgeDillard

A good oral argument is a conversation between the lawyers and judges. And in my view, it's difficult to have a productive discussion when the questions being posed by the judges—no matter how legitimate they may be—have a hostile tone.

3:40 PM · 2/8/24 · 44K Views

26 52 324 14

Most relevant replies ▾



Tahmineh Dehbozorgi ✓ @DeTah... · 2/9/24 ...
Any tips for moot court competition?

1 1 667



Judge Stephen Dillard ✓ @Judge... · 2/9/24 ...

My advice is: Know the record and relevant authorities cold; prepare for a discussion with the judges, not a speech; understand the other side's argument as well as your own; concede any weakness in your argument that don't doom your position; have an overarching narrative for your argument; think hard about the types of questions you would ask if you were the judge, and then practice answering them; and keep your composure no matter how hard the judges try to rattle you. Best of luck!



Judge Stephen Dillard ✓
@JudgeDillard

One of the most rewarding things you can do in life is to mentor others in your chosen profession.

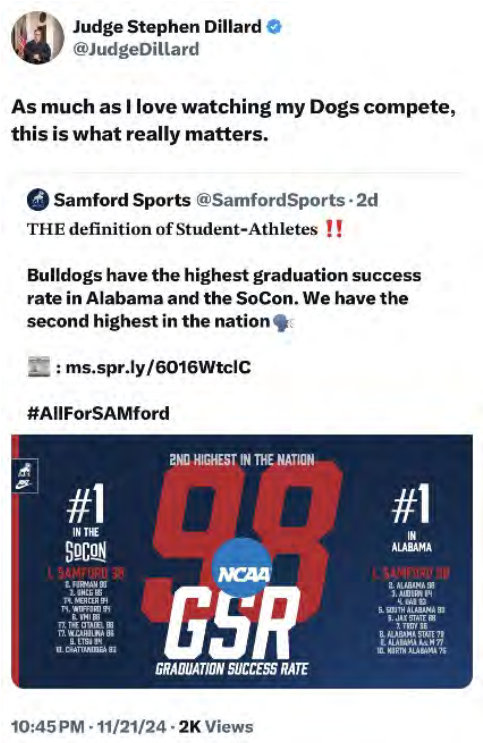
F. Personalization/Humanization

This final categorical bucket requires a greater degree of explanation because it is, by far, the broadest content category. But generally speaking, the purpose of “personalization/humanization” content on social media

is to let the public know more about who you are as a person off the bench. Again, I understand that many judges may have some discomfort with sharing personal details of their lives; but if you're required to be elected or re-elected by the people you serve, you may want to consider opening up a bit. Here are some different (and fairly benign) ways to do that.

You will often see posts on my social-media feeds about various non-legal subjects. For example, I regularly feature my undergraduate alma mater, Samford University, and its athletic teams on my social-media accounts. My undergraduate experience was transformative, and a significant part of who I am today is directly attributable to the academic and spiritual formation I received at Samford University. And given how actively involved I continue to be with Samford, it only makes sense to share this part of my life with the public.





My family members also occasionally make appearances on my social-media accounts—including personal moments/milestones and humorous quips from my bride and children. My family means everything to me, so it is only natural to share aspects of my family life with those I serve.



Judge Stephen Dillard 
@JudgeDillard

#ThrowbackThursday with my bride (1992).



Judge Stephen Dillard 
@JudgeDillard

It's official! Krista and I are thrilled to announce that Lindley will join the Class of 2025 this fall at @SamfordU. There are no words to describe how proud we are of Lindley or how excited we are that she will be attending our beloved alma mater. #AllForSAMford



 **Judge Stephen Dillard** 
@JudgeDillard

Jackson Dillard: Outstanding Attorney



 **Judge Stephen Dillard** 
@JudgeDillard

Happy 12th birthday to my beautiful, intelligent, funny, and spirited Mary Margaret. I love you, sweet girl.



And our rescue dog, Sirius Black, is often featured on my social-media feeds. Unsurprisingly, my posts about Sirius frequently receive numerous likes and retweets. Spoiler alert: People love pets.



Sirius is judging all of you.



I also share photographs of my beautiful church and other landmarks from around Georgia.



Seventh Sunday in Ordinary Time.



4:08 PM · 2/22/20



Judge Stephen Dillard 
@JudgeDillard

It's a cold but beautiful day in Atlanta.



8:34 AM · 1/10/24 · 2.5K Views



1



1



51



I also discuss and sometimes debate grammar, typography, and word processing issues with followers. These are all topics that I care about, and—judging by the amount of engagement I receive when posting about these topics—I am apparently not alone in my nerdiness.



Judge Stephen Dillard 
@JudgeDillard

Delete your account.

AP **APStylebook**  · 10/1/18

Let's start with a topic we rarely hear about: the Oxford comma! We say: Use commas to separate elements in a series, but do not put a comma before the conjunction in most simple series: The flag is red, white and blue. He would pick Deb, Xi...

4:59 PM · 10/1/18



46



357



1.5K



2





And I occasionally share my views and preferences on music (a recurring feature called “Chambers Music,” where I share my favorite songs or albums with my followers), books and other writings, and certain pop culture matters.





Judge Stephen Dillard
@JudgeDillard

I am one of the world's biggest HIMYM fans, so this made my day.

Liked

by Craig Thomas and 9 others

Judge Stephen Dillard @Ju... · 29m · ...

My wife says it's @jasonsegel, so that's my choice too.

JACKSON LANZING @Jac... · 2d

Who plays you in your biopic?

1

1

11

Craig Thomas

@HimymCraig

Co-Creator, How I Met Your Mother, MOLLY AND THE MOON, The Goodwin Games, American Dad!, Letterman,

Following



Judge Stephen Dillard
@JudgeDillard

Shrinking really is an incredible show. And the latest episode is a timely and beautiful reminder of the importance and power of forgiveness in our lives.

6:44 PM · 12/24/24 · 2.1K Views



I have even shared my fitness and health journey with my followers, which started in August 2022 and continues to this very day. I was reluctant to do so initially, but I finally disclosed this deeply personal information as a means of holding myself accountable. My thinking was that if I made a habit of posting my daily exercise routine to thousands of online friends, it would help me stay the course. And it did. What I did not expect—and was pleasantly surprised by—was just how invested and inspired many of my followers became in my fitness journey. They appreciated my vulnerability in sharing the details of my lifestyle changes, as well as my willingness to post photos documenting my weight loss (seventy pounds to date). And I have responded to numerous public and private messages over this period, answering questions and encouraging others who have also struggled to maintain a healthy lifestyle. In doing so, I have benefitted as much from those exchanges as those I sought to help. Here is just a sampling of the posts I have made (or received from my followers) related

to my health and wellness journey over the past few years.



Judge Stephen Dillard
@JudgeDillard

When I started my exercise journey last August, it took me 21 minutes to walk one mile. But today, I ran a mile in under 8 minutes and shaved over a minute and a half off of my previous PR. I really appreciate all of the encouragement so many of you have given me along the way.



TREADMILL

BEST

07:57

7:28 AM · 5/17/23 · 52K Views



Judge Stephen Dillard
@JudgeDillard

“Catch Me If You Can” is one of the more challenging @orangetheory benchmarks for me, so it really felt good to finally get past the two-mile mark and secure a new PR.



FRIDAY, DECEMBER 27

3:15 PM
MACON, GA
Savannah Harper
2.03 mi

THURSDAY, AUGUST 22

6:15 AM
MACON, GA
Tony Soleh
1.58 mi

MONDAY, JUNE 26, 2023

6:15 AM
MACON, GA
1.85 mi

Last edited 4:24 PM · 12/27/24 · 3K Views



Judge Stephen Dillard 
@JudgeDillard

You can really tell the difference in these photos. I waited until today to do a comparison (as a reward of sorts).

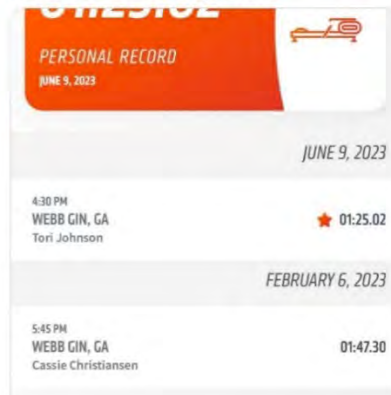


11:50 AM · 10/2/22



Eddie Greenblat @EddieGreenblat · 6/9/23 
Replying to @JudgeDillard

I hit a PR today too - and you're a big reason I started my fitness journey at @orangetheory - thanks for the encouragement!



Now, I want to be clear about something: I am not suggesting that you (as a judge) need to disclose this level of personal detail about your life to effectively engage with the public. I had my reasons for doing so, and I am thankful that I shared my health and fitness journey on social media; but you may not feel comfortable publicizing this type of information, and there is nothing wrong with that. That said, I do think the overwhelmingly positive reaction from the public and my

followers is a powerful reminder that people crave (and are inspired by) authentic leadership from their elected officials.¹⁸⁴

Finally, I have recurring Twitter habits that have evolved over time (in addition to my “Chambers Music” posts). I often take “judicial notice” of birthdays, remind Georgia lawyers and the public of when my Court’s constitutional “distress” deadlines are coming up, highlight the appellate practice classes I teach at Mercer Law School, and post the following tweet (sometimes in a video format) every Friday at or around 5:00 p.m.: “I hope that all of you have a wonderful and relaxing weekend. And as always, please be good to each other.”

Again, I understand that many judges will be reluctant to adopt this kind of personal approach with the public; but candidates for almost every other public office are already revealing aspects of their personal lives to make voters feel more connected to them. They do this for a reason: It works. Social media can humanize a branch that is called upon to make life-changing decisions for the public every day; and I believe the judiciary benefits enormously from having thoughtful and caring judges directly engage the people they serve on the social-media platforms those citizens use daily.

Even so, there is a downside to being on social media, and judges need to know this from the get-go. You will almost certainly receive a scathing tweet or critical message at some point in your online journey. And when this happens, my advice is simple and straightforward: Do not engage. It is a bad idea to get into online spats with your critics. There is no upside to judges “fighting fire with fire,” and you are playing right into the hands of someone who is almost certainly trying to provoke you for his or her own amusement. I also highly recommend that you do not block anyone (especially from your home

184. See, e.g., Cedra Mayfield, *The New Judge Dillard: He’s Changed*, THE FULTON CNTY. DAILY REP. (Nov. 18, 2022), <https://www.law.com/dailyreportonline/2022/11/18/the-new-judge-dillard-hes-changed/?slreturn=20241228-11022> [<https://perma.cc/RBE2-FFAV>].

state).¹⁸⁵ That is what they want you to do, and it will likely result in that person publicizing your block and attempting to create a narrative that you are thin-skinned and unwilling to engage with those who criticize you. Instead, my advice is to simply mute your unruly critics and let them scream into the void.¹⁸⁶ But it is important not to assume that every critic is acting in bad faith. If someone is asking you a legitimate question or offering constructive criticism that you can and should address (e.g., why your court's livestreaming feed isn't working well), you should make a point of kindly responding to those types of inquiries. And if you are uncertain about your critic's intentions, you will usually find out quickly what they are. And if your critic reveals himself to be a troll or bad-faith actor, you have every right to immediately withdraw from the conversation.¹⁸⁷ Judges should be accessible to the public, but we are not obliged to continue engaging with someone who's being rude or abusive.

Finally, just as there is a time and season for everything, there is also a time *not* to tweet. I regularly take a hiatus from posting on social media. Sometimes, it's because I have too much going on with my personal life and work, and I don't have the time to meaningfully engage on those platforms. Other times, I simply need a break from it all. And on some days, it's just prudent to remain silent in the wake of certain events—a

185. In fact, circuit courts have held that doing so violates the First Amendment—at least in some contexts. Vera Eidelman, *Court Rules Public Officials Can't Block Critics on Facebook*, ACLU (Jan. 9, 2019), <https://www.aclu.org/blog/free-speech/internet-speech/court-rules-public-officials-cant-block-critics-facebook> [<https://perma.cc/LG6Y-V5AM>]; Jonathan William Peters, *Public Officials: Beware Blocking Critics on Social Media*, ABA (July 22, 2019), <https://www.americanbar.org/groups/litigation/committees/civil-rights/practice/2019/blocking-social/> [<https://perma.cc/7EUX-TC5C>].

186. See Jon Hulsing, *Parental Alienation Is One Thing, but What Are You Going to Do When They Come for You?*, LITIG., Summer 2020, at 6, 9 (noting that when “there is an outrage in the blogosphere or social media, often the best advice for a judge is to simply ignore the posts”).

187. See Thornburg, *supra* note 42, at 272–73 (“It is safer, perhaps, for one judge to defend another than for the judge under attack to exercise digital self-defense.”).

presidential election, a natural disaster or tragic event, a controversial Supreme Court opinion, and the like. Needless to say, on days when your followers are on edge or understandably upset about something going on in the world, even the most benign post or comment is likely to be misconstrued or appear insensitive. As judges, even when we try our hardest, there are times when we are so focused on our jobs that we can log on to our social-media accounts and simply not be aware of the latest news. For this reason, I strongly recommend “taking the temperature” of a social-media platform before posting anything. You can do this by quickly looking at the “trending topics” section of that platform or taking a few moments to scroll through your feed to see what your followers and friends are commenting about that day. Lastly, while cross-posting your content across all your social-media accounts is certainly worth considering, you should always think through whether some posts may be better suited for more limited engagement. Again, a judge’s creed on social media should always be “constant vigilance.”¹⁸⁸

CONCLUSION

The public’s confidence in the third branch of government has decreased significantly in recent years, and the rhetoric used against the courts and judges—by both political leaders and regular citizens—is increasingly vitriolic and ill-informed. This is a recipe for disaster. It is crucial for the preservation of the rule of law that the people we serve have confidence in the work of the judiciary and the judges who carry out that crucial civic mission.

As Alexander Hamilton astutely noted in *The Federalist* No. 78, “the judiciary . . . has no influence over either the sword or the purse It may truly be said to have neither FORCE nor WILL, but merely judgment

188. See ROWLING, *supra* note 170.

....”¹⁸⁹ Our judgment—or more precisely, our reputation—is all we have. As a result, lawyers, judges, and the courts must do everything in our collective power to defend and promote the need for an independent judiciary in our tripartite system of government. But judges must lead the way. We wear the black robes, and we have the built-in platforms to directly engage the public in a meaningful, powerful, and transformative way. And I sincerely believe we can do this by embracing the social-media platforms the people we serve use daily. These mediums have revolutionized the way public servants communicate with the public, and judges can (and should) use these platforms to engage and educate our fellow citizens and demystify the courts.¹⁹⁰

Like those serving in the executive and legislative branches, judges are directly accountable to the people we serve; and I believe we need to start acting like it. As the Georgia Code of Judicial Conduct rightly emphasizes, “a judicial officer and person specially learned in the law . . . is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice.”¹⁹¹ And social media allows judges to share their views on these important issues to an exponential audience.

The courts “belong to the people,” and they play a “unique role” in our system of government.¹⁹² The public deserves (and is starting to demand) direct access and transparency from the judiciary. Thankfully, we have the ability to provide the people we serve with an unprecedented amount of information about the inner

189. THE FEDERALIST NO. 78 (Alexander Hamilton).

190. There are now calls on the federal judiciary to “develop a constrained social media presence” to “inform public discussion of judges and rulings with posts and blogs about their nonpartisan institutional culture, the role of the judge in adjudication, how judges are different from public officials in the other branches of government, and the ways in which federal judges, though life-tenured, are nonetheless accountable.” Charles Gardner Geyh, *To Legitimacy and Beyond: A Reform Agenda to Restore Public Confidence in the Federal Courts*, 87 L. & CONTEMP. PROBS., no.1, 2024, at 1, 27.

191. GEORGIA CODE OF JUD. CONDUCT r. 3.7 (B) cmt. 1 (amended 2016); see also CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 4 cmt. 1 (2019).

192. Dillard & McCormack, *supra* note 3, at 198.

workings and culture of our courts through social-media platforms. And when judges and courts use social media in a responsible and educational way, it increases the public's confidence and faith in the judiciary. In the end, judicial outreach is "a public service . . . [that can meaningfully] educate the public about the courts and foster [greater] understanding of their role and function."¹⁹³ I am proud to play a part in this crucial rethinking of how judges engage and educate the public, and my sincere hope is that more of my colleagues will join me in this worthy civic endeavor.

193. Savchak & Edwards, *supra* note 2.



THE AMERICAN
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Submitted by the Council to the membership of The American Law Institute
for consideration at the 2026 Annual Meeting on May 18-20, 2026

Principles of the Law High-Volume Civil Adjudication

Tentative Draft No. 1

(April 2026)

SUBJECTS COVERED

PART II Procedure and Case Management in High-Volume Civil Adjudication

CHAPTER 3 Notice and Service of Process (§§ 3.01-3.09)

CHAPTER 4 Pleading and Information Exchange (§§ 4.01-4.08)

CHAPTER 5 Hearings (§§ 5.01-5.08)

CHAPTER 7 Entry and Enforcement of Judgments (§§ 7.01-7.07)

APPENDIX A Black Letter of Tentative Draft No. 1

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**Principles of the Law
High-Volume Civil Adjudication**

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ALI welcomes comments on this draft.

To submit comments, we ask that you either send them via email to PLHVCAcomments@ali.org, or submit them via the project's page on the ALI website (login required). In either case, the comments will be automatically received by the Reporters and ALI's Director and Deputy Director, as well as by ALI Publications staff, who will post the comments on the project page.

Unless otherwise specified, when you submit comments you authorize ALI to retain the comments in our files and archives, and to post the comments on the project's page on the ALI website. Access to comments on the project page is limited to project participants and ALI members.

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Principles of the Law High-Volume Civil Adjudication

(as of April 7, 2026)

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The bylaws of The American Law Institute provide that “Publication of any work as representing the Institute’s position requires approval by both the membership and the Council.”

Each portion of an Institute project is submitted initially for review to the project’s Advisers and Members Consultative Group as a Preliminary Draft. As revised, it is then submitted to the Council as a Council Draft. After review by the Council, it is submitted as a Tentative Draft or Discussion Draft for consideration by the membership at an Annual Meeting.

Once it is approved by both the Council and membership, a Tentative Draft represents the most current statement of the Institute’s position on the subject and may be cited in opinions or briefs in accordance with Bluebook rule 12.9.4, e.g., Restatement (Second) of Torts § 847A (AM. L. INST., Tentative Draft No. 17, 1974), until the official text is published. The vote of approval allows for possible further revision of the drafts to reflect the discussion at the Annual Meeting and to make editorial improvements.

The drafting cycle continues in this manner until each segment of the project has been approved by both the Council and the membership. When extensive changes are required, the Reporter may be asked to prepare a Proposed Final Draft of the entire work, or appropriate portions thereof, for review by the Council and membership. Review of this draft is not de novo, and ordinarily is limited to consideration of whether changes previously decided upon have been accurately and adequately carried out.

The typical ALI Section is divided into three parts: black letter, Comment, and Reporter’s Notes. In some instances there may also be a separate Statutory Note. Although each of these components is subject to review by the project’s Advisers and Members Consultative Group and by the Council and the membership, only the black letter and Comment are regarded as the work of the Institute. The Reporter’s and Statutory Notes remain the work of the Reporter.

**Principles (excerpt of the Revised Style Manual approved by the ALI Council
in January 2015)**

Principles are primarily addressed to legislatures, administrative agencies, or private actors. They can, however, be addressed to courts when an area is so new that there is little established law. Principles may suggest best practices for these institutions.

a. The nature of the Institute’s Principles projects. The Institute’s Corporate Governance Project was conceived as a hybrid, combining traditional Restatement in areas governed primarily by the common law, such as duty of care and duty of fair dealing, with statutory recommendations in areas primarily governed by statute. The project was initially called “Principles of Corporate Governance and Structure: Restatement and Recommendations,” but in the course of development the title was changed to “Principles of Corporate Governance: Analysis and Recommendations” and “Restatement” was dropped. Despite this change of title, the Corporate Governance Project combined Restatement with Recommendations and sought to unify a legal field without regard to whether the formulations conformed precisely to present law or whether they could readily be implemented by a court. In such a project, it is essential that the commentary make clear the extent to which the black-letter principles correspond to actual law and, if not, how they might most effectively be implemented as such. These matters were therefore carefully addressed at the beginning of each Comment, as they should be in any comparable “Principles” project.

The “Principles” approach was also followed in Principles of the Law of Family Dissolution: Analysis and Recommendations, the Institute’s first project in the field of family law. Rules and practice in this field vary widely from state to state and frequently confer broad discretion on the courts. The project therefore sought to promote greater predictability and fairness by setting out broad principles of sufficient generality to command widespread assent, while leaving many details to the local establishment of “rules of statewide application,” as explained in the following provision:

§ 1.01 Rules of Statewide Application

(1) A rule of statewide application is a rule that implements a Principle set forth herein and that governs in all cases presented for decision in the jurisdiction that has adopted it, with such exceptions as the rule itself may provide.

(2) A rule of statewide application may be established by legislative, judicial, or administrative action, in accord with the constitutional provisions and legal traditions that apply to the subject of the rule in the adopting jurisdiction.

Principles of the Law of Family
Dissolution: Analysis and
Recommendations

Thus, a black-letter principle provided that, in marriages of a certain duration, property originally held separately by the respective spouses should upon dissolution of the marriage be recharacterized as marital, but it left to each State the formula for determining the required duration and extent of the recharacterization:

§ 4.12 Recharacterization of Separate Property as Marital Property at the Dissolution of Long-Term Marriage

(1) In marriages that exceed a minimum duration specified in a rule of statewide application, a portion of the separate property that each spouse held at the time of their marriage should be recharacterized at dissolution as marital property.

(a) The percentage of separate property that is recharacterized as marital property under Paragraph (1) should be determined by the duration of the marriage, according to a formula specified in a rule of statewide application.

(b) The formula should specify a marital duration at which the full value of the separate property held by the spouses at the time of their marriage is recharacterized at dissolution as marital property.

Principles of the Law of Family
Dissolution: Analysis and
Recommendations

The Comments and Illustrations examined and analyzed the consequences of selecting various possible alternatives.

“Principles” may afford fuller opportunity to promote uniformity across state lines than the Restatement or statutory approaches taken alone. For example, the Institute’s Complex Litigation: Statutory Recommendations and Analysis combines broad black-letter principles with the text of a proposed federal statute that would implement those principles.

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PROJECT STATUS AT A GLANCE

No portion of this project has previously been approved by the membership.

History of Material in This Draft

The Council approved the initiation of this project in October 2022.

Order of Draft Release

Preliminary Draft No. 1 – issued February 2024
Council Draft No. 1 – issued September 2024
Preliminary Draft No. 2 – issued October 2024
Council Draft No. 2 – issued December 2024

Council Draft No. 3 – issued September 2025
Preliminary Draft No. 3 – issued October 2025
Council Draft No. 4 – issued December 2025
Tentative Draft No. 1 – issued April 2026

Foreword

The Institute's project on Principles of the Law, High-Volume Civil Adjudication is designed to address a serious challenge facing the courts: the adjudication of high-volume, high-stakes, low-dollar-value civil claims. These types of claims, which arise in such areas as debt collection, evictions, home foreclosure, and child support, comprise a significant proportion of state court cases and are shaping the lives of millions of Americans. The cases raise unique issues because they are frequently uncontested and typically feature at least one party (generally with limited financial resources and legally unsophisticated) without a lawyer. The result is high numbers of default judgments. The Principles will offer guidance to courts and policymakers on the urgent issues these types of cases raise; they will surely provide great societal benefit.

After a preview of this project at last year's Annual Meeting, a draft of the project is coming before the membership for the first time. Tentative Draft No. 1 contains four Chapters from Part II on Procedure and Case Management in High-Volume Civil Adjudication: Chapter 3 covers Notice and Service of Process; Chapter 4 turns to Pleading and Information Exchange; Chapter 5 addresses Hearings; and Chapter 7 covers Entry and Enforcement of Judgments.

The project is under the excellent leadership of Reporter David Freeman Engstrom of Stanford Law School and Associate Reporters Rebecca Aviel of the University of Denver, Sturm College of Law; David Marcus of the University of California, Los Angeles School of Law; Lauren D. Sudeall of Vanderbilt University Law School; and Emily S. Taylor Poppe of the University of California, Irvine School of Law. The Institute is very grateful to all of them, as well as to Project Fellow Larisa G. Bowman of Stanford Law School and the project's Advisers, Liaisons, and Members Consultative Group, whose insights contribute greatly to the project.

DIANE P. WOOD
Director
The American Law Institute

April 3, 2026

REPORTERS' MEMORANDUM

To: ALI Members

From: David Freeman Engstrom, Reporter, and Rebecca Aviel, Dave Marcus,
Emily Taylor Poppe, and Lauren Sudeall, Associate Reporters

Re: Annual Meeting on May 18-19, 2026 –
Principles of the Law, High-Volume Civil Adjudication

Date: March 31, 2026

The Reporters for *Principles of the Law, High-Volume Civil Adjudication* are thrilled to make our first presentation to the ALI membership. This memo is designed to help set an agenda for the session. It proceeds in three steps. First, we provide a brief narrative overview of the Project. Second, we offer a short comment on the Project's scoping. Third, we set forth a full but tentative table of contents to show how the four draft Chapters we're circulating for consideration at the Annual Meeting fit into the broader whole.

We thank you in advance for your time and attention and are looking forward to seeing you in Washington, D.C.

Project Overview

Over the last several decades, a rising tide of high-stakes but small-scale cases has come to dominate state-court dockets: debt collections, evictions, home foreclosures, and child-support disputes, among other case types. *Principles of the Law, High-Volume Civil Adjudication* will offer courts and policymakers guidance on the urgent challenges these types of cases raise.

Two core ideas have animated the Reporter team's work thus far. First, the high-volume cases that overwhelmingly populate high-volume civil dockets bring particular challenges because they tend to pit an institutional plaintiff (a bank, debt buyer, corporate or municipal landlord, a government agency), nearly always represented by a lawyer, against an individual defendant, nearly always self-represented. In fact, in three-quarters of civil cases filed in state courts each year, at least one side lacks a lawyer. Such pervasive and sharp asymmetries in expertise, representation, and resources call into question conventional assumptions around adversarialism, due process, and procedural fairness.

Second, fair and accurate adjudication serves important interests beyond those of defendants. A core premise of our civil-justice system is lawful resolution of the claims and defenses of all parties to disputes, and plaintiffs, no less than defendants, deserve fair and accurate determination of their rights. Moreover, the millions of cases that make up high-volume civil dockets often help to make the markets where they operate, such as the market for affordable rental housing.

Principles of the Law, High-Volume Civil Adjudication is about how to modernize courts at the intersection of these two ideas—and, in so doing, ensure that courts overseeing high-volume dockets adhere to bedrock principles of procedural fairness and justice.

Reporters' Memorandum

Project Scoping

A Principles project that takes on the large and urgent problems of high-volume civil adjudication cannot make meaningful progress if it is insufficiently focused. The Reporters have engaged in extensive discussions since the Project's inception with their Advisers and other Project participants and with the ALI Council about the Project's scoping, particularly the issue of which case types to include and exclude from consideration. Those fruitful conversations yielded a determination that the Project will focus primarily on four of the high-stakes but low-dollar case types noted above: debt collections, evictions, home foreclosures, and government-pursued child-support-enforcement actions. These four case types currently make up the majority of civil case filings in most state-court jurisdictions. Moreover, this scoping focuses the Project on a discrete and tractable set of cases at the intersection of efficiency imperatives, consequential and even life-altering subject matter, and sharp asymmetries in expertise, resources, and access to legal help across the two sides of the "v.," posing unique challenges for courts and raising important questions about the future shape of the civil-justice system.

Tentative Table of Contents—and Progress So Far

We have made considerable progress since the Project's authorization in October 2022. Our drafting efforts to this point have focused on the portions of the Project devoted to procedure. The following is a full but tentative table of contents, with eight Chapters bolded—specifically, Chapters 2 through 7, Chapter 9, and Chapter 14—that are now full drafts and have already been presented to our Advisers and other Project participants, the ALI Council, or both. We will be presenting four of these Chapters—including Chapter 3 (Notice and Service of Process), Chapter 4 (Pleading and Information Exchange), Chapter 5 (Hearings), and Chapter 7 (Entry and Enforcement of Judgments)—at the Annual Meeting. These Chapters are an ideal useful starting point for your consideration because they are part of the Project's procedural core. Many of the Project's other Chapters work outward to an array of other topics, such as technology, the supply of legal help, and court funding and fees, and will be best considered once the Project's procedural principles have been solidified.

PART I. GENERAL PRINCIPLES OF FAIR ADJUDICATION IN HIGH-VOLUME CIVIL ADJUDICATION

Chapter 1 General Principles of Fair Adjudication

PART II. PROCEDURE AND CASE MANAGEMENT IN HIGH-VOLUME CIVIL ADJUDICATION

Chapter 2 General Principles of Procedure in High-Volume Civil Adjudication

Chapter 3 Notice and Service of Process

Chapter 4 Pleading and Information Exchange

Chapter 5 Hearings

Chapter 6 Settlement

Chapter 7 Entry and Enforcement of Judgments

PART III. COURT ADMINISTRATION AND HIGH-VOLUME CIVIL ADJUDICATION

Chapter 8 Systemic Administration

Chapter 9 The Judicial Role

Reporters' Memorandum

- Chapter 10 Supply of Legal Help: Court Personnel and Alternative Legal-Service Providers
- Chapter 11 Court Use and Regulation of Technology
- Chapter 12 Court Funding and Fees
- Chapter 13 Privacy and Confidentiality Procedures

PART IV. ADJUDICATION ALTERNATIVES

Chapter 14 General Principles of Adjudication Alternatives in High-Volume Civil Adjudication

- Chapter 15 ADR, ODR, and Diversion Programs
- Chapter 16 Dispute Avoidance

PART V. COURT STRUCTURE AND HIGH-VOLUME CIVIL ADJUDICATION

- Chapter 17 General, Limited, and Specialized Courts

PART II
PROCEDURE AND CASE MANAGEMENT IN HIGH-VOLUME
CIVIL ADJUDICATION

CHAPTER 3
NOTICE AND SERVICE OF PROCESS

§ 3.01. General Principles of Notice

(a) The fair, accurate, and timely resolution of disputes in high-volume civil adjudication requires effective notice. Notice is effective when it is reasonably certain to reach a party against whom a claim or defense is asserted, and when notice is provided in a form and under conditions that enable the party to take appropriate steps to participate meaningfully.

(b) Rules governing notice obligations should be tailored to particular high-volume civil-adjudication case types based upon recurring characteristics, capacities, and needs of the litigants who tend to be involved in those cases.

(c) The notice obligation is primarily one that parties should bear. In high-volume civil adjudication, however, courts and other rulemakers should also take steps to make notice as effective as reasonably possible. These steps include obligations to ensure the effectiveness of notice in individual cases and more systemic obligations, including the creation of court forms and other resources.

Comment:

a. Effective notice in high-volume civil adjudication. This Chapter sets forth principles governing the notice that should be provided to persons who have become parties to cases affecting their interests in high-volume civil adjudication. It does not address notice obligations to nonparties, such as individuals other than the tenant on the lease that is the subject of an eviction action.

This Chapter addresses notice generally and service of process specifically. Notice refers to efforts to provide a party with information about a case to which the party has been joined. This category includes service of process, a particular notice obligation that a party alleging claims against an adversary is required to fulfill. As elaborated in §§ 3.09 (Challenging Service) and 7.05 (Invalid Default Judgments), no judgment should be entered without proper service unless a

defending party has waived objections to any service defects. Notice also includes other obligations that are not formally part of service of process, including prefiling notice (§ 3.03(b)) and court efforts to supplement party-provided notice (§ 3.08(a)).

Circumstances common in high-volume civil adjudication create concerns about the effectiveness of notice. While numerous factors produce high rates of default judgments, problems with notice provided at the outset of litigation are an important driver. Sometimes process servers file fraudulent proofs of service, having never actually served the summons and complaint. The frequency of this “sewer service” is impossible to know, but high-profile episodes involving tens of thousands of cases suggest that it persists as a problem. Even when service is proper, responding parties may not understand what lawsuits entail, who their adversaries are or why they have commenced litigation, or the steps that should be taken to protect their rights and interests. Especially in eviction litigation, a lawsuit’s filing often triggers a short answer or response period, creating a challenge for the defendant that deepens when service is ineffective. See § 4.05 (Procedural Limits on Defenses and Counterclaims). Self-represented litigants may struggle to decipher the summons and pleadings, and court-provided resources may be difficult to find or access. When defendants default, courts risk entering judgments even where plaintiffs have not met their service obligations.

Responding to these and other concerns, this Chapter’s principles govern provision of effective notice. To be effective, notice must be reasonably certain to reach the responding party, consistent with §§ 3.02 (Reasonable Diligence), 3.04 (Preferred and Alternative Service), 3.05 (Confirmation of Service), and 3.08 (Court Obligations to Ensure Proper Notice). In addition, the notice should provide sufficient information, and in such a manner, to make it reasonably likely that the person served can understand what the proceedings entail and what steps the person can take to participate meaningfully in the case. Sections 3.06 (Content of Notice and Court-Provided Forms and Resources) and 3.07 (Accessible Notice) inform these matters. Finally, notice should be received in a timely fashion, to give the person receiving notice an adequate opportunity to respond effectively, consistent with § 3.03 (Timing of Notice).

b. Tailored notice rules and due process. Consistent with § 2.02 (Tailored Procedure and Case Management), this Chapter recommends that jurisdictions tailor rules governing notice to particular case types, taking account of the recurring characteristics, capacities, and needs of the parties who commonly appear in those proceedings.

Such tailored rules operate against the constitutional baseline established by due process. While “[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause[,] . . . there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice. . . .” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). The due-process standard asks whether a particular notice practice is “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford [the parties] an opportunity to present their objections.” *Id.* at 168. The notice provided must “be such as one desirous of actually informing” the party to be served “might reasonably adopt to accomplish it,” and this notice must be “reasonably certain to inform. . . .” *Mullane*, 339 U.S. at 315.

Application of this standard informs several principles that inform this Chapter’s principles. First, the adequacy of notice depends on the circumstances and barriers that a party providing notice can expect an adversary to face. Courts have repeatedly emphasized that when the notifying party knows—or reasonably should know—of barriers that may prevent effective notice, those barriers must be taken into account in selecting a method of service. See, e.g., *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 799 (1983). Second, because those barriers are likely to vary in predictable ways by case type, those patterns should inform notice rules that likewise “vary with circumstances and conditions.” *Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956).

Federal and state rules regulating service of process and other notice obligations exceed due process minima. In many settings relevant to high-volume civil adjudication, notice requirements already reflect recurring features of particular case types and the barriers that litigants commonly face that disable them from meaningfully participating in their cases. This Chapter’s principles build on that approach. For example, many states require landlords to provide tenants with prefiling notice before commencing eviction proceedings—an obligation that responds to the short response periods and high stakes that commonly characterize such cases. See § 4.05 (Procedural Limits on Defenses and Counterclaims). Numerous jurisdictions also require plaintiffs to serve case-type-specific informational materials with the summons and complaint to help self-represented litigants access court-provided resources.

Similarly, while § 3.04 retains personal service as the default method of service in high-volume civil adjudication, it recognizes that alternative methods of service may be appropriate in particular circumstances or case types. These tailored notice requirements exceed constitutional

1 minima but do so in ways that are consistent with—and, indeed, reinforce—the underlying due-
2 process principle that notice practices should be reasonably designed to reach those whose rights
3 and interests are at stake.

4 *c. Obligations and best practices for courts and other rulemakers.* In conventional civil
5 litigation, notice is primarily an obligation that parties fulfill. The plaintiff, for instance, must serve
6 the summons and complaint. While this Chapter’s principles aim to ensure that party-provided
7 notice is effective and reliable, it also proposes various notice obligations for courts. In particular,
8 courts and other rulemakers should consider designing court-provided forms and other documents
9 tailored to particular case types to increase the likelihood that notice is effective. These documents
10 should include a proof-of-service form that elicits details about the service effort (§ 3.05), an
11 answer form that the party attempting service should provide to the other party (§ 3.06), and
12 information for accessing court-provided resources for self-represented litigants (§ 3.06). To the
13 extent practicable, courts should also, as elaborated in § 3.08, provide “courtesy notice” upon a
14 lawsuit’s filing as a check against low-quality or fraudulent service. This courtesy notice offers an
15 additional guarantee that responding parties actually learn of the cases proceeding against them.
16 Before entering judgment, judges should review the parties’ filings to determine, to the extent
17 practicable, whether the plaintiff provided proper service, and whether the record suggests a lack
18 of actual notice (§ 3.08).

19 Effective notice requires, first and foremost, that courts enforce all applicable notice rules.
20 In addition, this Chapter’s principles set forth concrete ways that courts can incentivize parties to
21 adopt good notice practices beyond what those rules require. Oftentimes, a party will be able to do
22 more than what an applicable rule minimally requires—for instance, by providing greater detail
23 than is necessary to achieve a fully compliant proof of service—without incurring undue cost or
24 burden. For example, if a plaintiff-landlord regularly communicates by text message with a tenant,
25 the landlord could easily supplement personal service with additional notice of a lawsuit via text,
26 even if the rules do not require it.

27 Beyond enforcing applicable notice rules, courts and other rulemakers can adopt measures
28 that provide incentives to the parties to provide the best notice practicable under the circumstances.
29 Such measures can affect whether a plaintiff is able to benefit from the presumption of proper
30 service when the adversary challenges the sufficiency of service. See § 3.09 (Challenging Service).
31 For example, a proof-of-service form could require the party obligated to serve process to provide

1 detailed information documenting the steps the party took to provide service, including whether
2 the party used reasonably available, low-cost methods to supplement service. See §§ 3.04 and 3.05.
3 If the party provides this information, its adversary would have to make a stronger evidentiary
4 showing, beyond denying receipt of service, in order to rebut the presumption of proper service.
5 Conversely, if the party attempting service did not supplement personal service with an available,
6 low-cost method, the court will be more likely to find that the presumption has been rebutted.

7 Judicious administration of the presumption of proper service at the default-judgment stage
8 can also incentivize good notice practices. Under § 3.08, a court should not enter judgment before
9 reviewing the filings to confirm proper service or the defending party's waiver of any defects.
10 When the defendant defaults, a presumption of proper service goes unchallenged. But the court
11 should nonetheless consider the presumption rebutted if the record indicates a lack of actual notice,
12 and if the party attempting service did not take reasonably available steps beyond those required
13 to increase the likelihood that the responding party received actual notice of the lawsuit. See
14 §§ 3.08 (Court Obligations to Ensure Proper Notice) and 3.09 (Challenging Service).

REPORTERS' NOTES

15 *a. Effective notice in high-volume civil adjudication.* Notice makes possible “the
16 opportunity to be heard,” which is the “fundamental requisite of due process of law.” *Goldberg v.*
17 *Kelly*, 397 U.S. 254, 267 (1970); see also Restatement of the Law Second, Judgments § 2 (AM. L.
18 INST. 1982) (“The right to be heard before one’s interests are adjudicated is a fundamental principle
19 of fairness. Giving notice to persons whose interests are to be adjudicated makes possible their
20 exercise of that right.”). A judgment entered without proper notice is “constitutionally infirm” and
21 must be vacated on that ground alone, regardless of whether the party entitled to notice has any
22 defense on the merits. *Peralta v. Heights Medical Ctr., Inc.*, 485 U.S. 80, 84 (1988); Restatement
23 of the Law Second, Conflict of Laws § 25 (AM. L. INST. 1971).

24 Notwithstanding its fundamental importance, notice routinely poses serious problems in
25 high-volume civil adjudication. Few empirical studies have rigorously documented exactly how,
26 or how often, notice fails. E.g., Unif. Law Comm’n, Debt Collection Default Act, Reporter’s Issues
27 Memo 5 (June 9, 2022); FED. TRADE COMM’N, REPAIRING A BROKEN SYSTEM: PROTECTING
28 CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 7 (2010). But cf. LEGAL AID
29 SOCIETY ET AL., DEBT DECEPTION: HOW DEBT BUYERS ABUSE THE LEGAL SYSTEM TO PREY ON
30 LOWER-INCOME NEW YORKERS 9 (2010) (documenting that only eight percent of defendants in
31 consumer-debt cases who contacted a nonprofit’s legal-help hotline were served properly). But
32 studies of default-judgment rates and related phenomena, coupled with anecdotal information,
33 suggest that parties often do not know that they are involved in litigation. E.g., NYU FURMAN CTR.
34 HOUS. CRISIS RSCH. COLLABORATIVE, HALF THE BATTLE IS JUST SHOWING UP: NON-ANSWERS

1 AND DEFAULT JUDGMENTS IN NON-PAYMENT EVICTION CASES ACROSS NEW YORK STATE, 2016-
 2 2022, 2 (2023) (reporting that 54 percent of tenants in New York State eviction cases do not answer
 3 complaints); PEW CHARITABLE TRS., HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS
 4 OF STATE COURTS 2 (2020) [hereinafter “Pew Report”] (reporting that 70 percent of debt-collection
 5 defendants default); PEW CHARITABLE TRS., *Why Civil Courts Should Improve Defendant*
 6 *Notification*, [https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2023/03/why-civil-](https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2023/03/why-civil-courts-should-improve-defendant-notification#:~:text=By%20refining%20the%20elements%20of,in%20a%20lawsuit%20against%20them)
 7 [courts-should-improve-defendant-notification#:~:text=By%20refining%20the%20elements%20](https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2023/03/why-civil-courts-should-improve-defendant-notification#:~:text=By%20refining%20the%20elements%20of,in%20a%20lawsuit%20against%20them)
 8 [of,in%20a%20lawsuit%20against%20them](https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2023/03/why-civil-courts-should-improve-defendant-notification#:~:text=By%20refining%20the%20elements%20of,in%20a%20lawsuit%20against%20them) (Mar. 3, 2023) [hereinafter “PEW, IMPROVE
 9 DEFENDANT NOTIFICATION”] (documenting service failures in interviews of debt-collection
 10 defendants); SELLER CTR. FOR SOC. J., REDUCING DEFAULT JUDGMENTS IN PHILADELPHIA’S
 11 LANDLORD-TENANT COURT 7-9 (2020) (documenting the frequency with which default judgments
 12 in Philadelphia eviction cases are entered without notice to the tenant); APPLESEED, DUE PROCESS
 13 AND CONSUMER DEBT: ELIMINATING BARRIERS TO JUSTICE IN CONSUMER CREDIT CASES 12 (2010)
 14 (“Consumer debt litigants, court personnel, and judges all confirm that the number of default
 15 judgments entered because the defendant was not actually served is unacceptably high.”); U.S.
 16 Fed. Trade Comm’n, Roundtable, Debt Collection: Protecting Consumers, Tr. at 24 (Dec. 4, 2009)
 17 (reporting that a lack of service explains many defaults in consumer-debt litigation); MFY LEGAL
 18 SERVS., INC., JUSTICE DISSERVED: A PRELIMINARY ANALYSIS OF THE EXCEPTIONALLY LOW
 19 APPEARANCE RATE BY DEFENDANTS IN LAWSUITS FILED IN THE CIVIL COURT OF THE CITY OF NEW
 20 YORK 6-7 (2008) (reporting results of a random sample of consumer-debt lawsuit files and
 21 suggesting that service often fails); N.Y. CITY BAR, OUT OF SERVICE: A CALL TO FIX THE BROKEN
 22 PROCESS SERVICE INDUSTRY 4 (2010) (documenting a 66 percent default rate in consumer-credit
 23 cases filed in 2009, and identifying a lack of notice as “a major contributing factor”).

24 Several problems that commonly arise in high-volume civil adjudication can thwart
 25 effective notice and thereby undermine the legitimacy of litigation. The first involves fraud. For
 26 decades, across multiple jurisdictions, certain process servers have falsely sworn that they effected
 27 service of the complaint and summons. E.g., Adrian Gottshall, *Solving Sewer Service: Fighting*
 28 *Fraud with Technology*, 70 ARK. L. REV. 813 (2018); Frank M. Tuerkheimer, *Service of Process in*
 29 *New York City: A Proposed End to Unregulated Criminality*, 72 COLUM. L. REV. 847 (1972).
 30 Episodes of this “sewer service” have marred thousands of eviction and debt-collection cases. E.g.,
 31 Jake Harper, *A California Debt Collector has Sued Thousands of People – Some of Them Never*
 32 *Knew*, KPBS (Apr. 6, 2023), [https://www.kpbs.org/news/local/2023/04/06/a-california-debt-](https://www.kpbs.org/news/local/2023/04/06/a-california-debt-collector-has-sued-thousands-of-people-some-of-them-never-knew)
 33 [collector-has-sued-thousands-of-people-some-of-them-never-knew](https://www.kpbs.org/news/local/2023/04/06/a-california-debt-collector-has-sued-thousands-of-people-some-of-them-never-knew); Josh Kaplan, *Thousands of*
 34 *D.C. Renters are Evicted Every Year. Do They All Know to Show Up to Court?*, DCIST (Oct. 5,
 35 2020), [https://dcist.com/story/20/10/05/thousands-of-d-c-renters-are-evicted-every-year-do-they-](https://dcist.com/story/20/10/05/thousands-of-d-c-renters-are-evicted-every-year-do-they-all-know-to-show-up-to-court/)
 36 [all-know-to-show-up-to-court/](https://dcist.com/story/20/10/05/thousands-of-d-c-renters-are-evicted-every-year-do-they-all-know-to-show-up-to-court/); ANDREW SCHERER & FERN FISHER, RESIDENTIAL LANDLORD-
 37 TENANT LAW IN NEW YORK § 15:8 (2023 ed.) (commenting on the “prevalence of ‘sewer service’
 38 in landlord-tenant cases”). In 2013, for instance, the California Attorney General sued a credit-card
 39 company alleging that it routinely failed to provide required service but lied in court documents to
 40 the contrary. Martha Neil, *Calif. AG Sues JP Morgan Chase, Alleging ‘Robo-signing’ and ‘Sewer*

1 *Service’ in Credit Card Suits*, ABA J. (May 9, 2013), https://www.abajournal.com/news/article/calif._ag_sues_jp_morgan_chase_alleges_robo-signing_of_docs_in_credit-card. In 2009, the New
2 York State Attorney General sued to vacate 100,000 default judgments that involved a single
3 process server alleged to have filed fraudulent affidavits of service. Joel Stashenko & Noleen G.
4 Walder, *Suit Aims to Vacate 100,000 Judgments*, N.Y. L.J., July 23, 2009, at 1. Plaintiffs have filed
5 numerous class-action lawsuits against firms alleged to have engaged in “sewer service,” and in
6 some instances have won considerable recoveries. E.g., *Order in Bay Area Legal Aid v. Achievable*
7 *Solutions*, No. 22CV008464 (Alameda Super. Ct. Oct. 24, 2023); Benjamin Mueller, *Victims of*
8 *Debt Collection Scheme in New York Win \$59 Million in Settlement*, N.Y. TIMES, Nov. 13, 2015, at
9 A18; Dena Aubin, *N.J. Law firm, Debt Collector, Settle with NYC Customers*, REUTERS LEGAL,
10 (Sept. 19, 2017) (describing settlement of class action alleging sewer service, including a provision
11 to vacate 48,000 default judgments); Gottschall, *supra*, at 850-853 (describing Minnesota
12 enforcement efforts).

13
14 The flip side of fraud is evasion. Sometimes parties against whom claims are alleged may
15 affirmatively evade service, a problem likely exacerbated by courts’ commitments to traditional
16 methods of service not updated to reflect how people currently communicate. E.g., Andrew C.
17 Budzinski, *Reforming Service of Process: An Access-to-Justice Framework*, 90 U. COLO. L. REV.
18 167, 212-215 (2019). Efforts to evade service by defendants or respondents in child-support-
19 enforcement matters may pose a particular concern. E.g., *Snead v. Snead*, 874 So. 2d 568, 572
20 (Ala. Ct. Civ. App. 2003) (approving an alternative service method when “it was shown that the
21 father was willfully evading service of process”).

22 Notice poses problems even without intentional misconduct. Half of the American
23 population moves over a five-year period, and residential mobility is even more frequent among
24 low-income Americans. See Robin Phinney, *Exploring Residential Mobility Among Low-Income*
25 *Families*, 87 SOC. SERV. REV. 780, 780 (2013); *id.* at 782. A debt buyer who purchases distressed
26 debt from a credit-card company may have a years-old address for the defendant. If the only notice
27 obligation is for the party providing service to mail the summons and complaint to an adversary’s
28 last known address, service is likely to go awry. PEW REPORT, *supra*, at 16. Uniformed law-
29 enforcement personnel serve court papers in many jurisdictions, for certain types of cases. People
30 in immigrant neighborhoods may avoid service for fear of immigration consequences of
31 interactions with law enforcement.

32 Notice can fail even when the summons and complaint reach the party entitled to notice.
33 Many of these parties may not understand what a complaint’s meaning or effect and whether and
34 how they should respond. PEW, IMPROVE DEFENDANT NOTIFICATION, *supra*. They may not know,
35 for instance, that the complaint contains allegations, not findings of liability. APPLESEED, DUE
36 PROCESS AND CONSUMER DEBT, *supra*, at 21. Especially in consumer-debt cases, defendants may
37 not recognize the plaintiff’s name when a debt buyer has acquired the debt the defendant incurred
38 with a credit-card company. Lisa Stifler, *Debt in the Courts: The Scourge of Abusive Debt*
39 *Collection Litigation and Possible Policy Solutions*, 11 HARV. L. & POL’Y REV. 91, 108 (2017).
40 Parties with limited English proficiency may not be able to understand the documentation they

1 receive. And even a party who receives and understands notice may struggle to respond as
2 effectively as possible to protect rights and interests. Faced with legal problems, many people,
3 especially those with lower incomes or from marginalized communities, react with shame,
4 powerlessness, frustration, or resignation. Rebecca L. Sandefur, *The Importance of Doing*
5 *Nothing: Everyday Problems and Responses of Inaction*, in TRANSFORMING LIVES: LAW AND
6 SOCIAL PROCESS 112, 123-126 (Pascoe Pleasence et al., eds. 2007); Sara Sternberg Greene, *Race,*
7 *Class, and Access to Justice*, 101 IOWA L. REV. 1263, 1267 (2016).

8 *b. Tailored notice rules and due process.* The prevailing due-process standard for
9 measuring the adequacy of notice comes from *Mullane v. Central Hanover Bank & Trust Co.*, 339
10 U.S. 306 (1950). There, the U.S. Supreme Court held that “[a]n elementary and fundamental
11 requirement of due process in any proceeding which is to be accorded finality is notice reasonably
12 calculated, under all the circumstances, to apprise interested parties of the pendency of the action
13 and afford them an opportunity to present their objections.” *Id.* at 314. Due process does not require
14 that an interested party actually receive notice. Rather, “the means employed” for providing notice
15 “must be such as one desirous of actually informing [the party receiving notice] might reasonably
16 adopt to accomplish it.” *Id.* at 1315.

17 Exactly what the *Mullane* standard requires for the form and content of notice in particular
18 adjudication contexts depends upon the circumstances. E.g., *Tulsa Prof. Collection Servs., Inc. v.*
19 *Pope*, 485 U.S. 478, 489-490 (1988) (evaluating the interests of creditors of a decedent in knowing
20 about probate proceedings, the state’s interest in efficiency, and the expense and effectiveness of
21 different notice practices); see also *Hannah v. Larche*, 363 U.S. 420, 440 (1960) (“[T]he
22 requirements of due process frequently vary with the type of proceeding involved . . .”). The U.S.
23 Supreme Court in *Greene v. Lindsey*, 456 U.S. 444 (1982), measured notice’s adequacy against
24 the defendants’ circumstances and characteristics in the context of eviction litigation. A sheriff’s
25 deputy posted notice of a detainer action on the door of the tenant’s apartment pursuant to a state
26 statute that permitted such service when an effort at personal service failed. *Id.* at 446. Evaluating
27 this attempt at service, the Court noted that, “notices posted on apartment doors in the area where
28 these tenants lived were ‘not infrequently’ removed by children or other tenants before they could
29 have their intended effect.” *Id.* at 453. The deputy’s failure to account for this fact, of which
30 “process servers” in the area “were well aware,” meant that the attempted service fell short of due
31 process minima. *Id.*

32 These circumstances include, importantly, both the stakes of the case and the needs and
33 limitations of the party receiving notice. “Due process jurisprudence recognizes a sliding scale that
34 demands more protections the more substantial the intrusion or deprivation of a constitutionally
35 protected right.” *Flangas v. Perfekt Mktg.*, 507 P.3d 574, 580 (Nev. 2022); see also *Bivens v. Salt*
36 *Lake City Corp.*, 416 P.3d 338, 350 (Utah 2017) (“[T]he constitutional adequacy of notice is a
37 fact-specific inquiry, and we will scrutinize notice more carefully as the stakes rise – because, as
38 the private interest at stake becomes more and more important, so too does the cost of an erroneous
39 decision.”); *Mullins v. Direct Digit.*, 795 F.3d 654, 665 (7th Cir. 2015) (observing that “the types
40 of notice that courts require correspond to the value of the . . . interests” of the parties provided

notice). Fairly cursory practice, such as notice by publication, may be appropriate for parties who face only nominal or de minimis losses, especially if the state or the parties' adversaries have significant interests in having the litigation proceed to final judgment. E.g., *Salt Lake City Corp. v. Jordan River Restoration Network*, 299 P.3d 990, 1009 (Utah 2012). An absent class member with a \$15 claim at stake in a class-action settlement may only be entitled to notice posted on various websites. By contrast,

it is not too much to ask that a landlord seeking to evict a tenant from their home, an occurrence that could have devastating collateral impacts on the tenant and their family, be required to present evidence that it made the appropriate effort to locate the tenant and personally serve [the tenant] prior to the court exercising its authority to issue a default in favor of the landlord.

Southern Hills Ltd. P'ship v. Anderson, 179 A.3d 297, 302 (D.C. Ct. App. 2018).

The due-process standard also accounts for the needs and limitations of the party receiving notice. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983) ("[P]articularly extensive efforts to provide notice may often be required when [an adversary] is aware of a party's inexperience or incompetence."); Restatement of the Law Second, Judgments § 2, Comment f (AM. L. INST. 1982) ("When the party responsible for giving notice knows that the prescribed notice is unlikely to be understood, . . . he is required to modify the effort to give notice in accordance with that information."). Cf. *Goldberg v. Kelly*, 397 U.S. 254, 268-269 (1970) ("The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard."). In *Aguchak v. Montgomery Ward Co.*, 520 P.2d 1352 (Alaska 1974), the Alaska Supreme Court vacated a default judgment entered against consumer debtors who lived in a remote area far from the courthouse on grounds that the summons form failed to advise the defendants of the right to file a written pleading in lieu of a personal appearance to contest the plaintiff's allegations. The court took note of the fact that the debtors lived a significant distance from the court to which they were commanded to appear, such that travel costs would approximate the amount allegedly owed. The court also noted that, given the defendants' location and indigence, they almost surely would not have counsel who could have advised the defendants of the option to contest in writing. *Id.* at 1357. "[T]he proper tailoring of notice 'to the capacities and circumstances' of indigent [rural] defendants require[d] the communication of substantially more information regarding the methods by which such defendants can respond to a distant lawsuit than is presently imparted," the court held. *Id.* (quoting *Goldberg v. Kelly*, 397 U.S. 254, 268-269 (1970)); see also *Ogle v. Salamatof Native Assoc., Inc.*, 906 F. Supp. 1321, 1331 n.11 (D. Alaska 1995) (relying on *Aguchak*).

The high stakes of many areas of high-volume civil-adjudication support an exacting due-process measure of the adequacy of notice. So do the needs and limitations of the parties receiving notice. First, high-volume cases tend to involve matters of considerable, often exceptional, importance to parties defending claims brought against them. The interest a tenant has in housing is obvious. Beyond loss of housing, a tenant may face significant collateral consequences, including for the health and well-being of themselves and their families. See Robert Collinson & Davin Reed, *The Effects of Evictions on Low-Income Households* 30 (2018), <https://www.law.nyu.edu/sites/>

default/files/upload_documents/evictions_collinson_reed.pdf (concluding that evictions cause “a large and persistent increase in homelessness,” “increase emergency room use,” and “raise the risk of mental health hospitalizations”); Hugo Vázquez-Vera et al., *The Threat of Home Eviction and its Effects on Health Through the Equity Lens: A Systematic Review*, 175 SOC. SCI. & MED. 199 (2017). Eviction impacts children with particular severity. Emily Badger et al., *The Americans Most Threatened by Eviction: Young Children*, N.Y. TIMES (Oct. 2, 2023), <https://www.nytimes.com/2023/10/02/upshot/evictions-children-american-renters.html>. Although debt-collection lawsuits often involve modest amounts of money in absolute terms, defendants in these cases face considerable economic peril from an adverse judgment. Postjudgment interest can accumulate rapidly. Judgment creditors can garnish wages, put liens on property, and in some states seize money directly from bank accounts. PEW REPORT, *supra*, at 17-18. The majority of Americans live paycheck-to-paycheck and have less than three months’ worth of savings to cover emergencies. Lauren Sforza, *Survey: Nearly Two-thirds of Americans are Living Paycheck to Paycheck*, THE HILL (Jan. 30, 2023), <https://thehill.com/business/3836902-survey-nearly-two-thirds-of-americans-are-living-paycheck-to-paycheck/>; Francisco Velazquez, *Over Half of Americans Have Less than 3 Months Worth of Emergency Savings*, CNBC (July 28, 2021), <https://www.cnbc.com/2021/07/28/51percent-of-americans-have-less-than-3-months-worth-of-emergency-savings.html>. Second, as discussed throughout this Chapter, parties to eviction, debt collection, and other types of high-volume civil adjudication often lack access to counsel, have limited resources, may lack English proficiency, may have disabilities, and endure other circumstances that interfere with meaningful participation to protect rights and interests.

Two additional comments on due process’s flexibility and regard for party characteristics merit mention. First, the due-process standard for notice also accounts for the burdens placed on the party providing notice, as well as this party’s interest in an efficient adjudication of the party’s claims. *Mullane*, 339 U.S. at 317-318; *Jones v. Flowers*, 547 U.S. 220, 236 (2006) (requiring a party providing notice to use one of several “relatively easy options” but not one that imposes a “significantly greater” “burden[]”); *Tulsa Prof. Collection Serv., Inc v. Pope*, 485 U.S. 478, 489-90 (1988) (insisting that notice need not be “inefficient or burdensome”); *id.* at 489 (weighing a party’s “legitimate interest in the expeditious resolution of . . . proceedings” in the due process calculus). Individual landlords, for instance, own a large share of rental properties in the United States. Hyojung Lee, *Who Owns Rental Properties, and is it Changing?*, JOINT CTR. HOUSING STUDIES HARV. UNIV. (Aug. 18, 2017), <https://www.jchs.harvard.edu/blog/who-owns-rental-properties-and-is-it-changing>. They may have particular interests in expeditious access to rental units and thus legitimately expect a notice requirement for eviction litigation that does not unduly disrupt or delay proceedings or impose an unreasonable cost.

Second, the *Mullane* standard is predictive. “[T]he constitutionality of a particular procedure for notice is assessed *ex ante*, rather than *post hoc*.” *Jones v. Flowers*, 547 U.S. at 231. Due process, then, does not consider the particular circumstances of a specific litigant when notice actually goes awry in a specific case. Rather, the constitutionality of a notice practice depends upon an assessment of the circumstances, needs, and limitations of categories of litigants and types

of cases. Cf. *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976) (insisting that due-process rules be fashioned for “the generality of cases, not the rare exceptions”).

Rules tailored to the circumstances, needs, and limitations of the category of litigants involved in particular types of high-volume civil adjudication are consistent with the principles that inform due process. Rules are just that—rules, not flexible standards to be applied differently from case-to-case. See Kevin M. Clermont, *Rules, Standards, and Such*, 68 BUFF. L. REV. 751, 758 (2020). Rules tailored by case type can balance the need for administrability and predictability against the understanding that landlords and tenants may present a different set of notice needs and concerns than creditors and consumer debtors.

Virtually all jurisdictions have promulgated tailored service-of-process and other notice rules in settings relevant to high-volume civil adjudication. Many states, for instance, require prefiling notice in eviction litigation. E.g., OHIO REV. CODE § 1923.04; TENN. CODE ANN. § 66-7-109(a); TEX. PROP. CODE § 24.005; ARIZ. REV. STAT. § 33-1368(A)(2). Likewise, many states have rules that permit landlords under certain circumstances to serve complaints by posting them on the premises and mailing them to tenants. E.g., FLA. STAT. § 48.183; 735 ILL. COMP. STAT. § 5/9-107; ALA. CODE § 35-9A-461(c); MINN. STAT. ANN. § 504B.331(d). Notice rules may even vary within case type. In Colorado, for instance, landlords generally must provide 10 days’ notice to quit before filing eviction lawsuits. But landlords who lease single-family homes and who own five or fewer single-family rental units need only provide five days’ notice. CO. REV. STAT. § 13-40-104(1)(d); *id.* § 13-40-104(5)(b).

In many instances, notice rules exceed due process minima. Service-of-process rules are the clearest and most important example. Although “the mails today are recognized as an efficient and inexpensive means of communication,” *Mullane*, 339 U.S. at 319, virtually all jurisdictions require personal service or its equivalent for the summons and complaint. E.g., FED. R. CIV. P. 4; CAL. CODE CIV. P. § 415.10; ALA. R. CIV. P. 4(a)(3); S.C. R. CIV. PROC. 4(d)(1). Compare *Mullane*, 339 U.S. at 313-314 (rejecting a universal personal-service obligation on grounds that it may create “impossible or impractical obstacles” depending on the circumstances). While many of these jurisdictions authorize service by mail, they require more than the simple placement of the summons and complaint in the mail, often demanding some sort of confirmation of receipt. Andrew C. Budzinski, *Reforming Service of Process: An Access-to-Justice Framework*, 90 U. COLO. L. REV. 167, 200 n.171 (2019). Numerous jurisdictions have devised tailored notice rules to address concerns for the effectiveness of notice in various high-volume civil-adjudication contexts. These rules include obligations on courts to supplement party-provided notice (§ 3.08), obligations on plaintiffs to provide prefiling notice (§ 3.03), and requirements that the documents served at the outset of the case include information about available resources that self-represented litigants can access at the time of service (§ 3.06).

This Chapter’s recommendation for tailored rules that exceed due process minima, then, are consistent with notice and service practices generally and in the high-volume civil-adjudication context. But their fundamental consistency with basic premises of the *Mullane* standard for notice should also inform these due process minima as they evolve. This Chapter’s proposals, in other

words, are not limited by due process’s existing horizons, but they should inform these horizons’ development. *Cafeteria and Restaurants Workers Union Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 895 (1961) (“The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.”); Jason Parkin, *Adaptable Due Process*, 160 U. PA. L. REV. 1309, 1377 (2012) (concluding that “adapting the requirements of due process to new facts and circumstances is faithful to constitutional doctrine and necessary to ensure that existing procedural systems continue to provide due process of law.”).

c. Obligations and best practices for courts and other rulemakers. This Chapter’s principles require the adoption of rules that set minimum requirements for notice and service. E.g., § 3.04(a) & (b). Other principles impose affirmative obligations on courts, including the provision of forms and other court documents to strengthen the integrity and efficacy of notice, e.g., § 3.06, and the review of filings to ensure proper service before entering judgment. § 3.08(b).

This Chapter’s principles further provide that courts should take concrete steps to incentivize best notice practices, including steps that go beyond what governing rules setting forth minimum service obligations already require. For instance, a plaintiff satisfies minimum service obligations by serving a defendant via personal service, even if the plaintiff does not provide supplemental service by some reasonably available, low-cost method. See § 3.04 (Preferred and Alternative Service). To incentivize parties to take these additional steps, this Chapter suggests that courts leverage presumptions applicable in instances of challenges to service. Importantly, a presumption of proper service almost invariably arises from the filing of a facially valid proof of service. See § 3.09 (Challenging Service). As Comment *c* explains, courts should administer this presumption of proper service in ways that prompt litigants to do the most that is reasonably possible, not the least, to ensure that their adversaries receive actual notice. If a party uses a reasonably available, low-cost means to supplement personal service, for instance, an adversary should have to meet a heavier evidentiary burden to rebut this presumption when challenging service. See § 3.09 (Challenging Service).

Judicious administration of the presumption of proper service may vary by party type of a case’s circumstances. For instance, more may be required of an institutional, repeat-player plaintiff with ready access to multiple types of contact information and the ability to supplement minimum service requirements in scaleable, low-cost ways. As a result, a party providing notice at the outset of a case may face at least some uncertainty and may not be able to predict fully how a court might eventually assess its efforts. However, particularly for the sort of institutional, repeat-player plaintiffs common in high-volume civil adjudication, this uncertainty likely would incentivize these parties to do all they reasonably can, rather than as little as the rules permit, to ensure that their adversaries receive actual notice. Cf. Tom Baker et al., *The Virtues of Uncertainty in Law: An Experimental Approach*, 89 IOWA L. REV. 443, 480 (2004) (explaining how uncertainty in the administration of penalties can produce deterrence in tort and criminal law).

1 **§ 3.02. Reasonable Diligence**

2 **(a) Rules governing service of process should require:**

3 **(1) that the party attempting service take reasonably available steps to confirm**
4 **the accuracy of the identity, location, and contact information of the party to be**
5 **served; and**

6 **(2) that the party attempting service use reasonably available means to rectify**
7 **unsuccessful service whenever the party knows or has reason to know that an attempt**
8 **at service has failed to provide actual notice.**

9 **(b) Toward these ends, courts and other rulemakers should provide proof-of-service**
10 **forms tailored to case types. Such a form should require the party attempting service to**
11 **document the steps, if any, the party has taken to confirm the identity, location, and contact**
12 **information of the party to be served. The form should also require the party attempting**
13 **service to document previous service attempts, and also to document whether the party has**
14 **reason to know if service has failed to provide actual notice and what the party has done to**
15 **address the problem. The form may require the party attempting service to take a particular**
16 **step appropriate to the case type, or to explain why that step is not appropriate under the**
17 **circumstances.**

18 **Comment:**

19 *a. Reasonably available steps and knowledge or awareness of likelihood of success.*
20 Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), requires that notice be
21 attempted in a manner that “one desirous of actually informing” the party to be served would use.
22 Id. at 315. If a party attempting service knows or has reason to know that this notice has failed or
23 will fail, the party does not meet the *Mullane* standard if the party does not act on this information
24 when it attempts to provide notice. Restatement of the Law Second, Judgments § 2, Comment *f*
25 (“[I]f the party knows that notice delivered in the usual way will not be received, he must use a
26 different method of delivery.”). If a party knows or has reason to know that its attempt at service
27 has failed, even if the party has otherwise met the requirements for proper service, the party must
28 attempt service again using a reasonable alternative method. Jones v. Flowers, 547 U.S. 220, 229-
29 230 (2006).

1 Subsection (a)(1) contemplates steps the party attempting service in high-volume civil
2 adjudication should take to increase the likelihood of service that provides a defending party with
3 actual notice. A service rule consistent with subsection (a)(2) would impose obligations on the party
4 attempting service to utilize reasonably available means to address the reasons why a previous
5 service attempt has or is likely to have failed to provide the defending party with actual notice.

6 The balance of considerations that determine what is required to fulfill the notice obligation
7 in a particular high-volume civil-adjudication context should account for available resources that
8 can increase the likelihood that a service attempt provides actual notice. A party attempting service,
9 for instance, should check reasonably available information that could confirm where the party to
10 be served most likely resides or is located. The proliferation of inexpensive, easily accessed
11 databases including address information should factor into the balance of considerations that
12 determine the reasonableness of an effort at notice. Likewise, when the parties have readily
13 available digital means of contacting each other, a party that has reason to know that a service
14 attempt may not have provided a defending party with actual notice should follow up by one of
15 those digital means.

16 The determination of whether address or other contact information is “reasonably
17 available” should account for the circumstances of the case and the capacities of the litigants.
18 Those circumstances and capacities will likely recur for particular high-volume civil-adjudication
19 case types. Courts and other rulemakers should thus set rules for types of cases that establish
20 presumptions about the steps litigants should take. A tenant’s location is rarely an issue in eviction
21 litigation, and thus a landlord would only need to take additional steps to confirm the tenant’s
22 location if the landlord has reason to believe that the tenant cannot be found at the rental address.
23 By contrast, debt-collection cases may commence years after the parties’ contractual relationship
24 begins. Plaintiffs in those cases should take reasonably available steps to confirm defendants’
25 locations given the prospect that the address information in the contract may be out of date.

26 A court’s determination as to whether a particular method of service was reasonably
27 available to a party attempting service should account for cost. If a repeat-player litigant can spread
28 the cost of a database across hundreds or even thousands of filings, that database will likely be
29 found to be reasonably available to such a litigant to confirm the identity, location, and contact
30 information of the party to be served. By contrast, access to such a database may pose an
31 unreasonable cost to a plaintiff who sues only once or infrequently. That said, even the latter

1 plaintiff should try to contact a defendant at a telephone number or email address that the
2 plaintiff has on file if the plaintiff has reason to doubt whether the plaintiff knows the defendant's
3 location, or if the plaintiff has reason to believe that service at the defendant's physical location
4 may fail to provide actual notice.

5 **Illustrations:**

6 1. Debt Buyer files more than 100,000 cases each year. Debt Buyer can spread the
7 costs of access to address databases across these cases, making per-filing costs negligible.
8 Debt Buyer should use these databases to confirm, to the extent practicable, addresses of
9 the defendants it sues.

10 2. Landlord knows that Tenant regularly travels for extended periods of time. Tenant
11 has given Landlord a telephone number at which Tenant can be reached while traveling.
12 Landlord should confirm Tenant's location by phone or text message before assuming that
13 Tenant is physically present at the rental address and can be successfully served there.

14 3. Owner of a vacation home fails to pay a painting bill owed to House Painter.
15 House Painter has multiple addresses on file for Owner, as well as Owner's telephone
16 number. House Painter does not need to pay for access to an online database to confirm
17 Owner's address for service purposes, but House Painter should try to confirm the best
18 address by phone or text.

19 4. Landlord's process server attempts to personally serve Tenant at the rental
20 address. Tenant is not there. The process server returns a second time and posts the
21 summons and complaint on the door, then follows up by mail. But Landlord knows that
22 Tenant travels frequently and thus may not be physically present at the rental address.
23 Landlord has reason to know that the posting and mailing may fail to provide actual notice
24 and should use reasonably available means to rectify the problem. These means may
25 include emailing the complaint to Tenant at an email address Landlord already has on file.

26 *b. Reporting obligation.* Under subsection (b), courts and other rulemakers should provide
27 proof-of-service forms that require a party serving process to provide information about the steps
28 the party attempting service took to confirm an adversary's identity, location, or address. The
29 proof-of-service form should also require parties attempting service to indicate whether a previous
30 service attempt has failed to succeed. If a previous attempt was unsuccessful, the party attempting
31 service should document the steps it took, if any, to confirm an adversary's location or otherwise

1 to address the circumstances that made the attempt unsuccessful. The form should also elicit
2 information about whether the party attempting service has reason to know whether service has
3 failed to provide actual notice and what steps, if any, the party took to address the problem. If a
4 party moves to dismiss or to vacate a judgment based on improper service or lack of notice, this
5 information will enable the court to determine if the party attempting service met the “reasonable
6 diligence” threshold. Documentation of the efforts the party attempting service took to confirm an
7 adversary’s location may include an image of the database entry showing the adversary’s address.

8 The information requested on a proof-of-service form should be tailored to different case
9 types. In an eviction case, for instance, the form should ask the plaintiff-landlord whether the
10 landlord has reason to believe that the tenant-defendant does not reside at the rental address. If so,
11 the landlord should document the steps the landlord took to determine, to the extent practicable,
12 the tenant’s most likely location and why the landlord provided service there. By contrast, the form
13 in a debt-collection case should require the plaintiff to indicate what resources, if any, the plaintiff
14 consulted to confirm the defendant’s location. If the plaintiff did not consult any resources, the
15 plaintiff should provide a reason why it did not do so. If the resources the plaintiff consulted
16 provided inconsistent location information, the plaintiff should indicate why it opted to serve at
17 the location it chose. A court form may require a party attempting service to consult a particular
18 source of information to confirm an adversary’s address or location if an accessible and reliable
19 source exists for the jurisdiction.

REPORTERS’ NOTES

20 *a. Reasonably available steps and knowledge or awareness of likelihood of success.* A
21 party cannot lawfully provide notice at an address the party knows is incorrect or out-of-date. E.g.,
22 Robinson v. Hanrahan, 409 U.S. 38, 40 (1972) (holding that service at a person’s residence violates
23 due process if the state knows the person is in jail at the time of service); State v. 1330.00 in U.S.
24 Currency, 215 So. 3d 211 (La. 2017) (holding that notice mailed to the claimant’s last known
25 address violates due process if the state knows the claimant is incarcerated); Cititax Group, L.L.C.
26 v. Gibert, 108 So. 3d 229, 234 (La. Ct. App. 2012) (service at the wrong address when the correct
27 one was known violates due process). Cf. UTAH BAR FOUNDATION REPORT ON DEBT COLLECTION
28 AND UTAH’S COURTS 36 (Apr. 2022) (documenting instances of service at outdated addresses in
29 litigation over past-due rent). If circumstances give the party reason to believe that the address
30 information is incorrect or outdated, effective notice requires the party to do more than provide
31 service at the incorrect address. “A diligent search must include inquiries that someone who really
32 wants to find the defendant would make” In re E.R., 385 S.W.3d 552, 565 (Tex. 2012).

In *Jones v. Flowers*, 547 U.S. 220 (2006), a state attempted to provide notice of a tax foreclosure proceeding by certified mail at a property owner’s former address. The letter was returned as “unclaimed.” This attempt at notice, without more, violated due process. *Id.* at 230. “Deciding to take no further action is not what someone ‘desirous of actually informing’ [the owner] would do; such a person would take further reasonable steps if any were available.” *Id.* at 230 (quoting *Mullane*, 339 U.S. at 315); see also *Kelber v. WVT*, 213 F. Supp. 3d 789, 800-804 (N.D. W. Va. 2016) (discussing *Jones* and explaining what additional steps a party must take to satisfy due process). If, for instance, a party attempts but fails to serve an adversary, knows that an adversary is often not at the service address, and has a readily available means by which it can contact an adversary, service is invalid if the party does not attempt to confirm a better service address. See generally *In re E.R.*, 385 S.W.3d 552, 564-566 (Tex. 2012) (declaring this principle and supporting it with case law from several states); *Edelhoff v. Shakespeare Theatre at the Folger Library, Inc.*, 884 A.2d 643, 646 (D.C. Ct. App. 2005) (holding that service in an eviction case failed when the landlord twice attempted personal service, then posted the summons on the tenant’s door, when the landlord knew the tenant traveled frequently and had a telephone number at which it could try to reach the tenant).

The obligation to take reasonable steps to confirm a party’s address or contact information is particularly important in the context of high-volume civil adjudication. Statutes of limitations on consumer-debt claims, for instance, can extend for long periods of time. E.g., Mass. Gen. L. Title V, Ch. 260, § 2 (six years); *Portfolio Acquisitions, L.L.C. v. Feltman*, 909 N.E.2d 876, 884 (Ill. App. Ct. 2009) (five years); R.I. GEN. LAWS § 9-1-13 (ten years). Given the frequency with which Americans move, consumer-debt plaintiffs may often have outdated addresses for defendants on file when litigation commences years after a debt accrues. PEW, IMPROVE DEFENDANT NOTIFICATION, *supra*. Especially when considerable time passes between the last contact with their adversary and the lawsuit, the party providing service has an obligation to take steps to confirm the accuracy of the adversary’s address before serving. *W.S. Frey Co., Inc. v. Heath*, 158 N.J. 321, 326 (1999) (holding that attempted service violated due process in part because “no effort was made” to contact the defendant and confirm the accuracy of his address when the plaintiff sued considerably after the events that led to litigation).

While “reasonable diligence will depend on the facts and circumstances of each case,” the standard requires the party attempting service “to use common and readily available sources in the search of the defendant’s address.” *Am. Tax Funding, LLC v. Robertson Sandusky Properties*, 26 N.E.3d 1202, 1209 (Ohio Ct. App. 2014). This standard favors an obligation to use readily available, inexpensive resources to confirm the addresses of parties entitled to notice when this effort will tend to increase the likelihood that these parties actually receive notice when service is provided, and when the effort does not impose undue costs. In *Jones v. Flowers*, the U.S. Supreme Court held that the state did not need to perform “an open-ended search for a new address,” using government records, when notice provided by certified mail was returned as “unclaimed.” 547 U.S. at 236. The Court suggested that such an obligation would entail “burdens” “significantly greater” than “several relatively easy” alternative “options.” *Id.* Since *Flowers* in 2006, databases with address

information have proliferated and should be easily accessible in many instances, especially for repeat-player litigants, who can spread the cost of database subscriptions or access across numerous cases. Adrian Gottshall, *Solving Sewer Service: Fighting Fraud with Technology*, 70 ARK. L. REV. 813, 857-858 (2018); see also *Foreclosure of Liens for Delinquent Land Taxes in Action in Rem v. Holton*, 428 S.W.3d 670, 682 n.12 (Mo. Ct. App. 2014) (following *Flowers*, declining to require particular search efforts, but “recogniz[ing] that as technology advances, the ability to locate individuals becomes easier and less expensive” and suggesting that these changes may factor into the due-process balance). Administering due-process requirements and other laws, courts in several states have required parties attempting to provide notice to use this sort of information. E.g., *In re Dar C.*, 957 N.E.2d 898 (Ill. 2011) (holding that a party’s attempt to provide notice violated Illinois law when it failed to use all available databases to confirm an address); *Erin Cap. Mgmt., L.L.C. v. Fournier*, No. 11AP-483, 2012 WL 760711, at *5 (Ohio Ct. App. Mar. 8, 2012) (finding a service improper when the defendant did not serve the plaintiff at an address “readily available through a publicly accessible database”). For instance, a party that resorts to service by publication without undertaking “an effort” to locate the party to be served “proportional to the use and value of the property” interest at stake violates due process. *Bd. of Reno Cnty Comm’rs v. Akins*, 21 P.3d 535, 541-542 (Kan. 2001) (faulting the county in a tax foreclosure proceeding for failure to check with another government agency or a tenant living on the taxpayer’s land); see also *Owens v. Tergeson*, 363 P.3d 826, 836 (Colo. App. 2015) (suggesting that due process requires a search of “local tax rolls, deed records, judicial records, and other official records” for address information before resorting to service by publication); *Jackson Const. Co. v. Marrs*, 100 P.3d 1211, 1217 (Utah 2004) (holding that service by publication in a quiet-title action violated due process when the plaintiff failed to “make reasonably diligent attempts” to find the defendant, including by consulting the defendant’s cotenant or checking a telephone directory). Cf. *MacNaughton v. Warren County*, 20 N.Y.3d 252, 258 (2012) (following *Flowers* but commenting that a requirement that a taxing authority obtain an alternative address from the U.S. Postal Service “does not seem a burdensome one” and may be required under certain circumstances).

The benefits of an investigation into a party’s whereabouts will vary based on case type. Because a debt-collection lawsuit may commence years after the defendant enters into the contract that generates the debt at issue, the contract may reflect an out-of-date address. An effort to verify the defendant’s address using a low-cost, readily accessible commercial database may prove particularly beneficial. Moreover, if the plaintiff is a repeat-player litigant, the plaintiff can spread the costs of database access across multiple cases, lowering the per-case cost such that the expected benefit outweighs it. Reflecting these considerations, several jurisdictions have established an obligation for parties attempting service in debt-collection cases to document in an initial filing the steps they have taken to verify their adversary’s address. MASS. UNIF. SMALL CLAIMS RULE 2(b) (requiring the plaintiff in a debt-collection case to file a Verification of Defendant’s Address form along with the Statement of Small Claim indicating the steps the plaintiff has taken to confirm the defendant’s address within the 12 months prior to filing); *Small Claims Writ and Notice of Suit*, Form JD-CV-40, State of Connecticut Superior Court, Small Claims Session (requiring the plaintiff

1 to document steps taken to verify the defendant’s address). New York requires debt-collection
2 plaintiffs to provide the court with an “additional notice of lawsuit” form, which the court then
3 mails to the defendant at the address included in the proof of service. If the form is returned as
4 undelivered, no default judgment may enter until the plaintiff provides proof that the address
5 matches the defendant’s address in Department of Motor Vehicles records. N.Y.C.P.L.R. § 306-d.

6 By contrast, a landlord suing for possession will almost always know where the tenant is,
7 absent an unusual circumstance. The benefits of an investigation into the tenant’s whereabouts
8 would likely be slight. Thus, landlords in most instances should not need to take steps to confirm
9 the tenant’s whereabouts. This obligation changes if the landlord has reason to believe the tenant
10 is not present at the rental address. *S. Hills Ltd. P’ship v. Anderson*, 179 A.3d 297, 301 (D.C. Ct.
11 App. 2018) (holding that a landlord’s failure to contact a court or access public docket information
12 to ascertain an arrested tenant’s whereabouts contributed to a due-process violation when the
13 landlord was aware of the tenant’s arrest).

14 *b. Reporting obligation.* The costs and benefits of efforts to confirm an adversary’s location
15 will often vary in predictable ways by case type. For this reason, and to reduce uncertainty for
16 parties attempting service, courts and other rulemakers should design proof-of-service forms,
17 tailored to particular case types, that elicit the sort of information about reasonably available steps
18 appropriate for different types of cases. Every proof-of-service form should also require the party
19 attempting service to document any failed attempts and what steps that party took to confirm an
20 adversary’s location. Forms can thus generate information courts can readily administer to
21 determine whether the party attempting service should benefit from a presumption of proper
22 service, and how to administer that presumption when service is challenged. See § 3.09
23 (Challenging Service).

24 § 3.03. Timing of Notice

25 **(a) Rules governing notice and service of process in high-volume civil adjudication**
26 **should require that a party against whom claims are asserted have sufficient time to prepare**
27 **and assert an effective response to those claims, consistent with § 4.05 (Procedural Limits on**
28 **Defenses and Counterclaims).**

29 **(b) Under certain circumstances, timeliness may require prefiling notice. In**
30 **determining whether to require prefiling notice and in what form for particular types of**
31 **cases, courts and other rulemakers should consider:**

32 **(1) the likelihood that prefiling notice would ensure that the party against**
33 **whom claims are asserted actually learns of the litigation once it commences, to enable**
34 **the party to respond effectively;**

1 **(2) the potential of prefiling notice to enable the parties to resolve the dispute**
2 **without commencing litigation;**

3 **(3) the likely burdens of an additional notice obligation on the party providing**
4 **notice, including any legal risks that prefiling notice creates;**

5 **(4) the likely efficacy and cost of various means of providing prefiling notice**
6 **other than by mail or in-person personal service; and**

7 **(5) the possibility that prefiling notice may be coercive or otherwise abusive.**

8 **(c) In no instance should a prefiling-notice obligation lessen whatever service**
9 **obligation a party attempting service otherwise incurs.**

10 **Comment:**

11 *a. Timeliness as essential to the effectiveness of notice.* “If the right to notice and a hearing
12 is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can
13 still be prevented.” *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972). Notice that does not give a party
14 sufficient time to prepare and assert a response before something of significance in the case happens
15 violates this principle. The responding party must have enough time to investigate the allegations
16 an adversary makes; identify what defenses, denials, and counterclaims may be appropriate; and
17 prepare and file all documents necessary to preserve any arguments that the party may make.

18 As elaborated in § 4.05(c), courts and other rulemakers should not impose unreasonable
19 time limits on answer or response periods. As a default, answer or response periods in high-volume
20 civil adjudication should conform to the deadlines that a jurisdiction sets for civil litigation
21 generally. A shorter time period should require a particular justification. See § 4.05, Comment *d*.

22 The circumstances of litigation may determine the timeliness of notice, requiring
23 adjustments to response or answer periods otherwise set for different high-volume civil-
24 adjudication case types. For instance, whether notice is timely may depend upon how it is provided.
25 When a party serves an adversary personally, the adversary receives notice of the lawsuit at the
26 moment service is made. By contrast, when a party provides service by mail, several days or more
27 can pass between the moment when that party places the summons and process in the mail and the
28 moment when an adversary actually receives these documents. The rule setting a deadline for the
29 responding party’s answer should differentiate between the two situations. Otherwise notice may

1 be timely when a party personally serves an adversary but not when that party provides service by
2 mail. The response deadline should be extended by at least several days for service by mail.

3 The determination of the timeliness of notice also requires a balancing of the interests at
4 stake in the case. In rare instances, exigencies may require a case affecting a party's interests to
5 proceed, at least in part, before that party receives notice. Such instances should be infrequent and
6 typically involve an urgent situation that requires immediate court intervention before notice can
7 be provided—circumstances that would otherwise satisfy requirements for a temporary restraining
8 order.

9 *b. Prefiling notice.* Prefiling notice serves at least two important functions in high-volume
10 civil adjudication. First, it can enable the responding party to resolve the matter without formal
11 proceedings. While the informal resolution of disputes without litigation is generally thought
12 desirable, it has particular value in eviction and debt-collection litigation, where deprivations may
13 result from the commencement of a lawsuit alone. A landlord association or tenant-screening
14 company, for instance, may scrape data from court records, creating adverse implications even for
15 those tenants who prevail or settle upon favorable terms. That sort of consequence disappears if
16 the case never gets filed, an outcome enabled by prefiling notice.

17 Second, prefiling notice also acts as a supplemental form of notice, increasing the
18 likelihood that a party does not default simply for failure to learn of the action. It can be provided
19 with less formality and expense than the service of the summons and complaint.

20 Prefiling notice also poses some challenges. For instance, a party who has no intention
21 actually to file a lawsuit may use the threat of litigation to coerce an adversary into an action
22 against that adversary's interests. Conversely, prefiling notice that leads to a negotiated resolution
23 without litigation may create a risk of liability for the party providing it. Federal and state law
24 regulates communications between debt collectors and consumer debtors, and any prefiling-notice
25 obligation would have to honor those limits. A prefiling-notice requirement should include
26 protections to ensure that it has salutary effects without creating harm.

27 Consistent with § 3.01(b), subsection (b) of this Section recommends that courts and other
28 rulemakers set prefiling-notice obligations by case type. It enumerates several considerations that
29 should inform whether prefiling notice should be required for a particular case type, and also the
30 form this prefiling notice should assume. These considerations include the likelihood that prefiling
31 notice will make actual postfiling notice of litigation more likely; the availability of means of

1 providing notice beyond those required for formal service, as well as their likely efficacy; the
2 potential of prefiling notice to lead to a resolution without litigation; and potential harms that
3 prefiling notice might cause.

4 As practices in multiple jurisdictions suggest, these considerations should support
5 prefiling-notice requirements for eviction litigation. The costs and benefits of prefiling notice in
6 debt-collection litigation are more uncertain. A jurisdiction considering a prefiling-notice
7 requirement for debt-collection litigation should identify and design around potential liability that
8 the provision of prefiling notice might create for plaintiffs.

REPORTERS' NOTES

9 *a. Timeliness as essential to the effectiveness of notice.* Subsection (a) refers to § 4.05,
10 which discusses time limits for responsive pleadings or appearances that raise defenses and
11 possible counterclaims. These time limits pose less of a concern in debt-collection litigation. The
12 default answer or response period a jurisdiction sets for civil litigation generally tends to apply to
13 these cases. E.g., Ohio State Att’y General, *Debt Collection FAQs* (noting that debt-collection
14 defendants have 28 days to answer or respond); Ohio Civ. Rule 12(A)(1) (28-day answer period);
15 Legal Aid of Nebraska, *Debt Collection and Garnishment Court Cases* (30-day answer period);
16 Neb. Ct. Rules of Pleading – Civil § 6-1112(a)(1) (30 days). By contrast, states routinely set answer
17 or response periods for eviction cases that are shorter—often considerably so—than the period set
18 for civil litigation generally. Compare CAL. CODE CIV. PROC. § 412.20(a)(3) (30 days for civil
19 litigation generally), with CAL. CODE CIV. PROC. § 1167(a) (five days for tenant to respond after
20 personal service); see also ALA. R. CIV. PROC. 12(a) (30 days for civil litigation generally); ALA.
21 R. CIV. PROC. 12(dc) (seven days for eviction litigation).

22 In *Lindsey v. Normet*, 405 U.S. 56 (1972), the U.S. Supreme Court upheld Oregon’s
23 summary process for eviction actions, including a provision that permitted a trial within two days
24 of a complaint’s service on the tenant. *Id.* at 63. The Court noted that Oregon enacted the law
25 establishing this process in 1866 to replace landlords’ common-law right to resort to self-help, a
26 remedy that carried with it the possibility of violence. *Id.* at 71-72. The process spared the landlord
27 from “undeserved economic loss” and ended “a virulent source of friction and dispute,” and for
28 this reason it passed due process muster. *Id.* at 73.

29 *Lindsey v. Normet* has drawn considerable criticism, in part because the short answer period
30 it upholds for eviction cases prevents many tenants from taking the steps necessary to respond
31 meaningfully. E.g., Larisa G. Bowman, *Eviction Abolition*, 55 LOY. U. CHI. L.J. 541, 601 (2024).
32 See generally Kathryn Ramsey Mason, *Housing Injustice and the Summary Eviction Process:*
33 *Beyond Lindsey v. Normet*, 74 OKLA. L. REV. 391 (2022) (describing the history of summary
34 process in eviction and critiquing *Lindsey v. Normet* in light of developments since the early
35 1970s). Moreover, aspects of the decision stand in tension with subsequent Supreme Court
36 jurisprudence recognizing tenants’ interests in fair eviction procedure. See *Greene v. Lindsey*, 456

U.S. 444, 451 (1982) (describing tenants’ “right to continued residence in their homes” as a “significant interest in property”); *Pernell v. Southall Realty*, 416 U.S. 363(1974) (insisting that “both parties” to an eviction action should “have . . . a fair opportunity to present their cases,” and that “[o]ur courts were never intended to serve as rubber stamps for landlords seeking to evict their tenants”). To the extent the *Lindsey* court had an individual or small-scale landlord in mind when it invoked the particularly urgent need to restore landlord possession of income-generating property, *Lindsey*, 405 U.S. at 73, this perception of what types of landlords file eviction actions is outdated. See Henry Gomory, *The Social and Institutional Contexts Underlying Landlords’ Eviction Practices*, SOCIAL FORCES, Vol. 100, No. 4, June 2022, at 2 (determining based on extensive empirical investigation that large-scale landlords file eviction actions at a rate 2-3 times more frequently than small-scale landlords).

As Comment *d* to § 4.05 explains, a short answer or response period of the sort that *Lindsey v. Normet* held to be constitutional should require a particular justification, rooted in present-day eviction realities, for its departure from the default period for civil litigation in the jurisdiction. This departure can recognize landlords’ particular interest in the swift return of income-generating property, but it should also enable meaningful participation by tenants.

The timeliness of notice may require adjustments to account for particular circumstances, including how service is provided. In Florida, a tenant has five days to answer a landlord’s complaint whether the landlord serves the tenant in person or by posting the summons and process on the tenant’s home. FLA. R. CIV. PROC., Form 1.923 (amended July 6, 2023). Likewise, a tenant in Alabama has seven days to answer, regardless of whether the landlord serves the tenant personally or posts summons and process on the tenant’s door. ALA. RULE CIV. P. 12(dc); ALA. ADMIN. OFFICE OF CTS., ANSWER TO LANDLORD’S CLAIM, FORM PS-01. In Texas, service of the complaint must be completed at least six days before an eviction hearing proceeds regardless of how service is made. TEX. R. CIV. PROC. 510.4(b), (c)(3). The tenant already has little time to respond when served personally; a delay in discovering the posted notice may make compliance with the deadline impossible.

The failure to adjust important deadlines to account for the means of service can violate due process. *War Eagle Vill. Apts. v. Plumer*, 775 N.W.2d 714, 721 (Iowa 2009) (holding that service by certified mail violates due process in an eviction action when the hearing proceeds seven days after the complaint’s filing); see also *Becker v. Sunset City*, 216 P.3d 367, 369-370 (Utah App. 2009) (holding certified mail inadequate as a matter of due process when sent only one week before the hearing in question). California law extends the answer period from five to fifteen days when the landlord serves the tenant by posting and mailing instead of personal service. CAL. CODE CIV. PROC. § 415.45(c). This adjustment tracks the reality that service by posting alone can go awry, *Greene v. Lindsey*, 456 U.S. 444, 453-454 (1982), and that mailed notice can take several days to arrive. Other jurisdictions similarly extend the answer period for civil litigation generally when the plaintiff provides service by mail. E.g., MICH. CT. R. 2.108(A)(2) (extending the 21-day answer period to 28 days when service is made by mail).

b. Prefiling notice. Prefiling notice may be necessary to fully protect a party’s interests, especially in eviction litigation in which cases proceed on particularly fast timelines. In Ohio, for instance, “the day set for trial” in an eviction proceeding can be scheduled for seven days after the landlord serves the tenant with a summons. OHIO REV. CODE § 1923.06(A). The court can enter judgment on this date. Id. § 1923.07. Ohio requires landlords to provide a notice to vacate “three or more days before beginning the action” for nonpayment of rent. Id. § 1923.04(A). Such short periods of time from the provision of prefiling notice to a hearing at which judgment can be entered are insufficient for self-represented tenants facing housing insecurity to find resources and protect rights and interests.

Moreover, the filing of a lawsuit alone can have significant consequences for defendants. The appearance of a defendant in court records may affect that person’s ability to rent a home or secure credit, since credit agencies, landlords, and others often use court docket records to assess creditworthiness. E.g., CONSUMER FIN. PROT. BUREAU, TENANT BACKGROUND CHECKS MARKET 10-12 (2022); CMTY. LEGAL SERVS. OF PHILADELPHIA, ADVANCING PENNSYLVANIA’S HOUSING FUTURES: SEALING EVICTION RECORDS FOR HOUSING STABILITY AND ECONOMIC PROSPERITY 9 (2023). See generally Chapter 1 (General Principles of Fair Adjudication). The fact that court dockets often include outdated, even erroneous, information exacerbates this problem. E.g., UTAH BAR FDN. REPORT, *supra*, at 32-33 (reporting a significant percentage of “unsatisfied” judgments in consumer debt cases and speculating that docket inaccuracies account for many); Adam Porton et al., *Inaccuracies in Eviction Records: Implications for Renters and Researchers*, 31 HOUS. POL’Y DEBATE 377, 382 (2021) (determining that “22% of state eviction cases” from a 12-state sample have “ambiguous or false records”). Even if a plaintiff voluntarily dismisses a case, if the parties settle to the plaintiff’s satisfaction, if the defendant prevails, or the defendant otherwise discharges the liability, docket records may suggest ongoing litigation or liability. In eviction cases, for instance, landlords may forego pursuit of damages claims if they succeed in reclaiming the property. But court records may indicate that the former tenant continues to face unresolved liability. The consequences could be severe for vulnerable populations. Porton et al., *supra*, at 389 (noting that “having any presence in the eviction record is a major impediment to securing future housing and credit,” and concluding that “unresolved and opaque cases penalize tenants who, despite winning their cases or successfully negotiating with their landlord, are trailed by records which elide such developments”).

In most states, landlord–tenant laws require the landlord to provide notice in advance of filing an eviction action, offering the tenant an opportunity to cure whatever defect the landlord has identified. AM. BAR ASSOC., ABA TEN GUIDELINES FOR RESIDENTIAL EVICTION LAWS 1 (2022). The District of Columbia, for instance, requires landlords to provide tenants notice 30 days in advance of any eviction filing. D.C. CODE § 42-3505.01(a-1)(1). Maryland requires 10 days’ prefiling notice. MD. CODE, REAL PROP., § 8-401(c)(1); MD. EVICTION PROCESS LAW (2021). But see NOTRE DAME CLINICAL LAW CENTER, EVICTION PROTECTIONS FOR RENTERS: DOES INDIANA MAKE THE GRADE? 2 (2023) (reporting that Indiana requires no prefiling notice for landlords).

1 North Carolina has created a prefiling-notice obligation for debt-collection litigation. It
2 requires debt buyers to mail consumer debtors notice of an intent to sue 30 days before filing any
3 action. N.C. GEN. STAT. § 58-70-115(6); see also PEW CHARITABLE TRUSTS, HOW DEBT
4 COLLECTION WORKS IN PHILADELPHIA’S MUNICIPAL COURT 13 (2022).

5 Not only can prefiling-notice obligations protect prospective parties against the harmful
6 consequences of litigation, they can also lead to more efficient outcomes if they facilitate informal
7 resolutions that obviate the need for litigation. Fewer eviction filings happen, for instance, in states
8 where landlords must provide notice before commencing suit. Ashley Gromis et al., *Estimating*
9 *Eviction Prevalence Across the United States*, 119 PNAS 1, 6 (2022). Prefiling notice also
10 increases the likelihood that a defendant actually receives notice when served with the summons
11 and complaint, particularly if the plaintiff provides prefiling notice by a method that differs from
12 how the plaintiff provides service.

13 But prefiling notice can also impose costs. A landlord or creditor with no intention of filing
14 a lawsuit may send prefiling notice to intimidate the tenant or debtor into some action unwarranted
15 by the governing law or relevant facts. E.g., *Rider v. Carranza*, 306 Or. App. 616, 621 (2020)
16 (summarizing legislative history of a notice provision that comments on concerns about
17 termination notices used for illegitimate purposes). Prefiling notice may also confuse prospective
18 parties. A prospective defendant may not understand that suit has not yet been filed, or what to do
19 to avoid a lawsuit, or what happens when the complaint is filed. PEW, IMPROVE DEFENDANT
20 NOTIFICATION, *supra*. Particularly problematic are instances when procedures change depending
21 upon whether prefiling notice has been provided. In Utah, for instance, the time the tenant has to
22 file an answer depends upon whether a landlord provides pre-suit notice or not, and self-
23 represented tenants struggle to figure out exactly how to calculate the deadline for filing answers.
24 *Id.* Prefiling notice, then, should explain in clear, simple prose that the served party has not yet
25 been sued, what the party can do to avoid a lawsuit, the deadline the party faces before the
26 complaint will get filed, and what happens after a complaint gets filed.

27 The considerations listed in subsection (b) should help courts and other rulemakers
28 determine when the benefits of prefiling notice outweigh its costs for particular case types. These
29 considerations will almost surely counsel for prefiling notice in eviction litigation, as numerous
30 states have already recognized. For instance, landlords and tenants often communicate about rent,
31 repairs, and other matters by email or text message. In jurisdictions that require personal service
32 for eviction lawsuits, a prefiling-notice requirement might permit notification by less formal means
33 and take advantage of low-cost, efficient ways by which parties communicate effectively. Cf.
34 MISS. CODE REAL AND PERSONAL PROP. § 89-8-13(5)(a) (permitting a landlord to provide prefiling
35 notice by email or text if the tenant has agreed in writing to notification by these means). Moreover,
36 a tenant may better understand what is happening when personally served if the tenant has already
37 received a text message notifying the tenant of an impending lawsuit. The likelihood of actual
38 notice increases. Importantly, and as mentioned, prefiling-notice requirements reduce the
39 incidence of eviction litigation.

By contrast, whether prefiling-notice requirements make sense in debt-collection litigation may depend on jurisdiction-specific factors and merits further study. Various laws already require notice of a debt to be provided to consumer debtors. E.g., 15 U.S. § 1692h(a) (requiring a debt collector to provide a consumer with written notice of a debt that gives the consumer 30 days to contest its validity); WIS. STAT. § 425.104 (requiring creditors to provide consumer debtors with written notice of a right to cure); IOWA CODE § 537.5111 (right to cure requirement for consumer debts). If creditors have already invited debtors to challenge debts or otherwise attempt to resolve them, a prefiling-notice requirement may do little to resolve disputes before litigation commences. Moreover, less formal means like text messaging will rarely be available or efficacious for creditor-debtor communications. Finally, the burdens of this additional notice obligation might include potential liability for communications with consumer debtors that applicable federal and state laws might not permit. Cf. *Oei v. N. Star Cap. Acquisitions, LLC*, 486 F. Supp. 2d 1089, 1098 (C.D. Cal. 2006) (holding that a state law litigation privilege that protects against liability does not apply to FDCPA claims); *Irwin v. Mascott*, 112 F. Supp. 2d 937, 962-963 (N.D. Cal. 2000) (same).

Prefiling-notice requirements should include provisions to protect against potential abuses, including the possibility that the plaintiff might use prefiling notice to coerce the defendant into an unwise or unmerited settlement. A lawsuit filed when no reasonable basis exists to sue the defendant may expose the plaintiff or the plaintiff's attorney to sanctions under ethics rules. But these ethics rules do not apply until the plaintiff commences litigation.

Many jurisdictions have laws that protect tenants from harassing or threatening behavior engaged in by landlords under certain circumstances. E.g., COLO. REV. STAT. § 38-12-509 (prohibiting landlords from retaliating against tenants by threatening eviction). See also Manny Fernandez, *Expanded Protections for Tenants Upheld in Court*, N.Y. TIMES, (Aug. 5, 2009), <https://www.nytimes.com/2009/08/06/nyregion/06landlords.html> (describing New York City's Tenant Protection Act, which protects tenants from repeated frivolous filings by landlords). But such laws may not be sufficiently protective. E.g., *Garcia v. Adams*, 71 Misc. 3d 1205(A) (N.Y. Sup. Ct. Apr. 7, 2021) (explaining that a New York law protecting tenants from prefiling notice sent for illegitimate reasons applies only after repeated violations). A law that requires the tenant to prevail in an eviction action before the landlord is liable for threatening unwarranted litigation fails to protect tenants whom landlords never sue. Compare LOS ANGELES MUNI. CODE ch. IV, art. 5.3, § 45.33(7) (creating liability for threats to terminate a tenancy but requiring the tenant to prevail in an eviction action before the landlord is liable). By contrast, the Fair Debt Collection Practices Act (FDCPA) makes creditors strictly liable if they threaten to sue on time-barred debts. *Kaiser v. Cascade Cap.*, 989 F.3d 1127, 1135 (9th Cir. 2021); Consumer Financial Protection Bureau, *Fair Debt Collection Practices Act (Regulation F): Time-Barred Debt*, 88 FED. REG. 26475, 26476 (May 1, 2023); see also ORE. REV. STAT. § 646.349(2)(r) (prohibiting lawsuits to collect time-barred debt). A prefiling-notice requirement should include provisions specifying consequences, such as the sort of civil liability the FDCPA creates, if parties provide notice under conditions that would not support a lawsuit.

1 Prefiling notice will not serve its purposes if it is not provided in a timely fashion. In many
2 states, a landlord may file suit only three days after providing this notice. ABA TEN GUIDELINES,
3 *supra*, Guideline 1 Commentary. If the tenant has not paid past due rent or moved within these
4 three days, significant consequences, including liability for treble damages in some instances, can
5 ensue. UTAH BAR FDN. REPORT, *supra*, at 23. Three days are too few for a tenant to pay past due
6 rent or move. *Id.* The District of Columbia’s 30-day notice requirement better enables tenants to
7 respond appropriately before they become defendants.

8 *c. Prefiling notice and its relationship to formal service requirements.* The motivations for
9 a prefiling-notice requirement include, importantly, the increased likelihood that the party to be
10 served will actually receive notice of the action when it is filed. For this reason, a prefiling-notice
11 requirement should not lessen the formal service obligation a party attempting service otherwise
12 incurs. A personal-service requirement, for instance, should not yield to a lesser form of service
13 simply because the plaintiff has provided prefiling notice.

14 An idiosyncratic and potentially problematic equivalent to prefiling notice is so-called “hip
15 pocket filing.” This practice, permitted in only a few states, allows a party to serve the summons
16 and complaint on an adversary without first filing in court. See MINNESOTA STATE BAR ASSOC.
17 ACCESS TO J. COMM., MINNESOTA CONSUMER DEBT LITIGATION: A STATEWIDE ACCESS TO JUSTICE
18 REPORT 11 (2023). In Minnesota, the plaintiff has up to a year after service to file the case. *Id.* A
19 default judgment can be entered against a party who does not answer, with no court involvement at
20 all, and no obligation incurred by the party seeking relief to meet pleading or evidentiary submission
21 requirements. *Id.* at 10-11. Moreover, a party who receives notice and is concerned about a possible
22 scam would find no information about the case if the party checked a court’s docket information.
23 *Id.* To the extent that hip pocket service creates benefits by giving parties a chance to settle out-of-
24 court before litigation begins, see *id.* at 10, those benefits are better created by prefiling notice that
25 does not have the sort of judgment consequences that hip pocket filing does.

26 **§ 3.04. Preferred and Alternative Service**

27 **(a) *Personal and Supplemental Service.***

28 **(1) Rules governing service of process in high-volume civil adjudication should**
29 **make personal service the default method for most types of cases.**

30 **(2) Parties attempting personal service should use low-cost methods to**
31 **supplement this service when reasonable to do so. A party’s failure to supplement**
32 **personal service when reasonable to do so should factor into a court’s willingness to**
33 **enter a default judgment, consistent with § 3.08, or to vacate or set aside a judgment,**
34 **consistent with § 3.09.**

1 **(b) *Categorical Alternatives to Personal Service.***

2 **(1) Rules governing service of process may authorize an alternative to personal**
3 **service for a given case type if the alternative is at least as effective as personal service.**
4 **Such rules should account for the capacities and circumstances of the types of litigants**
5 **involved, the significance of the interests at stake, and the means by which parties**
6 **typically and reliably communicate in a given high-volume civil-adjudication area.**

7 **(2) Rules authorizing service by an electronic or digital method as an**
8 **alternative to personal service may be appropriate for cases involving parties that**
9 **have communicated reliably and successfully with each other by this method in the**
10 **past. A rule authorizing such service for a given case type should require the party**
11 **attempting service to provide information that the person being served has actually**
12 **received the summons and complaint, such as information indicating that the person**
13 **being served has opened the message, a returned acknowledgment of receipt, or some**
14 **other similar assurance of actual notice.**

15 **(c) *Alternatives to the Preferred Method of Service in Particular Cases.* When personal**
16 **service or an alternative to personal service is otherwise required, rules governing service of**
17 **process may permit service by a different method or methods if, in a particular case, the**
18 **party attempting service:**

19 **(1) shows that, after the exercise of reasonable diligence, the required method**
20 **of service cannot be completed at all or without undue difficulty or expense; and**

21 **(2) offers proof that the different method of service permitted by the rule was**
22 **accomplished in such a manner that the opposing party received or should have**
23 **received the summons and complaint.**

24 **Such rules should require a party attempting service by a different method to provide**
25 **supplemental service, when reasonable, by mail or digital means.**

26 **(d) *Contractual Provisions Regarding Service.***

27 **(1) Service pursuant to a method provided for in a contract between the parties**
28 **should not be considered proper unless this method is at least as likely to provide**
29 **actual notice to the party receiving service as the method the party attempting service**
30 **would otherwise be required to use under applicable law. A party attempting service**

1 **by a contracted-for method should include with its proof of service information**
2 **indicating why the contracted-for method will meet this standard.**

3 (2) **Service at a location specified in a contractual provision should not be**
4 **considered proper if applicable law would otherwise require service at a different**
5 **location unless service at the contracted-for address or location is as likely to provide**
6 **actual notice. A party providing service at such a contracted-for location should**
7 **include information with its proof of service that indicates why service at this location**
8 **will meet this standard.**

9 **Comment:**

10 *a. Personal service as default and supplemental service.* “Personal service of written notice
11 within the jurisdiction is the classic form of notice always adequate in any type of proceeding.”
12 *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). It should remain the
13 preferred method for high-volume civil adjudication until alternative methods, including service
14 by mail or a digital or electronic method, are shown to provide notice as effectively. That said,
15 given problems with personal service, parties attempting to serve opposing parties should use
16 supplemental methods as well when reasonable to do so under the circumstances. Such
17 supplemental methods may include service by a digital method.

18 **Illustrations:**

19 1. Landlord and Tenant communicate regularly about rent due and repairs by text
20 message. Supplemental service by text message would impose little burden on Landlord
21 and increase the likelihood that Tenant receives actual notice of a lawsuit. Landlord should
22 send Tenant the summons and complaint by text in addition to personal service.

23 2. Debt Collector sends a text message to Consumer Debtor about the debt
24 Consumer Debtor allegedly owes. Consumer Debtor then opts out of text-message
25 communications with Debt Collector. If Debt Collector then sues, supplemental service by
26 text message would be unreasonable, as a source of potential liability for Debt Collector
27 under the Fair Debt Collections Practices Act.

28 Notably, subsection (a) does not call on courts and other rulemakers to require that parties
29 supplement personal service. But, if a party chooses not to provide supplemental service by a
30 reasonably available method, the court should consider that choice when deciding whether to enter

1 a default judgment, see § 3.08, or whether to vacate or set aside a judgment, see § 3.09. If, for
2 instance, the record reflects a lack of actual notice, the court may refuse to enter a default judgment
3 until the party supplements a personal-service attempt. Likewise, if a defendant moves to vacate a
4 default judgment, alleging improper service, the court may weigh the plaintiff's failure to
5 supplement personal service with a reasonably available digital method against the presumption
6 of proper service that otherwise arises from a facially valid proof of service.

7 *b. Categorical alternatives to personal service.* Rules may authorize an alternative method
8 of service for a category of litigation or a category of litigants so long as the circumstances warrant
9 a departure from the personal-service default, and so long as the alternative is demonstrably at
10 least as effective as personal service. A categorical alternative to personal service should include
11 rules that ensure, to the extent practicable, that the party being served receives actual notice.

12 The jurisdiction should consider the needs and circumstances of the parties when deciding
13 whether to authorize an alternative method and what that method should be. For instance, parties
14 with fewer resources who are attempting service may have a stronger interest in alternative
15 methods of service, although the stakes for opposing parties may outweigh that interest. If an
16 alternative method is authorized, the parties' needs and circumstances should inform rules
17 regulating that alternative. If, for instance, a jurisdiction authorizes service on someone other than
18 a party, and if a readily available means exists to supplement that service, the jurisdiction should
19 consider requiring supplemental service.

20 Service by a digital or electronic method may be more effective than personal service,
21 particularly in eviction litigation. In many instances landlords and tenants have already
22 communicated with each other by text message, email, or other similar means about matters like
23 rent or repairs before litigation commences. A tenant may expect to receive important information
24 from a landlord through those means. By contrast, personal service may be surprising or
25 intimidating, and a tenant may be less likely to respond as a result. A tenant may be particularly
26 disinclined to accept personal service if the tenant has had negative experiences with legal
27 processes unrelated to the eviction action. Moreover, if a landlord and tenant have established a
28 practice of electronic or digital communication, service by that method may be more effective than
29 service by posting and mailing, which many jurisdictions allow for eviction litigation as an
30 alternative to personal service.

1 By contrast, a categorical alternative permitting service by a digital or electronic method
2 may be problematic in debt-collection litigation. Federal law regulates communications by email
3 and text message from debt collectors to consumer debtors. That law may preempt a blanket
4 authorization in state law for service by email or text message in debt-collection litigation.

5 Service by mail has long been an established alternative to personal service. If a jurisdiction
6 authorizes service by mail as an alternative to personal service, it should also consider service by
7 an electronic or digital method as an alternative. The jurisdiction should also set rules to ensure,
8 to the extent practicable, that the party to whom the summons and complaint are mailed or sent
9 actually receives these documents. For instance, if a party attempts service by mail, such service
10 should be incomplete until there exists evidence of actual notice, such as a returned
11 acknowledgment of receipt. Most jurisdictions require this sort of evidence for service by mail.

12 Evidence of actual notice is particularly important for service by a digital or electronic
13 method. Digital service methods offer considerable promise, both because they are often cost-
14 effective and they correspond better to the way many people communicate compared to traditional
15 service methods. But digital service is relatively untested, and digital communication raises
16 reliability concerns, especially when there is no past practice of this sort of communication
17 between the parties. Thus, when courts and other rulemakers authorize service by digital methods,
18 they should require some sort of evidence suggesting actual receipt. This evidence can include
19 information indicating that the party actively uses the phone number or social-media account at
20 which service is provided; an agreement between the parties to communicate by digital or
21 electronic means, plus information indicating that they have successfully done so in the past; or
22 digital evidence that the party has received and opened the message at issue.

23 *c. Alternatives to personal service in particular cases.* Rules governing service can
24 authorize an alternative method of service in a particular case if the party attempting service by
25 the preferred method cannot complete it after reasonably diligent efforts, or if the preferred method
26 presents an undue difficulty or an undue expense.

27 What counts as reasonable diligence depends on the circumstances of the case and the
28 litigants' needs. Whether the preferred method presents an undue difficulty should account for
29 both the circumstances of the party attempting service and the needs and interests of the party
30 receiving service. If a self-represented plaintiff sues to recover on a debt, and if that plaintiff and
31 the defendant have communicated with each other in the past by email or text message, then the

1 balance of interests favors alternative service by email or text if the plaintiff is of limited means.
2 An expense may be undue if it is significantly more than what service for the case type at issue
3 typically costs. If, for instance, personal service typically costs \$150 in debt-collection cases, that
4 cost is not undue even if the amount sued for is \$1000 or less. But if personal service in a particular
5 debt-collection case would cost \$500, not \$150, then the expense may justify service by an
6 alternative method. When a rule authorizes service by a different method, the rule should require
7 some sort of confirmation of receipt. See Comment *b*.

8 When a rule authorizes an alternative to an otherwise-required method of service in a
9 particular case, the party attempting service should be required to use a supplemental method that
10 imposes no or only de minimis additional cost unless circumstances suggest that this supplemental
11 service would be unreasonable. See Comment *a*. If a rule for eviction actions authorizes a landlord
12 to serve the summons and complaint by posting them on the premises where the tenant lives, for
13 instance, the rule should require the landlord to supplement that service with service by mail or
14 electronic or digital means.

15 *d. Contractual provisions regarding service.* Some jurisdictions allow parties to adjust the
16 means or location of service by contract. As an example, a contract might provide that service of
17 any litigation-related documents shall be made by email. Likewise, the contract may require service
18 at a particular address that differs from the address at which service would otherwise be provided.

19 When those contractual provisions appear in form contracts, they merit considerable
20 skepticism. Consumer-debt contracts almost invariably consist of standard contract terms. See
21 Restatement of the Law, Consumer Contracts § 1(a). Many residential leases are likewise form
22 contracts. Provisions regarding service in those settings do not typically result from bargaining by
23 parties on equal footing or reflect what the nondrafting party understands their agreement to entail.
24 A party may have no idea that the contract includes a provision regarding service. Service at a
25 contracted-for address in debt-collection litigation is particularly problematic since the consumer
26 almost certainly entered into the contract years earlier. That said, parties may have good reasons
27 to contract for service at a particular address or using a particular means. Landlords and tenants,
28 for instance, may prefer to communicate by text message, and service by text message when it is
29 preferred may make actual notice more likely than service by posting and mailing.

30 Provisions in form contracts regarding service should only be enforceable if the party
31 attempting service can show the efficacy of the contracted-for location or method. Service-by-

contract should be at least as good at providing actual notice as the service that applicable doctrine would otherwise require. This showing should require evidence beyond the contractual provision alone. A landlord might include a record of text exchanges indicating that the landlord and tenant regularly and successfully communicate by text. By contrast, given limitations on communications between creditors or debt buyers and consumer debtors, plaintiffs in consumer-debt litigation will rarely have the sort of information necessary to support the propriety of contractual provisions affecting service.

REPORTERS' NOTES

a. Personal service as default and supplemental service. Traditionally, personal service has been the “gold standard” for notice of the commencement of a civil action. According to the U.S. Supreme Court, personal service “guarantees actual notice of the pendency of a legal action; it thus presents the ideal circumstance under which to commence legal proceedings against a person” *Greene v. Lindsey*, 456 U.S. 444, 459 (1982). Personal service of physical copies of the summons and complaint thus remains the preferred method for providing notice in civil litigation. Robin J. Effron, *The Invisible Circumstances of Notice*, 99 N.C. L. REV. 1521, 1528 (2021) (“In-hand, personal service sits atop the hierarchy of preferred notice methods.”).

This preference’s continuation into the digital age may reflect a set of assumptions about parties, communication practices, and litigation that warrant reexamination. Effron, *supra*, at 1543-1554. Moreover, the flexibility of the due-process standard for the adequacy of notice ought to allow courts to account for changes in communication practices and technology. E.g., *Rio Props. v. Rio Int’l Interlink*, 284 F.3d 1007, 1017 (9th Cir. 2002) (insisting that *Mullane*’s “broad constitutional principle unshackles the federal courts from anachronistic methods of service and permits them entry into the technological renaissance”). Finally, the frequency of “sewer service” undermines full confidence in personal service’s efficacy. Effron, *supra*, at 1533.

Reason exists, however, to doubt the comparative efficacy of various alternatives to personal service, including service by mail and service via electronic or digital means, and especially in several high-volume civil-adjudication areas. E.g., *Lindsey*, 456 U.S. at 459-460 (O’Connor, J., dissenting) (expressing doubts about the reliability of mailed notice in an eviction proceeding); JUD. BRANCH OF CAL., SELF-HELP GUIDE TO THE CALIFORNIA COURTS: SERVICE OF COURT PAPERS (“Mail service is easy but not very reliable”); *In re Adoption of K.P.M.A.*, 341 P.3d 38, 51 (Okla. 2014) (expressing doubt about the efficacy of service by Facebook). The reliability of digital or electronic service remains unproven. Courts have voiced skepticism about its due-process footing. For instance:

E-mail has many things to recommend it; reliability is not one of them. Between the ease of mistaken address on the sender’s end and the arcane vagaries of spam filters on the recipient’s end, e-mail is ill-suited for a communication on which a[n important] lawsuit may hinge. A busy calendar, an overfull in-box, a careless

1 autocorrect, even a clumsy keystroke resulting in a “delete” command can result in
2 a speedy communication being merely a failed one.

3 LaSalle v. Vogel, 36 Cal. App. 5th 127, 137-138 (Cal. Ct. App. 2019). Absent rigorous empirical
4 demonstration that other forms of service better notify parties than personal service, personal
5 service should continue to be required as the default and primary means parties attempting service
6 must use in most high-volume civil-adjudication areas.

7 That said, personal service in these areas has generated problems, most notoriously
8 involving sewer service in debt-collection litigation. Given such concerns, subsection (a)
9 recommends that parties attempting service use low-cost methods to supplement personal service
10 when reasonable to do so. Service by email, text message, or social media is easy and virtually
11 costless when the party attempting service has an adversary’s relevant contact information on file.
12 The benefit to the adversary could be considerable, especially if a process server files a false proof
13 attesting to personal service that never actually happens. In this event, the adversary has a far better
14 chance of learning of proceedings if the party initiating proceedings sends the adversary a text
15 message that includes the summons and process.

16 A requirement that parties always supplement personal service in this manner would prove
17 too inflexible and may create challenging complications. For example, if a debtor has requested
18 not to be contacted by text message, supplemental service by text could create a Fair Debt
19 Collection Practices Act (FDCPA) liability risk even if required by state law. Cf. 12 C.F.R.
20 § 1006.6(e) (requiring debt collectors to enable debtors to opt out of electronic communications);
21 Oei v. N. Star Cap. Acquisitions, LLC, 486 F. Supp. 2d 1089, 1098 (C.D. Cal. 2006) (holding that
22 the FDCPA preempts state law litigation privileges).

23 The better approach is to encourage parties to supplement personal service when
24 reasonable, and for courts to assess failures to use it on a case-by-case basis. If, for instance, the
25 plaintiff’s filings give a reason to doubt the success or integrity of personal service, the court may
26 refuse to enter a default judgment if the plaintiff did not use a reasonably available, low-cost
27 method to provide supplemental service. See § 3.08(b). Likewise, if a defendant challenges proper
28 service, whether in a motion to dismiss or a motion to vacate a default judgment, the court should
29 allow the defendant to do less to rebut the presumption of proper service that a facially valid proof
30 of service might otherwise create if the plaintiff did not use reasonably available supplemental
31 service. See § 3.09. Some parties to high-volume litigation, especially tenants and landlords, will
32 have communicated with each other about other matters before the lawsuit commences. When the
33 parties have a pattern of communicating with each other using a particular method, a court should
34 refuse to enter a default judgment in a case where a party fails to make an appearance without
35 confirming that the party who attempted to serve the non-appearing party has provided
36 supplemental service to the defaulting party using this method. By contrast, if a party establishes
37 why supplemental service by a digital method could create legal exposure, its failure to supplement
38 personal service by these means should not factor into a default judgment determination.

39 *b. Categorical alternatives to personal service.* Categorical alternatives to personal service
40 are those a jurisdiction permits without requiring a party attempting service to obtain court

approval first. They may include service on a person other than the party against whom a claim is brought. Rule 4 of the Federal Rules of Civil Procedure, for example, permits service “by leaving a copy” of the summons and complaint “at the [party’s] dwelling or usual place of abode with someone of suitable age and discretion who resides there . . .” FED. R. CIV. PROC. 4(e)(2)(B). The party attempting service does not need to do anything more to complete proper service. By contrast, in California, if the summons and complaint are left with someone other than the party against whom the claims are asserted, the party attempting service must supplement this effort by mailing a copy of the summons and complaint to the party’s adversary. CAL. CODE CIV. PROC. § 415.20(b); see also OR. R. CIV. PROC. 7(d)(2)(B) (same).

Roughly half of states recognize service by mail as a categorical exception to the personal-service norm. Andrew C. Budzinski, *Reforming Service of Process: An Access-to-Justice Framework*, 90 U. COLO. L. REV. 167, 200 n.170 (2019). Cf. *Greene v. Lindsey*, 456 U.S. 444, 455 (1982) (claiming that, in eviction cases, “notice by mail may reasonably be relied upon to provide interested persons with actual notice of judicial proceedings”). However, the U.S. Supreme Court has not held that service by mail, without more, satisfies due process when a tenant is threatened with eviction. Decades ago, the Supreme Court declared in an eviction matter that “notice by mail may reasonably be relied upon to provide interested persons with actual notice of judicial proceedings.” *Lindsey*, 456 U.S. at 455. But it qualified this statement, noting that mailed service may be acceptable “[p]articularly where the subject matter of the action also happens to be the mailing address of the defendant, and where personal service is ineffectual.” *Id.* But cf. *Olson v. Comm’r of Revenue*, 955 N.W.2d 605, 609 (Minn. 2020) (upholding notice by mail in a tax foreclosure case and rejecting the argument that it is insufficient in an era of junk mail).

When a jurisdiction authorizes a categorical alternative to personal service, the rules regulating this service should include reasonable requirements to ensure that the alternative is at least as successful as personal service at ensuring actual notice. If a party serves the summons and complaint on someone other than the party’s adversary, for instance, the jurisdiction can require supplemental service by some readily available, low-cost method. E.g., CAL. CODE CIV. PROC. § 415.20(b) (requiring supplemental service by mail). Likewise, reflecting concerns with the reliability of service by mail, most jurisdictions that allow it as a categorical alternative require some step, in addition to the placement of the summons and complaint in the mail, to demonstrate receipt. Budzinski, *supra*, at 200 n.170; see also Effron, *supra*, at 1547-1548. These steps include, for instance, the return of some sort of proof acknowledging receipt. Budzinski, *supra*, at 200 n.171; see also CAL. CODE CIV. PROC. § 415.30 (permitting service by mail but requiring the party served to execute a written acknowledgment of receipt before service is complete); FED. R. CIV. P. 4(d)(1) (same).

The notion that service by mail should be the primary alternative to personal service warrants reconsideration, especially in certain high-volume civil-adjudication contexts. Robin J. Effron, *Taking Notice and Service of Process Digital*, in *DIGITALIZATION AS A CHALLENGE FOR JUSTICE AND ADMINISTRATION* 111, 115 (Ludwigs et al. eds., 2023). Low-income parties may have more stable, long-lasting access to a smart phone than a particular address. See Emily A. Vogels,

Digital Divide Persists Even as Americans with Lower Incomes Make Gains in Tech Adoption, PEW RESEARCH CTR., (June 22, 2021), <https://www.pewresearch.org/short-reads/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/> (reporting smart phone ownership at various income levels). Whether low-income parties are more likely to receive mailed or digitally provided notice is an empirical question, not one that should be assumed away due to a traditional preference for the former. Other aspects of service by digital means may make it more effective notice than mail. A summons served digitally, for instance, can include a link self-represented party can click on to access self-help and legal-aid resources immediately. Evidence of actual notice, such as an email read receipt, may be particularly easy to procure.

The balance of considerations that count in the due-process calculus can helpfully inform when categorical exceptions to the personal-service rule make sense. A debtor suing an institutional defendant in an FDCPA case, for instance, should be able to use mailed service. The institutional defendant should have a stable address and business processes in place to ensure this notice’s efficacy. The burden on the debtor-plaintiff that personal service would otherwise impose makes little sense given the negligible additional benefit that personal service offers the creditor-defendant. A similar balance of benefits and burdens counsels for a service-by-mail rule when a tenant sues a commercial landlord.

A categorical exception to personal service may make particular sense for eviction cases. If a landlord and tenant have communicated effectively by text message or email over more routine matters, such as past-due rent or needed repairs, service by text message or email may be more likely to inform than personal service. This method may reduce the possibility of sewer service. Moreover, when tenants face a legal vulnerability, including, for instance, concerns with immigration status, they may refuse to accept personal service. The landlord may then resort to a less effective method, such as posting and mailing.

Any such categorical exemption, including one permitting service by digital or electronic means, should include rules designed to ensure that the party receiving service is at least as likely to receive actual notice as the party would if personally served. See Reporters’ Note to Comment c. In Michigan, for instance, a tenant can consent to service by email, including by agreeing to a provision to this effect in the lease. MICH. COMP. L. § 600.5718(1)(d). But the provision is not enforceable unless the landlord sends the agreement that includes this term to the tenant by email, and the tenant replies to the landlord’s email. *Id.*

c. Alternatives to personal service in particular cases. Rules permit exceptions to the personal service norm on a case-by-case basis when an effort at personal service fails or would be unduly difficult. A number of states permit an alternative, including service by mail or digital means, when a party cannot effect service personally after trying with “reasonable” or “due diligence.” E.g., NEB. REV. STAT. § 21-517.02; *Colley v. Dyer*, 821 P.2d 565, 568 (Wyo. 1991); CAL. CODE CIV. PRO. § 415.50(a)(1); FLA. STAT. TITLE VI § 48.102; ME. R. SMALL CLAIMS PROC. 4(g)(1). No one-size-fits-all rule determines what counts as “reasonable” or “due diligence,” and this assessment should depend on the balance of circumstances and capacities of the parties likely to be involved. *Modan v. Modan*, 742 A.2d 613-614 (N.J. App. Div. 2000) (citing cases from

1 numerous jurisdictions in accordance with the proposition that ““due diligence is measured by the
2 qualitative efforts of a specific plaintiff seeking to locate and serve a specific defendant””) (quoting
3 *Abreu v. Gilmer*, 985 P.2d 746, 749 (Nev. 1999)).

4 These considerations include the importance of the interests at stake for the party providing
5 service and the extent of the burden on the party’s adversary. Under certain circumstances,
6 exigencies may particularly support an alternative to personal service. See generally Andrew C.
7 Budzinski, *Reforming Service of Process: An Access-to-Justice Framework*, 90 U. COLO. L. REV.
8 167 (2019) (discussing service in domestic violence protective order matters); Jane K. Stoevers,
9 *Access to Safety and Justice: Service of Process in Domestic Violence Cases*, 94 WASH. L. REV.
10 333 (2019) (discussing service in similar matters). By contrast, given the stakes involved for the
11 party receiving notice, the balance of considerations in a consumer-debt case should require
12 particularly strenuous efforts at personal service before a court allows a substitute. E.g., *Pickett v.*
13 *Sears, Roebuck & Co.*, 365 Md. 67, 85 (2001) (permitting service by posting and mail after five
14 attempts at personal service in a debt-collection case). Service rules should not permit an
15 alternative in eviction cases unless the landlord makes multiple efforts at personal service. E.g.,
16 FLA. STAT. TITLE VI § 48.183 (requiring at least two efforts at personal service before permitting
17 service by posting and mail); ME. REV. STAT. TIT.14, § 6004(1) (requiring three attempts at
18 personal service before the landlord can serve by posting and mail); CO. REV. STAT. § 13-40-108
19 (requiring two attempts at personal service before service by posting).

20 Reasonable diligence should include not just an assessment of the number of attempts at
21 personal service, but also the steps the party attempting service took to confirm the address at
22 which it has attempted service. MICH. J. FOR ALL COMM’N, ADVANCING JUSTICE FOR ALL IN DEBT
23 COLLECTION LAWSUITS 48 (2022) [hereinafter “Michigan Report”] (suggesting as “indicia of
24 accuracy” the following: “recent evidence of defendant’s address, receipt of mail from the
25 defendant with the return address listed, confirmation by defendant that the address is correct,
26 certified mail receipt signed by the defendant, voter registration information, vehicle registration
27 information, or information from a skip tracing service”).

28 Several considerations should inform the requirements for alternate service in instances
29 when a party providing service makes a showing of reasonable diligence in efforts to provide
30 personal service. A rule should not default to traditional forms of alternate service, such as mailed
31 notice, when service via text, email, or social media may be more likely to inform the adversary.
32 *K.A. v. J.L.*, 161 A.3d 154, 157-159 (N.J. Superior Ct. 2016) (noting that service through a
33 Facebook account the defendant is known to use actively is superior to service at an outdated
34 address). Cf. TEX. CIV. PRAC. & REMEDIES CODE § 17.033 (authorizing substituted service by
35 social media); MD. CODE, REAL PROP., § 8-401(c)(2)(iii) (authorizing service of prefiling notice
36 by text or email if the tenant elects it). If a court authorizes service by email, text, or social media,
37 it should require the party attempting service to “show[.]” that this service “will be reasonably
38 effective . . .” TEX. R. CIV. PROC. 106(b)(2). Such a showing might include information
39 indicating that an adversary actively monitors and engages with the email account, phone number,
40 or social-media site. E.g., *D.C. SUPER. CT. R. 4(e)(3)(B)(ii)(a)*; *Viahart, L.L.C. v. GangPengMenon*

v. Corbett, Civ. No. 21-8384, 2022 WL 3998393, at *3-4 (D.N.J. Sept. 1, 2022); Steward v. Kuettel, 450 S.W.3d 672, 677 (Ark. 2014) (finding due-process violation when the plaintiff served the defendant by email, when the plaintiff used pixels to confirm that the defendant opened the email, but when the plaintiff did not use pixels to confirm that the defendant opened the attachment that included the complaint); Supreme Court of Tex., *Order Amending Texas Rules of Civil Procedure 106 and 108d*, Misc. Docket No. 23-0924, Apr. 28, 2023, at 2 (commenting on a rule amendment authorizing service by social media under certain circumstances and instructing courts to “consider . . . whether the defendant regularly uses or recently used the technology”); E.L.V.H. Inc v. Bennett, Civ. No. 18-710, 2018 WL 6131947, at *2 (C.D. Cal. May 2, 2018). See generally Effron, *Taking Notice*, supra, at 117. If the rule authorizes service by mail, it should require some sort of proof of receipt. Finally, if a party proposes to serve via social media, that party should use the most private means possible, such as direct messaging, and avoid service that unnecessarily publicizes the litigation to others.

Service by publication has long served as “a last resort” when other means of service fail or are impossible. *Turner v. Turner*, 473 S.W.3d 257, 273 (Tenn. 2015). This option makes little sense if the party providing service has an adversary’s email address, phone number, or social-media account information. E.g., *624 Broadway, LLC v. Gary Housing Authority*, 193 N.E.3d 381, 385-386 (Ind. 2022) (service by publication violates due process if the plaintiff has information, including an email address, that it could use to provide more effective notice); *Baidoo v. Blood-Draku*, 48 Misc. 3d 309, 316 (N.Y. Sup. Ct. 2015). Cf. *Evans v. Evans*, 300 Va. 134, 150 (2021) (service by publication violates due process if the plaintiff “has not demonstrated why [this] most inferior method of service was the best [the plaintiff] could do”); MICHIGAN REPORT at 48 (recommending updating antiquated substitute service requirements).

The limited circumstances when notice by publication may make sense include instances when the defendant actively evades service. “Due process does not require [a court] to be complicit in that conduct.” *Schulz v. Doeppe*, 182 A.3d 1246, 1252 (Me. 2018); see also *In re N.N.N.*, 983 A.2d 1113, 1121 (D.C. Ct. App. 2009).

When a rule authorizes an alternative to the default service method for a specific case, the party attempting service should supplement service by a reasonably available, low-cost method that is appropriate to the case and would not raise liability concerns. E.g., ALASKA R. CIV. P. 4(e)(3) (permitting the court to require supplemental service by email or by posting to a social-media site when the plaintiff provides service by posting on the Alaska Court System’s legal notice website).

d. Contractual provisions regarding service. Contracts that adjust service-of-process requirements do so by specifying an address or location at which service shall be provided, or by specifying a means by which service may be provided. E.g., *Masimo Corp. v. Mindray DS USA Inc.*, Civ. No. 12-2206, 2013 WL 12131723, at *2 (C.D. Cal. Mar. 18, 2013) (discussing authorities regarding this issue). In high-volume civil-adjudication contexts, these provisions if included in form contracts should not be enforceable unless they ensure service that is at least as likely to provide actual notice as whatever service obligation would otherwise be required.

1 The U.S. Supreme Court has held that the right to notice is “subject to waiver,” and a
 2 contractual provision affecting the notice obligation does not violate due process if it is “voluntary,
 3 knowing, and intelligently made.” *D.H. Overmyer Co., Inc. v. Frick Co.*, 405 U.S. 174, 185 (1972).
 4 Cf. *Nat’l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 314 (1964) (upholding a contractual
 5 provision affecting notice but noting that, because the party had actually received notice, “no due
 6 process claim has been made”). In line with this holding, courts have affirmed contracts providing
 7 for mailed service in lieu of personal service, *Hoffman v. Nat’l Equip. Rental*, 643 F.2d 987, 990
 8 (4th Cir. 1981), and service at addresses other than what default service rules would require, *Fin.*
 9 *Fed. Credit Inc. v. Brown*, 384 S.C. 555, 567 (2009).

10 The Supreme Court’s engagements with contractual notice provisions involved disputes
 11 between business litigants, presumably of equal bargaining power. But these provisions may
 12 surface in contracts of the sort more common to high-volume civil litigation. Michigan’s provision
 13 authorizing service by email if contracted for by landlords and tenants is an example. MICH. COMP.
 14 L. § 600.5718(1)(d).

15 Contracts in eviction and debt-collection litigation differ considerably from those that
 16 generated much current due-process doctrine regarding service and contractual waiver. Virtually
 17 all contracts regulating consumer debt are standard form contracts, offered to the consumer on a
 18 “take-it-or-leave-it” basis, and without the possibility of negotiation. E.g., Michael I. Meyerson,
 19 *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L.
 20 REV. 583, 594 (1991). Residential leases likewise often follow a standard form, with their
 21 provisions determined by landlords. David A. Hoffman & Anton Strezhnev, *Leases as Forms*, 19
 22 J. EMP. LEGAL STUD. 90, 91 (2022) (documenting that Philadelphia landlords typically use
 23 standard form leases that do not get negotiated). Consumers and tenants rarely actually know of
 24 these terms or specifically consent to them. E.g., Restatement of the Law, Consumer Contracts
 25 § 2, Reporters’ Note to Comment *a* (AM. L. INST. 2024); Yannis Bakos et al., *Does Anyone Read*
 26 *the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 3 (2014).
 27 Whether agreement is voluntary also merits debate. E.g., Andrew Robertson, *The Limits of*
 28 *Voluntariness in Contract*, 29 MELB. U.L. REV. 179, 182 (2005).

29 In *Fuentes v. Shevin*, 407 U.S. 67 (1972), the U.S. Supreme Court distinguished the sort of
 30 contract it affirmed in *D.H. Overmyer* from contracts arising in disputes between merchants and
 31 consumers that purported to waive procedural protections:

32 The facts of the present cases are a far cry from those of *Overmyer*. There was no
 33 bargaining over contractual terms between the parties who, in any event, were far
 34 from equal in bargaining power. The purported waiver provision was a printed part
 35 of a form sales contract and a necessary condition of the sale. The [merchants] made
 36 no showing whatever that the [consumers] were actually aware or made aware of
 37 the significance of the fine print now relied upon as a waiver of constitutional rights.
 38 *Id.* at 95. Existing due-process doctrine, then, provides a questionable basis to support the
 39 constitutionality of service-by-contract provisions in consumer credit or lease agreements.

Moreover, if enforceable, contractual provisions affecting service obligations would almost surely lead in many instances to a lack of actual notice. The credit contracts that plaintiffs in consumer-debt litigation sue to enforce often date from years before the lawsuit is filed. The contract might specify a years' old address for service of process from which the consumer has long since moved. Whatever obligation a consumer has to provide a creditor with updated address information does not affect that consumer's right to effective notice. Cf. *Jones v. Flowers*, 547 U.S. 220, 231 (2006) (agreeing that a party's "failure to comply with a statutory obligation to keep his address updated" does not "forfeit[] his right to constitutionally sufficient notice").

Consistent with concerns about voluntariness, power, and knowledge, various laws prohibit tenants from waiving core procedural rights. Federally funded public housing authorities may not include provisions in leases that provide that "the landlord may institute suit without any notice to the tenant that the suit has been filed" 24 C.F.R. § 966.6(d). In California, a lease provision by which a tenant purports to waive any "procedural right[] in litigation," including the tenant's "right to notice," is void as against public policy. CAL. CIVIL CODE § 1953(a)(3), (4). Wisconsin law prohibits leases that "authorize the eviction" of a tenant "other than by judicial eviction procedures" WIS. STAT. 704.44(2m). But see *Fed. Knitting Mills Ltd. v. Harper*, 157 Ohio Misc. 2d 42, 45 (Cleveland Muni. Ct. 2010) (insisting in the context of an eviction action that "due process rights to notice and hearing prior to civil judgment are subject to waiver").

There may be instances, however, when the parties do knowingly, voluntarily, and intelligently agree to particular provisions regarding service. A tenant may travel frequently, indicate that this is so to the landlord, and provide contact information for when the tenant is not at the rental property. Were the parties to agree that the landlord would use this contact information for service purposes, the likelihood that the tenant actually receives notice of an eviction action may increase. Cf. *Edelhoff v. Shakespeare Theatre at the Folger Libr., Inc.*, 884 A.2d 643, 646 (D.C. Ct. App. 2005) (holding that service in an eviction case failed when the landlord twice attempted personal service, then posted the summons on the tenant's door, when the landlord knew the tenant traveled frequently and had a telephone number at which it could try to reach the tenant). A landlord and tenant may regularly and effectively communicate by email or text message, such that service by this means is more likely to reach the tenant than in-person service.

Under subsection (d)(1), a contractual provision regarding service should be enforceable so long as service provided pursuant to its terms is at least as likely to provide actual notice of the lawsuit as service pursuant to the otherwise-required rules would. These rules are almost invariably the service requirements that govern in the jurisdiction where the lawsuit proceeds. E.g., *Western Video collectors, L.P. v. Mercantile Bank of Kansas*, 935 P.2d 237, 239 (Kan. App. 1997) ("[T]he prevailing authority indicates that . . . general choice of law provisions in contracts incorporate only substantive law and do not displace the procedural law of the forum state"); *Federated Cap. Corp. v. Libby*, 384 P.3d 221, 226 (Utah 2016) (holding that "[a] choice of law provision [in a credit card agreement] selects the substantive law that will govern a contract dispute[,] and that procedural matters are governed by the law of the forum"); *Discover Bank v. Swartz*, 51 N.E.3d 694, 699 (Ohio Ct. App. 2016) (same). To meet this standard, a party attempting service pursuant

1 to a contract's terms should include with the proof of service evidence that the service is likely to
2 be successful.

3 Relationships between creditors and consumer debtors are unlikely to generate the sort of
4 engagements that can establish this sort of knowing, intelligent, and voluntary agreement. Among
5 other reasons, various laws limit the number and nature of contacts creditors can have with debtors.
6 Thus, contractual provisions altering service obligations in consumer-debt cases should almost
7 never be enforceable.

8 **§ 3.05. Confirmation of Service**

9 **(a) Rules governing service of process in high-volume civil adjudication should**
10 **require that a party or person attempting service on the party's behalf document service**
11 **attempts in detail and provide information about the number, timing, and location of the**
12 **attempts made. This documentation should include:**

13 **(1) in the case of personal service, a detailed description of the person served;**
14 **and**

15 **(2) in the case of service by mail or a digital or electronic method, evidence**
16 **that an adversary actually received the summons and complaint.**

17 **(b) Rules governing service of process should require a party or person attempting**
18 **personal service on the party's behalf to use reasonably available, low-cost, and appropriate**
19 **technological means to confirm the time and location of attempts made. Such means should**
20 **confirm the location where process is served but not unduly intrude upon any person's**
21 **privacy or create safety risks.**

22 **(c) Rules governing service of process should require that a party or person filing a**
23 **proof of service use a standardized court-provided form. Such forms should be tailored to**
24 **the particular high-volume civil-adjudication case type and elicit specific information**
25 **regarding the service.**

26 **Comment:**

27 *a. Sufficient confirmation of service and the presumption of proper service.* Proof of service
28 should include detail about the person served, the place of service, the time of service, and how
29 many times the process server attempted service. If a proof of service includes insufficient details,
30 the court may, consistent with § 3.09 (Challenging Service), refuse to enter a default judgment or
31 consider a presumption of proper service rebutted.

1 When personal service is attempted, the party providing service should include in the proof
2 of service a detailed description of the person served. This description should include that person's
3 approximate age, gender, skin color, weight, hair color, and height. When service is provided by
4 mail or a digital or electronic method, the party attempting service should file evidence indicating
5 that an adversary actually received the summons and complaint. This evidence could include, for
6 instance, a signed acknowledgment of receipt when the summons and complaint are mailed, or
7 digital proof that the adversary opened and read the served documents when provided digitally.

8 *b. Readily available and appropriate technological means.* Geolocation apps and other
9 such technology are readily available and inexpensive. A process server can easily create a digital
10 record of whereabouts when effecting service. This digital record can help to confirm the accuracy
11 of statements a process server makes in a proof of service. Given the ready availability of
12 geolocation technology, a process server's failure to document whereabouts digitally should weigh
13 against a presumption of proper service when service is challenged. See § 3.09 (Challenging
14 Service). The party that attempted service should have to justify the process server's failure to
15 document the location digitally in order to defeat a motion to dismiss or vacate on grounds of
16 improper service. Likewise, this failure, if unjustified, should weigh against the entry of a default
17 judgment. Under these circumstances, a court should require more rigorous proof of service before
18 granting any judgment in the absence of adversarial testing of proper service.

19 An appropriate technological means within the meaning of subsection (b) is one that avoids
20 or minimizes the likelihood of conflict or privacy intrusions. A photograph or video of the party
21 being served may unnecessarily intrude on that person's privacy or create safety risks. A time-
22 stamped photograph of the premises where service is made may not prove the completion of
23 personal service as conclusively. Nor would geolocation data. But neither risks the same privacy
24 intrusion or conflict as a photograph of the person served. Similarly, an audio recording of a
25 personal-service attempt, while not as conclusive as a video recording, is evidence that balances
26 the need to confirm service against privacy intrusions or safety concerns.

27 *c. Court forms.* To routinize service and reduce individual server discretion, courts should
28 provide standardized forms that parties attempting service should be required to use to document
29 their efforts. These forms should be tailored to particular high-volume civil-adjudication case
30 types, with fields requiring information about service efforts configured to the means used for that
31 case. When personal service is required, the form should request descriptive information about the

1 person served. When service by mail or a digital or electronic method is used, the form should
 2 identify the type of evidence that the party attempting service must include to confirm its receipt.
 3 The form should also require digital or other technological confirmation of the service attempt, or
 4 an explanation why such confirmation is not appropriate for the case. If a party files a form that
 5 lacks evidence confirming successful service, the incompleteness should weigh against a
 6 presumption of proper service.

REPORTERS' NOTES

7 *a. Sufficient confirmation of service and the presumption of proper service.* In conventional
 8 civil litigation, process servers have traditionally filed proofs to make a prima facie showing of
 9 proper service. The filing of that proof has long given rise to a presumption of proper service. E.g.,
 10 72 CORPUS JURIS SECUNDUM PROCESS § 112. “Bare and unsubstantiated denials of the summons
 11 and complaint” have been “insufficient to rebut” this presumption. *Aikens v. Kouchnerova*, 217
 12 A.D.3d 741, 742 (N.Y. App. Div. 2023). See § 3.09 (Challenging Service).

13 A presumption arising from the simple fact of filing proof of service rests on an implicit
 14 assumption of integrity that the circumstances of high-volume civil adjudication may not warrant.
 15 In numerous instances involving large numbers of vulnerable litigants, these proofs have proven
 16 fraudulent. In 2016, for instance, a group of debt buyers and a process server agreed to pay tens of
 17 millions of dollars to settle a class action alleging thousands of service irregularities. See *Sykes v.*
 18 *Mel S. Harris & Assocs.*, 780 F.3d 70, 76-77 (2d Cir. 2015) (describing these irregularities). The
 19 defendants’ records, for instance, indicated that, in hundreds of instances, process servers claimed
 20 to have served complaints at two or more locations at the same time. *Id.* In 2022, a legal-aid
 21 provider in California sued a debt buyer and others, alleging that the defendants had filed false
 22 proofs of service in hundreds, if not thousands, of cases. Complaint in *Bay Area Legal Aid v.*
 23 *Achievable Solutions*, No. 22CV008464 (Alameda Super. Ct. Oct. 24, 2023). In one day, the legal-
 24 aid provider alleged, a single process server claimed to have traveled 359 miles, crisscrossing the
 25 Bay Area, to serve 11 defendants. *Id.* at 13-14.

26 Moreover, the presumption necessarily assumes adversarial testing of proper service, an
 27 assumption at odds with the frequency with which parties in high-volume civil adjudication
 28 default. By its nature, service of process involves an inherent “conflict of interest[.] . . . [T]he party
 29 charged with providing this constitutionally required notice is also” adverse to the party receiving
 30 notice, and the serving party has “a countervailing interest in profiting from” an opposing party’s
 31 failure to respond and protect rights and interests. *Plemons v. Gale*, 382 F. Supp. 2d 826, 830 (S.D.
 32 W. Va. 2005). If a party appears and contests service, the party can try to rebut a presumption of
 33 proper service. But the various barriers to meaningful participation often faced by parties in high-
 34 volume civil adjudication routinely keep these litigants from doing so. Absent adversarial testing,
 35 inadequate or even fraudulent service can evade detection, obfuscated by a presumption that a
 36 proof may not deserve.

To ensure integrity and justify a presumption of proper service in high-volume civil adjudication contexts in which complaints routinely go unanswered, courts should require proofs of service to include detailed descriptions of the person served, detail about the place where service was effected, details about the timing of service, and details about attempts to serve. E.g., N.Y. C.P.L.R. § 306(b) (requiring proofs of service in instances of personal service to include “a description of the person to whom it was so delivered, including, but not limited to, sex, color of skin, hair color, approximate age, approximate weight and height, and other identifying features”); id. § 306(c) (requiring a proof of service to “specify the dates, addresses, and the times of attempted service” when service made by posting); Affidavit of Service (Hand Delivery/Private Process) (Md. Rule 2-121), Md. Ct. Form CC-DR-055, Apr. 2021 (requiring a description in an affidavit of service of the race, sex, age, weight, and height of the person served); Return and Affidavit of Proof of Service, Arkansas Judiciary (requiring a description of sex, skin color, hair color, age, height, weight, facial hair, and other distinguishing characteristics). Courts can then better assess proper service without adversarial testing, as they must in debt-collection litigation under numerous states’ laws. See Chapter 7 (Entry and Enforcement of Judgments). Only sufficiently detailed proofs merit the presumption of proper service. When proofs or affidavits are cursory or barebones, a party contesting service should be able to defeat any such presumption. E.g., *GS Holistic, LLC v. Abbasi*, Civ. No. 23-5571, 2024 WL 3463818, at *3 (N.D. Cal. July 18, 2024). Moreover, more detail will enable courts to resolve challenges to service more readily, especially in instances of personal service when the defendant’s physical appearance conflicts with a detailed description in a proof.

The evidence a party should submit to confirm proper service under this Section will depend upon the means used. If a party serves an adversary personally, the detailed description of the person served should constitute this evidence. If a party serves an adversary by other means, the proof should require more. In many jurisdictions, for instance, a party can send the summons and complaint to an adversary by mail. But service is only deemed complete if the adversary signs and returns a document indicating receipt. E.g., FED. R. CIV. PROC. 4(d)(4); CAL. CODE CIV. PROC. 415.30(c); TEX. R. CIV. PROC. 106(a)(2); MONT. R. CIV. PROC. 4(d)(3); WIS. STAT. § 799.12(3). This sort of requirement could readily be adjusted for service by digital means to require receipt of some sort of electronic confirmation that the party receiving service has opened the message.

b. Readily available and appropriate technological means. Courts and other rulemakers can require process servers in high-volume civil adjudication to use readily available technological means to confirm that they have indeed served the complaint at the locations attested to in proofs of service. See generally IAALS, EIGHTEEN WAYS COURTS SHOULD USE TECHNOLOGY TO BETTER SERVE THEIR CUSTOMERS 28 (2018); SHELLER CTR., *supra*, at 10. Several jurisdictions have done just this, which represents standard practice for many professional process-server companies. MICHIGAN REPORT, *supra*, at 46. Since 2010, New York City has required professional process servers to carry a device that uses a global positioning system (GPS) to document the time, date, and location of service. Adrian Gottshall, *Solving Sewer Service: Fighting Fraud with Technology*, 70 ARK. L. REV. 813, 855-856 (2018). In 2020, the District of Columbia enacted a requirement obliging landlords to submit photographic evidence, documenting the time and place of service,

1 when they serve the summons and complaint in eviction cases by posting the documents on the
 2 leased premises. D.C. CODE § 42-3505.01(a)(2). The District of Columbia in 2022 created a similar
 3 obligation for process servers in consumer-debt cases, obliging process servers to include with the
 4 proof of service a photograph with a timestamp and GPS information to indicate the time and place
 5 of service. D.C. CODE § 28-3814(p); see also *In re: Service of Petitions Filed Pursuant to the*
 6 *Municipal Claims and Tax Liens Act* (Penn. C.P. Sept. 11, 2017) (requiring time/date-stamped
 7 GPS photographs for service of process in tax foreclosure proceedings).

8 Given the readily available technological means with which process servers can document
 9 service efforts, a presumption of proper service should be more readily rebutted if based on mere
 10 attestations in a proof. See § 3.09 (Challenging Service). A process server could readily
 11 supplement these attestations with geolocation data. By contrast, it may be quite difficult for a self-
 12 represented party challenging service to marshal evidence to prove months or years after the fact
 13 that the process server’s attestation of personal service was false. When a party fails to appear—a
 14 routine phenomenon in high-volume civil adjudication, and one almost assured when service
 15 fails—the propriety of service will receive no adversarial testing. In many jurisdictions courts have
 16 affirmative obligations to check for proper service before entering default judgments. See Chapter
 17 7 (Entry and Enforcement of Judgments). But they will only identify service problems if these
 18 problems surface in the filings of the party that attempted service. A court should thus refuse to
 19 enter a default judgment without geolocation data absent an adequate justification for failure to
 20 include such data or information.

21 Under subsection (b), a person serving process should use a technological means that
 22 minimizes any privacy intrusion while still providing reliable information about the process
 23 server’s whereabouts. A photograph or video may risk an unwanted privacy intrusion. A party’s
 24 image may be filed as part of a proof of service and thus would be included in a publicly accessible
 25 docket. Moreover, a photograph or video, taken without the person’s consent, risks creating
 26 conflict. Geolocation apps, by contrast, can be used without capturing private information beyond
 27 what already goes into an affidavit of service. So too can audio recordings of service efforts.

28 That said, photographs may be important in certain recurring situations in which they can
 29 be used without risking privacy intrusions or conflict. Process servers in eviction litigation, for
 30 instance, routinely post documents at the leased premises. E.g., CAL. CODE CIV. PROC. § 415.45
 31 (authorizing service by posting and mail in eviction lawsuits under certain circumstances); 735
 32 ILL. COMPILED STAT. § 5/9-107 (same). This sort of service routinely goes awry when, for instance,
 33 the process server posts documents in a multiunit building. *SHELLER CTR.*, *supra*, at 8-9
 34 (documenting problems with service by posting in Philadelphia eviction litigation). Indeed,
 35 circumstances particularly likely to be present when parties live in multi-unit buildings may render
 36 service by posting invalid. *Greene v. Lindsey*, 456 U.S. 444, 453-454 (1982) (finding service by
 37 posting unconstitutional when process servers knew that children with access to units within an
 38 apartment building routinely removed writs of forcible entry and detainer). A process server could
 39 photograph exactly where the summons and complaint are posted, to ensure that the documents
 40 are posted in places where they are most likely to come to the served party’s attention, and to

enable courts to assess the adequacy of service by posting efforts. E.g., D.C. CODE § 42-3505.01(a)(2).

In instances where photographs or videos might be advisable, process servers should still use geolocation data to support assertions made in an affidavit of service. A court assessing whether service is proper might not be able to determine the location of a photograph of a door frame or porch without testimony from the party entitled to service and thus may fail to catch problems in cases where that party defaults. By contrast, problems revealed by geolocation data will be evident on the face of the submissions of the party that attempted service.

§ 3.06. Content of Notice and Court-Provided Forms and Resources

(a) Rules governing service of process in high-volume civil adjudication should require that the notice provided at the start of a case includes sufficient information for the party being served to prepare a defense and to access court-provided information about available resources that the party can utilize to help protect the party's rights and interests. In addition to the summons and the required pleadings, this notice should, to the extent practicable, include:

(1) any court-provided forms the party receiving service can use to answer or otherwise respond, when such an answer or response is required; and

(2) additional court-provided documents, as described in subsection (c), that describe or direct a responding party to potentially available resources that may enable the party to protect the party's rights and interests.

(b) A court should, to the extent practicable, provide a standardized summons form tailored to a given high-volume case type that, together with the pleadings, requires a plaintiff to describe the nature of the case; the remedy sought; and any costs, expenses, or interest sought. In addition, the summons form should describe, in plain language:

(1) the consequences of a default;

(2) the steps a responding party must take to protect the party's interests;

(3) the deadline by which a responding party must take these steps; and

(4) the means by which a party can obtain any needed extension.

(c) In addition to a standardized summons form, a court should, to the extent practicable, provide other service-related forms and documents to enable parties' meaningful participation. In particular, these court-provided forms and documents should:

1 **(1) identify reasonably available resources that self-represented litigants can**
2 **access to protect their rights and interests;**

3 **(2) include a website address or QR code that refers the served party to digital**
4 **versions of court-provided forms;**

5 **(3) be available in the several languages commonly spoken in the communities**
6 **the court serves;**

7 **(4) enable parties who are visually impaired or of low literacy to convert them**
8 **into a format that enables them to understand the documents' content; and**

9 **(5) indicate clearly to the party being served that the case does not involve a**
10 **criminal prosecution.**

11 **Comment:**

12 *a. Sufficient information.* Subsection (a) sets forth the baseline requirement that the first
13 documents the party entitled to notice receives should communicate sufficient information to
14 enable that party to make an informed decision about how best to respond. This information should
15 inform the party about steps the party should take to prepare a defense, and it should lead the party
16 to potentially available resources that can help the party understand how best to protect the party's
17 rights and interests. This information should include, at a minimum, a clear explanation of the
18 allegations against the party; a clear but sufficiently detailed description of the liability the party
19 faces, including interest, costs, and fees that may accumulate or be incurred; applicable deadlines
20 for responding; the immediate steps the party can take to protect the rights and interests at stake;
21 the consequences of a default; information about court forms and other court-provided self-help
22 materials; and court-assembled contact information for available legal-services providers.

23 Under subsection (b), the party providing service should, to the extent practicable, include
24 a court-designed answer form when an answer is required. Section 4.03 (Form of Pleading and
25 Informaiton Exchange) describes this form in more detail. The court-designed answer form should
26 include information for how the party receiving service can access a digital version, as well as
27 instructions for how the party can file the form. Instructions about digital versions of forms are
28 particularly important if the jurisdiction requires the answering party to file multiple forms, and if
29 the provision of those forms with the summons and complaint is not practicable.

1 The information that the party providing service should provide should also include
2 instructions for accessing digital versions of other forms that the responding party might find helpful,
3 whether an answer is required or not. Those forms should include those a party can use to request
4 delays, continuances, or postponements. Finally, that information should include descriptions of
5 additional court-provided resources that the party receiving service can access to understand the
6 lawsuit commenced against that party and enable the party to protect rights and interests to the extent
7 possible. That information should explain how the party can access those resources.

8 *b. The summons form.* The summons and required pleadings should convey much of the
9 information described in Comment *a*. The summons form, provided by the court, should ensure to
10 the extent practicable that the party receiving service understands that the action is an official court
11 proceeding, and that a default judgment will be entered unless the party responds. In addition, the
12 summons form should include core information identifying what the party receiving service must
13 do to respond, the deadline for taking these actions, and how the party can obtain an extension.

14 All forms and documents that constitute notice, including summons forms, should use plain
15 language designed to maximize reader understanding and reduce stress, anxiety, and other barriers
16 to effective engagement with court processes. For this reason, information beyond what the
17 summons form must contain may be provided most effectively in an additional document, served
18 with the summons and the complaint. Otherwise, the summons form may include too much detail,
19 jeopardizing the value the information might otherwise have.

20 *c. Court-provided forms and documents.* Court systems should make available summons
21 forms and other documents provided at the initial service of process that are accessible to parties
22 who face particular barriers to meaningful participation. A court system should make these forms
23 available in the languages most commonly spoken in the communities that the court system
24 typically serves. At a minimum, a court-provided form should include instructions, including
25 website information or a QR code, to guide the party receiving service to a place where that party
26 can access translations. The court system should also make available forms printed in Braille.
27 These forms should also be available in a print format or digital format that is compatible with
28 translation apps and text readers.

29 Courts and other rulemakers should also assemble information about resources that self-
30 represented litigants can access to help protect their rights and interests. This information should
31 include available legal aid or pro bono legal services; self-help materials and resources; and credit

counseling, rent assistance, and other support that might enable the defendant to rectify the problem that generated litigation. Such information should also guide self-represented litigants to resources for translation and other accessibility services, as well as to all court forms that litigants can use to protect their interests; describe the steps in the litigation process, settlement as an option, and the consequences of a judgment’s entry; and provide a more complete description of the nature of the case than what the summons form includes, including an overview of the case’s likely trajectory, what happens after a judgment is entered, and what options the party has to resolve the case. The party serving the summons and complaint should also provide that court-assembled information.

Many litigants in high-volume civil adjudication suffer from vulnerabilities that can stymie meaningful participation, as elaborated in §§ 2.03 (Meaningful Participation) and 2.04 (Procedure and Vulnerable Parties). Prior involvement with the criminal-justice system might particularly disincline a party from responding when served, leading the party to default rather than incur a perceived risk. To minimize that likelihood, the summons form should indicate clearly that the case itself does not implicate criminal justice.

REPORTERS’ NOTES

a. Sufficient information. Parties in eviction or consumer-debt cases may fail to respond to allegations made against them for rational reasons, whether because a party has no defense that warrants the time, energy, and expense of litigation, or because in certain instances a party who answers may not fare any better—and may possibly fare worse—than one who does not. See Lauren Sudeall & Daniel Pasciuti, *Praxis and Paradox: Inside the Black Box of Eviction Court*, 74 VAND. L. REV. 1365, 1396-1400 (2021) (documenting that defendants in several Georgia counties can delay evictions if they file answers but are also more likely to face money judgments). But in many high-volume civil-adjudication contexts, parties who do respond to a lawsuit enjoy significantly better results. See NYU HALF THE BATTLE, *supra*, at 6 (contrasting outcomes when defendants appear and when they do not); Mary Spector, *Debts, Defaults, and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. LAW & BUS. REV. 257, 295 (2011) (documenting an increase of 10 percentage points in the likelihood of a dismissal without prejudice for consumer-debt defendants who appear).

Preliminary empirical data suggest that this difference does not result solely from a selection effect. Rather, even parties with meritorious defenses may fail to engage out of a sense of confusion, shame, frustration, anxiety, distrust, or feelings of powerlessness. E.g., Margaret D. Hagan, *A Human-Centered Design Approach to Access to Justice: Generating New Prototypes and Hypotheses for Intervention to Make Courts More User-Friendly*, 6 IND. J. L. & SOC. EQUITY 199, 218-219 (2018); D. James Greiner et al., *Self-Help, Reimagined*, 92 IND. L.J. 1119, 1127-1130 (2017). This is particularly so for low-income litigants. *Id.*

1 The “notice required” by due process “will vary with circumstances and conditions,”
 2 Walker v. City of Hutchinson, 352 U.S. 112, 115 (1956), including the capacities of the parties
 3 with interests at stake in the proceedings. E.g., Mennonite Bd. of Missions v. Adams, 462 U.S.
 4 791 (1983) (“[P]articularly extensive efforts to provide notice may often be required when [an
 5 adversary] is aware of a party’s inexperience or incompetence.”). Barriers to meaningful
 6 participation that parties in high-volume litigation often face ought to count as “circumstances and
 7 conditions” that determine whether notice is effective. Accounting for these barriers has
 8 implications for notice content and design.

9 To ensure that notice is effective when litigants are mostly self-represented and face other
 10 challenges, the summons and process parties receive, as well as any other accompanying forms
 11 and notices, should enable these parties to understand comprehensively the allegations against
 12 them and what they need to do best to protect the rights and interests at stake. Turner v. Rogers,
 13 564 U.S. 431, 449 (2011) (finding a due-process violation when the state failed to advise a self-
 14 represented litigant of the “critical question” in a civil-contempt proceeding). Compare NYC
 15 HOUSING CT., NOTICE OF NONPAYMENT PETITION (form required to be served with complaint in
 16 eviction case, informing the tenant in plain language of the lawsuit, what the landlord seeks, what
 17 the tenant must do to protect rights and interests, the consequences of failing to answer, timelines,
 18 and available resources), with JUD. COUNCIL OF CAL., FORM SUM-130, SUMMONS-EVICTION
 19 (failing in a summons form for eviction cases to instruct tenants that eviction may be a consequence
 20 of the case), and PHIL. MUN. CT., LANDLORD AND TENANT COMPLAINT (using the term “judgment
 21 of possession” instead of eviction).

22 Given the circumstances and capacities of many self-represented litigants, the information
 23 that should be provided to a party without a lawyer may be more than the information to which a
 24 represented party is entitled. Aguchak v. Montgomery Ward Co., 520 P.2d 1352, 1358 (Alaska
 25 1974) (pronouncing a summons form used in a debt-collection case “constitutionally defective”
 26 because it did not inform indigent unrepresented defendants of an option to contest the allegations
 27 in writing instead of at an in-person hearing). Several courts, for instance, have held that a
 28 summons form in a postjudgment garnishment action that fails to inform the garnishee that certain
 29 property is exempt from garnishment violates due process. Strickland v. Alexander, 153 F. Supp.
 30 3d 1397, 1405-1410 (N.D. Ga. 2015); Dionne v. Bouley, 757 F.2d 1344, 1352 (1st Cir. 1985);
 31 Finberg v. Sullivan, 634 F.2d 50, 62 (3d Cir. 1980). Garnishees’ lack of counsel and the gravity of
 32 the deprivation in light of difficult economic circumstances have prompted courts, using the
 33 *Mathews v. Eldridge* balancing test, to determine that due process requires more complete
 34 information. E.g., *Dionne*, 757 F.2d at 1352; *Strickland*, 153 F. Supp. 3d at 1408.

35 A perennial problem for debt-collection litigation has been the filing and service of
 36 barebones complaints that provide defendants, who are often self-represented, with minimal
 37 information. FTC REPORT, *supra*, at 15-16. “[C]onsumers are often puzzled by the allegations that
 38 they owe a debt to an entity they do not recognize, and they are puzzled about the timing and
 39 amount of the alleged debt.” *Id.* at 16. Complaints with minimal amounts of information may
 40 reflect the persistence of notice pleading practices that most states have now jettisoned in favor of

“plausibility pleading.” Cf. *id.* at 14 (noting that most states’ pleading systems entailed notice pleading). Consistent with a larger shift toward more rigor in pleading, some jurisdictions now require the plaintiff in debt-collection litigation to include detailed allegations in support of claims. These plaintiffs must also attach documentation and affidavits that go well beyond the typical pleading standard in a civil action. E.g., MICHIGAN REPORT, *supra*, at 50. See generally Chapter 4 (Pleading and Information Exchange).

The first documents that the party receives advising that they have been sued should also include information about the party’s rights and the resources the party can access to help with a defense. The Civil Justice Improvements Committee of the National Center for State Courts recommends that the initial notice should include information “about court processes, options and expectations through a variety of portals/sources.” NAT’L CTR. FOR STATE COURTS CIV. JUST. IMPROVEMENTS COMM., CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL Appx. I, 10 (2016). This information should guide parties to self-help resources that courts provide online and in person, and it should inform them of low-cost or free legal services that may be available. Legislation enacted in Colorado in 2021, for instance, requires that the summons in an eviction action include a website link and phone numbers to guide defendants to civil legal aid and rental assistance, and it obliges a state agency to keep the list of such resources current. COLO. REV. STAT. § 30-40-111(5) (amended 2021); see also UNIFORM CONSUMER DEBT DEFAULT JUDGMENTS ACT, § 5 (proposing a notice form that includes information about available legal help). San Antonio requires landlords to include a “Notice of Tenants’ Rights” when they send tenants a notice to vacate for nonpayment of rent (notice required before filing an eviction action). City of San Antonio, Tex., Resolution No. 2023-05-04-0014 (May 4, 2023). Other jurisdictions have similar requirements. E.g., REV. CODE WASH. § 59.18.365(d) (describing required contents of a summons form in an eviction case and including information about potentially available legal help). Illinois requires landlords to serve a form with information about rental assistance, in English and Spanish, along with the summons and complaint. Illinois Courts, *Approved Statewide Forms – Eviction*, at www.illinoiscourts.gov/forms/approved-forms/forms-approved-forms-circuit-court/eviction. Arizona requires landlords to serve a “Residential Eviction Information Sheet,” which describes the stages of the case and the consequences of a judgment. Arizona Supreme Court, *Residential Eviction Information Sheet*, AOCLJEA3F-010123. See also Maine Judicial Branch, *Residential Forcible Entry and Detainer (Eviction) Information Sheet and Mediation Request*, CV-256, April 2024. Under subsection (b), courts should provide forms that serving parties must complete and provide along with the summons and complaint.

The party providing service should, to the extent practicable, include a court-designed answer form when an answer is required. This form should include clear, plain-language instructions for how to file it and by when, as well as instructions on where the answering party can obtain a digital version of the form. If a jurisdiction requires the answering party to file multiple or particularly extensive forms, then the provision of physical copies of the forms along with the summons and complaint may prove burdensome or confusing. In this instance, instructions for accessing digital versions are particularly important.

b. The summons form. Subsection (b) recommends that the summons form itself contain information that self-represented litigants will need to know to respond meaningfully and effectively when sued. Self-represented litigants should know from the initial moment they learn of the litigation of the potential consequences of failing to respond. For this reason, the Uniform Law Commission proposes that all complaints in consumer-debt cases be accompanied by a notice that advises defendants of the consequences of a default, including the amount the defendants may owe, the limitations period for the enforcement of a judgment, how a judgment creditor might enforce a judgment, and collateral implications of a judgment for employment and future access to credit. UNIFORM CONSUMER DEBT DEFAULT JUDGMENTS ACT, § 5. The ULC recommends that no default judgment be entered unless this notice is served with the complaint. *Id.* In addition, self-represented litigants should understand that they can settle a case, but also that they are entitled to a full and fair hearing on the merits if they choose not to settle. See generally Chapter 6 (Settlement).

The party receiving service should also receive information for how to access other forms to enable steps the party may need to take to protect the party's interests. Perhaps most important among these forms is one by which the party can request an extension, postponement, or delay (also called a continuance). In many states, hearings for eviction cases are scheduled before the landlord serves the complaint, without the tenant's input or acquiescence. These hearings may be scheduled for as few as two days after service. ARIZ. REV. STAT. § 12-1175(C). The date may subject the tenant to considerable, possibly prohibitive, inconvenience. A short summary process makes ready access to a form a tenant can easily access by which the tenant can request a continuance all the more important.

c. Court-provided forms and documents. Subsection (a) proposes that the serving party include with the summons and complaint court-provided information that guides self-represented litigants to resources these litigants might access to help them protect their rights and interests. Subsection (c) describes what sort of information courts should include in additional documentation that the serving party will include with the summons to meet obligations under subsection (a).

The obligation to provide comprehensive information may stand in tension with the obligation to provide information in a manner that best enables the party receiving summons and process to understand it. E.g., JOHN M. GRAECEN, RESOURCES TO ASSIST SELF-REPRESENTED LITIGANTS: A FIFTY STATE REVIEW OF THE "STATE OF THE ART" 23 (2011) (commenting on lawyers' tendency to prefer precision over comprehensibility in legal forms). Courts should ensure that comprehensive information is provided in an understandable, user-friendly way. See generally Chapter 2 (General Principles of Procedure and Case Management), particularly § 2.03 (Meaningful Participation). At a minimum, summons forms and other service-related documents should be written in plain language, crafted to maximize reader understanding and to reduce stress, anxiety, and other barriers to effective engagement with court processes. See generally NAT'L ASS'N FOR COURT MANAGEMENT, PLAIN LANGUAGE GUIDE: HOW TO INCORPORATE PLAIN LANGUAGE INTO COURT FORMS, WEBSITES, AND OTHER MATERIALS (2019); see also SELLER CTR., *supra*, at 11-12 (discussing this issue in connection with eviction litigation). Other government institutions are required to use clear communication accessible to the general public.

E.g., plainlanguage.gov (summarizing federal legal requirements for executive-branch agencies). A number of jurisdictions have crafted various legal forms for self-represented litigants in a manner consistent with well-understood approaches that maximize comprehension. E.g., Sean McLernon, Note, *Why Courts Need to Embrace Plain Language*, 24 GEO. J. ON POVERTY L. & POL’Y 381, 391-393 (2017) (summarizing state efforts); NYC HOUSING CT., NOTICE OF NONPAYMENT PETITION, *supra*, at 15-20 (enumerating “plain language principles”). Empirical scrutiny of such forms suggests considerable promise. One study tested redesigned proof of personal service and subpoena duces tecum forms against opposing parties then in use in California. Lay persons were markedly better able to understand what the redesigned forms were and, significantly, what these forms asked the litigants to do. Maria Mindlin, *Is Plain Language Better? Comparative Readability Study of Plain Language Court Forms*, TRANSCEND 3 (2012).

Design principles beyond plain language should inform the format and layout of court forms. In 2020, the Hamilton County (Ohio) Clerk of Court’s office, working with academic researchers and others, redesigned the summons form that tenants receive when landlords file eviction actions. Replacing a text- and jargon-filled older summons, the new form includes several prominent “call outs,” including those that explain the “who” and “where” of the case, what the tenant should do in response, and how the tenant can get help. The form also explains in plain language the consequences the tenant faces if the tenant ignores the summons. See *Eviction Summons Redesign in Cincinnati, OH*, EVICTION INNOV., (Jan. 28, 2020), <https://evictioninnovation.org/2020/01/28/summons-cincinnati/#:~:text=The%20new%20Summons%20is%20intended,connections%20to%20technology%2Dbased%20assistance.&text=The%20new%20Summons%20will%20be%20launched%20in%202020>. The design of the summons form alone can have a significant impact on the likelihood that the defendant will appear in court. Cf. Alissa Fishbane et al., *Behavioral Nudges Reduce Failure to Appear for Court*, 370 SCIENCE, Nov. 6, 2020 (reporting a 13 percent reduction in failure to appear by defendants charged with low-level criminal defenses served with a redesigned summons form). Researchers in Massachusetts conducted a randomized control trial to determine the efficacy of mailings from court designed specifically to respond to the sorts of psychological barriers that can deter self-represented parties from responding when sued in debt-collection litigation. The redesigned documents used plain language and illustrations to identify goals for litigants to set; to provide specific, simple steps to take; to mitigate the stress and anxiety litigants feel when served; and to specify in clear, concrete terms the potential consequences of failing to answer. This intervention doubled the rate at which parties answered the complaint. D. JAMES GREINER & ANDREA MATTHEWS, *THE PROBLEM OF DEFAULT*, PART I 5 (2015).

Governments have particular due-process obligations to ensure that notice is provided in an accessible language and format. E.g., *Minney v. U.S. Office of Personnel Mgmt.*, 130 F. Supp. 3d 225, 233 (D.D.C. 2015) (“[C]ourts . . . have required that correspondence from government agencies to visually impaired disability recipients be offered in a decipherable” format); *Clark v. Cal.*, 739 F. Supp. 2d 1168, 1182 (N.D. Cal. 2010); *American Council of the Blind v. Astrue*, Civ. No. 05-4696, 2009 WL 3400686, at *20-21 (N.D. Cal. Oct. 20, 2009); *V.L. v. Wagner*, 669 F. Supp. 2d 1106, 1120 (N.D. Cal. 2009) (holding that benefits-termination notices provided to

elderly, disabled, and LEP beneficiaries “likely [did] not comport with due process”). Statutes and regulations, both state and federal, oblige government institutions to ensure meaningful access for people with limited English proficiency. E.g., Exec. Order 13166 (Aug. 11, 2000) (requiring federal agencies and programs receiving federal financial assistance to ensure that LEP parties can meaningfully participate in the programs’ activities); CAL. GOV’T CODE §§ 7290-7299 (Bilingual Services Act); Supreme Court of Tex., *Emergency Order Regarding the Texas Eviction Diversion Program*, Misc. Docket No. 23-0924, Apr. 28, 2023, at 2 (requiring a statement regarding rental-assistance programs and legal-services providers to be included in English and Spanish). Cf. UNIFIED JUDICIAL SYSTEM OF PENN., *LANGUAGE ACCESS PLAN* 15 (2017) (recommending the identification of “vital documents and prioritizing them to be translated”). Other statutes and regulations oblige government institutions, including court systems, to ensure that programs are accessible to people with disabilities. See, e.g., *Tenn. v. Lane*, 541 U.S. 509, 517 (2004) (describing obligations under the Americans with Disabilities Act); *Adjartey v. Central Division of the Housing Court Dep’t*, 481 Mass. 830, 848 (2019) (“[W]here a party in a summary process eviction action alerts the court and the adverse party to a disability requiring accommodation, the court, if it determines that the party indeed has a disability, shall provide the disabled party with reasonable accommodation.”).

Consistent with these obligations, a court should ensure that all court-provided forms and documents are available in languages other than English that are commonly spoken in the communities served. CCJ CIVIL JUST. IMPROVEMENTS COMM., APPENDIX I PROBLEMS AND RECOMMENDATIONS FOR HIGH VOLUME DOCKETS 14 (2016). These documents should indicate prominently to the party receiving the summons that that party should make sure to have other documents received with the summons translated if the party serving the summons and complaint has not already done so. These would not only meet the court system’s obligations under due process and other doctrine, they would also decrease the burden on parties providing service. At a minimum, a court system should provide a document in commonly spoken languages, for inclusion with the summons and complaint, that can guide parties to online resources where they can access translated forms. E.g., New York City Housing Court, Postcard Notification Summary Proceeding – Nonpayment, www.nycourts.gov/courts/nyc/housing/forms.

Likewise, courts should ensure that forms and other documents provided at service are available in formats to ensure the most effective notice possible to parties with impairments or disabilities or low literacy. Forms should be available in Braille, for instance, and also in electronic formats that can be listened to. E.g., American Council of the Blind, 2009 WL 3400686, at *28-29 (N.D. Cal. Oct. 20, 2009) (requiring the Social Security Administration to communicate with blind and visually impaired beneficiaries with notice provided in braille and electronic format); 3 BARBARA SAMUELS, *SOCIAL SECURITY DISABILITY CLAIMS: PRACTICE AND PROCEDURE* § 24:11 (2d ed. 2023).

Past experience with or exposure to the criminal-justice system also stands as a barrier to meaningful participation. E.g., Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1292-1293 (2016). As the U.S. Supreme Court has long recognized, legal

concerns unrelated to the case at issue should not deter a party from engaging. *Lamb v. Schmitt*, 285 U.S. 222, 225 (1932) (“The due administration of justice requires that a court shall not permit interference with the progress of a cause pending before it, by the service of process in other suits, which would prevent, or the fear of which might tend to discourage, the voluntary attendance of those whose presence is necessary or convenient to the judicial administration in the pending litigation.”). Consistent with this recognition, court systems should include disclaimers on forms provided with service of process that clarify that the matter does not involve criminal prosecution.

§ 3.07. Accessible Notice

Rules governing service of process should require a party attempting service to take reasonable steps to increase the likelihood that the party to be served receives notice in a form the party can understand. Such rules should impose this obligation when the party attempting service knows or has reason to know that the party to be served has limited English proficiency, low literacy, or a disability. Reasonable steps may include, to the extent practicable, use of court-provided forms and other resources in an appropriate language, and use of a supplemental electronic or digital service method that can be converted into a format understandable to a party with a disability.

Comment:

a. Obligation to provide accessible notice. The circumstances of particular parties and party types in high-volume civil adjudication may create barriers to meaningful participation. These circumstances include limited English proficiency; low literacy; disabilities and other impairments; and prior or feared involvement in other legal processes, including criminal prosecution. See § 3.06.

There is no existing categorical due-process obligation to provide notice in a language or format that the party receiving service of process will understand. But various sources of legal obligation, including laws requiring reasonable accommodations for people with disabilities and fair housing laws, have implications for the sort of notice that ought to be provided to those facing particular barriers to meaningful participation. For instance, numerous states require government units to provide forms and documents translated into commonly spoken languages. Other states require courts to make reasonable accommodations to enable people with disabilities to protect their interests. Those laws and other practices are consistent with an obligation to ensure, to the extent practicable, that notice is provided in formats and manners that respond to circumstances

that parties providing notice can reasonably anticipate will create barriers to their adversaries’ meaningful participation.

A party may know that an adversary does not communicate fluently in written English, whether due to limited English proficiency, disability, or otherwise. This Section requires that, under such circumstances, the party attempting service should use readily available, inexpensive means to ensure that the party receiving service can understand and respond. These means include court-provided resources and forms, such as a summons form, translated into the language in which the plaintiff knows the defendant can communicate. They would also include other court-provided forms and information that steer defendants to translation or other resources that enable defendants to have the complaint rendered in an accessible format. Readily accessible means may also include the supplemental service of documents in a digital form particularly amenable to text readers or translation apps.

REPORTERS’ NOTES

a. Obligation to provide accessible notice. When a party providing service knows or has reason to know that an adversary has limited English proficiency (LEP), the party should make use of available court-provided forms and resources to ensure, to the extent practicable, that an adversary can understand the summons and complaint. Historically, courts have not extended due process to require a party to serve an adversary with documents in the adversary’s primary language, even when the adversary does not speak English at all. E.g., *Maso v. State of New Mexico Tax’n and Revenue Dep’t*, 136 N.M. 161, 165-166 (2004); *Hong v. United States*, 920 F. Supp. 311 (E.D.N.Y. 1996). But see Restatement of the Law Fourth, The Foreign Relations Law of the United States: Selected Topics in Treaties, Jurisdiction, and Sovereign Immunity § 423, Reporters’ Note 2 (AM. L. INST. 2018) (“If the defendant does not speak English, due process may require translation of the summons and complaint into another language. . . .”); *Vazquez v. Sund Emba AB*, 152 A.D.2d 389, 398 (N.Y. App. Div. 1989) (“Failure to provide a translation may, in some instances, constitute a denial of due process.”).

Even so, the broader principles that animate due process are arguably consistent with the more modest requirement that parties utilize court-provided documents in appropriate languages when they are available. Cf. *Maso*, 136 N.M. at 165-166 (rejecting a due-process right to Spanish-language notice in a drivers’ license revocation proceeding but refusing to “accept . . . the reasoning advanced in some . . . cases . . . that English is always adequate because this is an English-speaking country”). If, for instance, a court makes summons forms available in different languages, and if a party knows that they are suing an LEP adversary, that party should serve the adversary with the summons form in the adversary’s language. Given the availability of court forms, the burden on the party providing service in this instance is minimal, while the benefit to an adversary is potentially significant. Cf. D.C. CODE § 42-3505.01(a)(3) (requiring landlords to

1 provide prefiling notice of potential eviction actions to tenants in languages the tenants speak if
2 these languages are sufficiently commonly spoken).

3 When a party serves an opposing party with an impairment or disability, the party
4 attempting service should take all reasonable steps to ensure that the notice the party provides is
5 as effective as possible. E.g., *Space Coast Credit Union v. Groce*, 785 S.E.2d 663, 666 (Ga. Ct.
6 App. 2016) (holding that service on a “dozing, elderly” defendant was unconstitutional when the
7 process server took no steps to ensure the defendant’s comprehension). At a minimum, the party
8 should utilize any assistance that a court system provides to ensure effective notice given the
9 impairment at issue. If, for instance, a court system makes summons forms in Braille available,
10 and if a party fails to use this form when serving an adversary whom the party knows is blind,
11 service should be insufficient. Likewise, if a party knows or has reason to know that an adversary
12 is of low literacy, the party should supplement paper documents with service in an electronic
13 format. At a minimum, documents should be served in a format compatible with text readers.

14 Most landlords have an obligation to make reasonable accommodations for tenants who
15 have disabilities. E.g., *Information for Housing Providers, Landlords, and Property Managers*,
16 U.S. DEP’T OF HOUSING AND URBAN DEV., [https://www.hud.gov/program_offices/fair_housing_](https://www.hud.gov/program_offices/fair_housing_equal_opp/reasonable_accommodations_and_modifications/information_for_housing_providers_landlords_property_managers)
17 [equal_opp/reasonable_accommodations_and_modifications/information_for_housing_providers_](https://www.hud.gov/program_offices/fair_housing_equal_opp/reasonable_accommodations_and_modifications/information_for_housing_providers_landlords_property_managers)
18 [landlords_property_managers](https://www.hud.gov/program_offices/fair_housing_equal_opp/reasonable_accommodations_and_modifications/information_for_housing_providers_landlords_property_managers). This obligation can require a landlord to adjust how it communicates
19 with a tenant with disabilities. E.g., *Jordan v. Greater Dayton Premier Mgmt.*, 9 F. Supp. 3d 847,
20 859 (S.D. Ohio 2014) (discussing case law and concluding that a landlord violated federal
21 antidiscrimination laws by failing to communicate with a blind tenant using microcassettes). The
22 landlord’s duty to serve the summons and complaint in a format that ensures effective notice to a
23 tenant with disabilities is consistent with such requirements and should impose no greater burden
24 on the landlord than what it otherwise incurs for its communications with tenants.

25 § 3.08. Court Obligations to Ensure Proper Notice

26 (a) *Court-Provided Courtesy Notice.*

27 (1) When a case is filed in high-volume civil adjudication, the court should, to
28 the extent practicable, mail courtesy notice to the defending party at the address
29 indicated in the proof of service. The courtesy notice should include basic information
30 about the nature of the case and direct the party to available resources that may
31 enable the party to protect the party’s rights and interests.

32 (2) If this courtesy notice is returned as undelivered, the court should require
33 the party that filed the proof of service to confirm, to the extent practicable, the
34 accuracy of the service address. The court should also require the party to supplement

1 service with other reasonably available means if the party has not, consistent with
2 § 3.04, done so already.

3 **(b) Court Review of Service Prior to Entry of Judgment.**

4 (1) Consistent with § 7.03 (Showing of Entitlement to Judgment), a court,
5 before entering judgment, should review the filings and the evidence in the record to
6 determine whether the party seeking entry of judgment has provided proper service
7 or, when appropriate, whether the defending party has waived proper service.

8 (2) If the party seeking entry of judgment requests that the court impose the
9 costs of service on an adversary pursuant to a contractual provision or governing law,
10 the court should require the party to document these costs and certify that the amount
11 sought does not exceed the amount the party actually paid for service on the adversary.

12 **Comment:**

13 a. *Court obligations and courtesy notice.* Conventional procedural doctrine makes the
14 defending party responsible for litigating the lawfulness of service. As elaborated in § 3.09,
15 however, proper service does not require actual notice, leaving many cases in which a defending
16 party did not actually receive notice and so did not, and could not, affirmatively challenge the
17 plaintiff's compliance with service requirements. As described in § 3.01, service problems have
18 marred the integrity of litigation in various high-volume civil-adjudication contexts. For these
19 reasons, service requirements may go significantly underenforced if the sole responsibility for
20 raising concerns about proper service rests with the defending party.

21 Subsection (a)(1)'s call for courts to provide courtesy notice helps to solve these problems.
22 The party attempting service exerts control over the effort that goes into providing notice to an
23 adversary and, often, the information about this effort that the court relies upon to assess proper
24 service. Given these circumstances, court-provided courtesy notice has at least three benefits. First,
25 the court can send notice directly to the adversary and not rely upon the good faith of the party
26 attempting service. Second, this notice can generate information, independent of the party
27 attempting service, that the court can use to judge the sufficiency of that party's effort. When a
28 court mails notice to the address indicated in the proof of service and the mail is returned as
29 undelivered, the court has reason to believe that service may not have succeeded and can insist
30 that the party attempting service confirm the address's accuracy and attempt supplemental service.

1 Third, an adversary might distrust a party-provided summons and complaint, especially if the
2 adversary does not recognize the party's name. Notice bearing the court's imprimatur might
3 convince this person that a civil action has indeed commenced and will have consequences if the
4 adversary does not respond.

5 Court-provided courtesy notice should not relieve a party of that party's service obligations.
6 If a defending party appears and moves to dismiss on grounds of improper service, for instance, this
7 party's receipt of courtesy notice should not affect the court's consideration of the motion.

8 *b. Court review of the adequacy of service and its costs.* Consistent with § 7.03 (Showing
9 of Entitlement to Judgment), subsection (b)(1) imposes an affirmative obligation on courts to
10 review the proof of service for compliance with all service requirements, whether or not any party
11 challenges service, unless a defending party waives defects with service. Given recurring problems
12 with service in various high-volume civil-adjudication contexts, courts should hold any
13 ambiguities, incompleteness, or lack of clarity in the proof of service against the party moving for
14 the entry of judgment. Doing so allocates the costs of these flaws against the party best positioned
15 to avoid them. This affirmative obligation may involve court staff to conserve judicial time and
16 ensure the obligation is manageable.

17 A court may grant a default judgment if the record indicates proper service. In some
18 instances, however, the record will indicate that a service attempt has failed to afford actual notice.
19 The record may contain, for instance, a returned envelope addressed to the defendant at the service
20 address marked undelivered. Consistent with § 3.02 (Reasonable Diligence), the court should not
21 enter a default judgment under these circumstances unless the party seeking it can show that it has
22 exercised the required diligence in a good-faith effort to ensure actual notice. Such steps would
23 include, for instance, an attempt to confirm the defendant's address using readily available
24 resources and an effort to supplement the required service with service by reasonably available,
25 low-cost methods, such as by email or text message.

26 When a contract or governing law permits courts to shift the costs of service to the
27 defending party, the defending party should never have to pay more for these costs than what the
28 party providing service actually incurred in the specific case. If a debt buyer pays a discount rate
29 for service, for instance, it should not get reimbursed at the full "sticker" price the process server
30 otherwise quotes. The party requesting reimbursement should provide documentation to prove that

1 the amount sought equals the actual costs of service for that case, and the party should declare
2 under penalty of perjury that this documentation is accurate.

REPORTERS' NOTES

3 *a. Court obligations and courtesy notice.* A party who does not receive actual notice will
4 not appear and defend against an adversary's allegations. The defaulting party, in other words, will
5 not be able to challenge the lawfulness of the service before a default judgment is entered, leaving
6 such challenges—if they are ever raised—to a subsequent motion to vacate, enforcement, or
7 garnishment proceedings. For reasons discussed in § 3.09 (Challenging Service) and, more
8 generally, Chapters 1 (General Principles of Fair Adjudication) and 7 (Judgment Entry and
9 Enforcement), that result is problematic. This Section therefore provides for court obligations to
10 ensure, to the extent practicable, the adequacy of service.

11 Important among these obligations is court-provided courtesy notice. To a significant
12 extent, courts must rely upon the party attempting service both to ensure actual notice and to
13 provide the court with the information that informs an assessment of proper service. When a
14 defending party defaults, the court has little more than the proof the serving party has filed to
15 determine whether service is proper. While many proofs document good-faith service efforts
16 accurately and completely, the recurrence of “sewer service” suggests that this is not always so.
17 Cf. *Plemons v. Gale*, 382 F. Supp. 2d 826, 830 (S.D. W. Va. 2005) (describing the conflict of
18 interest inherent in a party-driven service-of-process regime).

19 Court-provided courtesy notice can help buttress the integrity of service. New York City
20 requires a version of this courtesy notice in eviction cases. See Uniform Civil Rules for the New
21 York City Civil Court § 208.42(i) (providing a postcard notice requirement for eviction cases).
22 The plaintiff in a debt-collection case in New York must submit an “Additional Notice of Lawsuit”
23 form and an unsealed, stamped envelope addressed to the defendant when the plaintiff files proof
24 of service of the summons and the complaint in a debt-collection case. The address on the envelope
25 must match the address in the proof-of-service form and must include the court clerk's office as
26 its return address. The clerk of court then sends the Additional Notice of Lawsuit to the defendant
27 using the provided envelope. The court may not enter a default judgment until 20 days have
28 elapsed. If during those 20 days the envelope is returned as undeliverable, the court may not enter
29 a default judgment until the plaintiff provides proof that the address on the envelope matches the
30 defendant's address on file with the Department of Motor Vehicles. N.Y. C.P.L.R. § 306-d.

31 In California, courts must send a “Notice of Unlawful Detainer (Eviction)” form to a tenant
32 upon the filing of the lawsuit, at the address provided in the complaint. CAL. CODE CIV. PROC.
33 § 1161.2(c); see also Notice of Unlawful Detainer (Eviction), Los Angeles County Superior Court
34 Civ. 002, Rev. Jan. 2023. This notice must include information about potentially available legal
35 service providers. *Id.* If a Florida landlord serves the complaint by posting it on the premises, the
36 landlord must provide a copy, along with a prestamped envelope addressed to the tenant at these
37 premises, to the clerk of the court. The clerk then mails the copy to the tenant. FLA. STAT.
38 § 48.183(2).

1 Courtesy notice of the sorts required by New York City, New York, California, and (in
 2 some instances) Florida costs little more than postage. Moreover, it responds to a challenge that
 3 may confound party-provided notice. Particularly in debt-collection litigation, a defendant may
 4 not recognize the plaintiff's identity, especially if the plaintiff is a debt buyer and not the company
 5 with which the defendant originally contracted. Given the ubiquity of fraud involving consumers'
 6 personal information, the defendant may react with understandable wariness to party-provided
 7 documents and dismiss them as connected to some sort of scam. Notice provided directly from the
 8 court may correct for this sort of mistaken reaction, increasing the likelihood that defending parties
 9 take steps to protect their interests.

10 Court-provided notice should include information about what the party providing service
 11 must do to provide proper service. This information can enable a party receiving service to determine
 12 whether this party has been properly served, and thus to respond appropriately if the party believes
 13 that service is improper. This information should also include instructions the party receiving the
 14 notice can follow if this party has not been served or believes that service has not happened.

15 Court-provided courtesy notice should not relieve a party's obligation to provide proper
 16 service. E.g., N.Y. C.P.L.R. § 306-d(c) ("Receipt of the additional [court-provided] notice by the
 17 defendant does not confer jurisdiction on the court in the absence of proper service of process.").
 18 If a defending party appears and moves to dismiss for improper service, for instance, the court
 19 should decide the motion based on whether the party attempting service complied with applicable
 20 service requirements. Actual notice the defending party receives from the court-provided courtesy
 21 notice should not defeat the motion. E.g., *Albra v. Advan, Inc.*, 490 F.3d 826, 829 (11th Cir. 2007)
 22 ("A defendant's actual notice is not sufficient to cure defectively executed service."); *Raschel v.*
 23 *Rich*, 69 N.Y.2d 694, 697 (1986) ("When the requirements for service of process have not been
 24 met, it is irrelevant that the defendant may have actually received the documents . . ."); *Sikhs for*
 25 *Justice v. Nath*, 850 F. Supp. 2d 435, 441 (S.D.N.Y. 2012). That said, if a defending party appears
 26 and does not raise an improper-service defense, the court may decline to dismiss the case under
 27 appropriate circumstances. See § 3.09(b) & Comment *b* thereto.

28 *b. Court review of the adequacy of service and its costs.* Subsection (b) restates and
 29 elaborates upon the recommendation in § 7.03 (Showing of Entitlement to Judgment) that courts
 30 review the filings and evidence in the record to determine whether proper service has been
 31 provided, or whether the defending party has waived proper service, before entering judgment.
 32 E.g., CIV. JUST. IMPROVEMENTS COMM., CALL TO ACTION, *supra*, at 36 (making a similar
 33 recommendation). Service problems may be readily detectable from the documents filed by the
 34 party providing service. If a jurisdiction requires geolocation information to confirm service, and
 35 if a proof of service lacks this information, the court does not need extrinsic evidence from the
 36 sued party to identify this flaw. Likewise, if a jurisdiction requires supplemental service by email
 37 or text message in addition to mailed notice, and if the docket sheet includes no information
 38 confirming the party provided this supplemental service, the court can catch this deficit without
 39 the sued party's participation.

1 A record may indicate that service, while otherwise proper, may not have afforded a
2 defending party actual notice. A court, for instance, may attempt to send forms or other documents
3 to the defending party at the address listed on the proof of service, but the mail is returned as
4 undelivered. In such instances, a court can help ensure actual notice by refusing to enter default
5 judgments unless the party seeking the judgment can show it has complied with rules requiring
6 reasonable diligence in a good-faith effort to provide actual notice. See § 3.02 (Reasonable
7 Diligence).

8 Court review should also include an assessment of service-related costs. See § 7.03(a)(7).
9 Plaintiffs in high-volume civil-adjudication contexts routinely request that the costs of service be
10 shifted to the defendant, pursuant to contractual provisions that permit this cost-shifting. E.g., PEW
11 REPORT, *supra* at 17; Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed*
12 *by Debt Buyers*, 26 LOY. CONSUMER L. REV. 179, 206-207 (2014). Courts should not shift these
13 costs unless applicable law permits their shifting, and unless the contract unambiguously permits
14 their imposition on the defending party.

15 Under subsection (b)(2), a court should in no event require a served party to pay more for
16 the cost of service than what the party providing service actually paid in that case. A repeat-player
17 plaintiff might purchase process-server services in bulk or by paying a flat fee. The actual cost that
18 this plaintiff pays for service may be a good deal less than the sticker price the process server
19 would charge for an individual service attempt. This plaintiff should not be reimbursed at the
20 sticker price, lest the plaintiff actually profit from cost-shifting. To avoid this possibility, the
21 plaintiff should submit documentation indicating what the plaintiff actually paid for service in the
22 specific case. The plaintiff should supplement this documentation with a sworn declaration that
23 the documentation accurately reflects the amount the party paid for service in the particular case.
24 Cf. TERRY B. FRIEDMAN ET AL., CALIFORNIA PRACTICE GUIDE: LANDLORD-TENANT, Ch. 8-G,
25 § 8:515 (requiring landlords seeking to be reimbursed for costs of eviction litigation to “prove-up”
26 their entitlement to these costs with evidence).

27 § 3.09. Challenging Service

28 (a) *Presumption of Proper Service.*

29 (1) A presumption of proper service arises when the party attempting service
30 files a proof of service that complies with all applicable service requirements. A party
31 challenging service can rebut this presumption by showing by a preponderance of the
32 evidence that service was improper. When determining whether the party challenging
33 service has made a sufficient showing, the court should consider the following factors:

34 (A) the detail with which the proof of service describes the service
35 attempt;

1 **(B) the detail the party challenging service provides in support of the**
2 **improper-service defense;**

3 **(C) the degree to which the party attempting service used reasonably**
4 **available means to confirm the defending party’s address or location before**
5 **service;**

6 **(D) whether the party attempting service used reasonably available,**
7 **low-cost, and appropriate technological means to confirm the time and**
8 **location of the service attempt;**

9 **(E) whether the party attempting service supplemented service by the**
10 **required method with service by other reasonably available, low-cost methods,**
11 **even if such supplemental service was not required; and**

12 **(F) whether the party attempting service used a process server who has**
13 **been determined to have filed false, incomplete, or otherwise deficient proofs**
14 **of service in other cases.**

15 **(2) In determining whether the presumption of proper service is rebutted, the**
16 **court should resolve any genuine dispute of fact by evidentiary hearing.**

17 ***(b) Challenging Service Before the Entry of Judgment.***

18 **(1) If a party receives actual notice of a lawsuit before judgment is entered but**
19 **believes that service was improper, the party should raise an improper-service**
20 **defense as soon as practicable.**

21 **(2) If the filings and other information in the record indicate that service is**
22 **improper, but a self-represented party nonetheless enters a general appearance or**
23 **otherwise fails to challenge service in a first responsive pleading, the court should**
24 **determine the extent to which the improper service has prejudiced or would prejudice**
25 **this party. If there is no prejudice, the court should deem service defects waived.**
26 **Otherwise, the court should take steps to ameliorate the prejudice, or it may dismiss**
27 **the case if the prejudice cannot be ameliorated.**

28 ***(c) Notice Challenges After Entry of Judgment.***

29 **(1) A party who did not receive actual notice of a lawsuit despite proper service**
30 **should be able to move to vacate a default judgment on those grounds. The party**
31 **should act with reasonable diligence upon discovering the default judgment.**

1 **(2) As provided for in § 7.05 (Invalid Default Judgments), a judgment obtained**
2 **in a case in which service is improper is invalid unless the responding party waived**
3 **an objection to improper service, or unless this party received adequate notice of the**
4 **pending action.**

5 **(A) A party who did not waive an objection to improper service should**
6 **be permitted to seek to set aside the judgment on these grounds at any time.**
7 **This party should be able to adduce any relevant evidence in challenging**
8 **service.**

9 **(B) If this party received actual notice of the lawsuit before the entry of**
10 **judgment despite allegedly improper service, the court may require the party**
11 **to make a more rigorous evidentiary showing to establish that service is**
12 **improper. If notice is adequate, then the judgment may not be invalid, and the**
13 **court should evaluate a motion to vacate or set aside the judgment pursuant**
14 **to the discretionary considerations described in § 7.06 (Considerations in**
15 **Vacating Judgments on Other Grounds).**

16 **(C) Except in instances of waiver, a judgment entered without proper**
17 **service can continue to have effect only under extraordinary circumstances**
18 **involving third-party interests and unreasonable conduct by the party who did**
19 **not receive proper service.**

20 **Comment:**

21 *a. The presumption of proper service.* Virtually all jurisdictions afford a presumption of
22 proper service upon the filing of a proof of service that indicates compliance with all service
23 requirements. Subsection (a)(1) recognizes this presumption. It also provides that, when this
24 presumption attaches, the party challenging service can rebut it if the party can show by a
25 preponderance of the evidence that service was improper. Importantly, subsection (a)(1) describes
26 considerations courts should consider when deciding whether the party challenging service has
27 met this evidentiary standard to rebut the presumption. Procedures and rules governing improper-
28 service challenges should be designed and administered to incentivize parties to take all reasonable
29 steps to ensure that opposing parties receive actual notice of the litigation. See § 3.01(c) &
30 Comment c. A party challenging service should be able to do so more easily if the party attempting

1 service failed to take such steps. If courts administer the presumption by considering the factors
2 described in subsection (a), they would encourage parties attempting service to do all that is
3 reasonably possible under the circumstances to increase the likelihood of actual notice.

4 A party, for instance, may not be required to supplement personal service. But if a low-
5 cost, reasonable method is reasonably available by which this party could supplement personal
6 service, and if the party fails to use it, this party risks losing a presumption of proper service upon
7 a lesser showing by the party challenging service. The party attempting service, then, is better off
8 supplementing personal service in the first instance. Likewise, the risk that a presumption may be
9 rebutted should encourage parties attempting service to include in the proof of service as much
10 factual detail about the service effort as possible, even if the detail goes beyond what a proof-of-
11 service form requires. This detail should include information about the use of technological means
12 used to confirm the time and location of the service attempt, when such use is appropriate. See
13 § 3.05 (Confirmation of Service).

14 The factors enumerated in subsection (a) should be considered together. If a party
15 challenging service simply denies receiving the summons and complaint, this claim, without more,
16 may be insufficient to rebut a presumption of proper service if the party attempting service used
17 resources to confirm the defending party's whereabouts and supplemented personal service with
18 service by other methods. By contrast, if the party attempting service did not make these efforts,
19 the defending party's denial may be sufficient, especially if the proof of service includes only
20 modest detail about the service attempt.

21 A court should resolve any disputes of fact about proper service by convening an evidentiary
22 hearing. A court should convene a hearing provided that the defending party provides some factual
23 basis to challenge service and does not simply deny in conclusory terms that service was proper.

24 *b. Challenging service before the entry of judgment.* A party entitled to service can waive
25 defects with service that would otherwise render it improper. The party can do so expressly. In
26 addition, in most jurisdictions, waiver is triggered if a defending party enters a general appearance
27 and fails to raise improper service in a first responsive pleading.

28 Self-represented litigants who receive notice of the case but are unaware of that rule may
29 fail to raise an improper-service defense. If the filings and other information in the record indicate
30 improper service, the court should determine whether this improper service has prejudiced the self-
31 represented litigant. If not, the court should deem the defects with service waived. To the extent

1 that correcting the service defect is necessary, the court can order that service be completed. But
2 the court should take remedial steps if improper service has disadvantaged the self-represented
3 litigant. If, for instance, the party attempting service also propounded a discovery request that the
4 defending party did not receive, and if the deadline for responding to that request has passed, the
5 court might order the discovery deadline extended if the reasons why service was improper also
6 interfered with the defending party's ability to respond. If the prejudice cannot be ameliorated,
7 the court may order the case's dismissal, notwithstanding the self-represented litigant's apparent
8 waiver of service defects. Such instances should be infrequent.

9 *c. Postjudgment notice challenges.* This Section builds upon the more general discussion
10 of postjudgment litigation in §§ 7.05 (Invalid Default Judgments) and 7.06 (Considerations in
11 Vacating Judgments on Other Grounds). The discussion here distinguishes between two scenarios.
12 One involves proper service that fails to give a party actual notice. While such judgments are not
13 invalid, courts should consider motions to vacate or set aside these judgments with particular
14 solicitude provided the party who lacked notice acts with reasonable diligence, as required in
15 subsection (c)(1), after discovering the judgment's entry. The other scenario involves instances
16 when service of process is improper. According to well-established doctrine, these judgments are
17 invalid unless the defending party waived a service-of-process objection before a judgment's entry,
18 or unless the defending party received adequate notice of the pending litigation before the
19 judgment's entry notwithstanding a minor service irregularity. See Restatement of the Law
20 Second, Judgments § 3 and Comments *b* & *d* thereto. These judgments can only have continued
21 effect under extraordinary circumstances. See Restatement of the Law Second, Judgments § 66.

REPORTERS' NOTES

22 *a. The presumption of proper service.* The plaintiff bears the burden of proving proper
23 service. E.g., *Sperry Assocs. Fed. Credit Union v. John*, 160 A.D.3d 1007, 1008 (N.Y. App. Div.
24 2018). That said, most jurisdictions provide that a proof, return, or similar document indicating
25 that service has been made creates a presumption of proper service unless that document on its
26 face suggests problems. E.g., *Kassouf v. Barylak*, 207 N.E.3d 974, 980 (Ohio Ct. App. 2023); *In*
27 *re J.B.*, 122 N.E.3d 774, 784 (Ill. App. Ct. 2018); *Wilson v. Md. Dep't of Env't*, 92 A.3d 579, 587
28 (Md. Ct. Special App. 2014); *McCain v. Dauzet*, 791 So. 2d 839, 842 (Miss. 2001); *S.E.C. v.*
29 *Internet Solutions for Bus. Inc.*, 509 F.3d 1161, 1163 (9th Cir. 2007); *Am. Express Centurion Bank*
30 *v. Zara*, 199 Cal. App. 4th 383, 390 (2011). If a proof of service demonstrates a failure to comply
31 with any service requirement, no presumption arises. E.g., *Dill v. Berquist Constr. Co.*, 24 Cal.
32 App. 4th 1426, 1442 (1994). An older rule, that a sheriff's or law enforcement's return or proof of

service is conclusive, is obsolete, and no distinction should be drawn between public and private process servers. Compare *Klarfeld v. Dubose*, 706 S.W.2d 62, 65 (Mo. Ct. App. 1986) (noting that a sheriff’s return of service is “conclusive” as to the lawfulness of service), with *Pantos v. Zarozny*, 2011 Mass. App. 226, at 2 (2011) (observing that this is an “old common law rule” that assumes someone wronged by improper service can sue the officer).

Different jurisdictions set different evidentiary thresholds for the party attempting to rebut the presumption of proper service. E.g., *Hall v. Folger Coffee Co.*, 874 So. 2d 90, 97 (La. 2004) (preponderance of the evidence); *Ballenger v. Floyd*, 639 S.E.2d 554, 574 (Ga. App. 2006) (holding that, to rebut the presumption, the evidence “must be not only clear and convincing, but the strongest of which the nature of the case will admit”) (internal quotations omitted); *M.F.S.D.-C.S.E. v. J.M.*, 651 S.W.3d 834, 837 (Mo. App. 2022) (clear and convincing); *Wells Fargo Bank NA v. Tobing*, 175 A.D.3d 745 (N.Y. App. Div. 2019) (observing that “bare and unsubstantiated denials” are insufficient to rebut the presumption, but a sworn denial with specific and detailed contradictions are sufficient); *iStativ v. Orlet*, 230 N.E.3d 139, 145 (Ill. App. Ct. Nov. 20, 2023) (clear and satisfactory). Likewise, while the party challenging service should have to adduce some sort of evidence to rebut the presumption of proper service that a proper return or proof creates, *Palm Prop. Invs. v. Yadegar*, 194 Cal. App. 4th 1419, 1428 (2011), jurisdictions have set different expectations for this evidence. In New York, for instance, “[a] sworn denial containing a detailed and specific contradiction of the allegations in the process server’s affidavit will defeat the presumption of proper service.” *Deutsche Bank Nat’l Trust Co. v. O’King*, 148 A.D.3d 776, 778 (N.Y. App. Div. 2017). By contrast, in Illinois, “a defendant’s uncorroborated testimony is not sufficient to impeach a return of service because of the risk of perjury, and for the sake of stability in judicial proceedings.” *U.S. Bank Trust, N.A. v. Tolson*, 2018 WL 5911812 (Ill. App. Ct. Nov. 9, 2018); see also *Wilson*, 92 A.3d at 587 (a denial of service will only stand if supported by “corroborative evidence by independent, disinterested witnesses”). Cf. *Famagelto v. Telerico*, 994 N.E.2d 932, 936-937 (Ohio Ct. App. 2013) (noting Ohio appellate precedent holding that an uncontradicted affidavit from the defendant denying the defendant was served is enough to rebut the presumption, but documenting disagreement with this precedent).

Subsection (a) makes four key choices that address these matters. First, it endorses a presumption of proper service upon the filing of a completed proof of service.

Second, subsection (a) recommends that, when a party challenges proper service, this party should be required to meet a preponderance of the evidence standard to rebut the presumption. This standard, a “[c]onventional rule[,],” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 253 (1989), “is the usual controlling standard in civil litigation.” *Snyder v. City of Moab*, 354 F.3d 1179, 1189 (10th Cir. 2003); see also *Perez-Montes v. Sessions*, 880 F.3d 849, 850 (7th Cir. 2018). The circumstances of high-volume civil adjudication do not justify a departure from this standard that would treat a facially valid proof of service with more confidence than it warrants. As this Chapter has repeatedly noted, concerns about service have persisted in various high-volume adjudication contexts for decades. Moreover, defendants in various types of high-volume civil adjudication, particularly debt-collection litigation, are unlikely to have detailed, factually rich evidence they

1 can marshal to challenge service. Most debt-collection defendants default, so challenges to service
 2 likely arise when they move to vacate or set aside judgments. These efforts may happen years after
 3 a creditor allegedly served the defendant. A defendant will struggle to articulate specific facts or
 4 provide specific evidence detailing the defendant’s whereabouts on a date from several years
 5 before. Finally, parties attempting service may be better positioned to avoid problems with service
 6 by taking advantage of reasonably available means to increase the likelihood of actual notice.

7 Third, to incentivize good service practices, subsection (a) pegs the showing the party
 8 challenging service must make to rebut the presumption to the quality of the service effort. If the
 9 proof of service contains only “general” and “conclusory statements” describing the alleged
 10 service, the averments of the party challenging service should be sufficient for that party to prevail
 11 provided they include some specific facts. *Pantos v. Zarozny*, 2011 Mass. App. 226, at 2 (2011).
 12 If a party’s process server has a record of improprieties, the party challenging service should be
 13 able to rebut the presumption upon a lesser showing. *CitiMortgage, Inc. v. Erani*, 180 A.D. 641,
 14 643 (N.Y. App. Div. 2020) (accounting for a process server’s license renewal denial “on the basis
 15 that he had falsified affidavits of service” when evaluating service). If, by contrast, a party
 16 supplemented personal service with other means or otherwise demonstrated a particular effort to
 17 ensure actual notice, the party’s adversary may be expected to make a more rigorous showing. Cf.
 18 *Ballenger v. Floyd*, 639 S.E.2d 554, 575 (Ga. App. 2006) (weighing against a plaintiff its failure
 19 to make “further efforts to perfect service” and thus “exercise the greatest possible diligence to
 20 ensure proper and timely service” when the defendant challenged service). These factors should
 21 be considered together. If, for instance, a proof of service only includes a modest amount of detail
 22 describing the person served, the defending party may be able to rebut the presumption of proper
 23 service with less factual information about the party’s whereabouts on the day of the alleged
 24 service. Likewise, the failure to include information confirming the time and place of service, such
 25 as geolocation information or a time-stamped photograph, should weigh against a presumption of
 26 proper service when the process server could have used low-cost, readily available technological
 27 means to confirm time and place. See § 3.05(b) & Reporters’ Note to Comment *b* thereto.

28 Fourth, subsection (a) provides that genuine factual disputes regarding proper service
 29 should be resolved at an evidentiary hearing. A bare, conclusory denial that a party failed to receive
 30 service may be insufficient to trigger a hearing. But a denial with a factual basis should be
 31 sufficient. See *Ohio Civ. Rts. Comm’n v. First Amendment Props.*, 680 N.E.2d 725, 729 (Ohio Ct.
 32 App. 1996) (holding that, once a defendant makes a sufficient evidentiary showing, the court
 33 should hold a hearing to decide the lawfulness of service); *CitiMortgage, Inc. v. Erani*, 180 A.D.3d
 34 641, 643 (N.Y. App. Div. 2020) (same). Thus, the court should hold a hearing to determine the
 35 propriety of service if a process server’s affidavit describes the defendant’s physical appearance
 36 inaccurately and the defendant can offer a “plausible explanation” for why the server may have
 37 served the wrong person. *U.S. Bank Trust*, 2018 WL 5911812 , at *4. Likewise, the court should
 38 hold the hearing if the defendant’s affidavit notes that the defendant does not live at the address
 39 cited in the process server’s proof, that the defendant had no knowledge that someone at the

address was served, and that the defendant never received notice of the case. Wells Fargo Bank, NA v. Tobing, 175 A.D.3d 745, 747-748 (N.Y. App. Div. 2019).

b. Challenging service before the entry of judgment. A party challenging service before the entry of judgment risks waiver of an improper-service defense if the party does not raise it as soon as reasonably possible. E.g., Retherford v. Kirkland, 363 So. 3d 132, 135 (Fla. Ct. App. 2023); FED. R. CIV. P. 12(b) (requiring that a challenge to service be raised in a first responsive pleading or by motion); 14 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1353 (5th ed. 2023) (noting that an improper-service argument must be raised in the first responsive pleading). By including a defense of improper service in a responsive pleading, the party preserves the defense and cannot be deemed to waive or forfeit it unless the party unreasonably delays before actually litigating that defense. E.g., Hamilton v. Atlas Turner, Inc., 197 F.3d 58, 62 (2d Cir. 1999).

A self-represented litigant may be unaware of the requirement to raise an improper-service defense as soon as reasonably possible. If this litigant engages actively in the lawsuit, defects in service may be technicalities that do not disadvantage the litigant. Under such circumstances, the court should deem an improper-service defense waived, even if defects with service are apparent in the filings and the record. But if these materials indicate defects in service, and if these defects have created or would create prejudice for the self-represented litigant, the court should take steps to ameliorate this prejudice. A landlord, for instance, might serve a tenant by posting the summons and complaint on the tenant's door and by mailing the summons and complaint to the same address. If the landlord knows or has reason to know that the tenant is traveling, and if the landlord does use reasonably available means to supplement this service with notice emailed or texted to the tenant, service may be improper. See § 3.02(a) & Comment *a* thereto. The landlord might also propound requests for admission at the service address. If the tenant appears, and if the deadline for responding to the requests has passed, the court should order the deadline extended.

Section 7.03 (Showing of Entitlement to Judgment) recommends that courts review the filings and record before entering judgment to confirm, to the extent practicable, proper service. If a defending party defaults, and if these documents indicate improper service, § 7.03 recommends that the court should refuse to enter judgment and may dismiss the case. A self-represented litigant who appears or otherwise engages notwithstanding improper service, in other words, may be worse off than one who defaults, if in the latter scenario the court dismisses the case upon identifying the service defect. If any prejudice to the self-represented litigant due to improper service cannot be ameliorated, the court may order the case dismissed, to ensure that engagement does not make this litigant worse off than a default.

c. Postjudgment notice challenges. Subsection (c) addresses two versions of postjudgment challenges involving notice. The first involves instances when service is proper, but the summons and complaint never actually reach the party entitled to them. That scenario is particularly likely when a party uses a substitute form of service, such as service by posting and mail, where there is no requirement that the party file a proof of service that confirms an adversary's actual receipt. A lack of actual notice should be grounds for setting aside a default judgment. E.g., N.Y. C.P.L.R. § 317 (permitting a party to whom a summons was not personally delivered to move to set aside a

default judgment on grounds of a lack of actual notice); CAL. CODE CIV. PROC. § 473.5(a) (permitting a party who did not receive actual notice of a lawsuit to move to set aside a default judgment); *Silva v. Silva*, 437 P.3d 593, 597 (Utah Ct. App. 2018).

This Section’s principles are consistent with the more general approach in civil litigation that permits a court to set aside a default judgment if the party against whom the judgment was entered failed to participate on grounds of “excusable neglect,” and if that party acted with “due diligence” and “reasonable promptness.” Restatement of the Law Second, Judgments § 67(1) & (2) (AM. L. INST. 1982). It also furthers the “‘presumption’ that cases should be tried on their merits if relief from the default is promptly sought.” *Id.*, Comment *a*; see also *Grappo v. McMills*, 11 Cal. App. 5th 996, 1006 (2017) (observing that California’s law permitting parties to contest default judgments “is often applied liberally where the party in default moves promptly to seek relief, and the party opposing the motion will not suffer prejudice if relief is granted”); *Burris v. Johnson*, 161 P.3d 956, 958 (Wash. 2006) (“This court has long favored resolution of cases on their merits [W]e will liberally set aside default judgments”). See generally Chapter 7 (Entry and Enforcement of Judgments).

A court should be particularly inclined to vacate a default judgment when a party lacked actual notice of the case’s filing, even when service is proper, if an adversary failed to use a low-cost method of providing supplemental service that would likely have been successful. If a party communicates regularly with an adversary by telephone, email, or text message, that party should provide supplemental service using one of those methods even if service is otherwise proper. If the party fails to do so, the court should be particularly inclined to vacate a default judgment. *Silva v. Silva*, 437 P.3d 593, 598 (Utah Ct. App. 2018) (holding that a defendant had a reasonable justification for failing to answer when the plaintiff, the defendant’s ex-husband, knew how to contact the defendant by phone or email but failed to supplement service of process using one of these methods).

The second version involves postjudgment challenges alleging improper service. A judgment is invalid if service of process is improper unless the party entitled to service waives the improper-service objection before the judgment’s entry, or unless notice of the pending litigation is adequate. E.g., Restatement of the Law Second, Judgments § 3 and Comments *b* & *d* thereto (discussing adequacy of notice); *Cal. Cap. Ins. Co. v. Hoehn*, 558 P.3d 590, 594, 2024 WL 4812045, at *2 (Cal. Nov. 18, 2024); *Buchholdt v. Nelson*, 534 P.3d 91, 93 (Alaska 2023) (“Judgments can be void for a number of reasons, including a lack of personal jurisdiction resulting from improper service of process.”); *Mun. Trust & Sav. Bank v. Moriarty*, 183 N.E.3d 146, 149 (Ill. 2021); *Turner v. Turner*, 473 S.W.3d 257, 269-272 (Tenn. 2015); *Sakaguchi v. Sakaguchi*, 173 Cal. App. 4th 852, 858 (2009); Chapter 7 (Entry and Enforcement of Judgments). In some jurisdictions, this rule applies whether a party had actual notice of the case or not before the judgment’s entry. *Moriarty*, 183 N.E.3d at 146; *Edison v. Beta Fin. Corp.*, 994 S.W.2d 827, 830 (Tex. Ct. App. 1999); *Master Fin. v. Woodburn*, 208 Ariz. 70, 74 (Ariz. Ct. App. 2004). The Restatement Second, Judgments, makes an exception for judgments entered when the defending party received “adequate” notice notwithstanding improper service. Restatement of the Law Second, Judgments § 3 & Comments *d*

1 & *b* thereto. Cf. *Garcia v. Puerto Vallarta Sports Bar*, 509 P.3d 1092, 1097 (Colo. App. 2022)
 2 (finding waiver of challenge to service of process because defendant had actual notice of case before
 3 default judgment entered but didn’t take action). This exception should be narrow and only applies
 4 when there have been “irregularities” in the serving party’s “technical compliance with notice
 5 procedures.” Restatement of the Law Second, Judgments § 3, Comment *b*.

6 When a judgment is invalid, the party against whom it is entered can move to have it
 7 vacated at any time. *M&K Welding, Inc. v. Leasing Partners, LLC*, 386 F.3d 361, 364 (1st Cir.
 8 2004); *County of San Diego v. Gorham*, 186 Cal. App. 4th 1215, 1226 (2010); *In re Marriage of*
 9 *Verdung*, 535 N.E.2d 542, 547 (Ill. 1989); *Matters of J.N. in Interest of C.G.*, 518 P.3d 788, 795
 10 (Colo. App. 2022). This party should not have to show reasonable diligence to obtain relief. E.g.,
 11 *Master Fin.*, 208 Ariz. at 74; *Sun South v. Bayou Vista*, 281 So. 3d 980, 985 (Miss. Ct. App. 2019);
 12 *Turner v. Turner*, 473 S.W.3d 257, 277-278 (Tenn. 2015); *Peay v. Barnett*, 236 Md. App. 306 (Md.
 13 Ct. Spec. App. 2018); *Allstate Ins. Co. v. Khani*, 75 Wash. App. 317 (Wash. Ct. App. 1994). But
 14 see *Deutsche Bank Nat’l Trust Co. v. Russo*, 57 A.3d 18, 23 (N.J. App. Div. 2012).

15 The notion that a judgment obtained without proper service is invalid dates to the historical
 16 connection between service of process and personal jurisdiction. Traditionally, a court acquired
 17 personal jurisdiction over a defendant only through the defendant’s consent or through proper
 18 service of the summons and complaint on the defendant. E.g., 14 CHARLES ALAN WRIGHT ET AL.,
 19 FEDERAL PRACTICE AND PROCEDURE § 1064 (5th ed. 2023). This identity is dated and no longer
 20 reflects the operation of contemporary personal-jurisdiction doctrine. E.g., Robin J. Effron, *The*
 21 *Lost Story of Notice and Personal Jurisdiction*, 74 N.Y.U. ANN. SURV. AM. LAW 23, 55-79 (2018).
 22 Cf. 14 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1353 (5th ed. 2023)
 23 (“Although the questions of personal jurisdiction and service of process are closely interrelated,
 24 service of process is merely the means by which a federal court gives notice to the defendant and
 25 asserts jurisdiction. . . .”). Nonetheless, courts continue to identify improper service with a lack of
 26 personal jurisdiction, reflecting an ongoing sense that the court lacks power to adjudicate when
 27 service is improper. E.g., *GEICO Indemnity Co. v. August*, 218 N.E.3d 157, 162 (Ohio Ct. App.
 28 2023).

29 Regardless, when a proceeding violates basic tenets of due process by proceeding without
 30 proper notice to an affected party, the judgment is invalid. *Peralta v. Heights Med. Ctr.*, 485 U.S.
 31 80, 87 (1988). For this reason, courts that impose no timing or reasonable-diligence requirements
 32 on parties moving to vacate judgments remain faithful to the historical understanding of the
 33 connection between proper service and the basic power to adjudicate. If a court lacks power to
 34 adjudicate, any judgment it enters is “void ab initio,” and anything that happens after the judgment’s
 35 entry “is too little, too late, to save the judgment.” *McCulley v. Brooks & Co. Gen. Contractors*,
 36 295 Va. 583, 590 (2018); see also *Voice Tele Services, Inc. v. Zee Telecoms*, 338 F.R.D. 200, 202
 37 (S.D.N.Y. 2021); *MN v. CS*, 908 P.2d 414, 416 (Wy. 1995). A reasonable-diligence requirement,
 38 for instance, suggests that a party’s failure to act quickly upon the discovery of a lawsuit or a default
 39 judgment can “cure” a judgment otherwise rendered by a court without power to adjudicate. In
 40 *Peralta*, the U.S. Supreme Court held that the State of Texas could not require defendants seeking

1 to vacate default judgments for improper service to show that they had a potentially meritorious
 2 defense to liability. 485 U.S. at 87. If a court lacks power to adjudicate, it cannot enter a judgment,
 3 regardless of the strength of the merits arguments the party moving to vacate can make. Likewise,
 4 a factor irrelevant to proper service, such as a party’s delay in moving to vacate, should not matter.

5 A rule that pegs a judgment’s validity to whether the defect in jurisdiction is apparent on
 6 the face of the record makes little sense for a similar reason. But see *Turner*, 473 S.W.3d at 217
 7 (“If the defect allegedly rendering the challenged judgment void is not apparent from the face of
 8 the judgment or the record of the proceeding . . . and must instead be established by additional
 9 proof, the judgment is merely voidable, not void.”). If a court lacks power to adjudicate in the first
 10 instance, the judgment’s infirmity should not depend upon whether the filings in the record before
 11 the entry of the default judgment indicate improper service, or whether improper service is only
 12 clear upon the submission of extrinsic evidence. E.g., *County San Diego v. Gorham*, 186 Cal. App.
 13 4th 1215, 1226 (2010) (“[O]nce proof is made that the judgment is void based on extrinsic
 14 evidence, the judgment is said to be equally ineffective and unenforceable as if the judgment were
 15 void on its face because it violates constitutional due process.”). Cf. *First Select Co. v.*
 16 *Mastromattei*, 2007 Mass. App. Div. 77, at 2-3 (2007) (allowing the defendant to use extrinsic
 17 evidence to show that service of process was improper and insisting that the timeliness of a
 18 challenge to a default judgment does not matter because the judgment is void); *CACH v. Ryan*,
 19 158 A.D.3d 1193 (N.Y. App. Div. 2018). A distinction between the two situations may be even
 20 less sound in high-volume civil-adjudication contexts in which service of process has historically
 21 and frequently been marred by fraud. Sewer service is problematic precisely because the process
 22 server’s affidavit, on its face, suggests proper service. A victim of sewer service may have to rely
 23 on extrinsic evidence to establish the fraud. A rule that restricts that victim’s ability to do so
 24 arbitrarily treats one set of cases differently than other, when both involve courts purporting to
 25 exercise power under fundamentally unfair circumstances. See generally *California Cap. Ins. Co.*
 26 *v. Hoehn*, 558 P.3d 590, 601-602, 2024 WL 4812045, at *10 (Cal. Nov. 18, 2024) (disapproving
 27 of a previous rule that precluded defendants in debt-collection litigation from adducing extrinsic
 28 evidence of improper service in a motion to vacate filed more than two years after the judgment’s
 29 entry and citing particular concerns about service in debt-collection litigation).

30 Whether a party has delayed in its effort to vacate the default judgment should not matter
 31 to a judgment’s validity when service is improper. That said, numerous courts, including most
 32 federal courts of appeals, demand a more rigorous evidentiary showing from the party challenging
 33 service if the party had notice before a judgment’s entry but did not act then. E.g., *SEC v. Internet*
 34 *Solutions for Bus., Inc.*, 509 F.3d 1161, 1163 (9th Cir. 2007); *Monster Heavy Haulers v. Goliath*
 35 *Energy Servs.*, 883 N.W.2d 917, 925 (N.D. 2016). This approach appropriately balances the
 36 prevailing party’s interest in the finality of judgments against an adversary’s due-process rights.
 37 The heightened showing penalizes parties against whom judgments are entered for unreasonable
 38 delay, but it does not conflict with the basic principle that a judgment entered without proper
 39 service is invalid absent waiver or adequate notice. The moving party simply has to make the
 40 requisite showing of improper service, albeit a more rigorous one, a penalty for the party’s failure

1 to challenge service in a timely fashion. E.g., *Internet Solutions*, 509 F.3d at 1163 (insisting that a
2 defaulting party that has actual notice before a judgment is entered must show by “strong and
3 convincing evidence” that service was improper).

4 Under extraordinary circumstances, a judgment rendered without proper service to the
5 party against whom it is entered can continue to have some effect. See Chapter 7 (Entry and
6 Enforcement of Judgments). The Restatement of the Law Second, Judgments, provides as follows:

7 Relief from a default judgment on the ground that the judgment is invalid will be
8 denied if:

9 (1) The party seeking relief, after having had actual notice of the judgment,
10 manifested an intention to treat the judgment as valid; and

11 (2) Granting the relief would impair another person's substantial interest of reliance
12 on the judgment.

13 Restatement of the Law Second, Judgments § 66 (AM. L. INST. 1982). If, for instance, a parent
14 waits more than two years after learning of a judgment terminating parental rights, and if children
15 have been adopted by another parent in the meantime, the parent who was not served properly may
16 not be able to obtain complete relief from the judgment’s effects. *Turner*, 473 S.W.3d at 282-284.
17 Likewise, if defendants in a foreclosure action had actual notice of the lawsuit before the entry of
18 judgment but waited years to challenge the proceedings, and if the property in the meanwhile was
19 sold to an innocent third-party purchaser, the defendants may not be able to obtain complete relief.
20 *PNC Bank*, 193 N.E.3d at 1203.

21 Litigation involving money judgments should rarely, if ever, present such extraordinary
22 circumstances. Cf. Restatement of the Law Second, Judgments § 66, Comment c (AM. L. INST.
23 1982) (“The interests of reliance protected by denying relief may include property interests,
24 interests in status, or interest in repose from legal controversy.”).

CHAPTER 4

PLEADING AND INFORMATION EXCHANGE

§ 4.01. General Principles of Pleading and Information Exchange

(a) The purposes of pleading in high-volume civil adjudication are to provide notice of the subject matter of the action to the parties and the court; to serve as a vehicle for information exchange; to facilitate meaningful participation by all parties, including access to legal help; to promote effective case management by the court; to promote fair settlements; and to enable full consideration of substantive and procedural requirements by the parties and the court prior to entry of judgment. These pleading-specific purposes serve the general goals of procedure set forth in § 2.01.

(b) Fair, accurate, and effective adjudication in high-volume civil dockets may require mandatory information exchange, including disclosures, provision of supporting materials as attachments, and certifications, with only enumerated and limited discovery thereafter. Litigation stages that are distinct in other types of civil litigation—for instance, pleading and discovery—may be collapsed into a single stage in high-volume civil adjudication.

(c) Rules governing pleading and information exchange should be tailored to particular high-volume civil-adjudication case types or case features; no single approach to pleading and information exchange is likely to be effective across all areas. However, in most high-volume civil-adjudication areas, pleading-linked, form-based, mandatory disclosure should replace discovery as the primary mode of pretrial information exchange.

(d) Rules governing the content, form, and timing of pleading and information exchange should promote the use of standardized forms and digital interfaces for parties who face barriers to meaningful participation, in order to reduce the costs and strategic disadvantages that litigant-designed pleadings and discovery requests can impose on litigants with less expertise, resources, or access to legal help.

(e) Asymmetric pleading and disclosure obligations may be justified in high-volume civil-adjudication areas in which one party typically controls most discoverable information or the opposing party has limited capacity to seek discovery on its own or comply with disclosure obligations, as when a litigation area features sharp asymmetries in expertise, resources, and representation across the parties.

Comment:

a. Overview—shift away from conventional pleading and discovery rules in high-volume civil adjudication. Pleading and information exchange are fundamental to access to courts. This Section, and the Sections that follow, mark a significant shift away from traditional pleading and discovery rules in high-volume civil adjudication. That shift has three parts: expanding the core purposes of pleading; merging pleading and discovery into a single unified stage via mandatory disclosure, with presumptive limits on conventional discovery; and adopting a more structured, court-directed approach to information exchange through standardized forms or digital platforms.

b. Pleading’s purposes in high-volume civil adjudication. Key features of high-volume civil adjudication—among them sharp asymmetries in litigant legal capacity, resources, and representation by counsel; the fact that repeat-player institutional parties, including the government, often possess most or all relevant evidence; rapid litigation timelines; and the high cost of participation for one-time and often self-represented litigants—justify widening pleading’s purposes beyond those that underlie pleading rules in other types of civil litigation. Conventionally understood, pleading provides notice of the claims and issues to be adjudicated in a case, frames and narrows those claims and issues so that the parties can evaluate their respective positions, and facilitates rapid disposition of insubstantial claims and defenses. Under the “notice” and “plausibility” pleading standards that govern most civil litigation, pleadings need only provide notice of the subject matter of the suit and enough factual particularity to close off innocent alternative inferences and draw into relief liability-conferring ones. Further development of facts and evidence is left to later litigation stages and, in particular, party-directed discovery.

In high-volume civil adjudication, pleading serves those conventional purposes, but it should also serve as a structured means of enabling earlier and more robust forms of information exchange in order to achieve key procedural and substantive ends. First, fact pleading combined with earlier and more robust information exchange can provide less expert, less resourced, and often self-represented litigants with needed information about available claims or defenses and the procedural frameworks that will apply in adjudicating a case. Second, more robust pleading coupled with mandatory information exchange can facilitate the efficient triage and provision of low-cost legal help. By surfacing relevant case materials at the outset of a litigation, legal-services providers can efficiently identify potential defenses and counterclaims and assess case merit and offer counsel or refer the party to other appropriate forms of legal assistance. Finally, more robust

pleading coupled with mandatory information exchange can enable sound administration by judges and court staff, such as triage or other forms of preliminary assessment in order to route cases to appropriate procedural pathways. See Chapter 8 (Systemic Administration); Chapter 14 (General Principles of Adjudication Alternatives in High-Volume Civil Adjudication). Pleading and information exchange can also facilitate the court’s careful consideration of the appropriateness of entering judgment. See Chapter 7 (Entry and Enforcement of Judgments). An important takeaway is that procedure, perhaps more so in high-volume civil adjudication than in other types of civil litigation, serves multiple audiences beyond just the parties to a case.

c. Pleading and discovery as a unified litigation stage. Meaningful party participation and effective case management in high-volume civil adjudication may be best achieved via procedures that depart from the traditional multistage approach to civil litigation in favor of streamlined, single-shot pleading and information exchange. In conventional civil litigation, procedures yield a predictable sequence of litigation stages, from service of a summons and complaint, to subsequent pleading (i.e., a motion to dismiss and answer), to discovery. In high-volume civil dockets, litigation stages that are distinct elsewhere in civil litigation—particularly pleading and discovery—may be merged into a single stage and treated as a single, unified step. See also Chapter 3 (Notice and Service of Process); § 2.03 (Meaningful Participation) (discussing consolidation via a general requirement that procedures prescribe minimum litigable stages). This Section’s principles aim to ensure that all information necessary to obtain a fair and accurate resolution is surfaced prior to entry of judgment. Treating pleading and discovery as a single, unified litigation stage in high-volume civil adjudication—including by requiring plaintiffs to provide information not typically demanded at the pleading stage in other forms of civil litigation—aims to allocate the cost of surfacing relevant information to the party who is best positioned to do so efficiently. In many high-volume civil-adjudication contexts, that party is the repeat-player, institutional plaintiff. This cost-allocation principle is well established in civil procedure. As just one example, Federal Rule of Civil Procedure 9 and its state analogues impose heightened disclosure requirements on plaintiffs alleging fraud because plaintiffs are often best positioned to supply the relevant information.

d. Structured and court-directed pleading and information exchange. Court control over the content, form, and timing of pleading and information exchange via structured forms, whether paper forms or an online digital interface, has four main benefits. First, a structured, court-directed approach to pleading and information exchange can ensure the comprehensibility and functionality

1 of pleadings and information exchange by minimizing complexities in legal materials and assisting
2 the parties, including less expert, less resourced, and often self-represented litigants, and legal-
3 services providers who might assist them. See § 2.03 (Meaningful Participation). Second, a
4 structured, court-directed approach to pleading and information exchange can limit asymmetric
5 strategic action by repeat litigants who might otherwise design pleadings and discovery requests
6 to achieve strategic litigation ends, whether by obfuscating issues or steering less expert, less
7 resourced, and often self-represented opposing parties toward particular courses of action that
8 might not be in their own interests. *Id.* Third, a structured, form-based approach to pleading and
9 information exchange, with enumerated and limited discovery thereafter, can help ensure that
10 information exchange and discovery remain proportional to the needs of specific high-volume
11 civil-case types while minimizing conflict, cost, and delay. Finally, court control over the content,
12 form, and timing of pleading and information exchange can be a key component of sound court
13 administration, particularly data collection, quality assurance, and other aspects of “systemic
14 administration.” See Chapter 8 (Systemic Administration). Litigants are not merely recipients of
15 information; they also contribute to the communication process. A structured, form-based
16 approach will often be the best way for courts to elicit needed information from litigants for court
17 administration as well as fair adjudication.

18 *e. Tailoring pleading and information-exchange rules to case types or case features.* While
19 high-volume civil-adjudication case types share many features in common, they often diverge in
20 the types and amount of information and proofs that are necessary to prove up and adjudicate
21 claims. See also § 2.02 (Tailored Procedure and Case Management). For instance, the optimal
22 menu of items subject to mandatory disclosure will vary as between eviction and consumer-debt
23 cases, as elaborated in § 4.02 (Content of Pleading and Information Exchange). More generally,
24 in formulating rules governing pleading and information exchange, courts and other rulemakers
25 should account for salient differences across high-volume civil-case types, including (i) the types
26 and amount of information and proofs that are necessary to present and adjudicate claims;
27 (ii) patterns of expertise, resources, and representation among litigants, particularly the prevalence
28 of cases pitting represented parties against self-represented ones or cases in which both sides are
29 self-represented; (iii) litigants’ relative access to case-relevant evidence or other materials; and
30 (iv) the differing strategic and economic incentives of litigants.

1 As with other areas of procedure in high-volume civil dockets, courts and other rulemakers
2 should take care to ensure that rules governing pleading and information exchange do not
3 systematically favor some parties over others, as even facially neutral rules can, and in some
4 settings, do. The more general goals of pleading and information exchange remain fair and accurate
5 resolution of disputes, meaningful participation, effective decisionmaking by litigants and the
6 court, and public elaboration of law. See § 2.01 (Goals of Procedure). However, in pursuit of these
7 goals, the rules governing high-volume civil adjudication may depart from procedural norms in
8 other types of civil adjudication. Key features of high-volume civil dockets, particularly sharp
9 asymmetries in expertise, resources, and representation, may require that only one side in a case is
10 obligated to make mandatory disclosures or is subject to particular pleading or information-
11 exchange requirements, thus departing from the norm in other types of civil litigation in which
12 both sides hold the same duties. See §§ 2.03 (Meaningful Participation) and 2.04 (Procedure and
13 Vulnerable Parties) (both discussing trans-substantivity and neutrality in procedure). Fair
14 adjudication may also necessitate limits on use of conventional discovery absent a showing of
15 good cause, see § 4.06 (Limits on Discovery), with mandatory disclosure thus serving as the
16 primary mode of pretrial information exchange.

17 Finally, the optimal approach to pleading and information exchange may vary based on
18 other procedural features of a given jurisdiction or case type. One such feature is whether a
19 jurisdiction is an “answer” court that requires a written responsive pleading, such as a written
20 responsive pleading or affidavit, to avoid default and schedule a hearing date, or an “appearance”
21 court, in which a trial date is automatically set and a defendant may choose to answer by appearing
22 at a hearing and, in some jurisdictions, may only file a written answer if asserting a counterclaim.
23 In appearance courts, rules regulating pleading and information exchange may impose on plaintiffs
24 a fuller set of automatic disclosure requirements, because a defendant may choose not to file an
25 answer—and, indeed, may be barred from doing so—thus potentially depriving the court of
26 information it may need to perform tasks related to adjudication, such as allocating the case to a
27 procedural track, see Chapter 8 (Systemic Administration) (detailing challenges of case triage), or
28 determining the plaintiff’s procedural and substantive entitlement to entry of judgment, see
29 Chapter 7 (Entry and Enforcement of Judgments).

REPORTERS' NOTES

1 *a. Overview—shift away from conventional pleading and discovery rules in high-volume*
 2 *civil adjudication.* Pleading and information exchange are fundamental to access to courts. See
 3 *Phillips v. County of Allegheny*, 515 F.3d 224, 230 (3d Cir. 2008) (“Few issues . . . are more
 4 significant than pleading standards, which are the key that opens access to courts.”); *In re Bank of*
 5 *Cal. Secs. Litig.*, No. 17-00118, 2017 WL 3972456, at *28 (C.D. Cal. Sept. 6, 2017) (noting “the
 6 importance of pleading standards for access to justice”); *Bank of Am. v. Reyes-Toledo*, 428 P.3d
 7 761, 773 (Haw. 2018) (rejecting heightened, “plausibility” pleading because “it results in decreased
 8 access to the courts for citizens”). Courts must ensure that all litigants have access to accurate and
 9 understandable information about the issues in dispute and the court processes that will be used to
 10 resolve those issues. This Section—and the Sections that follow in this Chapter—embody a shift
 11 away from conventional approaches to pleading and discovery in American civil litigation in light
 12 of key features of high-volume civil dockets. That shift has three related components: (i) an
 13 expansion of the core purposes of pleading; (ii) the merger of previously distinct litigation stages—
 14 pleading and discovery—into a single, unified stage, with presumptive limits on further discovery;
 15 and (iii) adoption of a more robust, structured, court-directed approach to pleading and information
 16 exchange via court-created, standardized forms or a court-hosted online digital interface.

17 *b. Pleading’s purposes in high-volume civil adjudication.* In conventional civil procedure,
 18 the purpose of pleading is to apprise the court and opposing parties of the issues to be adjudicated,
 19 to frame and narrow those issues for resolution, to provide a vehicle for speedy disposition of
 20 defective claims or defenses, and to guide further proceedings, particularly discovery and trial. See
 21 *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993) (“The fundamental purpose of pleadings . . . is
 22 to give adequate notice to the parties of each side’s claims and to allow cases to be decided on the
 23 merits after an adequate development of facts.”); *U.S. v. Fidelity & Deposit Co.*, 690 F. Supp. 905,
 24 907 (D. Haw. 1988) (“[P]leadings serve a notice function, which inform the defendant of the event
 25 for which they are sued.”); *White v. Fletcher*, 90 So. 2d 129, 131 (Fla. 1956) (“The purpose of
 26 pleadings is to present, define, and narrow the issues, and to form the foundation of, and to limit,
 27 the proof to be submitted on the trial.”); *People ex rel. Fahner v. Carriage Way West, Inc.*, 430
 28 N.E.2d 1005, 1008 (Ill. 1981) (“The purpose of pleadings is to present, define and narrow the issues
 29 and limit the proof needed at trial. Pleadings are not intended to erect barriers to a trial on the merits
 30 but instead to remove them and facilitate trial.”); 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER,
 31 *FEDERAL PRACTICE AND PROCEDURE* § 1202 (4th ed. 2023). In particular, pleading informs the court
 32 of the facts that the parties believe to exist and the likely issues to be adjudicated for purposes of
 33 conducting the case. Pleading likewise informs opposing parties of allegations and likely issues so
 34 that they can contest the legal and, where permitted, the factual sufficiency of a cause of action and
 35 prepare appropriate proofs and evidence. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)
 36 (litigants’ pleadings must “nudge[] their claims across the line from conceivable to plausible”);
 37 *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (noting that “[a] claim has facial plausibility when the
 38 pleaded factual content allows the court to draw the reasonable inference that the defendant is liable
 39 for the misconduct alleged.”); *Kaiser Trucking v. Liberty Mut. Fire Ins.*, 981 N.W.2d 645, 651 (S.D.

2022) (noting that a sufficient pleading “‘put[s] a person of common understanding on notice, with reasonable certainty of the accusations against [them] so [they] may prepare their defense.’” (quoting *Hallberg v. S.D. Bd. of Regents*, 937 N.W.2d 568, 577 (S.D. 2019))). Notice is thus paramount. Finally, pleading in much of conventional civil litigation frames the cause of action and factual allegations for future use and benefit, including subsequent appellate review, if an appeal is filed, and makes available a defense of *res judicata* (claim preclusion) in a subsequent action.

In high-volume civil adjudication, certain of these longstanding rationales shift or recede in significance. Preclusion is infrequently encountered in high-volume civil cases. Notice remains paramount, but many core features of high-volume civil dockets, particularly asymmetries in litigant legal capacity, resources, and representation, demand richer and more robust forms of notice to serve key justice ends. Pleading serves as more than an entry point to court for litigants. For instance, pleading and earlier and more robust information exchange inform triage decisions by court administrators tasked with routing cases to appropriate procedural pathways, or the decisions of legal-service providers and other intermediaries who route litigants to other appropriate forms of legal assistance. Here, as elsewhere, pleading and information exchange serve numerous audiences and purposes in high-volume civil dockets beyond the litigants themselves. See § 2.01 (Goals of Procedure); § 2.03 (Meaningful Participation) (noting role of procedures in facilitating low-cost legal help); see also Chapter 7 (Entry and Enforcement of Judgments) (prescribing procedures that assist judges in entry of default judgments).

Expanding pleading’s purposes in high-volume civil dockets is not inconsistent with past efforts to tailor procedure and case management to litigation realities in particular case types. Federal and state courts, rulemaking bodies, and legislatures have created case- and party-specific pleading rules in securities litigation, civil rights, prisoner litigation, and fraud cases. See Richard Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1779 (1998). Moreover, many courts, including the U.S. Supreme Court, have granted special solicitude to pro se litigants in interpreting pleading standards. See Chapter 9 (The Judicial Role); see also *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (noting that “pro se complaint[s], ‘however inartfully pleaded,’ [are] held to ‘less stringent standards than formal pleadings drafted by lawyers’”) (quoting *Haines v. Kerner*, 404 U.S. 519, 520-521 (1972) (per curiam)); *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 402 (2008) (“Even in the formal litigation context, pro se litigants are held to a lesser pleading standard than other parties.”); *Makila Land Co. v. Kapu*, 522 P.3d 259, 268 (Haw. 2022) (“Filings prepared by a pro se litigant should be construed by courts in a manner that will afford the pro se litigant equal access to justice and an opportunity to be heard.”); *State v. Hill*, 467 P.3d 473, 475 (Kan. 2020) (“Pro se pleadings are liberally construed to give effect to the pleading’s content rather than the labels and forms used to articulate the defendant’s arguments.”); *Javed v. Baig*, No. M2022-00331-COA-R3-CV, 2022 WL 17844285, at *6 (Tenn. App. Dec. 22, 2022) (stating that courts “should give effect to the substance, rather than the form or terminology, of a pro se litigant’s papers”); *Benbow v. Al-Barnawi*, No. 13-20-00131-CV, 2021 WL 3556214, at *4 (Tex. App. Aug. 12, 2021) (“Appellate courts construe pro se pleadings and briefs liberally . . .”).

More generally, the relative importance of pleading’s purposes has shifted over time and by jurisdiction. At common law or, later, under the “Field Code” pleading regime that prevailed in many states beginning in the mid-19th century, choosing the wrong form of action or pleading the wrong types of facts could be fatal to a case. See KELLEN FUNK, *LAW’S MACHINERY: REFORMING THE CRAFT OF LAWYERING IN AMERICA’S INDUSTRIAL AGE* (2025). Modern civil procedure abandoned rigid, formalistic pleading approaches and replaced them with a more functional and forgiving approach built around “notice pleading.” *Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 168 (1993). More recently, many jurisdictions, though not all, have shifted to “plausibility pleading.” See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); see also *Poola v. Howard Univ.*, 147 A.3d 267, 276 (D.C. 2016) (“We have adopted the pleading standard articulated by the Supreme Court”); *Warne v. Hall*, 373 P.3d 588, 595 (Colo. 2016) (“[W]e join those other states already embracing the plausibility standard”). But see *Webb v. Nashville Area Habitat for Humanity*, 346 S.W.3d 422, 424 (Tenn. 2011) (“We decline to adopt the new *Twombly/Iqbal* ‘plausibility’ pleading standard”); *Bank of Am. v. Reyes-Toledo*, 143 Haw. 249, 252 (2018) (“[T]his court has never adopted the *Twombly/Iqbal* ‘plausibility’ pleading standard, and we now expressly reject it.”); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 434-437, 492 (1986) (arguing that federal courts in practice had eroded the standard of “notice pleading” before *Twombly* and *Iqbal*). In contrast to notice pleading, “plausibility pleading” reflects a recognition that some narrowing of the issues at the start of the case may reduce the cost and time involved at later stages of litigation and so can be seen as a return to premodern pleading that considers both legal and also factual sufficiency. Marcus, *supra*; Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987). Expanding pleading’s purposes in high-volume civil dockets thus reflects continuing debate and experimentation.

c. Pleading and discovery as a unified litigation stage. The merger of pleading and information exchange into a single litigation stage, though a departure from the “default sequential ordering” of American civil litigation, Alexandra D. Lahav, *Procedural Design*, 71 VAND. L. REV. 821, 872 (2018), would serve important ends. First, merger of pleading and discovery via fact pleading and mandatory information exchange at the outset of a case better informs decisions by defendants whether and how to respond to a lawsuit and, just as important, helps ensure that litigants who have already engaged in a case are able to continue to do so. Rebecca Love Kourlis et al., *Reinvigorating Pleadings*, 87 DENVER U. L. REV. 245, 245 (2010) (“To fulfill their potential . . . pleadings must provide litigants with two types of access: the ability to get into court in the first place, and the ability to participate meaningfully in the process until a complete judicial resolution is reached.”). Second, unified pleading and information exchange are justified because conventional discovery is underutilized or even disallowed in many high-volume civil-litigation areas. E.g., MD. R. CIV. P. DIST. CT. 3-711 (2021) (“[N]o pretrial discovery . . . shall be permitted in a grantee action, or an action for summary ejection, wrongful detainer, or distress for rent, or an action involving tenants holding over.”); MINN. STAT. § 491A.01 (discovery unavailable in

conciliation court where amount in controversy is \$4,000 or less); IND. SMALL CL. R. 6 (discovery allowed in small claims court “only upon notice and good cause shown” and limited to “the necessities of the case”); N.Y.U. v. Farkas, 468 N.Y.S.2d 808, 811 (N.Y. Civ. Ct. 1983) (discovery disallowed in eviction cases unless a party can demonstrate “ample need” for the information sought and the scope can be narrowly tailored to minimize prejudice to the other side); S.C. MAGISTRATE CT. R. 15(a) (no discovery in magistrate court but encouraging “prompt voluntary exchange of information and documents by parties prior to trial”). See generally Diego A. Zambrano, *Missing Discovery in Lawyerless Courts*, 122 COLUM. L. REV. 1423, 1436 (2022) (cataloging and taxonomizing jurisdictions); Seymour Moskowitz, *Rediscovering Discovery: State Procedural Rules and the Level Playing Field*, 54 RUTGERS L. REV. 595, 609-610 (2002) (same); Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785, 790 (1998) (same). Mandatory disclosure thus ensures that adjudication does not occur without exchange of information or fact development that discovery would normally provide.

Mandatory and “automatic” forms of information exchange at the outset of a case are not new. To the contrary, they are well-established features of American civil litigation. Beginning in 1993, Federal Rule of Civil Procedure 26(a) imposed upon parties “a duty to disclose, without awaiting formal discovery requests, certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement.” FED. R. CIV. P. 26 (Advisory Committee Notes, 1993 Amendment). Similarly, “pattern” discovery keyed to case type has emerged as a popular solution to curbing excess discovery. E.g., JUD. CONF. ADVISORY COMM. ON CIV. RULES AND THE COMM. ON RULES OF PRACTICE AND PROCEDURE, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION 10-11 (2010), <https://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/special-projects-rules-committees/2010-civil>. So, too, discovery protocols keyed to case types—for instance, business interruption insurance, disaster, Fair Labor Standards Act, and employment—have been piloted or adopted in many jurisdictions, particularly during the COVID-19 pandemic. See INST. FOR ADVANCEMENT OF THE AM. LEGAL SYS., INITIAL DISCOVERY PROTOCOLS FOR BUSINESS INTERRUPTION INSURANCE DISPUTES ARISING FROM THE COVID-19 PANDEMIC AND SIMILAR PUBLIC HEALTH THREATS 1-2 (2021); FED. JUD. CTR., INITIAL DISCOVERY PROTOCOLS FOR FAIR LABOR STANDARDS ACT CASES NOT PLEADED AS COLLECTIVE ACTIONS 3 (2018); INST. FOR ADVANCEMENT OF THE AM. LEGAL SYS., INITIAL DISCOVERY PROTOCOLS FOR FIRST-PARTY INSURANCE PROPERTY DAMAGE CASES ARISING FROM DISASTERS (2019); FED. JUD. CTR., INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION: REPORT ON A PILOT PROJECT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE (2018); FED. JUDICIAL CTR., REPORT ON PILOT PROJECT REGARDING INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION (2015). Finally, numerous jurisdictions, including courts in the Southern District of New York, Arizona, Minnesota, Oregon, Utah, and Washington, have piloted or adopted multitier procedural approaches that incorporate mandatory information exchange coupled with discovery limits. E.g., S.D.N.Y. L. R. 33.3 (restrictions on the use of interrogatories); UTAH R. CIV. P. 26(c)(5) (limits on standard fact

discovery by tier); ARIZ. R. CIV. P. 26.2 (tiered limits on discovery based on attributes of cases); MN. R. CIV. P. 26.02(b)(2) (two-tier standard for discovery of electronically stored information).

An emerging body of empirical research evaluating these and other reform efforts finds that fact pleading and mandatory information exchange achieve vital benefits in civil litigation by informing litigants about available claims and defenses, reducing satellite litigation, shortening time to disposition, and decreasing the rate of default judgments. E.g., PAULA HANNAFORD-AGOR & CYNTHIA G. LEE, UTAH: IMPACT OF THE REVISIONS TO RULE 26 ON DISCOVERY PRACTICE IN THE UTAH DISTRICT COURTS (2015); PAULA HANNAFORD-AGOR ET AL., NEW HAMPSHIRE: IMPACT OF THE PROPORTIONAL DISCOVERY/AUTOMATIC DISCLOSURE (PAD) PILOT RULES 17-18 (2013); PEGGY E. BRUGGMAN, REDUCING THE COSTS OF CIVIL LITIGATION: DISCOVERY REFORM 29-46 (1995); WASH. ST. BAR ASS'N, TASK FORCE ON THE ESCALATING COSTS OF CIVIL LITIGATION, FINAL REPORT TO THE BOARD OF GOVERNORS 27 (2015); INST. FOR ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE OREGON COURTS: AN ANALYSIS OF MULTNOMAH COUNTY 2, 3 (2010); INST. FOR ADVANCEMENT OF THE AM. LEGAL SYS., MOMENTUM FOR CHANGE: THE IMPACT OF THE COLORADO CIVIL ACCESS PILOT PROJECT 13 (2014). For a recent research summary, see NAT'L CTR. FOR STATE CTS., REIMAGINING CIVIL CASE MANAGEMENT (2021). These benefits may be substantial in high-volume civil dockets characterized by pervasive asymmetries in parties' legal capacity, resources, and representation. However, courts and other rulemakers should be careful to parse research findings drawn from procedural reforms that also cover cases beyond high-volume civil adjudication. See, e.g., HANNAFORD-AGOR & LEE, *supra*, at 13 (reporting large effects on rates of dismissal, settlement, and judgment, reduced time to disposition, and less frequent discovery disputes in civil cases generally, but negligible effects in debt collection and family law ("domestic") actions in Utah's Rule 26 reforms). Not all research findings from procedural reforms will generalize to high-volume civil dockets, and some evaluations of such reforms specifically exclude important swathes of cases in those dockets. See, e.g., NAT'L CTR. FOR STATE CTS., CIV. JUST. INITIATIVE, TEXAS: IMPACT OF THE EXPEDITED ACTIONS RULES ON THE TEXAS COUNTY COURTS AT LAW 3 (2023) (noting the study's exclusion of default judgments, nonsuits, dismissals for failure to prosecute, and other non-meritorious dispositions because the Expedited Action Rules "were not expected to have an impact on those types of cases").

d. Structured and court-directed pleading and information exchange. This Section, in advocating merger of pleading and discovery into a single, unified step, embraces a growing trend among courts toward a structured, court-directed approach to identifying fact issues and legal claims and defenses in high-volume civil dockets. E.g., Cal. Cts., Find Your Court Forms, <https://www.courts.ca.gov/forms.htm>; see generally NAT'L CTR. FOR STATE CTS., CALL TO ACTION: ACHIEVING JUSTICE FOR ALL 33, 37 (2016) (hereinafter CALL TO ACTION) (calling for "[s]tandardized forms," including "online 'intelligent forms'"). Under this approach, allegations necessary to support a claim for relief or defense and mandatory information exchange are codified, whether by court rule or statute, and standardized via court-created forms or online digital interfaces, such as guided interviews or "wizards." See also Chapter 12 (Court Use and Regulation of Technology).

1 A structured, standardized, form-based approach to pleading and information exchange
2 serves three main ends. First, codified pleading and information exchange coupled with well-
3 designed, standardized forms or digital user interfaces can optimize information flows to and from
4 procedure’s multiple “audiences” in high-volume civil dockets. One such audience is the litigants
5 themselves. As detailed in § 4.03 (Form of Pleading and Information Exchange), less expert, less
6 resourced, and often self-represented litigants benefit from well-designed, plain-language forms.
7 By contrast, conventional pleading approaches may fail to apprise opposing parties of the basis for
8 the claim against them, particularly litigants without the assistance of counsel. A second audience
9 is legal-services providers or other intermediaries. Structured, form-based pleading and
10 information exchange facilitates triage efforts by legal-services providers or other intermediaries,
11 enabling efficient assessment of possible defenses or counterclaims and informed routing of
12 litigants to other appropriate forms of legal assistance. A third and final audience is the judge and
13 court. A structured approach to pleading and information exchange may be particularly valuable
14 when a defendant fails to respond to a complaint or appear for a hearing, because it enables the
15 court to independently evaluate a plaintiff’s claim and enter judgment accordingly. Courts need
16 sufficient information to determine the validity of the plaintiff’s claim and appropriateness of relief
17 before entering judgment. See Chapter 7 (Entry and Enforcement of Judgments).

18 Second, court control over the content and form of pleading and information exchange
19 limits strategic action by litigants, particularly more-expert, better-resourced, and often
20 represented parties, who might intentionally design pleadings and discovery requests in ways that
21 obfuscate rather than clarify issues or guide less expert, less resourced, and often self-represented
22 adversaries into particular courses of action. As detailed in § 4.03 (Form of Pleading and
23 Information Exchange), a growing literature finds that litigant-controlled pleadings and discovery
24 forms work to the disadvantage of the latter category of litigants.

25 Third, a structured, form-based approach to pleading and information exchange facilitates
26 sound judicial management and court administration. A structured, form-based approach can assist
27 judges in the entry of judgment, as detailed in Chapter 7 (Entry and Enforcement of Judgments).
28 In addition, a structured approach combining fact pleading with mandatory information exchange
29 facilitates new, team-based approaches to adjudication and court administration, such as staff-
30 performed preliminary assessments of entitlements to different types of relief or advance issue-
31 spotting for judges in preparation for hearings, as well as quality-assurance and other forms of
32 “systemic administration.” See Chapter 9 (Systemic Administration).

33 A formalized, structured approach to pleading and automatic information exchange is not
34 without potential costs. A structured, court-directed approach risks shoehorning cases into
35 predetermined categories and can yield a self-fulfilling prophecy: Cases governed by form-based
36 pleading and information exchange designed for “simple” cases will remain simple, while cases
37 governed by pleading and discovery rules designed for “complex” cases will tend to become
38 complex. The solution to this concern, however, is not one-size-fits-all procedure, but rather careful
39 system design to allow for re-designation of cases to alternate case management and procedural
40 pathways or permission for conventional discovery upon a showing of good cause and

proportionality. See Chapter 9 (Systemic Administration) (setting forth principles for the routing of cases to case management and procedural tracks or “pathways” based on case type or case features).

A wider critique holds that a unified, structured, form-based approach to pleading and information exchange is an imprudent relaxation of the adversarial process and judicial neutrality. Some critics have long declared “automatic” discovery to be an unwise incursion into lawyers’ ethical obligations of respect for client confidences and zealous representation. E.g., Justice Scalia, *Dissenting Statement to Amendments to the Federal Rules of Civil Procedure*, 146 F.R.D. 507, 511 (1993) (arguing that Rule 26’s mandatory disclosure provisions “would place intolerable strain upon lawyers’ ethical duty to represent clients and not to assist the opposing side. Requiring a lawyer to make a judgment as to what information is ‘relevant to disputed facts’ plainly requires him to use his professional skills in the service of the adversary.”); Jonah B. Gelbach & Bruce H. Kobayashi, *The Law and Economics of Proportionality in Discovery*, 50 GA. L. REV. 1093, 1104 (2016) (making the more general point that “our discovery system effectively requires a respondent party’s attorney, under threat of court-imposed sanctions, to act as his adversary’s agent”). See also William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703 (1989); Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978); Virginia E. Hench, *Mandatory Disclosure and Equal Access to Justice: The 1993 Federal Discovery Rules Amendments and the Just, Speedy and Inexpensive Determination of Every Action*, 67 TEMPLE L. REV. 179, 207-209 (1994); Samuel Issacharoff & George Loewenstein, *Unintended Consequences of Mandatory Disclosure*, 73 TEX. L. REV. 753 (1995); Paula Schaefer, *The Future of Inadvertent Disclosure: The Lingering Need to Revise Professional Conduct Rules*, 69 MD. L. REV. 195, 201-203 (2010); George Shepherd, *Failed Experiment: Twombly, Iqbal, and Why Broad Pretrial Discovery Should be Further Eliminated*, 49 IND. L. REV. 465, 478 (2016); George Shepherd, *Still a Failure: Broad Pretrial Discovery and the Superficial 2015 Amendments*, 51 AKRON L. REV. 817, 849-851 (2017). A further contention is that principles of judicial impartiality demand deference to the parties to litigation on matters of case processing and management. See, e.g., Judith Resnick, *Managerial Judges*, 95 HARV. L. REV. 376 (1982); Jessica K. Steinberg, *Adversary Breakdown and Judicial Role Confusion in “Small Case” Civil Justice*, 2016 BYU L. REV. 899, 956-959; Anna E. Carpenter, *Active Judging and Access to Justice*, 93 NOTRE DAME L. REV. 647, 662-664 (2017). In conventional civil litigation, after all, the parties conduct discovery mostly without oversight or involvement by the court.

While these critiques have at least some force, the simple response is that stark asymmetries in the legal capacity, resources, and representation of parties in many high-volume civil dockets, and the lack of adversarial contestation that results, can blunt concerns about harms to adversarial process and judicial impartiality. In the litigation conditions that prevail in many high-volume civil-adjudication areas, unmediated adversarialism coupled with strict judicial passivity may not satisfy the demands of due process or procedural fairness. See Chapter 1 (General Principles of Fair Adjudication).

e. Tailoring pleading and information-exchange rules to case types or case features. In formulating procedures governing pleading and information exchange, courts and other rulemakers should take account of relevant differences in party types as well as the other procedural rules that govern particular case types. For instance, in the consumer debt-collection context, a number of jurisdictions impose particular pleading and information-exchange requirements on debt buyers as opposed to debt originators. E.g., OR. REV. STAT. § 646A.670(1)(c) (providing that a debt buyer shall include in its pleadings business records that include, among other things, “a detailed and itemized statement” showing payment details, dates, and balance due before default or before the debt became charged-off; amount and rate of interest, fees, and charges imposed by the original creditor and any other owners; and fees the debt buyer seeks to recover (including attorney’s fees)); WASH. REV. CODE § 19.16.260 2(a)-(c) (requiring that debt buyers attach specific documentation about the debt to the complaint, prohibiting a debt buyer from requesting a default judgment against a debtor without providing to the court evidence that establishes the amount and nature of the debt, and requiring a list of disclosures in the complaint); COLO. REV. STAT. § 5-16-111(3)-(4) (setting forth the specific filing and disclosure requirements for debt buyers prior to entry of default judgment against a consumer and stating that in the absence of this evidence, “an affidavit does not satisfy the requirements”); ME. REV. STAT. tit. 32, § 11019 (establishing the requirements for a debt buyer to initiate a collection action); MD. CTS. & JUD. PROC. CODE ANN. § 5-1203(b)(3) (listing the evidence that a debt buyer must introduce in a consumer debt-collection action); D.C. CODE § 28-3814(s) (setting forth the specific filing and disclosure requirements for debt buyers prior to an entry of default, summary judgment, judgment on pleadings, or at trial against a consumer). Section 4.02 elaborates on those requirements.

In addition, courts and other rulemakers should take account of distinct features of a jurisdiction’s wider procedural scheme. For instance, some jurisdictions, sometimes referred to as “answer” courts, require a written responsive pleading, whether a motion to dismiss (demurrer) or answer, prior to the scheduling of further proceedings. E.g., N.Y. REAL PROP. ACTS. L. § 732(1)-(3) (providing that no hearing will be scheduled in nonpayment eviction cases until an answer is filed); ALA. SM. CL. R. C (“The defendant shall file a short and plain reply showing what defendant admits, what he denies and why he denies it.”); ARIZ. STAT. §§ 22-515 (requiring answer prior to hearing scheduling in small-claims court); CT. R. SUPER. CT. CIV. § 24-16(a) (providing that a court answer is required in small-claims court to avoid default and that such answer “should state fully and specifically, but in concise and untechnical form, such parts of the claim as are contested, and the grounds thereof”); ARK. DIST. CT. R. 10(b)-(c) (requiring an answer). In other courts, sometimes referred to as “appearance” courts, a defendant may answer by appearing at a court hearing. E.g., D.C. SUPER. CT. R. SM. CL. R. 5 (“No party is required to file an answer, plea, or defense in writing, except to assert a set-off or counterclaim.”); WIS. ST. § 799.20 (in small claims court responsive pleading may be oral and made on return date of summons or any adjourned date thereof); WYO. STAT. § 1-21-1004 (“The defendant shall not be required to file a written answer to the complaint as a condition of being allowed to participate fully in the trial.”); CAL. CODE CIV. P. § 116.360 (requiring a written answer in debt-collection actions only if a defendant seeks to

counterclaim); OKLA. STAT. tit. 12 § 1758. (“No formal pleading, other than claim and notice, shall be necessary, but if the defendant wishes to state a new matter which constitutes a counterclaim or a setoff, he shall file a verified answer”); IA. STAT. §§ 631.5, 631.7 (requiring that a defendant enter an appearance to avoid default and permitting “no [other] written pleadings or motions” beyond a counterclaim, cross-petition, or intervention); UTAH R. SM. CL. PROC. 5 (“No answer is required to an affidavit or counter affidavit. All allegations are deemed denied.”). These differences may demand different approaches to pleading and information exchange. For instance, courts and other rulemakers might opt to impose prehearing disclosure burdens exclusively on plaintiffs in appearance courts, since defaulting defendants cannot be relied upon to disclose information that might aid in adjudication and administration, such as the allocation of the case to an appropriate procedural track, see Chapter 9 (Systemic Administration), or a judge’s consideration of a plaintiff’s procedural and substantive entitlement to entry of judgment, see Chapter 7 (Entry and Enforcement of Judgments).

That said, in tailoring rules governing pleading and information exchange to particular parties or party types, courts and other rulemakers should remain cognizant of their obligation to preserve both the substance and the appearance of neutrality and impartiality. As an example, some commentators have noted the seeming unfairness of requiring a plaintiff to plead material facts supporting its claim but then allowing a defendant to answer by general denial. ABA Section of Litigation, Special Committee of Future of Civil Litigation, *supra*, at 7 (“Given the Committee’s view that many of the admissions and denials in an answer typically are unhelpful in narrowing the issues, and that the preparation of the answer nevertheless can be expensive, the Committee discussed adopting California’s procedure, which uses a general denial with affirmative defenses. However, we concluded that as a matter of fairness, the pleading standard should not be lowered for defendants at the same time that it is raised for plaintiffs.”). However, in many high-volume civil-adjudication areas, concerns about an appearance of unfairness do not outweigh the clear benefits of tailored procedures regarding pleading and information exchange in satisfying the distinctive goals of procedure in high-volume civil cases, including resolving disputes fairly and accurately, facilitating meaningful participation by disputants, promoting effective decisionmaking by the parties and the court, and fostering the public elaboration of law. See § 2.01 (Goals of Procedure).

§ 4.02. Content of Pleading and Information Exchange

(a) At a minimum, a party stating a claim for relief in high-volume civil adjudication should be required to provide a short and plain statement of the claim and set forth all material facts supporting the claim that are known or reasonably knowable to that party.

(b) Courts and other rulemakers may require that some or all of a party’s pleading obligations, including those set forth in subsection (a), shall take the form of mandatory information exchange, including:

- (1) allegations that must be made in a complaint or answer;
- (2) materials that must be attached to a complaint or answer;
- (3) certifications that must accompany a complaint or answer; or
- (4) completion of a court-provided form or digital interface, as detailed in

§ 4.03.

(c) The information encompassed by mandatory information exchange should:

- (1) be typical in the particular case type, proportionate, and usable; and
- (2) correspond to the proof necessary to establish a claim or defense or to satisfy a procedural obligation.

(d) Subject to the limitations in subsection (c), mandatory information exchange need not be limited to information that supports a party's own claims, defenses, or procedural obligations.

(e) Rules mandating disclosure of specified information should not purport, or be interpreted, to alter the governing burden of proof.

Comment:

a. Fact pleading as baseline. This Chapter advances structured, court-directed pleading and information exchange and presumptive limits on conventional discovery as the optimal approach in most high-volume civil-adjudication areas. Subsection (a) establishes a baseline within that broader approach by adopting fact pleading and thus providing that a party pleading a claim for relief should be required to plead all material and known or reasonably knowable facts that support that party's claims. The other principles in this Section then calls on courts and other rulemakers flexibility to impose additional information-exchange requirements or even to establish an exclusive approach to pleading and information exchange via standardized, court-provided forms or digital interfaces. As elaborated in subsection (d) and Comment *e*, those additional information-exchange requirements need not be limited to facts that support the pleading party's own claims or defenses. Rather, this Section adopts the more pragmatic position that information-exchange obligations may, subject to subsection (c)'s limiting principles, extend to any party's claims or defenses, whether or not those facts support the pleading party's own claims or defenses. Those obligations may also extend to a party's procedural obligations, such as certifications regarding service of process or the filing of required pre-filing notice. In general, structured, court-

1 directed pleading and information exchange within subsection (c)'s limits plus presumptive limits
2 on conventional discovery will best serve the core aims of procedure in high-volume dockets of
3 resolving disputes fairly and accurately, facilitating meaningful participation by disputants,
4 promoting effective decisionmaking by the parties and the court, and fostering the public
5 elaboration of law. See § 2.01 (Goals of Procedure).

6 *b. Means of mandatory information exchange.* Courts and other rulemakers have multiple
7 options when it comes to how mandatory information exchange is accomplished. As set forth in
8 subsection (b), these options extend beyond mere allegations or other forms of information to
9 tangible materials that might ultimately constitute evidence. The options include allegations that a
10 plaintiff must plead in a complaint, materials that a plaintiff must attach to a complaint, and
11 certifications that a plaintiff must make in a complaint or provide alongside it. Under subsection
12 (b), courts or other rulemakers can also impose information-exchange requirements via questions
13 or fields in structured, court-provided forms or digital interfaces, as detailed in § 4.03 (Form of
14 Pleading and Information Exchange). In choosing among these options, courts and other
15 rulemakers should take account of the goals of procedure enumerated in § 2.01, with particular
16 attention to the capacities and compliance burdens of typical litigants and the type and amount of
17 mandatory information exchange.

18 *c. Limiting principles for the content of pleading and information exchange: typical,*
19 *proportionate, usable.* This Section advances principles to guide courts and other rulemakers in
20 setting the content of mandatory information exchange. In general, rules prescribing the content
21 of mandatory information exchange should be tailored to particular types of high-volume civil-
22 cases and should be pragmatically drawn to serve pleading's expanded purposes in high-volume
23 civil dockets. See § 4.01 (General Principles of Pleading and Information Exchange). In addition,
24 this Section advances three more specific limiting principles for achieving the right amount and
25 type of mandatory information exchange in a given case type: the information encompassed by
26 mandatory disclosure requirements should be typical to the type of case, proportionate, and usable.
27 Put another way, mandatory information exchange should encompass issues that regularly arise in
28 a given case type (typical), without imposing unreasonable costs relative to the information's value
29 (proportionate), and without overwhelming the parties, particularly less expert, less resourced, and
30 often self-represented litigants, with unnecessary information (usable). Importantly, these limiting
31 principles are designed to guide only the adoption of ex ante rules prescribing mandatory

1 information exchange. They are not meant to guide judicial discretion exercised on a case-by-case
2 basis, such as the proportionality requirement that is common in many civil-procedure rules, in
3 weighing requests for conventional discovery. Compare § 4.06 (Limits on Discovery).

4 *c(1). Typical.* Mandated information exchange should include information relating
5 to core issues that commonly arise in a given case type, not peripheral or infrequent ones. A
6 requirement that a plaintiff attach to the complaint “any admissible evidence,” as adopted in some
7 jurisdictions, will encompass information and materials regarding issues that are not typical.
8 Pleading-linked information exchange should streamline and focus production of case-relevant
9 information, not merely accelerate it.

10 *c(2). Proportionate.* Rules enumerating required forms of automatic information
11 exchange should adhere to the commonsense principle that compliance costs must not be
12 disproportionate to the nature and scope of the case and the information’s value in fairly and
13 accurately resolving the case.

14 *c(3). Usable.* Courts should endeavor to strike a balance between too little and too
15 much mandated information exchange and remain cognizant of procedure’s multiple audiences and
16 purposes. See § 2.01 (Goals of Procedure). Bare-bones complaints give insufficient notice to
17 defendants, particularly those without counsel, of the basis of the case against them. On the other
18 hand, too much mandated information exchange can chill meaningful participation by burying less
19 expert, less resourced, and often self-represented litigants in materials, thus exacerbating the problem
20 of default. In some instances, both complaint attachments and separate disclosures may be necessary,
21 as when documents establishing a debt’s chain of title reflects entities that may be unfamiliar to a
22 defendant. The original documents may suffice to assist a legal-services provider or a judge
23 considering entering judgment, but a separate and simpler disclosure that clearly names the debt’s
24 originator may be necessary to facilitate meaningful participation by less expert, less resourced, and
25 often self-represented litigants. See § 4.03 (Form of Pleading and Information Exchange).

26 Taken together, these principles embody a more general principle of pragmatism. A
27 primary goal of pleading and pleading-linked information exchange in high-volume civil dockets
28 is to specify common and potentially dispositive issues that arise in a given case type, thus
29 facilitating efficient “issue-spotting” by parties, a legal-services provider or other intermediary, or
30 a judge entering judgment. Indeed, in many high-volume civil-litigation areas, well-designed

1 mandatory information exchange will elicit information sufficient to prepare, try, and adjudicate
2 all issues in most cases without resort to conventional discovery.

3 Comment *d* below enumerates minimum suggested components of mandatory information
4 exchange in particular high-volume case types. These minimum suggested components
5 presumptively satisfy the limiting principles set forth herein. Courts and other rulemakers should
6 ensure that additional components of mandatory information exchange in these case types, as well
7 as high-volume case types for which Comment *d* does not enumerate specific components, adhere
8 to these principles. For instance, the enumerated minimum that a debt-collection plaintiff attach
9 the underlying contract or agreement and proof of the chain of title of the debt is plainly typical,
10 proportionate, and usable, and is already a requirement in many jurisdictions. Courts and other
11 rulemakers might, applying this Section's principles, join other jurisdictions in also requiring
12 disclosure of copies of account and billing statements and evidence that the consumer was the one
13 who signed the account application. Similarly, in jurisdictions where debt collectors are subject to
14 bonding or licensing requirements, courts and other rulemakers might opt to require that plaintiffs
15 attest to their compliance with those requirements.

16 *d. Minimum requirements for mandatory information exchange.* This Comment
17 enumerates minimum requirements for mandatory information exchange in consumer-debt and
18 eviction cases. As already noted, these minimum components presumptively satisfy the limiting
19 principles set forth in this Section and Comment *c*.

20 (1) In consumer-debt cases, mandated information exchange should include, at a
21 minimum:

22 (A) a copy of a form the defendant-debtor can use to answer, if applicable,
23 or a link thereto;

24 (B) facts showing that the claim has been filed in an appropriate venue
25 under governing law;

26 (C) proof of prefiling notice, when such notice is required by law or rule;

27 (D) certification of verification of the debtor-defendant's address through
28 reliable sources, as elaborated in § 3.05 (Confirmation of Service);

29 (E) specification of the facts or occurrences that constitute the alleged
30 default by the consumer;

1 (F) the name, prominently presented, of the original creditor, if different
2 from the creditor-plaintiff;

3 (G) the original contract or credit agreement or, if the debt is based on
4 credit-card debt for which there is no signed writing, documents generated when
5 the credit card was used, the original account number, and proof of ownership of
6 the debt, including its chain of title from origination;

7 (H) proof of the debt's origination date, its charge-off date, if any, the date
8 of the last payment or other activity, and proof or certification that the debt is not
9 barred by the relevant statute of limitations;

10 (I) proof of the amount of the debt, including a clear itemized breakdown of
11 the current balance, the balance at charge-off, if any, and itemization of all claimed
12 interest, fees, including attorney's fees, and charges; and

13 (J) if the defendant still has the right to cure a default, the total payment or
14 performance necessary and the date by which either must be made or done.

15 (2) In eviction cases, mandated information exchange should include, at a minimum:

16 (A) a copy of a form the tenant-defendant can use to answer, if applicable,
17 or a link thereto;

18 (B) any past or present written rental agreement between the parties for the
19 property at issue;

20 (C) proof of prefiling notice or notice to quit, when such notice is required
21 by law or rule;

22 (D) specification of the facts or occurrences that constitute the basis for the
23 eviction;

24 (E) an itemized calculation of rent past due, damages, costs, attorney's fees,
25 interest, and late fees, if applicable;

26 (F) proof or certification of licensure or rental registration, when required
27 by law, and compliance with governing habitability standards; and

28 (G) evidence regarding any claimed violation of the parties' lease agreement.

29 *e. Any party's claims or defenses.* This Section's principles contemplate that procedures
30 governing pleading and information exchange may require disclosure of specifically identified
31 information that supports any party's claims, defenses, or procedural requirements, rather than only

1 the pleading party’s claims, defenses, or procedural requirements. While pleading, mandatory
2 information exchange, and “automatic” discovery in other areas of civil litigation have sometimes
3 been limited to facts or materials that support a party’s own claims or defenses, this Section favors
4 a more pragmatic approach aimed at surfacing all information held by either party regarding any
5 claims, defenses, and procedural issues that regularly arise in a given high-volume civil-case type.
6 As an example, rules governing mandatory information exchange could require that a plaintiff certify
7 or provide evidence that the claim has been brought within the governing statute of limitations, which
8 is an affirmative defense in most jurisdictions. Limits that apply to mandatory disclosure in other
9 areas of civil litigation may not make sense in high-volume civil dockets given their distinct features,
10 including pervasive asymmetries in party expertise, resources, and representation.

11 Relatedly, and as reflected in subsection (e), a pleading rule mandating disclosure of
12 specified materials or information that a party might not otherwise present should not shift or
13 otherwise alter the operative burden of proof. The function of mandatory information exchange is
14 to improve the accuracy and efficiency of adjudication by surfacing relevant information earlier in
15 the process, not to recalibrate the substantive standards governing liability or defense.
16 Accordingly, this Chapter’s disclosure requirements should be understood as procedural devices
17 that facilitate proof, while leaving unchanged the allocation of evidentiary burdens under otherwise
18 applicable law.

REPORTERS’ NOTES

19 *a. Fact pleading as baseline.* This Section adopts mandatory information exchange as the
20 optimal approach in most high-volume civil-adjudication areas, with fact pleading as the baseline
21 requirement. Within this framework, § 4.01(a)’s fact-pleading baseline serves an important role
22 by requiring a pleading party to separately plead all known or reasonably knowable facts that
23 support the party’s claims whenever governing rules do not provide for mandatory information
24 exchange accomplished via required allegations, attachments, certifications, or completion of
25 court-provided forms or court-hosted digital interfaces. The fact-pleading baseline thus ensures
26 that a pleading party discloses material facts even when other rules governing information
27 exchange do not call for their disclosure. In formulating procedures for pleading and information
28 exchange in high-volume civil adjudication, it thus remains possible that courts and other
29 rulemakers could choose fact pleading alone. However, given that high-volume civil-adjudication
30 case types typically feature sharp adversarial asymmetries and institutional plaintiffs with
31 significant relevant information and evidence, the better policy choice will often be rules that
32 combine fact pleading with mandatory information exchange or, by providing for an exclusive
33 form-based pleading approach or digital interface, supplant a traditional complaint altogether and

1 thus obviate the need for any fact-pleading baseline. See § 4.03 (Form of Pleading and Information
2 Exchange); Chapter 12 (Court Use and Regulation of Technology).

3 *b. Means of mandatory information exchange.* Numerous jurisdictions have adopted
4 tailored rules for pleading and information exchange in high-volume civil dockets that include
5 allegations that must be asserted in a complaint or answer, materials that must be attached to a
6 complaint or answer or certifications that must accompany a complaint or answer. Illustrative
7 examples include:

8 (i) a requirement that an eviction plaintiff make specific allegations in the complaint
9 regarding the factual basis for the eviction, WASH. REV. CODE ANN. § 59.18.650; VT. STAT.
10 ANN. tit. 12 § 4852;

11 (ii) a requirement that an eviction plaintiff attach materials to the complaint, including: a
12 written rental agreement, if any; a previously served eviction notice; an itemized
13 calculation of rent past due, damages, costs, and attorney's fees; proof of rental housing
14 registration or licensure; and a certification of compliance with habitability standards, ILL.
15 SUP. CT. R. 139; UTAH R. CIV. P. 26.3;

16 (iii) a requirement that an eviction-plaintiff allege substantial compliance with the warranty
17 of habitability to initiate an eviction action, see Berkeley Rent Board, Good Cause & Other
18 Local Requirements;

19 (iv) a requirement that a debt-collection plaintiff make specific allegations in the
20 complaint, including the name of the original creditor; the last four digits of the original
21 account number; the date of the last payment, transaction, or balance transfer; the name of
22 all purchasers of the debt since charge-off, if any; the amount due at charge-off; claimed
23 post-charge-off interest or fees; and the date on which the plaintiff purchased the debt, IL.
24 SUP. CT. R. 280.2; N.Y. C.P.L.R. 3016(j);

25 (v) a requirement that a debt-collection plaintiff certify verification of the debtor
26 defendant's address and that the claim is being brought within the statute of limitations,
27 D.C. CODE § 28-3814(p); OR. REV. STAT. § 646.639(4)(a);

28 (vi) a requirement that a debt-collection plaintiff attach a contract or other writing or, if the
29 debt is based on credit-card debt for which there is no signed writing, copies of documents
30 generated when the credit card was actually used, N.C. GEN. STAT. §§ 58-70-150;

31 (vii) a requirement that the case caption in a debt-collection complaint contain a sufficient
32 description of the original creditor to reasonably enable the defendant to identify the
33 account, VT. R. CIV. P. 9.1; Fair Debt Collection Practices Act;

34 (viii) a requirement that a party seeking a restraining order against an alleged abuser
35 describe the party's relationship to the defendant and detail specific instances of abuse,
36 MINN. STAT. § 609.748; Minnesota Judicial Branch, Instructions, Petition for HRO, [https://
37 www.mncourts.gov/mncourtsgov/media/CourtForms/HAR101.pdf?ext=.pdf](https://www.mncourts.gov/mncourtsgov/media/CourtForms/HAR101.pdf?ext=.pdf); GA. CODE
38 § 17-17-16;

39 (ix) a requirement in an action to obtain or modify child support that the noncustodial or
40 custodial parent submit an affidavit detailing income, assets, debts, expenses, and

employment and wage or salary information, TEX. R. CIV. PROC. 194.2 (2021); California Form FL-150 (Income and Expense Declaration); California Form FL-155 (Simplified Financial Statement);

(x) a requirement that a plaintiff seeking to hold a noncustodial parent in contempt for failure to pay child support complete an affidavit explaining what court order the obligor violated and how much unpaid child support the obligor owes, NEB. ST. CT. FORM DC 6.5:206:5.20; S.C. CODE ANN. § 63-17-385; and

(xi) a requirement that a state agency bringing a Title IV-D Child Support Case send a notice of financial responsibility, which includes the date of the negotiation hearing, information about debt owed to the state, and a request for financial information, S.C. CODE ANN. § 63-17-730; WASH. ADMIN. CODE § 388-14A-3115.

This Section’s enumerated lists of minimum requirements for particular high-volume civil-case types covered by these Principles are drawn from those examples and are designed to comport with subsection (c)’s limiting principles that the information encompassed by mandatory information exchange be typical, proportionate, and usable. Courts and other rulemakers should depart from these lists only with reliable evidence that a particular type of disclosure is or is not typical, proportionate, and usable.

c. Limiting principles for the content of pleading and information exchange: typical, proportionate, usable. This Section’s limiting principles for calibrating the optimal content of pleading and mandatory information exchange navigate a pair of tensions that have accompanied growing adoption of rules prescribing mandatory information exchange in high-volume civil dockets, an emerging academic literature evaluating those efforts, and past experience with mandatory disclosure and “automatic” discovery rules in other areas of civil litigation.

First is the tension between the longstanding aspiration of federal and state civil-procedure rules that discovery achieve “mutual knowledge of all the relevant facts,” see *Hickman v. Taylor*, 329 U.S. 495, 507 (1947), and the more pragmatic requirement that discovery of case-relevant materials satisfy the proportionality principle. See FED. R. CIV. P. 26(b)(1) (setting forth the proportionality requirement); ARIZ. R. CIV. P. 26(b)(1); OHIO R. CIV. P. 26(b)(1); MINN. R. CIV. P. 26.02(b); VT. R. CIV. P. 26(b)(1); UTAH R. CIV. P. 26(b)(3). In general, mandatory information exchange need not aim to achieve comprehensive coverage of all fact issues. Rather, the “typical” principle in subsection (c) instructs that courts should design mandatory information exchange based on the issues that most frequently arise in a given case type. As noted above, the aim should be to streamline and focus exchange of case-relevant information, not merely accelerate it.

Debt collection offers a useful illustration. In most jurisdictions, debt-collection cases are ordinary contract claims governed by the usual elements and defenses for breach of contract. The primary litigable issues tend to be discrete and few in number: whether the defendant incurred the debt, as opposed to being the victim of identity fraud or mistake; whether the action has been brought within the statute of limitations; and whether claimed interest and fees are permitted by law and have been calculated accurately. Defenses and counterclaims are available under the Fair Debt Collection Practices Act (FDCPA) and state-law equivalents but are also advanced by way

of collateral litigation. See Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692(p); Rosenthal Fair Debt Collection Practices Act, CAL. CIV. CODE §§ 1788-1788.32; Colorado Fair Debt Collection Practices Act, COLO. CODE §§ 5-16-101-135 (2022). Rules mandating disclosures establishing the chain of title of the debt, that the debt is within the statute of limitations, and past payments and the interest and fees being claimed would likely satisfy both the typical and proportionate requirements. However, disclosures related to possible defenses under the FDCPA, such as information regarding the frequency and type of prelitigation contacts, are more likely to violate those limits.

Eviction offers a contrast. In most jurisdictions, an eviction action is statutory and must adhere to numerous statutorily defined elements. An eviction defendant can also assert numerous legal counterclaims and defenses, from warranty of habitability to discrimination on the basis of race or disability under federal or state law. A rule mandating that plaintiffs attach to the complaint a written lease or rental agreement, if any, and an itemized calculation of rent past due, damages, costs, and attorney’s fees would likely pass muster under the typical and proportionate requirements. Materials relating to more peripheral or fact-intensive issues—such as materials regarding disability-related accommodations—may not satisfy the typical and proportionate requirements and may be best left to conventional discovery and even a separate procedural track. See § 4.06 (Limits on Discovery); § 2.02 (Tailored Procedure and Case Management).

Second is the tension between too much and too little disclosure, particularly in high-volume civil dockets featuring high numbers of less expert, less resourced, and often self-represented litigants. Pleading and mandatory information exchange should aim to provide actionable information to parties, legal-services providers or other intermediaries, court administrators performing triage, and judges entering judgment in a defendant’s absence. Complaints that are too lean or bare-bones provide insufficient notice to opposing parties, particularly those without counsel, of the basis of the case against them. At the same time, robust automatic discovery rules risk overwhelming less expert, less resourced, and often self-represented litigants with too much information, thus chilling meaningful participation. Courts must take care to balance the utility of mandatory disclosure at the pleading stage with the risk of overwhelming less expert, less resourced, and often self-represented litigants. See § 4.04 (Timing of Pleading and Information Exchange). The challenge for courts and other rulemakers is to find the optimum such that parties are empowered to engage in court processes, not deterred in doing so, and that courts are equipped to enter fair and accurate judgments. The form that automatic information exchange takes, as elaborated in § 4.03 (Form of Pleading and Information Exchange), will also matter in managing the tension between too much and too little disclosure.

Debt collection offers the best example. An unrepresented consumer may struggle to identify a debt if it has changed hands and the plaintiff is a debt buyer not recognized by the consumer. See Debt Collection Practices, 85 Fed. Reg. 76734, 76736 n.10 (Nov. 30, 2020) (debt buyers generated roughly one-third of debt-collection industry’s revenue in 2017); Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 HARV. L. REV. 1704, 1708-1709 (2022) (third-party debt-collection litigation accounts for the majority of civil cases filed in state courts by more-

expert, better-resourced, repeat plaintiffs for small dollar amounts). Mandatory disclosures that include the name of the original creditor or the last four digits of the original account number can help a defendant to recognize the debt and avoid default. E.g., Del. Ct. of Common Pleas Admin., Directive 2012-2 (2012); OR. REV. STAT. § 646.639 (2020); MD. CODE CTS. & JUD. PROC. § 5-1203 (2016). By contrast, attachments of the original legal documentation establishing the chain of title of a debt that has changed hands multiple times can quickly overwhelm less expert, less resourced, and often self-represented defendants. A court-created form rather than attachments may be the better choice. See § 4.03 (Form of Pleading and Information Exchange).

Beyond the specific limiting principles that the content of information exchange be typical, proportionate, and usable, rules setting the content and type of mandated information exchange should be pragmatically drawn. This Section rejects the rigid position advanced by some commentators that automatic disclosure rules in high-volume civil cases should obligate a plaintiff to attach materials to the complaint establishing all elements of a *prima facie* case and all anticipated defenses. See, e.g., INST. FOR ADVANCEMENT OF THE AM. LEGAL SYS., REFORMING OUR CIVIL JUSTICE SYSTEM 19 (2015) (advocating “production of all known and reasonably available documents and things that support or contradict specifically pleaded factual allegations”). Mandatory disclosure should be the primary mode of information exchange in high-volume civil dockets, but it need not be the sole mode. See § 4.06 (offering principles for triggering conventional discovery). This Section likewise rejects the equally rigid position advanced by some that would eliminate all mandatory information exchange. See, e.g., ABA SECTION OF LITIG., SPECIAL COMMITTEE ON THE FUTURE OF CIVIL LITIGATION, CIVIL PROCEDURE IN THE 21ST CENTURY—SOME PROPOSALS 9 (2010).

Central to this Section’s pragmatic approach is the obligation of courts to monitor mandatory disclosure rules to ensure they are achieving core procedural goals, particularly meaningful participation, as in § 2.03 (Meaningful Participation), and are not exacerbating underlying patterns of disadvantage that already pervade high-volume civil dockets, as in § 2.04 (Procedure and Vulnerable Parties). For instance, a rule mandating that a plaintiff attach robust automatic disclosures to a complaint might seem justified by high rates of default on the assumption that judges, not defendants, will be the primary users, but disclosure mandates without guardrails to ensure that self-represented litigants can parse the disclosures and ensure that those litigants are not overwhelmed by the volume of material could chill participation by defendants and exacerbate the problem of default the rule is designed to mitigate. A pragmatic approach will thus demand continual re-evaluation of rules to ensure that they reflect on-the-ground litigation realities. A key component of a pragmatic approach is a well-functioning process in which courts or other rulemakers periodically review and make needed revisions to rules governing both the content and form of mandatory information exchange. See § 4.03 (Form of Pleading and Information Exchange); see also Chapter 9 (Systemic Administration).

d. Minimum requirements for mandatory information exchange. Comment *d* enumerates minimum requirements for mandatory information exchange in consumer-debt and eviction cases. Implicit in these enumerations is the more general principle that, when imposing these or other

requirements, courts and other rulemakers should take care to ensure that the content of mandatory information-exchange requirements is consistent with governing law and otherwise abides by limits on their authority. In *Shaker House LLC v. Daniel*, 193 N.E.3d 1159 (Ohio Ct. App. 2022), the court considered a challenge to Cleveland Municipal Housing Court Local Rule 3.015, which required that landlords establish compliance with Cleveland’s “lead-safe certification ordinance” as a precondition to obtaining an eviction. The court agreed with the appellant landlord that it was impermissible for the housing court, in establishing the rule, to “effectively add[] an additional element to an eviction cause of action that is not required by the eviction statutes.” *Id.* at 1163. See also *In re Marriage of Woolsey*, 220 Cal. App. 4th 881, 900 (2013) (finding local rule in family court invalid because local rules “cannot impose requirements for enforcement of mediated settlement agreements in addition to those specified by statute”); *Tex. Fire & Cas. Co. v. Harris Cnty. Bail Bond Bd.*, 684 S.W.2d 177, 178-179 (Tex. App. 1984) (finding that local rule promulgated by bail bond board was invalid because it imposed additional substantive requirements that conflicted with state statute).

e. Any party’s claims or defenses. Subsection (d) continues this Section’s pragmatic approach to pleading and information exchange by clarifying that required disclosures need not be limited to a party’s own claims. Past experience implementing automatic disclosure rules in other types of civil litigation provides practical guidance here. Since 2000, a party’s automatic disclosure obligations under Rule 26(a) of the Federal Rules of Civil Procedure have been limited to the party’s own claims or defenses. Disclosure obligations thus extend to information a party may use to support its own allegations, claims, or defenses and also to information that the party may use to deny or rebut the allegations, claims, or defenses of another party, but the party need not disclose adverse information that supports another party’s allegations, claims, or defenses. FED. R. CIV. P. 26(a). A party’s Rule 26(a) obligations are further limited to materials and witnesses that the party may use to support its claims or defenses, as opposed to the Rule’s prior coverage of any information that is “relevant to the subject matter involved in the pending action,” meaning the Rule’s disclosure requirement is no longer tied to particular allegations in the pleadings but rather the information’s intended use at trial. *Id.* Both of these narrowings of Rule 26 were motivated by a desire to strike a balance between the value of robust pretrial discovery and the goal of avoiding undue burden, cost, and delay, particularly in fully lawyered cases where the adversarial process plausibly performs much of the work of determining what information is and is not relevant to a case. See generally Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589, 1607, 1611-1617 (1994) (noting the significant controversy engendered by Rule 26). Given sharp asymmetries in expertise, resources, and representation among the parties in many high-volume civil-adjudication areas, this Section’s principles do not endorse either of Rule 26(a)’s current limitations and instead adopt a more pragmatic approach. See William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 24 CARDOZO L. REV. 1865 & n.59 (2002) (noting the benefits of the 1993 version of Rule 26(a) for “unequipped litigants”). Under this Section’s principles, a jurisdiction may require that a plaintiff disclose materials or certify facts relevant to commonly raised defenses to the extent they are known or reasonably knowable to the

plaintiff—for instance, in an eviction proceeding, that the plaintiff is unaware of any open housing code violations, see BERKELEY MUN. CODE § 13.76.130(C) (in an eviction complaint, “a landlord shall allege, as to each rental unit on the property, substantial compliance as of the date of the notice of termination or notice to quit and as of the date of the commencement of the action for possession with the implied warranty of habitability”); PHIL. MUN. CODE § 9-3901(4)(e) (landlord must attach to eviction complaint a copy of rental license, which requires certification that there are no outstanding habitability violations), or, in a debt-collection case, that the filing is within the statute of limitations, see CT. R. SUPER. CT. CIV. § 24-8 (complaint for collection of consumer debt shall state basis for plaintiff’s claim that statute of limitations has not expired); ME. REV. STAT. § 111019(1)(E) (debt-buyer complaint must allege case is filed within statute of limitations).

§ 4.03. Form of Pleading and Information Exchange

(a) In most high-volume civil-litigation areas, court-provided forms or court-hosted digital interfaces that elicit allegations, information, and materials from the parties will be superior to litigant-constructed pleadings and papers.

(b) In determining whether to make the parties’ use of forms or digital interfaces for pleading and information exchange mandatory or discretionary for a particular high-volume civil-adjudication case type, courts and other rulemakers should consider:

(1) the feasibility of designing a form or digital interface that reliably elicits necessary information from all party types;

(2) the feasibility of designing a form or digital interface that is accessible and usable for all party types;

(3) the risk that a mandated form or digital interface will unduly advantage or disadvantage particular party types;

(4) the risk that party-constructed pleadings or papers will confuse or overwhelm opposing parties who lack expertise, resources, or counsel; and

(5) the risk that a mandated form or digital interface, by channeling or limiting party responses, will stifle the assertion of claims or defenses or impair the elaboration of law, as set forth in § 2.05.

(c) Forms and digital interfaces for pleading and information exchange should, consistent with §§ 2.03 (Meaningful Participation) and 2.04 (Procedure and Vulnerable Parties), be designed to minimize, to the extent practicable, various barriers to understanding and accessibility, using an evidence-based approach that includes user-testing

1 **and feedback. In addition, forms and digital interfaces for pleading and information**
2 **exchange should:**

3 **(1) be made available at court, online, and at sites where litigants commonly**
4 **seek legal assistance;**

5 **(2) include user-friendly checklists for basic elements of claims, counterclaims,**
6 **and defenses;**

7 **(3) embed information about court procedures and processes and available**
8 **legal help; and**

9 **(4) include form discovery requests if discovery is available upon a showing of**
10 **cause, as in § 4.06.**

11 **(d) Processes associated with forms and digital interfaces, such as attaching**
12 **documents, paying fees, or seeking applicable fee waivers, should be clearly explained and**
13 **easy to navigate and complete.**

14 **Comment:**

15 *a. Benefits of structured pleading and information exchange.* The approach adopted in this
16 Section is a crucial component of this Chapter's commitment to a structured, court-directed
17 approach to pleading and information exchange. Mandatory, court-created forms and court-hosted
18 digital interfaces achieve multiple, cross-cutting benefits in high-volume civil dockets. Working
19 in tandem with rules specifying the content and timing of pleading and information exchange,
20 well-designed forms and digital interfaces, see Chapter 12 (Court Use and Regulation of
21 Technology), clearly and consistently inform the parties about the merits of claims and defenses
22 and the procedural frameworks that will apply in adjudicating them. As noted in §§ 2.01 and 4.01,
23 court-created forms and digital interfaces also improve high-volume civil adjudication by assisting
24 actors other than litigants, including legal-service providers or other intermediaries, court staff or
25 adjudication teams engaged in case triage or other tasks, or the presiding judge. Finally, court-
26 created forms mitigate the concern that assistance provided by court staff will cross the line from
27 legal information to legal advice. See Chapter 11 (Supply of Legal Help: Court Personnel and
28 Alternative Legal-Service Providers). For all these reasons, courts should promote form-based
29 pleading and information exchange wherever possible, consistent with these Principles.

1 *b. Mandatory versus discretionary forms.* The choice between mandatory and discretionary
2 forms is critically important in high-volume civil adjudication. A long literature spanning multiple
3 disciplines and domains establishes that the form in which information is presented shapes
4 behavior. A particular challenge in designing forms for pleading and information exchange in the
5 legal domain is under- and over-specification of legal information: how to convert technical legal
6 language, or “legalese,” into plain language without either undue information loss or information
7 overload. Because research on how best to maximize usability and functionality of forms,
8 particularly in the legal domain, is still nascent, court testing and refinement will be crucial
9 elements of user-centered design. See also § 2.03 (Meaningful Participation) (setting forth general
10 principles of “accessible procedures,” including user-centered design).

11 Another core concern with making the use of forms discretionary rather than mandatory is
12 that parties will construct their own pleadings and papers in ways that inadvertently or deliberately
13 limit usability and functionality. An emerging empirical literature finds that less expert, less
14 resourced, and often self-represented parties fare systematically worse in jurisdictions that have
15 adopted forms but only make their use discretionary, thus giving parties the option of constructing
16 their own pleadings and papers.

17 That said, a structured, court-directed approach via mandated use of forms or digital
18 interfaces is not without risks. Structured pleading and information exchange can artificially
19 compress litigation into predetermined fact patterns and legal theories, thus constricting case
20 trajectories, unduly limiting the issues addressed, preventing complete relief, and stifling the
21 broader development of law. Litigant design of pleadings and papers can also yield salutary
22 innovation in effective presentation of case information compared to standardized forms or digital
23 interfaces that result from centralized court design processes.

24 Applying subsection (b)’s factors, courts and other rulemakers may determine that use of
25 forms or digital interfaces should be mandatory as to some party types but discretionary as to
26 others. For example, courts and other rulemakers might determine that use of forms is mandatory
27 for plaintiffs but not defendants in high-volume civil-adjudication contexts featuring sharp
28 asymmetries in expertise, resources, and representation. Whether use of a standardized form or
29 digital interface is mandatory or discretionary, courts and other rulemakers must pay careful
30 attention to the content, form, and notice of pleading and information exchange and employ a user-
31 centered approach to testing and refinement.

1 *c. Against blanket prohibitions on mandated use of forms and plain-language requirements*
2 *alone.* Implicit in this Chapter’s advocacy of a structured, court-directed approach to pleading and
3 information exchange is a rejection of the approach in a few jurisdictions that prohibit courts from
4 mandating standardized forms or digital interfaces. As reflected in subsection (b), the choice to
5 make court-provided forms mandatory or discretionary is a critical policy choice. A blanket ban is
6 unlikely to reflect best practice in all high-volume civil-adjudication contexts. In addition, and for
7 similar reasons, this Section disfavors the approach taken by some jurisdictions in which use of
8 standardized forms and digital interfaces is discretionary, but parties are subject to a general
9 requirement that they use plain language.

REPORTERS’ NOTES

10 *a. Benefits of structured pleading and information exchange.* Two significant
11 developments have fueled a growing trend toward a structured, court-directed approach to pleading
12 and information exchange in high-volume civil dockets. First is the growth in self-represented
13 litigants and a recognition that their prevalence in many high-volume civil dockets is a durable
14 feature of those dockets. Second is a growing body of knowledge around the science of readability
15 and plain language as applied to the legal domain. As detailed in § 2.03 (Meaningful Participation),
16 that literature has advanced and tested the commonsense notion that procedures themselves, and
17 any communication of procedures to litigants, should be tailored to the particular audience, use
18 clear and active language instead of jargon, feature reader-friendly typography and functional
19 graphics and illustrations, and present information in a clear and logical manner with
20 accompanying outlines and roadmaps. Relatedly, principles of “user-centered design”—a
21 methodology grounded in the user experience and an iterative process of testing and refinement—
22 is an effective approach for designing litigant-facing interventions and interfaces.

23 A structured, form-based approach to pleading and information exchange has rapidly gained
24 favor in courts overseeing high-volume civil dockets. Judicial and legislative efforts have driven
25 form-centered reforms. See Daniel W. Bernal, *Pleadings in A Pandemic: The Role, Regulation, and*
26 *Redesign of Eviction Court Documents*, 73 OKLA. L. REV. 573, 635-640 (2021) (highlighting model
27 judicial and legislative reforms). Reform has focused on requiring parties to use certain court-
28 mandated forms, see CAL. GOV’T CODE § 85511 (2021) (authorizing California’s Judicial Counsel
29 to require the use of forms approved by the Judicial Counsel by all parties and in all courts); COLO.
30 R. COUNTY CT. CIV. P. 310 (requiring the use of plain-language forms in eviction actions); WASH.
31 REV. CODE ANN. § 26.26B.010 (2020) (requiring mandatory use of divorce forms), and also on
32 requiring that those forms be written in plain, understandable language, see ARIZ. REV. STAT. ANN.
33 § 33-361(F); IOWA CT. R. 17.1; Okla. H.B. 2792 (requiring the affidavit and summons form for
34 unlawful entry and detainer actions to be in “clear and understandable form”). In the eviction
35 context, some courts have even collaborated with design thinkers to reimagine and recreate
36 traditional court forms, such as summons and information sheets, outlining the legal process more

clearly for litigants. See *Court Initiatives on Eviction Prevention*, EVICTION INNOVATION (Jan. 28, 2020), <https://evictioninnovation.org/innovations/courts/> (listing improved court summons and fliers for Hamilton County Courts in Ohio and the Justice Court of Yellowstone County in Montana). Similarly, in the debt-collection context, some courts have developed checklist forms for defendants to use in answering a debt-collection summons and complaint. See D. James Greiner et al., *Self-Help Reimagined*, 92 IND. L.J. 1119, 1160 (2017); Lisa Stifler et al., *Debt in Courts: The Scourge of Abusive Debt Collection Litigation and Possible Policy Solutions*, 11 HARV. L. & POL'Y REV. 91, 134 (2017); see, e.g., N.D. Cts., Checklist for Answering a Debt Collection Summons and Complaint, <https://www.ndcourts.gov/Media/Default/legal-resources/legal-self-help/civil-action/Answering%20a%20Debt%20Collection%20Civil%20SC%20Checklist.pdf>; Cooke Cty. Tex., Defendant's Answer (Debt Claim Suit), <https://www.co.cooke.tx.us/upload/page/8612/docs/SmallClaimsandDebtClaimsCases/8DEFENDANTSANSWERDEBTCLAIMS.pdf>.

Another area where states have uniformly embraced form-based pleadings is family law. Every state requires a plaintiff seeking a domestic-violence restraining order (DVRO) to complete a series of forms that function as the pleadings in the case. E.g., Minn. Jud. Branch, Order for Protection 101 (OFP101), <https://mncourts.gov/mncourtsgov/media/CourtForms/OFP101.pdf?ext=.pdf> (instructions for petitioners seeking an order of protection); Jud. Council of Cal., How to Ask for a Domestic Violence Restraining Order (DV-505-INFO), <https://www.courts.ca.gov/documents/dv505info.pdf> (same). These forms create a structured way for plaintiffs, who are often unrepresented, to specify their allegations, provide relevant evidence, and indicate the relief requested. See Christine Agnew-Brune et al., *Domestic Violence Protective Orders: A Qualitative Examination of Judges' Decision-Making Processes*, 32 J. INTERPERSONAL VIOLENCE 1921, 1924 (2017) (noting that DVRO proceedings rarely involve attorneys). Similarly, in the child-support context, a petitioner seeking to hold a noncustodial parent in civil contempt for failure to pay the parent's obligation must complete a form explaining (i) what court order the defendant violated, (ii) how much unpaid child support is owed, and (iii) and what evidence the petitioner has that the defendant is willfully refusing to pay. See, e.g., Colo. Jud. Branch, Motion and Affidavit for Citation for Contempt of Court (JDF-1816), <https://www.courts.state.co.us/Forms/PDF/JDF%201816%20Verified%20Entry%20of%20Support%20Judgment.pdf>.

Form-based pleadings also facilitate information-sharing between the court and litigants. Contempt proceedings for failure to pay child support provide one example. In *Turner v. Rogers*, 564 U.S. 431, 447-448 (2011), the U.S. Supreme Court indicated that due process requires that the alleged contemnors be notified that their ability to pay will be the critical issue at their hearing. In order to comply with *Turner's* mandate, most jurisdictions include information on the contempt petition meant specifically for the obligor, including a notification that the ability to pay will be the central issue in the case. See, e.g., Minn. Jud. Branch, Notice of Motion and Motion for Contempt (DIV1402), <https://www.courts.state.co.us/Forms/PDF/JDF%201816%20Motion%20and%20Affidavit%20for%20Citation%20for%20Contempt%20of%20Court.pdf> (contempt petition served on defendant); Elizabeth G. Patterson, *Turner in the Trenches: A Study of How Turner v. Rogers Affected Child Support Contempt Proceedings*, 25 GEO. J. POVERTY L. & POL'Y 75, 101 (2017) ("In

1 most [South Carolina] counties, notice of the importance of the ‘ability to pay’ issue was confined
 2 to a written statement on the back of the service of process form.”).

3 *b. Mandatory versus discretionary forms.* Some jurisdictions mandate use of court-created
 4 forms. See, e.g., MASS. R. SM. CL. STANDARD 3:01 (mandatory small-claims form); N.M. R. CIV.
 5 P. METRO. CT. 3-201 (2020) (same). Many jurisdictions, however, do not. In California, for
 6 instance, statewide forms are available and must be accepted by courts but are often discretionary
 7 for litigants. See *Find Your Court Forms*, JUD. BRANCH OF CAL., [https://www.courts.ca.gov/](https://www.courts.ca.gov/forms.htm)
 8 [forms.htm](https://www.courts.ca.gov/forms.htm) (last visited Feb. 1, 2024). Some jurisdictions, though outliers, specifically prohibit
 9 courts from mandating use of forms. See, e.g., ARIZ. REV. STAT. ANN. § 33-361(F) (West 2021)
 10 (“[A]n agency of this state and an individual court may not adopt or enforce a rule or policy that
 11 requires a mandatory or technical form for providing notice or for pleadings in an action for
 12 forcible entry or forcible or special detainer.”).

13 Jurisdictions that neither mandate court-created forms nor closely regulate litigant
 14 construction of pleadings and papers via plain-language or other requirements are implicitly
 15 delegating discretion to institutional plaintiffs and their counsel. See Bernal, *supra*, at 579. That
 16 discretion can be costly in terms of access to court processes and meaningful participation by all
 17 parties. An emerging empirical literature finds that landlord-created pleadings are more likely to
 18 obfuscate applicable rules, such as opportunities to cure, and convey a discouraging tone, whether
 19 by highlighting the costs of going to court or forecasting the burdens of losing. Not surprisingly,
 20 the same body of evidence finds that tenants are substantially more likely to appear at a hearing
 21 (thereby answering the complaint) and less likely to suffer default judgments when served with
 22 court-created forms as opposed to plaintiff-created pleadings and papers. *Id.*; see also Alissa
 23 Fishbane, Aurelie Ouss & Anuj K. Shah, *Behavioral Nudges Reduce Failure to Appear for Court*,
 24 370 SCIENCE 682 (Nov. 2020).

25 *c. Against blanket prohibitions on mandated use of forms and plain-language requirements*
 26 *alone.* The principles advanced in this Section favor court-created forms and court-hosted digital
 27 interfaces in order to simplify court-litigant interfaces and screen out unnecessary technical
 28 complexities to the greatest extent possible. It rejects alternative approaches, such as rules that
 29 leave the construction of pleadings and papers to litigant discretion but mandate use of plain
 30 language. Federal and state governments have long mandated use of plain language in citizen
 31 interactions, see, e.g., Plain Writing Act of 2010, Pub. L. No. 111-274, § 3(2)-(3), 124 Stat. 2861,
 32 2861 (2010), and numerous courts are similarly subject to rules requiring plain-language, see, e.g.,
 33 KY. ST. §§ 24A.260, 24A.300 (small-claims forms must be mandatory and “simplified,
 34 nontechnical”); IOWA CT. R. 17.1 (mandating use of plain-language forms in eviction cases); H.B.
 35 2792, 2023 Reg. Sess. (Okla. 2023) (eviction complaints must be written in “plain and
 36 understandable language”). See generally Michael A. Blasie, *Regulating Plain Language*, 2023
 37 WIS. L. REV. 687, 705, nn.123-127 (2023) (collecting laws). However, across multiple domains,
 38 there is little evidence that plain-language requirements alone have had measurable effects. Blasie,
 39 *supra*, at 720. This Section likewise impliedly rejects the rule in some jurisdictions, noted in
 40 Reporters’ Note to Comment *b*, that prohibits courts from mandating use of forms.

§ 4.04. Timing of Pleading and Information Exchange

(a) Rules governing the timing of mandatory information exchange should:

(1) require that a party make disclosures at the pleading stage, except when early disclosure would require information that is not reasonably accessible or would impose a substantial and unjustified burden on the party; and

(2) favor a single, fixed deadline for making required disclosures over staggered and rolling deadlines because of the potential of the latter to confuse less expert, less resourced, and often self-represented litigants and the additional compliance and other burdens they impose on courts.

(b) In setting deadlines for mandatory information exchange, courts and other rulemakers should take account of the capacities of the types of litigants that commonly appear in particular high-volume civil-litigation areas, including which parties have routine access to relevant information. In high-volume civil-litigation areas featuring a high number or proportion of litigants who face barriers to meaningful participation, as described in § 2.03, one side may be allotted additional time to respond to mandatory information exchange.

(c) If a party later acquires information that would have been subject to mandatory information exchange initially, the party should be required to provide the new information to the other party in a timely manner.

Comment:

a. Presumption in favor of early disclosure and single, fixed deadlines. Subsection (a) creates a presumption in favor of early disclosure, at the pleading stage, and single, fixed deadlines. In theory, rules mandating information exchange can be designed to trigger required disclosures at different litigation stages: upon the filing of a complaint or responsive pleading; upon a party's request for an evidentiary hearing; or upon a plaintiff's motion for entry of default judgment. However, subsection (a)(1) creates a strong presumption in favor of earlier disclosure, at the pleading stage, as opposed to disclosure at a later stage. Disclosure prior to an answer can help inform a litigant's threshold decision whether to defend a case or, instead, accept a default judgment. Early, pleading-linked disclosure is also preferable because it facilitates the provision of effective, low-cost legal assistance and informs court administration, including, when relevant, the triage of cases into appropriate procedural pathways. See Chapter 9 (Systemic Administration).

1 In general, requiring that a repeat-player, institutional plaintiff provide the materials and
2 information contemplated in § 4.02 (Content of Pleading and Information Exchange) and
3 Comment *d* to that Section will not trigger subsection (a)(1)'s exception for reasonable
4 accessibility or substantial and unjustified burden.

5 Subsection (a) also expresses a strong preference for singular, pleading-linked information
6 exchange as opposed to sequencing mandatory disclosures across multiple litigation stages.
7 Staggered or rolling deadlines for mandatory information exchange offer little utility in high-
8 volume civil dockets. The sequencing of conventional litigation into distinct stages, beginning with
9 pleading and then moving to mandatory disclosures followed by discovery, is designed to tailor
10 the parties' exchange of information to their need for that information at each stage of a case while
11 avoiding overdisclosure or overproduction of documents or other discovery materials when they
12 are not needed. The situation is different in many high-volume civil-adjudication areas. Because
13 certain high-volume civil-case types, such as eviction and debt collection, tend to involve a finite
14 and knowable set of proofs, a sequenced approach to pleading, disclosure, and discovery is
15 unlikely to streamline or cabin collection of evidence. Rather, staggered or rolling deadlines for
16 providing disclosures risk confusing less expert, less resourced, and often self-represented litigants
17 and increasing rates of default. Staggered or rolling deadlines also demand greater judicial
18 resources to monitor compliance.

19 *b. Tailoring to litigant types.* Under subsection (c), rules governing the timing of mandatory
20 information exchange should account for the capacities and compliance burdens of different types
21 of litigants in high-volume civil dockets. In setting disclosure deadlines for a given high-volume
22 civil-case type, courts should thus consider patterns of representation, litigants' understanding of
23 legal process, and litigants' offensive or defensive posture in the case. Repeat-player parties,
24 particularly institutional plaintiffs who make up a substantial proportion of many high-volume
25 civil dockets, can be expected to have gathered materials in support of their claims prior to bringing
26 suit, such that mandatory disclosure of materials upon the filing and service of the complaint will
27 entail minimal additional resource expenditure. In contrast, parties who lack legal capacity or
28 representation may struggle to adhere to early-stage litigation deadlines. In particular, self-
29 represented defendants may require a longer timeframe to complete mandatory disclosures and
30 should typically be sanctioned only upon a showing of intentional or bad-faith noncompliance.
31 See § 4.08 (Implementation of Rules Governing Pleading and Information Exchange).

c. Duty to supplement. Subsection (c) sets forth a continuing obligation to supplement mandatory information exchange, reflecting the principle that disclosure duties in high-volume civil adjudication should be ongoing rather than fixed at the outset of a case. Because relevant information may emerge or become reasonably knowable only after initial exchange, a timely supplementation requirement promotes accuracy, reduces surprise, and supports fair and efficient adjudication. This obligation is analogous to the duty to supplement under Federal Rule of Civil Procedure 26(e), but it should be tailored to the particular features of high-volume civil adjudication, including the pervasive presence of repeat-player, institutional plaintiffs and self-represented defendants. To ensure that the duty to supplement is understood, a court should consider issuing a standard order after the pleadings are submitted instructing the parties in plain language to review their filings and determine if any additional information that has not yet been exchanged should be exchanged. Timeliness should be assessed in light of the circumstances, including the significance of the information, the stage of the proceeding, the extent to which delay may prejudice the opposing party or disrupt case management, and the capacities of the parties.

REPORTERS' NOTES

a. Presumption in favor of early disclosure and single, fixed deadlines. As reflected in subsection (a), the timing of mandatory information exchange in high-volume civil adjudication is critical to fully realizing its benefits. While mandatory information exchange serves the classic procedural rationales of streamlining discovery, reducing conflict, cost, and delay, and promoting settlement, it can also increase access by inducing defendants to participate in the litigation process or else make an informed choice to neglect it. Early disclosure thus plays an essential role in promoting engagement and reducing default. This Section thus adopts the position of those jurisdictions that link mandatory disclosure obligations to the filing of a complaint or other pleading. See, e.g., CAL. CIV. CODE § 1788.58 (debt-collection plaintiffs); Phila. Mun. Ct., Information for Small Claims Court 1-2, <https://www.courts.phila.gov/pdf/brochures/mc/small-claims-pamphlet.pdf> (small claims); *Initial Disclosures*, UTAH STATE CTS., <https://www.utcourts.gov/en/legal-help/legal-help/procedures/court-process/initial-disclosures.html> (last visited Jan. 30, 2024) (eviction plaintiffs); N.Y. FAM. CT. ACT § 424-a (child-support cases).

A key question of timing is whether to require singular, up-front information exchange or instead to stage mandatory disclosures over the lifespan of a case. Some jurisdictions provide for staged mandatory disclosure, with disclosure requirements at different litigation stages, such as the filing of a responsive pleading, see, e.g., TEX. R. CIV. P. 194.2(d); UTAH R. CIV. P. 26(a)(1), or a party's request for an evidentiary hearing, see, e.g., UTAH CODE § 78B 6-810. Still other jurisdictions require mandatory disclosures when a plaintiff requests entry of default judgment. See, e.g., MD. R. CIV. P. DIST. CT. 3-306(b) (at the time of filing debt-collection complaint, plaintiff

1 may file a demand for judgment by affidavit, with required attachments proving validity of claim);
 2 N.Y. COMP. CODES R. & REGS. tit. 22, § 208.14-a (2014) (setting forth required forms of proof for
 3 entry of default judgment in a consumer-credit matter); ME. REV. STAT. ANN. tit. 32, § 11019(3)
 4 (listing plaintiff disclosures required for entry of judgment in debt-collection matters); COLO. REV.
 5 STAT. ANN. § 5-16-111(3) (providing that plaintiffs must file certain evidence with the court prior
 6 to entry of a default judgment in a debt-collection action); N.C. GEN. STAT. ANN. § 58-70-155
 7 (following the same general approach to mandatory disclosures as Maine and Colorado).

8 Advocates of a staged approach to information exchange commonly invoke the
 9 inefficiencies if the defendant defaults, a motion to dismiss is granted, or settlement could have
 10 been achieved based on the complaint alone. However, the supposed efficiency advantages of such
 11 an approach are not supported by the evidence. See INST. FOR ADVANCEMENT OF THE AM. LEGAL
 12 SYS. & AM. COLL. OF TRIAL LAWYERS, REFORMING OUR CIVIL JUSTICE SYSTEM: A REPORT ON
 13 PROGRESS AND PROMISE 16 (2015) (hereinafter PROGRESS AND PROMISE) (“[E]arly exchange of
 14 information . . . identifies disputes fairly at issue in the litigation and leads to more focused,
 15 effective, efficient, and less-expensive discovery, especially in the digital age.”); NAT’L CTR. FOR
 16 STATE CTS., UTAH: IMPACT OF THE REVISIONS TO RULE 26 ON DISCOVERY PRACTICE IN THE UTAH
 17 DISTRICT COURTS 53 (2015) (hereinafter UTAH: REVISIONS TO RULE 26) (finding that initial
 18 disclosures cause discovery disputes to occur earlier in the litigation, making case management
 19 easier for the judge). Moreover, while repeat-player institutional plaintiffs benefit from a
 20 sequenced approach to mandatory disclosure, other parties, particularly those who are not repeat
 21 players and defendants, may not. See Brittany K. T. Kauffman, *Initial Disclosures: The Past,*
 22 *Present, and Future of Discovery*, 51 AKRON L. REV. 783, 809-810 (2017) (finding in debt-
 23 collection context that requiring mandatory disclosures at the pleading stage helps unrepresented
 24 defendants and reduces default judgments); *id.* at 810 (“[T]he growing number of self-represented
 25 litigants means that a clear and streamlined process of initial disclosures . . . is essential.”). Finally,
 26 a narrow focus on litigation costs fails to account for the role of mandatory information exchange
 27 in fostering meaningful participation by all litigants. If a rule triggers disclosure obligations upon
 28 a party’s filing of a responsive pleading, that rule deprives that party, or those who might seek to
 29 assist the party, of information that might be relevant to a defense or counterclaim and, in addition,
 30 might inform the party’s calculus as to whether to defend at all. See also § 2.03 (offering general
 31 principles for fostering “meaningful participation”). Defendants are most likely to seek legal help,
 32 if at all, after being served with the complaint, and legal-services providers are most likely to
 33 provide help—often in the form of unbundled, limited assistance—before the defendant responds
 34 to the complaint or defaults. For all these reasons, early, single-stage mandatory information
 35 exchange, with conventional discovery only upon a showing of good cause thereafter, as detailed
 36 in this Section and in § 4.06, will often be the better procedural choice.

37 As called for in subsection (a)(2), single, fixed deadlines offer significant benefits. While
 38 not a high-volume civil-adjudication context, Colorado’s Civil Access Pilot Project (CAPP)
 39 illustrates the drawbacks of pleading and disclosure deadlines not clearly fixed at the outset of the
 40 litigation. The CAPP rules implement rolling and staggered deadlines for pleadings and disclosures

in business litigation cases, including all debt-collection cases not brought by commercial banks or financial institutions. CORINA D. GERETY & LOGAN CORNETT, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., MOMENTUM FOR CHANGE: THE IMPACT OF THE COLORADO CIVIL ACCESS PILOT PROJECT 2, 21 n.27 (2014). The plaintiff’s initial disclosures are to occur 20 days after service of the complaint, with the defendant’s answer following 20 days after service of the plaintiff’s initial disclosures. Yet, in more than half of surveyed CAPP cases, the plaintiff did not disclose on time—rendering the defendant’s answer date a moving target. *Id.* at 19. Moreover, because the answer date hinges on when the plaintiff discloses and therefore cannot be known precisely at the time of service of the complaint, it is not included in the summons. *Id.* at 20. The CAPP rules do not make clear how the defendant is to be notified of the date by which to serve and file the answer. *Id.* This uncertainty may exacerbate high default rates in high-volume civil cases.

Staggered or rolling deadlines also pose logistical challenges for courts. The CAPP rules, for example, make automation of case management difficult. Court staff must calculate and enter deadlines into the case-management system each time a triggering event occurs. In courts stretched thin by high-volume civil dockets, there is little time for such manual entry, and the margin for error is wide.

b. Tailoring to litigant types. Timeframes for completing mandatory disclosure obligations should, as with the content and form of pleading and information exchange, account for the capacities and circumstances of different party types in a given high-volume civil-litigation area. In general, a growing body of empirical research finds that parties who lack legal capacity, resources, or representation may struggle to adhere to early-stage litigation deadlines. See, e.g., NAT’L CTR. FOR STATE CTS., UTAH: REVISIONS TO RULE 26, *supra*, at 36, 38 (reporting results of an attorney survey finding that plaintiffs were significantly less likely to report compliance with disclosure rules by the opposing party, particularly in lower-dollar-value claims, most of which were debt-collection cases with unrepresented defendants); CORINA D. GERETY & LOGAN CORNETT, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., MOMENTUM FOR CHANGE: THE IMPACT OF THE COLORADO CIVIL ACCESS PILOT PROJECT 19 (2014) (noting closer adherence to automatic disclosure deadlines in cases with counsel on both sides rather than those involving a self-represented litigant).

In high-volume civil dockets that feature less expert, less resourced, and often self-represented parties as defendants, procedures should afford defendants greater time to complete mandatory disclosures to account for their presumed lack of preparation for the litigation. See INST. FOR ADVANCEMENT OF THE AM. LEGAL SYS., REFORMING OUR CIVIL JUSTICE SYSTEM, *supra*, at 20 (recommending “that the plaintiff could be required to make the required initial production very shortly after the complaint is served and that the defendant, who, unlike the plaintiff, may not be presumed to have prepared for the litigation beforehand, be required to produce such documents within a somewhat longer period of time, say 30 days after the answer is served.”). Formally equal time limits may not achieve procedural equity and may also exacerbate impacts on vulnerable parties within high-volume civil dockets. See § 2.02 (Tailored Procedure and Case Management); § 2.04 (Procedure and Vulnerable Parties). Some states impose disclosure requirements only when a party takes an affirmative step to advance the litigation, such as a request for an evidentiary

1 hearing. See, e.g., UTAH R. CIV. P. 26.3(c) (landlord or tenant who requests an evidentiary hearing
2 in eviction must serve certain disclosures with the request). However, in high-volume civil
3 contexts, linking the timing of mandatory disclosures to a defendant’s litigation choices is of
4 questionable value. Two of the primary goals of a court-directed, structured approach to pleading
5 and information exchange—encouraging parties to meaningfully engage in litigation and
6 facilitating provision of low-cost legal assistance—are not served and may even be impaired by
7 timing rules triggered by a defendant’s actions in many high-volume litigation areas.

8 *c. Duty to supplement.* Subsection (c)’s creation of a duty to supplement reflects a well-
9 established obligation in ordinary civil litigation. Federal Rule of Civil Procedure 26(e) and its
10 state-level analogues impose an ongoing duty to supplement disclosures and discovery responses
11 “in a timely manner” when a party learns that its prior submission is materially incomplete or
12 incorrect and the new information has not otherwise been disclosed. That duty is continuous, party-
13 initiated, and not dependent on a court order. A simple, court-issued instruction—delivered after
14 the pleading stage and framed in accessible language—can help translate a procedural rule’s
15 abstract standard into a concrete expectation: parties should revisit their filings and disclosures as
16 new information becomes available and promptly share any material additions or corrections.

17 **§ 4.05. Procedural Limits on Defenses and Counterclaims**

18 **Courts and other rulemakers should minimize procedural limits on the assertion of**
19 **defenses and counterclaims in high-volume civil cases. In particular, rules governing**
20 **pleading and information exchange should not:**

21 **(a) bar, limit, or bifurcate into a separate proceeding any defense or**
22 **counterclaim that arises out of the same transaction or occurrence that is the subject**
23 **matter of the opposing party’s claim, except when:**

24 **(1) the benefits substantially outweigh the costs; or**

25 **(2) applicable law assigns primary jurisdiction over the defense or**
26 **counterclaim to a nonjudicial administrative body;**

27 **(b) condition the filing of an answer or the assertion of a defense or**
28 **counterclaim on paying a court fee, posting a bond, or satisfying any other financial**
29 **requirement; or**

30 **(c) impose unreasonably short time limits on the filing of a responsive pleading**
31 **or the making of an appearance in order to assert a defense or counterclaim.**

Comment:

a. Overview—procedural limits on defenses and counterclaims and the goals of procedure in high-volume civil adjudication. In many high-volume civil-adjudication areas, an array of court- and legislatively-created procedures limits the assertion of claims, counterclaims, and defenses. Some are formal limits, such as a procedural rule that a defendant may only assert certain counterclaims or defenses, with the remainder shunted into separate proceedings. Others impose more practical barriers: a requirement that a defendant pay an answer fee or post a bond in order to assert a defense or counterclaim, or extremely short time limits for filing an answer. This Section’s principles make clear that those procedural limits on the assertion of claims and defenses are inconsistent with the bedrock procedural goals in high-volume civil dockets: resolving disputes fairly and accurately, facilitating meaningful participation by disputants, promoting effective decisionmaking by the parties and the court, and fostering the public elaboration of law. See § 2.01 (Goals of Procedure).

This Section’s principles are limited in two important ways. First, these principles apply only to procedures. They do not apply to a range of related but substantive questions of law in high-volume civil-adjudication areas, such as how to define the warranty of habitability in eviction matters; whether to require that tenant-defendants plead and prove that withholding rent was a “good faith” response to a landlord’s failure to make repairs; what constitutes “time-barred” debt; or whether a debt-collection practice is deceptive, unfair, or abusive.

Second, these principles focus on procedural limits that burden responsive pleading, particularly counterclaims and defenses. Procedures that place conditions on plaintiffs’ assertion of claims, such as rules governing a plaintiff’s provision of notice and service of process, see Chapter 3 (Notice and Service of Process), case-initiation fees, see Chapter 12 (Court Funding and Fees), and entry of judgment, see Chapter 7 (Entry and Enforcement of Judgments), are treated elsewhere.

b. Presumption in favor of holistic resolution of disputes. In calling on courts and other rulemakers to limit procedures that bar, limit, or bifurcate defenses or counterclaims, this Section creates a presumption in favor of holistic resolution of disputes, thereby returning high-volume civil adjudication to the longstanding default in American civil procedure favoring liberal joinder of issues in a single proceeding over piecemeal litigation. Expeditious but fair adjudication of all claims in a single proceeding and, where appropriate, already-existing protections against abusive claiming behavior, such as judiciously imposed and carefully calibrated sanctions under Rule 11

1 of the Federal Rules of Civil Procedure or its equivalents, is not only fairer to the parties in
2 balancing plaintiffs’ legitimate investment or other interests against defendants’ ability to mount
3 an effective defense but also limits burdens on courts.

4 This Section’s principles thus disfavor procedural rules in place in many high-volume civil-
5 adjudication areas that limit the assertion of defenses or counterclaims beyond those permitted by
6 conventional pleading rules or otherwise channel those defenses or counterclaims into separate
7 proceedings or cases. For decades, “summary process” eviction procedures have restricted triable
8 issues to possession and a tenant’s default, thereby limiting defenses based on the landlord’s breach
9 of duty to maintain the premises. While many such limits have since been pared back through
10 legislation and case law, vestiges remain. In many jurisdictions, procedures bar tenant-defendants
11 from asserting counterclaims that are not directly or even “inextricably” related to a plaintiff’s
12 claim of possession, thus precluding assertion of certain habitability defenses and counterclaims,
13 antidiscrimination claims, and counterclaims for consequential damages, such as compensation for
14 damaged possessions or mental distress, in the summary proceeding. A defendant’s inability to
15 pursue all counterclaims and defenses in a single proceeding can weaken the defendant’s strategic
16 position and their settlement prospects, particularly for self-represented litigants who already face
17 heightened practical and economic barriers to meaningful participation. It also contributes to a
18 chronic lack of adversarial testing, public elaboration of legal norms, or legitimating participation
19 by those affected in many high-volume dockets. See § 2.01 (Goals of Procedure) (discussing these
20 problems in high-volume civil adjudication); see also § 2.03 (Meaningful Participation); § 2.04
21 (Procedure and Vulnerable Parties); § 2.05 (Open Courts and Law Development). Finally, multiple
22 proceedings unduly tax judicial resources.

23 Under subsection (a), a court may depart from the single-proceeding default position in
24 either of two circumstances. First, departure from the single-proceeding default position is justified
25 when the benefits of doing so substantially outweigh the costs. For example, when a complex title
26 issue exists in an eviction matter, or when a tenant-defendant alleges a false representation by a
27 buyer in a foreclosure sale that the buyer would use the property as a primary residence, it may be
28 appropriate to litigate the unlawful detainer and other claims separately or to litigate the entire case
29 in a non-summary proceeding. Without doing so, the possession determination might be
30 unreasonably delayed or a complex, evidence-intensive claim given short shrift, thus increasing
31 the risk that a landlord is deprived of legitimate ownership or investment interests, or a tenant is

1 evicted by a landlord who lacks a legal interest in the property. In many other contexts, however,
2 the benefits of bifurcation will not be sufficient to rebut this Section’s strong presumption in favor
3 of unified resolution of all parties’ claims.

4 Second, departure from the single-proceeding default position may be justified when a
5 counterclaim or defense may be more effectively resolved by an administrative body outside the
6 court system. In many jurisdictions, courts share concurrent jurisdiction over certain claims,
7 particularly antidiscrimination claims, with administrative agencies equipped with specialized
8 expertise and procedures for resolving them. When concurrent jurisdiction exists, many courts
9 invoke the doctrine of primary jurisdiction in deferring resolution of qualifying claims to the
10 agency. Subsection (a)(2) endorses that longstanding practice. When a court invokes the primary-
11 jurisdiction doctrine and defers resolution of a qualifying claim to an agency, the court should also
12 typically stay the proceeding pending the agency’s determination, to be followed by unified
13 resolution of all other claims once the agency has completed its work. When applicable law confers
14 wide discretion on courts to determine whether a stay is appropriate, a court should apply
15 subsection (a)(1)’s cost–benefit test and ask whether the benefits of immediate judicial resolution
16 simultaneous with administrative proceedings so substantially outweigh the costs as to disfavor a
17 stay followed by resolution of all remaining claims in a single judicial proceeding once the agency
18 has made its determination.

19 A possible concern with this Section’s single-proceeding presumption is that defendants
20 may interpose frivolous claims to buy additional and unjustified time. However, as already noted,
21 the better way to minimize abusive litigation practices in some cases will be judiciously imposed
22 and carefully calibrated sanctions under Rule 11 and state analogues. Nor is it a workable solution
23 to concerns about frivolous claiming to require, for example, that a tenant advance an
24 antidiscrimination or other counterclaim prior to the filing of an eviction action, as such a rule
25 would yield an unseemly race to the courthouse or agency.

26 Subsection (a)’s anti-bifurcation rule, which applies to any counterclaim arising out of the
27 same transaction or occurrence as the original claim, also raises important issues of joinder and
28 preclusion. For instance, under Federal Rule of Civil Procedure 13(a) and state analogues, a
29 counterclaim meeting subsection (a)’s standard would ordinarily be treated as compulsory rather
30 than permissive. As a result, a tenant-defendant’s failure to assert a counterclaim for breach of the
31 warranty of habitability in an eviction action could preclude the tenant from pursuing that claim in

1 a subsequent suit. The principles set forth in this Section assume that high-volume civil
2 adjudication will be governed by the same joinder and preclusion rules that apply in other civil
3 litigation, thereby securing the benefits of resolving related claims in a single proceeding even at
4 the cost of later forfeiture of unasserted claims.

5 As a final note, subsection (a)’s principles govern only rules that bar, limit, or bifurcate
6 certain defenses or counterclaims into separate proceedings. They do not address the decision by
7 courts and other rulemakers to assign jurisdiction over high-volume civil-adjudication case types to
8 specific court divisions or court components or specialized courts, such as a housing or debt court,
9 which can result in bifurcation because of the limited jurisdiction conferred. Chapter 17 (General,
10 Limited, and Specialized Courts) sets forth principles on these wider jurisdictional design issues.
11 Relatedly, in certain instances, the joinder of a counterclaim may have jurisdictional implications—
12 for instance, when the counterclaim requests relief that exceeds the amount-in-controversy for a
13 limited-jurisdiction or small-claims court. Chapter 17 likewise addresses such scenarios.

14 *c. Counterclaims, defenses, and financial requirements.* This Section flatly prohibits any
15 procedure or practice in high-volume civil adjudication that conditions the assertion of a defense
16 or counterclaim on the payment of fees or other financial requirements. Chapter 12 (Court Funding
17 and Fees) sets forth principles for all other types of court fees, including case-filing fees and
18 appellate bonds.

19 A flat prohibition on “pay-to-answer” rules is justified by concerns about imposing
20 additional barriers to meaningful participation in high-volume civil-adjudication areas that feature
21 large numbers of self-represented litigants who already face significant impediments. See
22 generally Chapter 1 (General Principles of Fair Adjudication); see also § 2.03 (Meaningful
23 Participation). In particular, a requirement that a tenant-defendant who holds a meritorious
24 habitability claim and is legally entitled to rent abatement must nonetheless post the full amount
25 of the contested rent—or, in some jurisdictions, even pay such rent directly to the landlord-
26 plaintiff—unfairly subsidizes noncompliant landlords and poses an undue barrier to meaningful
27 participation by litigants who have been haled before a court. In high-volume civil cases, the better
28 way to protect the interests of all parties, including legitimate ownership and investment interests
29 of property owners and creditors, is not answer fees or bond requirements that systematically
30 depress the assertion of valid defenses or counterclaims, but rather the expeditious but fair
31 adjudication of all parties’ claims of right.

1 Fee waivers are an incomplete solution to the barriers imposed by pay-to-answer rules. To
2 begin, many litigants in high-volume civil adjudication lack legal or technical capacity. The
3 barriers they face in navigating court procedures and processes apply in full force to the process
4 of obtaining a fee waiver. Relatedly, answer fees can substantially limit the availability of low-
5 cost legal services. Purveyors of online form-filling or “document assembly” platforms that assist
6 defendants in completing and filing an answer must still manually complete fee waivers on behalf
7 of platform users, a time-consuming process that can defeat the availability and scalability of their
8 services. Legal-aid providers also spend a substantial amount of their scarce time and resources
9 completing fee waivers on clients’ behalf in jurisdictions with pay-to-answer rules, reducing the
10 number of clients they can serve.

11 Prohibiting pay-to-answer rules is not without costs. In some instances, relief from current
12 financial requirements can promote abusive claiming behavior. For instance, defendants in high-
13 volume civil cases might assert a marginal defense or counterclaim in order to gain additional time,
14 thus defeating a plaintiff’s legitimate ownership or investment interests or delaying recovery of
15 legitimate debt. Even so, imposing financial requirements on litigants who might have meritorious
16 defenses but, by definition, have limited ability to pay yields few benefits relative to the costs and
17 makes little sense in a system already built for expedition. As already noted, the better way to
18 protect all parties’ interests is prompt but fair adjudication of all claims of right, thus obviating the
19 need for pleading-based financial requirements or securities. In certain instances, judiciously
20 imposed litigation sanctions under Rule 11 and state analogues can serve as a further safeguard
21 against abusive pleading practices.

22 This Section’s prohibition on answer fees does not extend to financial requirements as
23 preconditions for appealing a judgment. Many jurisdictions require tenants to post bonds to appeal
24 eviction decisions. Appellate bonds, as discussed in Chapter 12 (Court Funding and Fees), raise
25 fewer fairness and other issues because a trial court has already entered a judgment, thus blunting
26 concerns about predetermining merits or assuming the validity of one party’s claims.

27 *d. Responsive pleadings and unreasonable time limits.* In many high-volume civil-
28 adjudication areas, a defendant is afforded only a few days to file a responsive pleading or attend
29 a hearing at which a defense or counterclaim can be asserted. A premier example is “summary
30 process” in eviction, which affords tenant-defendants in some jurisdictions as few as two days
31 from the date of service to file a responsive pleading or attend a hearing. While the appropriate

time limit will vary by case type and by jurisdiction, including a jurisdiction’s other procedural features, mounting evidence suggests that, in most instances, an answer period of fewer than 10 days substantially impairs meaningful participation by litigants. Courts and other rulemakers should consider time periods shorter than 10 days only if there is reliable evidence that the benefits of the shorter time clearly outweigh the costs.

REPORTERS’ NOTES

a. Overview—procedural limits on defenses and counterclaims and the goals of procedure in high-volume civil adjudication. Even well-meaning procedures can defeat core goals of procedure in high-volume civil adjudication of resolving disputes fairly and accurately, facilitating meaningful participation by all litigants, promoting effective decisionmaking by the parties and the court, and fostering the public elaboration of law. See § 2.01 (Goals of Procedure). This Section adopts the position that courts and other rulemakers should minimize procedural limits on the assertion of defenses and counterclaims in high-volume civil cases, with particular attention to three such limits: (i) rules that limit defenses or counterclaims to particular legal or fact issues; (ii) rules that condition defenses or counterclaims on the payment of a bond or other security; and (iii) rules that deprive litigants of adequate time to file a responsive pleading or prepare for a hearing.

b. Presumption in favor of holistic resolution of disputes. An array of procedural rules directly limits the assertion of defenses and counterclaims in high-volume civil adjudication. A primary example is the basket of statutory and court-made procedures that make up what is commonly referred to as “summary process” in eviction proceedings. See David Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CAL. L. REV. 389 (2011) (tracing history of summary process); Amanda Quester, *Evolution Before Revolution: Dynamism in Connecticut Landlord-Tenant Law Prior to the Late 1960s*, 48 AM. J. LEG. HIST. 408 (2006) (same).

Core to summary process, which dates back a century or more in many jurisdictions, is the idea that only defenses or counterclaims that go to the issue of possession should be heard in a rapid proceeding designed to settle possessory rights, with any remaining issues or claims of right channeled into separate proceedings on a slower schedule. See, e.g., *Barela v. Superior Court*, 636 P.2d 582, 584 (Cal. 1981) (“Unlawful detainer actions are summary proceedings. Only issues directly relevant to the ultimate question of possession may be raised in defense of an unlawful detainer action. Generally counterclaims, cross-complaints and affirmative defenses cannot be considered.”) (internal citations and quotations omitted); *Texaco, Inc. v. Johnson*, 539 P.2d 288, 291 (Idaho 1975) (“The sole issue before a court in such a[n] [unlawful detainer] proceeding (after determining that a landlord-tenant relationship exists) is the question of who has the right to possession. No other extraneous issues are to be injected by either party to cloud the proceedings for to allow either party to interpose questions unrelated to the issue of possession would frustrate the purpose and objective of the unlawful detainer provisions.”) (internal citation omitted); *Munden v. Hazelrigg*, 711 P.2d 295, 298 (Wash. 1985) (“The action is a narrow one, limited to the question of possession and related issues such as restitution of the premises and rent In

order to protect the summary nature of the unlawful detainer proceedings, other claims, including counterclaims, are generally not allowed Where the right to possession ceases to be at issue at any time between the commencement of an unlawful detainer action and trial of that action, the proceeding may be converted into an ordinary civil suit for damages, and the parties may then properly assert any cross claims, counterclaims, and affirmative defenses.”) (internal citations omitted). In many jurisdictions, limits on available defenses and counterclaims are statutory. E.g., 735 ILCS 5/9-106 (“[N]o matters not germane to the distinctive purpose of the [forcible entry and detainer] proceeding shall be introduced by joinder, counterclaim or otherwise.”). See generally Mary B. Spector, *Tenants’ Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135, 137 (2000) (noting that “a basic feature” of summary process “is its limited nature”); Kathryn Ramsey Mason, *Housing Injustice and the Summary Eviction Process: Beyond Lindsey v. Normet*, 74 OKLA. L. REV. 391, 391 (2022) (noting that summary process “prioritizes a landlord’s claim to possession above all other considerations”).

A second core component of summary process is extremely rapid case timelines, with as few as two days between service of process and an eviction hearing. ALASKA R. CIV. PROC. 85(a)(2) (“Summons shall be served not less than two days before the day of the eviction hearing”); ARIZ. REV. STAT. § 12-1175(C) (“The summons shall be served at least two days before the return day, and return made thereof on the day assigned for trial.”); N.C. GEN. STAT. § 42-29 (providing that service of process must be “at least two days prior to the day the defendant is required to appear to answer the complaint”). This component of summary process is treated in subsection (c) and Comment *d* and Reporters’ Note to Comment *d* thereto. Other core components of summary process are also treated elsewhere, among them minimal service-of-process requirements and brief (or even non-existent) notice periods before a landlord can file an eviction proceeding, see Chapter 3 (Notice and Service of Process), and minimal filing fees, see Chapter 12 (Court Funding and Fees).

In *Lindsey v. Normet*, 405 U.S. 56 (1972), the U.S. Supreme Court upheld summary process against constitutional challenges, on due-process and equal-protection grounds, finding no constitutional impediment to an Oregon eviction statute that shunted all defenses and counterclaims except for payment of rent or constructive eviction into separate proceedings and provided for trial within just two to six days from service of the complaint. The *Lindsey* Court thus refused to constitutionalize a tenants’ rights revolution during the 1950s and 1960s that had systematically reshaped the landlord-tenant relationship via newly robust housing codes, new statutory and nonstatutory defenses and counterclaims in eviction proceedings (most notably the warranty of habitability), and new prohibitions on discrimination, harassment, and retaliatory eviction. See generally Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 551-552 (1983) (describing these developments); see also Super, *supra*, at 439-443; Mason, *supra*, at 400-402.

An important component of the tenants’ rights revolution, and key to the doctrinal backdrop in the run-up to *Lindsey*, was a sea-change in eviction law that responded to the shifting realities of modern residential tenancies by reframing leases not as a property-based conveyance of land, in which the tenant’s duty to pay rent is wholly independent of any action or inaction by

the landlord, but rather as a contract-based transaction, with mutual obligations on both sides, including the landlord's obligation to maintain safe and secure premises. See *Javins v. First National Realty Corp.*, 428 F.2d 1071, 1082 (D.C. Cir. 1970) (holding that "the tenant's obligation to pay rent is dependent upon the landlord's performance of his obligations, including his warranty to maintain the premises in habitable condition"); *Pines v. Persson*, 111 N.W.2d 409, 412-413 (Wis. 1961) ("To follow the old rule of no implied warranty of habitability in leases, would in our opinion, be inconsistent with the current legislative policy concerning housing standards."). See generally Donald E. Campbell, *Forty (Plus) Years After the Revolution: Observations on the Implied Warranty of Habitability*, 35 U. ARK. LITTLE ROCK L. REV. 793, 829 (2013) (tracing the shift from a classical property model to a contract-based conception of eviction and the retirement of two related doctrines: caveat emptor, or "caveat lessee," which held that a tenant took property as-is, and the doctrine of independent covenants, which held that a tenant's obligation to pay rent was not contingent upon any action or inaction by the landlord regarding on the state of the premises being conveyed); Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503 (1982) (same). This sea-change in eviction law's core underpinnings created sharp tension between summary process, particularly its commitment to rapid proceedings focused solely on possession, and the recognition of new defenses and counterclaims for tenants.

Though *Lindsey* upheld summary process against constitutional attack, many jurisdictions have since pared back its core components, particularly the bifurcation of claims according to their relationship to possessory rights. Some jurisdictions expressly permit counterclaims or defenses in summary proceedings, whether habitability claims or more generally, thus satisfying this Section's single-proceeding default position. E.g., COLO. REV. STAT. ANN. § 38-12-507 (authorizing habitability counterclaims and specifying that a tenant "may recover actual damages directly arising from the breach of the warranty of habitability" and may also "recover court costs, reasonable attorney fees, punitive damages, and any other damages as ordered by the court"); MASS. GEN. L. ch. 239, § 8A ("In any action under this chapter to recover possession of any premises rented or leased for dwelling purposes . . . the tenant or occupant shall be entitled to raise, by defense or counterclaim, any claim against the plaintiff relating to or arising out of such property, rental, tenancy, or occupancy for breach of warranty, for a breach of any material provision of the rental agreement, or for a violation of any other law."); GA. CODE § 44-7-51(B) (permitting a tenant-defendant's answer to "contain any legal or equitable defense or counterclaim"); K.S.A. 58-2561 (permitting tenants in possession for nonpayment of rent cases to "counterclaim for any amount which such tenant may recover under the rental agreement or this act"); CONN. GEN. STAT. § 47A-33A ("In any action of summary process under this chapter, the tenant may present any affirmative legal, equitable or constitutional defense that the tenant may have."); WASH. REV. CODE ANN. § 59.18.380 (defendant "may answer, orally or in writing, and assert any legal or equitable defense or set-off arising out of the tenancy"); *Fritz v. Warthen*, 213 N.W.2d 339, 342 (Minn. 1973) (interpreting state's unlawful detainer statute to permit a habitability defense); *Green v. Superior Court* 517 P.2d 1168, 1179 (Cal. 1974) (holding that a tenant could raise a habitability defense in a summary proceeding); CAL. CIV. PROC. CODE § 1174.2 (codifying *Green*). See generally Legal

Services Corporation, LSC Eviction Laws Database, <https://www.lsc.gov/initiatives/effect-state-local-laws-evictions/lsc-eviction-laws-database> (reflecting that, as of 2021, 17 states allowed for rebuttals to an eviction based on the landlord’s refusal to complete repairs or the landlord’s maintenance of an uninhabitable dwelling).

Moreover, while the general rule in most jurisdictions remains that only counterclaims or defenses that bear on the question of immediate possession may be heard unless permitted by statute, courts and legislatures have gradually expanded the boundaries of the rebuttals deemed sufficiently germane to possession to defeat bifurcation. In many jurisdictions, one or more of the most common counterclaims and defenses, including habitability, retaliation, discrimination, and even unlawful trade practices, are typically permitted without bifurcation, consistent with this Section’s single-proceeding default position. See *Jack Spring, Inc. v. Little*, 280 N.E.2d 208, 217 (Ill. 1972) (holding that habitability claims are germane to possession); *Clore v. Fredman*, 319 N.E.2d 18, 21-22 (Ill. 1974) (holding that retaliation claims are germane to possession); *Josephinium Assocs. v. Kahli*, 45 P.3d 627, 632 & n.26 (Wash. App. 2002) (permitting unlawful discrimination to be asserted as a defense in a summary eviction proceeding, noting that “most jurisdictions” do so, and canvassing other states’ case law); *Newell v. Rolling Hills Apartments*, 134 F. Supp. 2d 1026, 1038 (N.D. Iowa 2001) (holding that discrimination is an available affirmative defense in Iowa and noting that “[i]t appears that the majority of states to consider the question recognize that the landlord’s discriminatory conduct . . . towards a tenant on the basis of a protected characteristic . . . is a cognizable defense in [an FED] action”); *Mascaro v. Hudson*, 496 So. 2d 428, 429 (La. Ct. App. 1986) (affirmative defense of national-origin discrimination in violation of the FHA could be raised in summary eviction proceeding); *Marine Park Assocs. v. Johnson*, 1 Ill.App.3d 464, 274 N.E.2d 645, 648 (1971) (holding that tenant’s assertion of racial discrimination constituted an equitable defense that was “germane . . . to the distinctive purpose of the [FED] proceeding” and therefore could be raised as an affirmative defense); *Hoffer v. Szumski*, 877 P.2d 128, 130 (Or. App. 1994) (interpreting state unlawful detainer statute to permit counterclaim under state’s Unlawful Trade Practices Act where plaintiff allegedly engaged in false advertising); *Foisy v. Wyman*, 83 Wn. 2d 22, 31-32 (Wash. 1974) (holding that the affirmative defense of warranty of habitability was available in an unlawful detainer action because it “goes directly to the issue of rent due and owing, which is one of the basic rules in an unlawful detainer action”); *Munden v. Hazlerigg*, 1-5 Wn. 2d 39, 45 (Wash. 1985) (holding that “[a]n exception to the general rule is made when the counterclaim, affirmative equitable defense, or set-off is based on facts which excuse a tenant’s breach”) (quoting *First Union Management, Inc. v. Slack*, 36 Wn. App. 849, 854 (Wash. 1984)). See generally *Lindsey*, 405 U.S. at 69 & nn. 15 & 16 (noting “growing practice of some jurisdictions to enlarge the scope of issues tried in a summary proceeding for possession”).

Many jurisdictions also expressly authorize rent abatement as a remedy for a successful habitability counterclaim or defense. See COLO. REV. STAT. ANN. § 38-12-507 (authorizing habitability counterclaims and specifying that “the tenant may recover actual damages directly arising from the breach of the warranty of habitability, which shall include any reduction in the fair

rental value of the dwelling unit during any period that the residential premises were uninhabitable”); TEX. PROP. CODE ANN. § 92.335 (authorizing a defense of “rent deduction lawfully made” in an eviction action); OHIO REV. CODE ANN. § 1923.061 (“In an action for possession of residential premises based upon nonpayment of the rent or in an action for rent when the tenant or manufactured home park resident is in possession, the tenant or resident may counterclaim for any amount the tenant or resident may recover under the rental agreement.”); ARIZ. REV. STAT. ANN. § 33-1365(A) (“In an action for possession based upon nonpayment of the rent or in an action for rent where the tenant is in possession, if the landlord is not in compliance with the rental agreement or this chapter, the tenant may counterclaim for any amount which he may recover under the rental agreement or this chapter.”); ALASKA STAT. § 34.03.190(a) (“In an action for possession based upon nonpayment of the rent or in an action for rent when the tenant is in possession, the tenant may counterclaim for any amount recoverable under the rental agreement or this chapter.”); NEV. REV. STAT. ANN. § 118A.490(1) (same); S.C. CODE ANN. § 27-40-640(a) (same); R.I. GEN. LAWS § 34-18-32(a) (same); N.M. STAT. ANN. § 47-8-30(A) (“In an action for possession based upon nonpayment of rent or in an action for rent where the resident is in possession, the resident may counterclaim for any amount which he may recover under the rental agreement or the Uniform Owner-Resident Relations Act.”); NEB. REV. STAT. § 76-1428(1) (“In an action for possession based upon nonpayment of the rent or in an action for rent where the tenant is in possession, the tenant may counterclaim for any amount which he or she may recover under the rental agreement or the Uniform Residential Landlord and Tenant Act.”); OR. REV. STAT. § 90.370(1)(a) (“In an action for possession based upon nonpayment of the rent or in an action for rent when the tenant is in possession, the tenant may counterclaim for any amount, not in excess of the jurisdictional limits of the court in which the action is brought, that the tenant may recover under the rental agreement or this chapter.”); FLA. STAT. § 83.60(b) (“A material noncompliance with [the obligation to maintain premises] by the landlord is a complete defense to an action for possession based upon nonpayment of rent, and, upon hearing, the court or the jury, as the case may be, shall determine the amount, if any, by which the rent is to be reduced to reflect the diminution in value of the dwelling unit during the period of noncompliance.”); N.D. CENT. CODE § 47-32-04 (2023) (“An action of eviction cannot be brought in a district court in connection with any other action, except for rents and profits accrued or for damages arising by reason of the defendant’s possession. No counterclaim can be interposed in such action, except as a setoff to a demand made for damages or for rents and profits.”); MASS. GEN. LAWS ANN. ch. 239, § 8A (2004) (stating that “[t]here shall be no recovery of possession under this chapter if the amount found by the court to be due the landlord equals or is less than the amount found to be due the tenant or occupant by reason of any counterclaim or defense under this section” and providing a tenant with one week to pay any shortfall where the amount found to be due the landlord exceeds that due the tenant).

However, not all jurisdictions permit habitability defenses or counterclaims in summary proceedings. E.g., ARK. CODE § 18-17-601 (2023) (requiring the tenant to comply with habitability standards but imposing no such obligation on landlords); *I-70 Mobile City, Inc. v. Cartwright*, 595 S.W.3d 161, 167 (Mo. Ct. App. 2020) (applying state’s forcible entry and detainer statute, MO.

ANN. STAT. § 534.200, and barring tenant’s habitability claim because it “does not concern possession of the property but rather the property’s suitability for human habitation prior to the termination of her tenancy”); *Moser v. Cline*, 214 S.W.3d 390, 393 (Mo. Ct. App. 2007) (“Issues relating to title or matters of equity, such as a claim of set-off against rent, cannot be interposed as a defense in unlawful detainer actions.”). Other jurisdictions leave bifurcation to judicial discretion. MICH. COMP. LAWS ANN. § 600.5739 (providing for liberal joinder of “counterclaims for money judgment for damages attributable to wrongful entry, detainer, or possession, for breach of the lease or contract under which the premises were held, or for waste or malicious destruction to the premises,” but noting that “[t]he court may order separate summary disposition of the claim for possession, without prejudice to any other claims or counterclaims”).

In addition, some jurisdictions that permit certain of the more common eviction defenses and counterclaims in summary proceedings continue to limit others, particularly counterclaims seeking damages or other affirmative relief. For instance, some New York courts liberally apply the requirement that a counterclaim be “inextricably intertwined” with possession to permit many common eviction defenses, including habitability, laches, rent overcharges, and harassment. E.g., *601 West Realty, LLC v. Chapa*, 19 Misc. 3d 1133(A) (N.Y. City Civ. Ct. 2008) (tenant’s warranty of habitability counterclaims deemed “intertwined” with non-payment proceeding). See generally ANDREW SCHERER & FERN FISHER, *RESIDENTIAL LANDLORD TENANT LAW IN NEW YORK* §§ 10.68, 10.71, 10.76, 10.81, 10.86, & 10.89 Westlaw (Nov. 2022). However, New York courts are less likely to find counterclaims for consequential damages or emotional distress to be sufficiently intertwined and often sever or dismiss those claims. Compare SCHERER & FERN, *supra*, at § 10.89 (collecting cases, including those in which claims for fraud and physical and emotional distress were found “too attenuated” from plaintiff’s possession claim to be heard in a summary proceeding) with *Westchester Plaza Holdings, LLC v. Afriyie*, 60 Misc. 3d 1202(A), 2018 WL 2994340 (N.Y. City Civ. Ct. 2018) (holding that tenant’s unjust-enrichment counterclaim based on property damages incurred as a result of a burst pipe was “inextricably intertwined” with plaintiff’s claim for rent arrears and defendant’s habitability defense.).

Other jurisdictions are in accord in barring claims seeking damages or other forms of affirmative relief as not sufficiently related to the core issue of possession. E.g., *Schuminsky v. Field*, 606 P.2d 1133, 1135 (Okla. 1980) (interpreting state’s forcible entry and detainer statute, OKLA. ST. ANN. tit. 12 § 1148.1, to bar tenant counterclaims for consequential damages); *Scalzo v. Anderson*, 275 N.W.2d 894, 899-900 (Wis. 1979) (noting that “the ultimate issue in any eviction proceeding is simply who has the right to possession of the premises” and dismissing a counterclaim asserting damages based on unfair trade practices); *Am. Nat’l Bank v. Powell*, 691 N.E.2d 1162, 1170 (Ill. App. 1997) (holding that tenant’s habitability counterclaim was not germane to the landlord’s forcible entry claim because it sought money damages); *People ex rel. Dep’t of Transp. v. Walliser*, 629 N.E.2d 1189, 1195 (Ill. App. 1994) (upholding dismissal of counterclaim seeking damages for failure to pay relocation benefits as not germane to core issue of possession); N.D. CENT. CODE § 47-32-04 (2023) (“An action of eviction cannot be brought in a district court in connection with any other action, except for rents and profits accrued or for damages arising by

reason of the defendant’s possession. No counterclaim can be interposed in such action, except as a setoff to a demand made for damages or for rents and profits.”); TEX. PROP. CODE ANN. § 92.335 (authorizing retaliation claims and claims for rent abatement, but stating that “[o]ther judicial actions under this chapter may not be joined with an eviction suit or asserted as a defense or crossclaim in an eviction suit”); TEX. R. CIV. P. § 510.3(e) (“The court must adjudicate the right to actual possession and not title. Counterclaims and the joinder of suits against third parties are not permitted in eviction cases.”); *Jimison v. MAEDC-Hulen Bend Senior Cmty., L.P.*, No. 02-23-00206-CV, 2024 WL 3282544, at *5 (Tex. App. July 3, 2024) (“[A] counterclaim for damages is not recoverable in a forcible detainer suit.”); *Am. Nat’l Bank by Metroplex, Inc. v. Powell*, 293 Ill. App.3d 1033, 1044-1045 (Ill. App. Ct. 1997) (acknowledging that “[c]ounterclaims seeking money damages are not germane to forcible entry claims” but finding that appellant-tenant’s counterclaim for remedies specifically provided in the Residential Landlord and Tenant Ordinance that accompanied his defense of retaliatory eviction was germane to the issue of possession); *Lincoln Square Apartments, Section I, Inc. v. Davis*, 58 Misc. 2d 292, 295 N.Y.S.2d 358, 361 (N.Y. Civ. Ct. 1968) (holding that equitable relief to renew an expired lease based on a First Amendment claim was unavailable in a summary proceeding), *aff’d*, 316 N.Y.S.2d 130 (N.Y. App. Term. 1969).

Subsection (a) is designed to bring high-volume civil adjudication into closer alignment with the conventional approach in federal and state civil procedure favoring liberal joinder of related claims, counterclaims, or defenses in a single court and proceeding rather than piecemeal adjudication. This Section’s approach thereby departs from the more restrictive approach to counterclaims in many jurisdictions in favor of a more liberal, single-proceeding default position. For instance, New York’s requirement that a counterclaim be “inextricably intertwined” with the primary claim is plainly more demanding than this Section’s application of the transaction-or-occurrence test. See generally ANDREW SCHERER & FERN FISHER, *RESIDENTIAL LANDLORD TENANT LAW IN NEW YORK* §§ 10.68, 10.71, 10.76, 10.81, 10.86, & 10.89, Westlaw (Nov. 2022). Indeed, while subsection (a)’s transaction-or-occurrence approach would permit counterclaims when the opposing claims are part of the same overall controversy between the parties, New York’s standard is more stringent, requiring a close-knit connection between the opposing claims. As noted previously, though some types of counterclaims tend to satisfy New York’s standard (e.g., habitability, harassment, laches), other counterclaims that might pass muster in other jurisdictions are less likely to do so (e.g., consequential damages, emotional distress).

In implementing subsection (a), courts and other rulemakers should heed the conventional doctrinal view that the transaction-or-occurrence standard is to be applied liberally. See, e.g., *Warshawsky & Co. v. Arcata Nat’l Corp.*, 552 F.2d 1257, 1261 (7th Cir. 1977) (“[T]he term ‘transaction’ is to be construed generously to avoid the unnecessary expense inherent in multiplicity of litigation.”); *Albright v. Gates*, 362 F.2d 928, 929 (9th Cir. 1966) (defining transaction as a “term [that] gets an increasingly liberal construction”); *United Artists Corp. v. Masterpiece Productions*, 221 F.2d 213, 216 (2d Cir. 1955) (“‘Transaction’ is a word of flexible meaning.”); *Annis v. Dewey County Bank*, 335 F. Supp. 133, 138 (D.S.D. 1971) (“It is clear that

1 the trend of decisions is to give a liberal and broad construction to claims and counterclaims in
 2 determining whether they arise out of the same transaction or occurrence under Rule 13(a).”).

3 For instance, if a landlord seeks to evict a tenant on the basis of one month of unpaid rent,
 4 the transaction or occurrence should not be limited to one month of rent. Rather, it may include
 5 other landlord–tenant disputes that could be efficiently resolved in tandem with the rent question.
 6 This is because the transaction-or-occurrence standard is not limited to one issue or incident, but
 7 rather “may comprehend a series of many occurrences, depending not so much upon the
 8 immediateness of their connection as upon their logical relationship.” *Warshawsky & Co. v. Arcata*
 9 *Nat’l Corp.*, 552 F.2d 1257, 1261 (7th Cir. 1977). Discrimination counterclaims in eviction actions
 10 should also be broadly permitted under subsection (a)’s transaction-or-occurrence test despite their
 11 different legal bases and evidentiary requirements except where, as elaborated in subsection (a)(2)
 12 and discussed below, applicable law assigns primary jurisdiction over the claim to a nonjudicial
 13 administrative body. E.g., *Josephinum Assocs. v. Kahli*, 45 P.3d 627, 632 (Wash. App. 2002)
 14 (holding that “if unlawful discrimination is the reason for an eviction, the defense certainly affects
 15 the tenant’s right of possession” and the court must consider the defense). Only the rare case will
 16 either fail subsection (a)’s transaction-or-occurrence test or satisfy its separate requirement that the
 17 benefits of bifurcation substantially outweigh the costs. Most such cases will be eviction
 18 proceedings coupled with other disputes, such as claims involving ownership of property or an
 19 eviction for another property based on the same lease. E.g., *Phillips v. Phillips*, 90 Wis. 2d 862
 20 (Wis. Ct. App. 1979) (ownership of property); *Ellis v. Doe*, 924 N.W.2d 258, 262 (Minn. 2019)
 21 (eviction from parking lot spaces and from building); see also *Martin-Bragg v. Moore*, 219 Cal.
 22 App. 4th 367, 393, 395 (Cal. Ct. App. 2013) (noting that “adjudication of complex issues of title to
 23 property should not be forced to adhere to the strictures that apply to summary proceedings for
 24 unlawful detainer” and holding that trial court erred in requiring the complex title issue to be tried
 25 within the summary unlawful detainer proceeding). In such cases, unless the summary proceeding
 26 is separated from the non-summary one, the underlying possession determination might be
 27 unreasonably delayed or the possession or discrimination claim given short shrift.

28 In the same vein, “transaction or occurrence” need not be a single incident or issue. Rather,
 29 “[a]s a word of flexible meaning, ‘transaction’ may comprehend a series of many occurrences,
 30 depending not so much upon the immediateness of their connection as upon their logical
 31 relationship.” *Warshawsky & Co. v. Arcata Nat’l Corp.*, 552 F.2d 1257, 1261 (7th Cir. 1977); see
 32 also *G & M Tire Co. v. Dunlop Tire & Rubber Corp.*, 36 F.R.D. 440, 441 (N.D. Miss. 1964)
 33 (“‘[T]ransaction or occurrence’ shall be broadly interpreted and may include a series of
 34 transactions or occurrences.”).

35 As Comment *b* notes, subsection (a) raises the question of whether a counterclaim, once
 36 made available in the original action, should be treated as compulsory in nature. Under Federal
 37 Rule of Civil Procedure 13 and its state analogues, a counterclaim that arises out of the same
 38 transaction or occurrence is compulsory, and so a defendant who fails to raise it in a responsive
 39 pleading has waived it and, once a final judgment issues in the case, can be precluded from
 40 asserting the claim in a subsequent action between the same parties. Compare FED. R. CIV. P. 13(a)

(compulsory counterclaims) with FED. R. CIV. P. 13(b) (permissive counterclaims); see also ALA. R. CIV. P. 13; ARIZ. R. CIV. P. 13; COLO. R. CIV. P. 13; FLA. R. CIV. P. 1.170(a); MASS. R. CIV. P. 13; NEV. R. CIV. P. 13; OHIO R. CIV. P. 13(A); R.I. SUPER. R. CIV. P. 13; TEX. R. CIV. P. 97a; UTAH R. CIV. P. 13; WYO. R. CIV. P. 13. See generally Restatement of the Law Second, Judgments § 22 (“Effect of Failure to Interpose Counterclaim”) (AM. L. INST. 1982) (noting that most states have adopted compulsory counterclaim rules or statutes similar or identical to Rule 13).

While Comment *b* states that subsection (a) assumes that high-volume civil adjudication will be governed by the same joinder and preclusion rules that apply in other civil litigation, there are also grounds on which courts and other rulemakers could choose the opposite position. Less expert, less resourced, and often self-represented litigants may lack the legal capacity to understand that their failure to plead a counterclaim in a responsive pleading may preclude them from raising it later in the case or in a subsequent proceeding. Courts and other rulemakers might therefore conclude that, even when the transaction-or-occurrence approach to determining which counterclaims may lie in an eviction action tracks the rule governing compulsory counterclaims, those counterclaims are to be treated as permissive only. See, e.g., Mass. Trial Ct. R. 5 (2024) (counterclaims in summary process must be asserted in the answer, except for good cause shown, but counterclaims are permissive, not compulsory, and thus may be raised in a separate civil suit if not asserted in summary process); Mass. Uniform Summary Process R. 5 (same) (1980). But see *Adjartey v. Cent. Div. of the Hous. Ct. Dep’t*, 481 Mass. 830 (2018) (citing Rule 5 of the Massachusetts Uniform Summary Process Rules and lamenting that a tenant “must generally assert any affirmative defenses and counterclaims in the answer” even though the “time to respond to his or her landlord’s complaint is sharply limited”). Whatever policy is chosen, courts and other rulemakers should be clear on the matter. Compare *McAlpine v. Patrick*, No. 86453, 2006 WL 562191, at *2 (Ohio Ct. App. Mar. 9, 2006) (finding claim preclusion applicable to breach-of-contract and wrongful-eviction claims in a suit subsequent to summary process); *Forney v. Climbing Higher Enters., Inc.*, 815 N.E.2d 722, 727 (Ohio Ct. App. 2004) (same) with *Haney v. Roberts*, 720 N.E.2d 101, 102 (Ohio Ct. App. 1998) (finding that Rule 13’s compulsory-counterclaim rule does not apply to eviction actions). See also WIS. STAT. ANN. § 799.43 (providing that “any claim related to the rented property shall be considered as arising out of the transaction or occurrence which is the subject matter of the plaintiff’s claim” but not specifying that any counterclaim that meets that standard is permissive); *Scalzo v. Anderson*, 87 Wis.2d 834 (1979) (narrowly construing counterclaims that may be pleaded in eviction); *Norman v. Faulkner*, 1997 Wisc. App. LEXIS 374 (reiterating *Scalzo*’s narrow construction of permissible counterclaims in eviction but adding that a tenant is “not without redress” because extrinsic or collateral matters can be severed and addressed in a separate proceeding); *Omegbu v. Wagner*, 2006 Wisc. App. LEXIS 1031 (suggesting that any counterclaim “stemm[ing] from the landlord-tenant relationship” is compulsory under WIS. STAT. ANN. § 799.43 and the common law). See generally Kimberly E. O’Leary, *The Inadvisability of Applying Preclusive Doctrines to Summary Evictions*, 30 U. TOL. L. REV. 49, 67-72 (1998) (noting doctrinal confusion); Rosemary Smith,

1 *Locked Out: The Hidden Threat of Claim Preclusion for Tenants in Summary Process*, 15 SUFFOLK
2 J. TRIAL & APP. ADVOC. 1, 2 (2010) (same).

3 The broader rationale for this Section’s alignment of responsive pleading in high-volume
4 civil adjudication with the liberal joinder rules that characterize much of the rest of civil litigation
5 is two-fold. First, mounting empirical evidence suggests that available defenses or counterclaims
6 are systematically underenforced in many high-volume civil case types. See generally Nicole
7 Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. CHI. L. REV. 145,
8 149 (2020) (coining the term “operationalization gap” to describe “a gap between the number of
9 tenants with meritorious [habitability] claims and the number of tenants who receive some benefit
10 from the claim”); David Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CAL.
11 L. REV. 389 (2011) (tracing the history of the warranty of habitability and establishing its
12 substantial underenforcement); Kathryn A. Sabbeth, *(Under)Enforcement of Poor Tenants’ Rights*,
13 1 GEO. J. ON POVERTY L. & POL’Y 97, 135 (2019) (noting the “accumulated underenforcement of
14 tenants’ housing rights” as contributing to “the underdevelopment and distortion of law”).

15 Part of the problem, a growing pool of data suggests, is that habitability defenses or
16 counterclaims are rarely asserted, particularly when a litigant is self-represented. See, e.g., Carroll
17 Seron, Martin Frankel, & Gregg Van Ryzin, *The Impact of Legal Counsel on Outcomes for Poor*
18 *Tenants in New York City’s Housing Court: Results of a Randomized Experiment*, 35 L. & SOC’Y
19 REV. 419, 426 (2001) (finding that only 3.3 percent of self-represented litigants asserted
20 habitability claims, as against 18.8 percent of represented litigants); Paula A. Franzese, Abbott
21 Gorin & David J. Guzik, *The Implied Warranty of Habitability Lives: Making Real the Promise of*
22 *Landlord-Tenant Reform*, 69 RUTGERS UNIV. L. REV. 1, 21 (2016) (finding that the warranty of
23 habitability was asserted in only 80 out of 40,00 cases, or 0.02 percent).

24 Of particular note, the warranty of habitability, hailed in the 1970s as a transformative shift
25 in landlord-tenant law, has not gained significant traction or served as a strong deterrent against
26 practices condemned by courts and legislatures alike, at least in part because of procedural barriers
27 to its assertion. This Section’s principles are designed to lower the procedural barriers to the
28 warranty’s assertion in service of the core goals of procedure in high-volume civil adjudication—
29 resolving disputes fairly and accurately, facilitating meaningful participation by all litigants,
30 promoting effective decisionmaking by the parties and the court, and fostering the public
31 elaboration of law. See § 2.01 (Goals of Procedure). In high-volume civil cases, expeditious but
32 fair adjudication of all claims in a single proceeding, combined with measures to protect against
33 abusive claiming behavior, including, in certain instances and where appropriate, Rule 11
34 sanctions, represent the sounder approach and should be the strong procedural norm.

35 Second, liberal joinder and single proceedings more fairly balance litigants’ interests on
36 either side of the “v.” Bifurcation might protect the legitimate investment or other interests of
37 landlords or creditors by ensuring rapid resolution of disputes. However, it does so only at
38 significant cost to other interests, particularly a defendant’s ability to prepare and mount an
39 effective defense and also the public elaboration of law. The inability to pursue all claims and
40 defenses in a single proceeding invariably weakens a defendant’s position strategically,

1 particularly self-represented defendants who already face myriad practical and economic barriers
 2 to meaningful participation in their cases. A procedural scheme that requires tenants to defend a
 3 lawsuit for possession, and then file a separate lawsuit seeking damages relating to a landlord's
 4 failure to maintain the habitability of the property, violates the principle that high-volume civil-
 5 adjudication procedures should prescribe minimum litigation stages or steps, consistent with fair
 6 and accurate adjudication, as a way to lower litigation costs and foster meaningful participation by
 7 all litigants. See § 2.03 (Meaningful Participation).

8 A final situation implicating this Section's presumption in favor of holistic, single-
 9 proceeding resolution of disputes, as addressed in subsection (a)(2), arises when applicable law
 10 confers jurisdiction over a defense or counterclaim on an administrative body outside the court
 11 system. An important example is antidiscrimination law, which is a powerful source of rights for
 12 tenants but creates complications where courts and administrative agencies share concurrent
 13 jurisdiction over such claims. E.g., N.Y. EXEC. LAW § 297; WASH. REV. CODE ANN. §§ 49.60.030
 14 & 49.60.225. Similarly, many jurisdictions provide that an executive-branch agency shall hear
 15 administrative claims asserting rent overcharge, unfair rent increases, or unsafe housing conditions.
 16 In New York, for example, a housing court might have jurisdiction to hear counterclaims on rent
 17 overcharge, but there is also an alternative administrative forum that oversees such claims—the
 18 New York State Division of Housing and Community Renewal (DHCR). *Downing v. First Lenox*
 19 *Terrace Assocs.*, 107 A.D.3d 86, 91 (N.Y. App. Div. 2013), *aff'd sub nom. Borden v. 400 E. 55th*
 20 *St. Assocs., LP*, 24 N.Y.3d 382 (2014); see *Collazo v. Netherland Prop. Assets, LLC*, 35 N.Y.3d
 21 987, 990 (2020) (plaintiff's choice of forum controls). In Philadelphia, the Fair Housing
 22 Commission enforces the city's Fair Housing Ordinance and conducts hearings on properties that
 23 are alleged to be in unsafe or in poor condition. Phila. Code § 9-803; *Marshall Square Realty Co.*
 24 *LP v. Gordon*, 2020 Pa. Super. Unpub. LEXIS 3934 (2020) (affirming dismissal of tenant's
 25 counterclaims concerning matters previously decided by the Philadelphia Fair Housing
 26 Commission). See also, e.g., D.C. Code § 2-1831.03 (establishing the Office of Administrative
 27 Hearings' jurisdiction over certain rental housing and condominium cases).

28 Even when courts share concurrent jurisdiction over discrimination claims with an
 29 administrative body, many courts apply the “primary jurisdiction” doctrine and defer resolution of
 30 the claim or issue to the agency and, further, order a stay pending administrative resolution. See
 31 170 West 85 St. *HDFC v. Jones*, 176 Misc. 2d 262, 266-267 (N.Y. Civ. Ct. 1998) (stating that
 32 when a court and agency have concurrent jurisdiction, the doctrine of primary jurisdiction,
 33 applicable to summary proceedings like eviction, supports the court exercising its discretion to
 34 stay matters within the agency's specialized experience and technical expertise); see also *United*
 35 *States v. Western Pacific Railroad Co. Inc.*, 352 U.S. 59, 62-63 (1956) (providing a broad overview
 36 of the “primary jurisdiction” doctrine). In *Drayton v. Poretsky Mgmt., Inc.*, 462 A.2d 1115 (D.C.
 37 1983), the D.C. Court of Appeals helpfully described the doctrine as follows:

38 Primary jurisdiction . . . applies where a claim is originally cognizable in the courts,
 39 and comes into play whenever enforcement of the claim requires the resolution of
 40 issues which, under a regulatory scheme, have been placed within the special

1 competence of an administrative body; in such a case the judicial process is
 2 suspended pending referral of such issues to the administrative body for its views.
 3 Id. at 1118.

4 While this Section takes no position on the policy wisdom of separate administrative
 5 remedies in high-volume civil adjudication, in jurisdictions that make such remedies available,
 6 subsection (a)(2) relaxes the presumption in favor of holistic, single-proceeding resolution and
 7 defers to courts and other rulemakers on whether to apply the primary-jurisdiction doctrine or other
 8 applicable law in determining whether to defer resolution of counterclaims or defenses to an
 9 administrative body. When a court determines that deferral to an administrative body is
 10 appropriate, the court should likewise apply applicable law in determining whether to stay its hand
 11 or instead move forward with judicial resolution of the other claims. E.g., *Akassy v. William Penn*
 12 *Apartments Ltd. P’ship*, 891 A.2d 291, 304 (D.C. Ct. App. 2006). In making stay determinations,
 13 courts vested with discretion to decide whether to stay judicial proceedings pending an
 14 administrative determination might apply subsection (a)’s cost-benefit test, thus asking whether
 15 the benefits of separate, simultaneous judicial and administrative proceedings substantially
 16 outweigh the costs as compared to entering a stay and resolving all remaining claims in a single
 17 proceeding once the agency has made its determination. Some courts, in making stay
 18 determinations in eviction matters with separate agency proceedings on the validity of rent
 19 increases, provide a landlord with a choice between a stay or an immediate trial on the basis of the
 20 rent minus the disputed increase. *Drayton*, 462 A.2d at 1122 (“Where such a proceeding is
 21 pending, the trial court should either stay the possessory action pending the administrative
 22 determination of the validity of the rent increase or, at the option of landlord, proceed with the trial
 23 on the basis of the rent less the challenged increase.”). Both approaches are sound.

24 *c. Counterclaims, defenses, and financial requirements.* This Section’s principles adopt the
 25 position that financial requirements as a precondition for filing a responsive pleading or attending
 26 a hearing serve no good end and should not be imposed in high-volume civil adjudication.

27 Answer fees and other financial requirements for the assertion of defenses or counterclaims
 28 are common in high-volume civil adjudication. In the debt-collection area, many states’ statutes
 29 and rules require defendants to pay a fee to respond to a lawsuit—that is, to file an answer or other
 30 responsive pleading. See NAT’L CTR. FOR ACCESS TO JUSTICE, *Consumer Debt Litigation Index*
 31 (Mar. 4, 2024), [https://ncaj.org/news/new-consumer-debt-litigation-index-ranks-states-best-](https://ncaj.org/news/new-consumer-debt-litigation-index-ranks-states-best-policies-access-justice)
 32 [policies-access-justice](https://ncaj.org/news/new-consumer-debt-litigation-index-ranks-states-best-policies-access-justice) (noting that 15 states still charge a fee to answer a consumer-debt
 33 complaint); see, e.g., ARIZ. REV. STAT. ANN. § 22-281 (charging a \$15 small claims answer fee);
 34 Missoula County, Montana, *Missoula County Justice Court – Civil Division*, [https://www.missoula-](https://www.missoula-county.us/government/civil-criminal-justice/justice-court/civil#motion)
 35 [county.us/government/civil-criminal-justice/justice-court/civil#motion](https://www.missoula-county.us/government/civil-criminal-justice/justice-court/civil#motion) (charging an answer filing
 36 fee of \$30 per defendant); COLO. JUD. BRANCH, *Filing Fees, Surcharges, and Costs in Colorado*
 37 *State Courts*, [https://www.courts.state.co.us/userfiles/file/Self_Help/Fees%20Chart/FeesChart](https://www.courts.state.co.us/userfiles/file/Self_Help/Fees%20Chart/FeesChart%20-%20JDF1.pdf)
 38 [%20-%20JDF1.pdf](https://www.courts.state.co.us/userfiles/file/Self_Help/Fees%20Chart/FeesChart%20-%20JDF1.pdf) (charging between \$26 and \$130, depending on the award limit and whether
 39 there are counterclaims); CAL. GOV’T CODE § 70602.5 (prescribing answer fees of \$370 or \$225
 40 depending on amount in controversy); see generally George Simons, *Civil Court Fees Block Justice*

1 *Even in Well-Intentioned States*, BLOOMBERG (Feb. 23, 2022, 1:00 AM PST), <https://news.bloomberglaw.com/us-law-week/civil-court-fees-block-justice-even-in-well-intentioned-states>
2 (listing Arizona, California, Colorado, Georgia, Idaho, Illinois, Louisiana, Minnesota, Montana,
3 Nevada, New Jersey, Oregon, Pennsylvania, and South Dakota as states that require defendants to
4 pay an answer fee in debt-collection suits); Claire Johnson Raba & Dalié Jiménez, Working Paper,
5 *Pay to Plead: Finding Unfairness and Abusive Practices in California Debt Collection Cases* (Nov.
6 9, 2023), at 19, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4611756 (discussing states
7 that require defendants to pay a fee to plead in district court or in small claims court).

8 Similarly, in many jurisdictions, the assertion of defenses or counterclaims in eviction
9 proceedings or the availability of a hearing is predicated on a defendant’s payment or deposit of
10 unpaid rent, variously referred to as a “rent bond,” “rent escrow,” or “rent-posting” requirement.
11 E.g., NEV. REV. STAT. ANN. § 118A.490 (“If a tenant fails to deposit with the court within 24 hours
12 after the original hearing the entire amount required pursuant to subsection 1, the tenant
13 relinquishes the right to a hearing and the court shall at that time grant a judgment for eviction
14 without further hearing.”); OHIO REV. CODE ANN. § 1923.061(B) (“[T]he court from time to time
15 may order the tenant to pay into court all or part of the past due rent and rent becoming due during
16 the pendency of the action.”); IDAHO CODE § 6-311 (permitting a continuance for a period longer
17 than two days only if the defendant gives an “undertaking to the adverse party with good and
18 sufficient security, to be approved by the court, conditioned for the payment of the rent that may
19 accrue if judgment is rendered against the defendant”); UTAH CODE § 78B-6-808 (requiring
20 defendant to pay a counter bond if the plaintiff posts a bond and the defendant wishes to remain in
21 possession while the forcible entry and detainer proceeding is pending). See generally *Bell v.*
22 *Tsintolas Realty Co.*, 430 F.2d 474, 482 (D.C. Cir. 1970) (authorizing a “prepayment of rent
23 requirement” as a protection against the “severe disadvantage” faced by landlords during a
24 “prolonged period of litigation without rental income”).

25 In Florida, for instance, tenants defending against a landlord’s claim for possession must
26 deposit the accrued rent owed into a registry in order to raise any defense other than payment. In
27 Florida and elsewhere, such a monetary deposit is a prerequisite for a hearing; should the tenant
28 fail to pay the money into the registry, a default judgment issues without further notice or
29 proceedings. FLA. STAT. § 83.60(2) (“Failure of the tenant to pay the rent into the registry of the
30 court or to file a motion to determine the amount of rent to be paid into the registry within 5 days,
31 excluding Saturdays, Sundays, and legal holidays, after the date of service of process constitutes
32 an absolute waiver of the tenant’s defenses other than payment, and the landlord is entitled to an
33 immediate default judgment for removal of the tenant with a writ of possession to issue without
34 further notice or hearing thereon.”); see also HAW. REV. STAT. § 521-78(b) (noting that if a tenant
35 is unable to deposit the disputed rent in a possession action when the payment of rent is in dispute,
36 “the landlord shall have judgment for possession and execution shall issue accordingly”); OHIO
37 REV. CODE ANN. § 5321.07 (requiring a tenant who is current in rent but who reasonably believes
38 the landlord has failed to fulfill habitability obligations to “deposit all rent that is due and thereafter
39 becomes due” with the court or apply for a court order directing the landlord to remedy the
40

condition and “the court may require the tenant to deposit rent with the clerk of court”); S.D. CODIFIED LAWS § 43-42-9 (permitting lessee alleging lack of habitability and in need of repairs exceeding one month’s rent to withhold rent and “immediately deposit [rent] in a separate bank or savings and loan account . . . maintained only for the purpose of making repairs”); MINN. STAT. § 504B.385 (“If a violation exists in a residential building, a residential tenant may deposit the amount of rent due to the landlord with the court administrator.”); *Daoud v. Mohammad*, 952 A.2d 1091, 1092 (N.J. Super. Ct. App. Div. 2008) (tenant may raise habitability only upon deposit of rent with clerk). See generally Kathryn A. Sabbeth, *Eviction Courts*, 18 U. ST. THOMAS L.J. 359, 381 (2022) (citing *LSC Eviction Laws Database*, LEGAL SERVS. CORP., <https://www.lsc.gov/initiatives/effect-state-local-laws-evictions/lsc-eviction-laws-database> (last updated Jan. 1, 2021) (describing pervasive use of rent bonds as a condition to obtaining a hearing, reopening an eviction action, appealing an order of eviction, or otherwise avoiding an eviction order).

This Section’s categorical prohibition on pay-to-answer requirements is justified on at least four grounds. First and foremost, financial requirements as a precondition to asserting defenses and counterclaims exacerbate several of the problems in many high-volume civil-adjudication contexts that are elaborated in § 2.03, including a chronic lack of adversarial testing, legitimating participation, or public elaboration of law, all of which result from high rates of defendant default. This Section’s categorical ban on answer fees as a condition of asserting a defense or counterclaim thus reflects the view that a lack of meaningful participation by litigants in high-volume civil adjudication, particularly less expert, less resourced, and often self-represented litigants, represents a significant threat to the legitimacy of the system and its outputs.

In particular, a small but growing empirical literature documents the effect of answer fees, bond requirements, and other financial conditions on hearing participation rates in certain high-volume civil-case types, including eviction and debt-collection actions. See Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. CHI. L. REV. 145, 210-213 (2020) (finding that “more than 90 percent of tenants with meritorious claims did not benefit from the warranty [of habitability]” and were “unable to use the law as a tool to secure needed repairs”); Kathryn A. Sabbeth, *(Under)Enforcement of Poor Tenants’ Rights*, 27 GEO. J. POVERTY L. & POL’Y 97, 120 (2019) (concluding that the “pay-to-play structure systematically neglects the enforcement of housing safety laws”). Other research finds that imposing answer fees in the debt-collection context deters participation in the court process—including at a hearing on the merits—and is more likely to result in default judgment. See Raba & Jiménez, *supra*. The reasons are plain. Many eviction-defendants are unable to comply with financial requirements because they are using withheld rent to cope with repairs not made by the landlord. See Summers, *supra*, at 164 (citing examples of purchasing space heaters and hot plates to mitigate a broken heating system or stove); Franzese & Thomas, *supra*, at 1277 (same). Moreover, because many households pay over half of their incomes toward rent, financial requirements can be insurmountable, leaving litigants defenseless. Finally, by preventing a defendant from raising issues other than nonpayment of rent, rent bonds stymie the public elaboration of law and result in the underenforcement of legal norms, such as the warranty of habitability. See Nicole Summers, *The Limits of Good Law: A Study of*

1 *Housing Court Outcomes*, 87 U. CHI. L. REV. 145, 210-213 (2020) (coining the term
 2 “operationalization gap” to describe the underenforcement of habitability mandates); Kathryn A.
 3 Sabbeth, *(Under)Enforcement of Poor Tenants’ Rights*, 27 GEO. J. POVERTY L. & POL’Y (2019)
 4 (offering a similar view).

5 Second, a categorical ban on answer fees is consistent with the well-established norm in
 6 American civil litigation that it is the party who voluntarily invokes the court’s jurisdiction, not
 7 the defendant who is involuntarily haled into court, who can be made to submit payment as a
 8 condition of participation in litigation. Of course, plaintiff-filing fees are pervasive in American
 9 law. Moreover, many jurisdictions impose fees on parties who initiate suit even beyond filing fees.
 10 For instance, most states require a party to post a security when seeking a prejudgment attachment
 11 of property, see *Connecticut v. Doe*, 501 U.S. 1, 24-26 (1991) (identifying numerous states as
 12 of 1991), or a temporary injunction, e.g., CAL. CIV. PROC. CODE § 529; 375 ILL. COMP. STAT. 5/11-
 13 103 (court may require plaintiff to give bond for payment of costs and damages that may be
 14 incurred by defendant if wrongfully enjoined); FED. R. CIV. P. 65(c) (same), or when seeking to
 15 stay enforcement of an adverse money judgment pending appeal, e.g., CAL. CIV. PROC. CODE
 16 § 917.1(a); N.Y. CIV. PRAC. L. & R. 5519(a); ILL. S. CT. R. 305. In stark contrast, defendant-side
 17 fees as a condition of asserting a defense or counterclaim are virtually unheard-of outside of high-
 18 volume civil adjudication. A rare and isolated example is that some jurisdictions require an
 19 unlicensed nonresident insurer who has been sued to deposit with the court a “pre-answer security”
 20 in the amount of any possible judgment against it as a precondition to defending the suit on the
 21 merits. See 6 National Association of Insurance Commissioners, *Model Laws, Regulations and*
 22 *Guidelines* § 850-6 (2007) (identifying state statutes). See generally Walter W. Heiser, *Due*
 23 *Process Limitations on Pre-Answer Security Requirements for Nonresident Unlicensed Insurers*,
 24 88 NEB. L. REV. 494, 495 (2010). The financial requirements imposed by many jurisdictions as a
 25 precondition of responsive pleading in high-volume civil adjudication are a significant outlier in
 26 American procedure.

27 Third, pay-to-answer rules do not meaningfully advance the goals of procedure in high-
 28 volume civil adjudication. As an initial matter, two common justifications for court fees—their
 29 utility as a charge for invoking the court’s jurisdiction and as a method of weeding out frivolous
 30 claims—carry less weight when defendants are made to pay. See E. Keith Stott Jr. & Richard N.
 31 Ross, *Survey and Analysis of Court Filing Fees*, STATE CT. J., Spring 1978, at 8-9 (describing
 32 reasons for filing fees in U.S. courts). Because defendants do not initiate the lawsuit or invoke the
 33 courts, answer fees are neither fair nor necessary as a way to modulate resort to the civil-justice
 34 system. In contrast, it is plaintiffs who decide whether and where to bring their case and the remedy
 35 they seek. Flat-rate answer fees, which are common in debt-collection actions, are particularly ill-
 36 adapted to regulating case flows. Because such fees are not keyed to the amount in controversy,
 37 they are, at best, a coarse and imprecise means of modulating use of the civil-justice system.

38 Relatedly, pay-to-answer requirements do not meaningfully advance the goals of procedure
 39 in high-volume civil adjudication because they are often poorly calibrated to achieve those goals.
 40 In many jurisdictions, a court may order a tenant to pay a rent bond in the full amount of disputed

1 rent. E.g., OHIO REV. CODE ANN. § 1923.061(B) (authorizing a court to order a tenant who asserts
 2 a counterclaim to pay “all or part of the past due rent and rent becoming due during the pendency
 3 of the action”); HAW. REV. STAT. § 521-78(a) (2023) (“At the request of either the tenant or the
 4 landlord in any court proceeding in which the payment or nonpayment of rent is in dispute, the
 5 court shall order the tenant to deposit any disputed rent as it becomes due into the court.”).
 6 However, in any eviction proceeding in which some amount of rent abatement is ultimately found
 7 to be legally warranted, rent bonds keyed to the full amount of disputed rent wrongly assume the
 8 validity of the plaintiff’s claims and thus operate as an unfair subsidy to noncompliant landlords
 9 and an unfair tax on tenants. Cf. *Fritz v. Warthen*, 213 N.W.2d 339, 342 (Minn. 1973) (noting that,
 10 because the covenants of payment and habitability are “mutually dependent,” “the rent, or at least
 11 part of it, is not due under the terms of the lease when the landlord has breached [its] covenants”).
 12 Even where the resulting subsidy and tax are temporary, as where the relevant law provides for
 13 any rent setoff to be returned to a tenant who ultimately prevails on a habitability defense, rent
 14 bonds can effect an undue and consequential transfer of wealth, depriving tenants of resources they
 15 might otherwise put toward legal services or payment of other costs incident to meaningful
 16 participation in their case. This concern about poorly calibrated financial requirements and unfair
 17 landlord subsidies and tenant taxes is particularly acute in jurisdictions in which a tenant-defendant
 18 who wishes to assert a habitability defense or counterclaim, and thus vindicate rights, must
 19 nonetheless pay full rent directly to the landlord-plaintiff, rather than into court escrow—or, as in
 20 some jurisdictions, possess the legal know-how and resources to petition the court to pay into
 21 escrow rather than directly to a landlord. E.g., *Davis v. Comerford*, 483 Mass. 164, 182-184 (2019)
 22 (interpreting MASS. GEN. L. ch. 239, § 8A to permit the court, in the exercise of its discretion, to
 23 order a tenant to pay “use and occupation” directly to the landlord while the case is pending,
 24 although requiring the court to “consider any evidence relative to the effect of any conditions
 25 claimed upon the use and occupation).

26 In sum, because pay-to-answer requirements further reduce already-low participation in
 27 high-volume adjudication, are inconsistent with the norm that only parties who invoke the courts
 28 should be subject to financial requirements, and are poorly calibrated to achieve their purported
 29 procedural ends, the better approach, as embodied in this Section, is a categorical bar on answer
 30 fees. E.g., COLO. REV. STAT. § 38-12-507(2)(c) (2024) (noting that, to raise an affirmative defense,
 31 a tenant is not required to “[d]eposit a bond to assert or perfect a breach of the warranty of
 32 habitability as an affirmative defense”).

33 Fourth, this Section’s categorical ban on answer fees as a condition of participation in
 34 litigation comports with evolving principles of due process. As a matter of federal constitutional
 35 law, courts, including the U.S. Supreme Court, have determined the permissibility of court fees
 36 with reference to two factors: (i) the implication of a fundamental right; and (ii) whether the state
 37 exercises a remedial monopoly over the vindication of that right. Thus, in *Boddie v. Connecticut*,
 38 401 U.S. 371 (1971), the U.S. Supreme Court held that a filing fee charged to an indigent plaintiff
 39 seeking a divorce violated due process because conditioning a divorce petitioner’s access to the
 40 courts on payment of fee was equivalent to denying the petitioner a meaningful opportunity to be

1 heard. *Id.* at 377-380. The reason, as the Court put it, was that court is “the only avenue open” for
 2 dissolving a marriage, so closing the courthouse doors means indigent litigants will be precluded
 3 from justice altogether. *Id.* at 380-381. Two years later, however, in *U.S. v. Kras*, 409 U.S. 434
 4 (1973), the Court adopted a narrow interpretation of *Boddie*, holding that the Constitution does not
 5 prohibit the government from mandating payment of court fees as a condition of filing a
 6 bankruptcy petition. *Id.* at 450. Reading *Boddie* narrowly, the *Kras* Court made clear that each of
 7 the two conditions that moved the Court in *Boddie*—the presence of a fundamental right or interest
 8 and a government monopoly over its vindication—is necessary, but not sufficient in itself, to
 9 trigger a constitutional violation. This conjunctive requirement doomed the due-process claims
 10 because, as the Court noted, a debtor, unlike a divorce petitioner, can choose not to file a formal
 11 bankruptcy proceeding and instead seek, via extralegal means, “to adjust his debts by negotiated
 12 agreement with his creditors.” *U.S. v. Kras*, 409 U.S. 434, 445 (1973).

13 Subsequent cases have not altered the basic contours of this fundamental interest/
 14 government monopoly approach. See *Ortwein v. Schwab*, 410 U.S. 656, 659-660 (1973) (*per*
 15 *curiam*) (holding that state law requiring payment of court filing fees did not deny access to court
 16 in violation of due process when applied to indigent welfare recipients appealing an agency
 17 decision reducing their welfare payments because those payments did not constitute a fundamental
 18 interest); *Morrison v. State Dep’t of Lab. & Indus.*, 168 Wash. App. 269, 273 (2012)
 19 (characterizing *Boddie* as finding “that monetary prerequisites to court access (e.g., filing fees) are
 20 permissible unless the right attempted to be vindicated is fundamental and the courts provide the
 21 only means through which vindication of such right may be obtained. . . .”); *Hous. Auth. of King*
 22 *Cnty. v. Saylor*, 87 Wash. 2d 732, 739 (1976) (upholding a filing fee for an indigent defendant to
 23 appeal an eviction judgment and, invoking *Kras*, finding that the defendant’s interest in the
 24 outcome “lies in the area of economics and social welfare” and thus avoids *Boddie*’s more stringent
 25 procedural-due-process standards reserved for “fundamental” rights); *Fleet Bank of Connecticut*
 26 *v. Dowling*, No. CV 91-0446252S, 1992 WL 24444, at *1 (Conn. Super. Ct. Jan. 14, 1992) (relying
 27 on *Kras*, and noting, in a challenge to a statute imposing a 12 percent interest penalty on the amount
 28 of a rejected settlement offer lower than the ultimate judgment, that “where a statute inhibits access
 29 to the courts for the resolution of an economic matter (e.g., debt collection), a rational justification
 30 of the statute defeats a constitutional challenge”).

31 Left open in *Boddie*, however, was the possibility that the involuntary status of a civil
 32 defendant might be sufficient to trigger due process. Indeed, while nothing in the *Boddie/Kras/*
 33 *Ortwein* line of doctrine formally articulated a different standard for defendants as opposed to
 34 plaintiffs, the *Boddie* Court explicitly analogized a poor divorce petitioner to a defendant summoned
 35 into a court. See *Boddie*, 401 U.S. at 376-377 (“Resort to the judicial process by these plaintiffs is
 36 no more voluntary in a realistic sense than that of the defendant called upon to defend his interests
 37 in court. For both groups this process is not only the paramount dispute-settlement technique, but,
 38 in fact, the only available one.”). The Court’s dicta went one step further in noting that, because
 39 judicial process becomes the only effective way for a defendant to resolve a filed case, “denial of a
 40 defendant’s full access to that process raises grave problems for its legitimacy.” *Id.* at 376.

Some state courts have subsequently extended *Boddie*, striking down fees even when a fundamental right was not at stake or when the state’s constitution provided more protection for access to courts than the U.S. Constitution. The Supreme Court of Kansas expanded *Boddie*’s holding by striking down a \$50 nonrefundable fee assessed to obtain an administrative hearing on a license suspension (with no available fee waiver): although a person “does not have a fundamental right to possess a driver’s license,” once a person does possess a driver’s license, “that person has an interest in the license which the State cannot take away without providing procedural due process,” and “due process rights should not depend upon the depth of the licensee’s pockets.” See *Creedy v. Kan. Dep’t of Revenue*, 310 Kan. 454, 464 (2019). The court took issue with the law’s lack of a fee waiver for indigency, which constructed “a barrier to due process that is potentially insurmountable.” *Id.* at 465-466. As another example, Arizona expanded *Boddie* on the basis of the privileges and immunities clause of its state constitution, see *Ariz. Const.*, art. II, § 13, which has been interpreted to afford “all citizens” of Arizona, “regardless of their financial status,” with an “equal opportunity to the courts and an equal opportunity to appeal.” *Hampton v. Chatwin*, 505 P.2d 1037, 1038 (Ariz. 1973). Similarly, in *Eastin v. Broomfield*, 570 P.2d 744 (Ariz. 1977), the Arizona Supreme Court invalidated a statute creating a three-member panel to review all medical-malpractice claims before filing in civil court. Under the law, if either party rejected the decision of the panel, that party had to pay a \$2000 bond before filing in court. If the plaintiff did not pay the bond, the action would be dismissed; if the defendant did not pay the bond, the matter would be defaulted. The court held that the law violated the privileges and immunities clause of its state constitution both for Arizonans who could afford the bond (because “it places a heavier burden upon his access to the court”) and also for those who could not (“by denying access to the courts”). *Id.* at 754. Finally, the Supreme Court of Washington has expressly held its state Constitution protects access to courts as a “fundamental” right, above what federal due process protects. See *Gonzales v. Inslee*, 535 P.3d 864, 874 (Wash. 2023). The court’s holding implies that answer fees should be scrutinized more heavily than the rational-basis scrutiny required by the federal Constitution. See *M.L.B. v. S.L.J.*, 519 U.S. 102, 123 (1996) (“[F]ee requirements ordinarily are examined only for rationality.”).

Answer fees may also violate equal protection. In *Lindsey v. Normet*, 405 U.S. 56 (1971), the Court invalidated, on equal-protection grounds, a double-bond requirement—that is, a requirement that a tenant seeking to appeal an eviction judgment file an undertaking in the amount of twice the rental value of the premises. *Id.* at 74-79. This double-bond aspect was fatal to the requirement, which the Court rightly said bore no reasonable relationship to any valid government aim. *Id.* at 76-78.

Fee waivers do not adequately address the many policy and constitutional concerns about pay-to-answer rules. Accumulating experience suggests that making fee waivers available to low-income or other qualifying litigants is an incomplete response to concerns that fees deprive litigants access to justice based on ability to pay. To be sure, courts have upheld fee waivers as sufficient to satisfy constitutional demands even where fundamental rights are implicated. E.g., *Creedy*, 310 Kan. at 464 (“[W]here a fundamental right or interest is implicated, allowances may need to be

made for indigent litigants. . . . [W]hen fundamental rights are not implicated, the assessment of a fee without a provision for indigency or waiver has been upheld.”); *In re Forfeiture of 2000 GMC Denali and Contents*, 316 Mich. App. 562, 582 n.10 (Mich. Ct. App. 2016) (suggesting a fee waiver is “is necessary to comply with the constitutional protections afforded to indigent claimants”); *Didlake v. Washington State*, 186 Wash. App. 417, 428 (2015) (when “the right involved is not fundamental,” an “indigent individual does not have a constitutional right to a fee waiver”).

However, as commenters have noted, fee waivers are often complicated to understand and difficult for self-represented litigants to fill out. Many litigants in high-volume civil cases lack the legal knowledge or technological skills needed to navigate court systems, and these same challenges apply to the process of seeking a fee waiver. See *Raba & Jiménez*, *supra*, at 18, 43, 47 (finding that fee-waiver applications are used by only about 30 percent of litigants who respond to court cases in California); Adelina Herrarte & Melanie Zelikovsky, *The Effect of Filing Fees on the Access to Justice*, N.J. LAWYER, Feb. 2023, at 39 (noting that the efficacy of fee waivers is undercut because “the required documentation process can be time consuming, invasive, and overly burdensome”); Andrew Hammond, *Pleading Poverty In Federal Court*, 128 YALE L.J. 1478, 1497-1499 (2019) (noting how fee-waiver forms in federal district courts ask questions such as the “Make & Model” of automobiles and boats, monthly gas expenses, and money owed to doctors or lawyers). The forms require litigants to disclose their monthly expenses, financial accounts, and personal property, for which they likely need to refer to past bills, bank statements, and government benefits and even to conduct research into the market value of their possessions. See, e.g., Jud. Council of Cal., Request to Waive Court Fees, <https://www.courts.ca.gov/documents/fw001.pdf> (requiring applicant to list all financial accounts, including bank name and account); State of Alabama Unified Jud. Sys., Affidavit of Substantial Hardship and Order, <https://judicial.alabama.gov/docs/library/rules/crc10.pdf> (asking about “Equity of Personal Property, (such as the value of motor vehicles, stereo, VCR, furnishing, jewelry, tools, guns”). They therefore fail to ensure that indigent litigants have access to courts.

Answer fees can also significantly hinder the availability of low-cost legal service models. For example, online platforms that help defendants prepare and file answers may still, given current technological constraints, need to manually process fee-waiver applications, an inefficient step that undermines the scalability of their services. Similarly, answers fees may compel legal-aid organizations to devote limited resources to completing fee waivers for clients, diverting time and energy from other critical forms of assistance.

As a final note, some courts that have authorized rent bonds have instructed that they are to be used in “limited fashion” and their amount set based, at least in part, on “whether the tenant has been allowed to proceed in forma pauperis.” *Bell v. Tsintolas Realty Co.*, 430 F.2d 474, 484 (D.C. Cir. 1970). However, these efforts to guide judicial discretion on a case-by-case basis in setting bond amounts may fare no better than many fee-waiver systems. As with many fee-waiver systems, they ignore the brute realities of high-volume dockets and the extreme representational asymmetries that place even the most basic showings required beyond the capacities of many less expert, less resourced, and often self-represented litigants.

1 *d. Responsive pleadings and unreasonable time limits.* Subsection (c) prohibits
 2 unreasonable time limits for the assertion of defenses and counterclaims in high-volume civil
 3 adjudication. A large number of jurisdictions allow tenants only five days—or less—to respond in
 4 an eviction action. CONN. GEN. STAT. § 47a-26a (“If the defendant appears but does not plead
 5 within two days after the return day, the complainant may file a motion for judgment for failure to
 6 plead, served upon the defendant in the manner provided in the rules adopted by the judges of the
 7 Superior Court for the service of pleadings. If the defendant fails to plead within three days after
 8 receipt of such motion by the clerk, the court shall forthwith enter judgment that the complainant
 9 recover possession or occupancy with his costs.”); UTAH CODE ANN. § 78B-6-807(3)(a) (“The
 10 summons shall include the number of days within which the defendant is required to appear and
 11 defend the action, which shall be three business days from the date of service, unless the defendant
 12 objects to the number of days, and the court determines that the facts of the case should allow more
 13 time.”); ARK. CODE § 18-16-505 (“If, within five (5) days, excluding Sundays and legal holidays,
 14 after the date of service of this notice you have not filed in the office of the clerk of this court a
 15 written objection to the claims made against you by the plaintiff in his or her complaint for eviction,
 16 then a writ of possession shall forthwith issue from this office directed to the sheriff of this county
 17 or to the police chief of the city ordering him or her to remove you from possession of the property
 18 described in the complaint.”); CAL. CIV. PROC. CODE § 1167.3 (“In any action under this chapter,
 19 unless otherwise ordered by the court for good cause shown, the time allowed the defendant to
 20 answer the complaint . . . shall not exceed five days.”); FLA. STAT. § 51.011(1) (“All defenses of
 21 law or fact shall be contained in defendant’s answer which shall be filed within 5 days after service
 22 of process.”); MONT. CODE § 70-24-429(4) (“In an action for possession or unlawful holdover, the
 23 provisions of the Montana Justice and City Court Rules of Civil Procedure, Title 25, chapter 23,
 24 apply, except that the time for filing an answer under Rule 4C(2)(b) is 5 business days after service
 25 of summons and complaint, exclusive of the date of service.”); NEV. REV. STAT. § 40.254(1)(c)(1)
 26 (The written notice to surrender must “[a]dvise the tenant of the tenant’s right to: Contest the notice
 27 by filing before the court’s close of business on the fifth judicial day after the day of service of the
 28 notice an affidavit with the court that has jurisdiction over the matter stating the reasons why the
 29 tenant is not guilty of an unlawful detainer” or request that the court stay execution of the order
 30 for removal for a period not exceeding 10 days based on good cause.); W. VA. CODE § 55-3A-1(c)
 31 (Plaintiff’s notice of hearing to the tenant “shall inform the tenant that any defense to the petition
 32 must be submitted in writing to the petitioner within five days of the receipt by the tenant of the
 33 notice, and in no case later than the fifth day next preceding the date of hearing.”).

34 A few jurisdictions provide tenants a more reasonable time period to respond, allowing as
 35 much as 21 days. E.g., VT. STAT. tit. 12, § 4853B(d)(1) (“If the defendant fails to appear for the
 36 hearing, or to file an affidavit, signed written statement, or memorandum in opposition to the
 37 plaintiff’s motion, or has failed to file an answer [within 21 days of being served with the summons
 38 and complaint], the plaintiff shall be entitled to judgment by default for immediate possession of
 39 the premises.”); R.I. GEN. LAWS § 34-18-36(c) (In evictions for noncompliance with the rental
 40 agreement “[t]he summons . . . shall specify that the tenant has twenty (20) days from the date of

service in which to file his or her answer to the complaint, and that if he or she fails to file his or her answer within that time, he or she will be defaulted.”); S.C. CODE § 27-40-910(f) (“In an action for possession where the tenant intends to raise a defense [based on retaliation], the tenant must notify the landlord in writing within ten days after service of the Rule to Vacate or Show Cause of his intent to do so.”); ALA. R. CIV. PROC. 12(dc) (In “an action for eviction . . . a defendant shall serve an answer within seven (7) calendar days after service of the summons and complaint.”); GA. CODE § 44-7-51(b) (“The summons served on the defendant . . . shall command and require the tenant to answer either orally or in writing within seven days from the date of the actual service If the answer is oral, the substance thereof shall be endorsed on the dispossessory affidavit. The answer may contain any legal or equitable defense or counterclaim.”).

While the reasonableness of time limits will vary substantially by jurisdiction and case type, a reasonable rule of thumb is that at least 10 business days for a responsive pleading is necessary to fulfill the goals of procedure in high-volume civil adjudication. Particularly in jurisdictions that lack readily available electronic filing, see Chapter 11 (Court Use and Regulation of Technology), or a robust ecosystem of legal assistance and court and noncourt self-help services, see Chapter 10 (Supply of Legal Help: Court Personnel and Alternative Legal Service Providers), any period shorter than 10 business days unduly impairs defendants’ ability to seek and obtain appropriate legal assistance or to mount a meaningful defense, violating the core procedural goals in high-volume civil adjudication of resolving disputes fairly and accurately, facilitating meaningful participation by disputants, promoting effective decisionmaking by the parties and the court, and fostering the public elaboration of law. See § 2.01 (Goals of Procedure).

It is true that abbreviated time limits can serve to protect the legitimate investment or other interests of plaintiffs. In the eviction context, prolonged litigation can prevent landlords from using, leasing, or maintaining their property, leading to financial loss. Fast and frictionless eviction proceedings may also increase the supply of housing or reduce rents, thus benefiting tenants. See Chapter 1 (General Principles of Fair Adjudication). At the same time, short time limits directly impair defendants’ ability to prepare and mount an effective defense. As the U.S. Supreme Court put it in *Pernell v. Southall Realty*:

Some delay, of course, is inherent in any fair-minded system of justice. A landlord-tenant dispute, like any other lawsuit, cannot be resolved with due process of law unless both parties have had a fair opportunity to present their cases. Our courts were never intended to serve as rubber stamps for landlords seeking to evict their tenants, but rather to see that justice be done before a man is evicted from his home. 416 U.S. 363, 385 (1974). As already noted in Reporters’ Note to Comment *b*, most states permit rebuttals to an eviction complaint based on the landlord’s refusal to complete repairs or the landlord’s maintenance of an uninhabitable dwelling. LSC Eviction Laws Database, *supra*. But because summary eviction proceedings happen with such speed, tenants are often ill-prepared to raise an adequate rebuttal, decreasing the likelihood of lawful resolution of the dispute and increasing the potential for unjust outcomes and compromising the fairness and integrity of the process. Concerns about due process, basic fairness, and the practical challenges facing many

litigants in high-volume civil adjudication due to limited access to transportation, technology, or legal service all militate in favor of a 10-day minimum for answering.

§ 4.06. Limits on Discovery

(a) Discovery should be presumptively limited in high-volume civil adjudication in favor of mandatory information exchange consistent with §§ 4.02 through 4.04. These limits can include outright prohibitions on discovery, limits on the quantity or type of discovery, limits on the time available for discovery, and limits on the parties or nonparties from whom discovery can be sought. Discovery beyond presumptive limits should be available to a party on a case-by-case basis only upon a showing of good cause and proportionality.

(b) In setting limits on discovery in a given high-volume civil-adjudication case type, courts and other rulemakers should weigh the need for discovery, its potential asymmetric and strategic use by litigants, and the costs and benefits of a disclosure-based approach.

(c) When discovery beyond mandatory information exchange is authorized, whether by rule or upon a party's showing consistent with subsection (a), courts and other rulemakers should provide standardized discovery templates and forms for making and responding to discovery requests.

Comment:

a. From unlimited to limited discovery. This Section, in tandem with other Sections in this Chapter, embodies a critically important shift in high-volume civil adjudication, already underway in some jurisdictions, away from the default norm of open-ended discovery in conventional civil litigation and toward automatic, mandatory information exchange coupled with presumptive limits on conventional discovery. In many high-volume civil-adjudication case types, mandatory information exchange will provide information sufficient to prepare, try, and adjudicate most cases without resort to other discovery. Under this Section's principles, mandatory disclosures should be paired with limits on other methods of discovery, except when a party makes a showing of good cause and proportionality, thus refocusing and streamlining conventional pretrial process. In jurisdictions with specialized court divisions or departments—for instance, small-claims courts, magistrate courts, or justice courts—that already bar conventional discovery, this Chapter calls on courts and other rulemakers to consider mandatory information exchange as a way to elicit relevant information about claims and defenses.

1 The principles articulated in this Section contemplate that courts overseeing high-volume
2 civil dockets will oversee and enforce two types of limits on discovery: first, preset, rule-based
3 limits on discovery tailored to particular categories of cases; and second, case-by-case limits when
4 a party seeks discovery beyond preset, rule-based limits and makes the required showing of good
5 cause and proportionality.

6 The first of these limits operates at the level of categories of cases and contemplates that
7 courts and other rulemakers will, for a particular case type or types, set presumptive limits on
8 discovery, from outright prohibition on any discovery beyond mandatory information exchange to
9 more specific and targeted limits on the quantity, type, or timing of discovery. See also § 2.02
10 (Tailored Procedure and Case Management). In setting those limits, courts and other rulemakers
11 should consider key features of a given high-volume civil-litigation area. A primary consideration
12 is whether discovery is needed and how much, particularly taking into account the degree to which
13 the parties are already subject to mandatory information exchange on an issue. One-sided
14 disclosure requirements or limits on discovery may be warranted to accommodate the pervasive
15 lack of representation among defendants in high-volume civil cases and the risk that discovery
16 demands may chill meaningful participation or be used for strategic advantage by more-expert,
17 better-resourced, and often represented litigants. See also § 2.03 (Meaningful Participation); § 4.01
18 (General Principles of Pleading and Information Exchange) (noting role of procedures governing
19 pleading and information exchange in limiting strategic gaming); § 4.08 (Implementation of Rules
20 Governing Pleading and Information Exchange) (setting forth principles for policing pleading and
21 information exchange).

22 The second limit operates at the individual-case level. Under subsection (a), a party in high-
23 volume civil adjudication can establish good cause for discovery beyond rule-based limits when
24 the party shows that the discovery sought is relevant to the subject matter of the case and is
25 proportional to the needs of the case, including a requirement that the discovery sought is not
26 unreasonably duplicative of mandatory information exchange. For instance, a defendant might
27 have defenses or counterclaims—such as violations of the Fair Housing Act in eviction cases or
28 violations of the Fair Debt Collection Practices Act in debt-collection cases—that are not
29 encompassed by mandatory information exchange, and so the relevant facts can only be brought
30 to light via conventional discovery methods. A court should allow discovery in that instance if a
31 party demonstrates good cause and proportionality. However, if such a showing is made, courts

1 can still cabin the discovery process by enforcing restrictions on the quantity, type, or timing of
2 discovery or through form-based templates for propounding or responding to discovery requests.

3 These limits are well-grounded in history and law. Although liberal discovery has been a
4 central feature of American civil litigation since 1938, concerns about abuse led to significant
5 reforms beginning in the 1970s, ranging from mandatory disclosure rules and sanctions to limits
6 on electronically stored information and discovery proportionality. Many state courts now
7 formally restrict or prohibit discovery in particular case types, a return to the earlier, pre-1938 era
8 in civil litigation when discovery was largely unavailable. That history underscores that pretrial
9 discovery is not a constitutionally guaranteed feature of civil litigation.

10 *b. Strategic use of discovery.* A substantial concern in high-volume civil adjudication is
11 strategic use of discovery requests to impose costs on opposing parties. For example, some eviction
12 and debt-collection plaintiffs have reportedly developed a practice of serving extensive requests
13 for admission on any defendant who answers the complaint. When an overmatched defendant
14 defaults on those requests, the plaintiff then seeks to have those requests deemed admitted and
15 files for summary judgment. A court-directed, structured approach to pleading and information
16 exchange, with only targeted and enumerated discovery thereafter, is an effective way to minimize
17 such impositional use of discovery. Limits on discovery work in concert with active judicial
18 management to foster compliance with rules governing pleading and information exchange. See
19 § 4.08 (Implementation of Rules Governing Pleading and Information Exchange). In addition to
20 adopting presumptive limits on discovery, courts and other rulemakers in jurisdictions that retain
21 some amount of conventional discovery can also address concerns about abusive deployment of
22 requests for admission via rules that limit a judge's discretion to impose evidentiary sanctions that
23 satisfy the propounding party's burden of proof upon a self-represented litigant's failure to respond
24 to such requests.

25 *c. Good cause and proportionality.* Under this Section's principles, parties should be
26 permitted to petition the court for discovery beyond mandatory information exchange when they
27 can show good cause and proportionality. Good cause, as generally understood across jurisdictions,
28 means that the requested discovery is necessary to the requesting party's case, is narrowly tailored
29 to specific and identifiable issues unique to the claims or defenses, and cannot be obtained through
30 prior or planned disclosures or exchanges. This approach aligns with a broad consensus among state
31 and federal courts in defining the principle of proportionality to include considerations such as the

1 importance of the issues at stake, the amount in controversy, the parties’ relative access to relevant
2 information, their resources, the importance of the discovery to resolving the case, and whether the
3 burden or expense of the discovery outweighs its likely benefit. Where a jurisdiction’s civil rules
4 differ from these common standards, courts and other rulemakers should consider aligning them to
5 promote consistency, predictability, and efficiency in discovery practices.

6 *d. Discovery templates.* Discovery, like pleading and mandatory information exchange, can
7 be improved through the use of court-created forms written in plain language. States should
8 consider providing, and in some cases requiring, standardized discovery forms tailored to specific
9 case types. As elaborated in §§ 2.03 (Meaningful Participation) and 4.03 (Form of Pleading and
10 Information Exchange), such forms should be designed using an evidence-based process that
11 includes user-testing and feedback and should be made readily available to court users.

REPORTERS’ NOTES

12 *a. From unlimited to limited discovery.* The limits on discovery outlined in this Section
13 follow from the broader approach to pleading and information exchange articulated throughout
14 this Chapter. Rather than requiring active, case-level judicial management to police relevance and
15 proportionality, courts adjudicating cases in high-volume civil dockets should couple more robust
16 pleading requirements and mandatory information exchange with tailored, rule-based limits on
17 discovery and/or “triggers” permitting discovery beyond those rule-based limits upon a showing
18 of good cause and proportionality. This approach differs from certain proposals to streamline case
19 management and discovery, both in high-volume civil dockets and in more general civil-litigation
20 contexts. For instance, the Institute for the Advancement of the American Legal System (IAALS)
21 and the American College of Trial Lawyers have proposed that limited discovery should be
22 available as a matter of right even after mandatory disclosure, with additional discovery after the
23 first round requiring a court order upon a showing of good cause. INST. FOR ADVANCEMENT OF THE
24 AM. LEGAL SYS. & AM. COLL. OF TRIAL LAWYERS, PROGRESS AND PROMISE, *supra*, at 22.
25 Similarly, the American Bar Association takes the position that discovery should be as available
26 to litigants in eviction cases as it is in other areas of civil litigation. See AM. BAR ASS’N, ABA TEN
27 GUIDELINES FOR RESIDENTIAL EVICTION LAWS 5-6 (2022).

28 The differing approach adopted here is nonetheless consistent with the established
29 approach of numerous jurisdictions. For instance, the Arizona Rules of Civil Procedure do not
30 apply to eviction cases, and in 2009 the Arizona Supreme Court adopted the Arizona Rules of
31 Practice for Eviction Actions (RPEA), prescribing automatic disclosures in line with these
32 principles and, in addition, conventional discovery, including document requests, depositions, and
33 inspections, upon a showing of “good cause” and “in a manner that will not delay the times set by
34 statute for proceeding with an eviction action.” 17B A.R.S. Rules Proc. Evic. Act., Rule 10.
35 Similarly, in New York, discovery is available in eviction proceedings only upon a showing of

“ample need.” N.Y. Univ. v. Farkas, 121 Misc. 2d 643, 644 (N.Y. Civ. Ct. 1983). To determine whether a party has met the “ample need” requirement, courts consider factors such as whether the moving party has asserted sufficient facts to establish a cause of action, whether gathering additional information is necessary, whether the disclosure is appropriately narrow, whether any potential prejudice may be reduced by a court’s conditional grant, whether the information sought is known only to the other side, and whether disclosure can be structured to prevent tenants from any adverse effect of disclosure. See N.Y. Univ. v. Farkas, 121 Misc. 2d 643, 644 (N.Y. Civ. Ct. 1983) (cataloging factors); see also Gerald Lebovits and Marhlias W. Li, Nonprimary-Residence Holdover Proceedings, 34 N.Y. REAL PROP. L.J. 63, 69 (2006) (same).

The flexible approach adopted here, with mandatory disclosure rules coupled with presumptive limits on discovery, serves the core aims of pleading and information exchange in high-volume civil dockets. As already noted, such an approach serves to streamline information exchange and empower litigants and legal-services providers who might assist them.

That said, conventional discovery should nonetheless be available, upon a showing of good cause and proportionality, for two reasons. First, discovery may be necessary to establish certain claims or defenses, especially complex ones. For instance, defendants might have defenses or counterclaims—such as under the Fair Housing Act in eviction cases, see 42 U.S.C. § 3204, or the Fair Debt Collection Practices Act in debt collection, see 15 U.S.C. §§ 1692-1692p—that may require traditional discovery methods and are not encompassed by well-scoped rules governing mandatory information exchange. See § 4.02 (Content of Pleading and Information Exchange). Robust discovery may also be necessary to fully and fairly adjudicate competing claims—for instance, a landlord-plaintiff’s claim to rent arrears versus a tenant-defendant’s claim to rent abatement. Second, discovery should be available because the policing of rules governing mandatory information exchange will necessarily be imperfect. See § 4.08 (Implementation of Rules Governing Pleading and Information Exchange).

The limits on discovery set forth in this Section are well-grounded in history and legal tradition. Liberal discovery has been a cornerstone of American civil litigation since at least 1938, when the new Federal Rules provided for open-handed, self-executing discovery between the parties. Beginning in the 1970s, however, liberal discovery has come under attack, spurred by a perception, though not always empirical reality, that discovery abuse is pervasive. See, e.g., Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 639 (1989); Milton Pollack, *Discovery—Its Abuse and Correction*, 80 F.R.D. 219, 223 (1979); Virginia E. Hench, *Mandatory Disclosure and Equal Access to Justice: The 1993 Federal Discovery Rules Amendments and the Just, Speedy and Inexpensive Determination of Every Action*, 67 TEMPLE L. REV. 179, 232 (1994); Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994). The result has been a cascade of discovery-limiting procedural reforms, including the development of discovery-specific sanctions apart from Rule 11 and state equivalents, new forms of automatic disclosure and discovery at the outset of a case, special rules governing electronically stored information (ESI), and a tightening of rules defining the scope of discoverable information and requiring that

1 discovery is proportional to case needs. Some advocate a “discovery budget” for small-stakes cases
 2 in federal court. Paul W. Grimm, *Are We Insane? The Quest for Proportionality in the Discovery*
 3 *Rules of the Federal Rules of Civil Procedure*, 36 REV. LITIG. 117 (2017).

4 Also beginning in the 1970s, state courts began to constrict discovery’s availability in
 5 routine matters, including high-volume civil dockets. See Moskowitz, *Rediscovering Discovery*,
 6 *supra*, at 611-613. Many states disallow discovery in high-volume litigation areas. Discovery is
 7 formally prohibited in eviction proceedings in many jurisdictions. E.g., MD. R. CIV. P. DIST. CT.
 8 R. 3-711 (2011); Zambrano, *supra*, at 1444 (noting that Michigan, Pennsylvania, and Texas do not
 9 provide “time or tools” for discovery in eviction cases). In many others, and in any event, the
 10 truncated timeframe of summary process makes discovery impracticable and even impossible.
 11 Compare ARIZ. REV. ST. § 12-1176 (eviction hearing to occur no more than five days after
 12 complaint is filed), with ARIZ. R. CIV. P. 34(b)(3)(A) (providing 30-60 days to respond to a
 13 discovery request); compare WASH. REV. CODE § 59.18.370 (eviction case can be heard on seven
 14 days’ notice), with WASH. SUPER. CT. CIV. R. 33, 34, 36 (2015) (30 days for responses to written
 15 discovery), and WASH. SUPER. CT. CIV. R. 30 (five days’ notice for deposition); compare KAN.
 16 STAT. § 61-3807 (eviction trial required within 14 days), with KAN. STAT. § 61-3101-3106 (written
 17 discovery responses due within 14 and 30 days). Similarly, small-claims courts, consistent with
 18 their design to simplify and streamline the process, rarely offer litigants the opportunity to conduct
 19 discovery. See Zambrano, *supra*, at 1437; see, e.g., KY. REV. STAT. § 24A.300(3) (“There shall be
 20 no pretrial discovery in the small claims division of the District Court.”); ARIZ. REV. ST. § 22-
 21 516(B) (no formal discovery in small claims); MICH. CT. R. 2.301 (“discovery is not permitted in
 22 actions in the small claims division of the district court”). With such restrictions in place, much
 23 state-court civil litigation today involves little to no discovery. See Zambrano, *supra*; NAT’L CTR.
 24 FOR STATE CTS., CALL TO ACTION, *supra*, at app. 1, 19 n.6.

25 Implicit in that history is that there is no general constitutional right to pretrial discovery
 26 in civil cases. See *United States v. Augenblick*, 393 U.S. 348, 356 (1969) (holding that lower court
 27 erred in making a denial of discovery a violation of due process); *United States v. Zubayah*, 595
 28 U.S. 195, 225 (2022) (Thomas, J., concurring) (noting no “right” to civil discovery). After all,
 29 discovery was highly limited in American courts prior to the creation of the Federal Rules of Civil
 30 Procedure in 1938 and certainly at ratification of the due process clauses in 1787 and 1868. Stephen
 31 N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal*
 32 *Discovery Rules*, 39 B.C. L. REV. 691, 691 (1998) (“Prior to the Federal Rules of Civil Procedure
 33 (‘Federal Rules’), discovery in civil cases in federal court was severely limited. The Federal Rules
 34 discovery provisions dramatically increased the potential for discovery.”); Imre Stephen Szalai, *A*
 35 *Constitutional Right to Discovery? Creating and Reinforcing Due Process Norms Through the*
 36 *Procedural Laboratory of Arbitration*, 15 PEPPERDINE DISP. RES. L.J. 337, 369 (2015). Even in
 37 the criminal context, where prosecutors are under the constitutional obligation to disclose
 38 exculpatory evidence to the defense, see *Brady v. Maryland*, 373 U.S. 83 (1963), defendants do
 39 not enjoy a “general constitutional right to discovery,” *Weatherford v. Bursey*, 429 U.S. 545, 559
 40 (1977). The closest courts have come in the civil context to creating a right to discovery is a set of

1 holdings suggesting that certain discovery practices, such as “merits-preclusive” use of requests
 2 for admission, implicate due process via the requirement of a meaningful opportunity to be heard.
 3 See, e.g., *McEndree v. Volke*, 634 S.W.3d 413, 422 (Tex. App. 2021) (holding that a court’s
 4 refusal to withdraw requests for admissions “that compromise or preclude an adverse party’s right
 5 to present the merits of a case . . . implicate due process”) (citing *Marino v. King*, 355 S.W.3d 629,
 6 633-634 (Tex. 2011)).

7 *b. Strategic use of discovery.* Discovery can be a double-edged sword in high-volume civil
 8 dockets. On the one hand, discovery may be necessary to surface relevant information about
 9 complex claims that is not encompassed by rules setting the bounds of mandatory information
 10 exchange. On the other hand, a particular risk in high-volume civil dockets is party use of discovery
 11 to achieve strategic ends rather than to surface case-relevant information. For instance, some
 12 plaintiffs in high-volume civil contexts serve extensive requests for admission whenever a
 13 defendant files an answer to the complaint calculating that, if the defendant fails to respond, key
 14 facts can be deemed admitted. See *McCullough v. Johnson, Rodenberg & Lauinger*, 610 F. Supp.
 15 2d 1247, 1256 (D. Mont. 2009) (“The requests for admission appear to be designed to conclusively
 16 establish each element of [plaintiff’s] case against [defendant] and to use the power of the judicial
 17 process against a *pro se* defendant to collect a time-barred debt. This conduct is abusive, unfair
 18 and unconscionable.”). The plaintiff can, in turn, seek summary judgment without having to offer
 19 proofs and, if successful, win a judgment that is largely immunized from defendant challenges to
 20 its entry. PAULA HANNAFORD-AGOR, NAT’L CTR. FOR STATE CTS., CIV. JUST. INITIATIVE, THE
 21 LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS iv (2015) (noting use of summary judgment in
 22 debt-collection cases “to minimize the risk of post-disposition challenges”).

23 Discovery can pose particular peril for self-represented litigants. A common term of
 24 eviction settlement agreements is for the tenant to pay the landlord’s attorney’s fees, and these fees
 25 increase with more extensive litigation, including discovery. See Lillian Leung et al., *Serial*
 26 *Eviction Filing: Civil Courts, Property Management, and the Threat of Displacement*, 100 SOC.
 27 FORCES 316 (2021). Those fees can often dwarf the underlying rent debt. TARA COOKSON ET AL.,
 28 SEATTLE WOMEN’S COMM’N & HOUS. JUST. PROJECT, LOSING HOME: THE HUMAN COST OF
 29 EVICTION IN SEATTLE 43 (2018) (documenting examples of landlords’ attorney’s fees
 30 disproportionate to the rent amount demanded in cases where there was no trial, including one
 31 instance of \$3,400 in legal fees to collect \$600 in rent). Moreover, open-ended discovery can
 32 quickly overwhelm less expert, less resourced, and often self-represented litigants, creating tension
 33 with efforts at procedural simplification. See Zambrano, *supra*, at 1425-1427.

34 Given these concerns, presumptive limits on discovery coupled with well-designed
 35 mandatory disclosure as the primary mode of pretrial information exchange helps to ensure that
 36 case merits, not resource endowments, drive case outcomes. These rules can also help narrow
 37 persistent asymmetries in the representation, resources, and expertise of parties that characterize
 38 many high-volume civil dockets. See Chapter 1 (General Principles of Fair Adjudication).

39 While the above examples focus on plaintiff-side practices, strategic use of discovery is not
 40 limited to more-expert, better-resourced, or represented parties. For tenants facing eviction,

discovery offers one of few ways to slow the rapid litigation timelines of summary process. Defendants in eviction cases, sometimes on the advice of legal-services providers, may serve discovery requests in order to obtain a continuance of the trial date. See, e.g., MASS. UNIF. SUMM. PROCESS R. 7(b) (automatic two-week postponement of trial date where either party serves discovery); Mass. L. Reform Inst., Booklet 4: Discovery – Representing Yourself in an Eviction, <https://www.masslegalhelp.org/housing/lt1-booklet-4-discovery.pdf>. The objective is to buy time—nominally for the sake of trial preparation but often to catch up on the overdue rent that is the basis for the eviction. Discovery requests may also aim to increase a plaintiff’s litigation costs. This Section’s presumptive bar on conventional discovery will limit those litigation practices as well.

In general, discovery procedures should not fuel a “sporting” approach to justice. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ANN. REP. A.B.A. 395, 404-405 (1906), *reprinted in* 35 F.R.D. 273, 281 (1964). See also *Conley v. Gibson*, 355 U.S. 41, 48 (1957) (“The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.”); *Giles v. Maryland*, 386 U.S. 66, 102 (1977) (Fortas, J., concurring) (arguing that a trial is “not a sporting event”). Particularly in high-volume civil-case types in which mandatory information exchange is sufficient to prepare, try, and adjudicate most cases, this Section’s limits on conventional discovery are fully aligned with the more general procedural goals of resolving disputes fairly and accurately while facilitating the meaningful participation of the disputants and public elaboration of law. See § 2.01 (Goals of Procedure).

c. Good cause and proportionality. Under this Section’s principles, parties should be able to petition the court to seek discovery beyond mandatory information exchange. When a party demonstrates good cause for discovery, courts should allow it, while maintaining control over the discovery process through case type-specific restrictions on the number or type of discovery requests that litigants may use. See CALL TO ACTION, *supra*, at 22; INST. FOR ADVANCEMENT OF THE AM. LEGAL SYS. & AM. COLL. OF TRIAL LAWYERS, PROGRESS AND PROMISE, *supra*, at 22-23; see also Seymour Moskowitz, *Discovery in State Civil Procedure: The National Perspective*, 35 W. ST. U. L. REV. 121, 124-125 (2007) (cataloging how state discovery rules increasingly “make sharp differentiations between cases defined by subject, amount in question or other characteristics”). As contemplated in this Section, and following a rough consensus among federal and state courts, good cause means that the discovery is necessary to the movant’s case, narrowly tailored to specific, identifiable issues unique to the claims or defenses of the parties, and is not addressed or could not be addressed by past or planned information exchange, whether disclosures or discovery. See *Hertog v. City of Seattle*, 979 P.2d 400, 412 (Wash. 1999) (good cause for discovery is satisfied upon “showing that requested documents are necessary to establishment of the movant’s claim or that denial of production would cause moving party hardship or injustice” (citation omitted)); *Boeing Airplane Co. v. Coggeshall*, 280 F.2d 654, 659 (D.C. Cir. 1960) (same); *Stanback v. Stanback*, 215 S.E.2d 30, 38-39 (N.C. 1975) (good-cause standard is no mere formality and requires that the sought material be necessary as well as relevant); *State v. Spry*, 21 P.3d 675,

679 (Utah Ct. App. 2001) (in criminal context, defining “good cause” standard to permit discovery when the sought information is “necessary” to the preparation of the movant’s case); COLO. R. CIV. P. 26(b)(2)(F) (defining “good cause” in terms of the overall reasonableness of the sought discovery). This Section likewise advances proportionality in its usual application under federal and state rules of procedure as:

proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

FED. R. CIV. P. 26(b)(1); see, e.g., ALA. CT. R. 26(b)(1) (same); MINN. CT. R. 26.02(b)(1) (same); ALASKA CT. R. 26(b)(2)(A) (permitting court to limit discovery if “the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues”). When a jurisdiction’s own rules of civil procedure deviate from these common meanings, courts and other rulemakers should consider applying those rules to leverage accumulated case law and institutionalized practices among trial courts and ensure predictability and consistency in application.

d. Discovery templates. Discovery, like pleading and mandatory information exchange, can benefit from court-created forms written in plain language. See also § 2.03 (Meaningful Participation). States should make available, and also consider requiring use of, “form” interrogatories specific to case types. See, e.g., FLA. R. CIV. P. 1.340(a) (requiring use of court-approved form interrogatories for particular case types). California has form interrogatories for eviction that either party can use by checking boxes next to the questions the party wants to ask, provided they are relevant to a claim or defense raised in the pleadings. Cal. Form Interrogatories-Unlawful Detainer (Disc-003/UD-106), <https://www.courts.ca.gov/documents/ud106.pdf>. New Jersey offers “model” interrogatories that parties may use in debt-collection cases if the claim exceeds \$5000 (or smaller claims with the court’s permission). N.J. Cts., N.J. Model Interrogatories in Special Civil Part Contract and Debt Collection Cases in Which the Demand Exceeds \$5,000, https://www.njcourts.gov/sites/default/files/forms/11895_scp_interrogatories.pdf.

§ 4.07. Court Access to Official Data

(a) Courts and other rulemakers may develop court-wide processes and rules pursuant to which judges or court staff can obtain reliable materials or information from official data sources when:

(1) the materials or information are sufficiently reliable, including whether they are derived from verified or regularly maintained official data systems;

1 **(2) the materials or information will assist in the fair and accurate adjudication**
2 **of a case, including by enabling meaningful participation by one or more of the parties;**

3 **(3) the materials or information are not otherwise likely to be disclosed or**
4 **identified by the parties; and**

5 **(4) privacy concerns are low.**

6 **(b) Parties should have notice and an opportunity to be heard on the use of any**
7 **materials or information that a court obtains from official data sources when those materials**
8 **or information will inform the resolution of any party’s claim or defense. When providing**
9 **such notice and an opportunity to be heard, the court should:**

10 **(1) clearly identify the information obtained;**

11 **(2) describe its potential relevance to the claims or defenses at issue; and**

12 **(3) afford the parties a meaningful chance to contest, explain, or supplement**
13 **the information.**

14 **(c) In all events, a court’s use of materials or information obtained from official data**
15 **sources should comply with relevant evidentiary rules, procedural rules, and canons of**
16 **judicial conduct.**

17 **Comment:**

18 *a. Overview of court access to official data.* In high-volume civil adjudication, fair and
19 expeditious adjudication of cases may benefit from court access to reliable official data maintained
20 by public agencies. Such data can assist a court in assessing, among other things, a noncustodial
21 parent’s ability to pay child support, a creditor-plaintiff’s compliance with licensing requirements,
22 or a landlord-plaintiff’s outstanding housing-code violations. Access to official data may also help
23 a court, whether judge or court staff, to verify a party’s eligibility for a fee waiver—for instance,
24 by confirming receipt of means-tested public benefits.

25 Courts and other rulemakers can develop court-wide processes whereby courts, whether
26 judges or court staff, can gain access to official data in two ways: (i) direct information requests;
27 or (ii) direct system access. First, a court might make a request for materials or information to a
28 public agency that maintains official data. The agency then fulfills the data request and pushes
29 materials or information to the court, typically via an established digital pathway, such as email or
30 upload. Second, a court might be afforded direct access to an agency’s data systems, allowing the

1 court to pull materials and information by running queries against the agency’s data system. In the
2 field of data management and information technology, the latter method is sometimes called
3 “direct system-of-record access” or, if a system provides a unified view of data pooled from
4 multiple sources, “data federation.” With direct system access, the court can retrieve or view
5 information without the underlying data ever leaving the originating system.

6 In crafting court-wide processes and rules, courts and other rulemakers should specify the
7 circumstances under which judges or court staff must, can, or may not access official data. Clear,
8 system-wide guidelines can mitigate concerns about inconsistency in adjudication if individual
9 judges vary in their willingness or capacity to access official data.

10 While this Section offers guidance on how best to structure processes enabling court use of
11 official data, it should not be read to foreclose alternative approaches. For example, a jurisdiction
12 with robust standardized forms—and empirical evidence that self-represented litigants can readily
13 access and use those forms—might opt to permit courts to access official data only when the
14 relevant party authorizes that access by completing a simplified, user-friendly form. Under this
15 model, party consent would operate as a precondition to any court-initiated access to official data.

16 *b. Benefits and risks of court access to official data.* Court access to official data can yield
17 important benefits. First, it can surface relevant facts that may not emerge through conventional,
18 party-controlled discovery. Many litigants in high-volume civil adjudication lack the resources or
19 know-how to request, obtain, or properly introduce materials or information on their own. Even
20 when rules mandate robust information exchange, as called for in Chapter 4 (Pleading and
21 Information Exchange), less experienced or self-represented litigants may struggle to comply,
22 leaving gaps in the factual record. Access to official data enables courts to fill those gaps in ways
23 that do not depend on party initiative or capacity. Second, access to official data may be especially
24 valuable when the materials or information, such as documents necessary to establish eligibility
25 for a fee waiver, uniquely reside with an individual litigant who may lack the capacity to identify
26 and provide that information to the court. By enabling courts to verify such information directly,
27 access to official data can enable meaningful participation by all parties, reduce procedural delays,
28 and promote more accurate, equitable outcomes. Finally, court access to official data can provide
29 a more efficient and less burdensome alternative to third-party subpoenas, a substantial portion of
30 which are directed at government agencies in high-volume civil adjudication. Direct access can
31 streamline adjudication while reducing costs for courts, litigants, and agencies alike.

1 Court access to official data also carries substantial risks. First, it may raise *ex parte*
2 concerns when materials or information obtained outside the parties' presence are used to adjudicate
3 claims or defenses without affording the parties an opportunity to challenge their accuracy,
4 completeness, or relevance. Second, direct system access—particularly through federated data
5 architectures that make information from multiple sources available in a single place—introduces
6 privacy concerns, as connectivity between systems can expose sensitive information to
7 unauthorized access. Third, by making available materials or information that do not directly relate
8 to a particular case—for example, when a query returns all housing-code violations associated with
9 a landlord rather than those tied to the rental unit at issue in a particular case—court access may run
10 afoul of the traditional inadmissibility of propensity evidence under the rules of evidence. While
11 this concern is most acute in jury trials, it retains at least some force in the bench trials that pervade
12 high-volume civil adjudication. As just one example, an adjudicator's access to information
13 regarding a party's past record of spousal abuse might bias, or be perceived as biasing, an
14 adjudicator's exercise of judgment. Finally, court access to official data risks injecting inaccuracies
15 into adjudication or court case management if government databases are not well-maintained or up
16 to date. Many official databases are designed primarily for administrative purposes, not
17 adjudicatory ones, and may lag behind real-world events, remain uncorrected well after conditions
18 have changed, or contain data-entry errors. Reliance on agency-maintained information without
19 sufficient safeguards risks incorporating administrative errors into court decisionmaking.

20 *c. Limits on court use of official data.* Given the concerns enumerated in Comment *b*, this
21 Section contemplates a limited and closely regulated role for court access to official data because
22 of the risks to the integrity of adjudication. Subsection (a) imposes four separate limits on court
23 access to official data. Under subsection (a)(1), courts and other rulemakers should develop
24 systems enabling court access to official data only when the data in question are sufficiently
25 reliable. Reliability should be evaluated in light of the source, method of generation, and other
26 indicia of accuracy of the data in question, including whether the data are derived from verified or
27 regularly maintained official data systems. For example, records drawn from a municipal housing-
28 code enforcement system reflecting violations that have been inspected, verified, and updated in
29 the ordinary course would be more reliable than raw complaint logs or unverified reports of alleged
30 violations. Similarly, a database of finally adjudicated regulatory cases would be more reliable
31 than a database of all complaints received by an agency. Under subsection (a)(2), courts and other

1 rulemakers should develop systems enabling court access to official data only when the materials
2 or information at issue will contribute to the fair and accurate adjudication of cases or meaningful
3 participation by the parties. A good example is materials or information necessary to determine
4 eligibility for a fee waiver. Many self-represented litigants lack the capacity to collect and submit
5 the often-extensive materials and information required to establish fee-waiver eligibility. See
6 Chapter 12 (Court Funding and Fees). A process whereby judges or court staff can directly access
7 required materials or information related to fee waivers can lower or eliminate barriers to obtaining
8 those waivers, thus enabling meaningful participation by all parties and ensuring that case merit,
9 not litigant capacity, determines case outcomes. Under subsection (a)(3), courts and other
10 rulemakers should develop systems that enable judges or court staff to obtain materials or
11 information from official data sources only when the relevant materials or information are unlikely
12 to be disclosed or identified by the parties themselves. Courts should not rely upon access to
13 official data in managing or adjudicating cases when party initiative and capacity are already
14 sufficient to surface needed materials or information. Finally, under subsection (a)(4), courts
15 should weigh the benefits of court access to official data against the potential privacy risks that
16 come with connectivity to external systems. See Chapter 11 (Court Use and Regulation of
17 Technology). Such risks can take generic forms, such as the potential disclosure of personally
18 identifiable information relating to finances or health, or it could involve more specific categories
19 of sensitive information, such as a party's immigration status.

20 Subsection (b) imposes a further limit: Courts should not rely on materials or information
21 obtained through access to official data to determine any party's merits-based claim or defense
22 without first providing all parties with notice and an opportunity to be heard. A court's failure to
23 do so raises fundamental due-process concerns, as it deprives one or more parties of the
24 opportunity to review, challenge, or rebut evidence that may bear on claims or defenses.
25 Subsection (b) is consistent with the practice in some jurisdictions that permits courts to take
26 judicial notice of official records—for example, housing-code violations in an eviction case—but
27 treats such notice as creating a rebuttable presumption subject to contestation by the opposing
28 party. When, however, the materials or information to be accessed are relevant to case
29 administration but not merits adjudication—for instance, a party's eligibility for a fee waiver—
30 subsection (b)'s requirement of notice and an opportunity to be heard by all parties does not apply.

Subsection (c) imposes a final set of limits, emphasizing that systems enabling court access to official data should comport with all relevant evidentiary rules, procedural rules, and canons of judicial conduct. For instance, subsection (c)'s reference to evidentiary rules makes clear that use of official data must comply with bars on propensity evidence in the rare circumstances when litigation proceeds to a jury trial. To stay within subsection (c)'s limits, courts and other rulemakers might confine court access to official data relating to merits adjudication to information and materials that are encompassed by a party's automatic disclosure obligations, thus ensuring that the court's acquisition of such data does not exceed the parties' already-existing disclosure obligations. Aligning court access to official data with pleading and information-exchange burdens in this way can help address concerns about a judge's authority to raise issues *sua sponte* or the proper allocation of the burden of proof. See Chapter 9 (The Judicial Role). Finally, subsection (b)'s requirement that a judge provide the parties with notice and an opportunity to be heard when using materials or information obtained via court access to official data to make merits-based determinations blunts the concern that court access to official data violates judicial codes of conduct prohibiting judges from engaging in *ex parte* communications about a pending matter.

In general, court access to official data is most justified when it demonstrably improves the accuracy or efficiency of non-merits determinations, such as assessing a party's eligibility for a fee waiver. By contrast, such access is least justified when the materials or information in question are relevant to the court's merits-based determinations and evidence and experience suggests that party-centered mechanisms for surfacing relevant materials or information—for example, mandatory information exchange or, when available, conventional discovery—are already sufficient to surface those materials or information.

d. Relationship to systemic administration and court data governance. Court access to official data is related to the wide array of data governance and management practices discussed in Chapter 8 (Systemic Administration) and Chapter 12 (Court Use and Regulation of Technology).

REPORTERS' NOTES

a. Overview of court access to official data. This Section provides for court access to official data as a limited and closely regulated way for courts to obtain materials or information that are necessary to the fair and accurate administration and adjudication of cases. As defined in Comment *a*, court access to official data takes two main forms: direct information requests and direct system access. Among the two, direct system access may hold particular promise when a public agency maintains records relevant to the management and adjudication of high-volume case

types, such as a landlord’s licensure or past violations of housing codes or a litigant’s eligibility for a fee waiver. Instead of relying on the parties to provide such information, courts—whether judges or court staff—can access it directly.

Court access to official data is a growing practice in American courts, including in high-volume civil adjudication. In New York Housing Court, judges have real-time access to housing-code enforcement records via the New York City Department of Housing Preservation and Development’s multiyear database of complaints, inspections, and violations. See Paula A. Franzese, Abbott Gorin, and David J. Guzik, *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform*, 69 RUTGERS UNIV. L. REV. 1, 34-36 (2016) (describing a system in New York City Housing Court in which judges have real-time access to housing-code enforcement records via the New York City Department of Housing Preservation and Development’s database of complaints, inspections, and violations); see also Mary Marsh Zulack, *If You Prompt Them, They Will Rule: The Warranty of Habitability Meets New Court Information Systems*, 40 JOHN MARSHALL L. REV. 425, 449-453 (2007) (proposing direct system access to confirm housing-code violations). Some commentators have further called for court access to official data to assist in determining when to use their authority to order housing-code inspections. Summers, *supra*, at 202.

Family law provides other examples, some within the scope of high-volume civil adjudication as defined in these Principles and some not. E.g., Indiana Child Support Bureau, *ISETS Case Inquiry Website: How County Court & State Employees Can Log In, Navigate, & Search for Information* (Apr. 23, 2024), https://www.in.gov/dcs/files/ISETS_Case_Inquiry_Website.pdf (outlining a system whereby county court and state employees can log into the Indiana Support Enforcement Tracking System and search for child-support case information); Michigan Courts, State Court Administrative Office, Friend of the Court Bureau, New Director/Leader Orientation Manual, <https://www.courts.michigan.gov/4a1a4b/siteassets/court-administration/standardsguidelines/foc/newdirleadrorientationmanual.pdf> (explaining that specific court staff and employees have access to Michigan’s Child Support Enforcement System (MiCSES), from which they can track child-support investigations, reviews, and modifications, as well as access MiCSES records that can be admitted into support hearings); Wisconsin Court System, Consolidated Court Automation Programs (CCAP), <https://www.wicourts.gov/courts/offices/ccap.htm> (explaining that Wisconsin’s Department of Children and Families (DCF) and the Wisconsin Court System exchange information electronically in child-support cases and related proceedings).

While no court appears to use access to official data to obtain materials or information relevant to a litigant’s eligibility for a fee waiver, fee-waiver requests are a prime candidate for two reasons. First, a growing body of evidence suggests that fee waivers are a primary barrier to self-represented litigants’ meaningful participation in their cases and, further, a significant drag on the provision of low-cost legal services. See § 4.05, Reporters’ Note to Comment c; see also Chapter 12 (Court Funding and Fees). Second, and relatedly, in many jurisdictions, litigants automatically qualify for a fee waiver if receiving certain public benefits, including SNAP, WIC, SSI, social security disability insurance, Medicaid, veteran’s benefits, or workers’ compensation. E.g., MASS.

GEN. LAWS ch. 261, § 27A-27G; MICH. CT. R. 2.002; D.C. CODE § 15-712; LA. SUP. CT., IN FORMA PAUPERIS AFFIDAVIT, <https://www.lasc.org/rules/dist.ct/COURTRULESAPPENDIX8.0.pdf>, 735 ILL. COMP. STAT. 5/5-105 (2021); CONN. GEN. STAT. § 52-259b; ARIZ. SUP. CT., APPLICATION FOR DEFERRAL OR WAIVER OF COURT FEES AND CONSENT TO ENTRY OF JUDGMENT (2025), <https://www.azcourts.gov/courtfilingsfees/Fee-Waivers-and-Deferrals/Fee-Waiver-and-Deferral-Forms#Trial>; see also Chapter 12 (Court Funding and Fees). Enabling court access to official data on public benefit programs in those jurisdictions can streamline adjudication of fee-waiver requests, minimize procedural delays, and lower costs for courts, litigants, legal-services providers, and agencies alike.

Streamlining the administration of fee waivers will not only minimize delays and lower costs, but will also promote the dignity of litigants. When applying for a fee waiver, litigants must disclose their income, financial debts and expenses, and public aid, sometimes in publicly available filings. Claire Johnson Raba & Dalié Jiménez, *Pay to Plead: Finding Unfairness and Abusive Practices in California Debt Collection Cases*, 44 J. BANKING & FIN. L. 113, 184 (2025) (“Fee waivers are procedurally complex, burdensome, invasive—a process that likely excludes eligible litigants from applying.”). Intrusive disclosure requirements may deter some litigants from filing for a fee waiver for fear of embarrassment. ILL. ST. BAR ASS’N SPECIAL COMM. ON FAIR AND IMPARTIAL CTS., *Report on the Funding Crisis in the Illinois Courts*, Appendix C at 11 (2013) (“For those who truly need fee waivers, the application process and court appearance is somewhat embarrassing.”). Internalizing the fee-waiver process via court access to official data can help shield low-income litigants from the privacy intrusion and stigma of proving their financial status.

Empowering courts to access official data sources extends beyond the traditional ability of courts to take judicial notice of facts, see FED. R. EVID. 201 (court may take judicial notice of adjudicative fact “not subject to reasonable dispute” because commonly known or able to be verified by credible source); WIS. STAT. § 902.01 (same as federal); TEX. R. EVID. 201 (same as federal); N.J. R. EVID. 201(b) (judicial notice allowed for facts of such generalized knowledge or common notoriety that they are not reasonably subject to dispute; facts that can be determined immediately by resort to accurate, well-accepted sources; or certain court records); CAL. EVID. CODE §§ 451-452 (court must take judicial notice of facts of generalized knowledge that are not subject of dispute and *may* take notice of facts “capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy”); FLA. STAT. § 90.202 (court may take judicial notice of facts that are not subject to dispute where capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned); IND. R. EVID. 201 (court may take judicial notice of facts that may be accurately and readily determined from sources whose accuracy cannot reasonably be questioned, and of the existence of “records of a court of this state”), or to conduct research to understand a case’s wider context, see *Commodity Futures Trading Comm’n v. McDonnell*, 287 F. Supp. 3d 213, 230 (E.D.N.Y. 2018) (“It is appropriate and necessary for the judge to do research required by a case in order to understand the context and background of the issues involved,” so long as “the judge indicates to the parties the research and conclusions, by opinions and otherwise, so they may contest and clarify.”). Court access to official

1 data also extends beyond a growing set of statutory provisions empowering courts to take notice
 2 of information not normally covered by traditional judicial notice, such as agency records of
 3 regulatory violations. See, e.g., N.Y. MULT. DWELL. LAW § 328(3) (court may take judicial notice
 4 of housing code violation records, as displayed online or in a printout, as prima facie evidence
 5 proving the existence of the conditions stated therein); see also *Dep’t of Hous. Preserv. v. Knoll*,
 6 120 Misc. 2d 813 (N.Y. App. Term 1983) (taking judicial notice of evidence from a database of
 7 Housing Code violation notices as prima facie evidence that the violation has not been corrected).
 8 See generally Jessica K. Steinberg, *A Theory of Problem-Solving Courts*, 93 N.Y.U. L. REV. 1579
 9 (2018) (discussing these and other examples).

10 *b. Benefits and risks of court access to official data.* Well-designed systems enabling court
 11 access to official data can narrow asymmetries in expertise and resources between the parties in
 12 high-volume civil adjudication while reducing the cost of adjudication for courts and litigants
 13 alike. These potential benefits are readily apparent in the child-support context. As a matter of due
 14 process, a delinquent noncustodial parent cannot be held in civil contempt for nonpayment unless
 15 the parent has the ability to satisfy the obligation. See *Turner v. Rogers*, 564 U.S. 431, 442 (2011).
 16 Nevertheless, indigent obligors are incarcerated on civil-contempt orders, despite their inability to
 17 pay. Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent*
 18 *Return of Debtor’s Prison*, 18 CORNELL J. L. & PUB. POL’Y 95, 97 (2008). That systemic failure
 19 can be partly attributed to a lack of information: Courts may be unable to accurately assess the
 20 obligor’s financial means, so they are unable to determine whether the obligor has been willfully
 21 disobedient. To address that issue, recent regulations promulgated by the federal Office of Child
 22 Support Enforcement (OCSE) requires state child-support agencies to provide courts with
 23 information “regarding the noncustodial parent’s ability to pay,” in order to assist the court at the
 24 contempt hearing. 45 C.F.R. § 303.6(c)(4)(ii) (2021). The information available to the state agency
 25 is often substantial. Child-support agencies frequently possess the noncustodial parent’s financial
 26 affidavits, wage statements, and other information ascertained through their investigations. See
 27 *Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs*, 81 Fed. Reg.
 28 93492, 93536-93537 (Dec. 20, 2016). Thus, the OCSE rule has the potential to substantially
 29 decrease the number of erroneous civil-contempt orders in child-support cases. In those
 30 circumstances, court access to official data could prove to be an effective and efficient means of
 31 obtaining the financial information necessary to realize these benefits. This is particularly true in
 32 jurisdictions where the court itself, not a separate executive agency, initiates the contempt
 33 proceeding. E.g., S. C. Rule Family Ct. 24 (instructing clerks of court to review child-support
 34 accounts for arrearage and then to issue show-cause orders and schedule a contempt hearing).

35 Relatedly, court access to official data may be a valuable substitute for conventional
 36 discovery, particularly third-party subpoenas served on government agencies. Third-party
 37 discovery can be unduly time- and labor-intensive—for litigants, judges and clerks, process
 38 servers, and the third parties themselves—relative to its value in the high-stakes, low-dollar cases
 39 that pervade high-volume civil adjudication. See Chapter 1 (General Principles of Fair
 40 Adjudication); § 4.06 (Limits on Discovery). Indeed, numerous authorities have recognized the

1 difficulty that many self-represented litigants face in trying to navigate and understand the
 2 procedural requirements for issuing subpoenas. See *Handling Cases Involving Self-Represented*
 3 *Litigants: A Benchguide for Judicial Officers* 8-2 (Judicial Council of Cal., Center for Families,
 4 Children & the Courts 2007) (“Self-represented litigants are unfamiliar with the procedures
 5 required to subpoena and cross-examine witnesses, and to explain or refute information in
 6 documents of which they have been given notice[.]”); see also Andrew C. Budzinski, *Overhauling*
 7 *Rules of Evidence in Pro Se Courts*, 56 U. RICH. L. REV. 1075, 1097-1098 (2022)
 8 (“[U]nrepresented litigants must obtain judicial authorization before issuing a subpoena, a process
 9 with which pro se litigants are unlikely to be familiar . . . [e]nforcing a subpoena brings a whole
 10 new set of challenges for a pro se litigant[.]”).

11 The impediments to self-represented litigants’ use of third-party discovery take many
 12 forms. First, while represented parties can serve third-party subpoenas in some jurisdictions
 13 without court involvement via counsel, as an “officer of the court,” self-represented litigants must
 14 typically persuade the judge or court clerk to issue any such subpoenas. See, e.g., VA. STAT. § 15.1-
 15 89 (subpoena duces tecum to be served on third party may be issued by judge, court clerk, or
 16 attorney “as an officer of the court”); S.C. MAGISTRATE CT. R. 13(e) (court or attorney “as officer
 17 of the court” may issue subpoena in magistrate court); TEX. R. CIV. P. 176.4 (subpoena may be
 18 issued by court clerk, state officer, or attorney “as an officer of the court”); COLO. R. CIV. P. 45(a)
 19 (subpoena may be issued by court clerk or attorney “as an officer of the court”); COMM’N ON OFF.
 20 LEGAL PUBL’NS, CONN. JUD. BRANCH, CONNECTICUT PRACTICE BOOK § 7-19 (2024), [https://www.](https://www.jud.ct.gov/publications/PracticeBook/PB.pdf)
 21 [jud.ct.gov/publications/PracticeBook/PB.pdf](https://www.jud.ct.gov/publications/PracticeBook/PB.pdf) (directing superior court judges to conduct ex parte
 22 review of subpoena applications submitted by pro se litigants and to only direct issuance if
 23 “warranted under the circumstances”). Logistical challenges can also be significant: A self-
 24 represented litigant must know how to request a subpoena sufficiently in advance of trial and
 25 arrange for its service, including payment of associated fees. See, e.g., NEB. CT. R. ch. 6, art. 14,
 26 app. 1 (in small-claims court, a subpoena duces tecum “must be requested, paid for, issued, and
 27 served before the court date”); ALASKA R. ADMIN. 7 (requiring parties in civil cases to pay witness
 28 fees in advance, upon request); CONNECTICUT PRACTICE BOOK, *supra*, at § 24-22 (in small-claims
 29 actions, the party requesting a subpoena is responsible for service and witness fees); Civ. Ct. of
 30 the City of N.Y., Instructions for Service of Subpoena (CIV-GP-63-i), [https://www.nycourts.gov/](https://www.nycourts.gov/courtsnycousing/forms/instructionsservicesubpoena.pdf)
 31 [courtsnycousing/forms/instructionsservicesubpoena.pdf](https://www.nycourts.gov/courtsnycousing/forms/instructionsservicesubpoena.pdf) (requiring service and payment of fees a
 32 “reasonable amount of time” before the hearing date, estimated at five days).

33 Other barriers lowered by court access to official data include the simple fact that discovery,
 34 whether third-party subpoenas or otherwise, is not available in any form in many courts of limited
 35 jurisdiction, where debt-collection and eviction cases are often filed and adjudicated. See, e.g.,
 36 MINN. GEN. R. PRAC. 512, advisory committee comments to 2007 amendment (“Although
 37 subpoenas may be used for pretrial discovery from non-parties in district court proceedings,
 38 conciliation [small claims] court practice does not allow pretrial discovery, so this use of subpoenas
 39 is similarly not authorized by this rule.”); see also § 4.06 (Limits on Discovery), Reporters’ Note to
 40 Comment *a* (listing jurisdictions that limit or even prohibit conventional discovery in small-claims

1 and other limited-jurisdiction contexts). Moreover, the rules regarding timing for compliance with
 2 a subpoena duces tecum may be at odds with the fast timeframe of certain high-volume civil-
 3 adjudication case types. In eviction matters, for instance, cases may proceed to trial before the third
 4 party’s deadline to respond arises. Compare OHIO CIV. R. 45(C)(2)(b) (person commanded by
 5 subpoena to produce documents has 14 days to comply or object), with OHIO REV. CODE § 1923.06
 6 (eviction trial can be held as few as seven days after service of summons and complaint); see also
 7 § 4.06, Reporters’ Note to Comment *d*. But see N.Y. CIV. PRAC. L. & R. 2307 (subpoenas can be
 8 made returnable on very short notice, e.g., 24 hours, or even less in the event of an emergency and
 9 by court order). These impediments to the use of subpoenas duces tecum by self-represented
 10 litigants render defendant-filed third-party discovery largely absent from high-volume civil dockets,
 11 even when not barred outright by statute or court rule.

12 As already noted, court access to official data may be a particularly attractive substitute for
 13 third-party subpoenas in many high-volume civil-adjudication areas because those subpoenas are
 14 often directed to government agencies. For instance, a tenant defending an eviction action may
 15 offer into evidence official records of housing-code enforcement to prove a warranty of habitability
 16 defense, see *Dahl v. Prince Holdings 2012, LLC*, No. 157743/2014, 2024 WL 624074 (N.Y. Sup.
 17 Ct. Feb. 14, 2024) (stating that the placement of an agency-generated vacate order on a premises
 18 is prima facie proof of a landlord’s breach of the warranty of habitability), *Choudhury v. Ramtahal*,
 19 24 Misc. 3d 1211(A), 890 N.Y.S.2d 368 (N.Y. Civ. Ct. 2009) (relying on agency records submitted
 20 by the tenant, which documented lead-paint issues, leaking fixtures, and pest infestations, to
 21 support the tenant’s retaliatory eviction and breach of warranty defenses), and *Dep’t of Hous. Pres.*
 22 *& Dev. of City of New York v. Living Waters Realty Inc.*, 14 Misc. 3d 484, 827 N.Y.S.2d 627
 23 (N.Y. Civ. Ct. 2006) (stating that computer-printed housing-code violations are prima facie
 24 evidence of “any matter stated therein”), or a tenant in a federally subsidized housing unit may
 25 require a copy of a tenant file maintained by the local housing authority to prove that the rent
 26 allegedly owed is the financial responsibility of that government agency, see *Misthopoulos v.*
 27 *Ruhl*, 183 A.D.2d 651, 652 (N.Y. Sup. Ct. 1992) (records of state agency Division of Housing and
 28 Community Renewal, which administers Section 8 Housing Choice Voucher Program, could be
 29 obtained by subpoena). Similarly, in debt-collection cases, consumers might also seek to support
 30 their defenses and counterclaims with information from the Consumer Financial Protection
 31 Bureau’s “complaint database.” Jessica K. Steinberg, *A Theory of Civil Problem-solving Courts*,
 32 93 N.Y.U. L. REV. 1579, 1618-1619 (2018). Rather than require litigants to identify the relevant
 33 agency, request issuance of a subpoena directed at the agency, and serve and pay for it, court access
 34 provides a streamlined pathway for these records to be made available, exchanged, and admitted
 35 into evidence that does not rely on party capacity.

36 Despite its many potential virtues, courts and other rulemakers considering facilitating
 37 court access to official data should weigh numerous risks and concerns. First, any approach that
 38 involves connectivity between systems to facilitate transfer of potentially sensitive information
 39 heightens privacy risks and increases the potential costs of data hacks. David Freeman Engstrom
 40 & RJ Vogt, *New Judicial Governance: Courts, Data, and the Future of Civil Justice*, 72 DEPAUL

1 L. REV. 171, 212-213 (2023). Data federation, by pooling data from multiple sources into a single
 2 unified view, poses particular privacy risks. Given such concerns, courts and other rulemakers
 3 should ensure that systems enabling court access to official data adhere to the principles of data
 4 management and data governance detailed in Chapter 9 (Systemic Administration) and Chapter 12
 5 (Court Use and Regulation of Technology).

6 Second, court access to official data may run afoul of judicial codes of conduct and
 7 evidentiary and procedural rules. For instance, court-initiated information requests and direct
 8 system access may conflict with judicial codes of conduct that prohibit judges from engaging in
 9 ex parte communications about a pending matter, except under specific circumstances such as
 10 scheduling or other forms of case management and court administration that do not affect
 11 substantive rights. E.g., CODE OF CONDUCT FOR U.S. JUDGES, Canon 4(A)(4); see also CAL. CODE
 12 OF JUD. ETHICS, Canon 3(B)(7)(a) (2018) (prohibiting a judge from investigating the facts bearing
 13 on a pending case); IND. CODE OF JUD. CONDUCT, Rule 2.9 (2018) (a judge “shall not initiate,
 14 permit, or consider ex parte communications . . . concerning a pending or impending matter”);
 15 NEB. REV. CODE OF JUD. CONDUCT §5-302.9 (2011) (prohibiting ex parte communications about a
 16 pending case except for concerning case administration, scheduling, or nonsubstantive matters);
 17 WIS. SUP. CT. R., Ch. 60 (same); W. VIR. CODE OF JUD. CONDUCT, Rule 2.9 (same). Moreover,
 18 independent judicial access to information about a party that extends beyond the case at hand—
 19 for instance, housing-code violations for properties other than the one implicated in an eviction
 20 suit—sits in tension with the traditional ban on propensity evidence under federal and state rules
 21 of evidence. E.g., FED. R. EVID. 404(a) (evidence of a person’s character is not admissible to prove
 22 that the person acted in accordance with that trait); CAL. EVID. CODE § 1101 (evidence of a
 23 person’s character is generally inadmissible to prove the person’s conduct on a certain occasion);
 24 FLA. STAT. § 90.404 (same as federal); MASS. R. EVID. 404 (same as federal). Court access to such
 25 information, particularly when it extends beyond the claims or defenses in a case and suggests a
 26 person’s tendency to act in a certain way, can unfairly influence a judge or court staff with
 27 responsibilities for adjudicating or managing a case. Finally, court access to official data without
 28 appropriate guardrails may run afoul of federal and state procedural rules that narrowly limit ex
 29 parte communications to particular pretrial or emergency contexts. E.g., FED. R. CIV. P. 16(c) &
 30 65(b); TEX. R. CIV. P. 680 (permitting the granting of temporary restraining orders without notice
 31 only when it “clearly appears from specific facts” shown in affidavits or the verified complaint
 32 that “immediate and irreparable injury, loss, or damage will result to the applicant before notice
 33 can be served”.); CAL. CIV. PROC. CODE § 527(c) (restricting the granting of temporary restraining
 34 orders without notice to specific circumstances); NY CPLR § 6313 (2024) (same). These rules
 35 collectively aim to ensure the fairness and transparency of legal and administrative proceedings
 36 by preventing improper influence or the appearance of bias or impropriety. That said, the greater
 37 concern in New York Housing Court may be “that judges rarely use [their real-time access to
 38 housing-code enforcement records] to enforce the warranty [of habitability] and advance repairs
 39 in the tenant’s unit.” Nicole Summers, *The Limits of Good Law: A Study of Housing Court*
 40 *Outcomes*, 87 U. CHI. L. REV. 145, 181, 204 (2020).

1 Finally, courts should remain attentive to the possibility that agency-maintained databases
 2 may be outdated, incomplete, or inaccurate. Many public databases are designed primarily for
 3 administrative, not adjudicative, purposes. See, e.g., Wisconsin Dep’t of Justice, Wisconsin
 4 Criminal Justice Coordinating Council, CJCC Data Sharing Report 2020 11 (2020) (explaining
 5 that most of the systems that collect data for the criminal-justice system at the state and local level
 6 “are operational or administrative in design” and “were not designed for research, analysis, or
 7 evaluation purposes.”). Entries may lag behind real-world events, remain uncorrected after
 8 underlying conditions change, or reflect data-entry errors that have never been audited. Reliance
 9 on such information without appropriate safeguards risks importing administrative inaccuracies
 10 into judicial decisionmaking. Accordingly, any system of direct access should incorporate
 11 procedures for verifying the currency and reliability of retrieved data, including, where
 12 appropriate, procedures designed to provide parties with an opportunity to contest or correct
 13 information drawn from official sources.

14 *c. Limits on court use of official data.* Given the above risks and concerns, courts and other
 15 rulemakers should impose limitations on the availability and use of materials and information
 16 obtained via court access to official data. Subsections (a) through (c) impose several such limits.
 17 Subsection (a) recommends that court access to official data be limited to contexts in which the
 18 data at issue are sufficiently reliable, the materials or information in question will assist the court
 19 in fairly and accurately adjudicating a matter or enabling meaningful participation by a party, the
 20 materials or information obtained would not otherwise be surfaced by party-based disclosures or
 21 discovery, and privacy risks are low. In turn, subsection (b) recommends that courts should not
 22 use materials or information obtained via court-initiated request or direct system access in order
 23 to determine a merits-based claim or defense without first providing all parties with notice and an
 24 opportunity to be heard on those materials or information.

25 The latter requirement of notice and an opportunity to be heard reflects fundamental
 26 principles of due process when courts decide merits issues. Parties must be able to test, explain, or
 27 rebut information that could influence the outcome of their case, especially when the court acquires
 28 such information outside party-based disclosure or discovery. Thus, while New York law allows
 29 courts to take judicial notice of housing code violation records as prima facie evidence proving the
 30 existence of poor habitability conditions, see N.Y. MULT. DWELL. LAW § 328(3), this presumption
 31 is rebuttable and can be challenged by the other party, see Dep’t of Hous. Pres. & Dev. of City of
 32 New York v. Joseph, 229 N.Y.S.3d 817 (N.Y. App. Term. 2025) (rejecting a constitutional
 33 challenge to New York’s housing law and holding that “[i]mposing a rebuttable presumption of
 34 uncorrected violations on landlords following sufficient notice does not violate due process”).
 35 Providing advance notice not only guards against due-process violations but also ensures the
 36 integrity and transparency of judicial decisionmaking. See, e.g., FED. R. EVID. 201(e), Notes of
 37 Advisory Committee on Proposed Rules (“Basic considerations of procedural fairness demand an
 38 opportunity to be heard on the propriety of taking judicial notice and the tenor of the matter
 39 noticed.”); Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*,
 40 61 DUKE L.J. 1 (2011) (arguing that adversarial justice is undermined when appellate courts look

outside the record the parties developed before the trial court, which results in courts relying on unfounded assumptions, rather than tested facts, and a lack of transparency in judicial opinions); ABA Model Code of Judicial Conduct Rule 2.9(A)(2) (stating that a judge can obtain the written advice of a disinterested expert on the law only if they give “advance notice” to the parties and affords them “a reasonable opportunity to object and respond to the notice and to the advice received”); Gregory Segal, *Clashing Standards in the Courtroom: Judicial Notice of Scientific Facts*, 51 COLUM. J.L. & SOC. PROBS. 587 (2018) (arguing that greater judicial transparency, such as judges providing more detailed explanations when taking judicial notice, is “the key” to ensuring that Rule 201 is not misapplied in the context of judicial notice of scientific facts). Clear disclosure of the information’s content, context, and potential relevance allows the parties to engage with it meaningfully, strengthening the accuracy of factfinding and maintaining public confidence in the court’s impartiality. Under subsections (b)(1)-(b)(3), when a court provides notice and an opportunity to be heard, it should do so in a manner that clearly identifies the information at issue, explains how it may bear on claims or defenses, and affords a meaningful chance for the parties to contest, supplement, or contextualize the materials or information at issue before any merits-based ruling is made.

Under subsection (c), courts and other rulemakers should consider imposing other limits on court access to and use of official data to avoid trenching on evidentiary rules, procedural rules, and canons of judicial conduct. An example is a rule limiting use of official data in merits-based determinations to materials and information that are encompassed by the mandatory disclosure obligations of one of the parties. This limit would blunt concern about judges raising issues sua sponte or improperly altering the burden of proof. See Chapter 9 (The Judicial Role). Note that this limit would apply only to merits-based determinations, not court use of official data to confirm eligibility for a fee waiver. Other limits that courts and other rulemakers might entertain are specific to high-volume civil-adjudication case types. For instance, in the eviction area, use of materials and information obtained via direct system access could be limited by statute or rule to the particular property at issue, rather than all the properties under management by a party, to avoid the concern that court access to official data might breach traditional evidentiary rules disfavoring propensity evidence. Such a limit would be more restrictive than the current New York law, which, in authorizing courts to take judicial notice of housing-code violation records as prima facie evidence proving the existence of poor habitability conditions, merely requires that the information obtained must be “relevant to the enforcement of state and local laws for the establishment and maintenance of housing standards.” N.Y. MULT. DWELL. LAW § 328(3).

§ 4.08. Implementation of Rules Governing Pleading and Information Exchange

(a) Courts should take appropriate measures to promote compliance with rules governing pleading and information exchange in high-volume civil adjudication.

1 **(b) An effective and administrable means of compelling compliance with pleading and**
2 **information-exchange requirements in many high-volume civil-adjudication areas is to deny**
3 **a noncompliant party’s request for entry of judgment.**

4 **(c) Courts may take other appropriate measures in response to a party’s failure to**
5 **comply with pleading and information-exchange requirements, including:**

6 **(1) imposing monetary sanctions;**

7 **(2) ordering that facts are established;**

8 **(3) prohibiting evidence from being introduced at a merits hearing;**

9 **(4) striking claims or defenses;**

10 **(5) staying the case until mandated disclosures are made; or**

11 **(6) dismissing the case with or without prejudice.**

12 **The application of such measures should take account of limitations on a party’s capacity or**
13 **understanding and be structured to deter repetition of noncompliance.**

14 **(d) Measures to promote compliance with pleading and information-exchange**
15 **requirements should be taken in a manner consistent with Chapter 7 (Entry and**
16 **Enforcement of Judgments), including § 7.03 (Showing of Entitlement to Judgment), and**
17 **Chapter 9 (The Judicial Role), including § 9.04 (Application of Procedural Rules). Nothing**
18 **in this Section should be construed to conflict with those principles.**

19 **Comment:**

20 *a. Active court management.* This Section calls for well-designed and rigorously
21 implemented measures to promote compliance with pleading and information-exchange
22 requirements in high-volume civil adjudication. Pleading and information-exchange requirements
23 are a linchpin of procedure and case management in high-volume civil adjudication. They help
24 inform parties of the allegations, claims, and defenses at issue; facilitate access to low-cost legal
25 assistance; and enable judges and court staff to administer cases effectively. See § 4.01 (General
26 Principles of Pleading and Information Exchange). Efforts to promote compliance with pleading
27 and information-exchange requirements are most effective when courts communicate clear
28 expectations at the outset of litigation and respond in firm but proportionate ways when parties fall
29 short. At the same time, compliance efforts should remain attentive to the practical limits that many
30 litigants—particularly litigants proceeding without meaningful legal help—face in meeting these

obligations. Chapter 9 (Systemic Administration) addresses complementary systemic tools that courts may adopt to reinforce expectations and strengthen overall adherence.

b. Appropriate implementation measures; deter repetition. Measures to promote compliance with rules governing pleading and information exchange are an essential component of court management of high-volume civil dockets, but they also risk inefficiency, protracted satellite litigation, and gamesmanship. Courts must strike a careful balance. Implementation measures should promote compliance by litigants with sufficient expertise, resources, or legal assistance to understand and meet their obligations, while avoiding overly punitive measures against parties whose noncompliance stems from limited capacity or knowledge. The menu of available measures—and the choice of measure in a particular case—should be calibrated to litigant incentives and abilities, the case context, and the characteristics of the specific docket. Commonly imposed sanctions in other areas of civil litigation, particularly those whose impact is primarily felt at trial, such as precluding evidence from being offered, may be ineffective in high-volume civil adjudication given high rates of default. Accordingly, when designing compliance measures, courts and other rulemakers should steer way from measures against litigants whose failures reflect genuine limitations rather than strategic behavior. At the same time, compliance measures directed at more-expert, better-resourced, and often represented filers should be structured to deter repeat or systemic practices, particularly business practices that abuse legal process and distort the adjudicative process.

c. Relationship to other principles. Subsection (d)’s cross-references to Chapters 7 and 9 clarify that this Section’s principles operate within a broader framework governing the entry and enforcement of judgment and the appropriate scope of the judicial role, and they should not be read to conflict with those other principles. For example, Chapter 7 (Entry and Enforcement of Judgments), and particularly § 7.03 (Showing of Entitlement to Judgment), recognize that a court may enter judgment only if a party has established the procedural and substantive sufficiency of the claim, including, among other enumerated requirements, compliance with rules governing pleading and information exchange. This Section’s principles thus elaborate on, and do not conflict with, a subset of the requirements that a party seeking entry of judgment must satisfy under Chapter 7. Likewise, Chapter 9 (The Judicial Role), and particularly § 9.04 (Application of Procedural Rules), provide guidance to judges on the application of procedural rules, including the excusal of noncompliance by a party if doing so would not impair the court’s adjudication of the case or unduly

prejudice another party. Section 9.04 further provides that judicial explanation and a reasonable opportunity to cure is the proper course in response to a self-represented litigant’s good-faith failure. Subsection (c)’s admonition that measures to promote compliance with pleading and information-exchange requirements should take account of limitations on a party’s capacity or understanding adds to Chapter 9’s more general provisions and underscores that a court should exercise particular caution in addressing noncompliance by a self-represented litigant who has acted in good faith.

REPORTERS’ NOTES

a. Active court management. Fair and accurate decisionmaking in high-volume civil adjudication depends on active court enforcement of rules governing pleading and information exchange. Active management includes clear scheduling and deadlines for compliance and rigorously implemented measures against failures to comply. Judicial oversight may be particularly important in high-volume civil dockets that feature substantial asymmetries in expertise, resources, and representation among parties. In general, noncompliance is best deterred when a court sets clearly defined expectations at the outset of litigation and rigorously enforces them. Grimm, *supra*, at 148-149 n.82; see INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., 21ST CENTURY CIVIL JUSTICE SYSTEM: A ROADMAP FOR REFORM; CIVIL CASEFLOW MANAGEMENT GUIDELINES 8-9 (2009) (detailing the benefits of early judicial involvement and expectation-setting); Adam M. Josephs, *The Availability of Discovery Sanctions for Violations of Protective Orders*, 80 U. CHI. L. REV. 1355, 1389 (2013) (explaining that formally codified sanctions rules enhance legitimacy, strengthen deterrence, and improve case management); see also FED. R. CIV. P. 26 (Advisory Committee Notes, 1983 Amendment) (“Sanctions to deter discovery abuse would be more effective if they were diligently applied ‘not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.’” (quoting *Nat’l Hockey League v. Metro. Hockey Club*, 427 U.S. 639, 643 (1976))).

b. Appropriate implementation measures; deter repetition. This Section prescribes well-designed and rigorously implemented measures against failures to comply with pleading and information-exchange requirements. However, any such measures should also be well-tailored to litigant capacities and incentives.

The appropriateness of enforcement measures will often turn on the sources and severity of noncompliance. Frivolous filings and other forms of noncompliance with pleading and disclosure rules are hardly new to high-volume civil adjudication. A growing body of evidence suggests that compliance with pleading requirements, including in jurisdictions that have adopted clear information-exchange requirements, is often low. See JULIA BARNARD ET AL., CTR. FOR RESPONSIBLE LENDING, COURT SYSTEM OVERLOAD: THE STATE OF DEBT COLLECTION IN CALIFORNIA AFTER THE FAIR DEBT BUYER PROTECTION ACT 30-31 (2020) (finding that high-volume debt-collection plaintiffs in California failed to provide documentation required under the

California Fair Debt Buying Practices Act in more than half of cases). Indeed, one could fairly conclude that noncompliance with heightened pleading and information-exchange requirements is part of the business model of some litigants in high-volume civil dockets. For instance, a mix of regulatory actions, litigation, often under the Fair Debt Collection Practices Act, and research strongly suggest that at least some high-volume filers knowingly file cases involving “out-of-stat” debt—industry lingo for debt for which the statute of limitations has run—with the aim of obtaining default judgments and wage garnishments for what would otherwise be unrecoverable debt obligations or, alternatively, inducing a debtor to make a payment on the debt, thus starting a new statute-of-limitations period in some jurisdictions’ rules. FED. TRADE COMM’N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION iii, 27, 29 (2010). See generally *Phillips v. Asset Acceptance, LLC*, 736 F. 3d 1076, 1079 (7th Cir. 2013); *Huertas v. Galaxy Asset Mgmt.*, 641 F. 3d 28, 32-33 (3rd Cir. 2011); *Castro v. Collecto, Inc.*, 634 F. 3d 779, 783 (5th Cir. 2011); *Freyermuth v. Credit Bureau Servs.*, 248 F. 3d 767, 771 (8th Cir. 2001) (all holding that bringing time-barred debt-collection suits violate the Fair Debt Collection Practices Act). The fact that certain high-volume debt-collection filers reflexively dismiss any case in which a defendant files a responsive pleading strengthens the inference of gaming around statutes of limitations.

To be sure, a determination that debt is time-barred need not yield an inference of abuse of process. Reflexive dismissals may also reflect narrow profit margins and a calculation of litigation costs as against the expected value of recovery even in fully meritorious cases. See Wilf-Townsend, *supra*, at 1721. Moreover, calculating the statute of limitations can be complex—for instance, when a debtor resided in different states upon opening a credit-card account, the credit company’s charge-off of the debt, and the filing of a collection lawsuit. See, e.g., *Rodriguez v. Portfolio Recovery Assocs., LLC*, 2024 WL 531263, at *1 (W.D. Ky. Feb. 9, 2024) (performing extensive analysis of where and when a debt-collection claim accrued), appeal dismissed, No. 24-5191, 2024 WL 2830145 (6th Cir. May 1, 2024). Cases that are ultimately determined to be time-barred might be filed because the correct statute of limitations is unknown or subject to interpretation. See, e.g., *Hill v. Am. Express*, 657 S.E.2d 547 (Ga. Ct. App. 2008) (holding, after many years of uncertainty, that credit-card debt was a contract governed by a six-year statute of limitations, not an open account with a four-year statute of limitations).

The potential for abuse of legal process in high-volume civil adjudication extends beyond business practices. In the domestic-relations context, abusers regularly seek to maintain control over former partners through legal action. Filing baseless lawsuits and motions to seek or modify child-support or custody orders is a way for abusers to force their former partners to interact and engage with them, however unwillingly. Ellen R. Gutowski & Lisa A. Goodman, *Coercive Control in the Courtroom: the Legal Abuse Scale (LAS)*, 38 J. FAM. VIOLENCE 527, 528-529 (2023) (“[L]egal proceedings can serve as platforms for post-separation coercive control as they enable abusive partners to have direct contact with their victims, often over an extended period of time.”); NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES, REVISED CHAPTER 4: FAMILIES AND CHILDREN; MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE 31-32, 44-45 (2021) (noting “pervasive”

1 exploitation of litigation in family-court context); see Mary Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of Their Victims Through the Courts*, 9 SEATTLE J. SOC. JUST. 1053 (2011).

4 Courts generally have wide latitude under civil-procedure rules to impose sanctions in order to promote compliance with pleading and discovery rules. Robin J. Effron, *Ousted: The New Dynamics of Privatized Procedure and Judicial Discretion*, 98 B.U. L. REV. 127, 145 (2018) (cataloging wide judicial discretion to impose sanctions); see, e.g., FED. R. CIV. P. 11(c); FED. R. CIV. P. 26(g); FED. R. CIV. P. 37; WASH. SUPER. CT. CIV. R. 11 (substantially same as federal rule 11); MINN. R. CIV. P. 37 (substantially same as federal rule 37); CAL. CIV. PROC. CODE § 128.5 (authorizing sanctions for bad faith or frivolous litigation tactics). The general view is that sanctions should be tailored to the offense, considering the particularities of the litigants, the type of case, and other docket realities. See *Kwik Way Stores, Inc. v. Caldwell*, 745 P.2d 672, 677 (Colo. 1987) (emphasizing “proportionality between the sanction imposed and the culpability of the disobedient party”); *Burnet v. Spokane Ambulance*, 933 P.2d 1036, 1041 (Wash. 1997) (“[T]he court should impose the least severe sanction that will be adequate to serve the purpose of the particular sanction.”); *Usowski v. Jacobson*, 836 A.2d 1167, 1174 (Conn. 2003) (“[T]he sanction imposed must be proportional to the violation.”).

18 The challenge for courts and other rulemakers in high-volume civil adjudication is achieving the right mix of judicial discretion to take account of individualized circumstances and equities and a more rigid, rule-based approach that can deter systemic evasions, achieve a high level of compliance, and thus deliver the many benefits that flow from pleading and information exchange.

22 Subsection (b) focuses on the common scenario in high-volume civil adjudication in which a plaintiff fails to comply with pleading and information-exchange requirements and then, upon a defendant's failure to respond, moves for default judgment. In such instances, a court can often compel compliance with those requirements via nothing more than denying without prejudice the noncompliant plaintiff's request for entry of judgment.

27 Subsection (c) offers guidance on further measures that courts might take to promote compliance with pleading and information-exchange requirements. After setting forth a menu of options, it makes clear that courts should refrain from taking such measures when noncompliance reflects a party's limited capacity or understanding. See *Societe Internationale v. Rogers*, 357 U.S. 197 (1958) (disfavoring discovery sanctions under Federal Rule of Civil Procedure “when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner”); *Hawes Firearms Co. v. Edwards*, 634 P.2d 377, 378 (Alaska 1981) (“Willfulness, in the sense of a conscious intent to impede discovery, and not mere delay, inability or good faith resistance, must be demonstrated before sanctions may be imposed.”); *Locke v. Kansas Fire & Cas. Co.*, 665 P.2d 776, 779 (Kan. App. 1983) (holding that dismissal of an action for discovery conduct is inappropriate if the failure was “due to inability and not to willfulness or bad faith.”); *Welsh v. Automatic Poultry Feeder Co.*, 439 F.2d 95, 97 (8th Cir. 1971) (“Willful as used in the context of a failure to comply with a court order or failure to prosecute implies a conscious or intentional failure to act, as distinguished from accidental or involuntary

noncompliance[.]”); *Omaha Indian Tribe, Treaty of 1854 with U.S. v. Tract I-Blackbird Bend Area*, 933 F.2d 1462, 1468 (8th Cir. 1991) (holding that a court should consider whether a party whose action was dismissed consciously or intentionally, as opposed to accidentally or involuntary, refused to comply with a court order); see also Chapter 9 (The Judicial Role) and § 9.04 (Application of Procedural Rules).

At the same time, courts should take compliance measures against litigants, particularly institutional plaintiffs with the capacity to comply, even when the failure in question was not intentional or in bad faith. To that extent, this Section departs from the view that courts should only take compliance measures against bad-faith failures. Compare INST. FOR ADVANCEMENT OF THE AM. LEGAL SYS. & AM. COLL. OF TRIAL LAWYERS, *PROGRESS AND PROMISE*, *supra*, at 20 (sanctions should be limited to “a bad faith failure to comply absent cause or excusable neglect”). In particular, the pleading and information-exchange requirements set forth in this Chapter may be rendered toothless, and their many benefits foregone, unless courts refuse to enter judgments if a plaintiff has not met those requirements. See Chapter 7 (Entry and Enforcement of Judgments). The better approach is that a court should rigorously take measures against any failure to comply with pleading and information-exchange requirements, but with careful attention to a party’s capacity or understanding.

In implementing subsection (c)’s guidance that a court should take account of limitations on a party’s capacity or understanding, courts and other rulemakers might decide to adopt an approach in which a party must show good cause and excusable neglect. Such an approach would benefit from existing case law drawn from Federal Rule of Civil Procedure 6 and state-level equivalents. See FED. R. CIV. P. 6(b)(1)(B) (providing that, when a party seeks an extension of a deadline after missing a deadline, the court can grant the request if the requesting party can show both good cause and excusable neglect); FLA. R. CIV. P. 1.090 (mirroring the federal approach); N.Y. C.P.L.R. 2004 (permitting enlargements of time “upon such terms as may be just and upon good cause shown”); TEX. R. CIV. P. 5 (providing for enlargements “where good cause is shown for the failure to act”); see also *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1259 (9th Cir. 2010) (offering extensive analysis of “good cause”); *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 392 (1993) (offering extensive analysis of “excusable neglect”). Moreover, both standards are context-sensitive, focusing not just on factors that were within a party’s control, but also those that were outside of it—and thus permitting consideration of a party’s capacity or understanding of the litigation process, consistent with subsection (c).

In general, enforcement measures need not be severe to deter repetition of noncompliance in many high-volume civil-adjudication areas. In conventional civil litigation, dismissal is often among the harsher among available sanctions, particularly in later-stage litigation after the parties have expended considerable time and resources. See, e.g., *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 140 (2d Cir. 2007) (stating that dismissal “‘is a drastic remedy that should be imposed only in extreme circumstances,’ usually after consideration of alternative, less drastic sanctions.”) (quoting *John B. Hull, Inc. v. Waterbury Petroleum Prods., Inc.*, 845 F.2d 1172, 1176 (2d Cir. 1988)); *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986) (“Dismissal is a harsh

1 penalty and is to be imposed only in extreme circumstances.”); *Raiford v. Pounds*, 640 F.2d 944,
2 945 (9th Cir. 1981) (“Because dismissal is so harsh a penalty, it should be imposed only in extreme
3 circumstances.”). But in many high-volume civil-adjudication areas, a simple denial of a motion
4 seeking entry of judgment or dismissal of a case without prejudice, by necessitating refiling and a
5 second filing fee, can have a significant deterrent effect. As already noted, in the debt-collection
6 context, many institutional plaintiffs reportedly drop rather than litigate cases whenever an answer
7 is filed, ostensibly because of razor-thin margins between litigation costs and expected return. E.g.,
8 *Wilf-Townsend*, supra, at 1721 (“When cases are disputed, some [debt collection] plaintiffs drop
9 the case rather than litigate, to keep costs low.”).

10 As necessary as enforcement of pleading and disclosure rules is, overenforcement can
11 breed gamesmanship, satellite litigation, and unnecessary cost and delay without meaningfully
12 improving overall compliance. Courts’ calibration of enforcement measures should entail, as a
13 threshold matter, whether their imposition is “likely to exacerbate tensions” and embolden parties
14 to aggressively monitor each other’s compliance with the rules in ways that do not serve core
15 procedural ends. NAT’L CTR. FOR STATE CTS., CIV. JUST. INITIATIVE, NEW HAMPSHIRE: IMPACT OF
16 THE PROPORTIONAL DISCOVERY/AUTOMATIC DISCLOSURE (PAD) PILOT RULES 22 (2013)
17 (commenting on how courts acting forcefully to police compliance may contradict the premise of
18 cooperation in early-stage litigation). However, such concerns should not distract courts from
19 recognizing that pleading and information-exchange requirements are an essential component of
20 procedure in high-volume civil adjudication, helping inform litigants of allegations, claims, and
21 defenses; facilitating access to low-cost legal assistance; and enabling effective administration and
22 adjudication by judges and court staff.

CHAPTER 5

HEARINGS

§ 5.01. Definition and Purpose of Hearings

(a) For purposes of these Principles, a hearing is defined as an event in which one or more parties and a judge or other appropriate decisionmaker meet, either in person or remotely, to resolve or address a specific issue related to a case, including but not limited to final disposition.

(b) In addition to furthering Chapter 2's general principles of procedure, hearing procedures and practices should:

(1) permit each party a meaningful opportunity to be heard on an issue or issues;

(2) provide a fair and accurate disposition of a particular issue or case;

(3) foster the open and transparent development of law and public trust and confidence by clearly communicating and recording the hearing's outcome; and

(4) be open and accessible to the public, consistent with § 5.02 (Access and Accessibility) and Chapter 13 (Privacy and Confidentiality).

Comment:

a. Definition of hearing. Live, synchronous hearings play a prominent role in high-volume civil adjudication compared to other parts of the civil-justice system, where written pleadings more often frame and decide the dispute. This Section's principles reflect the practical assumption that, in many high-volume civil cases, such hearings will be the primary if not the only vehicle for raising, discussing, evaluating, and resolving both procedural and substantive issues.

Subsection (a) accordingly adopts a broad definition of hearing to include any live, synchronous event that involves one or more parties, a judge or other court-designated individual vested with authority to decide an issue or case, and the possibility of reaching a resolution as to a specific issue, question, or the case in its entirety. Numerous events in high-volume civil adjudication meet this definition and may include, but need not be limited to, proceedings that address (i) a problem with service, (ii) a request for a fee waiver or in forma pauperis status, (iii) the sufficiency of pleadings, (iv) parameters of discovery, (v) contested issues of fact or law, (vi) a stipulation or agreed order requiring judicial approval, (vii) a request for a default judgment,

(viii) a request to vacate or set aside a judgment, and (ix) a postjudgment remedy, such as wage garnishment or a payment plan. Case-management conferences may also fall within this broad definition, given the possibility that issues or questions may be resolved on that occasion. The ultimate decisionmaker at a hearing will often be a judge, but other decisionmakers may also oversee events that fall within subsection (a)’s definition—for example, quasi-judicial officers exercising delegated authority or court personnel operating in a “teaming” approach, as described in Chapter 8 (Systemic Administration).

Under subsection (a)’s definition, a hearing may be conducted in person or remotely, as discussed in § 5.07 (Availability of Remote Hearings) and § 5.08 (Conduct of Remote Hearings). Though broad, the term “hearing” is limited to synchronous proceedings. Principles for asynchronous proceedings, such as online dispute resolution (ODR), are set forth in Chapter 11 (Court Use and Regulation of Technology) and Chapter 14 (Alternatives to Adjudication). Subsection (a)’s definition also excludes “paper” hearings. Though the U.S. Supreme Court and other courts have long recognized that hearings may take “paper” forms for due process and other purposes, paper-based proceedings are not distinguishable from motions practice in civil litigation. Though not the subject of this Section’s principles, motions practice should adhere to subsection (b)’s broad purposes as well as applicable procedural rules.

As this discussion makes clear, a hearing need not be the exclusive means of achieving resolution of an issue or case. As detailed in Part IV (Adjudication Alternatives), a court may adopt alternative dispute resolution (ADR) methods that enable a dispute to be resolved without a hearing. Settlements achieved outside the presence of a judge or other appropriate decisionmaker are a further way to resolve a case but do not constitute a hearing. Chapter 6 (Settlement) governs such resolutions.

b. Hearings and the goals of procedure. In crafting hearing procedures, courts and other rulemakers should adhere to the general principles of procedure in § 2.01 (General Principles of Procedure). That is, hearing procedures should be designed and administered to foster the fair and accurate resolution of disputes (§ 2.01), meaningful participation (§§ 2.01 and 2.03), effective decisionmaking by the parties and court (§ 2.01), and the open and transparent development of law (§§ 2.01 and 2.05). Subsection (b) sets forth several hearing-specific goals of procedure.

c. Open and public access. Given their central role in high-volume civil adjudication, hearings should presumptively be open to the public. When public access may lead to a substantial

likelihood of injury, harm, or prejudice to individual litigants, as elaborated in Chapter 13 (Privacy and Confidentiality), courts may limit such access after weighing public and private interests, using the least restrictive means possible to protect litigant privacy and confidentiality concerns.

REPORTERS' NOTES

a. Definition of hearing. This Chapter's definition of a hearing for high-volume civil adjudication may differ from the traditional parameters of a hearing as understood in other types of civil litigation. Proceedings elsewhere in the civil-justice system are often more structured and may also be separated into distinct hearings, each with its own purpose—for instance, to hear a motion to dismiss or resolve discovery or case-management issues or disputes. Hearings in federal courts often possess those characteristics. In many high-volume civil-adjudication areas, by contrast, the boundaries and purpose of a hearing may be more amorphous. Even an initial hearing can result in the resolution of a case. As a result, courts and other rulemakers should ensure that any proceeding or case event fitting this Section's broad definition of a hearing adheres to the principles advanced in this Chapter.

There is no consensus definition of what constitutes a hearing. Some formulations stem from constitutional due-process guarantees. The requirement of a hearing itself formed the early basis of the U.S. Supreme Court's understanding of due-process demands, but the Court provided little elaboration on what constitutes a hearing itself. See *Londoner v. City of Denver*, 210 U.S. 373, 386 (1908) (“[A] hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal.”). It was not until the 1960s that the Court elaborated a more detailed set of due-process requirements and thus began to enumerate discrete elements of a hearing. In *Goldberg v. Kelly*, 397 U.S. 254 (1970), a case testing the process due to a social welfare recipient facing possible benefits termination, the Court set forth three core elements of a “fair hearing,” including (i) an opportunity to state positions orally and to confront and cross-examine witnesses, (ii) the opportunity to retain an attorney (but not a state-provided attorney), and (iii) an impartial decisionmaker who states the reason for a ruling and indicates the evidence on which the ruling is based. *Id.* at 269-271. However, in setting forth these elements, the Court emphasized the need for flexibility and accommodation of parties without legal expertise, holding that permitting only written presentations of argument and evidence would not satisfy due process. *Id.* at 269 (“Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important.”). The *Goldberg* Court also endorsed informal procedures to enable litigants to make their case, eschewing the notion that due process requires any “particular order of proof or mode of offering evidence.” *Id.* Soon after, in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court offered a framework for weighing rights and interests in determining the constitutionally required elements

of a hearing, as elaborated in § 5.04 (Hearing Rights and Due Process), and then used that framework to pare back the required elements for a different type of social welfare claimant. In so doing, the Court implicitly held that an entirely paper hearing—that is, one that lacked an in-person opportunity to present argument or evidence—could still pass constitutional muster as a “fair hearing.” Thus, while *Goldberg* and *Mathews* demonstrated the Court’s willingness to identify hearing elements and accompanying procedures required by due process, it did not announce a general method or test for determining what constitutes a hearing in the first place.

At roughly the same time as these decisions, and in the wake of the “due process explosion” through which the Court translated the hearing requirement first elaborated in *Goldberg* and *Mathews* to other contexts, Judge Henry J. Friendly elaborated upon the elements of a “fair hearing.” Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1268 (1975). Among the elements Judge Friendly delineated were (i) an unbiased tribunal; (ii) notice of the proposed action and the basis asserted; (iii) an opportunity to present arguments against the action; (iv) the right to call witnesses, know the evidence offered in opposition, and to a decision based solely on the evidence presented; (v) counsel; (vi) the making of a record and statement of reasons for the decision; (vii) public attendance; and (viii) judicial review. As with the Court’s decisions in *Goldberg* and progeny, Judge Friendly, focused on the elements of a “fair hearing,” only implicitly offering a definition of what is and is not a hearing.

Against that backdrop, this Section offers a pragmatic and inclusive definition of a hearing in high-volume civil adjudication that is independent of the question of what constitutes a “fair” hearing or otherwise satisfies due process minima. As already noted, courts and other rulemakers should apply the principles set forth in this Chapter to any proceeding or case event that meets subsection (a)’s broad definition.

c. Open and public access. Historically, the common law has protected the right to open and publicly accessible proceedings in both the criminal and civil contexts. *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 386 n.15 (1979). Indeed, the U.S. Supreme Court has deemed open courtrooms a “fundamental feature of the American judicial system,” due to their ability to serve as an outlet for community concern and vindication, their role in holding courts accountable and minimizing judicial error and misconduct, and their facilitation of truthful and accurate factfinding—all considerations that apply to both civil and criminal cases. *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1177-1179 (1983) (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) and *Globe Newspaper Co. v. Superior Court for Norfolk Cnty.*, 457 U.S. 596 (1982)). Finally, many state constitutions contain relevant “open court” provisions. E.g., Ore. Const. Art. I, § 10 (“No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay. . . .”); Ala. Const. § 13 (“That all courts shall be open. . . .”); W.V. Const. Art. III, § 17 (“The courts of this state shall be open. . . .”); Utah Const. Art. I, § 11 (“All courts shall be open. . . .”). See generally Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279, 1279 (1995) (canvassing state constitutional provisions).

Consistent with those authorities, and as elaborated in more detail in Chapter 13 (Privacy and Confidentiality), all hearings should remain open to the public, whether held in person or remotely, except for specific cases in which a substantial likelihood of injury, harm, or prejudice may result to individual litigants if public access is not restricted. In those cases, courts should limit public access by the least restrictive means possible. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 15 (1986) (requiring that “any limitation” on public access to presumptively open judicial proceedings be “narrowly tailored”). This may include closing the courtroom for one specific hearing or case or protecting the identity of individual witnesses or litigants through the use of technology (e.g., a hybrid hearing where one party appears remotely with their identity obscured).

§ 5.02. Access and Accessibility

Courts and other rulemakers should ensure, to the maximum extent practicable, that every party can meaningfully participate in hearings regardless of circumstances, including but not limited to financial status, access to legal representation, disability, language, or access to needed technology, as elaborated in § 5.07 (Availability of Remote Hearings). At a minimum, courts and other rulemakers should:

(a) not condition any party’s participation in a hearing on the ability to meet financial requirements without a bona fide fee-waiver system, consistent with § 4.05 (Procedural Limits on Defenses and Counterclaims) and Chapter 12 (Court Funding and Fees);

(b) take reasonable measures to accommodate parties for whom legal-representation status, disability, language, or any other barrier would otherwise frustrate meaningful participation in the hearing, consistent with § 2.03 (Meaningful Participation);

(c) utilize flexible and user-friendly calendaring and scheduling practices to maximize parties’ attendance and minimize defaults resulting from inaccessibility or litigant confusion;

(d) provide a courthouse and courtroom environment that minimizes party confusion, distraction, and discomfort; treats all parties with equal respect; and maximizes party engagement; and

(e) provide open and public access to hearings, consistent with § 2.05 (Public Development of Law) and Chapter 13 (Privacy and Confidentiality).

Comment:

a. Access and meaningful participation generally. Hearings should be structured to afford meaningful participation, consistent with § 2.03 (Meaningful Participation) and § 5.04 (Conduct of Hearings). This broad principle refers not only to the discrete elements included in a hearing, but also the conditions under which courts hold hearings. Rules and features of hearings—including but not limited to threshold requirements, scheduling, and the courtroom environment—should not place an undue burden on litigants, should not discriminate against certain types of litigants, should take account of the barriers to meaningful participation that a particular litigant might face, see § 2.04 (Procedure and Vulnerable Parties), and should promote engagement with the court process.

In high-volume civil adjudication, hearings play an outsized role in the administration of justice compared to other parts of the civil-justice system. In federal courts, for example, written pleadings and papers are more prevalent and may provide much of the basis for decisions and even judgment. High-volume civil adjudication is different. In many jurisdictions, a defendant in an eviction case must appear at a court hearing to answer the complaint or else risk default. Even in jurisdictions where a written answer must be filed to be heard, a hearing may nonetheless provide self-represented litigants an important chance to present their claims and defenses in a form not tied to the strictures of pleading. Further, many cases in high-volume civil adjudication are already disposed of at the first, and only, hearing. As a result, hearings in high-volume civil dockets, while varied in form, structure, and purpose, define many litigants’ experience of the civil-justice system. When court rules or policies restrict litigants from meaningfully participating in hearings, they not only impair courts’ ability to make fair and accurate decisions, they also impair the broader right of access to courts and erode public trust in the legal system. See generally Chapter 1 (General Principles of Fair Adjudication).”

b. Access and financial requirements. Subsection (a) offers a hearing-specific statement of the more general principle in Chapter 12 (Court Funding and Fees) that calls on courts and other rulemakers to refrain from imposing any fees or other financial requirements as a condition of participation unless a bona fide, fully accessible fee-waiver process is available. It differs from the principle advanced in § 4.05 (Procedural Limits on Defenses and Counterclaims), which calls on courts and other rulemakers to categorically prohibit answer fees—defined as charges imposed for filing an answer or responsive pleading—whether or not those fees are technically waivable upon a showing of inability to pay. Chapter 12 provides a fuller account of the attributes of a bona fide

1 fee-waiver system. As more fully discussed there, the prohibition on fees or other financial
2 conditions as a necessary predicate to a hearing without a bona fide and fully accessible fee-waiver
3 system stems from concern about erecting barriers to participation for those who have been
4 involuntarily haled into court, particularly for the large numbers of self-represented litigants who
5 already face significant impediments to meaningful participation in many high-volume civil-
6 adjudication areas. A court’s decision to conduct a hearing should rest on an objective, fact-based
7 analysis of what fairness and due process require in a specific case or case type. Litigants in high-
8 volume civil adjudication should not be barred from exercising their constitutional right to be heard
9 at a hearing on account of their financial status.

10 *c. Barriers to meaningful participation—litigant characteristics, courtroom environment,*
11 *and scheduling.* Potential barriers to meaningful participation in hearings extend well beyond
12 financial requirements. Features of both the courthouse environment and the courtroom setting can
13 hinder parties’ ability to engage effectively, particularly when combined with individual
14 characteristics such as limited English proficiency, disabilities, or lack of legal representation.
15 These factors should never impose undue burdens or operate in ways that disadvantage or exclude
16 particular groups of litigants. Instead, hearing procedures and practices and the courtroom and
17 courthouse environment should be designed with litigants’ varied capacities in mind.

18 Language barriers, disability, and legal-representation status may substantially impair a
19 litigant’s access to a hearing. Courts should make reasonable accommodations to ensure that litigants
20 who face such barriers are able to participate in hearings to the same degree as litigants for whom
21 such limitations on participation do not exist. While remaining sensitive to the traditional court
22 commitment to neutrality and impartiality, courts and other rulemakers should alter procedures and
23 rules as necessary to achieve a fair and accurate outcome in cases in which a litigant’s circumstances
24 would otherwise frustrate this overarching objective. For cases involving litigants with disabilities
25 or language challenges, courts should appoint interpreters and identify alternative methods of
26 translation assistance when interpreters are not available, among other accommodations.

27 Attendance at a court hearing can be a logistical challenge even for litigants for whom access
28 is not otherwise constrained, given difficulties relating to transportation, employment, and
29 childcare. Likewise, a loud, chaotic courtroom environment can inhibit litigants from successfully
30 presenting their claims and defenses, even when they are not challenged by issues like disability
31 (e.g., deafness), sensory processing disorders, neurodiversity, or language access. Court practices

1 that promote flexibility in scheduling and rescheduling hearings, including hearing times outside
2 work hours, provide visual guidance in the courtroom, and minimize noise beyond what is
3 transpiring on the record can enhance meaningful participation in hearings for all classes of litigants.

4 When scheduling hearings and considering requests for a continuance, courts should
5 accommodate good-faith requests for dates or times that will not inhibit a litigant’s meaningful
6 participation. Courts should offer scheduling options to the extent permitted by court and statutory
7 rules regarding the timeframe for an issue or case to be heard. In addition, courts should strive to
8 minimize litigant waiting times, such as by providing more precise hearing schedules and
9 individually scheduled hearings, when practicable. When holding hearings, courts should consider
10 how to optimize courtroom flow, setup, signage, and acoustics for litigants to be present when
11 their case is called and heard by the judicial officer presiding over the hearing without disruption
12 or distraction. Courtroom design and environment, like scheduling, should be optimized for the
13 user experience, as they can have significant implications for hearing participation.

14 When practicable, courts should reduce the number of mandated court appearances, see
15 § 2.03 (Meaningful Participation), which can lead to fewer missed appearances, bring higher
16 incentives to attend scheduled hearings, and result in time-savings for court users and court
17 personnel alike.

18 *d. Courtroom privacy.* High-volume civil adjudication often involves sensitive and
19 emotional matters. Matters of personal finance, intimacy, and violence often feature in hearings
20 and are even central fact questions. While the “open courts” ideal is an important one, courts and
21 other rulemakers should, when practicable, remain sensitive to the privacy concerns of all parties
22 and witnesses. At a minimum, courts and other rulemakers should (i) minimize distance between
23 active parties and the bench so as to keep the conversation as private as possible, while remaining
24 cognizant of safety concerns and the potential educative value of the proceedings for those litigants
25 who are awaiting their own hearing; (ii) maintain distinct areas for parties (and their attorneys, if
26 applicable) and members of the public; and (iii) have a separate, safe waiting area for litigants
27 involved in sensitive matters, particularly when there is increased potential for violence.

REPORTERS’ NOTES

28 *a. Access and meaningful participation generally.* This Section addresses a range of access
29 and accessibility barriers to meaningful participation in the specific context of hearings. As with
30 other Sections in this Chapter, the principles set forth here thus provide a hearing-specific

1 elaboration of the principles of meaningful participation in § 2.03 (Meaningful Participation), as
 2 well as the other procedural ends set forth in § 2.01 (General Principles of Procedure). Throughout,
 3 this Section’s principles are animated by the idea that, while meaningful participation is already a
 4 linchpin procedural value in high-volume civil adjudication, ensuring meaningful participation in
 5 hearings is a particularly weighty obligation of courts and other rulemakers overseeing high-
 6 volume civil adjudication. As noted in § 5.03, hearings are often the point in a case that presents
 7 the best opportunity to be heard and the greatest risk of impairing that right. Finally, while § 5.03(a)
 8 makes clear that courts and other rulemakers overseeing high-volume civil dockets have general
 9 obligations to ensure meaningful access to hearings, this Section also specifies four minimum
 10 requirements for access and accessibility: (i) a categorical bar on financial conditions for
 11 participation in hearings, (ii) reasonable accommodation of those without counsel or with language
 12 or disability-based needs, (iii) flexible and user-friendly scheduling systems, and (iv) an accessible
 13 and hospitable courtroom environment.

14 *b. Access and financial requirements.* As elaborated in § 4.05 (Procedural Limits on
 15 Defenses and Counterclaims) and Chapter 12 (Court Funding and Fees), the question whether and
 16 when courts should be permitted to charge fees to court users is complex and involves balancing
 17 the financial sustainability of the judicial system, wise allocation of court resources (since fees can
 18 modulate claiming behavior), and ensuring access to justice for all individuals, regardless of their
 19 economic status. In particular, § 4.05 calls on courts and other rulemakers to outright prohibit
 20 answer fees, defined as fees that attach to filing an answer or responsive pleading, irrespective of
 21 the waivability of those fees. Chapter 12 calls on courts and other rulemakers to prohibit any other
 22 fee or financial requirement as a condition of any type of participation in high-volume civil-
 23 adjudication cases except when a bona fide, fully accessible process is provided for litigants who
 24 are unable to pay to seek and obtain a fee waiver. Subsection (a) restates this latter principle in the
 25 specific context of hearings. Chapter 12 offers a fuller elaboration of the general principle
 26 regarding fees and financial conditions other than answer fees, including the attributes of a bona
 27 fide, fully accessible fee-waiver system.

28 *c. Barriers to meaningful participation—litigant characteristics, courtroom environment,*
 29 *and scheduling.*

30 *c(1). Language access.* Language access is an important element of court access and
 31 accessibility. Reliable estimates suggest that more than 25 million people in the U.S. have limited
 32 English proficiency. NAT’L CENTER FOR ACCESS TO JUSTICE, *2021 Justice Index: Language Access*,
 33 <https://ncaj.org/state-rankings/justice-index/language-access> (last visited Feb. 11, 2024)
 34 [hereinafter *2021 Justice Index*]. Ensuring that individuals who do not speak or understand the
 35 court’s dominant language is thus vitally important to ensure meaningful participation in hearings
 36 (§ 2.03) and to promote effective decisionmaking by the parties and the court (§ 2.01). First, careful
 37 design of court hearings with litigants’ language needs in mind can improve the accuracy and
 38 efficiency of communication at hearings. Misunderstandings and misinterpretations can lead to
 39 errors, delays, and even injustices. Accurate and clear communication ensures that proceedings run
 40 more smoothly and efficiently. Second, ensuring language access at hearings helps to maintain and

enhance public confidence in the judicial system by bolstering the perception of basic fairness. See *People v. Carreon*, 151 Cal. App. 3d 559, 574 (Cal. Ct. App. 1984) (holding that failing to provide a Spanish-speaking defendant with an interpreter violated the “basic due process right of fairness”); *Negron v. New York*, 434 F.2d 386, 390 (2d Cir.1970) (under principles of due process and “simple humaneness,” litigants with limited English proficiency deserve “more than to sit in total incomprehension” during court proceedings). Finally, language access is particularly important for protecting the rights of vulnerable populations, including immigrants, refugees, and individuals with limited educational backgrounds. These groups may face additional barriers in accessing legal protection and services. See *State v. Pina*, 49 Ohio App. 2d 394, 395-396 (Ohio Ct. App. 1975) (noting that immigrant defendants’ lack of adequate language access was “compounded by cultural and concept differences which operated as a handicap to an explanation of the American judicial concepts to people familiar only with a different system”); *Rodriguez v. Dep’t of Lab. & Indus.*, 85 Wash. 2d 949, 953 (1975) (noting that the general policy of our laws is to “protect those who are unable to protect themselves,” and this includes protecting those with limited English literacy).

The U.S. Constitution itself does not explicitly mandate that courts provide language assistance to litigants in civil, as opposed to criminal, cases. E.g., *State of N.M. ex rel. CYFD v. William M.*, 141 N.M. 765, 774-775 (N.M. Ct. App. 2007) (noting there is “no constitutional right requiring the assistance of a court-appointed interpreter to supplement the right to counsel”); *Jara v. Mun. Ct.*, 21 Cal. 3d 181 (Cal. 1978) (finding no constitutional obligation to provide interpreters at public expense to assist non-English-speaking litigants). However, federal laws and judicial interpretations have established obligations that courts provide language-assistance services to ensure that all individuals, regardless of their English proficiency, have meaningful access to the courts. The Civil Rights Act of 1964, specifically Title VI, prohibits discrimination based on national origin, which has been interpreted by federal agencies and courts to include an obligation to provide language services in court proceedings to ensure access for limited English proficient (LEP) individuals. That interpretation is grounded in the principle that denying a person the ability to communicate effectively in court due to language barriers constitutes discrimination based on national origin. In a 2010 letter written by Assistant Attorney General Thomas Perez, the Justice Department warned that many state-court language-access policies were “inconsistent with federal civil rights requirements” by limiting the types of proceedings in which interpreter services would be provided by the court, charging one or more parties for the cost of interpreters, restricting the provision of language access to courtroom proceedings, and failing to deploy language access support where necessary to ensure effective communication with court-appointed counsel or other case-related personnel, such as guardians ad litem. Letter from Thomas E. Perez, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Chief Justice/State Court Administrator 1, 5 (Aug. 16, 2010), https://www.dol.gov/sites/dolgov/files/oalj/PUBLIC/APA/REFERENCES/MISCELLANEOUS/final_courts_ltr_081610.pdf

Whether or not required by law, many jurisdictions have converged on a set of policies and practices that include (i) court provision of certified or qualified interpreters or other language assistance services at no or low cost to litigants; (ii) posting signs at all major entry and service

access points and providing bench and desk cards in the most commonly spoken languages explaining that language services will be provided at no cost upon request; (iii) providing judges and court staff with bench and desk cards with standard questions to assess a litigant’s English proficiency; (iv) requiring all certified interpreters to complete annual continuing education to maintain certification; (v) maintaining a centralized Language Services Office to coordinate court-wide language services; (vi) identifying documents and signage to be translated and translating those documents pursuant to quality control protocols; and (vii) providing a process for litigants to file and obtain prompt resolution of complaints regarding the provision of language services. See *2021 Justice Index*. Courts should, when practicable, adopt these practices, and should also consider using new technologies, when appropriate, to better meet litigants’ language needs. See JUD. COUNCIL OF CAL., TECHNOLOGICAL OPTIONS FOR PROVIDING AND SHARING COURT LANGUAGE ACCESS SERVICES OUTSIDE THE COURTROOM 16 (2018), <https://www.courts.ca.gov/documents/lap-toolkit-technological-options-outside-the-courtroom.pdf>. See also Chapter 11 (Court Use and Regulation of Technology). Interpretive services should always be available, to avoid unnecessary and/or multiple continuances. In the event an interpreter is not available, telephonic and video interpretation services are available and can often serve as a “an appropriate and reasonable alternative,” depending on the circumstances. Questions and Answers Regarding the Title VI Language Access Guidance Letter to State Courts, U.S. Department of Justice, at 1-2, <https://www.justice.gov/crt/file/1052851/dl?inline>.

c(2). Scheduling. Many courts overseeing high-volume civil dockets schedule large numbers of cases for the same block of time (e.g., the morning or afternoon court session), a practice commonly derided as “cattle calling.” See STATE OF N.Y. UNIF. CT. SYS., REPORT FROM THE SPECIAL ADVISOR ON EQUAL JUSTICE IN N.Y. COURTS (2020), <https://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf> (last visited Feb. 7, 2024) (emphasizing court users’ complaints about “dehumanizing” and “demeaning cattle-call culture” in high-volume courts). The large volume of cases assigned to one hearing window leads to long wait times, often hours. SHANNON MCAULIFFE ET AL., IDEAS42, NATIONAL GUIDE TO IMPROVING COURT APPEARANCES 36 (2023). Concerningly, repeat-player attorneys are able to cluster their cases together to be heard in quick succession, often at the start of a broader hearing session, leaving self-represented litigants waiting even longer. See NAT’L CTR. FOR STATE CTS., CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL 34 (2016), https://www.ncsc.org/__data/assets/pdf_file/0029/19289/call-to-action_-achieving-civil-justice-for-all.pdf [hereinafter CIVIL JUSTICE IMPROVEMENTS] (noting that courts frequently “sequence cases after the initial call to benefit attorneys, resulting in long wait times for self-represented litigants”). That inefficiency and resulting sense of feeling rushed can undermine the central purpose of a hearing: to make litigants feel heard. See Maximillian A. Bulinski & J.J. Prescott, *Online Case Resolution Systems: Enhancing Access, Fairness, Accuracy, and Efficiency*, 21 MICH. J. OF RACE & L. 205, 228 (2016) (noting that high-volume calendars pressure litigants to move in an “assembly-line fashion,” which makes court users less likely to feel “listened to and treated with respect”).

Courts should abandon “cattle calls” in favor of more precise hearing schedules, when practicable. Some smaller courts may have the capacity to schedule individual hearings so that the parties (and their attorneys, where applicable) can avoid long waits for their case to be called. See, e.g., Lauren Sudeall & Daniel Pasciuti, *Praxis and Paradox: Inside the Black Box of Eviction Court*, 74 VAND. L. REV. 1365, 1384 (2021) (describing a Georgia state court practice of scheduling individual hearings and calling parties to confirm availability). Other courts, like Orange County District Court in North Carolina, have implemented “block scheduling,” where hearings are scheduled in 1.5-hour blocks instead of longer morning and afternoon sessions; this reduces wait times and allows users to better predict the time they need to carve out of their day for court. N.C. CT. APPEARANCE PROJECT, FINDINGS AND POLICY SOLUTIONS FROM NEW HANOVER, ORANGE, AND ROBESON COUNTIES (2022), <https://cjl.sog.unc.edu/wp-content/uploads/sites/19452/2022/04/NC-Court-Appearance-Project-Report-4-22-22.pdf> (last visited Feb. 7, 2024). In setting precise hearing times or implementing block scheduling, courts should consider sequencing cases randomly rather than clustering cases involving the same party to avoid asymmetric benefits to repeat players, especially institutional plaintiffs in eviction and debt-collection proceedings. See CIVIL JUSTICE IMPROVEMENTS, *supra*, app. I, at 12 (recommending courts schedule cases for hearings at predesignated intervals and organize dockets “so as not to benefit any category of litigant (for example, volume-driven attorneys) at the expense of other litigants and attorneys”).

Furthermore, for many litigants, the realities of their daily lives may make it difficult—and, in some cases, impossible—to attend time-consuming hearings scheduled during ordinary business hours. See VICTOR D. QUINTANILLA ET AL., ACCESSING JUSTICE WITH ZOOM: EXPERIENCES AND OUTCOMES IN ONLINE CIVIL COURTS 2, 26 (2023) (noting barriers to attending court proceedings, including the need to take time off from work, cost and time for transportation, and waiting times in court); Bulinski & Prescott, *supra*, at 224 (noting that, because many litigants work during regular court hours, the “opportunity costs of going to court can be significant”); David A. Hoffman & Anton Strezhnev, *Longer trips to court cause evictions*, 120 PROC. NAT’L ACAD. SCI. (PNAS), Jan. 3, 2023, at 1, 7 (finding a statistically significant positive relationship between weekday commuting time to court and the rate of default judgments in Philadelphia eviction proceedings). In a 2021 survey conducted by the National Center for State Courts, participants identified the need to take time off work (41% of participants) and the need to secure childcare (22% of participants) as two of the primary obstacles to attending court sessions. See NAT’L CTR. FOR STATE CTS., *The State of State Courts: A 2021 NCSC Public Opinion Survey*, <https://www.ncsc.org/consulting-and-research/areas-of-expertise/court-leadership/state-of-the-state-courts/state-of-the-state-courts> (last visited Feb. 7, 2024).

To better accommodate litigants’ work and childcare obligations, courts should also consider scheduling sessions outside of regular business hours—i.e., on evenings and weekends. See COMM’N ON THE FUTURE OF THE CAL. CTS., JUSTICE IN THE BALANCE 2020 (1993), <https://www.courts.ca.gov/documents/2020.pdf> (finding that expanded hours in California traffic courts reduced failures to appear and default judgments); see also HM COURTS AND TRIBUNALS SERVICE, FLEXIBLE OPERATING HOURS PILOTS EVALUATION FINDINGS (2021), <https://assets.publishing.service.gov.uk/>

government/uploads/system/uploads/attachment_data/file/1005224/Annex_A_-_FOH_Evaluation_Main_Report.pdf (finding flexible court hours decreased the time litigants had to take off work to attend court in the U.K.). A number of courts already employ such flexible scheduling. For example, New York City small-claims courts hold evening court sessions one day a week. See *Civil Court Schedule and Service Changes*, N.Y. STATE UNIFIED CT. SYS., <http://www.nycourts.gov/courts/nyc/smallclaims/courtservicechanges.shtml> (last visited Jan. 10, 2024). The small-claims court in the County of Merced, California holds night court once a month. See *Night Court for Small Claims Cases*, SUPER. CT. OF CAL., CNTY. OF MERCED, <https://www.merced.courts.ca.gov/es/node/116> (last visited Feb. 7, 2024). When practicable, courts should minimize the number of required court appearances, particularly in-person appearances, which can increase the likelihood of missed appearances, disincentivize users from appearing, and cause court users to feel that the court does not respect their time. SHANNON MCAULIFFE ET AL., IDEAS42, NATIONAL GUIDE TO IMPROVING COURT APPEARANCES 25 (2023); see also Chapter 2 (General Principles of Procedure).

However, even expanded hours and more precise calling times may be insufficient to improve court accessibility for parents and caregivers where young children and other dependents are not allowed inside the courtroom. Although a policy of excluding young children may minimize court distractions, when courts require in-person hearing participation, dependents should nonetheless be allowed into the courtroom and/or other accommodations should be made available (e.g., childcare services). San Francisco Superior Court, for example, offers free childcare for parents and caregivers attending court with children up to 16 years old. See *Children's Waiting Rooms*, JUD. BRANCH OF CAL., <https://sf.courts.ca.gov/general-information/childrens-waiting-rooms> (last visited Feb. 7, 2024). The New York State Unified Court System partners with local community agencies to provide children's centers in state courts. See *Children's Centers in the Courts*, N.Y. STATE UNIFIED CT. SYS., <https://ww2.nycourts.gov/ip/childrenscenter/index.shtml> (last visited Feb. 7, 2024).

Remote hearings are an additional tool for accommodating litigants' employment and family obligations. See COMM'N TO REIMAGINE N.Y. STATE CTS., N.Y. CTS.' RESPONSE TO THE PANDEMIC (2023), <https://www.nycourts.gov/LegacyPDFS/press/pdfs/NYCcourtsPandemicPracticesReport.pdf> (finding that virtual proceedings reduced the likelihood that court users with work responsibilities had to take time off and that court users with childcare responsibilities had to make alternative arrangements or pay for childcare). Principles for court use of remote hearings are set forth in § 5.07 (Availability of Remote Hearings) and § 5.08 (Conduct of Remote Hearings).

Courts should also implement liberal rescheduling policies that allow users to reschedule via phone or online instead of requiring in-person requests for continuances. King County District Court, for example, allows litigants in mitigation hearings for traffic or other civil infractions to call the court to reschedule their hearing (once per case). See *Reschedule*, <https://kingcounty.gov/en/legacy/courts/district-court/court-dates-and-fees/reschedule> (last visited Feb. 7, 2024). Additionally, court date reminders, sent via text, voicemail, or live calls containing information about the date, time, and location of the hearing as well as what to expect and what to bring, can make litigants more likely to appear in court, thereby avoiding inadvertent defaults. See MCAULIFFE

ET AL., *supra*, at 10 (citing studies finding court notification programs increased court appearance rates between 4–25 percent and that live call reminders reduced nonappearance by 39 percent). Several California Superior Courts have implemented court date reminder systems. See *Hearing Reminder Service*, <https://hrs.courts.ca.gov/la> (last visited Feb. 7, 2024) (Los Angeles Superior Court); *Court Reminder Notifications*, <https://www.santacruz.courts.ca.gov/online-services/court-reminder-notifications> (last visited Feb. 7, 2024) (Santa Cruz Superior Court); *Court Launches New Hearing Reminder Service*, <https://www.lakecountycourt.ca.gov/DocumentCenter/View/8983/Hearing-Reminder-System-> (last visited Feb. 7, 2024) (Lake County Superior Court). As an alternative, courts might survey court users to determine the need and then schedule a mix of hearing windows, ideally including one or more times on evenings and weekends.

Finally, necessary tradeoffs may arise between the need for flexibility discussed in this Section and the use of specialized courts. Some specialized courts require consistent levels of case flow and, in managing that case flow, may lack the necessary resources to provide a wide range of scheduling options. See Nora Freeman Engstrom, *A Dose of Reality for Specialized Courts: Lessons from the VICP*, 163 U. PENN. L. REV. 1631 (2015). In courts where scheduling flexibility is paramount to providing meaningful access to the courts, the need for flexibility should be balanced against a specialized court’s capacity to accommodate scheduling concerns. See also Chapter 17 (General, Limited, and Specialized Courts).

c(3). Courtroom environment. The courtroom environment can be unfamiliar and inhospitable for many litigants, particularly self-represented ones. See Bulinski & Prescott, *supra*, at 228 (describing high-volume civil courtrooms as “crowded” and “uncomfortable” for litigants); Hannah Lieberman, *Uncivil Procedure: How State Court Proceedings Perpetuate Inequality*, 35 YALE L. & POL’Y REV. 257, 265 (2016) (describing high-volume civil proceedings as “confusing” to many litigants and high-volume courtrooms as “crowded and noisy, dominated by the repeat-lawyer players, and seemingly chaotic”). Crowded, noisy environments can even lead to inappropriate default judgments against defendants who are present in the courtroom, because those defendants are unable to hear and thus respond to docket calls quickly enough. See Hannah Lieberman & Paula Hannaford-Agor, *Meeting the Challenges of High-Volume Civil Dockets*, in TRENDS IN STATE COURTS 89, 93 (NAT’L CTR. FOR ST. CTS., 2016) (finding that in crowded courtrooms, docket calls are often “fast-paced and hard to hear and understand,” and default judgments are “often sought and entered quickly after a defendant does not respond”); Jonathan I. Rose & Martin A. Scott, “*Street Talk*” *Summonses in Detroit’s Landlord-Tenant Court: A Small Step Forward for Urban Tenants*, 52 U. DETROIT J. URB. L. 967, 988 n.88 (1975) (quoting a judge as stating a housing court is so packed that “the clerk calls defaults as soon as possible to ease the congestion”); Isaiah Fleming-Klint et al., *Navigating an Overburdened Courtroom: How Inconsistent Rules, Shadow Procedures, and Social Capital Disadvantage Tenants in Eviction Court*, 23 CITY & COMM’Y 220, 230 (2023) (noting how, in the “noisy and fast-paced” courtrooms of a housing court, tenants struggle to announce their presence during roll call). That is exacerbated in courtrooms where the attorneys for repeat players play a prominent role in dictating how proceedings unfold, resulting in a lack of clarity for unfamiliar litigants as to which actors are court

officials and to the roles and loyalties of the people with whom they interact. HUMAN RTS. WATCH, RUBBER STAMP JUSTICE: US COURTS, DEBT BUYING CORPORATIONS, AND THE POOR 57-60 (2016). Courtroom procedures should aim to create an environment that minimizes distraction and confusion from overcrowding or excessive noise and that maximizes litigant privacy through smaller batches of case calls. See CIVIL JUSTICE IMPROVEMENTS, *supra*, at 33.

Measures that can be taken to further these aims include but are not limited to:

(i) maintaining clear visual cues throughout the courthouse that apply best practices regarding limited literacy, see, e.g., NAT’L CTR. FOR STATE CTS., WAYFINDING AND SIGNAGE STRATEGIES FOR LANGUAGE ACCESS IN THE CALIFORNIA COURTS (2017), <https://www.courts.ca.gov/documents/LAP-Wayfinding-and-Signage-Strategies-Language-Access-in-the-CA-Courts.pdf> (recommending physical signage in courthouses phrased at a 4th–6th grade reading level);

(ii) using plain language in prefatory explanations of what will occur in the courtroom and to explain party responsibilities throughout the proceedings, see, e.g., Hon. Bridget Mary McCormack, *Access to Justice Requires Plain Language*, MICH. BAR. J. (Feb. 2021), <http://www.michbar.org/file/barjournal/article/documents/pdf4article4112.pdf> (advocating for the translation of court forms, orders, and other communications into plain language in Michigan state courts));

(iii) limiting the number of people required to be in the courtroom at any specific time, see, e.g., CIVIL JUSTICE IMPROVEMENTS, *supra*, at 34 (describing the result of overcrowded courtrooms as “noisy” and “chaotic environments in which litigants may not hear their case when it is called or may become distracted by competing activities in the courtroom”); and

(iv) providing equal positioning and treatment to represented and unrepresented parties—for example, not allowing lawyers a privileged position to sit within the courtroom, beyond the bar and closer to the bench. See, e.g., CIVIL JUSTICE IMPROVEMENTS, *supra*, at 34 (recommending that courts provide physical separation between opposing counsel and court personnel to prevent self-represented litigants from mistakenly assuming opposing counsel is connected to the court).

d. Courtroom privacy. Courts should design and maintain courtroom environments to respect the privacy of parties in sensitive matters. Although courts should generally remain open to the public, in sensitive disputes such as certain family-law matters, courts should consider having sufficient space to separate different groups of witnesses, victims, and defendants. See NAT’L CTR. FOR ST. CTS., *The Courthouse: Juvenile and Family Courts*, <https://www.ncsc.org/courthouse/planning/space-planning-standards/juvenile-and-family-courts> (last visited Feb. 9, 2024); CTR. FOR CT. INNOV., *CREATING A DOMESTIC VIOLENCE COURT: ADAPTING THE MODEL TO YOUR COMMUNITY* 23 (2011) (suggestions how to create a safe courthouse environment for domestic-violence victims). Courts can also address privacy concerns by conducting hearings individually or in smaller groups, or by scheduling a hearing at the end of a court’s calendar, which can reduce the number of people otherwise in the courtroom. See also Chapter 13 (Privacy and Confidentiality).

1 **§ 5.03. Hearing Rights and Due Process**

2 **(a) When a hearing is required, it should offer the parties a timely and meaningful**
3 **opportunity to be heard by an impartial decisionmaker, and it should proceed in a manner**
4 **that is reasonably likely to result in a decision in accordance with substantive law and the**
5 **facts.**

6 **(b) Due process imposes affirmative obligations on courts and other rulemakers to**
7 **ensure that opportunities to be heard are meaningful for all parties and that hearings**
8 **generate fair and accurate results.**

9 **Comment:**

10 *a. The due-process right to a hearing.* “‘The fundamental requisite of due process of law
11 is the opportunity to be heard.’” *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Grannis v.*
12 *Ordean*, 234 U.S. 385, 394 (1914)). For this reason, “some kind of hearing is required at some time
13 before a person is finally deprived of his property interests.” *Wolff v. McDonnell*, 418 U.S. 539,
14 557-558 (1972). Exactly what sort of hearing due process requires and at what moment depend
15 upon the circumstances of adjudication. At a minimum, the hearing must be offered at a timely
16 moment, it must allow the parties meaningful opportunities to present evidence and make
17 arguments, and it must proceed in a manner reasonably likely to result in a fair and accurate
18 decision. The fact that the parties have a right to a hearing does not necessarily mean that a hearing
19 will be held in every case; parties may waive this right through the willful failure to appear or by
20 choosing to instead present arguments through court filings—for example, a motion to dismiss. In
21 the latter instance, the opposing litigant must be provided with an opportunity to respond before
22 the decisionmaker renders final judgment. See Chapter 7 (Entry and Enforcement of Judgments).

23 *b. Due process and affirmative court obligations.* Traditionally the hearing has been
24 understood as both required by the logic of an adversarial system and necessary to ensure that an
25 adversarial process successfully vindicates due process’s core values. E.g., *Joint Anti-Fascist*
26 *Refugee Comm. v. McGrath*, 341 U.S. 123, 171-172 (1951) (Frankfurter, J., concurring) (“No
27 better instrument has been devised for arriving at truth than to give a person in jeopardy of serious
28 loss notice of the case against him and opportunity to meet it. Nor has a better way been found for
29 generating the feeling, so important to a popular government, that justice has been done.”). In high-
30 volume civil adjudication, however, a hearing’s success may require adjustments to an otherwise

1 strictly adversarial process, one that relies solely on litigant initiative to identify important issues
 2 and provide the evidence and arguments necessary to a fair and accurate decision. Especially when
 3 parties lack counsel or otherwise face barriers to meaningful participation (§ 2.03), due process
 4 may thus require courts, including judges adjudicating particular cases, and other rulemakers to
 5 take steps proactively to make sure that hearings are meaningful, fair, and effective. *Turner v.*
 6 *Rogers*, 564 U.S. 431, 447-448 (2011). These affirmative obligations may also extend to the
 7 evaluation of particular procedures' cost-effectiveness, to enable rigorous determinations of what
 8 due process should require for particular types of cases and particular categories of litigants going
 9 forward. See Chapter 8 (Systemic Administration). As described in further detail in Chapter 9 (The
 10 Judicial Role), imposition of such affirmative obligations often furthers, and does not detract from,
 11 judicial neutrality. In many cases involving self-represented litigants, affirmative actions on the
 12 part of the court may be necessary to facilitate judicial neutrality.

13 *c. Due process minima.* The principles set forth in this Chapter at times extend beyond the
 14 minimum procedures required to satisfy constitutional guarantees of due process, or they apply in
 15 situations in which constitutional mandates remain underdeveloped or ambiguous. These
 16 principles are neither intended to be a restatement of constitutional law, whether state or federal,
 17 nor are they intended merely to replicate existing constitutional rules. Although courts and other
 18 rulemakers must adhere to all constitutional requirements, they have considerable leeway to craft
 19 procedures and policies in areas that constitutional rules do not address and, in particular, to adopt
 20 more rights-protective procedures and policies. But due process is dynamic and context-specific,
 21 with its requirements pegged, in important part, to the efficacy of particular procedures and their
 22 cost in particular adjudication contexts. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). While
 23 many of the principles set forth in this Chapter sit above current due process minima and so do not
 24 reflect constitutional constraints on the procedural choices of courts and other rulemakers, some
 25 principles could become constitutional obligations as conceptions of due process develop.
 26 Conversely, some principles that currently reflect constitutional obligations could, as doctrine
 27 evolves, fall outside due-process mandates but would still retain their force as principles to which
 28 courts and other rulemakers should aspire.

REPORTERS' NOTES

29 *a. The due-process right to a hearing.* This Section sets forth principles that define the
 30 constitutional baseline for the conduct of hearings and offers a synthesis of due-process

requirements from *Goldberg v. Kelly*, 397 U.S. 254 (1970), to *Turner v. Rogers*, 564 U.S. 431 (2011). The setting for this analysis is hearings for two reasons. First, as compared to certain other Chapters in these Principles, the conduct of hearings has been heavily constitutionalized. Compare § 4.06, Comment *a* & Reporters’ Note to Comment *a* thereto (noting the near-consensus among courts against a constitutional right to discovery). Second, and more practically, the hearing is often the moment in court process that presents the best opportunity to be heard and also poses the greatest risk of undermining that right. That said, and as noted in Comment *c*, this Chapter does not offer a comprehensive restatement of constitutional law in high-volume civil adjudication. Instead, this Section seeks to define the dynamic and evolving constitutional baseline for the conduct of hearings, including affirmative obligations that not all courts overseeing high-volume civil dockets have recognized. Other Sections of this Chapter offer principles for high-volume civil adjudication that sit apart from, but are informed by, this constitutional baseline, addressing, in turn, court and courtroom access and accessibility (§ 5.02), the conduct of hearings (§ 5.04), and the factual record and evidence (§ 5.05), each with a constitutional dimension.

Beyond hearing availability, courts frequently specify due-process guardrails to ensure the fair conduct of hearings, especially those that involve litigants who face barriers to their meaningful participation in parental-rights and child-custody proceedings. The termination of parental rights without a hearing is a clear due-process violation. E.g., *Tara R. v. Dep’t of Fam. and Cmty. Servs.*, 541 P.3d 530, 539-540 (Alaska 2024). A court’s failure to enable a parent’s effective engagement in a hearing by remote means when the parent cannot be physically present in court violates that parent’s due-process rights. *Interest of A.S.*, 319 Kan. 396, 408-409 (2024). A parent who is only permitted to provide testimony but not otherwise participate in proceedings has suffered a due-process violation. In *Interest of M.D.*, 921 N.W.2d 229, 236 (Iowa 2018). A court must notify a child’s guardian of the prospect of the guardianship’s possible termination before the hearing commences. So too must the court indicate during the hearing that the guardianship’s termination is a possibility, to enable the guardian to address the court’s concerns during the hearing. Failure to do so violates the guardian’s due-process rights. *Matter of Guardianship of D.M.F.*, 535 P.3d 1154, 1164-1165 (Nev. 2023). A court that terminates parental rights without a merits hearing, as a sanction for a parent’s failure to appear at a pretrial conference, violates that parent’s due-process rights. In *re E.D.J.*, 348 P.3d 1098, 1101-1102 (Okla. Ct. App. 2015).

This constitutional guidance is not limited to the parental-rights or child-custody context. The Due Process Clause has also generated constraints on processes for wage garnishment, including by strengthening hearing rights. E.g., *Finberg v. Sullivan*, 634 F.2d 50, 58-62 (3d Cir. 1980) (holding that due process requires that a judgment debtor receive notice and the right to request a hearing to challenge the legality of wage garnishment); *Lind v. Midland Funding, L.L.C.*, 688 F.3d 402, 407-408 (8th Cir. 2012) (same). People enduring housing insecurity must have an opportunity to be heard before the government takes action jeopardizing their property. *Davis v. Bissen*, 545 P.3d 557, 573-574 (Haw. 2024); *Todman v. Mayor and City Council of Baltimore*, 104 F. 4th 479, 492 (4th Cir. 2024).

1 *b. The judicial model of due process and its limits.* As elaborated more fully in Chapter 1
 2 (General Principles of Fair Adjudication), modern procedural due-process doctrine in civil cases
 3 originates with *Goldberg v. Kelly*, 397 U.S. 254 (1970), which emphasized the right to a hearing
 4 before a government deprives a person of a protected property interest. E.g., Jason Parkin, *Dialogic*
 5 *Due Process*, 167 U. PA. L. REV. 1115, 1124 (2019) (discussing *Goldberg* and the “Due Process
 6 Revolution”). *Goldberg* extended the adversarial “judicial model”—characterized by trial-type
 7 procedures like evidence presentation, cross-examination, and neutral adjudication—from the
 8 criminal to the civil domain. See Owen M. Fiss, *Reason In All Its Splendor*, 56 BROOK. L. REV.
 9 789, 789 (1990). The Court’s approach assumed that fairness could be achieved by importing
 10 adversarial safeguards into administrative and civil proceedings. That faith in adversarialism
 11 carried forward in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), which articulated a balancing
 12 test evaluating procedural fairness by weighing private interests, risk of error, and the
 13 government’s burden. Courts thus began measuring due-process adequacy by the extent to which
 14 proceedings resembled the judicial model.

15 Despite its foundational role, the judicial model often fails in practice, especially in high-
 16 volume dockets like eviction, debt collection, and child-support enforcement, where many litigants
 17 appear without lawyers and lack the capacity to participate meaningfully in their case. Judge Henry
 18 Friendly and legal scholar Jerry Mashaw recognized early on that relying on adversarial procedures
 19 in mass-adjudication settings can be unrealistic and unfair. Each proposed alternative models:
 20 Judge Friendly’s “investigatory model,” in which judges actively develop the factual record, see
 21 Friendly, *supra*, and Professor Mashaw’s “managerial model,” which emphasizes systemic quality
 22 assurance and procedural consistency across cases, see Jerry L. Mashaw, *The Management Side*
 23 *of Due Process: Some Theoretical and Litigation Notes on the Accuracy, Fairness, and Timeliness*
 24 *in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 782 (1974). Those
 25 critiques highlight that due process, in many contexts, requires more than formal hearings; it
 26 requires systems and procedures that account for practical barriers to participation and what are
 27 often sharp asymmetries in expertise and resources across the two sides of the “v.” Subsequent
 28 work on high-volume civil adjudication has sharpened those critiques and renewed Judge
 29 Friendly’s and Professor Mashaw’s earlier calls for a conception of due process with both
 30 investigatory and managerial elements. See Jason Parkin, *Adaptable Due Process*, 160 U. PA. L.
 31 REV. 1309, 1330 (2012) (summarizing criticism of *Goldberg*); David Ames et al., *Due Process*
 32 *and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1, 22-23 (2020) (calling for an
 33 enriched conception of due process that includes investigatory and managerial elements); Jessica
 34 K. Steinberg, *Adversary Breakdown and Judicial Role Confusion in “Small Case” Civil Justice*,
 35 2016 B.Y.U. L. REV. 899, 919-926 (same); Anna E. Carpenter, *Active Judging and Access to*
 36 *Justice*, 93 NOTRE DAME L. REV. 647, 649-650 (2017) (same).

37 The U.S. Supreme Court’s decision in *Turner v. Rogers*, 564 U.S. 431 (2011), arguably
 38 marked a shift in thinking toward what might be called “mediated adversarialism.” See Chapter 1
 39 (General Principles of Fair Adjudication). The *Turner* Court held that in certain high-volume
 40 adjudication contexts, such as proceedings that may result in incarceration for nonpayment of child

support and where one or more of the parties lack counsel, courts must implement affirmative safeguards—including, where relevant, clear notice of the core issues to be adjudicated, standardized forms, judicially guided factfinding, and on-the-record findings that facilitate appellate and other types of review. That approach blends judicial, investigatory, and managerial elements. While few courts have fully embraced *Turner*’s logic in case law beyond the context of child-support enforcement, many courts and policymakers have nonetheless adopted via rulemaking or other policymaking means a host of related practices, among them a more active judicial role, court-created forms, structured information exchange, and use of judicial staff, to make the process of adjudication fairer, more accurate, and more transparent. In the context of hearings more specifically, many judicial conduct codes now recognize that neutrality does not require passivity; rather, fair judging may require judges to take proactive but even-handed steps to build a complete and accurate record in proceedings involving pro se litigants. See Chapter 9 (The Judicial Role). As a result, while the principles offered herein may sit above due process minima under current doctrine, the constitutional floor could change. As the Supreme Court has repeatedly emphasized, due process is not a rigid formula but a flexible standard, evolving with the demands of particular contexts—and today’s innovations, if proven effective, may well become tomorrow’s constitutional requirements.

§ 5.04. Conduct of Hearings

While hearings in high-volume civil adjudication may vary in format and structure given the varying geography, resources, and staffing of courts, all hearings should, at a minimum:

(a) be preceded, sufficiently in advance of the hearing to enable meaningful preparation by all parties, by a clear statement of the purpose of the hearing and the issues to be presented for decision, the consequences of failure to participate, and possible sources of legal help or information;

(b) not commence until the court or decisionmaker has confirmed that the parties have met all preliminary procedural requirements;

(c) be conducted by an impartial and qualified decisionmaker with clearly established authority to make rulings, consistent with Chapter 9 (The Judicial Role);

(d) begin with a clear statement of the purpose of the hearing in plain language and, when practicable, on the record; the issues to be presented for decision; the basic procedures, including applicable rules of evidence, to be followed; the elements of claims or defenses raised by either party that must be established; the burden of proof

1 or applicable evidentiary standard; and the consequences of failing to prove an
2 element of a claim or defense;

3 (e) provide a meaningful opportunity for each party to present evidence and
4 arguments and counter the opposing party's evidence and arguments, and for the
5 decisionmaker to test the validity of each party's evidence and arguments, consistent
6 with § 5.05 (Factual Record and Evidence) and Chapter 9 (The Judicial Role);

7 (f) when applicable, provide a meaningful opportunity for settlement, as
8 described in Chapter 6 (Settlement);

9 (g) provide a clearly communicated statement, both orally and in writing, of
10 any determination or outcome, consistent with § 5.06 (Court Orders), or, if the matter
11 is taken under advisement, a clear statement of when and how a decision might be
12 issued; and

13 (h) when resulting in a final disposition, provide the parties with relevant
14 information about postjudgment proceedings, including instructions on how to
15 challenge a judgment and steps each party can take with respect to enforcement,
16 consistent with Chapter 7 (Entry and Enforcement of Judgments).

17 **Comment:**

18 *a. Fair hearings generally.* Drawing on due process, courts have developed a functional
19 understanding of what a “fair hearing” requires. Across case law, policy, and practice, four core
20 elements have emerged: a neutral decisionmaker, adequate notice, an opportunity to be heard, and
21 a decision supported by sufficient evidence. This Section elaborates the procedures that can give
22 these elements content in high-volume civil adjudication, with related principles addressed in
23 subsequent Sections.

24 *b. Advance notice.* The obligations in subsection (a) both restate and extend the principles
25 set forth in Chapter 3 (Notice and Service of Process). Advance notice is a fundamental
26 requirement of fairness and due process and furthers multiple ends of procedure, as elaborated in
27 § 2.01 (General Principles of Procedure). Advance notice of the reasons for a hearing and the
28 issues to be presented for decision ensure that all parties can fully prepare, make informed
29 decisions both before and during a hearing, and participate meaningfully. It also increases the
30 likelihood that the court will have all of the information it needs to render a decision without the

1 need for continuances. While advance notice thus facilitates meaningful participation and effective
2 decisionmaking, it also promotes the core procedural goals of fair and accurate decisionmaking
3 and public elaboration of law. Advance notice should be clear, written in plain language, and
4 adhere to the principles of user-centered design, as addressed in § 2.03 (Meaningful Participation).
5 Advance notice should also provide meaningful notice of the issues or questions to be determined
6 at the hearing, the consequences of failure to participate, information about what procedures or
7 rules will apply at the hearing, reasonably anticipated outcomes that might result from the hearing,
8 and possible sources of legal help or information. Although the range of specific issues raised in
9 any hearing may differ and may not always be clear until the hearing itself, the court can still
10 inform parties of the purpose of the hearing, the range of issues generally raised, and the range of
11 possible outcomes. Even for a nonmerits hearing, advance notice as to possible topics to be
12 covered, any applicable rules or procedures, and any services that may be available to the litigants
13 should still be provided. Information as to the range of likely topics and coverage and applicable
14 rules for various hearing types can be provided through attachments included with notice of a
15 hearing; such information could also be provided on court websites, and litigants could be directed
16 to such information (through a QR code or other mechanism) by the hearing notice.

17 *c. Preliminary procedural requirements.* No adjudicator should commence a hearing
18 before confirming that all procedural requirements have been met, unless both parties have
19 knowingly and voluntarily waived any requirements that they are able to waive. As addressed in
20 § 4.08 (Enforcement of Rules Governing Pleading and Information Exchange), procedural
21 requirements regarding pleading and information exchange must be scrupulously followed and
22 vigorously enforced if they are to fulfill their purpose of ensuring fair and accurate outcomes,
23 meaningful participation, and effective decisionmaking by litigants and the court, and of fostering
24 the public development of law. See § 2.01 (General Principles of Procedure). Courts and other
25 rulemakers should create rules requiring a judge or other adjudicator to confirm compliance with
26 such requirements prior to commencing a hearing. Oversight of these requirements may lend
27 themselves to a checklist approach or “bench cards”—concise, quick-reference materials that
28 judges use while presiding over court proceedings—to guide the judge or other adjudicator
29 discretion and ensure compliance with all applicable requirements. See also Chapter 10 (Systemic
30 Administration) (reviewing the benefits and also the potential risks of bench cards).

1 *d. Unbiased, impartial, and qualified decisionmaker.* Nonjudicial decisionmakers may
2 supervise aspects of hearings provided that they do so with the requisite levels of training, skill,
3 and expertise. Delegations of judicial authority to nonjudge court staff, including any limitations
4 on the authority delegated, should be clearly established as a matter of statutory law or court rule
5 and made transparent to all parties, including any limitations on the authority that has been
6 delegated. For example, a court clerk or other member of the court staff might review the
7 sufficiency of the evidence before judgment is entered. See Chapter 7 (Entry and Enforcement of
8 Judgments). Of course, regardless of whether judges or nonjudicial adjuncts preside over hearings,
9 courts have an obligation to assess their quality—including adherence to applicable legal and
10 procedural requirements—and, where deficient, to take steps to remedy the problem. See § 5.03
11 (Hearing Rights and Due Process); see also Chapter 8 (Systemic Administration); Chapter 9 (The
12 Judicial Role).

13 *e. Preliminary statement of purpose, issues, and procedural and evidentiary rules.* At the
14 outset of a hearing in a high-volume docket, the judge or other appropriate decisionmaker should
15 open the proceeding with a clear, accessible explanation of what lies ahead—both to promote
16 procedural fairness and to help ensure meaningful participation, especially by self-represented
17 litigants. This includes stating, in plain language and, when practicable, on the record, why the
18 hearing is taking place, what specific legal questions or factual disputes will be resolved, and what
19 procedural and evidentiary rules will govern the hearing. In particular, the judge or other
20 decisionmaker should identify which party is responsible for proving which claims or defenses,
21 articulate the elements that must be satisfied under the relevant law, and explain the applicable
22 standard of proof. The judge or decisionmaker should also describe the implications of failing to
23 meet this burden, such as the denial of a requested remedy or dismissal of a claim. Providing this
24 structured overview at the outset of the hearing not only reinforces the court’s neutrality and the
25 transparency of the proceedings, but also helps to equip all parties, particularly self-represented
26 ones with limited legal or other capacity, with a basic roadmap for how to participate effectively
27 in the hearing. Chapter 9 (The Judicial Role) sets forth additional principles that govern the
28 ongoing conduct of a judge or other decisionmaker beyond subsection (d)’s preliminary statement
29 of purpose, issues, and procedural and evidentiary rules, including provision of information and
30 explanation to parties, elicitation of information from parties and witnesses, and facilitation of the
31 parties’ compliance with evidentiary rules.

1 *f. Barriers to meaningful participation and affirmative court obligations.* The ways
2 hearings are structured—from courtroom layout to the language used by the judge or other
3 adjudicator and court staff—can indirectly silence parties and otherwise deny parties a meaningful
4 opportunity to be heard. For example, when a judge centers an eviction hearing on the issue of
5 nonpayment, without any exploration of preliminary procedural requirements, other relevant
6 factual issues, or claims the tenant might have raised, the judge’s centering of those issues may
7 create an anchoring effect that deters or deemphasizes engagement with any other issues.

8 An important element of fair hearings is clear communication by the court. As described
9 in § 5.03 (Hearing Rights and Due Process) and Chapter 9 (The Judicial Role), achieving a
10 meaningful opportunity to be heard may require court-provided assistance, including information
11 provided in advance to prepare litigants for the hearing; self-help or other assistance during the
12 hearing (e.g., navigators); translation services; and any other assistance needed for individuals with
13 physical or other disabilities. The court should inquire in advance of the hearing whether any
14 interpretation or other assistance will be required.

15 Some further specific ways in which courts can actively engage litigants during the hearing
16 and ensure a meaningful opportunity to be heard include (i) explaining the process of presenting
17 evidence, questioning witnesses, or providing personal testimony; (ii) breaking the hearing into
18 distinct questions or topics, which can help by directing litigants as to when certain issues or
19 evidence are appropriate and/or most relevant; (iii) ensuring that both parties have an equal
20 opportunity to address all topics; (iv) paraphrasing the arguments made by the parties and
21 confirming accuracy; (v) explaining the basis for a ruling; (vi) soliciting input from all parties on
22 the language of the issuing order and/or using the parties’ language in the order itself; and
23 (vii) making referrals to available resources that might assist the litigant in preparing for the
24 hearing. Concerns specific to people with disabilities, limited literacy, and language access barriers
25 are further addressed in more detail in § 5.02 (Access and Accessibility). The judge’s role in
26 facilitating such proceedings is further discussed in § 5.05 (Factual Record and Evidence) and
27 Chapter 9 (The Judicial Role).

28 *g. Oral orders.* It is incumbent upon the court in high-volume adjudication contexts to
29 ensure that the parties understand any order issued. The judge or other decisionmaker should
30 announce an order and decision at the conclusion of the hearing when possible. If an order is not
31 or cannot be issued at the conclusion of the hearing, the judge or other decisionmaker should

1 inform the parties of any next steps, when an order might be issued, and how the parties will
2 receive the order. If the judge or decisionmaker is able to issue an oral order at the hearing but
3 cannot issue a written order at the same time, the judge or decisionmaker should issue an oral order
4 at the conclusion of the hearing and follow up with a written order. Through colloquy on the record
5 when appropriate, and speaking in plain language, the judge or decisionmaker should confirm that
6 the parties grasp how their rights and obligations may be impacted. Doing so provides
7 instantaneous opportunities for clarification and input from the parties and promotes transparency.
8 Real-time, oral communication of orders can also permit a judge or decisionmaker, whether
9 through verbal or nonverbal means, to demonstrate compassion for the litigants, thus promoting
10 dignity interests. Oral communication of rulings should use any supplemental mechanisms needed
11 to account for litigant capacity, including litigants with disabilities, non-English-speaking litigants,
12 and litigants with limited literacy.

REPORTERS' NOTES

13 *a. Fair hearings generally.* Informed by due process minima, as described in § 5.03
14 (Hearing Rights and Due Process), courts overseeing high-volume civil dockets have engaged in
15 parallel interpretation and provided their own gloss on what a “fair hearing” requires. A survey of
16 case law, administrative policies, and court training materials demonstrates that the primary
17 elements of a “fair hearing” are (i) a neutral arbiter; (ii) notice; (iii) an opportunity to be heard;
18 and (iv) sufficient evidence supporting the decisionmaker’s findings. This Section aims to capture
19 a wide array of courtroom procedures and practices that give meaning to these elements and, taken
20 together, constitute minimally sufficient requirements for the conduct of fair hearings. Subsequent
21 Sections set forth further principles regarding the factual record and evidence (§ 5.05), court orders
22 (§ 5.06), and remote hearings (§§ 5.07 and 5.08). Several of the principles advanced in this Section
23 are more fully elaborated in those subsequent Sections.

24 *b. Advance notice.* Facilitating meaningful participation of the parties at a hearing requires
25 affirmative acts prior to the hearing. See *Soja v. Factoryville Sportmen’s Club*, 522 A.2d 1129,
26 1133 (Pa. Super. Ct. 1987) (“It is the antithesis of due process to bring someone before a court to
27 defend himself on one basis if the court then reaches its decision on a different basis.”). In *Turner*
28 *v. Rogers*, 564 U.S. 431 (2011), the Court emphasized this same factor in holding that “‘substitute
29 procedural safeguards’” were necessary in the absence of counsel to satisfy petitioner’s right to
30 due process, including clear notice of the issue that would “constitute the critical question” in his
31 case. *Id.* at 447, 449. In *Turner’s* case, which concerned compliance with a child-support order,
32 the critical issue was his ability to pay; in the wake of *Turner*, some South Carolina courts included
33 a written statement with such notice on the back of the service form (one county also provided oral
34 notice of the same during the hearing). Elizabeth G. Patterson, *Turner in the Trenches: A Study of*
35 *How Turner v. Rogers Affected Child Contempt Proceedings*, 25 GEO. J. ON POVERTY L. & POL’Y

75, 101 (2017). South Carolina’s Notice of Support Enforcement Hearing also states that “[t]he scope of the hearing will be limited to matters of payment of past-due support and sanctions.” Notice of Support Enforcement Hearing, S.C. Dep’t of Soc. Servs., Form SCCA436, <https://www.sccourts.org/forms/pdf/SCCA436.pdf>.

As elaborated in Chapter 3 (Notice and Service of Process) and Chapter 7 (Entry and Enforcement of Judgments), advance notice is especially crucial for the initial hearing, which can resolve a case, and before any hearing at which a default judgment may be entered. At the outset of a case, parties should receive timely notice of a lawsuit with sufficient time to respond effectively, see § 3.03 (Timing of Notice), and notice containing sufficient information to inform the party of their rights and any resources available to protect those rights, see § 3.06 (Content of Notice). Similarly, parties should receive effective notice of the consequences of a failure to appear or to defend before a hearing where a default judgment may be entered. See Chapter 7 (Entry and Enforcement of Judgments), particularly § 7.02 (Notice Prior to and After Entry of Judgment).

For all other hearings aside from the initial hearing and the default judgment hearing, courts should still endeavor to provide reasonable notice of what is at stake in the hearing, what procedures or legal rules will apply, how the hearing will be conducted, and possible outcomes. See JOHN M. GREACEN & MICHAEL HOULBERG, *ENSURING THE RIGHT TO BE HEARD: GUIDANCE FOR TRIAL JUDGES IN CASES INVOLVING SELF-REPRESENTED LITIGANTS* 7 (2019). Courts should consider conveying the information to parties directly through attachments. See City of Boulder, Eviction Prevention and Rental Assistance Services Program, <https://bouldercolorado.gov/media/4766/download?inline> (attachment notifying tenants of free legal aid for tenants facing eviction). They could also consider posting information about hearings and their accompanying procedures and rules on the self-help pages of court webpages or provide such information in self-help centers in courts. See INST. FOR THE ADVANCEMENT OF THE LEGAL SYS, *COURT COMPASS: MAPPING THE FUTURE OF USER ACCESS THROUGH TECHNOLOGY* 3 (2017) (noting that 48 states and all federal courts provide websites with some forms and self-help content). But cf. D. James Greiner et al., *Self-Help Reimagined*, 92 IND. L.J. 1119, 1123 (2017) (noting that available content does not necessarily mean that parties have taken advantage of the resources or understand the information).

c. Preliminary procedural requirements. This Section requires that, before convening a hearing, a court should ensure that the parties have satisfied all threshold procedural requirements regarding service of process, the statute of limitations, and pleading and information exchange, among any others. The main purpose of that exercise is to ensure the validity of any determination made at the conclusion of the hearing. Conducting such a review avoids scheduling a hearing (with related party inconveniences) that is premature, unnecessary, or barred by failure to meet procedural requirements.

Although the burden is often placed with the parties to raise preliminary procedural issues, in high-volume civil dockets the responsibility for policing such issues and ensuring that the court’s judgment is substantively and procedurally accurate, ultimately rests with the court, as elaborated in Chapter 4 (Pleading and Information Exchange) and Chapter 7 (Entry and Enforcement of Judgments). See generally GREACEN & HOULBERG, *supra*, at 12 (clarifying that

1 courts are responsible for the legal sufficiency of their rulings). In the event that failures in the
 2 adversarial process or the limited capacity and expertise of self-represented litigants lead to a
 3 failure to surface procedural irregularities, the court has an affirmative obligation to address those
 4 issues before issuing a judgment. See Chapter 7 (Entry and Enforcement of Judgments); see also
 5 NAT’L CTR. FOR STATE CTS., CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL 33 (2016)
 6 (“Courts must implement systems to ensure that the entry of final judgments complies with basic
 7 procedural requirements for notice, standing, timeliness, and sufficiency of documentation
 8 supporting the relief sought.”); cf. Jason Parkin, *Adaptable Due Process*, 160 U. PA. L. REV. 1309,
 9 1359, 1366-1367 (2012) (noting the need for prehearing procedures that can identify and address
 10 actions not supported by facts or law).

11 In order to discharge these obligations, courts and other rulemakers should develop a
 12 postfiling, prehearing screening mechanism to ensure that all requirements, including that a
 13 complaint and summons was properly served and fell within the statute of limitations. See Chapter
 14 8 (Systemic Administration) (offering principles for use of “teaming” by judges and court staff to
 15 perform such screens); Chapter 7 (Entry and Enforcement of Judgments) (offering principles for
 16 reviewing substantive and procedural sufficiency prior to entry of judgment.)

17 Ensuring that rulings that result from court hearings adhere to all legal requirements,
 18 including preliminary procedural requirements, promotes effective use of judicial resources and
 19 minimizes needed hearing time. See § 2.01 (General Principles of Procedure) (discussing court
 20 optimization of resources). In addition, increased judicial or court involvement in determining
 21 whether procedural prerequisites have been met will help to ensure consistent outcomes for all
 22 litigants, regardless of representation status. See GREACEN & HOULBERG, *supra*, at 11
 23 (emphasizing the importance of consistency of outcome across litigant type based on the law and
 24 facts of the case even if a litigant lacks legal representation). Effective screening to ensure
 25 procedural compliance also diminishes reliance on the appellate process as a mechanism for
 26 retroactively ensuring compliance with procedural requirements. Screening thus plays a
 27 particularly important role in many high-volume civil-adjudication areas, where appeals are
 28 unlikely and litigants are often without the benefit of legal counsel and otherwise lack the resources
 29 or expertise to identify and effectively raise such issues on appeal.

30 *d. Unbiased, impartial, and qualified decisionmaker.* Numerous state courts have held that
 31 a fair hearing requires an impartial and unbiased decisionmaker. E.g., *In re Marriage Rounds*, 423
 32 P.3d 895, 900 (Wash. App. 2018) (“All litigants are guaranteed the right to an impartial judge.”);
 33 *Schmeeckle v. Hamilton Cnty.*, No. E2023-01533-COA-T10B-CV, 2023 WL 9083111, at *12
 34 (Tenn. App. Nov. 20, 2023) (“[L]itigants are entitled to have cases resolved by fair and impartial
 35 judges.” (citing *Cook v. State*, 606 S.W.3d 247, 253 (Tenn. 2020))); *Plaistow Bank & Trust Co. v.*
 36 *Webster*, 433 A.2d 1332, 1334 (N.H. 1981) (“It is the right of every citizen to be tried by judges
 37 as impartial as the lot of humanity will admit.”); *Cummings v. Wayne County*, 533 N.W.2d 13, 14
 38 (Mich. App. 1995) (“Due process in civil cases generally requires notice of the nature of the
 39 proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial
 40 decisionmaker.”). An impartial decisionmaker is also a core requirement in administrative

proceedings. E.g., *Chicago v. Wash. State Human Rights Comm’n.*, 557 P.2d 307, 312 (Wash. 1976) (“[E]ven a mere suspicion of irregularity, or an appearance of bias or prejudice, is to be avoided by the judiciary in the discharge of its duties”); *Clark v. City of Hermosa Beach*, 56 Cal. Rptr. 2d 223, 233 (Cal. Ct. App. 1996) (noting that the protection of fair procedure rights includes impartiality of the adjudicators); *Babcock v. Saint Francis Med. Ctr.*, 543 N.W.2d 749, 760 (Neb. Ct. App. 1996) (noting that “a hearing before an impartial decisionmaker” is a “hallmark[] of procedural due process”); *In re Sprague*, 564 A.2d 829, 839 (N.H. 1989) (“An impartial tribunal is an essential element of a fair hearing.”).

Some of those courts have adopted the more formal (and incorrect) view that, in order to be impartial, the judge or decisionmaker should not play an active role in soliciting information from either party, even in an attempt to supply essential elements of the case. See, e.g., *R.O. v. State*, 46 So. 3d 124, 126 (Fla. Dist. Ct. App. 2010) (“[J]udicial neutrality becomes much more impaired when the trial court actively seeks out the presentation of additional evidence.”); *Jones v. State Dep’t of Pub. Health & Welfare*, 354 S.W.2d 37, 40 (Mo. Ct. App. 1962) (“[H]ostile conduct and comments on the part of the presiding officer indicating bias and prejudgment may constitute a denial of fundamental justice.”). As more fully elaborated in Chapter 9 (The Judicial Role), if done in the role of factfinder rather than advocate, soliciting relevant information as needed from the parties does not render the judge partial and instead advances the court’s responsibility to ensure an accurate and fair proceeding. See GREACEN & HOULBERG, *supra*, at 14-15 (noting that judges can ensure a meaningful opportunity for litigants to be heard by eliciting needed information from litigants). To the contrary, relying on evidence provided primarily by one party in the absence of a full factual record may render the court incapable of an impartial decision. Section 5.05 (Factual Record and Evidence) and Chapter 9 (The Judicial Role) elaborate on these principles.

e. Preliminary statement of purpose, issues, and procedural and evidentiary rules. At the outset of a hearing in high-volume civil adjudication, the judge or other appropriate decisionmaker should take care to orient all participants with a clear, accessible explanation of what lies ahead. See Chapter 9 (The Judicial Role) (describing judicial obligation to provide explanation). This initial orientation serves multiple functions: it signals procedural fairness, it reinforces the court’s role as a neutral arbiter, and it helps ensure that litigants, especially those without counsel, can meaningfully engage in the proceeding. A structured introduction should include a plain-language statement, on the record, of why the hearing is taking place, what specific legal questions or factual disputes are before the court, and what procedural and evidentiary rules will guide the process. Such explanations demystify the legal environment, reduce anxiety, and increase the likelihood that participants will present the information the court needs to reach a just and accurate decision.

Equally important is the judge’s duty to clarify the substantive stakes of the hearing. This entails identifying which party bears responsibility for proving which claims or defenses, setting out the legal elements that must be satisfied, and articulating the applicable standard of proof. The court should also explain the consequences of failing to meet these burdens, such as denial of a requested remedy, dismissal of a claim, or entry of judgment for the opposing party. By offering this roadmap, the judge provides all parties—particularly self-represented litigants or those with

1 limited capacity to navigate formal procedure—with the basic tools to participate effectively.
 2 Doing so enhances not only the perceived and actual fairness of the process, but also the accuracy
 3 and legitimacy of judicial outcomes in high-volume dockets.

4 *f. Affirmative court obligations—standardization via “bench cards.”* Many of the principles
 5 advanced in this Section can be achieved via use of “bench cards.” As elaborated in Chapter 8
 6 (Systemic Administration), bench cards are concise reference materials that are designed to assist
 7 judges in applying procedures, substantive law, and evidence rules accurately and consistently
 8 during hearings. See INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., UNBUNDLED LEGAL
 9 SERVICES IN THE NEW NORMAL 15 (2022) (noting that bench cards are a resource for judges to assist
 10 self-represented litigants); Ryan Cooper, *Don’t Look Now, but American Judges are Attacking*
 11 *Debtor’s Prison*, THE WEEK (Feb. 13, 2017), [https://theweek.com/articles/678870/dont-look-now-](https://theweek.com/articles/678870/dont-look-now-but-american-judges-are-attacking-debtors-prison)
 12 [but-american-judges-are-attacking-debtors-prison](https://theweek.com/articles/678870/dont-look-now-but-american-judges-are-attacking-debtors-prison) (describing bench cards as “basically a cheat
 13 sheet for following the law”); see e.g., Sup. Ct. of the State of Ariz., Admin. Order No. 2017-81,
 14 Bench Cards for Ability to Pay at Sentencing in Criminal and Civil Traffic Cases, [https://](https://www.ncsc.org/__data/assets/pdf_file/0031/64489/AZ-admin-order-2017-81-bench-cards.pdf)
 15 www.ncsc.org/__data/assets/pdf_file/0031/64489/AZ-admin-order-2017-81-bench-cards.pdf
 16 (noting the steps courts should take in determining whether to incarcerate individuals for failure to
 17 pay court fines and fees); Mich. Judicial Institute, Determining the Ability to Pay in the Collection
 18 of Court Ordered Financial Obligations (Apr. 30, 2021), [https://www.ncsc.org/__data/assets/](https://www.ncsc.org/__data/assets/pdf_file/0024/64491/MI-Ability-to-Pay-Benchcard.pdf)
 19 [pdf_file/0024/64491/MI-Ability-to-Pay-Benchcard.pdf](https://www.ncsc.org/__data/assets/pdf_file/0024/64491/MI-Ability-to-Pay-Benchcard.pdf) (listing what constitutes adequate notice,
 20 defining a “meaningful opportunity to raise inability to pay, and noting the court’s required
 21 findings”); Tex. Office of Ct. Admin., Bench Card for Judicial Processes Relating to the Collection
 22 of Fines and Costs: Justice and Municipal Court Version—Applies to Fine-Only Offenses, [https://](https://www.ncsc.org/__data/assets/pdf_file/0030/64497/TX-sb-1913-justice-municipal.pdf)
 23 www.ncsc.org/__data/assets/pdf_file/0030/64497/TX-sb-1913-justice-municipal.pdf (listing the
 24 procedural requirements, in a checklist format, for court collection of fines and fees); Minn. Jud.
 25 Branch, Bench Card: Courtroom Interpreting, [https://www.mncourts.gov/Documents/0/Public/](https://www.mncourts.gov/Documents/0/Public/Interpreter_Program/Bench_Card_-_Interpreter_2012.pdf)
 26 [Interpreter_Program/Bench_Card_-_Interpreter_2012.pdf](https://www.mncourts.gov/Documents/0/Public/Interpreter_Program/Bench_Card_-_Interpreter_2012.pdf) (determining the need for an interpreter);
 27 Jud. Officer Bench Card: Stalking, [https://www.ncjfcj.org/wp-content/uploads/2022/10/SPARC-](https://www.ncjfcj.org/wp-content/uploads/2022/10/SPARC-Judicial-Bench-Card-For-Stalking.pdf)
 28 [Judicial-Bench-Card-For-Stalking.pdf](https://www.ncjfcj.org/wp-content/uploads/2022/10/SPARC-Judicial-Bench-Card-For-Stalking.pdf) (identifying stalking behaviors to issue restraining orders).
 29 Bench cards often summarize complex legal issues, statutory requirements, guidelines for assessing
 30 evidence, procedural steps, and other critical information relevant to the cases before them. E.g.,
 31 Sup. Ct. of Neb., BENCH CARD: Exception Hearings, [https://supremecourt.nebraska.gov/sites/](https://supremecourt.nebraska.gov/sites/default/files/files/2921/Exception_Hearings_Bench_card.pdf)
 32 [default/files/files/2921/Exception_Hearings_Bench_card.pdf](https://supremecourt.nebraska.gov/sites/default/files/files/2921/Exception_Hearings_Bench_card.pdf) (listing the procedural timeline for
 33 termination of parental rights hearing and relevant state statutes). These decisional aids standardize
 34 the steps adjudicators should take in presiding over a hearing and provide specific factors and
 35 evidence to be considered, which can help to minimize bias and ensure that any adjudicators, J.D.
 36 or not, decide cases as consistently and accurately as possible.

37 Bench cards serve multiple purposes. They help streamline hearings by providing judges
 38 with immediate access to essential information, thus reducing lengthy pauses to look up legal
 39 standards or procedural rules. By standardizing the information available to judges across similar
 40 cases, bench cards promote uniformity in the application of the law, contributing to fairness and

predictability in judicial outcomes. See Colleen M. Berryessa et al., *Prosecuting From the Bench? Examining Sources of Pro-Prosecution Bias in Judges*, 28 *LEGAL & CRIMINOLOGICAL PSYCH.* 1, 10 (2022) (noting that bench cards could be behavioral nudges to interrupt bias). Bench cards also serve as a safeguard against misapplication of the law by summarizing key legal principles and procedural requirements that must be considered during the decisionmaking process. See Brittany Kauffman & Mark Staines, *Task Force Releases ‘Bench Card,’ Additional Resources for Judges on Fines and Fees*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL. SYS. (Feb. 24, 2017), <https://iaals.du.edu/blog/task-force-releases-bench-card-additional-resources-judges-fines-and-fees> (describing bench cards as providing “a clear set of instructions for state judges to use when determining whether a person has the means to pay” court fines). Finally, bench cards serve as a means for judges to connect litigants to appropriate legal help, social services, or community resources that may be particularly helpful in high-volume civil-adjudication areas such as eviction, debt collection, or family law. E.g., Sup. Ct. of Neb., *BENCH CARD: Aging out Resources*, https://supremecourt.nebraska.gov/sites/default/files/u2921/Aging_out_Benchcard_2020_10-2022.pdf (providing resources for youth aging out of the foster and/or justice systems); Texas Housers, *‘Case Dismissed!’ What Does This Mean for Tenants in Eviction Hearings?*, (June 14, 2022), <https://texas-housers.org/2022/06/14/tenant-eviction-hearing-case-dismissal/> (including in the bench card a check-list reminder about whether the decisionmaker directed parties to resources).

That said, reliance on bench cards also presents risks that courts and other rulemakers should take steps to mitigate. First, bench cards, if not carefully and properly constructed, can perpetuate legal or procedural errors at scale. For this reason, use of bench cards should always be coupled with appropriate training, and bench cards should always be updated promptly to reflect changes in applicable law. See NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES, *RIGHT FROM THE START: THE CCC PRELIMINARY PROTECTIVE HEARING BENCHCARD STUDY REPORT 7* (2012) (noting the importance of training); see also NAT’L CTR. FOR STATE CTS. ET AL., *HELPING COURTS ADDRESS IMPLICIT BIAS: STRATEGIES TO REDUCE THE INFLUENCE OF IMPLICIT BIAS* 12 (2012), https://www.ccf.ny.gov/files/2215/2044/3779/Helping_courts_reduce_the_influence_of_implicit_bias.pdf (noting concern about untrained judges’ sporadic application of bench cards designed to reduce implicit bias). Second, use of bench cards can induce a form of “automation bias”—defined as the tendency of users of an automated or algorithmic process to become complacent—thus reducing their vigilance and openness to contradictory information and arguments that do not fit within a preset framework. E.g., Raja Parasuraman & Dietrich H. Manzey, *Complacency and Bias in Human Use of Automation: An Attentional Integration*, 52 *HUM. FACTORS* 381 (2010); Linda J. Skitka & Kathleen Mosier, *Accountability and Automation Bias*, *INT. J. HUMAN-COMPUTER STUDIES* (2000). Cf. *State v. Loomis*, 881 N.W.2d 749, 772 n.2 (Wis. 2016) (Roggensack, C.J., concurring) (clarifying that the court’s decision permits trial courts to *consider* criminal risk assessment tool output but may not *rely* on the tool). Overreliance on bench cards can also lead to the atrophy of judicial judgment and skill, as judges become less practiced in the many tasks that must be performed from the bench.

g. Oral orders. Except where a matter or issue is taken under advisement, the court should announce on the record its order and decision at the conclusion of the hearing. Doing so allows the

judge to “use nonverbal behavior to present the ruling in a way that demonstrates compassion for both litigants.” GREACEN & HOULBERG, *supra*, at 15. It also allows the parties to seek clarification if needed, which is helpful not only to ensure party comprehension of and compliance with the order but also to alert the court to any points it may have overlooked. *Id.* Announcing the order and decision from the bench also allows the judge to seek input from the parties as needed and make the judge’s decisionmaking process as transparent as possible. Providing an explanation further enables the court to “provide[] the parties with examples of principles they can apply between themselves in resolving future disputes.” *Id.* In addition to explaining the terms and nature of the order, the court should provide litigants with any available and relevant guidance as to postjudgment proceedings, including information regarding enforcement and filing a motion to vacate or an appeal. JOHN M. GREACEN & MICHAEL HOULBERG, *ENSURING THE RIGHT TO BE HEARD: GUIDANCE FOR TRIAL JUDGES IN CASES INVOLVING SELF-REPRESENTED LITIGANTS* 16 (2019) (“After summarizing the terms of the order, trial judges should provide self-represented litigants with instructions about what to do if they want to appeal their case. The court can use a standard fact sheet written in plain English to assist in this process.”). All orders delivered orally should be accompanied, either simultaneously or subsequently, by a written order.

§ 5.05. Factual Record and Evidence

(a) Courts and other rulemakers should tailor evidentiary rules to particular high-volume civil-adjudication case types or case features and, when appropriate, simplify those rules to ensure that parties are heard, relevant and reliable evidence is introduced, and claims and defenses are fairly adjudicated. In particular, courts and other rulemakers should consider:

(1) revising evidentiary rules to focus on the weight and sufficiency of evidence rather than its admissibility;

(2) consolidating multiple evidentiary rules into a single, easily understood standard; and

(3) narrowing the scope or application of evidentiary rules to contexts or types of evidence that raise particular concerns about reliability or probative value.

However, courts and other rulemakers should exercise caution in eliminating evidence rules entirely or revising evidence rules that protect foundational rights or serve non-adjudicatory ends, such as rules governing privilege.

(b) When presiding over a hearing, a judge or other appropriate decisionmaker should take reasonable steps to ensure the creation of a factual record necessary to render a fair and accurate decision. At a minimum, a judge or other appropriate decisionmaker should:

1 **(1) clearly communicate the evidentiary rules that will apply to particular**
2 **types of evidence at the start of a hearing, consistent with § 5.04, and when evidence**
3 **is introduced thereafter; and**

4 **(2) explain procedures, processes, and legal requirements, consistent with**
5 **§ 9.02; elicit facts and arguments, consistent with § 9.03; adjust procedures to excuse**
6 **nonprejudicial failures, consistent with § 9.04; and facilitate compliance with**
7 **evidentiary rules, consistent with § 9.05.**

8 **Comment:**

9 *a. Court obligations regarding the factual record.* Courts have a longstanding duty to take
10 reasonable steps to ensure the creation of a factual record necessary to reach an accurate decision.
11 That obligation is well-grounded in multiple legal sources, including the Fifth Amendment’s
12 guarantee of due process for all persons, procedural and evidentiary rules governing judicial
13 factfinding, and a growing body of case law, elaborated more fully in Chapter 9 (The Judicial
14 Role), imposing a duty on judges to ensure the legal and factual sufficiency of their rulings by
15 providing information and explanation, eliciting facts and arguments, construing pleadings and
16 adjusting procedures, and facilitating parties’ compliance with evidentiary rules.

17 As in civil litigation more generally, much of the evidence-gathering work in high-volume
18 civil adjudication will fall on the litigants themselves. However, ensuring an adequate factual
19 record is also appropriately understood as a duty of the court, particularly in high-volume civil-
20 adjudication areas that feature sharp asymmetries across the parties in expertise, resources, and
21 access to legal help. The baseline requirement that courts ensure their decisions rest on an adequate
22 factual foundation has two key implications: first, for the evidentiary rules that are promulgated
23 by courts and other rulemakers, as addressed in subsection (a); and second, how a judge or other
24 appropriate decisionmaker conducts a hearing and applies evidentiary rules in particular cases, as
25 addressed in subsection (b).

26 *b. Tailored and simplified evidentiary rules.* Subsection (a) addresses the proper
27 formulation of evidentiary rules, calling on courts and other rulemakers to tailor those rules to
28 particular high-volume civil-adjudication areas and, when appropriate, simplify those rules to
29 promote fair and accurate adjudication.

1 This Section’s call for tailored and simplified evidentiary rules rests on two broad grounds.
2 First, tailored and simplified rules can steer between a pair of intractable tensions in high-volume
3 civil adjudication. One tension is how to grant latitude to judges and other decisionmakers to
4 evaluate the reliability and probative value of evidence while still providing basic safeguards
5 against unreliable evidence and inconsistent or biased decisionmaking. A second tension is how
6 to balance the greater accessibility for self-represented litigants that simplified rules can provide
7 against the risk that parties with greater expertise, resources, and access to legal help will be able
8 to exploit simplified rules and adjudicative informality to their advantage. In particular, while
9 simplification can lower access barriers, it can also invite more-expert, better resourced, and
10 typically represented parties to flood the record with unauthenticated documents, hearsay-laden
11 declarations, or conclusory ledgers that skate by untested. Subsection (b)’s enumerated ways that
12 courts and other rulemakers might tailor and simplify evidentiary rules attempt to steer between
13 both of these tensions.

14 Second, this Section’s call for tailored and simplified evidentiary rules joins a broader
15 reassessment of American evidentiary traditions to better reflect current litigation realities in high-
16 volume civil adjudication and beyond. Rules of evidence that commonly apply in conventional
17 civil litigation, as typified by the Federal Rules of Evidence, may be less appropriate in high-
18 volume civil adjudication for at least three reasons. To begin, in most high-volume civil-
19 adjudication areas, judges or other appropriate decisionmakers, rather than juries, serve as
20 factfinders. This undermines the typical bifurcation in jury trials in which the judge is the
21 gatekeeper and screener of evidence and the jury is the ultimate factfinder based on the prescreened
22 evidence put before it. By contrast, in most high-volume civil-adjudication contexts, the judge or
23 other appropriate decisionmaker serves in both the gatekeeper and factfinder roles, lessening the
24 need for stringent evidentiary rules, such as those governing admissibility, that are designed to
25 protect lay decisionmakers and mitigate prejudice to one or more of the parties.

26 Moreover, many litigants in high-volume civil adjudication, particularly those who are self-
27 represented, may struggle to understand or apply complex evidentiary doctrines. See *Powell v.*
28 *Alabama*, 287 U.S. 45, 69 (1932) (“Even the intelligent and educated layman has small and
29 sometimes no skill in the science of law. . . . He is unfamiliar with the rules of evidence.”). In an
30 eviction matter, a self-represented tenant who asserts that the landlord has engaged in deceit and
31 has also made similar misrepresentations to other tenants may be met by a trio of objections from

1 the landlord's counsel: that the accusation is hearsay, that the accusation is not based on the
2 tenant's personal knowledge, and that the tenant is barred from developing such facts even by
3 direct testimony, as they constitute propensity evidence. Meeting these objections requires an
4 understanding of an array of evidentiary principles that exceed the limited legal capacities of most
5 self-represented litigants. Well-tailored and simplified evidentiary rules can be more intuitive and
6 usable for the self-represented litigants who comprise a large proportion of the parties in many
7 high-volume civil-adjudication areas.

8 Finally, conventional rules of evidence can impose significant burdens on courts in high-
9 volume civil adjudication. Because many litigants, particularly self-represented ones, cannot
10 understand or apply complex evidentiary doctrines, judges and other appropriate decisionmakers
11 often struggle to uphold rules while maintaining basic fairness, imposing burdens on them and
12 needlessly consuming court time. In contrast, tailored and simplified rules can reduce the burden
13 on courts by allowing judges and other decisionmakers to focus on substantive issues, such as the
14 weight and sufficiency of the evidence, rather than technical rules of admissibility.

15 Tailored rules can bring significant further benefits in high-volume civil adjudication.
16 Different case types will often vary in their fact patterns, the types of evidence that predominate,
17 and burdens of proof in ways that one-size-fits-all evidentiary rules are not designed to handle. In
18 debt-collection matters, for instance, tailored rules can better calibrate authentication and hearsay
19 rules to recurring types of evidence, such as machine-generated business records, while imposing
20 targeted safeguards, such as data-provenance requirements and anti-robo-signing attestations, to
21 deter sloppy or abusive filings. Similarly, for eviction cases, evidentiary rules might be tailored in
22 light of the prevalence of photographic evidence and assertions about patterns of behavior by
23 landlords and tenants alike. In general, tailored evidentiary rules that take account of the particular
24 features of a given high-volume case type can empower courts to hear the right evidence quickly
25 and fairly while avoiding unproductive evidentiary back-and-forth or costly errors. See also § 2.02
26 (Tailored Procedure and Case Management).

27 In tailoring and simplifying evidentiary rules, courts and other rulemakers should consider
28 the capacities and resources of the parties, including self-represented litigants. In some settings,
29 the optimal rule will be party-specific and apply differently depending on party characteristics,
30 such as whether the party is a plaintiff or defendant, is an entity or individual, or is represented.
31 However, well-tailored and simplified evidentiary rules need not always apply different

1 evidentiary rules to different parties. Rather, courts and other rulemakers should aim, whenever
2 possible, to craft rules that accommodate the needs and capacities of all parties within a given
3 high-volume civil-adjudication case type.

4 Courts and other rulemakers should also recognize the cognitive, institutional, and
5 environmental constraints on adjudicators in many high-volume civil-adjudication contexts.
6 Heavy case calendars, short hearing slots, fragmented records, remote-platform glitches,
7 interpreter lag, and emotionally charged subject matter increase cognitive load and push judges
8 and other decisionmakers toward mental shortcuts, rules of thumb, and other decisionmaking
9 heuristics rather than careful and patient consideration. Evidentiary rules should be tailored and
10 simplified to make the legally correct decision the easy decision, enabling consistent, accurate
11 adjudication while preserving each party's meaningful opportunity to be heard.

12 This Section follows the approach of a growing set of jurisdictions that have modified the
13 evidentiary rules that apply in particular case types or particular courts, including in high-volume
14 civil adjudication. Subsections (a)(1) through (a)(3) highlight three ways that courts and other
15 rulemakers might tailor and simplify evidentiary rules in a given high-volume civil-adjudication
16 context. In each instance, courts and other rulemakers should aim to achieve a balance between a
17 predictable, consistent, rule-based structure while ensuring that all parties, whatever their
18 resources, expertise, or access to legal help, have a meaningful opportunity to be heard.

19 Under subsection (a)(1), courts and other rulemakers should consider revising evidentiary
20 rules to focus on the weight and sufficiency of evidence rather than its admissibility. One way to
21 do so is to make certain types of evidence presumptively admissible if the evidence is relevant and
22 more likely than not authentic. Some high-volume civil-adjudication areas feature recurring types
23 of evidence—for instance, photographs, social-media posts, neighbor complaints, or rent ledgers
24 and property-management software printouts in eviction cases, or third-party data, such as credit
25 bureau reports or skip-traces, in debt-collection cases. Courts and other rulemakers might conclude
26 that a particular type of evidence, taking into account its typical use in litigation, advances in
27 technology, the costs and burdens of obtaining alternative evidence, and the practical realities of
28 high-volume civil adjudication, enjoys sufficient reliability and probativeness to justify lowering or
29 even eliminating barriers to its admission. Some jurisdictions, for example, already permit self-
30 authentication of qualifying business records via certification rather than a witness, or permit
31 landlords to prove ledgers, payment histories, and notices without sworn certifications. Courts and

1 other rulemakers might likewise conclude that a photograph with a date-and-time stamp offered by
2 a tenant-defendant to prove habitability conditions is presumptively admissible, thus shifting the
3 burden to a landlord to raise concerns about its reliability or offer contrary evidence. That said,
4 courts and other rulemakers should take care that such presumptions are adopted in principled ways,
5 using common metrics and criteria, to avoid favoring some parties or some categories of evidence
6 over others when the case for a tailored and simplified evidentiary rule is equally compelling.

7 In shifting the focus of evidentiary rules from admissibility to weight and sufficiency,
8 courts and other rulemakers might likewise consider a rule that makes certain types of evidence
9 presumptively admissible but then provide rules for how much weight to attach to that evidence
10 based on enumerated indicia of reliability. By emphasizing inference over exclusion, and by
11 further providing guidance for how evidence is to be weighed and interpreted rather than screened,
12 well-tailored and simplified rules of evidence can address the practical demands of factfinding in
13 high-volume civil adjudication while recognizing the cognitive, institutional, and environmental
14 constraints on adjudicators in those contexts.

15 That said, there are risks to reorienting evidentiary rules away from admissibility and
16 toward inference and weight. Chief among them is the concern that evidentiary rules that privilege
17 inference and weight over admissibility can erode judicial accountability, since fact
18 determinations, which are reviewed under a clearly-erroneous standard, are generally thought to
19 be more insulated from appellate review than admissibility determinations, which are reviewed
20 under an abuse-of-discretion standard. Moreover, some degree of gatekeeping may be necessary
21 to preserve the integrity of adjudication. For instance, certain types of evidence—such as
22 inflammatory character evidence, prior-bad-act evidence offered solely to disparage an opponent,
23 or highly partial hearsay introduced without cross-examination—are so problematic that their mere
24 presence can compromise both the process of adjudication and its perception. Even when an
25 adjudicator ostensibly discounts such material, its admission may still create an appearance of
26 unfairness and erode public confidence in the system.

27 Under subsection (a)(2), courts and other rulemakers should consider consolidating
28 multiple evidentiary prohibitions and exceptions into a single comprehensible standard. For
29 instance, courts and other rulemakers could adopt a rule that an out-of-court statement is
30 admissible if the judge determines that its admission is justified by its necessity (defined as the
31 importance of the evidence and the availability of the declarant) and its reliability (defined as its

1 corroboration and the presence or absence of an incentive to lie), thus replacing the multilevel rules
2 and panoply of exceptions that govern hearsay evidence under many evidence codes.
3 Alternatively, courts and other rulemakers might adopt a rule that evidence should be excluded
4 only when its prejudicial effect substantially outweighs any probative value, thus replacing an
5 extensive evidence code with a single standard that tracks Federal Rule of Evidence 403 or its
6 state-level equivalents and thus vests significant discretion in trial judges.

7 Under subsection (a)(3), courts and other rulemakers should consider narrowing the scope
8 or application of evidentiary rules. A common proposal is to redefine hearsay to include only
9 testimonial statements made with the intent to accuse or with an eye toward litigation, thus
10 capturing only statements that amount to “giving testimony” outside of court with the intention of
11 influencing litigation. As elaborated in Reporters’ Note to Comment c, that approach parallels the
12 U.S. Supreme Court’s narrowing of the application of the Confrontation Clause to formal
13 statements made with the primary aim of establishing evidence for prosecution in *Crawford v.*
14 *Washington*, 541 U.S. 36 (2004).

15 As already noted above, courts and other rulemakers face two core challenges in tailoring
16 and simplifying evidentiary rules along the lines enumerated in subsections (a)(1) to (a)(3). First
17 is how to give judges and other decisionmakers latitude to evaluate the reliability and probative
18 value of evidence while providing guardrails that protect against unreliable evidence and potential
19 judicial bias. Second is how to strike the right balance between the greater accessibility that tailored
20 and simplified evidentiary rules can provide in high-volume dockets pervaded by self-represented
21 litigants and the risk that parties with greater expertise, resources, and access to representation will
22 exploit simplified rules to their advantage using their greater capacity for advocacy.

23 To steer between these concerns, subsection (a) aims to occupy a pragmatic middle ground
24 between traditional evidentiary rules and what is sometimes called the “free proof” model, in which
25 judges are vested with open-ended discretion to rely on their expertise and common sense to admit
26 and weigh evidence. As elaborated in Comment c, traditional evidentiary rules supply structure and
27 predictability but can be excessively rigid and applied in overly formalistic ways in high-volume
28 civil adjudication. The free-proof model, by contrast, gives judges wide latitude to admit and
29 evaluate evidence, a feature that is often praised for promoting flexibility and efficiency in bench
30 trials but can also lead to inconsistency across judges and jurisdictions, unpredictability, bias, and
31 inaccuracies in decisionmaking. As further elaborated in Reporters’ Note to Comment c, this

1 Section’s answer to competing concerns about excessive discretion or excessive formality is careful
2 calibration, not retreat (to the traditional rules of evidence) or revolution (abolition of any evidentiary
3 rules at all). Courts and other rulemakers should aim to steer a course between formal evidentiary
4 rules and outright abolition by pairing well-tailored, simplified rules with appropriate guardrails.

5 Given the complex challenges of balancing discretion and accountability and accessibility
6 and gamesmanship in tailoring and simplifying evidentiary rules, courts and other rulemakers have
7 an ongoing duty to evaluate the efficacy of their design choices and to make adjustments as
8 necessary. Ongoing evaluation of rule choices, including the collection and analysis of data both
9 in isolation and in coordination with other jurisdictions, can contribute to the development of best
10 practices and address unintended consequences. See Chapter 8 (Systemic Administration).

11 *c. Caution in revising evidentiary rules that serve non-adjudicatory ends or eliminating*
12 *evidentiary rules entirely.* The last sentence of subsection (a) cautions that some evidentiary rules
13 should be preserved in high-volume civil adjudication because they transcend adjudication and are
14 rooted in broader social policies. A key example is rules governing privilege, which aim to protect
15 certain relationships and communications from disclosure in legal proceedings, even when the
16 information is relevant to the case, based on a broader policy judgment that society benefits more
17 from fostering candor and open communication in certain relationships that society deems vital
18 than from having every relevant fact available in court. Put another way, privilege rules are
19 exceptions to truth-seeking that serve broader social ends, such as protecting privacy, autonomy,
20 and socially valuable relationships, including attorney–client, spousal, clergy–penitent, or
21 physician–patient relationships, even at some cost to factfinding. In tailoring evidentiary rules to
22 particular high-volume civil-adjudication contexts or simplifying those rules, courts and other
23 rulemakers should revise evidentiary rules that serve purely or mostly social ends only upon a
24 strong showing that doing so will substantially increase the adjudicative integrity and fairness.
25 When an evidentiary rule or its revision implicates both non-adjudicatory and adjudicatory values,
26 courts and other rulemakers should carefully consider potential trade-offs.

27 Subsection (a) also counsels against eliminating evidentiary rules altogether, calling for the
28 tailoring and simplification of evidence rules, not their abolition. As already noted, a free-proof
29 system, in which the admissibility, weight, and evaluation of evidence are left largely to judicial
30 discretion rather than being governed by rigid, exclusionary rules, is not advisable because it
31 provides few guardrails against bias and inconsistency, whether across judges or in the decisions

1 of the same judge over time. Both can erode public confidence in the system. The risks of a free-
 2 proof system can be especially acute in high-volume civil adjudication because well-resourced
 3 parties may seek to exploit informality to the detriment of their self-represented adversaries. A
 4 free-proof system can also reduce transparency and predictability: Without evidentiary rules to
 5 guide a litigation and its evidentiary inputs, and with trial judges exercising unreviewable
 6 discretion, litigants may be unable to gauge case strengths and weaknesses, making fair settlements
 7 harder to reach.

8 *d. Judge obligations to develop fact record when presiding over hearings.* Subsection (b)
 9 turns to the administration of evidentiary rules in particular matters and states, in summary form,
 10 a judge’s obligations to ensure the creation of an adequate factual record when presiding over a
 11 hearing, as more fully elaborated in § 5.04 (Conduct of Hearings) and Chapter 9 (The Judicial
 12 Role). Because many litigants, particularly self-represented ones, may struggle to understand
 13 complex procedures and collect, process, provide, or organize the information necessary for the
 14 court to make an accurate determination, courts should supplement the parties’ efforts by clearly
 15 communicating the purpose and details of a hearing, consistent with § 5.04; providing information
 16 and explanation, consistent with § 9.02; asking questions to elicit evidence and arguments in order
 17 to clarify the parties’ positions and requests, consistent with § 9.03; excusing nonprejudicial
 18 failures to comply with procedural rules, consistent with § 9.04; and facilitating compliance with
 19 evidentiary rules, consistent with § 9.05. As the U.S. Supreme Court explained in *Turner v.*
 20 *Rogers*, 564 U.S. 431 (2011), self-represented litigants often do not understand underlying legal
 21 issues in their cases or what evidence is needed to address those issues. Absent court assistance,
 22 those limitations may preclude the fundamentally fair hearing that due process requires. In
 23 providing assistance, however, courts must remain fair, impartial, and sensitive to the risk that
 24 court or judge actions will prejudice one or more of the parties. See generally Chapter 9 (The
 25 Judicial Role) (weighing these values and mapping the floor and ceiling of judicial obligation to
 26 self-represented litigants).

27 While the judge or other appropriate decisionmaker who presides over a hearing has a duty
 28 to ensure the development of an adequate factual record, such efforts can also be performed by
 29 court personnel who are responsible for screening cases, compiling documents prior to the hearing,
 30 and communicating with litigants about submitting required materials and evidence. See Chapter
 31 8 (Systemic Administration). In addition, courts and other rulemakers can contribute to the creation

of an adequate factual record by making available or mandating forms for the completion of pleadings, as elaborated in Chapter 4 (Pleadings and Information Exchange).

As discussed more fully in Chapter 9 (The Judicial Role), judicial discretion to provide information and explanation, elicit facts and arguments, excuse nonprejudicial procedural missteps, and assist parties in complying with evidentiary rules can introduce variation and inconsistency in how cases are adjudicated across both judges and jurisdictions. Risk of uneven application, however, is inherent in any system that relies on judicial discretion. More importantly, in high-volume civil adjudication, the harms caused by such inconsistency are outweighed by the far greater harms from unfair or inaccurate adjudication that arise when litigants—often facing substantial disparities in expertise, resources, and access to legal help—lack the guidance or procedural leeway needed to present their cases effectively.

REPORTERS' NOTES

a. Court obligations regarding the factual record. A bedrock principle within the American legal tradition is that judicial outcomes must be tethered to facts proved in the record, not to intuition or unsupported allegations. A corollary is that a court bears an obligation to take reasonable steps to ensure the creation of a factual record necessary to reach an accurate decision. That obligation is heightened and takes on particular significance in high-volume civil-adjudication areas that feature sharp asymmetries across the parties in expertise, resources, and access to legal help.

A court's obligations to help create an adequate factual record are longstanding and well-grounded in multiple legal sources, with both individual and structural components. First is the Fifth Amendment's guarantee of due process for all persons. The Due Process Clause requires that individuals not be deprived of life, liberty, or property without due process of law. This includes the right to a decision based on the facts of a case, since anything else would itself be a deprivation. Thus, in *Goldberg v. Kelly*, 397 U.S. 254, 263-264 (1970), the U.S. Supreme Court held that welfare benefits could not be terminated without a pretermination hearing based on factual evidence. In *Mathews v. Eldridge*, 424 U.S. 319, 334, 349 (1976), the Court emphasized that due process is flexible, but it requires notice and a meaningful opportunity to be heard, including the presentation and evaluation of evidence. An underlying assumption of both decisions is that a government that deprives an individual of a protectable right must do so on the basis of competent evidence and a sound factual record, not speculation or unfounded claims.

More recently, in *Turner v. Rogers*, 564 U.S. 431, 449 (2011), the U.S. Supreme Court synthesized but also substantially extended *Goldberg* and *Mathews*, two cases arising from an administrative rather than a court proceeding, by recognizing that a state court adjudicating a child-support-enforcement action must adopt a more active and affirmative approach to adjudication to deliver due process to self-represented litigants. See *Turner*, 564 U.S. at 448-449 (finding that due

process required the court and trial judge to provide “procedural safeguards” by notifying a self-represented defendant of the “critical question” in the case, eliciting oral or written testimony on that question, and making an express finding on that question). As elaborated at length in Chapter 1 (General Principles of Fair Adjudication), *Turner* represents a watershed moment in the development of due process by recognizing that courts bear special obligations to assist self-represented litigants, including the obligation to assist those litigants in developing a factual record.

Procedural and evidentiary rules are a second vital source of a court’s obligations to help create an adequate factual record. In bench trials, Federal Rule of Civil Procedure 52(a) requires that: “The court *must* find the facts specially and state its conclusions of law separately.” FED. R. CIV. P. 52(a) (emphasis added); see, e.g., ALASKA R. CIV. P. 52(a); ARK. R. CIV. P. 52(a)(1); COLO. R. CIV. P. 52; HAW. R. CIV. P. 52(a); MICH. CT. R. 2.517(A)(1); N.C. R. CIV. P. 52(a)(1); WASH. SUPER. CT. CIV. R. 52(a)(1). As another example, Rule 55(b)(2) empowers a judge in an uncontested matter to hold a hearing upon a motion for the entry of a default judgment “to establish the truth of any allegation by evidence” FED. R. CIV. P. 55(b)(2); see, e.g., KAN STAT. ANN. § 60-255; MISS. R. CIV. P. 55(b); MONT. R. CIV. P. 55(b); W. VA. R. CIV. P. 55(b)(2); WYO. R. CIV. P. 55(b)(2). While Rule 55(b)(2) confers discretion rather than imposing a mandate, its language reflects an underlying expectation that courts and judges will ensure that truth, rather than speculation and supposition, determines case outcomes. Still other examples include standards of appellate review for factual findings, which appeals courts typically review using a “clearly erroneous” standard, see *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), and the “substantial evidence” standard for denying a motion for a directed verdict, see *Consolidated Edison Co. v. Nat’l Lab. Rels. Bd.*, 305 U.S. 197, 229 (1938), or the standard for denying a summary-judgment motion, which requires a party to show no “issue of material fact,” see *First Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-289 (1968). A final example, drawn from evidentiary rather than procedural rules, is the provision, present in most evidence codes, expressly authorizing a judge to call and question witnesses, see ALA. R. EVID. 614; ARIZ. R. EVID. 614; VT. R. EVID. 614, or appoint its own experts, see MINN. R. EVID. 706; LA. CODE EVID. art. 706; ALA. R. EVID. 706; IDAHO R. EVID. 706; ME. R. EVID. 706; see also *People v. Cummings*, 850 P.2d 1, 47 (Cal. 1993) (noting that California’s evidence code “expressly authorizes the court to call witnesses . . . ‘in order to ensure that the truth is exposed.’”). Taken together, those rules lend still more support to the baseline expectation that a trial court builds and then bases its decision on an adequate factual foundation.

Finally, and though risking circularity, a court’s obligations to help create an adequate factual record can be inferred from a longstanding but rapidly growing body of doctrine, noted in Comment *b* and elaborated in substantially more detail in Chapter 9 (The Judicial Role), setting forth the actions a trial judge must, may, and cannot take to assist self-represented litigants. Those obligations include provision of information and explanation, as elaborated in § 9.02; elicitation of information, as elaborated in § 9.03; adjustment of procedures, including by excusing nonprejudicial noncompliance, as elaborated in § 9.04; and facilitating litigants’ compliance with evidentiary rules, as elaborated in § 9.05.

1 This trio of legal sources—due process, procedural and evidentiary rules, and case law—
 2 provides a legal foundation for longstanding scholarly pronouncements that a trial judge owes a
 3 duty to compile a robust factual record containing the information necessary to adjudicate the
 4 parties’ dispute. See generally Chapter 9 (The Judicial Role); see also Russell Engler, *And Justice*
 5 *for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and*
 6 *Clerks*, 67 FORDHAM L. REV. 1987, 2028 (1999) (“The court has a ‘basic obligation to develop a
 7 full and fair record’” (citation omitted)); Pamela K. Bookman, *Default Procedures*, 173 U.
 8 PA. L. REV. 1419, 1471, 1477 (2025) (emphasizing the “institutional integrity” of state court
 9 systems); GREACEN & HOULBERG, ENSURING THE RIGHT TO BE HEARD, *supra*, at 17 (counseling
 10 courts to take a proactive role in cases involving pro se litigants, in order to elicit the information
 11 needed “to make a fair and legally correct ruling”); Jessica K. Steinberg, *Demand Side Reform in*
 12 *the Poor People’s Court*, 47 CONN. L. REV. 741 (2014) (proposing “demand side” reforms as
 13 remedy to access to justice crisis, where judges assume the duty of advancing cases).

14 The remainder of this Section, working in concert with § 5.04 and Chapter 9 (The Judicial
 15 Role), enumerates a court’s specific obligations when overseeing high-volume civil adjudication to
 16 take steps to ensure the creation of an adequate factual record. Subsection (a), discussed briefly in
 17 Comment *b* and Reporters’ Note to Comment *b*, restates a trial judge’s obligations, as elaborated in
 18 substantially more detail in §§ 9.02 to 9.05, to steer litigation and promote substantive justice by
 19 assisting self-represented litigants. Subsection (b), as elaborated in Comment *b* and Reporters’ Note
 20 to Comment *b*, calls on courts and other rulemakers to promulgate tailored and simplified
 21 evidentiary rules that align with the distinctive litigation realities of high-volume civil adjudication.

22 Finally, the obligation to help develop the factual record will rest on the judge or other
 23 appropriate decisionmaker who presides over a hearing, Comment *b* makes clear that such efforts
 24 can be performed by court personnel who are responsible for screening cases and compiling
 25 documents prior to the hearing and communicating with litigants about submitting required
 26 materials and evidence. See Chapter 8 (Systemic Administration). In addition, courts and other
 27 rulemakers can contribute to the creation of an adequate factual record by making available or
 28 mandating party use of form-based pleadings, as elaborated in Chapter 4 (Pleadings and
 29 Information Exchange).

30 *b. Tailored and simplified evidentiary rules.* Subsection (a)’s principles embody the notion
 31 that justice is best served in high-volume civil adjudication by tailored and simplified evidentiary
 32 rules. In calling for such rules, this Section joins a broader reassessment of American evidentiary
 33 traditions to better reflect current litigation realities in high-volume civil adjudication and beyond.
 34 E.g., Andrew C. Budzinski, *Overhauling Rules of Evidence in Pro Se Courts*, 56 U. RICH. L. REV.
 35 1075, 1081 (2022) (“The Rules are a monolith of procedural history—one that has ossified even
 36 as society around it has grown and evolved.”); John Sheldon & Peter Murray, *Rethinking the Rules*
 37 *of Evidentiary Admissibility in Non-Jury Trials*, 86 JUDICATURE 227, 229 (2003) (“American
 38 courtrooms have been flooded by self-representing litigants, few of whom understand either the
 39 concept of admissibility or . . . the rules of evidence . . . [e]ven the intelligent and educated
 40 layman . . . is unfamiliar with the rules of evidence.”)(citing *Faretta v. California*, 422 U.S. 806,

838 (1975))). Calls to reassess that tradition have gained steam in recent decades, but they are hardly new. As far back as 1931, Dean Charles McCormick of the University of Texas School of Law fumed that the rules of evidence “are absurdly inappropriate to any tribunal or proceeding where there is no jury.” Charles McCormick, 5 *ENCYCLOPEDIA OF SOCIAL SCIENCES* 637, 644 (1931). Mid-century calls picked up where Dean McCormick left off. See, e.g., Kenneth Culp Davis, *An Approach to Rules of Evidence for NonJury Cases*, 50 *A.B.A. J.* 723, 724 (1964) (“Today’s law of evidence is focused almost entirely on jury trials almost completely ignores nonjury trials.”); Howard B. Miller, *Beyond the Law of Evidence*, 40 *S. CAL. L. REV.* 1, 5 (1967) (“The law of evidence has more than once been called a child, whether legitimate or not, of the jury system.”); Jack B. Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials*, 66 *COLUM. L. REV.* 223, 223 (1966) (“Fundamental changes in our society and modifications in judicial procedure have created an atmosphere far different from that of the era when the rules were developed—particularly conducive to revision.”); John V. Salierno, *Hearsay and the Proposed Federal Rules of Evidence*, 17 *N. Y. L. F.* 241, 241 (1971) (lauding the then-Proposed Rules of Federal Evidence and complaining that courts have “mechanically applied” hearsay rules “and consequently, much valuable evidence has been excluded”).

The case for a tailored and simplified evidentiary regime in high-volume civil adjudication is grounded in three main arguments. First, juries are rare in high-volume civil adjudication, which moots the traditional bifurcation between judicial gatekeeping, in which the judge screens the evidence, and jury factfinding, in which the jury weighs the judge-screened evidence. In the bench trials that pervade high-volume civil adjudication, by contrast, the role of gatekeeper and factfinder fuses in the judge or other adjudicator, leaving “less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate for himself.” *United States v. Brown*, 415 F.3d 1257, 1269 (11th Cir. 2005); Jessica K. Steinberg, *Demand Side Reform in the Poor People’s Court*, 47 *CONN. L. REV.* 741, 799 (Feb. 2015) (“The court is well equipped to do the hard work of determining whether and to what extent each piece of evidence lends support to a party’s case.”). Moreover, unlike lay jurors, the judges who preside over hearings in high-volume civil adjudication are familiar with legal concepts and rules of evidence. Evidentiary rules, as some have put it, “are for non-experts.” Henry Zhuohao Wang & Edward K. Cheng, *Evidentiary Rules for Administrative Hearings*, 104 *TEX. L. REV.* (forthcoming 2026) (manuscript at 9); see also JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 266, 508-509 (1898) (describing rules of evidence as “the child of the jury system”); John Henry Wigmore, *Administrative Boards and Commissions: Are the Jury-Trial Rules of Evidence in Force for Their Inquiries?*, 17 *ILL. L. REV.* 263, 263 (1922) (“Historically, the rules of evidence familiar to Anglo-American lawyers were a direct growth out of trial by jury.”). On this view, much of the American evidentiary regime is an ill-fitting hold-over from an earlier time that no longer aligns with litigation realities. Indeed, historically minded proceduralists point out that, first devised at common law for use in jury trials, the rules of evidence were unreflectively integrated into the equity side of the system when law and equity were joined via the promulgation of the Federal Rules of Civil Procedure in 1937. See Sheldon & Murray, *Rethinking the Rules of Evidentiary Admissibility in Non-Jury Trials*, *supra*, at

229 (“And just as the American practice of civil jury trial is becoming isolated, the practice of
 2 applying rules of admissibility to non-jury trials is becoming eccentric.”); Stephen N. Subrin, *How*
 3 *Equity Conquered Common Law: The Federal Rules of Civil Procedure In Historical Perspective*,
 4 135 U. PA. L. REV. 909 (1987).

5 The near-absence of jury trials in high-volume civil adjudication has a pair of concrete
 6 implications. One is that concerns about exposing jurors to relevant yet potentially prejudicial
 7 evidence, or what some see as the futility of “curative” instructions to juries when such evidence
 8 is presented anyway, are dampened or disappear entirely. See *Schultz v. Butcher*, 24 F.3d 626, 632
 9 (4th Cir. 1994) (“For a bench trial, we are confident that the district court can hear relevant
 10 evidence, weigh its probative value and reject any improper inferences.”); *State v. Burrell*, 772
 11 N.W.2d 459, 467 (Minn. 2009) (“The risk of unfair prejudice [at a bench trial] is reduced because
 12 there is comparatively less risk that the district court judge, as compared to a jury of laypersons,
 13 would use the evidence for an improper purpose or have his sense of reason overcome by
 14 emotion.”); *Liggett v. People*, 135 P.3d 725, 733 (Colo. 2006) (“In the context of a bench trial, the
 15 prejudicial effect of improperly admitted evidence is generally presumed innocuous.”); see also
 16 *Krulewich v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (“The naive
 17 assumption that prejudicial effects can be overcome by instructions to the jury all practicing
 18 lawyers know to be unmitigated fiction.”). Most judges, unlike juries, have formal legal training,
 19 and even those who do not are typically experienced adjudicators who can be expected to
 20 appropriately weigh evidence according to its probative value.

21 The other, related implication is that, in the course of a bench trial, there may be little to be
 22 gained by instructing a judge to disregard evidence, rather than to merely accord it lesser weight.
 23 In other words, “judges cannot shield the trier of fact from evidence by declining to admit it,
 24 because judges *are* the triers of fact. Any attempt to do so is futile.” Andrew C. Budzinski,
 25 *Overhauling Rules of Evidence in Pro Se Courts*, 56 U. RICH. L. REV. 1075, 1112 (2022); see also
 26 Sheldon & Murray, *Rethinking the Rules of Evidentiary Admissibility in Non-Jury Trials*, *supra*, at
 27 228 (“Screening is impossible, because the person who does the screening is the very person from
 28 whom the evidence is supposed to be screened, and it makes no sense to ask judges to instruct
 29 themselves.”); cf. FED. R. EVID. 103 advisory committee’s note to proposed rule (“[A] ruling which
 30 excludes evidence in a jury case is likely to be a pointless procedure if the excluded evidence
 31 nevertheless comes to the attention of the jury.”). In short, the core of the conventional justification
 32 for traditional evidence codes is inapplicable in high-volume civil adjudication.

33 Second, formal rules of evidence disserve the self-represented litigants who feature heavily
 34 in many high-volume civil-adjudication areas. The rules of evidence were developed in the context
 35 of an adversarial system that was built by and for lawyers, with lawyers responsible for articulating
 36 why their own evidence is admissible and objecting to improper evidence presented by their
 37 adversaries. See STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* 4
 38 (1984) (“Because of the potential complexity of legal questions and the intricacy of the legal
 39 mechanism, parties generally cannot manage their own lawsuits. Rather, they, and the adversary
 40 system, have come to rely upon a class of skilled professional advocates to assemble and to present

the testimony upon which decisions will be based.”). This duty maps poorly to the realities of high-volume civil adjudication pervaded by self-represented litigants. Indeed, many or even most self-represented litigants are wholly ignorant of basic evidentiary principles. See Budzinski, *Overhauling Rules of Evidence in Pro Se Courts*, supra, at 1081 (“[P]ro se litigants struggle and often fail to apply complex evidentiary principles. As a result, judges rule inconsistently and sometimes erroneously; litigants lose faith in the legal process as a fair method of dispute resolution; and, often, everyone involved experiences frustration, exasperation, and confusion.”); Sheldon & Murray, *Rethinking the Rules of Evidentiary Admissibility in Non-Jury Trials*, supra, at 228 (“Irrespective of what prompts people to represent themselves, almost all who do share this common characteristic: They are ignorant of the concept of evidentiary ‘admissibility.’ Many pro se litigants do not even suspect the existence of rules of evidence, let alone understand them.”); Steinberg, *Adversary Breakdown*, supra, at 921 (“[U]nrepresented parties often do not understand which issues are important to raise, and cannot, on their own, get all relevant facts and requests before the court.”); see also Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 169 (2007) (observing that evidentiary rules governing admissibility are unintuitive because they are contrary to the natural process of human cognition, which does not entertain rules of exclusion or corroboration for types of evidence or classes of events).

More concretely, many self-represented litigants struggle to understand and apply technical evidence rules and, as a result, fail to object to evidence introduced by an opposing party, defend themselves against objections levied by that party, lay a foundation for evidence, admit documents into evidence, or qualify expert witnesses. NATALIE ANNE KNOWLTON ET AL., INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CASES WITHOUT COUNSEL: RESEARCH ON EXPERIENCES ON SELF-REPRESENTATION IN U.S. FAMILY COURT 2, 34-35 (2016) (“[L]itigants specifically discussed difficulties associated with introducing and presenting evidence. . . . Judge and court staff participants echoed the stories of many litigant participants, often observing struggles with trial preparation, evidentiary matters, and other courtroom procedures.”); Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City’s Housing Court*, 3 CARDOZO PUB. L. POL’Y & ETHICS J., 659, 666-667 (2006) (“As structured, [the rule-oriented court] excludes virtually all tenants from meaningful participation in the conversation. This makes the legal process a charade.” (citing Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 586-589 (1992))); Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992). (“Despite the enactment of tenant-protective legislation in the mid-1970s, the [Baltimore] rent court operates in virtually the same manner as it did nearly twenty years ago. Today few tenants raise the available defenses; even fewer find it worth the candle.”). Self-represented litigants also struggle to comply with prohibitions on leading questions on direct examination, rules limiting cross-examination to the scope of the prior direct examination, more general norms against narrative testimony, and the “less-than-intuitive question-format requirement.” Budzinski, *Overhauling Rules of Evidence in Pro Se Courts*, supra, at 1109.

1 The empirical evidence is overwhelming on these barriers. In a 2009 survey of more than
 2 900 state court judges, 94 percent of judges found that “failure to present necessary evidence was
 3 the most common problem” for self-represented litigants, with 89 percent tracing negative impact
 4 to procedural errors and 81 percent to the failure to properly object to evidence. LINDA KLEIN, AM.
 5 BAR ASS’N COAL. FOR JUST., REPORT ON THE SURVEY OF JUDGES ON THE IMPACT OF THE ECONOMIC
 6 DOWNTURN ON REPRESENTATION IN THE COURTS 4, 11 (2010) (“[T]here is a strong consensus that
 7 parties are hurt by failure to present necessary evidence, suffer from procedural errors, are
 8 ineffective when examining witnesses, and fail to properly object to evidence.”). Designed to
 9 channel accurate, reliable facts to adjudicators and prevent them from giving undue weight to
 10 misleading, if accurate, evidence, formal rules of evidence too often operate instead as “tools of
 11 exclusion,” depriving self-represented litigants of the ability to present evidence and establish facts
 12 because they are unable to clear technical hurdles, not because the evidence is unreliable.
 13 Budzinski, *Overhauling Rules of Evidence in Pro Se Courts*, supra, at 1110, 1113.

14 Third, formal evidence rules impose significant burdens on courts in high-volume civil
 15 adjudication. Judges must navigate difficult tensions between enforcing formal rules, maintaining
 16 neutrality and impartiality, and ensuring a fair hearing in dockets that feature often extreme
 17 asymmetries in expertise, resources, and access to legal help across the parties. For instance, self-
 18 represented litigants routinely offer proof (screenshots, texts, rent ledgers, third-party letters)
 19 without the foundation that formal evidentiary rules require—or, worse, fail to offer any evidence
 20 at all. See D. James Greiner, Dalié Jimenez, & Lois Lupica, *Self-Help, Reimagined*, 92 IND. L.J.
 21 1119, 1124 (2017) (“A pro se tenant, as a result of fully accessible self-help legal materials and
 22 limited advice, came to her eviction hearing armed with damning photographic evidence of her
 23 apartment’s uninhabitability as well as knowledge of favorable law. But at a mediation in her case,
 24 she failed to produce the evidence she had in hand or to raise legal defenses. The tenant’s
 25 explanation: ‘it didn’t come up.’”). In eviction matters, a mom-and-pop landlord’s rent ledger may
 26 be accurate yet inadmissible without a live records custodian. See *Watermark II Member LLC v.*
 27 *Kim*, 2023 Mass. App. Unpub. LEXIS 615 at *2 (2023) (holding that landlord’s rent ledger does
 28 not fall in the business record exception without testimony or certification). As a result,
 29 proceedings may stall while courts sort hearsay and foundation or continue the matter to bring in
 30 a witness. The result is delay, inconsistent records, and fewer minutes devoted to the substantive
 31 merits issues the court must decide. Judges assigned to child-support calendars report similar
 32 frictions when pay stubs, employer wage records, or benefits printouts lack custodial foundations,
 33 leaving ability-to-pay findings uncertain. *State v. Carrier*, 17 N.W.3d 577, 580 (N.D. 2025)
 34 (denying adjustment to child-support payments when evidence of new income was “unreliable and
 35 unverified”). When those or other examples arise, judges spend scarce and valuable hearing time
 36 explaining complex rules governing admissibility, eliciting missing fact predicates themselves, or
 37 granting continuances so a party can subpoena a custodian or correct defects—multiplying
 38 appearances and further clogging crowded court calendars. See Budzinski, supra, at 1098
 39 (explaining that both pro se litigants and judges themselves struggle to understand and apply
 40 complex evidentiary rules, including the business records exception). Objections that would be

1 routine in lawyered cases become mini-tutorials, placing pressure on judicial neutrality and
 2 stretching what could be a single hearing into piecemeal proceedings. Similar burdens result from
 3 evidence adduced by represented parties. Debt-buyer suits can trigger mini-trials over the chain of
 4 title of the debt—from original creditor to intermediary to purchaser—and whether each link’s
 5 business records are properly authenticated. See *LVNV Funding, LLC v. Sengillo*, 78 N.Y.S.3d
 6 879, 884 (N.Y. Sup. Ct. 2018) (dismissing debt buyer’s case on summary judgment after
 7 considering incomplete and conflicting documents, finding that the buyer failed to provide
 8 admissible evidence of the chain of title from the original creditor to himself). As a result, judges
 9 spend scarce time parsing boilerplate affidavits rather than testing the claimed balance.

10 By better aligning proof systems with modern litigation realities, tailored and simplified
 11 evidentiary rules can help to mitigate each of the above concerns. Tailoring evidentiary rules to
 12 particular high-volume civil-adjudication areas is also a straightforward application of the
 13 principles set forth in § 2.02 (Tailored Procedure and Case Management). Because different high-
 14 volume case types differ in their fact patterns, the types of evidence that predominate (including
 15 new digital forms of proof), and the relative capacities of the litigants and the resulting power
 16 imbalances, one-size-fits-all evidentiary rules will often misfire. At the same time, because of the
 17 recurring nature of particular types of evidentiary disputes in high-volume civil adjudication,
 18 evidentiary rules that are tailored to issues or types of evidence—prescribing what must be shown,
 19 how it may be shown, and when a brief continuance must be granted to cure defects—enables
 20 judges to spend time on the weight and sufficiency of the evidence rather than on serial
 21 admissibility fights.

22 While this Section does not endeavor to define the precise contours of a tailored and
 23 simplified evidentiary code in high-volume civil adjudication, subsection (a) does offer substantial
 24 guidance by enumerating three principal ways that courts and other rulemakers might structure
 25 rule revisions.

26 Under subsection (a)(1), courts and other rulemakers can shift the center of gravity of
 27 evidentiary rules from gatekeeping to evaluation by revising evidentiary rules to focus judicial
 28 attention on the weight and sufficiency of proof rather than its admissibility. An example is
 29 Wisconsin’s rules for “small claims” cases—a label that includes eviction matters and debt-
 30 collection actions under \$10,000—which replace the admissibility screens that would normally
 31 apply under the state’s general rules of civil procedure with a general standard of probativeness.
 32 E.g., WIS. STAT. ANN. § 799.209 (“The proceedings shall not be governed by the common law or
 33 statutory rules of evidence except those relating to privileges. . . . The court or circuit court
 34 commissioner shall admit all other evidence having reasonable probative value, but may exclude
 35 irrelevant or repetitious evidence or arguments. An essential finding of fact may not be based
 36 solely on a declarant’s oral hearsay statement unless it would be admissible under the rules of
 37 evidence.”); see also American Arbitration Association, Commercial Arbitration Rules and
 38 Mediation Procedures, Rule 35(b) – Evidence (“The arbitrator shall determine the admissibility,
 39 relevance, and materiality of the evidence offered and may exclude evidence deemed by the
 40 arbitrator to be cumulative or irrelevant.”).

Other more focused approaches could make particular recurring categories of proof presumptively admissible or permit enumerated categories of documents to be authenticated via certification. In Pennsylvania, most civil disputes under \$50,000 are subject to compulsory arbitration. See 42 PA. STAT. AND CONS. STAT. ANN. § 7361. For these cases, courts recognize certain types of documents—for instance, bills and business records—as self-authenticating so long as the other party is given 20 days’ notice. *Am. Express Centurion Bank v. Rhoads*, No. CI-09-18838, 2013 Pa. Dist. & Cnty. Dec. LEXIS 621, at *3 (C.P. Mar. 4, 2013); see Pa. R.C.P. No. 1305. As another example, Minnesota has adopted the Uniform Interstate Family Support Act, which allows nonresident parties to offer testimony via affidavits signed under penalty of perjury in child-support matters. MINN. STAT. § 518C.316. Documents such as certified payment records are admissible for the truth of the matter, and not treated as hearsay, so long as they are provided to the adverse party in advance. *Id.* Many states have also implemented these rules under the Uniform Interstate Family Support Act. See, e.g., ME. REV. STAT. ANN. tit. 19-A, § 3016 (Maine) (permitting certification of nonresident documents by affidavit); ARIZ. REV. STAT. § 25-1256 (Arizona) (same); WYO. STAT. § 20-4-166 (Wyoming) (same); N.C. GEN. STAT. § 52C-3-315 (North Carolina) (same); TEX. FAM. CODE § 159.316 (Texas) (same); D.C. CODE § 46-353.16 (District of Columbia) (same). As the North Carolina rules explain, its approach aims to “eliminate by statute as many potential hearsay problems as possible in interstate litigation, with the goal of providing each party with the means to present evidence, even if not physically present.” N.C. GEN. STAT. ANN. § 52C-3-315. These same rule comments indicate that certain types of evidence, like medical bills, are often not in dispute, and therefore need not be held to the same authentication requirements. *Id.* A similar rationale could apply to the eviction or foreclosure context, where establishment of the lease or mortgage is not necessarily at issue. Using these approaches as a rough model, in eviction cases, tailored simplified evidentiary rules could permit photos of property conditions so long as the declarant provides an affidavit certifying their legitimacy under penalty of perjury. At the same time, simplified rules could make rent ledgers exported from property-management software presumptively admissible or admissible via affidavit and certification rather than live testimony. *Morris v. Behrens*, 499 P.3d 39, 44 (Ok. App. 2021) (“under the [Oklahoma] Small Claims Procedure Act, which relaxes the rules of evidence, estimates, quotes and invoices--like those admitted as exhibits in this case--are not always treated as hearsay.”).

Subsection (a)(2) contemplates that courts and other rulemakers will consolidate multiple and often multilayered evidentiary rules into a single, comprehensible standard. See, e.g., N.C. GEN. STAT. § 42A-24 (for expedited eviction proceedings, “any reasonably reliable and material statements, documents, or other exhibits to be admitted as evidence”); *Bartlett v. Portfolio Recovery Assocs., LLC*, 438 Md. 255, 283 (2014) (holding that in a debt-collection case, while the formal rules of evidence do not apply, the trial judge must weigh reliability and probative value of the evidence before him or her”). Many jurisdictions relax the rules of evidence for small-claims courts, replacing them with a standard based on reliability or trustworthiness of the evidence. See, e.g., La. C.C.P. Art. 4921.2 (“technical rules of evidence are relaxed, and all relevant evidence is admissible, including hearsay, provided the justice of the peace satisfies himself of its general

reliability”); *Houghtaling v. Superior Ct.*, 17 Cal. App. 4th 1128, 1134 (1993) (finding that evidence rules should be relaxed in California small-claims court); N.J. R. EVID. 101 (providing that evidence rules may be relaxed in small-claims cases “to admit relevant and trustworthy evidence in the interest of justice.”). Judicial and academic commentators have long championed a more comprehensive approach that replaces the current web of hearsay exceptions with a single unified standard focused on two elements: necessity and reliability. See *United States v. Barbati*, 284 F. Supp. 409, 412 (E.D.N.Y. 1968) (explaining the long-standing common-law practice of admitting hearsay statements into evidence when they are necessary to the case and indicative of trustworthiness); RICHARD A. POSNER, *REFLECTIONS ON JUDGING* 145-46 (2013) (advocating for an overall simplification of the judicial process, including the consideration of photographic and electronic evidence); George F. James, *Role of Hearsay in a Rational Scheme of Evidence*, 34 ILL. L. REV. 788, 797 (1940) (advocating standards rather than fixed categories in structuring hearsay rules). Done well, the result could be a single, readily understandable framework that speeds routine admissions while preserving principled judicial control.

Under subsection (a)(3), courts and other rulemakers can narrow the scope or application of evidence rules so they bite only where reliability risks are real. Returning to a prior example, Wisconsin tailors the hearsay rule in small-claims, including eviction matters and debt-collection cases under \$10,000, to apply only to an “essential finding of fact,” and even then, only requires that these findings have *some* other support, aside from the oral hearsay statement. WIS. STAT. ANN. § 799.209. Another innovative proposal is to redefine hearsay to cover only testimonial statements—that is, out-of-court statements made with the primary purpose of creating evidence for use in litigation or to accuse—while treating routine, non-accusatory communications and machine-generated outputs as non-hearsay that go to weight rather than admissibility. See Richard D. Friedman, *A Proposal to Replace the Hearsay Rules*, 57 U. MICH. J.L. REFORM 909, 912-913 (2024) (proposing that accusatory statements that necessitate confrontation and cross-examination should serve as the basis for the hearsay rule, and therefore the hearsay rule should not apply to non-testimonial statements); Edward K. Cheng & Monica A. Miecznikowski, *Crawford’s Revolutions*, 57 U. MICH. J.L. REFORM 869, 881 (2024) (same). The result is a civil analogue to the U.S. Supreme Court’s tailoring of Confrontation Clause protection in *Crawford v. Washington*, 541 U.S. 36 (2004), to only testimonial statements. This approach provides a principled narrowing of the hearsay rules, yielding fewer skirmishes and a sharper focus on credibility and sufficiency, while still demanding live, testable proof for the kinds of out-of-court accusations that most threaten fairness.

To keep rule revisions of any sort principled and even-handed, courts and other rulemakers should ensure that tailoring and simplification efforts are adopted on principle, not convenience, by using common, even-handed metrics so the revisions do not privilege some parties or types of evidence over others when the case for tailoring and simplification is equally strong. For instance, a rent ledger exported from property-management software and a tenant’s bank statements or receipts should meet the same *prima facie* standard, and so too a debt buyer’s assignment schedules

1 and a debtor’s payment logs. Litigation-only documents (e.g., “affidavits of debt” or letters
2 solicited by counsel) should face tighter scrutiny unless corroborated by routine records.

3 The concrete examples noted above make clear that this Section’s call for tailored and
4 simplified evidentiary rules in high-volume civil adjudication is not groundbreaking. In addition to
5 those examples, numerous jurisdictions have either relaxed or abolished formal rules of evidence
6 in particular courts or case types. Simplification and even outright abolition of evidentiary rules is
7 particularly common in family law, where the focus on the best interests of the child and frequent
8 presence of out-of-state parties may trump concerns about reliability. The Idaho Supreme Court has
9 adopted special rules of civil procedure for family-law cases specifying that the rules of evidence
10 do not apply unless both parties stipulate that they will. IDAHO R. FAM. L. P. 102.B; see also ARIZ.
11 R. FAM. L. P. 2(b) (adopting the same position); see also N.H. Cir. Ct. Fam. Div. Rs. 2.1-2.2 (stating
12 that the New Hampshire rules of evidence do not apply in domestic-relations actions). In a similar
13 vein, in certain domestic-relations trials in Alaska and Oregon, the rules of evidence can be
14 disregarded unless one of the parties objects. ALASKA R. CIV. P. 16.2; OR. UNIF. TRIAL. CT. R.
15 8.120; see also WASH. G.R. 40 (both parties can consent to an Informal Family Law Trial as opposed
16 to a formal trial subject to the rules of procedure and evidence.). Finally, and as already noted,
17 small-claims courts, whether or not they include high-volume cases such as eviction or debt, often
18 feature simplified evidentiary rules or abolish them altogether. See N.Y. CITY CIV. CT. ACT § 1804
19 (Consol. 2021) (small-claims hearings are not bound by rules of procedure or evidence); OHIO EVID.
20 R. 101(D) (Ohio’s small-claims courts do not apply the formal rules of evidence).

21 Administrative proceedings also serve as a guide. Formal rules of evidence do not apply in
22 federal administrative hearings and in most state-level ones. See *Richardson v. Perales*, 402 U.S.
23 389 (1971) (holding that sufficiently reliable hearsay evidence can constitute substantial evidence
24 in a proceeding under the Administrative Procedure Act); *Robinson v. D.C. Hous. Auth.*, 660 F.
25 Supp. 2d 6, 12 (D.D.C. 2009) (holding that, for an administrative hearing before the D.C. Housing
26 authority, “[a]s long as it is relevant and material, the utilization of hearsay evidence in
27 administrative proceedings is well grounded.”); Wash. Admin. Code 381-70-400 (for
28 administrative parole revocation hearings in Washington state, “[a]ll relevant evidence shall be
29 admissible which, in the opinion of the presiding officer, is the best evidence reasonably
30 obtainable, having due regard for its necessity, availability, and trustworthiness.”) N.Y. Comp.
31 Codes R. & Regs. tit. 9, § 2051.3 (in New York state, “administrative law judge[s] shall not be
32 bound by common law or statutory rules of evidence or by technical or formal rules or procedure”).
33 See generally Wang & Cheng, *supra* (outlining the range of approaches to simplifying evidentiary
34 rules for administrative hearings); FLA STAT. §§ 120.569 (g) & 120.57 (providing a relaxed
35 evidentiary scheme for administrative hearings in Florida); 1 Tex. Admin. Code § 165.21
36 (providing that, for Texas administrative hearings, “[a]ny relevant evidence is admissible, subject
37 to the imposition of time limits and the parties’ compliance with procedural requirements imposed
38 by the judge, including a schedule for the prehearing exchange of documents.”) Indeed, many
39 observers agree that administrative adjudications are well-served by simplified evidentiary rules,
40 namely because, as is typically the case in high-volume civil adjudication, cases are heard by an

1 experienced decisionmaker rather than a lay jury. Richard J. Pierce Jr., *Use of the Federal Rules*
 2 *of Evidence in Federal Agency Adjudications*, 39 ADMIN. L. REV. 1, 22 (1987) (“Agency
 3 decisionmakers are experts, not lay jurors or lay witnesses . . . it makes no sense for Congress or
 4 an agency to attempt to restrict an ALJ’s discretion to admit evidence solely because that evidence
 5 is not admissible in a jury trial.”); see also Nat Stern, *The Substantial Evidence Rule in*
 6 *Administrative Proceedings: Restrictions on the Use of Hearsay Since Richardson v. Perales*, 36
 7 ARK. L. REV. 102, 118 (1982) (“In a sense, administrative law has spearheaded the movement in
 8 the field of evidence toward discretionary admission of reliable evidence.”).

9 Finally, cross-national evidence bolsters this Section’s call for courts and other rulemakers
 10 to adopt tailored and simplified evidentiary rules. Many or most advanced democracies, including
 11 common-law jurisdictions, have simplified or outright abolished formal evidentiary rules. See
 12 Mirjan R. Damaska, *Free Proof and Its Detractors*, 43 AM. J. COMP. L. 343, 343-344 (1995)
 13 (describing how common-law jurisdictions rejected formal evidence rules in favor a free proof
 14 regime, allowing courts to weigh all available evidence in pursuit of the truth); John Sheldon &
 15 Peter Murray, *Rethinking the Rules of Evidentiary Admissibility in Non-Jury Trials*, 86
 16 JUDICATURE 227, 228 (2003) (noting the absence of admissibility rules, other than privilege, in
 17 continental Europe and the abolition of the hearsay rule in Scotland in 1988 and England in 1995);
 18 see, e.g., Civil Evidence Act of 1995 (adopted Nov. 5, 1995, effective Jan. 1, 1997) § 1 (“In civil
 19 proceedings evidence shall not be excluded on the ground that it is hearsay.”). Hearsay reforms
 20 are more variable. Canadian courts take a “principled” approach to hearsay that admits traditional
 21 categories of hearsay when justified by considerations of necessity and reliability. South Africa,
 22 by contrast, admits hearsay when it is “in the interests of justice” to do so, creating what some
 23 describe as a “residual” hearsay exception. See John Sheldon & Peter Murray, *Rethinking the Rules*
 24 *of Evidentiary Admissibility in Non-Jury Trials*, 86 JUDICATURE 227, 231 (2003).

25 In tailoring and simplifying evidentiary rules, courts and other rulemakers must manage
 26 two main tensions. The first is the tradeoff between adjudicator discretion and accountability. A
 27 central design challenge under subsection (b) is how to give judges enough latitude to assess
 28 reliability and probative force while maintaining guardrails that screen out untrustworthy proof
 29 and cabin judicial bias. On the one hand, traditional evidence rules supply structure and
 30 predictability, but they can be rigid and overly formalistic, excluding reliable proof and generating
 31 delay in high-volume civil adjudication, particularly where one or more of the parties is self-
 32 represented. Simplified evidentiary rules can also leave too many decisions within the court’s
 33 discretion and so risk silencing or otherwise disadvantaging pro se litigants. See Barbara Bezdek,
 34 *Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in Legal Process*,
 35 20 HOFSTRA L. REV. 533, 535-536 (1992) (observing how “differences in speech” and “dissonant
 36 interpretations” frustrate the court’s ability to understand and recognize the claims of pro se
 37 litigants). In particular, a lack of tightly codified rules can open the door to implicit bias and other
 38 forms of discrimination. See Pamela K. Bookman & Colleen F. Shanahan, *A Tale of Two Civil*
 39 *Procedures*, 122 COLUM. L. REV. 1183, 1188-1189 (2022) (explaining the necessity of formal rules
 40 so that lawyers may “object to opponent’s procedural manipulations . . . counter judges’ exercise

1 of procedural power and provide a check on both by observing proceedings, demanding reasoned
 2 explanations, and filing appeals.”); Elizabeth L. MacDowell, *Reimagining Access to Justice in the*
 3 *Poor People’s Courts*, 22 GEO. J. ON POVERTY L. & POL’Y 473, 487-499 (2015) (arguing that
 4 informal procedures have meant that “much decision-making affecting legal rights takes place
 5 largely without reference to legal rights and norms and, in many cases, without a written record or
 6 the possibility of appellate review,” thus allowing for greater racial and gender bias).

7 On the other hand, rule simplification may alleviate, rather than exacerbate, concerns about
 8 lawlessness or bias. With simplified rules, a judge may retain the discretion to facilitate the
 9 admission of the self-represented litigant’s evidence into the record. Many judges, particularly those
 10 overseeing high-volume dockets, report that strict application of formal procedures does not lead to
 11 a satisfactory resolution of cases involving self-represented parties. See Steinberg, *Adversary*
 12 *Breakdown*, supra, at 938 (“The dockets in most civil courts would grind to a halt if judges did not
 13 find ways to assist the unrepresented parties who appear before them.”). As a result, many judges
 14 “deal with unrepresented litigants in an ad hoc manner” and exercise “virtually unfettered discretion
 15 to enforce or waive various procedural requirements” in such cases. Stephan Landsman, *The*
 16 *Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 450-451 (2009); see also
 17 Steinberg, *Adversary Breakdown*, supra, at 938 (explaining that, under the status quo, judges
 18 approach pro se matters without training or guidelines, yielding strikingly inconsistent treatment);
 19 Carpenter et al., *Judges in Lawyerless Courts*, supra, at 938 (expressing concern with trial judges’
 20 “unfettered, unchecked discretion in lawyerless courts” and the increasing reliance on “ad hoc,
 21 party-driven procedural rules”). As the system currently operates, it is something of a legal fiction
 22 to say that formal rules of procedure and evidence apply in the pro se context. In reality, many
 23 judges have already adapted evidentiary rules to the realities of high-volume civil adjudication.

24 A second tradeoff, and a second design challenge, pits accessibility gains for self-
 25 represented litigants against the risk that more-expert, better-resourced, and often represented
 26 parties will exploit the flexibility that can come with simplified evidentiary rules. As just noted,
 27 simplified evidentiary rules can lower access barriers by making rules more comprehensible for
 28 self-represented litigants who must navigate the civil-justice system without meaningful legal help.
 29 Simplified rules also make it easier for self-represented litigants to present their case. See Colleen
 30 F. Shanahan, Anna E. Carpenter & Alyx Mark, *Lawyers, Power, and Strategic Expertise*, 93 DENV.
 31 L. REV. 469, 581 (2016) (explaining that it may be particularly difficult for self-represented
 32 litigants to prove their case without relying on hearsay evidence); Jessica K. Steinberg, *Demand*
 33 *Side Reform in the Poor People’s Court*, 47 CONN. L. REV. 741, 799 (2015) (explaining that a
 34 relaxation of formal evidence rules “would free unrepresented litigants to introduce any evidence
 35 of their choosing and relieve them of having to object to an opponent’s evidence”). In addition,
 36 the rules of evidence, when applied by a judge, will sometimes protect a self-represented litigant
 37 from an adversary with weak or defective evidence. See 137 Realty Associates v. Samuel, 7 Misc.
 38 3d 80, 796 N.Y.S.2d 509 (N.Y. App. Term 2005) (applying hearsay rule to bar landlord’s evidence
 39 offered to prove a drug transaction by a tenant). Formal evidentiary rules can also introduce delay
 40 into proceedings, which will often benefit defendants. See Kathryn A. Sabbeth, *Simplicity as*

1 *Justice*, 2018 WIS. L. REV. 287, 295 (2018) (“Slower processes can offer benefits to otherwise
 2 disadvantaged parties . . . [w]hether it is by allowing a different substantive result to come about
 3 or just delaying the inevitable, the process checks the application of the plaintiffs or prosecutor’s
 4 otherwise unbridled power.”). Finally, simplified rules of evidence may offer advantages from a
 5 procedural justice perspective. By relaxing admissibility standards, judges will have an easier time
 6 explaining the rules and their evidentiary rulings, enhancing their perceived neutrality and
 7 trustworthiness. Budzinski, *supra*, 1120-1121 (“If litigants understand the rules of the proceeding
 8 and why and how those rules are being applied, they are more likely to trust that the proceeding is
 9 fair.”). The parties will be more likely to understand and apply the rules, increasing their ability to
 10 shape the factual record and—in combination with digestible explanation of evidentiary
 11 decisions—will be more likely to feel that their evidence was considered and, thus, that they were
 12 respected and heard. Budzinski, *supra*, at 1120-1121 (“Pro se parties will be liberated to shape
 13 their own factual record, to understand the impact of their evidence on the outcome of the
 14 proceeding, and to communicate about why and how the judge will evaluate it”); see also Lauren
 15 Sudeall & Daniel Pasciuti, *Praxis and Paradox: Inside the Black Box of Eviction Court*, 74 VAND.
 16 L. REV. 1365, 1429 (October 2021) (arguing that informality may be used “to compensate for a
 17 lack of procedural expertise” and to “ensure the court has all of the necessary and relevant
 18 information before it”).

19 But simplified rules can also work against self-represented litigants. Simplified rules invite
 20 repeat players to flood the record with unauthenticated documents, hearsay-laden declarations, or
 21 conclusory ledgers that slip by untested. Indeed, more powerful and sophisticated parties may gain
 22 an advantage from simplified rules, which can leave more room for strategic maneuvering. See
 23 Budzinski, *supra*, at 1117; Shanahan et al., *supra*, at 506; Jessica K. Steinberg, *A Theory of Civil*
 24 *Problem-Solving Courts*, 93 N.Y.U. L. REV. 1579, 1601 (2018) (“Judges have allowed corporate
 25 parties to exploit the informal regime of small claims courts to their advantage.”). At their core,
 26 simplified evidentiary rules should be easily explained, involve few exceptions, and encourage
 27 evidentiary decisions based on substance rather than technicalities, but only when doing so does
 28 not unduly permit gaming by more-expert, better-resourced, and typically represented parties.

29 Given these tradeoffs and related complexities, this Section does not endeavor to define
 30 the precise contours of a single simplified evidentiary code, whether in high-volume civil
 31 adjudication generally or in particular high-volume civil-adjudication areas. Accord Budzinski,
 32 *supra*, at 1114-1115 (advocating a “more permissive evidentiary rule set” but noting need for
 33 additional study “to find the appropriate balanced of evidentiary standards in the context of pro se
 34 courts”). What is clear, however, is that the answer is likely to be calibration, not a retreat to
 35 conventional rules of evidence at one end of the formality spectrum or complete abolition, as
 36 assessed in Comment c and Reporters’ Note to Comment c, at the other end of the formality
 37 spectrum. Further, courts and other rulemakers must remain vigilant to address any unintended
 38 consequences of tailored and simplified procedures. As discussed in § 5.03 (Hearing Rights and
 39 Due Process) and Chapter 8 (Systemic Administration), courts have an ongoing duty to evaluate
 40 procedural rules for cost-effectiveness, efficacy, and fairness.

1 *c. Caution in revising evidentiary rules that serve non-adjudicatory ends or eliminating*
 2 *evidentiary rules entirely.* While this Section calls for courts and other rulemakers to tailor and
 3 simplify evidentiary rules in high-volume civil adjudication, it counsels caution in revising
 4 particular evidentiary rules that serve non-adjudicatory ends, such as privilege rules, or in
 5 abolishing evidentiary rules altogether.

6 In the classic account, privilege rules are exceptions to truth-seeking that are justified by
 7 broader social ends, such as protecting privacy, autonomy, and socially valuable relationships—for
 8 instance, between spouses, clergy and penitents, or physicians and patients, among others—even at
 9 some cost to factfinding. See EDWARD J. IMWINKELREID, *THE NEW WIGMORE: EVIDENTIARY*
 10 *PRIVILEGES* § 1.2 (3d ed. 2022); Charles W. Quick, *Privileges Under the Uniform Rules of*
 11 *Evidence*, 26 UNIV. CIN. L. REV. 537, 537-538 (1957). In tailoring and simplifying evidentiary rules
 12 in particular high-volume civil-adjudication contexts, courts and other rulemakers should avoid
 13 revising evidentiary rules that serve these purely social ends without compelling evidence that the
 14 gains to adjudicatory accuracy, integrity, or fairness clearly outstrip any foregone social benefits.

15 Subsection (a) likewise counsels against wholesale abolition of evidentiary rules. Numerous
 16 jurisdictions have adopted that approach in small-claims courts. See, e.g., N.Y. CITY CIV. CT. ACT
 17 § 1804 (Consol. 2021) (small claims are not bound by rules of procedure or evidence); N.H. CIR.
 18 CT. FAM. Div. Rs. 2.1-2.2 (New Hampshire has done away entirely with rules of evidence in
 19 domestic-relations cases, including divorce and child support); OHIO EVID. R. 101(D) (Ohio’s
 20 small-claims courts do not apply the formal rules of evidence). Similarly, in Texas justice courts,
 21 which adjudicate a wide range of case types, including high-volume civil-adjudication cases such
 22 as debt collection and eviction, the rules of evidence do not apply except for when the judge deems
 23 a particular rule is necessary for fairness to all parties. TEX. R. CIV. P. 500.3.

24 In rejecting outright abolition in high-volume civil adjudication, this Section resists the
 25 conclusion of some that “patchwork remodeling” of evidentiary rules will not suffice to address the
 26 core problem that those rules are ill-adapted to modern litigation realities or that they arm more-
 27 expert, better-resourced, and represented parties with a potent means of defeating rather than
 28 ascertaining the truth. John Sheldon & Peter Murray, *Rethinking the Rules of Evidentiary*
 29 *Admissibility in Non-Jury Trials*, 86 JUDICATURE 227, 228 (2003) (rejecting “patchwork
 30 remodeling”). Instead, and as already noted, well-tailored and simplified rules will typically be the
 31 best way to manage the difficult tradeoffs—between discretion and accountability for judges, and
 32 between accessibility and the risk of gaming and abuse for litigants—posed by any move away
 33 from formal rules of evidence in high-volume civil adjudication. First, the asymmetries in expertise,
 34 resources, and representation that characterize many high-volume civil-adjudication areas raises the
 35 specter that some litigants will benefit from a “free-proof” approach because of their greater ability
 36 to marshal and introduce evidence, including in strategic and abusive ways. Second, and relatedly,
 37 a rule-based structure, even if composed of tailored and simplified rules, nonetheless provides a
 38 measure of predictability and consistency. See Wang & Cheng, *supra*, manuscript at 10, (noting
 39 “the potential for inconsistency between judges’ decision—or even variability in the decisions of
 40 the same judge over time” in a free-proof system). It also legitimates any adjudicatory system by

1 screening out low-value proof, channeling factfinders toward tested, verifiable evidence, and
 2 limiting unfairly prejudicial and propensity- or character-based proof that can cause legal
 3 proceedings to drift toward character assassination or moral outrage rather than facts tied to legal
 4 elements. *Id.* at 21. Third, retaining at least some admissibility screens preserves a measure of
 5 accountability for trial judges, since fact determinations are heavily insulated from appellate review
 6 in most jurisdictions. Decisions reached under rules focused on weight and inference, because
 7 reviewed under the “clearly erroneous” standard, are even less likely to generate appeals, depressing
 8 already-thin appellate oversight of trial-level evidentiary rulings. Margaret A. Berger, *When, If*
 9 *Ever, Does Evidentiary Error Constitute Reversible Error*, 25 LOY. L. REV. 893 (1992).

10 In short, free proof maximizes flexibility and speed in bench trials, yet unconstrained
 11 discretion can yield inconsistency, opacity, bias, and accuracy loss. Budzinski, *supra*, at 1077
 12 (“Without any regulation of evidence, pro se courts would morph into seemingly arbitrary,
 13 unaccountable decision-making bodies, which could seriously undermine public trust in their
 14 adjudication.”). In contrast, the calibrated approach embodied by the rest of subsection (a)
 15 preserves core protections—relevance, authenticity, transparent reasons-giving, rebuttable
 16 presumptions, and opportunities to contest—while simplifying routes of admission and shifting
 17 more disputes to questions of weight and sufficiency rather than technical admissibility.

18 *d. Judge obligations to develop fact record when presiding over hearings.* Managing
 19 receipt of evidence is a crucial component of judicial oversight of hearings. Subsection (a) restates
 20 the judicial obligation to take reasonable measures to fully and fairly develop the factual record,
 21 as more fully elaborated elsewhere. In particular, § 5.04 sets forth the obligations of trial judges to
 22 clearly communicate the evidentiary rules that will apply to particular types of evidence at the start
 23 of a hearing), while Chapter 9 (The Judicial Role) offers a comprehensive treatment of a trial
 24 judge’s obligations to self-represented litigants, including actions that a judge must, may, and may
 25 not take in order to facilitate meaningful participation by all parties and achieve fair and accurate
 26 adjudication of claims of right while balancing their duty of impartiality to all parties. As reflected
 27 in these Principles, the role of the judge in high-volume civil adjudication is not merely to sit and
 28 listen or process cases on an assembly line. See *Kane v. Heckler*, 731 F.2d 1216, 1219 (5th Cir.
 29 1984) (offering a similar caution with respect to administrative law judges in social security cases).
 30 Instead, because courts are responsible for the fairness, accuracy, and legal sufficiency of their
 31 decisions, it is the judge’s duty in every case to take reasonable measures to ensure the compilation
 32 of a robust factual record containing the information necessary to adjudicate the parties’ dispute.

33 § 5.06. Court Orders

34 (a) In addition to making a statement on the record at the conclusion of a hearing, as
 35 set forth in § 5.04 (Conduct of Hearings), the court should promptly furnish to the parties a
 36 written copy of any order once issued, including any separately drafted decision that the
 37 court renders. That order should convey, or include or attach a decision that provides, the

1 legal and factual basis for the court’s determination and its significance for the rights and
2 duties of the parties and for further proceedings in the case. If the order results in the entry
3 of judgment, it should provide or be accompanied by information that advises parties of the
4 judgment's consequence and steps they can take to protect rights and interests, consistent
5 with § 7.02 (Notice Prior to and After Entry of Judgment).

6 (b) Courts and other rulemakers should consider requiring structured, court-created
7 forms to memorialize and communicate orders. Such forms should, consistent with § 2.03
8 (Meaningful Participation) and § 5.02 (Access and Accessibility), be designed to minimize, to
9 the extent practicable, barriers to understanding and accessibility, using an evidence-based
10 approach that includes user-testing and feedback. In addition, forms for memorializing and
11 communicating orders should include options for the judge or other appropriate
12 decisionmaker to tailor information to the specifics of the issue or case.

13 (c) The court should promptly enter any order or decision into the court record to
14 promote easy access by the parties and the public. When a hearing concludes with a court
15 taking the parties’ arguments under submission, the court should meet the requirements of
16 subsection (a) as soon as practicable and promptly notify the parties once the order is
17 finalized or judgment is entered.

18 (d) The court should provide the parties with clear and understandable information
19 related to how to seek any further review of an order.

20 **Comment:**

21 *a. Scope—orders in relation to judgments.* The principles advanced in this Section apply
22 to orders that courts issue during or after hearings. They are designed to be fully consistent with
23 Chapter 7 (Entry and Enforcement of Judgments), which sets forth principles for the issuance of
24 orders, including default judgments, that extend beyond this Section’s focus on reason-giving and
25 the form and timing of orders.

26 *b. Written orders.* Orders should be reduced to writing and provided to the parties. Written
27 orders encourage litigant understanding and compliance by providing a resource that is accessible
28 outside of court. Written orders that provide a factual and legal basis for the decision allow for the
29 possibility of meaningful appellate review, when needed, and subsequent development of the law.
30 For more complex issues, the court should, after reciting the papers (e.g., pleadings, memoranda,

1 and affidavits) or evidence (e.g., testimony and exhibits) relied on, include factual findings and the
2 legal reasoning for any determination made in its order or accompanying decision. For less
3 complex matters, the court may choose to use standardized forms for conveying orders.

4 *c. Form-based orders.* Courts should consider using structured forms to convey orders.
5 Such forms can be accompanied by longer, freeform decisions explaining the court’s reasoning
6 but should stand alone in short form. Such forms should be designed to maximize litigants’
7 understanding of what the court is ordering, and their design should adhere to principles of plain
8 language and user-centered design set forth in § 2.03. Well-designed forms serve multiple ends.
9 They ensure comprehensive consideration of procedural and evidentiary requirements for a legally
10 supported decision and promote consistency in decisionmaking and accompanying oral
11 explanations or recitations of orders. They also facilitate data collection and analysis, as elaborated
12 in Chapter 8 (Systemic Administration). Finally, forms also ensure that parties receive needed
13 information faster and, given their other benefits, are superior to reliance on party-drafted orders
14 as a way of ensuring expeditious decisions. Structured, court-created forms and case-specific
15 particularization need not be mutually exclusive. Forms that are tailored to particular case types
16 can allow for more detailed input in particular areas, such as the amount of a monetary judgment,
17 attorney’s fees, the amount of any allowable costs, and the rate and other conditions of any
18 allowable interest.

19 *d. Court record.* A court should enter the outcome of a hearing into the court record as soon
20 as practicable and, ideally, not later than the hearing’s conclusion. Contemporaneous
21 recordkeeping avoids missing or erroneous entry and facilitates dissemination of the outcome
22 without delay. The entry of orders should be standardized in terms of terminology, with the same
23 terms used across all cases and case types, and courts should refrain from employing shorthand to
24 catalogue orders, unless an abbreviation would be unequivocally clear to less sophisticated parties.
25 Ministerial as it may seem, clear and prompt entry of orders serves the core procedural values of
26 promoting public trust in the legitimacy of courts to render just and speedy determinations in each
27 case and encouraging the elaboration of legal norms in the otherwise underdeveloped bodies of
28 law that characterize many high-volume civil-adjudication areas. See Chapter 1 (General
29 Principles of Fair Adjudication). However, when a judge or other decisionmaker takes the matter
30 under submission and subsequently enters an order, the court should immediately notify the parties
31 once the order has been finalized or judgment entered.

1 *e. Review of orders.* Under this Section’s principles, all orders should provide guidance to
 2 litigants about how to seek reconsideration of an issue. In addition, orders that are subject to
 3 appellate review, including certain nonfinal ones, should alert parties of the right to appeal, the
 4 deadline to appeal, and attach a copy of the relevant rules governing the appeals process.

REPORTERS’ NOTES

5 *a. Scope—orders in relation to judgments.* In civil litigation generally, orders are directions
 6 or commands by the court. Orders may decide a motion, resolve a preliminary or collateral matter,
 7 or continue the litigation, without deciding the merits of the case. Judgments are distinct from orders
 8 but only exist because a court orders their entry, whether after trial, on a motion for summary
 9 judgment, or by consent of the parties. Thus, judgments are uniquely significant court orders—the
 10 final adjudication of the rights and obligations of the parties—putting an end to the litigation. 46
 11 AM. JUR. 2D *Judgments* § 4; *Thomas v. McElroy*, 243 Ark. 465, 470 (1967) (“A judgment is
 12 distinguished from an order in that the latter is the mandate or determination of a court on some
 13 subsidiary or collateral matter arising in an action not disposing of the merits but adjudicating a
 14 preliminary point or directing some step in the proceedings.”). This Section’s principles apply to
 15 all court orders, including those entering judgment. To that extent, this Section’s principles dovetail
 16 with the principles set forth in Chapter 7 (Entry and Enforcement of Judgments), which offers
 17 additional guidance for orders entering judgments, including default judgments.

18 Courts issue orders upon motion, application, or sua sponte and the form those orders take
 19 can vary considerably. Orders may be brief docket entries by the clerk to reflect what transpired
 20 in open court, often called “minute orders.” See *Cuenllas v. VRL Int’l.*, 112 Cal. Rptr. 2d 383, 385
 21 (Cal. Ct. App. 2001) (unsigned order entered into permanent minutes of court record has full force
 22 of written order, unless court directs that preparation of formal order is to follow); cf. CAL. R. CT.
 23 8.104(c)(2) (date of entry of appealable order is date it is entered in permanent minutes, except for
 24 when minute order directs that written, signed order be filed). Orders may be drafted on court-
 25 created forms, usually with checkboxes for standard information, such as recitation of the papers
 26 relied on to decide a motion and space for a short decision. See Reporters’ Note to Comment c.
 27 Orders may be incorporated at the end of a longer decision, when one is needed in the court’s
 28 discretion. See, e.g., N.Y. C.P.L.R. § 2219 (order must “give the determination or direction in such
 29 detail as the judge deems proper”). Courts often instruct the prevailing party to prepare a proposed
 30 order that must be settled with the losing party before being submitted for the judge’s signature.
 31 See, e.g., 22 N.Y.C. R. & REGS. 202.48.

32 In general, orders are intended to effectuate decisions by the court. The substance of an
 33 order must conform to the court’s decision. *Matter of Esposito v. Magill*, 32 N.Y.S.3d 802, 803
 34 (N.Y. App. Div. 2016). But while a decision explains the court’s reasoning, it does not order or
 35 effect a judgment. But cf. D. CONN. L. CIV. R. 77(a) (memorandum deciding nondispositive motion
 36 is the court’s order unless the memorandum directs submission of an order in extended form).
 37 Thus, a decision is not appealable, while an order is. *Charalabidis v. Elnagar*, 132 N.Y.S.3d 129,

1 134 (N.Y. App. Div. 2020) (“An order implements a decision by requiring a party to act or refrain
 2 from acting consistent with the decision. Decisions may not be appealed, although appeals may be
 3 taken from orders and final judgments.”); *Matter of Spectrum News NY1 v. N.Y.C. Police Dep’t*,
 4 179 A.3d 578, 579 (N.Y. App. Div. 2020) (“interim decision” issued without any motion pending
 5 was “not an appealable paper”); N.Y. C.P.L.R. § 5512(a).

6 *b. Written orders.* In high-volume civil dockets, courts conduct much of their business
 7 through in-person interactions with the parties. See, e.g., *Grisi v. Shainswit*, 119 A.2d 418, 421
 8 (N.Y. App. Div. 1986) (noting “growing tendency” of trial courts “to condition the making of a
 9 written motion on prior judicial approval” and then to orally deny or refuse to allow the motion,
 10 resulting in no written order). Written orders with findings of fact and conclusions of law are
 11 increasingly rare in many high-volume adjudication areas, reflecting courts’ resource constraints,
 12 the fact that many self-represented litigants do not know to request written findings of fact or
 13 conclusions of law, or the judicial perception that appeal rates in high-volume civil dockets are
 14 low, thus limiting the utility of a written order. See Anna E. Carpenter et al., *Studying the “New”*
 15 *Civil Judges*, 2018 WIS. L. REV. 249, 267 (2018); Colleen F. Shanahan et al., *Lawyerless Law*
 16 *Development*, 75 STAN. L. REV. ONLINE 64, 66 (2023) (both exploring the role of orders in high-
 17 volume civil dockets).

18 The landscape of unwritten orders in high-volume dockets limits the appeal rights of parties
 19 and stymies the public development of law through appellate review. As discussed in Reporters’
 20 Note to Comment *a*, only orders can be appealed, distinguishing them from decisions, oral rulings,
 21 or other transcribed statements. Absent a written order, including in the minutes of the court record,
 22 the losing party has nothing to appeal. The failure to reduce to writing the determination of an
 23 issue that otherwise would have been appealable effectively allows the trial court to stand in for
 24 the appellate court and deny the appeal de facto. See *Grisi*, 119 A.2d at 421 (“A party cannot be
 25 deprived of his right to be heard on a substantive matter not involving a trial ruling by the simple
 26 expedient of denying him the right to make a written motion or a record, thereby foreclosing the
 27 opportunity for appellate review.”); cf. *M.L.B. v. S.L.J.*, 519 U.S. 102, 120-121 (1996) (noting
 28 due-process interest in having a record sufficiently complete to allow for fair appellate
 29 consideration). Furthermore, self-represented litigants may not know to request that an oral ruling
 30 be reduced to written order. See, e.g., N.Y. C.P.L.R. § 2219 (“[U]pon the request of any party, an
 31 order or ruling made by a judge, whether upon written or oral application or sua sponte, shall be
 32 reduced to writing or otherwise recorded.”). Without regular appellate review, the contours of the
 33 law develop in informal and undocumented ways. Shanahan et al., *Lawyerless Law Development*,
 34 *supra*, at 70. Present and future litigants and the public at large lose the transparency and
 35 predictability that comes with public elaboration of law (§ 2.05). Judges encounter recurring legal
 36 questions without the guidance from appellate courts that would enable them to move through the
 37 volume of cases effectively and consistently.

38 The principles advanced in this Section address these concerns by making written court
 39 orders the default policy and practice in high-volume civil adjudication. Written orders improve
 40 parties’ understanding of and compliance with what the court has ordered. Parties may return to and

consult a written order’s terms, and they are more likely to perceive an order as legitimate when in writing. Reducing to writing the court’s order and the basis for it also fosters judicial reflection and minimizes the likelihood of misstatement or inaccuracy. Written orders promote accountability and consistency among judges—decreasing the need for appellate review while simultaneously making it possible. Finally, written orders preserve transparency, allowing members of the public to follow the business of courts without attending each and every hearing. Cf. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1292 (1975) (“A written statement of reasons, almost essential if there is to be judicial review, is desirable on many other grounds. The necessity for justification is a powerful preventive of wrong decisions. The requirement also tends to effectuate intra-agency uniformity and would be particularly important in this regard if the hearing board were composed of individuals drawn from outside the agency. A statement of reasons may even make a decision somewhat more acceptable to a losing claimant.”).

In addition to being in written form, decisions should convey the legal and factual support for the court’s order. To that extent, the principles advanced here embrace the approach in some jurisdictions requiring separate findings of fact and conclusions of law as against those that do not. Compare, e.g., MISS. CODE ANN. § 93-21-15 (“specific findings of fact regarding the existence of abuse” required for every domestic abuse protection order); *Mintz v. Mintz*, 307 S.E.2d 391, 394 (N.C. App. 1983) (“proper” order for forced visitation in child-custody dispute must be based on “findings of fact and conclusions of law determined by the judge to justify and support the order”); *Pleasant v. Gibson*, 285 A.3d 1246, 1250 (D.C. Ct. App. 2022) (“express findings of fact” required for third-party custody order), with OHIO CIV. R. 52 (findings of fact and conclusions of law unnecessary upon all motions); P.R. LAWS AP. tit. 32A, § 5, R. 24 (findings of fact not required on most motions or “when the court so decides in view of the nature or the cause of action or of the relief granted by the judgment”); N.M. R. CHILD CT. 10-351 (party waives findings of fact and conclusions of law by failing to file request within “reasonable” time specified by court in a proceeding to terminate parental rights); N.Y. C.P.L.R. § 2219(a) (order must “give the determination or direction in such detail as the judge deems proper”). When a substantial interest of a party is at stake, more particularity may be necessary for factual findings and legal conclusions. See *In re Guardianship of L.C.*, 538 P.3d 309, 315 (Wash. Ct. App. 2023) (court need not make specific factual finding as to each statutory factor in ordering residential schedule for children in child-custody dispute, but factual findings as to every statutory factor are required for orders appointing guardian other than person nominated by child’s parents). Even when detailed findings of fact are not strictly mandated, conclusions of law without explanation are insufficient to support an order. An appellate court should be able to ascertain the factual and legal basis for the order. See, e.g., N.J. CT. R. 1:7-4 (“The court shall, by an opinion or memorandum decision, either written or oral, find the facts and state its conclusions of law thereon . . . on every motion decided by a written order that is appealable as of right”).

The principles advanced in this Section share at least some commonalities with administrative practice. In general, administrative agencies engaged in adjudication must produce a “written statement by the factfinders as to the evidence relied on and reasons” for the decision.

1 *Morrissey*, 408 U.S. at 489 (1972). See, e.g., *Royer v. State Dep’t of Emp’t Sec.*, 394 A.2d 828,
 2 832 (N.H. 1978) (“[A]n impartial decision-maker and a written statement of reasons are elements
 3 of a fair hearing which are traditional and necessary”); *Nicoletta*, 390 A.2d at 101 (N.J. 1978)
 4 (quoting *Goldberg*) (“[T]he decision maker should state the reasons for his determination and
 5 indicate the evidence he relied on”). See also NAT’L CONF. OF COMM’RS ON UNIF. STATE LAWS,
 6 REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 413(d) (“A recommended, initial, or
 7 final order must separately state findings of fact and conclusions of law on all material issues of
 8 fact, law, or discretion, the remedy prescribed, and, if applicable, the action taken on a petition for
 9 a stay.”); *Friendly*, supra, at 1292 (“[T]he requirement [of a written statement of reasons] is not
 10 burdensome; sometimes it can even be met by checking a list on a card.”).

11 *c. Form-based orders.* In high-volume civil dockets, cases tend to present limited, recurring
 12 issues that can be resolved without protracted decisionmaking. Court orders can be standardized
 13 and structured to address such issues, like a request for dissolution of a writ of garnishment when
 14 the defendant establishes an entitlement to an exemption. See Fla. 13th Jud. Cir. Ct., Order
 15 Dissolving Writ of Garnishment, [https://www.fljud13.org/Portals/0/Forms/pdfs/judges/jdghuey/
 16 Order%20Dissolving%20Writ%20of%20Garnishment_Huey.pdf?ver=2015-12-02-102543-690](https://www.fljud13.org/Portals/0/Forms/pdfs/judges/jdghuey/Order%20Dissolving%20Writ%20of%20Garnishment_Huey.pdf?ver=2015-12-02-102543-690).
 17 Forms can use checkboxes to capture information such as any motion papers relied upon, who was
 18 present at the hearing or the papers relied upon. Checkboxes even can guide judges in making the
 19 requisite findings of fact and conclusions of law. For instance, South Carolina’s standard order for
 20 a revision of child support instructs the judge to delineate current child-support payments by
 21 amount and child and then to select whether “[a] significant change in circumstances has/has not
 22 occurred, the current ongoing child support obligation is/is not reasonable, and the child support
 23 obligation should/should not be reduced.” S.C. Jud. Branch, SCCA 400.29 SRL-CSM (S.C. 2012),
 24 <https://www.sccourts.org/forms/pdf/SCCA400.29SRL-CSM.pdf>. Continuing to use checkboxes,
 25 the form then leads the judge to select the appropriate relief, with fill-in-the-blank boxes for the
 26 revised child-support amount. *Id.*

27 Form-based orders should adhere to principles of plain language, user-centered design, and
 28 accessibility, as set forth in §§ 2.03 and 5.05. Court orders should be written in the present tense,
 29 use active voice, and make first- and second-person references. NAT’L ASS’N FOR CT. MGMT.,
 30 PLAIN LANGUAGE GUIDE: HOW TO INCORPORATE PLAIN LANGUAGE INTO COURT FORMS,
 31 WEBSITES, AND OTHER MATERIAL 41-58 (2019). When the use of technical legal language is
 32 necessary, explanation of those terms in plain language should be included in the order. Best
 33 practices include using text that is “easy to read, understand, and use;” clearly organizing
 34 information chronologically using outlines and roadmaps; using reader-friendly typography with
 35 adequate white space; using functional graphics and illustrations; and using affirming language
 36 that can reduce stress and bolster user confidence. See, e.g., J. David Greiner, Dalié Jiménez &
 37 Lois Lupica, *Self-Help, Reimagined*, 92 IND. L.J. 1119 (2017). User-centered design—a
 38 methodology grounded in the user experience and an iterative process of user and expert testing
 39 and refinement—is an effective approach through which to design such interventions. See
 40 Margaret Hagan, *A Human-Centered Design Approach to Access to Justice: Generating New*

1 *Prototypes and Hypotheses for Intervention to Make Courts User-Friendly*, 6 IND. J. L & SOC.
2 EQUALITY 199, 199-209, 215-223 (2018).

3 The use of standardized, court-created orders obviates the need for freeform, party-
4 proposed ones. Requiring the parties to produce and settle orders outside of court carries important
5 downsides in high-volume civil dockets characterized by asymmetries in representation across
6 parties. Self-represented litigants may be unaware of the practice of drafting an order or responding
7 to the other side’s draft. Parties represented by counsel may gain the upper hand by styling factual
8 findings in a client’s favor. Further, the time required to settle the order can prolong enforcement
9 or appeal. Courts should employ form orders to ensure balanced, speedy entry into the court record
10 and provide notice to the parties of the order’s content and legal consequences.

11 *d. Court record.* For the benefit of the parties and members of the public who may have an
12 interest in the litigation, court orders should be entered when issued. Only an entered order may
13 be enforced or appealed. Its timely entry by the clerk, despite being ministerial in nature, thus
14 holds significant import for the rights and duties of the parties. *Harvey v. Hammer*, 249 N.Y.S.2d
15 1012, 1015 (N.Y. Sup. Ct. 1964) (“It has always been assumed that the ultimate act of perfecting
16 an order of the court is its entry.”). But see *Sassower v. Blaustein*, 208 A.2d 820, 822-823 (N.J.
17 Super. Ct. App. Div. 1994) (“The fact that some of the orders were not promptly entered was a
18 mere irregularity which did not affect the validity of the orders.”).

19 For the clerk to enter an order in a timely fashion, the order itself must be clear and
20 unambiguous as to the issues decided and the parties affected. In drafting orders and decisions,
21 judges therefore must consider various audiences, including the parties, members of the public,
22 the appellate court on review, and the court staff who enter orders into the court record. Judges
23 should demarcate the steps necessary to effectuate the court’s order in a way that a person
24 unfamiliar with the case could easily follow. When incorporated into a longer decision, the
25 command or direction given by the court—the “ordering” language—should appear at the end of
26 the document and be set clearly apart for ease of identification by the clerk. See generally STATE
27 OF N.Y. UNIF. CT. SYS., GUIDE TO THE FORM AND ORDER OF JUDGMENTS (3d ed. 2010), [https://](https://www.nyc.gov/assets/lateralorientation/downloads/pdf/Guide%20to%20the%20form%20of%20Orders%20and%20Judgments.pdf)
28 [www.nyc.gov/assets/lateralorientation/downloads/pdf/Guide%20to%20the%20form%20of%20](https://www.nyc.gov/assets/lateralorientation/downloads/pdf/Guide%20to%20the%20form%20of%20Orders%20and%20Judgments.pdf)
29 [Orders%20and%20Judgments.pdf](https://www.nyc.gov/assets/lateralorientation/downloads/pdf/Guide%20to%20the%20form%20of%20Orders%20and%20Judgments.pdf).

30 *e. Review of orders.* Orders and decisions should provide specific instructions to self-
31 represented parties about how to seek reconsideration or, where relevant, appellate review of an
32 order. This information should also be provided in written form, using plain language, and
33 conveyed in a manner that litigants can access. That said, interlocutory appeal is rare in high-
34 volume civil adjudication.

35 § 5.07. Availability of Remote Hearings

36 (a) *Definitions.* A “remote hearing” is a synchronous hearing at which at least one
37 party appears remotely by audio or audio-visual means, such as telephone or
38 videoconference. If all participants appear remotely, the hearing is a “fully remote hearing.”

1 If at least one participant appears remotely and at least one participant appears in person,
2 the hearing is a “hybrid hearing.”

3 **(b) *Availability of Remote Hearings.***

4 (1) Courts and other rulemakers should adopt clear, accessible, and evidence-
5 based rules for when a remote hearing, including a fully remote or hybrid hearing,
6 can or must be held in particular cases, types of cases, or types of hearings.

7 (2) In formulating these rules, courts and other rulemakers should weigh
8 available mechanisms for determining the availability of remote hearings in a given
9 case or case type, including but not limited to:

10 (A) judge discretion;

11 (B) party consent;

12 (C) per se rules either mandating or prohibiting remote hearings in
13 particular case types, hearing types, or based on other case features; or

14 (D) a mix of these approaches.

15 (3) In determining when different hearing formats are appropriate, courts and
16 other rulemakers should consider:

17 (A) the effect of a hearing format on the meaningful participation of all
18 parties and participants, including witnesses;

19 (B) the nature and complexity of the hearing, including whether it is
20 evidence-intensive;

21 (C) whether the court, the parties, and participants, including
22 witnesses, have access to the technological infrastructure necessary to
23 effectively facilitate all essential components of the hearing;

24 (D) the competence of the court, the parties, and participants, including
25 witnesses, in using the necessary technology;

26 (E) the needs of parties and participants facing barriers to access, as
27 elaborated in § 5.02;

28 (F) the parties’ representation status;

29 (G) the potential for strategic action by parties or witnesses, including
30 the ability to talk confidentially with a legal-services provider or observe
31 proceedings in other cases;

1 **(H) the privacy and safety of hearing participants; and**

2 **(I) the public interest in an open hearing.**

3 **(4) These same factors should apply when a judge or other appropriate**
4 **decisionmaker exercises case-by-case discretion in a jurisdiction that has adopted**
5 **subsection (b)(2)(A)’s approach.**

6 **(c) Opt Out From Default Rules.**

7 **(1) If a rule requires an in-person hearing, all parties should be afforded the**
8 **opportunity to opt out and appear remotely if adequate technology is available and**
9 **the party would not otherwise be able to appear.**

10 **(2) If a rule requires a remote hearing, all parties, particularly those who face**
11 **barriers to access, should, for good cause shown, be afforded the opportunity to opt**
12 **out of a remote hearing and appear in person.**

13 **(3) If a party chooses to opt out of a required hearing format pursuant to**
14 **subsection (c)(1) or (c)(2), the opposing party should be permitted, but not required,**
15 **to participate in the same hearing format as the opt-out party.**

16 **Comment:**

17 *a. Definitions and overview.* This Section’s definitions make clear that the term “remote
18 hearing” as regularly used by courts, policymakers, litigants, and the public in fact encompasses
19 many different types of proceedings. The definitions offered in this Section capture the distinction
20 between “fully remote” and “hybrid” hearings while excluding asynchronous hearings, such as
21 online dispute resolution (ODR), which are treated separately in Chapter 11 (Court Use and
22 Regulation of Technology).

23 Remote hearings present courts and other rulemakers overseeing high-volume civil dockets
24 with significant opportunities and challenges, particularly balancing litigant autonomy and self-
25 determination with other procedural goals in high-volume civil adjudication. On the one hand,
26 remote hearings can make it easier for litigants to overcome barriers to in-person appearances such
27 as transportation, time-off work, and childcare. On the other hand, remote hearings can undermine
28 the goals of procedure set forth in § 2.01 by impairing the fair and accurate adjudication of
29 disputes, meaningful participation by the parties, effective decisionmaking by the parties and the
30 court, and the public elaboration of law. A growing body of evidence suggests that self-represented

litigants and litigants from vulnerable populations are particularly likely to be affected by both the advantages and disadvantages of remote hearings compared to represented parties and their counsel. As a result, remote hearings have the potential to both mitigate and exacerbate many of the challenges of high-volume civil adjudication. See Chapter 1 (General Principles of Fair Adjudication). Because not all cases, case types, or hearing types may be suitable for remote hearings, this Section offers courts and other rulemakers a framework for reaping the benefits and mitigating the risks of remote hearings by adopting context-sensitive, transparent, and evidence-based policies regarding the choice of hearing format. Section 5.08 sets forth principles governing the conduct of remote hearings when selected.

b. Remote-hearing availability. Subsection (b)(2) provides a menu of decision mechanisms that courts and other rulemakers might adopt for determining when remote hearings are triggered in particular cases, case types, or hearing types. Primary options—paralleling procedural rules for moving litigants between fora in civil litigation more generally—include judicial discretion, party consent, or per se rules either mandating or prohibiting remote or in-person hearings in particular types of cases or hearings. In practice, courts and other rulemakers will often determine that the optimal approach mixes two or more of the above approaches. For instance, courts and other rulemakers might determine that the optimal approach is to make remote hearings presumptively available, but not required, upon the election of one of the parties but with an opt-out mechanism for the other parties subject to judicial discretion via a “good cause” standard.

Subsection (b)(3) provides a list of factors to be applied in two distinct contexts regarding the availability of remote hearings: first, the choice by courts and other rulemakers among subsection (b)(2)’s different decision mechanisms; and second, the decision to make a remote hearing available in a particular case in those jurisdictions that have adopted a decision mechanism that includes a role for judicial discretion. For example, hearings that focus primarily on scheduling or logistical issues may more appropriately be held remotely, whereas hearings involving the exchange and detailed viewing of documents may require more sophisticated technology (and users) to be conducted effectively in a remote setting. A key factor to be considered is whether parties and participants have sufficient access to needed technological infrastructure to participate meaningfully in remote hearings and, if not, whether access to such infrastructure can be expanded by offering parties or participants the option to participate in remote hearings from appropriately equipped and publicly accessible venues, such as designated rooms in courts, public libraries, or

1 facilities operated by community and legal-aid organizations. Conversely, when a party can only
2 participate in a hearing remotely, that fact should weigh heavily in favor of a remote hearing,
3 unless it would impair the court’s ability to reach a fair and accurate decision, contrary to § 2.01.
4 Finally, hybrid hearings present unique challenges stemming from the structured differences in the
5 parties’ mode of participation.

6 *c. Ability to opt out.* Subsection (c) sets forth general rules for when a party can opt out of a
7 default hearing format. Under subsection (c)(1), any party may opt out of an otherwise required in-
8 person hearing and appear remotely, subject to the condition that available technology is adequate,
9 consistent with subsection (b)(3)(C), and the party will otherwise not be able to appear. This test is
10 demanding and is designed to afford limited access to remote hearings and to afford such access
11 only when adequate technology is available and in-person participation by one or more of the parties
12 is not realistically attainable. Subsection (c)(2) covers the opposite situation: All parties, but with
13 particular attention to those facing barriers to meaningful participation, retain the ability to opt out
14 of a required remote hearing and appear in person upon a showing of good cause. In implementing
15 subsection (c)(2)’s good-cause test, courts and other rulemakers should ensure that opt-out rights
16 are exercised only when a party seeking opt-out can articulate a rationale grounded in the party’s
17 meaningful participation and must guard against a party’s attempt to exercise opt-out rights to gain
18 tactical advantage, including seeking to impose additional travel costs or logistical burdens on an
19 opposing party in order to induce default, discourage participation, or secure a more favorable
20 settlement. In all events, under subsection (c)(3), when a party successfully exercises available opt-
21 out rights under either subsection (c)(1) or (c)(2), the other parties should be permitted, but not
22 required, to participate in the hearing using the same format. If another party chooses not to do so,
23 a hybrid hearing may result. This may not be ideal in some circumstances but is preferable to a
24 hearing that may raise due-process concerns for the impacted party.

REPORTERS’ NOTES

25 *a. Definitions and overview.* Remote court appearances have been part of the American
26 justice system since the early 1970s, when courts first began conducting limited types of hearings
27 via audio-visual links. Their advantages, disadvantages, and overall appropriateness have been
28 debated ever since, mostly in the context of criminal and administrative proceedings. Frank M.
29 Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice—The Use of*
30 *Teleconferencing in Asylum Removal Hearings*, 22 GEO. IMMIGRATION L. J. 259 (2007); CAMILLE
31 GOURDET ET AL., COURT APPEARANCES IN CRIMINAL PROCEEDINGS THROUGH TELEPRESENCE:

IDENTIFYING RESEARCH AND PRACTICE NEEDS TO PRESERVE FAIRNESS WHILE LEVERAGING NEW TECHNOLOGY (2020), https://www.rand.org/pubs/research_reports/RR3222.html.

The decades-long reluctance of courts to adopt remote proceedings to any significant degree eroded during the COVID-19 pandemic. To maintain critical operations, courts across the country shifted to remote proceedings at unprecedented pace and scale. See *How Courts Embraced Technology, Met the Pandemic Challenge, and Revolutionized Their Operations*, THE PEW CHARITABLE TRUSTS (Dec. 1, 2021), <https://www.pewtrusts.org/en/research-and-analysis/reports/2021/12/how-courts-embraced-technology-met-the-pandemic-challenge-and-revolutionized-their-operations>. Using generic videoconferencing platforms, courts held hybrid and fully remote hearings in both nontrial and trial proceedings across multiple case types, including high-volume civil adjudication. See Katherine L.W. Norton, *Accessing Justice in Hybrid Courts: Addressing the Needs of Low-Income Litigants in Blended In-Person and Virtual Proceedings*, 30 GEO. J. POVERTY L. & POL'Y 499, 513 (2023); Alicia L. Bannon & Douglas Keith, *Remote Court: Principles for Virtual Proceedings During the COVID-19 Pandemic and beyond*, 115 NW. U. L. REV. 1875, 1883-1885 (2021); David Freeman Engstrom, *Post-COVID Courts*, 68 UCLA L. REV. DISC. 246, 255-257 (2020). After the pandemic subsided, many jurisdictions opted to continue conducting remote hearings in some civil proceedings, most commonly, albeit not exclusively, in pretrial hearings perceived to be simple in nature. However, there remains considerable variation across jurisdictions in terms of the authorizing authority, case types, applicable procedures and technology used. See NAT'L CTR. FOR STATE CTS., NATIONAL SCAN OF AUTHORITY FOR REMOTE OR VIRTUAL COURT PROCEEDINGS (2023), https://www.ncsc.org/__data/assets/pdf_file/0029/94556/Allowed-Remote-or-Virtual-Format-2023.08.28-.pdf; Norton, *supra*, at 515-516.

The definitions provided in this Section are designed to capture key distinctions among a wide variety of remote hearing models that have emerged across jurisdictions while bracketing and reserving asynchronous hearings—and, in particular online dispute resolution, or ODR—for Chapter 11 (Court Use and Regulation of Technology). The remainder of this Section aims to take account of both the longer and more recent history of hybrid and fully remote hearings alongside a growing body of empirical evidence that can guide courts and other rulemakers in making optimal use of remote hearings in high-volume civil adjudication. Given the unique complexities and trade-offs involved, the principles advanced in this Section join a growing chorus of recommendations that courts overseeing high-volume civil dockets carefully develop policies and practices governing both the availability and conduct of remote hearings. See NAT'L CTR. FOR STATE CTS. REMOTE PROCEEDINGS TOOLKIT VERSION 2 (2024), https://www.ncsc.org/__data/assets/pdf_file/0027/82377/Remote-Proceeding-Toolkit-Final.pdf (explaining the need for court policies on remote proceedings and outlining options and considerations to assist in their design); Conf. of Chief Justs. & Conf. of State Ct. Adm'rs., Resolution 3, *In Support of Clear Policies for Virtual and Remote Hearings Post-Pandemic* (July 27, 2022) (encouraging states and jurisdictions to create policies around the use of remote proceedings and suggesting best practices for their development.).

b. Remote-hearing availability. In formulating rules for when remote hearings should be made available in specific high-volume civil-adjudication areas, courts and other rulemakers should

1 focus on two main goals: first, reducing barriers to meaningful participation by the parties; and
 2 second, promoting the fairness and accuracy of hearings. Previous research on remote hearings
 3 suggests that, while these goals can sometimes sit in tension, conflicts can be minimized and even
 4 avoided if remote hearings are triggered or made available in appropriately identified circumstances.

5 The menu of possible decision mechanisms advanced in subsection (b)(2)—judicial
 6 discretion, party consent, and per se rules either mandating or prohibiting remote hearings—draw
 7 from the typical set of ways courts and other rulemakers have designed “traffic rules” for sorting
 8 litigants among different fora in other areas of civil litigation. See David Freeman Engstrom,
 9 *Digital Civil Procedure*, 169 U. PA. L. REV. 2243, 2245 (2021); see also Ronen Avraham &
 10 William H.J. Hubbard, *The Spectrum of Procedural Flexibility*, 87 U. CHI. L. REV. 883 (2020)
 11 (offering a similar taxonomy); cf. Alicia L. Bannon & Douglas Keith, *Remote Court: Principles*
 12 *for Virtual Proceedings During the COVID-19 Pandemic and Beyond*, 115 NW. U. L. REV. 1875,
 13 1882 (2021) (describing jurisdictions that allow remote videoconferencing in certain criminal
 14 proceedings only with defendant consent).

15 The benefits of remote proceedings may be more salient in particular matters where the
 16 tradeoffs are not as stark. For example, remote proceedings may be more appropriate in cases
 17 likely to be decided on the law and which do not require in-depth factfinding, thus avoiding a host
 18 of concerns about determining witness credibility over video and/or being able to view evidence
 19 clearly. See Eagly, *supra*, at 973. The latter set of issues can also be addressed by training
 20 specifically focused on how to determine credibility without exclusive reliance on nonverbal cues.
 21 The Joint Technology Committee of the Conference of State Court Administrators, National
 22 Association for Court Management, and National Center for State Courts has developed
 23 recommendations for courts’ use of evidence during remote hearings, including special support
 24 for self-represented litigants. JOINT TECH. COMM., MANAGING EVIDENCE FOR VIRTUAL HEARINGS
 25 1 (2020), [https://www.ncsc.org/__data/assets/pdf_file/0019/42814/2020-07-27-Managing-](https://www.ncsc.org/__data/assets/pdf_file/0019/42814/2020-07-27-Managing-Evidence-for-Virtual-Hearings-002.pdf)
 26 [Evidence-for-Virtual-Hearings-002.pdf](https://www.ncsc.org/__data/assets/pdf_file/0019/42814/2020-07-27-Managing-Evidence-for-Virtual-Hearings-002.pdf) [<https://perma.cc/MC69-CSSK>].

27 For these reasons, the decision when to trigger remote proceedings should be made on the
 28 basis of case and even hearing type. Courts may determine that remote hearings are only
 29 appropriate in certain hearing types and, whenever implemented, should be tailored to the specific
 30 nature and substance of the hearing. For example, the Florida Supreme Court’s COVID-19
 31 Working Group determined that the state’s mandate for remote hearings should apply only to status
 32 and pretrial conferences, non-evidentiary hearings, and other categories of proceedings the group
 33 deemed “amenable” to being conducted remotely. Sup. Ct. Fla., Admin. Order No. AOSC20-23
 34 Amendment 2, In re Comprehensive COVID-19 Emergency Measures for the Florida State Courts,
 35 (May 21, 2020) at 8-9, [https://www.floridasupremecourt.org/content/download/633282/file/](https://www.floridasupremecourt.org/content/download/633282/file/AOSC20-23.pdf)
 36 [AOSC20-23.pdf](https://www.floridasupremecourt.org/content/download/633282/file/AOSC20-23.pdf).

37 One option that has been used by several courts is to categorize certain hearing types as
 38 presumptively remote or in-person. See, e.g., Supreme Court of Alaska, Order No. 2012 (Aug. 15,
 39 2023), <https://courts.alaska.gov/sco/docs/sco2012.pdf> (categorizing some case types—for
 40 example, bench and jury trials and motions and evidentiary hearings—as presumptively in-person

1 and others—including calendar calls, default hearings, and settlements on record as presumptively
 2 remote); OneCourtMN Hearings Initiative Policy, Minnesota Judicial Branch Policy and
 3 Procedures (revised Nov. 17, 2022), [https://mncourts.gov/mncourtsgov/media/Judicial_Council_](https://mncourts.gov/mncourtsgov/media/Judicial_Council_Library/Policies/500/525.pdf)
 4 [Library/Policies/500/525.pdf](https://mncourts.gov/mncourtsgov/media/Judicial_Council_Library/Policies/500/525.pdf) (applying presumption that hearings for certain case types, including
 5 eviction, will be remote, but that evidentiary hearings will generally be held in person);
 6 Administrative Order No. 2022-88, Supreme Court of Arizona (Feb. 22, 2022), [https://www.](https://www.azcourts.gov/Portals/22/admorder/Orders22/2022-88.pdf?ver=TyXe22a9TrW9wfDuOFsQMA%3d%3d)
 7 [azcourts.gov/Portals/22/admorder/Orders22/2022-88.pdf?ver=TyXe22a9TrW9wfDuOFsQMA](https://www.azcourts.gov/Portals/22/admorder/Orders22/2022-88.pdf?ver=TyXe22a9TrW9wfDuOFsQMA%3d%3d)
 8 [%3d%3d](https://www.azcourts.gov/Portals/22/admorder/Orders22/2022-88.pdf?ver=TyXe22a9TrW9wfDuOFsQMA%3d%3d) (imposing in-person and remote presumptions across case types, including presumption
 9 of remote proceedings for scheduling conferences, initial appearances in eviction cases, hearings
 10 in small-claims cases).

11 Little rigorous empirical evidence currently exists that might help courts and other
 12 rulemakers choose among these decision rules or decide which case or hearing types can be
 13 conducted remotely. See generally Kristina Bryant & Tara Kunkel, *Do Remote Hearings Help—*
 14 *or Hurt—Access to Justice?*, 106 JUDICATURE 1, 4 (2022) (noting still-emerging empirical
 15 evidence). However, recent experience has brought some more general observations into focus
 16 about the potential benefits and costs of remote hearings, and a small but growing empirical
 17 literature has begun to test key claims.

18 First, remote hearings have substantial potential to lower barriers to meaningful
 19 participation in hearings, and by extension, to reduce the rate of default judgments and
 20 abandonments, making them particularly attractive in many high-volume adjudication areas.
 21 Remote hearings can bring significant time- and cost-savings for litigants compared to in-person
 22 hearings, by eliminating the need to travel to a physical courthouse, take time off work or school,
 23 or find care for children and other dependents. See THE PEW CHARITABLE TRUSTS, *supra*
 24 (summarizing two studies finding that use of remote hearings coincided with a substantial decline
 25 in default rates in eviction proceedings in Arizona); cf. David A. Hoffman & Anton Strezhnev,
 26 *Longer Trips to Court Cause Evictions*, 120 PROC. NAT’L ACAD. SCI., Jan. 2023, at 10 (finding
 27 that longer mass transit travel times to the courthouse were associated with higher default rates).
 28 Online access can also eliminate wait times queuing at security checkpoints and waiting for a case
 29 to be called. See REMOTE PROCEEDINGS TOOLKIT, *supra*, at 9; JOHN GREACEN, SELF-REPRESENTED
 30 LITIG. NETWORK, REMOTE APPEARANCES OF PARTIES, ATTORNEYS AND WITNESSES: A REVIEW OF
 31 CURRENT COURT RULES AND PRACTICES (2017), [https://www.srln.org/node/1269/report-remote-](https://www.srln.org/node/1269/report-remote-appearances-parties-attorneys-and-witness-review-currentcourt-rules-practices)
 32 [appearances-parties-attorneys-and-witness-review-currentcourt-rules-practices](https://www.srln.org/node/1269/report-remote-appearances-parties-attorneys-and-witness-review-currentcourt-rules-practices). Time- and cost-
 33 savings from remote hearings can be substantial in rural areas and for persons with disabilities. *Id*
 34 at 3.

35 Early and conflicting data findings from the sources described above suggest a need for
 36 jurisdiction-specific research to inform the design and implementation of rules governing the
 37 availability and conduct of hearings. While some elements of remote proceedings appear to be
 38 largely effective or beneficial, local variation or demographic characteristics may require specific
 39 adaptations, training, or resources to reach that level of effectiveness and/or to mediate
 40 countervailing forces. For example, although remote proceedings have the potential to address

1 obstacles regarding travel and transportation, competing concerns about the digital divide must
2 also be considered.

3 Second, remote proceedings can improve the quality of participation for some litigants,
4 particularly self-represented ones, by increasing comfort and reducing anxiety compared to in-
5 person hearings. Bryant & Kunkel, *supra*, at 3 (finding some litigants “were less anxious when
6 they attended court remotely”); Nicole Lemire-Garlic & Adam Dunbar, *Public Perceptions of*
7 *Remote Courts and Equal Access: Who Prefers Remote Video Proceedings and Why?*, CURRENT
8 ISS. IN CRIM. JUST., Jan. 2024 (suggesting that “attending court from home was more ‘comfortable’
9 and shielded [litigants] from what they considered to be a hostile court environment.”). These
10 benefits may be more pronounced when there is a power imbalance between the parties. Ayelet
11 Sela, *Streamlining Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation*,
12 26 CORNELL J. L. & PUB. POL’Y 331, 360 (2016) (suggesting that remote participation can
13 neutralize negative courtroom dynamics). Such “silencing” dynamics has been observed, for
14 example, in in-person eviction hearings. Bezdek, *supra*, at 589. These benefits may explain
15 emerging research finding that self-represented litigants who took part in remote hearings had
16 favorable experiences, were open to further remote hearings in the future, and reported higher
17 satisfaction with their case outcomes than litigants attending court in person. VICTOR D.
18 QUINTANILLA ET AL., ACCESSING JUSTICE WITH ZOOM: EXPERIENCES AND OUTCOMES IN ONLINE
19 CIVIL COURTS 2, 38 (2023) These findings held steady across case types, including eviction, small
20 claims, debt collection, and family law. *Id.*

21 However, positive user perceptions may not hold true for all case types. Studies in the
22 family-law context suggest that remote hearings generate less positive experiences compared to in-
23 person hearings. ACCESS TO JUSTICE LAB & LAGRATTA CONSULTING LLC, WHAT’S BETTER: IN-
24 PERSON OR REMOTE HEARINGS? 2 (2023) (reporting that the majority (84%) of in-person family-
25 law litigants responding to a survey in Utah reported perceptions of fair treatment by the court while
26 only 65% of remote litigants reported the same.); LISA HARKER MARY ET AL., REMOTE HEARINGS
27 IN THE FAMILY JUSTICE SYSTEM: A RAPID CONSULTATION (2020) [https://www.nuffieldfjo.org.uk/
28 wp-content/uploads/2021/05/nfjo_remote_hearings_20200507-2-.pdf](https://www.nuffieldfjo.org.uk/wp-content/uploads/2021/05/nfjo_remote_hearings_20200507-2-.pdf) (reporting that in a survey of
29 unrepresented parties in England, respondents indicated they experienced video proceedings in
30 family cases as being less empathetic and humane than in-person hearings).

31 Though remote hearings may lower structural access barriers, they can also introduce new
32 technology-access barriers. Litigants may lack access to devices and internet connectivity; low-
33 quality version of either can lead to difficulty hearing, seeing, and comprehending proceedings.
34 See TAYLOR BENNINGER ET AL, STAN. CRIM. JUST. CTR., VIRTUAL JUSTICE? A NATIONAL STUDY
35 ANALYZING THE TRANSITION TO REMOTE CRIMINAL COURT 17 (2021). These risks are heightened
36 among low-income litigants and in rural areas, where internet access may be limited or low-
37 quality. See Norton, *supra*, at 524; THE PEW CHARITABLE TRUSTS, *supra*; NAT’L CTR. STATE CTS.,
38 REMOTE HEARINGS AND ACCESS TO JUSTICE 7-8 (2022), [https://www.ncsc.org/__data/assets/
39 pdf_file/0018/40365/RRTTechnology-ATJ-Remote-Hearings-Guide.pdf](https://www.ncsc.org/__data/assets/pdf_file/0018/40365/RRTTechnology-ATJ-Remote-Hearings-Guide.pdf). Even with full access,
40 other digital inequalities persist, including limited digital literacy and difficulties navigating the

web. Victor D. Quintanilla et al., *Digital Inequalities and Access to Justice*, in LEGAL TECH AND THE FUTURE OF CIVIL JUSTICE 232 (David Freeman Engstrom ed. 2023). Differences in access to technology can also exacerbate power differentials between well-resourced and poorly resourced litigants and between represented and self-represented litigants, particularly where one side can use high-quality remote access to enhance self-presentation through “hyper-personalization” and can use and perceive nonverbal behavior and the other side has audio-only access via a smartphone. QUINTANILLA ET AL., *supra*, at 240-241; James V. Noonan, & Judge Patrick T. Stanton, *Remote Hearings: Let’s Not Forget the Cost of What’s Lost*, 54 LOY. U. CHI. L. J. 1, 4 (2023). Courts, too, can lack adequate technical capacity, see Norton, *supra*, at 521, and courts and other rulemakers should take care not to pivot to remote hearings without first ensuring that the necessary technological infrastructure is in place. See Chapter 11 (Court Use and Regulation of Technology).

Self-represented litigants may face other, nontechnical challenges in navigating remote hearings. Self-represented litigants may struggle with presenting and viewing physical and documentary evidence in remote settings or scanning and admitting it into evidence, Bannon & Keith, *supra*, at 1894; Noonan & Stanton, *supra*, at 11-12. A separate concern is that remote hearings, by reducing trips to a physical courthouse, make it harder for self-represented parties to connect with resources or legal services. Bannon & Keith, *supra*, at 1898. Relatedly, unrepresented litigants in remote hearings may lack opportunities to observe and learn from other proceedings and conversations happening within the courtroom, or to engage in informative informal discussions with opposing counsel. Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933, 989-990, 992-993 (2015). These challenges may impact some litigant types more than others. For example, in the debt-collection context, plaintiffs have reportedly adapted more easily to remote hearings than defendants. Claire Johnson Raba, Working Paper, *Going Remote: Due Process and Self-Represented Debt Collection Defendants During the COVID-19 Pandemic* (Nov. 10, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4064918.

Finally, courts and other rulemakers formulating decision rules for when remote hearings are available should also consider the opportunities and challenges that remote hearings pose for improving public access and transparency. On the one hand, making remote hearings widely available can increase channels for public and democratic accountability as well as the public elaboration of law (§ 2.05). On the other hand, widely available remote hearings may yield trade-offs with privacy interests, resulting in the loss of the “practical obscurity”—the concept that information, while technically available and public, is effectively hidden due to the difficulty in accessing it—that currently shields high-volume dockets from efforts, many of them commercial, to monetize entanglement with the civil-justice system. Bannon & Keith, *supra*, at 1900 (citing ALBERT FOX CAHN & MELISSA GIDDINGS, VIRTUAL JUSTICE: ONLINE COURTS DURING COVID-19 4 (2020) <https://static1.squarespace.com/static/5c1bfc7eee175995a4ceb638/t/5f1b23e97ab8874a35236b67/1595614187464/Final+white+paper+pdf.pdf>). See generally Chapter 13 (Privacy and Confidentiality).

c. Ability to opt out. Courts and other rulemakers formulating decision rules must take particular care in structuring opt-out rules. This Section adopts a “good cause” standard for when

1 a party may opt out of an otherwise mandatory hearing format in order to safeguard fairness and
 2 accessibility. While remote hearings can reduce the costs of adjudication for the parties and court
 3 alike, they may not be suitable for all parties, particularly those who lack technological proficiency,
 4 have disabilities, or face challenges like limited internet access. These barriers can prevent litigants
 5 from fully participating in or understanding the process, thus compromising their right to a fair
 6 hearing. Additionally, some disputes may involve complex legal or factual issues that are best
 7 addressed in an in-person hearing. By permitting opt-outs based on “good cause,” courts and other
 8 rulemakers can balance the benefits of remote hearings with the need to accommodate individual
 9 circumstances, thereby preserving the goals of procedure as set forth in § 2.01.

10 In adopting subsection (c)’s “good cause” requirement, this Section rejects alternative
 11 approaches adopted in certain jurisdictions. For instance, some jurisdictions grant opt-out rights
 12 only to litigants who are natural persons not represented by counsel. E.g., Spanish Royal Decree
 13 Law 6/2023, art. 32. In high-volume dockets, such an approach would be both over- and under-
 14 inclusive in protecting legitimate procedural rights and fostering meaningful participation across
 15 the full range of parties, from small, “mom and pop” proprietors organized as limited liability
 16 companies to privately held ones with large holdings and significant expertise and resources. This
 17 Section’s “good cause” standard favors case-by-case discretion over such a rule-based approach.

18 Similarly, this Section rejects an approach where all parties enjoy broad opt-out rights. In
 19 particular, such an approach risks advantaging more-expert, better resourced, and often
 20 represented parties, who might otherwise strategically compel in-person hearings to increase the
 21 costs of participation for adversaries and thus increase the likelihood of default. Subsection (c)(3)’s
 22 requirement that a party may, but need not, choose the same hearing format once another party has
 23 successfully exercised opt-out rights from an otherwise mandatory in-person hearing offers a
 24 safeguard against this concern.

25 Finally, in specifying and implementing subsection (c)’s “good cause” requirement, courts
 26 and other rulemakers should remain attentive to the significant asymmetries in expertise and
 27 resources across parties in many high-volume civil-adjudication areas. For instance, a requirement
 28 that less expert, less resourced, and often self-represented parties adduce substantial evidence on
 29 the difficulty and expense of connecting remotely risks recreating the obstacles to meaningful
 30 participation already faced by many less expert, less resourced, and often self-represented litigants.
 31 See Julianne Dardanes, *When Accessing Justice Requires Absence from the Courthouse: Utah’s*
 32 *Online Dispute Resolution Program and the Impact it Will Have on Pro Se Litigants*, 21 PEPP.
 33 DISP. RESOL. L.J. 141, 159-160 (2021) (discouraging use of opt-out decision rules on these
 34 grounds). The better approach is for a court to ask litigants to state their reasons for opting out and
 35 then apply wide latitude as to the range of acceptable justifications. At the same time, courts should
 36 remain aware that more expert, better resourced, and often represented parties may seek in-person
 37 hearings not because of an inability to meaningfully participate in the hearing but rather in order
 38 to gain tactical advantage.

§ 5.08. Conduct of Remote Hearings

(a) Courts and other rulemakers should adopt clear, accessible, and evidence-based rules for the conduct of remote hearings. Those rules should address:

(1) procedures for requesting or opposing a remote hearing;

(2) technological standards for remote hearings, including the infrastructure that is required for meaningful participation, cyber-security, and privacy;

(3) rules of conduct during remote hearings, including provisions to facilitate attorney–client communications when a party is represented;

(4) accommodations for vulnerable parties and participants, including persons with disabilities or limited language proficiency; and

(5) public access to remote hearings.

(b) To ensure meaningful participation in a remote hearing, courts should, at a minimum, provide parties and participants with:

(1) timely and accessible instructions for accessing and participating in a remote hearing and information about the required technological infrastructure;

(2) information about publicly accessible venues that are equipped to support participation in a remote hearing, at the court or in partnership with other public bodies or community organizations; and

(3) technical assistance before and, to the extent practicable, throughout the hearing.

Comment:

a. Conduct of remote hearings. When courts and other rulemakers require or make available remote hearings, those hearings should be designed and administered to ensure those hearings serve the ends of procedure set forth in § 2.01. This Section provides guidance to courts and other rulemakers by enumerating a set of factors that should be considered in formulating and administering rules governing the conduct of hearings, including technological accessibility, security and privacy, and public access and transparency. As with the decision when to require or make remote hearings available, hybrid hearings pose particular challenges, and courts and other rulemakers should take measures to minimize any procedural disadvantages related to the difference in the parties’ mode of participation. Finally, courts and other rulemakers should

provide training and clear guidelines for judges and other decisionmakers, court staff, attorneys, parties, and participants on conducting and participating in remote hearings. Principles regarding training of judges and court staff are set forth more fully in Chapter 11 (Court Use and Regulation of Technology).

REPORTERS' NOTES

a. Conduct of remote hearings. When formulating rules that make remote proceedings available to litigants, courts and other rulemakers should take affirmative measures to ensure meaningful access and accessibility. The principles advanced in this Section place particular emphasis on clear and accessible procedures for requesting or opposing a remote hearing. For instance, where court rules permit litigants to opt out and request in-person hearings, those rules should ensure that exercising the opt-out option does not recreate or exacerbate access barriers. Norton, *supra*, at 539; Julianne Dardanes, *When Accessing Justice Requires Absence from the Courthouse: Utah's Online Dispute Resolution Program and the Impact it Will Have on Pro Se Litigants*, 21 PEPP. DISP. RESOL. L.J. 141, 159-160 (2021). Instead of requiring litigants to provide information on the difficulty and expense of connecting remotely, litigants might be asked to state their reasons for opting out, with the court applying wide latitude as to the range of acceptable justifications.

A second priority should be providing clear and timely information to parties and participants on how to access and participate in remote hearings. Prior to a remote hearing, courts should provide participants with information about the technology required to participate in remote hearings, clear instructions for accessing the hearing, and information about how to create a private and neutral environment. This information may include a “tech-check” into the hearing process to ensure that a participant’s technology is working correctly, which could be conducted in advance of the hearing. REMOTE HEARINGS TOOLKIT, *supra*, at 27. Courts should also be prepared to provide real-time orientation and assistance in navigating the process and using the technology. Norton, *supra*, at 537, 541, including for example, creating welcoming and informational virtual waiting rooms for hearings, *id.* at 47.

Third, services and accommodation for litigants with limited English proficiency or disabilities should be available in remote proceedings on par with in-person ones. This includes allowing for live interpretation and using videoconference platforms that are compatible with screen-reading software and closed captioning. SHANNON MCAULIFFE ET AL., *supra*, at 24.

Finally, courts and other rulemakers formulating rules and policies for the conduct of remote hearings should ensure that court technology systems meet minimum standards for usability and accessibility. Minimum requirements include an easily accessible platform, a way to assess users’ technological capacity (including access to the Internet and necessary accommodations or language access needs), adequate technology support for users before and during remote proceedings, the ability to provide public access in real time and/or record such proceedings for future public access, and any additional technology needed for the introduction and viewing of evidence, including

1 witness testimony and documentary evidence. See CAL. COMM. ON ACCESS TO JUST., REMOTE
2 HEARINGS AND ACCESS TO JUSTICE: DURING COVID-19 AND BEYOND (2020), [https://www.ncsc.org/
3 ___data/assets/pdf_file/0018/40365/RRT-Technology-ATJ-Remote-Hearings-Guide.pdf](https://www.ncsc.org/___data/assets/pdf_file/0018/40365/RRT-Technology-ATJ-Remote-Hearings-Guide.pdf); see also
4 Jud. Council of Cal., Minimum Technology Standards for Remote Proceedings (SB 133) (2024),
5 <https://www.courts.ca.gov/documents/Minimum-Technology-Standards-20240401.pdf>. Courts
6 might also consider providing safe access points within the community for litigants to access remote
7 technology, or forging court partnerships with community and legal-service organizations who can
8 do so. Bannon & Keith, *supra*, at 1917; see also Norton, *supra*, at 541 (suggesting sites for remote
9 access in community-based satellite offices).

CHAPTER 7

ENTRY AND ENFORCEMENT OF JUDGMENTS

§ 7.01. General Principles of Entry and Enforcement of Judgments

Procedures that govern the entry and enforcement of judgments in high-volume civil adjudication should:

(a) account for barriers to meaningful participation in litigation that many parties face; and

(b) promote case outcomes consistent with the well-settled preference for the resolution of cases on the merits.

Comment:

a. The entry and enforcement of judgments and barriers to meaningful participation in high-volume civil adjudication. This Chapter primarily addresses judgments entered with little or no meaningful litigation, particularly default judgments. Although many cases in high-volume civil dockets settle, these negotiated resolutions raise distinct issues. Accordingly, principles governing the resolution of cases through negotiation and settlement are addressed primarily in Chapter 6 (Settlement). That said, nothing in this Chapter should be understood as inconsistent with those principles.

Judgments entered with minimal or no adversarial testing, especially default judgments, are common in high-volume civil-adjudication contexts. See Chapter 1 (General Principles of Fair Adjudication). This feature of high-volume civil dockets makes rules governing the entry and enforcement of judgments particularly important to the achievement of accurate and fair outcomes. Such rules regulate the notice provided when parties seek and courts grant default judgments; procedural and substantive obligations to be satisfied before the entry of judgments; efforts to vacate, set aside, or stay judgments; and various issues that arise after the entry and during the enforcement of judgments.

The frequency of default judgments often reflects the fact that many parties in various high-volume civil-adjudication contexts share characteristics that limit their capacity to participate meaningfully in litigation and protect their rights and interests. These barriers are particularly hard for under-resourced, inexperienced, and self-represented litigants to overcome when cases proceed on short timelines. At this Chapter's core is the commitment that rules and court practices

1 concerned with the entry and enforcement of judgments should respond, to the extent practicable,
2 to the problem of little or no engagement with the merits of the parties' claims and defenses. A
3 judgment's legitimacy depends, in important measure, on how closely it reflects the parties'
4 entitlements under the applicable substantive law, and whether its entry comes after parties have
5 been afforded a meaningful opportunity to participate. These two considerations are related.
6 Judgments entered without meaningful opportunities for participation may fail as trustworthy
7 indicators of the parties' entitlements and liabilities under the applicable substantive law.

8 Barriers to meaningful participation contribute to a recurring problem in high-volume civil
9 adjudication. Judgments can be enforced in ways that create harms that go beyond what a remedy's
10 full vindication requires. Even if a judgment was entered and affirmed after the defendant had a
11 meaningful opportunity to participate on the merits, the defendant must also be afforded a
12 meaningful opportunity to be heard at the enforcement stage to increase the likelihood that
13 enforcement will be fair and will not cause unnecessary harms. Such participation can help to
14 prevent the execution of judgments against assets or property that are exempt from enforcement,
15 or the unnecessary impairment of the defendant's property or liberty interests. As elaborated in
16 § 7.07 (Measures to Protect Against Unnecessary Harms from the Entry and Enforcement of
17 Judgments), judgment enforcement should proceed in ways that minimize those unnecessary
18 harms to the extent possible.

19 *b. Preference for merits outcomes and finality.* Procedures and doctrines in many
20 jurisdictions reflect a longstanding preference for merits outcomes as a principle informing the
21 rules that regulate the entry and enforcement of judgments as well as their application in particular
22 cases. This Chapter's principles reflect the well-established preference for merits outcomes and
23 build upon those well-established procedures and practices. This preference has particular
24 importance for high-volume civil adjudication, given recurring problems that prevent many
25 judgments from satisfying standards for judgment integrity that legitimate outcomes in other types
26 of civil litigation. Thus, § 7.05 (Invalid Default Judgments) responds to recurring issues in high-
27 volume civil adjudication, including improper service, by calling on courts to vacate or set aside
28 an invalid judgment except under extraordinary circumstances. In addition, a judgment entered
29 without meaningful participation by both parties is less likely to reflect the merits of their
30 respective positions. For that reason, § 7.06 (Considerations in Vacating Judgments on Other
31 Grounds) calls on courts to exercise discretion in considering requests to vacate an otherwise valid

1 judgment by weighing barriers to a party’s meaningful participation. Finally, § 7.04 (Procedures
2 for Motions to Stay or Vacate) calls on courts and other rulemakers to bolster rules governing
3 vacatur of judgments by simplifying the processes by which parties can seek to stay or vacate
4 judgments and thereby request opportunities to renew merits litigation.

5 Procedures, including rules and court practices, can honor this preference for merits
6 outcomes and account for barriers to meaningful participation without sacrificing the value
7 afforded to the finality of judgments. Courts can take reasonable steps to avoid a clash between
8 one party’s legitimate interest in the entry or enforcement of a judgment and another party’s
9 legitimate interest in the reopening of merits litigation. These steps can include, for instance, the
10 administration of rigorous service-of-process rules, see Chapter 3 (Notice and Service of Process),
11 court review of the parties’ filings for procedural and substantive sufficiency, see Chapter 4
12 (Pleading and Information Exchange) and § 7.03 (Showing of Entitlement to Judgment), and the
13 provision of notice before the entry of judgment, see § 7.02 (Notice Prior to and After Entry of
14 Judgment). Such safeguards encourage participation and prompt engagement with the merits
15 before the entry of judgment. A judgment rendered after a process that benefits from these
16 protections should require fewer fixes after its entry, vindicating finality values.

REPORTERS’ NOTES

17 *a. The entry and enforcement of judgments and barriers to meaningful participation in*
18 *high-volume civil adjudication.* This Chapter’s principles primarily address the entry of judgments
19 after little or no merits litigation, with little or no participation by at least one of the parties. Most
20 consumer-debt cases fit this description. E.g., MINN. STATE BAR ASSOC. ACCESS TO JUST. COMM.,
21 MINNESOTA CONSUMER DEBT LITIGATION: A STATEWIDE ACCESS TO JUSTICE REPORT 3 (2023).
22 Defaults are common in eviction litigation as well. But eviction cases routinely end in settlements,
23 often culminating with the entry of consent judgments. E.g., Nicole Summers, *Civil Probation*, 75
24 STAN. L. REV. 847, 858-860 (2023). The circumstances and dynamics that produce negotiated
25 resolutions raise a distinctive set of issues different from those that tend to lead to default
26 judgments. See, e.g., *id.* at 859 (discussing “hallway” settlements in eviction litigation). Moreover,
27 doctrine regulating opportunities for renewed litigation after the entry of judgment tends to
28 distinguish between default judgments and outcomes reached after participation by both sides
29 (including settlements). Restatement of the Law Second, Judgments, Ch. 5, Topic 1, Title A,
30 Introductory Note (AM. L. INST. 1982) (“A contested action yields a judgment in which the value
31 of finality is greatest. There has been a decision following an examination of the critical issues
32 through bilateral participation of the parties.”); see also *Haller v. Wallis*, 573 P.2d 1302, 1305
33 (Wash. 1978) (“Since a judgment approving a settlement differs from a judgment by default in that

both parties have appeared before the court and have sought its approval of their agreement disposing of the case, different equitable factors must be considered when the court is asked to vacate such a judgment.”). But cf. 144 Woodruff Corp v. Lacrete, 154 Misc. 2d 301, 302 (N.Y. Civ. Ct. 1992) (declaring that “relief from a stipulation” in an eviction case “may be granted in order to prevent injustice,” and insisting that this relief not be “closely confined”) (internal quotation omitted). For these reasons, principles addressing the negotiated resolution of cases are addressed elsewhere. See Chapter 6 (Settlement).

Many litigants in high-volume civil-adjudication contexts struggle to participate meaningfully in litigation. See Chapter 1 (General Principles of Fair Adjudication); Chapter 2 (General Principles of Procedure). Litigants must contend with lack of access to counsel; feelings of confusion, alienation, frustration, and despair; inadequate childcare resources and transportation difficulties; and other such extra-legal challenges. E.g., FREDERICK F. WHERRY & HANNAH HILL, HOW STATE POLICIES AFFECT COURT JUDGMENTS IN DEBT COLLECTION SUITS: A COMPARATIVE STUDY ACROSS FOUR STATES 13-14 (Oct. 2024) (documenting an increase in default judgments entered after the COVID-19 pandemic ended and identifying the end to virtual court proceedings and the return to in-person court as a possible factor); PUBLIC JUST. CTR., JUSTICE DIVERTED: HOW RENTERS ARE PROCESSED IN THE BALTIMORE CITY COURT 32 (2015); Rebecca L. Sandefur, *The Importance of Doing Nothing: Everyday Problems and Responses of Inaction*, in TRANSFORMING LIVES: LAW AND SOCIAL PROCESS 112, 123-126 (Pascoe Pleasence et al., eds. 2007).

Legal barriers can also disable effective and appropriate participation. When service fails to provide defendants with notice of litigation commenced against them, consumer debtors, tenants, and others who might otherwise attempt to protect their interests in court may default. JANUARY ADVISORS, OREGON DEBT COLLECTION LAWSUITS: DATA ANALYSIS CHARTBOOK 41 (2024) (documenting different default-judgment rates depending upon the method of service used). When adjudication proceeds quickly, as it often does in eviction litigation, even the most sophisticated and dogged of self-represented litigants may struggle to protect their interests. See, e.g., Adjartey v. Central Div. of Hous. Ct. Dep’t, 481 Mass. 830, 837-838 (2019) (commenting on this phenomenon in Massachusetts eviction litigation). Courts operate pursuant to informal norms and unwritten rules—practices for how to get an absence from court excused, for instance—that an inexperienced litigant may struggle to understand. Isaiah Fleming-Kink et al., *Navigating an Overburdened Courtroom: How Inconsistent Rules, Shadow Procedures, and Social Capital Disadvantage Tenants in Eviction Court*, 22 CITY & CMTY. 1, 2 (2023); id. at 13. Consumer debtors sued by debt buyers and not original creditors default more often, possibly because defendants do not recognize these plaintiffs and are wary of engaging with them. SHERRY & HILL, supra, at 14.

Finally, representation in high-volume civil litigation is often asymmetric, with plaintiffs represented by counsel and defendants not. See generally Chapter 1 (General Principles of Fair Adjudication). These barriers may have disparate impacts. E.g., CLAIRE JOHNSON RABA, THE UNEQUAL BURDEN OF DEBT CLAIMS 3 (2023) (observing that debt-collection case filings disproportionality affect Black and Hispanic borrowers, and that Black and Hispanic borrowers are less likely to be represented by counsel than white borrowers); JANUARY ADVISORS, OREGON

1 DEBT COLLECTION LAWSUITS: DATA ANALYSIS CHARTBOOK 37 (2024) (disproportionately high
 2 filings against Black and Latino/Hispanic debtors in Oregon regardless of income level);
 3 MICHIGAN JUSTICE FOR ALL COMM’N, ADVANCING JUSTICE FOR ALL IN DEBT COLLECTION
 4 LAWSUITS 27 (2022) (documenting racial disparities in debt collection default judgment rates).

5 Barriers to meaningful participation in the adversarial process contribute to massive
 6 numbers of default judgments in American courts. E.g., JULIA BARNARD ET AL., COURT SYSTEM
 7 OVERLOAD: THE STATE OF DEBT COLLECTION IN CALIFORNIA AFTER THE FAIR DEBT BUYER
 8 PROTECTION ACT 2 *(2020) (documenting a 66-67 percent average default-judgment rate in debt-
 9 collection cases, with rates varying depending on the type of case); ASPEN INST. FIN. SEC.
 10 PROGRAM, A FINANCIAL SECURITY THREAT IN THE COURTROOM 1 (2021) (referring to several
 11 studies documenting a 70 percent default rate); NAT’L CONSUMER L. CTR., THE DEBT MACHINE:
 12 HOW THE COLLECTION INDUSTRY HOUNDS CONSUMERS AND OVERWHELMS COURTS 15 (2010);
 13 Williams v. Shaffer, 385 U.S. 1037, 1040 (1967) (Douglas, J., dissenting) (commenting on
 14 pathologies in eviction litigation and observing that “[d]efault judgments . . . are obtained in
 15 machine-gun rapidity”); Kathryn A. Sabbeth, Eviction Courts, 18 U. ST. THOMAS L.J. 359, 380
 16 (2022) (describing empirical research documenting default-judgment rates in eviction litigation of
 17 15-80 percent); Ryan Brenner et al., *Half the Battle Is Just Showing Up: Non-Answers and Default*
 18 *Judgments in Non-Payment Eviction Cases Across New York State, 2016-2022* 2, NYU Furman
 19 Ctr. (Jan. 2023) (finding 54 percent of nonpayment eviction cases go unanswered across New York
 20 state); Mayor’s Task Force on Eviction Prevention and Response, Report and Recommendations
 21 (2018) (finding 54 percent of all legal evictions in Philadelphia over a five-year period were the
 22 result of a default judgment). In debt-collection cases, these default judgments routinely result in
 23 the garnishment of wages, tax returns, or other assets. E.g., MICHIGAN JUSTICE FOR ALL COMM’N,
 24 ADVANCING JUSTICE FOR ALL IN DEBT COLLECTION LAWSUITS 33 (2022) (finding that 78 percent
 25 of debt cases in Michigan which judgment was entered result in garnishment); *id.* at 44 (finding
 26 that 70 percent of debt cases result in default judgments).

27 Default judgments may be legitimate and result from a party’s rational decision not to
 28 defend. The design of procedural rules and practices should acknowledge this fact. Defendants
 29 may determine that they lack defenses to the plaintiffs’ claims, for instance, and determine that
 30 litigation would simply waste time and resources. Or they may determine more generally that the
 31 costs of engagement outweigh the benefits. An experienced repeat-play litigant may obtain more
 32 from an inexperienced adversary in a settlement than what a court might award in a default
 33 judgment. See Lauren Sudeall & Daniel Pascuiti, *Praxis and Paradox: Inside the Black Box of*
 34 *Eviction Court*, 74 VAND. L. REV. 1365, 1409 (2021). Thus, in certain instances defending parties
 35 may be better off defaulting.

36 But default judgments in high-volume civil adjudication can also result from inadequate
 37 procedures that fail meaningfully to enable participation, or from recurring circumstances
 38 characteristic of a litigation system, such as a lack of access to legal help. In such instances default
 39 is not rational. Indeed, it is likely that judgments are often entered when plaintiffs would not prevail
 40 if the case were litigated. Potentially viable defenses or counterclaims do not get litigated. E.g.,

PAULA HANNAFORD-AGOR & BRITTANY KAUFFMAN, PREVENTING WHACK-A-MOLE MANAGEMENT OF CONSUMER DEBT CASES: A PROPOSAL FOR A COHERENT AND COMPREHENSIVE APPROACH FOR STATE COURTS 7 (2020) (“Government investigations and empirical studies of consumer debt litigation have repeatedly found judgments entered in cases in which viable defenses could have been raised and likely would have been successful.”). Plaintiffs often have not satisfied required procedures before judgments are entered. E.g., ABHAY ANEJA ET AL., MORE PAPER IN CONNECTICUT: AN EVALUATION OF DOCUMENTATION REFORMS IN STATE COURT 2 (July 2024) (determining that no plaintiff in a sample of debt-collection cases met Connecticut’s documentation requirements); *id.* at 32 (noting that 75 percent of the cases in the sample ended in default judgments); JULIA BARNARD, ET. AL, COURT SYSTEM OVERLOAD: THE STATE OF DEBT COLLECTION IN CALIFORNIA AFTER THE FAIR DEBT BUYER PROTECTION ACT 30-31 (2020) (reporting that in more than half of consumer-debt cases in a sample in which default judgments were entered plaintiffs did not submit documentation California law requires for the entry of a default judgment); Judith Fox, *Do We Have a Debt Collection Crisis? Some Cautionary Tales of Debt Collection in Indiana*, 24 LOY. CONSUMER L. REV. 355, 382-383 (2012) (documenting in a study of debt-collection litigation in Indiana that in no instance did a plaintiff provide required notice to a defendant before the entry of a default); SHELLER CTR. FOR SOC. JUST., REDUCING DEFAULT JUDGMENTS IN PHILADELPHIA’S LANDLORD-TENANT COURT 7-9 (2020) (documenting the frequency with which default judgments in Philadelphia eviction cases get entered without notice to the tenant). The result is that litigation routinely fails to generate outcomes warranted by the applicable substantive and procedural law.

The design and administration of procedures in high-volume civil adjudication should foster conditions such that default judgments are entered and enforced when parties default for rational reasons, not when barriers to meaningful participation obstruct engagement. See § 2.03 (Meaningful Participation). If parties do not participate in litigation, in other words, the choice not to appear should be knowing and reasoned. This premise fits a longstanding preference in many American jurisdictions for outcomes obtained after merits litigation over those resulting from defaults. See § 7.06 (Considerations in Vacating Judgments on Other Grounds).

Litigants should have all necessary protections to ensure that they do not suffer harms caused by a judgment’s entry or enforcement that a remedy’s full vindication does not require. If a judgment debtor has assets that are immune from execution, that debtor should have meaningful access to procedures necessary to ensure that these assets do not get taken. If a tenant is ordered evicted, the judgment’s enforcement should give the tenant sufficient time to leave the premises under circumstances that minimally impact that tenant’s property and overall well-being. Subsection (a)’s general principle that procedures should account for barriers to meaningful participation has a corollary that courts and other rulemakers should adopt rules to prevent harms related to a judgment’s entry or enforcement that are unnecessary to a remedy’s full vindication. See § 7.07.

b. Preference for merits outcomes and finality. A preference for the resolution of cases on the merits over the entry of judgments without merits testing is common and longstanding in American courts. E.g., *Krupski v. Costa Crociere*, 560 U.S. 538, 550 (2010) (referring to the

1 preference in the Federal Rules of Civil Procedure “for resolving disputes on their merits”); United
 2 States v. Starling, 76 F.4th 92, 99 (2d Cir. 2023) (“Because a default judgment may lead a pro se
 3 party’s entire case to founder on mistake or ignorance, a court’s discretion to grant default
 4 judgment is circumscribed as a reflection of our oft-stated preference for resolving disputes on the
 5 merits.”) (internal quotation omitted); McMichael v. Encompass PAHS Rehabilitation Hosp.,
 6 LLC, 522 P.3d 713, 720 (Colo. 2023) (referring to “our preference for resolving cases on the
 7 merits” when discussing the setting aside of default judgments); Ridgway v. Mount Vernon Fire
 8 Ins. Co., 176 A.3d 1167, 1173-1174 (Conn. 2018) (referring to “a policy preference to bring about
 9 a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court”)
 10 (internal quotation omitted); Maddux v. Bd. of Prof. Responsibility of the Supreme Court of Tenn.,
 11 409 S.W.3d 613, 623 n.9 (Tenn. 2013) (referring to “the general rule that default judgments run
 12 counter to the judicial system’s preferred objective of disposing of cases on the merits”).

13 Courts and court systems can administer settled and well-established procedures that
 14 regulate the entry of judgments in ways that respond to barriers to meaningful participation without
 15 unsettling commitments to finality or exacerbating docket pressures. For example, service of the
 16 summons and complaint routinely goes awry in high-volume civil adjudication. See Chapter 3
 17 (Notice and Service of Process). Thus, a rule providing for court notification to defendants of a
 18 plaintiff’s request for the entry of a default judgment before the judgment’s entry may decrease
 19 instances when defendants default for lack of notice. Parties in high-volume civil adjudication also
 20 routinely fail to assert meritorious defenses due to a lack of legal sophistication, inadequate
 21 information, confusion, or alienation. See Chapter 4 (Pleading and Information Exchange). A rule
 22 that courts will evaluate a plaintiff’s filings for their substantive and procedural sufficiency before
 23 entering judgment can decrease the need for postjudgment litigation.

24 This Chapter’s principles may require departures from a rigidly passive role for judges that
 25 fit a strictly adversarial conception of litigation. See Chapter 10 (The Judicial Role). However, the
 26 sort of judicial and court responsibilities that these principles contemplate would not require a
 27 dramatic role change. Indeed, they build upon laws in numerous jurisdictions that already require
 28 similar engagement. E.g., CAL. CIV. CODE § 1788.60(c) (providing that a judge may not enter
 29 default judgment in certain debt-collection actions if the plaintiff has not met documentation
 30 requirements). Additionally, such principles mirror best practices pioneered by other government
 31 institutions handling enormous dockets. See Chapter 8 (Systemic Administration). Finally, court
 32 staff can help administer these obligations, relieving judges of the entire responsibility to do so. *Id.*

33 Traditionally the entry of judgment marked a significant turning point for defendants and
 34 their right to invoke processes to protect their interests. Provided that a defendant had notice and
 35 an opportunity to be heard before the judgment’s entry, for instance, the defendant lost any claim
 36 to further procedural protection for property or other interests subject to the judgment’s execution.
 37 See generally *Endicott-Johnson Corp. v. Encyclopedia Press, Inc.*, 266 U.S. 285 (1924) (holding
 38 that judgment debtors have no right to due process after a judgment’s entry when the judgment is
 39 executed).

1 This understanding is at least partially obsolete for several reasons. First, every jurisdiction,
2 state and federal, offers avenues for the reopening of judgments, and they agree that these avenues
3 should be particularly available when no meaningful merits litigation preceded the judgment's entry.
4 See § 7.06 (Considerations in Vacating Judgments on Other Grounds). Second, a broad array of state
5 and federal laws provides protections that immunize certain property and liberty interests from
6 infringement even after a judgment's entry. Federal law, for instance, prohibits the garnishment of
7 more than a certain amount of a judgment debtor's wages, regardless of the size of the judgment
8 awarded. 15 U.S.C. § 1673. These interests have garnered constitutional protection. See § 7.07
9 (Measures to Protect Against Unnecessary Harms from the Entry and Enforcement of Judgments).

10 These reasons, taken together, support judgment-related procedures that do not disfavor
11 the reopening of cases but instead permit litigation to recommence upon a showing of a reasonable
12 justification. This approach tracks the preference for the resolution of cases upon the merits with
13 which courts in many jurisdictions approach motions to vacate or set aside default judgments. See
14 § 7.06 (Considerations in Vacating Judgments on Other Grounds).

15 There may be instances when interests in a judgment's finality, whether those of the party
16 that benefits from the judgment, those of a third party, or those of the court itself, outweigh another
17 party's interest in the resolution of the case on the merits. Cf. *Ariz. v. Cal.*, 460 U.S. 605, 619
18 (1983) (discussing interests in the finality of judgments); *Tice v. Am. Airlines, Inc.*, 162 F.3d 966,
19 970 (2d Cir. 1998) (describing “the need of litigants and the judicial system alike for finality of
20 decisions *after a full and fair airing of a matter*” as an “important principle[] of civil litigation”) (emphasis added); Restatement of the Law Second, Judgments, Ch. 5, Introductory Note, Topic 1,
21 Title A (AM. L. INST. 1982) (discussing the lesser value afforded to the finality of default judgments
22 compared with judgments entered in contested cases). While this Chapter recommends principles
23 that, on balance, should facilitate the reopening of judgments in appropriate instances in the service
24 of meaningful participation, these principles do not portend a fundamental disruption to judgment
25 finality in any wider sense. Even a doubling in the rate at which parties move to vacate judgments,
26 for instance, will have a modest impact on court dockets. See CLAIRES JOHNSON RABA, ONE-SIDED
27 LITIGATION: LESSONS FROM CIVIL DOCKET DATA IN CALIFORNIA DEBT COLLECTION LAWSUITS 28
28 (2023) (documenting that .55 percent of consumer defendants in California debt buyer litigation
29 moved to vacate judgments during the study period); MICHIGAN JUSTICE FOR ALL COMM'N,
30 ADVANCING JUSTICE FOR ALL IN DEBT COLLECTION LAWSUITS 26 (2022) (finding that defendants
31 file motions to set aside debt-collection default judgments in fewer than 1 percent of cases).
32 Ultimately whether a party will take advantage of procedures designed and administered to enable
33 the reopening of merits litigation, when justified, depends on that party's initiative. Some of the
34 barriers to a party's meaningful participation in the first instance, especially extra-legal barriers,
35 will have continued effect after a judgment's entry.
36

1 **§ 7.02. Notice Prior to and After Entry of Judgment**

2 **(a) Notice Prior to the Entry of Judgment.**

3 (1) A party against whom claims are asserted should receive notice as part of
4 service of the consequences of a failure to appear or to defend, consistent with § 3.06
5 (Content of Notice and Court-Provided Forms and Resources).

6 (2) In addition, a party seeking the entry of a default judgment should provide
7 timely and effective notice to the party's adversary of any hearing, other proceeding,
8 or court action at which a default judgment may be entered. If the defending party
9 has not appeared or entered, the party seeking the judgment's entry should provide
10 this notice if it can do so without undue burden. This notice should include a complete
11 description of the relief sought and court-provided documentation indicating the
12 steps the adversary can take before the judgment's entry to protect the adversary's
13 rights and interests.

14 **(b) Notice After the Entry of Judgment.**

15 (1) Upon entry of judgment, the court should ensure that a copy of the order
16 entering judgment is delivered to the party against whom the judgment is entered, as
17 well as notice advising this party of:

18 (A) the judgment's entry and the matter or matters the judgment
19 resolves;

20 (B) the remedy granted and any fees, interest, and costs awarded;

21 (C) likely enforcement processes and when they might commence;

22 (D) any additional obligations that might accrue after the judgment's
23 entry, including postjudgment interest;

24 (E) steps the party can take to appeal, move to vacate or set aside the
25 judgment, and stay or postpone the judgment's enforcement; and

26 (F) the rights or interests of the party that could foreseeably be
27 adversely affected by judgment enforcement or execution in a given case type,
28 and the steps the party can take to protect those rights and interests.

29 (2) This notice should be accompanied by court-provided forms that the party
30 against whom a judgment is entered can use to respond in appropriate ways to the
31 judgment's entry.

1 **(c) Notice prior to and after the entry of judgment should:**

2 **(1) be provided by reliable, inexpensive means; and**

3 **(2) be provided in a manner and to a location most likely to achieve effective**
4 **notice, taking full account of any relevant information a party or the court has received**
5 **during the pendency of the case that indicates how this notice can be most effective.**

6 **Comment:**

7 *a. Notice prior to the entry of judgment.* This Section calls on courts and other rulemakers
8 to adopt procedures requiring notice regarding the entry of judgment both before the judgment's
9 entry and after. Subsection (a) places the burden of providing this first notice on the party seeking
10 the judgment's entry. Subsection (b) places the burden of ensuring that postjudgment notice is
11 provided on the court. The court may meet this burden either by providing notice directly or by
12 requiring the party that sought the judgment's entry to provide it.

13 Subsection (a)(1) requires that, when a defending party is served, that party should also be
14 advised of the consequences of a failure to appear, including the possible entry of a default
15 judgment and the relief that might be awarded. See § 3.06 (Content of Notice and Court-Provided
16 Forms and Resources). Subsection (a)(2) also recommends that a party notify an adversary when
17 the party seeks the entry of a default judgment. This notice obligation has several justifications.
18 Service often goes awry in high-volume civil adjudication. See Chapter 3 (Notice and Service of
19 Process). Even when service is effective and includes the information described in subsection
20 (a)(1), defending parties may not fully appreciate the consequences of a failure to appear or defend
21 due to challenges they commonly face, including a lack of representation and little experience with
22 the legal system. Sometimes a party's pleadings do not include a complete enumeration of the
23 relief sought, disabling a defending party from fully understanding the consequences of default.
24 Moreover, self-represented litigants are more likely to engage if nudged to do so repeatedly. This
25 is especially so if a significant time lapses between service and a proceeding at which the court
26 may enter judgment. Under such circumstances, additional notice to a defending party of a hearing,
27 proceeding, or other court action at which the court could enter judgment is important.

28 In eviction cases that proceed on short timelines, the notice called for in subsection (a)(2)
29 should be included with the summons and complaint. In many jurisdictions, insufficient time
30 passes between the service of the summons and complaint and a scheduled merits hearing date to

1 justify additional notice. Notice in addition to that provided with the summons and complaint
2 should be provided in most other cases, including in those eviction cases in which the merits
3 hearing does not follow immediately after service. This additional notice, which the party seeking
4 the entry of judgment should provide, increases the likelihood that a defending party will appear
5 and engage in meaningful merits litigation.

6 The timing of this additional notice can depend upon a jurisdiction's judgment entry
7 practices. Some jurisdictions require the entry of the defending party's default before an entry of a
8 default judgment. Notice provided before or immediately after the entry of default can enable the
9 defending party to respond before judgment is entered, seeking to have the default vacated pursuant
10 to more relaxed standards than those that govern efforts to vacate judgments. In any event,
11 defending parties should receive this additional notice with sufficient time to prepare for or respond
12 to the hearing, proceeding, or other court action that might result in a judgment's entry. For instance,
13 rules in numerous jurisdictions, including the Federal Rules of Civil Procedure, require that notice
14 is provided at least seven days before the hearing, proceeding, or anticipated court action.

15 Subsection (a)(2) requires that the party seeking the entry of judgment provide notice prior
16 to the entry of a default judgment unless doing so would create an undue burden. Many
17 jurisdictions require that notice be provided before the entry of a default judgment to any party
18 that has indicated an intent to defend. Defending parties can indicate this intent not just by
19 answering, but also through more informal actions not captured by filings or other actions that
20 merit entries on court dockets. The sorts of informal actions that qualify have traditionally been
21 determined on a case-by-case basis, after the entry of judgment, and have thus created uncertainty
22 about judgment finality. The better practice is simply to require additional notice before the hearing
23 or proceeding, anytime the party seeking the entry of judgment can provide it without an undue
24 burden. This threshold will almost always favor additional notice. This notice, unlike the formal
25 service of the summons and complaint, can in most instances be provided by more informal,
26 inexpensive means that should impose little burden. The burden may be undue, however, if the
27 defending party has actively evaded service or has disappeared and cannot be located upon
28 reasonable investigation. That said, subsection (a)(2) is not intended to weaken rules that require
29 that notice be provided when a defendant has appeared or answered.

30 Notice provided before the entry of judgment should include a complete description of the
31 relief the party seeking the judgment's entry seeks. The pleadings should have already included a

1 preliminary description of the damages or equitable relief sought, as well as a demand for interest,
2 fees, or costs. See § 3.06 (Content of Notice and Court-Provided Forms and Resources). Notice
3 provided before the entry of judgment can provide more specificity, detailing the precise amount
4 of damages, prejudgment interest, costs, and attorney’s fees sought. A self-represented litigant
5 could then understand in concrete, straightforward terms the result of a default judgment’s entry.
6 In addition, this notice should include court-provided documentation advising the defending party
7 of the steps that party can take to protect the party’s rights and interests. Such documentation
8 should include court-provided forms a defending party can use to request a postponement of the
9 hearing, proceeding, or court action that might result in the entry of judgment.

10 *b. Notice after the entry of judgment.* Subsection (b) addresses postjudgment notice. It
11 requires that a court ensure that notice is provided to a party against whom a judgment is entered
12 that both conveys core information to that party about the judgment and enables the party to take
13 steps to protect the party’s rights and interests. Notice shortly after entry of judgment increases the
14 likelihood that a defaulting party who desires to do so can take prompt action to move to set aside
15 the judgment if grounds for vacatur exist, at minimal cost to finality interests. Also, notice after
16 entry of judgment can advise inexperienced and self-represented litigants of the steps needed to
17 minimize any unnecessary harm that the judgment’s entry or enforcement might cause. When a
18 court has the administrative capacity to provide this notice itself, it should do so. The party that
19 benefits from the judgment may have less of an incentive to ensure that this notice is as effective as
20 possible. The court has no such reduced incentive. If a court lacks the necessary administrative
21 capacity, it can require the party benefiting from the judgment to assist with providing postjudgment
22 notice. For instance, the party benefiting from the judgment may be required to provide to the court
23 an envelope addressed to the defending party that the court can use to send notice of the judgment.

24 This notice should provide the party against whom the judgment is entered information
25 that enables the party to understand the consequences of its entry, to identify matters the party
26 might challenge in further proceedings, and to inform the party of steps the party can take to protect
27 the party’s rights and interests. The party should be informed of what liability the judgment
28 extinguishes, and what remedy this liability has generated. In addition, this information should
29 include an identification of any costs, interest, and fees imposed on the defending party;
30 information about steps the prevailing party might take to enforce the judgment, including
31 information about timing; information about postjudgment interest that might accrue, as well as

1 any other additional liabilities that the judgment's entry might generate; and steps the defending
2 party can take to challenge the judgment or delay its enforcement. This notice should also include
3 information about actions a defending party can take to protect rights and interests that, given the
4 case type involved, the judgment's enforcement or execution might foreseeably impair. See § 7.07
5 and Comment *b* to that Section. In consumer-debt cases, for example, the notice should include
6 information about wage and asset exemptions and methods the defending party can take to protect
7 these wages and assets. In eviction cases, the notice should include information about methods the
8 tenant can take to protect personal property, including storage obligations that the landlord or the
9 municipality may incur.

10 Courts should provide documentation that conveys this information, as well as forms that
11 a defending party can use to appeal, to move to stay enforcement, or to move to vacate the
12 judgment. Due to the repetitive nature of high-volume civil adjudication, most cases will involve
13 a discrete and limited set of issues when judgment is entered or when the prevailing party enforces
14 the judgment. Courts and other rulemakers can thus design forms that self-represented litigants
15 can use to raise these issues most effectively, facilitating merits litigation before cases are finally
16 resolved and judgments irrevocably enforced.

17 Although some jurisdictions assign the postjudgment notice obligation to the parties,
18 subsection (b) follows practice in those jurisdictions that impose this responsibility on courts. To
19 minimize the resulting burden on courts, procedures regulating postjudgment notice can require
20 the party benefiting from the judgment to provide assistance by providing up-to-date contact
21 information for the defending party if the prevailing party has this information or can readily
22 acquire it. The party may be required to provide a stamped envelope that the court uses to send the
23 notice. But courts and other rulemakers should fully shift the burden of providing postjudgment
24 notice to a party only if a court system is incapable of providing it even with party assistance. The
25 fact that numerous jurisdictions require courts to provide postjudgment notice suggests that this
26 burden should not prove unreasonably burdensome for other jurisdictions.

27 *c. Means of notice connected to entry of judgment.* In most instances, personal service
28 should be unnecessary for additional notice sent before the entry of judgment or for notice of the
29 judgment's entry. The defending party should already have been served, and the docket should
30 include the defendant's contact information. Pre- and postjudgment notice can be provided by
31 another reliable and cost-effective means, including by first-class mail. Notice by electronic

1 means, such as email, would also be permissible if information indicates that the parties have
2 communicated effectively by those means in the past, or if the digital message can include evidence
3 confirming its receipt by the defending party. See § 3.04(a)(2) and Comment *b* to that Section
4 (Preferred and Alternative Service).

5 Subsection (c) provides that the means used for pre- and postjudgment notice, and the
6 address at which it is provided, should be based on information on how to provide effective notice
7 that the parties and the court have received during the pendency of the lawsuit that would indicate
8 this notice’s effectiveness. If a court mailing to a defending party has been returned as undelivered,
9 for instance, the party seeking the entry of judgment should take reasonable steps to identify a
10 location for providing notice or a means for providing it that is more likely to prove successful.

REPORTERS’ NOTES

11 *a. Notice prior to the entry of judgment.* As subsection (a)(1) recommends, the party
12 seeking the entry of judgment should provide the defending party notice of the possibility and
13 consequences of a default judgment at the same time the defendant receives the complaint. E.g.,
14 UNIFORM CONSUMER DEBT DEFAULT JUDGMENTS ACT, § 5 (declaring that a court may not enter a
15 default judgment without this notice); Administrative Directive of the Chief Judge of the Court of
16 Common Pleas, Delaware, No. 2016-8, Directing in All Consumer Debt Actions the Attached
17 Notice be Provided to Defendants (Oct. 21, 2016) (requiring this information to be provided along
18 with the complaint). See generally § 3.06 (Content of Notice and Court-Provided Forms and
19 Resources) & Reporters’ Note to Comment *c* thereto. Especially given short litigation timelines,
20 particularly in eviction actions, self-represented defendants should know from the first moment
21 they receive the complaint the consequences of a failure to appear and what actions must be taken
22 immediately to protect rights and interests. To be fully effective, this notice should explain the
23 steps the defending party needs to take to defend and on what timeline; the amount this party may
24 lose, including fees, costs, and interest; any other remedy the court might order; enforcement steps
25 that will follow upon a default, including the possibility of wage or property garnishment; and
26 information about legal services that may be available. See § 3.06; see also UNIFORM CONSUMER
27 DEBT DEFAULT JUDGMENTS ACT, § 5; N.Y.C.P.L.R. § 306-d (requiring this sort of notice with the
28 complaint in a consumer credit case). This information should be provided accessibly and in plain
29 language. Compare UNIFORM LAW COMM’N, CONSUMER DEBT DEFAULT JUDGMENTS ACT, FORM
30 CONSUMER NOTICE (explaining consequences of default in separate form written in plain language,
31 to be served with the complaint), with U.S. COURTS, SUMMONS IN A CIVIL ACTION, FORM NUMBER
32 AO:440 (stating in a summons form, “[i]f you fail to respond, judgment by default will be entered
33 against you for the relief demanded in the complaint,” but providing no additional information).
34 The Uniform Law Commission recommends that courts refuse to enter default judgments in debt-

1 collection cases unless defendants receive this sort of notice. UNIFORM CONSUMER DEBT DEFAULT
2 JUDGMENTS ACT, § 5.

3 Subsection (a)(2) recommends that the party seeking the entry of a default judgment
4 provide notice of any hearing, proceeding or other court action that might result in this judgment’s
5 entry provided that the provision of such notice does not impose an undue burden. The summons
6 and complaint should include this information in eviction cases that proceed on short timelines,
7 because those timelines make additional, separate notice containing this information unrealistic.
8 E.g., CONN. GEN. STAT. § 47a-26 (permitting landlords to file motions for default judgments two
9 days after the return date and requiring the court to decide the motion within a day of its filing). In
10 those eviction cases that proceed more slowly, and in most other types of cases, parties seeking
11 the entry of judgment should provide defending parties with additional notice before the hearing,
12 proceeding, or other court action takes place. This additional notice should include guidance for
13 how the defendant can appear, move to postpone the proceedings, or otherwise act to protect the
14 defendant’s interests.

15 Many jurisdictions require this sort of notice in their generally applicable rules of procedure,
16 or in rules crafted for particular types of cases. E.g., ARIZ. R. CIV. P. 55(a)(3) (requiring notice
17 before the entry of a default); *Keller v. May*, 67 A.3d 1, 4-5 (Pa. 2013) (discussing Pennsylvania’s
18 rule); MINN. REV. STAT. § 548.101(a)(7) (requiring that “the party requesting the default
19 judgment . . . mail[] a notice of intent to apply for default judgment to the debtor”); TENN. R. CIV.
20 P. 55.1 (requiring notice for all defendants, whether or not the defendant appears); MASS. R. CIV.
21 P. 55.1(d) (requiring notice for all defendants in consumer-debt cases, regardless of appearance);
22 E.D. WASH. LOCAL RULE 55.1 (requiring default notice regardless of defendant’s appearance); N.Y.
23 C.P.L.R. § 3215(g)(3)(i) (requiring this notice in cases involving “nonpayment of contractual
24 obligations”). Compare FED. R. CIV. P. 55(b)(1) (requiring no such notice to a defendant who has
25 been defaulted for not appearing); see also *N.Y. v. Green*, 420 F.3d 99, 106 (2d Cir. 2005). Indeed,
26 some courts have determined that the failure to provide such notice in advance of the entry of a
27 default judgment, when required, amounts to a due-process violation. E.g., *Rodriguez v. Marcus*,
28 564 S.W.3d 216, 221 (Tex. Ct. App. 2018); *LBL Oil Co. v. Int’l Power Servs.*, 777 S.W.2d 390,
29 391 (Tex. 1989); 1445 *Washington Ltd. P’ship v. Lemontang*, 19 So. 3d 1079, 1081 (Fla. Ct. App.
30 2018). Cf. *Wright & Miller* § 2687 (describing the failure to provide this notice, when required, as
31 a “serious procedural error”). But see *Rothschild v. Finkelstein*, 248 A.D.2d 701-702 (N.Y. App.
32 Div. 1998) (denying that failure to provide required notice before the entry of a default judgment is
33 a “fatal defect” when the defendant acknowledged receipt of the summons and complaint).

34 In other jurisdictions, an additional notice requirement is triggered when the defending
35 party enters an appearance or otherwise indicates an intent to defend. E.g., FED. R. CIV. P. 55(b)(2);
36 N.C. R. CIV. P. 55(b)(1); IDAHO R. CIV. P. 55(b)(1); *Wilson v. Wilson*, 132 S.W.3d 533 (Tex. Ct.
37 App. 2004). The trigger for this additional notice in Rule 55 of the Federal Rules of Civil Procedure
38 and elsewhere—the defending party’s appearance or intent to defend—reflects the assumption,
39 which may not make sense in high-volume civil-adjudication contexts, that this additional notice
40 is a “benefit” for defendants who respond reasonably diligently to the case filed against them.

Ortiz-Gonzalez v. Fonovisa, 277 F.3d 59, 63 (1st Cir. 2002). This assumption implies an assessment about the deservingness of litigants that does not correspond to the circumstances of high-volume civil adjudication involving large numbers of self-represented litigants. Cf. Restatement of the Law Second, Judgments, Ch. 5, Topic 1, Title A, Introductory Note (AM. L. INST. 1982) (noting that, when a party defaults without an appearance, “it cannot be told whether the default was attributable to a blunder, pure ignorance, or calculated defiance of the court’s authority—circumstances that warrant quite different responses from the court when relief from the judgment is sought”). Unsuccessful service and other barriers many litigants face to meaningful participation in the adversary process complicate any facile assumption that a defendant who fails to appear has acted irresponsibly and thus forfeits a claim to low-cost protections aimed to litigate the case on the merits.

Moreover, the issue of whether a defending party has appeared has generated frequent disputes about what, exactly, counts as an appearance or indication of an intent to defend. In many instances courts have required actions short of the formal entry of an appearance. E.g., BB Buggies, Inc. v. Leon, 150 So. 3d 90, 98-99 (Miss. 2014); see also Wright & Miller § 2686. These actions have included letters to the court sent after service of a complaint, Rodriguez v. Marcus, 564 S.W.3d 216, 220 (Tex. Ct. App. 2018), and Cales v. Wills, 569 S.E.2d 479, 487 (W.Va. 2002); conversations by defendants with plaintiff’s counsel, Baines v. Harwood, 622 N.E.2d 372, 373 (Ohio Ct. App. 1993), U.S. Bank Nat’l Ass’n v. Arnold, 631 N.W.2d 150, 154 (N.D. 2001); and even pre-suit negotiations between the parties. Lindholm v. Prime Hosp. Corp., 90 P.3d 1283, 1285 (Nev. 2004). But see Morin v. Burris, 161 P.3d 956, 962 (Wash. 2007) (action must take place after filing to constitute an appearance). Cf. Apartment Comms. Corp. v. Martinelli, 859 A.2d 67, 73 (Del. 2004) (describing factors to consider). In many jurisdictions, no bright-line rule or simple docket entry could determine whether a defendant has appeared and thus has an entitlement to pre-default notice. Another trigger for this notice in some jurisdictions is whether the plaintiff seeks liquidated or unliquidated damages. E.g., 1445 Washington Ltd. P’ship v. Lemontang, 19 So. 3d 1079, 1081 (Fla. Ct. App. 2018); S.C.R. Civ. P. 5(a). This determination is not mechanistic and can require discretion in particular cases. *Lemontang*, 19 So. 3d at 1081 (vacating a default judgment entered without notice because the judgment provided for attorney’s fees, which the court “considered unliquidated damages”).

A rule requiring notice absent undue burden obviates the need for a case-by-case assessment of whether a defending party has expressed an intent to defend. Moreover, this notice provides several benefits and provides an important bulwark for the proceeding’s overall fairness. If service has gone awry, it increases the chances that the defendant learns about the case with sufficient time to appear and engage in merits litigation. Even if the defendant received notice earlier in the case, repeated nudges increase the likelihood that self-represented litigants will engage. E.g., Alissa Fishbane et al., *Behavioral Nudges Reduce Failure to Appear for Court*, 370 SCIENCE 658, 658 (2020). Additional notice may be particularly important if a long period of time has elapsed since the initial service, a delay that might lead self-represented litigants to believe

1 that the case has ended or otherwise gone away. Cf. WASH. SUP. CT. CIV. R. 55(f)(1) (requiring
2 notice to a defaulting party if more than a year has elapsed since service of the summons).

3 Finally, the burden this notice imposes should usually be modest. Parties typically use
4 inexpensive means to provide additional notice. E.g., Wright & Miller § 2687 (“Notice of an
5 application for the entry of a default judgment need not be in any particular form.”); CAL. CODE
6 CIV. P. § 587 (mailed notice of request for entry of default); MASS. R. CIV. P. 55.1(d) (providing
7 for mailed default notice); MINN. REV. STAT. § 548.101(a)(7) (same). Indeed, notice provided by
8 email may actually be more effective if reason exists to believe that the defendant actively monitors
9 the account. See Chapter 3 (Notice and Service of Process). If a defending party has evaded
10 service, or if finding the defending party would require considerable effort, an additional notice
11 obligation might prove too burdensome and thus be excused. But such instances should be few,
12 especially in cases where a process server completed service and thus the plaintiff has successfully
13 located the defendant.

14 The timeliness of prejudgment notice may depend on circumstances. But as a general matter,
15 a period of least seven days makes sense. Rule 55 of the Federal Rules of Civil Procedure requires
16 seven days for this notice. FED. R. CIV. P. 55(b)(2); see also OHIO CIV. R. 55(a) (same). While some
17 states provide for notice on a shorter timeline, e.g., IND. R. TRIAL PROC. 55(b) (three days); KY. R.
18 CIV. P. 55.1 (three days), their rules tend to follow an older approach the Federal Rules took before
19 the promulgation of an amendment that changes how days get counted for the computation of time.
20 Compare IND. R. TRIAL P. 6(A) (excluding weekend days, holidays, and days during which courts
21 are closed), with FED. R. CIV. P. 6(a) (including these days). See also ADVISORY COMM. ON FED. R.
22 OF CIV. P., REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 2-10 (2008) (explaining changes to
23 how time is computed); *id.* at 28 (indicating the change from three days to seven days for default-
24 judgment notice). The seven-day period should be a minimum. New York requires 20 days’ advance
25 notice in cases involving contractual obligations. N.Y. C.P.L.R. § 3215(g)(3)(i).

26 Subsection (a)(2) recommends that notice before the entry of a default judgment include
27 court-provided documentation that advises a defending party of how the party can appear, request
28 a continuance, or otherwise engage with the proceedings to protect rights and interests. In addition,
29 this notice should include a complete description of the relief sought. The summons and complaint
30 should include a description of the damages or equitable relief sought, as well as information about
31 any fees, costs, and interest sought. See § 3.06 (Content of Notice and Court-Provided Forms and
32 Resources). The notice provided before the entry of a default judgment can provide this
33 information with more specificity and should be provided at this time. E.g., CAL. CODE CIV. PROC.
34 425.11(b) & (c) (requiring a plaintiff to provide a “statement setting forth the nature and amount
35 of damages being sought” to a defendant “before any default may be taken”). This information
36 should include precisely the damages or other relief sought, as well as the amount of attorney’s
37 fees, costs, and prejudgment interest. A self-represented litigant may not fully grasp a case’s stakes
38 without these sums specified in a manner that enables this litigant to calculate with precision what
39 a judgment might cost. Indeed, the failure to provide information about the full relief sought may
40 amount to a due-process violation. *Janssen v. Luu*, 57 Cal. App. 4th 272, 279 (1997) (holding that

the failure to serve notice of the damages sought before the entry of a default judgment violates “fundamental fairness” and renders the judgment “void”).

b. Notice after the entry of judgment. Defending parties should also receive timely notice as soon as a judgment is entered against them. Settled practice in numerous jurisdictions requires that the court itself provide this postjudgment notice to the defending party. E.g., CONN. PRAC. BOOK, SUPERIOR COURT – PROCEDURE IN CIVIL MATTERS § 17-36. In Wyoming, the court must “transmit” by mail a copy of any “money judgment” before it can be enforced. WYO. STAT. § 1-17-102(c). Several jurisdictions require the party benefiting from the judgment to assist the court with this notice obligation. In Texas, for instance, a landlord must provide the court with the tenant’s last known address, and the court must then immediately mail notice of the entry of a default judgment to that address and, if different, to the premises that are the subject of the lawsuit. TEX. R. CIV. P. 510.6(c); see also TEX. R. CIV. P. 503.1. In Idaho, the party seeking a default judgment must provide to the court “written certification of the name of the party against whom the judgment is requested and the address most likely to give the party notice of default judgment.” IDAHO R. CIV. P. 55(b)(3).

Other jurisdictions do not have a postjudgment notice requirement or impose the notice obligation on the party benefiting from the judgment’s entry. E.g., MO. R. CIV. P. 74.03 (not requiring notice of judgment entry upon a defaulting party); N.J. CT. R. 4:43-1 (party obligation); MICH. CT. R. § 2.603 (party obligation). In California, for instance, neither the court nor the landlord has an obligation to notify the tenant when a possession-only default judgment has been entered. Terry B. Friedman et al., *California Practice Guide – Landlord-Tenant* § 8:512 (“[N]either the court nor the landlord need serve the tenant with notice of the entry of judgment[.]”). The tenant may learn of the judgment only when the sheriff serves a notice to vacate, leaving the tenant with just five days to file for a stay of execution or a motion to set aside the judgment. See CAL. CRTS. SELF-HELP GUIDE, EVICTION-TENANTS. In New York, a court cannot require a landlord to notify the tenant of an entry of judgment before the landlord can secure a warrant of eviction. The tenant may only learn of the judgment 14 days before required to leave the premises. *Menella v. Lopez-Torres*, 91 N.Y.2d 474, 479 (1998); N.Y. REAL PROP. ACT. & PROC. § 749.

Subsection (b) favors practice in jurisdictions that require postjudgment notice and impose the obligation to provide it on the court. Four reasons underpin this approach. First, those jurisdictions that require postjudgment notice confirm that the requirement does not pose a challenging burden. Second, a judgment’s entry may lead to significant, sometimes irreversible, consequences in short order and under conditions that disable defendants from protecting rights and interests. An opportunity to move to set aside a judgment may mean little if the judgment’s enforcement happens too quickly. Moreover, swift enforcement without sufficient notice may keep defending parties from protecting interests that the judgment’s execution should not impact. Third, the entry of judgment is an official action the court undertakes. Fourth, a party that benefits from the judgment has an incentive to provide notice by the least reliable means that otherwise passes muster. The court, by contrast, does not stand to benefit from notice that goes awry. By shifting the burden from the party to the court at this juncture, subsection (b) involves a different and less-conflicted institution in the provision of notice and may increase the likelihood of its receipt. That

1 said, procedures regulating this postjudgment notice may appropriately require the party benefiting
 2 from the judgment to assist with its provision—by providing a stamped envelope, for instance, or
 3 by providing the court with updated address information that this party has available. Only in
 4 instances when the administrative burden on the court is substantial should the court have no
 5 obligation beyond ordering the party benefiting from the notice to provide it.

6 Postjudgment notice should clarify the judgment’s scope, including the liability that it
 7 covers, and explain all facets of the remedy issued. See SELLER CTR. FOR SOC. JUST., REDUCING
 8 DEFAULT JUDGMENTS IN PHILADELPHIA’S LANDLORD-TENANT COURT 22 (2020). The judgment
 9 should explain, in plain language, what the court decided and what, if anything, remains ongoing.
 10 This information may be particularly necessary in eviction litigation, where claims for money
 11 damages may continue after entry of a judgment awarding a landlord possession. E.g., JACOB
 12 PURCELL, A DECENT PLACE TO LIVE: IMPROVING INDIANA’S PUBLIC AND PRIVATE HABITABILITY
 13 ENFORCEMENT MECHANISMS 16 (2023) (describing Indiana’s bifurcated proceedings in eviction
 14 litigation). Postjudgment notice should include a breakdown of any costs, interest, and fees
 15 awarded to the judgment creditor, both to advise the judgment debtor of the nature of the
 16 obligations, and to enable postjudgment challenges to the reasonableness of these obligations. E.g.,
 17 State of Michigan, *Default Request, Entry, and Judgment (Sum Certain)*, Form MC 07a, July 2022,
 18 at 2 (breaking down damages, costs, and attorney’s fees). Likewise, the judgment should describe
 19 postjudgment interest or fees that can accumulate, to ensure that the party against whom judgment
 20 is entered understands the consequences of delay in satisfying the judgment. E.g., *id.* at 2; Wash.
 21 Ct. Form, *Small Claims Judgment*, Misc. 05-0500, Jan. 2025.

22 Notice of a judgment’s entry should explain the steps defendants can take to protect the
 23 sorts of rights and interests typical to the case type at issue that a judgment’s enforcement or
 24 execution tends to impair. E.g., MD. R. CIV. P. § 3-306(g) (requiring the court to notify the
 25 consumer debtor when a default judgment is entered that they can move to vacate); HANNAFORD-
 26 AGOR & KAUFFMAN, *supra*, at 24 (recommending that courts provide “notice to debtors about the
 27 purpose of post-judgment enforcement hearings and information about how to challenge the
 28 underlying judgment if the debtor believes it was entered in error”). This information should
 29 explain the difference between an appeal and a motion to vacate and instruct defendants how to
 30 pursue each. It should also explain judgment-enforcement procedures, including garnishment, and
 31 notify the defendant of their rights in connection with these proceedings. E.g., Jud. Council
 32 California, *Notice of Entry of Judgment*, Form SC-200, Jan. 1, 2025, at 3-4 (explaining
 33 garnishment procedures and advising the judgment debtor of how and when to appeal and how
 34 and when to move to vacate). The notice should also include information about rights and interests
 35 that enjoy protections from the judgment’s execution, such as exempt assets or wages. See § 7.07.

36 Postjudgment notice should include forms or links to forms that defendants can use to avail
 37 themselves of postjudgment protections. In California, “[f]iling a set aside motion” after an
 38 eviction judgment is entered “is difficult,” and tenants must “write the motion in a specific legal
 39 format.” But “[t]here are no court forms” available to help tenants with this task. CAL. CRTS. SELF-
 40 HELP GUIDE, *supra*. New York City Housing Court makes an array of forms available to self-

represented litigants, including for appeals, and has an online system tenants can use to generate affidavits to vacate default judgments. See N.Y.C. HOUSING CT., *Housing Court Forms*, www.nycourts.gov/courts/nyc/housing/forms (last visited Jan. 24, 2024). But marshals often do not include information about these forms or resources when serving notices of eviction. Court-provided access to forms or equivalent resources that defendants can use is common and consistent with the adversarial process. E.g., TEX. ACCESS TO JUST. COMM’N, A REPORT TO THE SUPREME COURT ADVISORY COMMITTEE FROM THE TEXAS ACCESS TO JUSTICE COMMISSION ON THE COURT’S UNIFORM FORMS TASK FORCE 7 (2012) (describing the near-ubiquitous provision of standardized forms to help self-represented litigants).

c. Means of notice connected to entry of judgment. In most high-volume civil-adjudication settings, use of means other than personal service to provide pre- and postjudgment notice will be sufficient to meet standards of reliability. But cf. CAL. CODE CIV. PROC. § 425.11 (requiring personal service of a statement specifying the nature and amount of damages sought in a personal-injury or wrongful-death case). The party seeking entry of judgment should know an adversary’s whereabouts and be able to provide notice by mail to the address at which service was successful made. The court likewise should be able to provide notice by mail at this same address after entry of judgment.

Notice by both first-class mail and digital or electronic means makes particular sense if the party seeking the entry of judgment has both physical and digital address information. Especially in eviction proceedings, which proceed on fast schedules and where enforcement can happen quickly, notice by digital means may give a defending party meaningful additional time. Conversely, notice by digital means may be inadequate if emails go to junk mail folders, get blocked by spam filters, or otherwise go awry. Texas requires the party seeking a default judgment in most civil actions to provide to the court its adversary’s last known email and mailing addresses. The clerk then must provide notice of the default judgment’s entry by both mail and email. TEX. R. CIV. P. 239a; TEX. R. CIV. P. 21(f)(10). At a minimum, notice by electronic means should include some sort of evidence that its recipient has received the message, such as a read receipt requested. See Chapter 3 (Notice and Service of Process).

Information might surface during litigation that indicates that a party’s address information is incorrect or otherwise inadequate. Court-provided courtesy notice, for instance, might get returned as undelivered. E.g., ABHAY ANEJA ET AL., MORE PAPER IN CONNECTICUT: AN EVALUATION OF DOCUMENTATION REFORMS IN STATE COURT 32 (July 2024). In such instances, the court should require the party seeking the entry of a default judgment to take reasonable steps to identify either an alternative location for providing notice, or an alternative means for providing it. See Chapter 3 (Notice and Service of Process).

§ 7.03. Showing of Entitlement to Judgment

(a) A party should be required to establish the procedural and substantive sufficiency of the claim for which the party seeks relief before the court can enter a judgment providing

1 **this relief or any part of it. At a minimum, the party should be required to establish the**
2 **following before judgment may be entered:**

- 3 **(1) proper service or, when appropriate, the defending party’s waiver thereof;**
- 4 **(2) the court’s jurisdiction or, when appropriate, the defending party’s**
5 **consent to jurisdiction or waiver of jurisdictional defects;**
- 6 **(3) proper venue or, when appropriate, the defending party’s consent to venue**
7 **or waiver of venue defects;**
- 8 **(4) the lawsuit’s timeliness;**
- 9 **(5) compliance with all pleading and information-exchange requirements,**
10 **consistent with § 4.02 (Content of Pleading and Information Exchange);**
- 11 **(6) the party’s substantive entitlement to the remedy sought, as reflected in**
12 **documentation filed to meet pleading and information-exchange requirements and**
13 **any other evidence the court might require;**
- 14 **(7) the party’s entitlement to fees, interest, and costs that the party seeks; and**
- 15 **(8) the absence of any applicable law that the judgment’s entry would violate,**
16 **such as a provision limiting the entry of judgments against people with the requisite**
17 **military status.**

18 **(b) Before entering judgment, the court should review the filings and evidence in the**
19 **record to determine whether the party seeking the judgment’s entry has made the showings**
20 **required in subsection (a).**

21 **(c) A party’s failure to comply with requirements for the entry of judgment may be**
22 **grounds for dismissal.**

23 **Comment:**

24 *a. Showing of entitlement to relief before entry of judgment.* This Section builds upon
25 Chapter 4’s principles regarding pleading and information exchange by requiring that parties
26 demonstrate to courts that, at a minimum, they have met the obligations contained therein. See
27 Chapter 4 (Pleading and Information Exchange). Two core features of high-volume dockets
28 underpin subsection (a). First, given the high rates at which defending parties default in high-
29 volume civil adjudication, pleading and information-exchange requirements will go underenforced
30 unless courts have an affirmative obligation to determine that the party requesting a judgment has

1 met them. Second, a strictly adversarial approach to merits litigation will regularly fail to achieve
2 the procedural and substantive sufficiency of judgments, even when defending parties do not
3 default, due to barriers to meaningful participation.

4 Subsection (a) sets forth the minimum that a party asserting a claim to a remedy must
5 establish before the court enters judgment ordering that relief. Responding to recurring problems in
6 high-volume dockets, subsection (a) lists eight determinants of a judgment's sufficiency. The first
7 two correspond to the prerequisites for the entry of a valid judgment. See Restatement of the Law
8 Second, Judgments § 1 (1982). The court has an independent obligation to confirm that it has
9 subject-matter jurisdiction over the dispute, but the party seeking the entry of judgment should make
10 this showing in the first instance. This party should also demonstrate that the court has personal
11 jurisdiction over the defending party unless the defending party has waived jurisdictional defects.
12 The same is true for proper service, that the party seeking the entry of judgment should establish it
13 absent the defending party's waiver. See § 3.08(b) (Court Obligations to Ensure Proper Notice).

14 A judgment's procedural sufficiency also depends upon whether the case proceeds in the
15 proper venue, unless the defending party waived any venue defects, and whether the party seeking
16 the judgment's entry alleges timely claims. The latter showing may be particularly important in
17 consumer-debt litigation, which has attracted scrutiny for the filing of time-barred claims. While
18 ordinarily timeliness is an affirmative defense, a court may appropriately require the party seeking
19 the entry of judgment to address the issue under two circumstances. First, such a requirement is
20 justified when the applicable pleading and information-exchange requirements may require the
21 plaintiff to make a showing of timeliness. See § 4.02 and Comments *d* and *e* to that Section.
22 Second, such a requirement is justified in those jurisdictions in which a court may raise timeliness
23 sua sponte. See Chapter 9 (The Judicial Role).

24 Otherwise, the procedural sufficiency of the requested judgment will depend on whether
25 the plaintiff has met applicable pleading and information-exchange requirements, as set forth in
26 Chapter 4 (Pleading and Information Exchange). Procedural sufficiency is independent of
27 substantive sufficiency. The filings may indicate a party's substantive entitlement to the remedy
28 sought, but a procedural deficiency should preclude the entry of judgment unless the defending
29 party has waived an objection to it. That said, compliance with applicable pleading and
30 information-exchange requirements will often dovetail with a showing of substantive sufficiency,

1 since those requirements may often include documentation that supports the party's prima facie
2 case and addresses possible defenses. See § 4.02, Comment *c*.

3 The court has broad discretion to assess the substantive sufficiency of a party's request for
4 a particular remedy, both to determine whether the defending party is liable and whether the
5 remedy is appropriate. Consistent with this discretion, the court should assess any documentation
6 or other evidence that applicable pleading and information-exchange rules require to determine
7 whether it supports a finding of the defendant's liability. The court should disregard any allegations
8 of fact in a pleading that are inconsistent with that documentation or evidence. This discretion also
9 empowers the court to require the submission of competent, reliable evidence to support a showing
10 of the defending party's liability, even if a jurisdiction's pleading and information-exchange rules
11 do not require the filing of such evidence. In those instances, the court should require an
12 evidentiary showing if the factual allegations in the complaint are sparse or conclusory, if anything
13 in the record suggests the possibility of a genuine dispute of material fact, if parties to the case
14 type at issue routinely fail to have relevant and admissible evidence of a material fact, or for any
15 other reason that would further the preference for the resolution of cases on their merits. The party
16 seeking the entry of judgment must provide evidence to support any requested recovery that does
17 not involve a sum certain, confirmable by specific allegations in a complaint, or that could not
18 otherwise be determined in a ministerial fashion from the pleadings.

19 Government agencies, courts, and other organizations have documented repeated instances
20 where debt buyers cannot establish proper chain of title for the debts upon which they attempt to
21 collect. If the jurisdiction's pleading and information-exchange requirements do not already
22 require a debt buyer plaintiff to provide documentation to establish chain of title, the court should
23 exercise its discretion to require this evidence before granting a debt buyer's request for the entry
24 of a default judgment.

25 **Illustrations:**

26 1. A credit-card company seeks to recover \$3250 from a consumer debtor. The credit-
27 card company does not attach the credit contract or any other documentation supporting this
28 requested amount. Nor does the credit-card company include allegations in the complaint
29 that, if taken as true, demonstrate why \$3250 is the correct amount owed. The court should
30 require the credit-card company to support its requested damages with evidence.

1 2. Applicable law provides that, unless a landlord has registered a rental property
2 with the local housing agency, the landlord cannot obtain a judgment ordering a tenant
3 evicted for nonpayment of rent. The landlord's filings do not include documentation
4 indicating that a property is registered. The court should require the landlord to provide
5 this documentation.

6 Subsection (a) also requires the plaintiff to demonstrate its entitlement to any attorney's
7 fees, costs, and/or interest that the plaintiff seeks. The plaintiff will likely do so with the same
8 documentation it uses to establish its substantive entitlement to the remedy sought. Any such
9 amounts that cannot be determined in a ministerial fashion—by reference to a fee schedule, for
10 instance—should have evidentiary support. The party requesting the entry of the judgment should
11 also establish the basis for the applicable interest rate and a calculation that shows that the
12 requested interest amount is appropriate. The request for costs should include an assertion under
13 oath that the party seeking the entry of judgment actually incurred those costs to litigate the
14 particular case to judgment. The information in the record that the plaintiff uses to support a request
15 for fees, costs, and interests should also demonstrate that the request is consistent with applicable
16 law. In addition, the plaintiff's filings should demonstrate that the request is reasonable based on
17 the circumstances when courts have the discretion to adjust these fees, costs, and interests.

18 **Illustrations:**

19 3. A jurisdiction's procedural rules provide a schedule for the recovery of attorney's
20 fees in debt-collection litigation. This schedule provides that the fees shall equal 15 percent
21 of the damages recovered or \$100, whichever is greater. The party seeking the entry of
22 judgment should not need to provide evidence to support the attorney's fee award it requests.

23 4. A debt buyer uses a process server that charges the debt buyer a discounted rate
24 due to the volume of business the debt buyer gives the process server. The debt buyer's
25 declaration in support of costs it seeks to recover should list the actual amount the debt
26 buyer paid for service on the defendant in the particular case, not the price the process
27 server quotes as its standard rate.

28 Finally, the party seeking the entry of judgment should establish that the judgment's entry
29 will not violate any applicable law. If the party is seeking the entry of a default judgment, for
30 instance, the party should file a declaration to establish that the defending party is not a military

1 servicemember. See 50 U.S.C. § 3911(2). Servicemembers enjoy specific procedural protections
2 under federal law that the processes leading to the entry of a default judgment must include.

3 By ensuring substantive and procedural sufficiency before the entry of judgment, a court
4 will significantly reduce errors that otherwise might prompt postjudgment proceedings. This sort
5 of court scrutiny thus protects the finality of judgments.

6 *b. The court review obligation.* Subsection (b) creates an obligation for courts to determine
7 that the parties have made required showings of procedural and substantive sufficiency before
8 entering judgment. This obligation, though sitting in some tension with conventional norms of
9 judicial neutrality and impartiality in an adversarial system, is justified in light of pervasive barriers
10 to meaningful participation in high-volume civil adjudication. See Chapter 9 (The Judicial Role).
11 In the absence of judicial oversight, pleading and information-exchange requirements will go
12 underenforced. See § 4.08. Recurring problems in high-volume civil adjudication, such as
13 improper service or facially inadequate evidentiary bases for the remedy sought, might go
14 undetected for long periods.

15 Subsection (b) provides for a court review obligation in all cases on high-volume dockets,
16 not just in instances in which defending parties default. A self-represented litigant who does not
17 default may still lack the sort of legal capacity or experience necessary for an adequate adversarial
18 testing of an adversary's entitlement to prevail. The underenforcement of pleading and information-
19 exchange requirements, for instance, may result not just when a party defaults, but also when the
20 party does not know to insist that an adversary meet these requirements. Court review may thus
21 guard against inaccurate and unfair outcomes in all cases, not just those in which defendants default.

22 Judges need not bear sole responsibility for this review. The repetitive nature of high-
23 volume civil adjudication should enable court staff in most instances to review the record and
24 confirm, at least preliminarily, that the party seeking the entry of judgment has met applicable
25 pleading and information-exchange requirements, has filed a facially valid proof of service, has
26 filed any required documentation showing that the judgment comports with applicable law, and has
27 filed any required documentation to support a request for fees, cost, and interest. Computer-assisted
28 review may also develop to facilitate these tasks, consistent with principles governing court use of
29 technological tools, see Chapter 11 (Court Use and Regulation of Technology), and delegation of
30 adjudicatory responsibilities more generally, see Chapter 8 (Systemic Administration).

c. Dismissal for failure to meet requirements for the entry of judgment. By authorizing dismissal in response to a party’s failure to comply with requirements for the entry of judgment, this Section gives plaintiffs additional incentive to meet pleading and information-exchange requirements deemed necessary for fair and accurate adjudication, as elaborated in § 4.08 (Implementation of Rules Governing Pleading and Information Exchange). Subsection (c) gives courts discretion based upon the circumstances to determine whether this dismissal should be with or without prejudice. If the plaintiff’s claim is clearly time-barred, for instance, the dismissal should be with prejudice. The dismissal should also be with prejudice if the plaintiff has repeatedly failed to meet pleading and information-exchange requirements. But if the plaintiff’s failure is modest or could be remedied without prejudice to the defending party, a dismissal without prejudice may be more appropriate. Indeed, a dismissal may not be appropriate at all if a party seeking the entry of judgment fails to meet a technical requirement for the entry of judgment, such as a failure to file a declaration of nonmilitary status. In such instances the court should give the party a chance to correct the record. Likewise, a dismissal may not be appropriate if, for instance, a plaintiff has otherwise demonstrated an entitlement to the judgment’s entry but has inadequately supported a request for fees. In that instance, the court may simply withhold the entry of judgment or enter judgment but not award the requested fees.

REPORTERS’ NOTES

a. Showing of entitlement to relief before entry of judgment. A core premise of this Section is that the circumstances common to many high-volume dockets undermine confidence in party initiative and a passive, neutral judge as organizing principles of civil litigation. See Chapter 1 (General Principles of Fair Adjudication); Chapter 2 (General Principles of Procedure). See generally Jessica K. Steinberg, *Adversary Breakdown and Judicial Role Confusion in “Small Case” Civil Justice*, B.Y.U. L. REV. 899, 919-926 (2016). When defendants default, the case undergoes none of the adversarial testing that, in principle, should ensure that only meritorious claims result in judgments in favor of plaintiffs. Given barriers to meaningful participation that disable defendants from protecting their interests, plaintiffs may win judgments in various high-volume civil-adjudication contexts that are either factually or legally unwarranted, or both. E.g., ABHAY ANEJA ET AL., *MORE PAPER IN CONNECTICUT: AN EVALUATION OF DOCUMENTATION REFORMS IN STATE COURT 2* (July 2024); PAULA HANNAFORD-AGOR & BRITTANY KAUFFMAN, *PREVENTING WHACK-A-MOLE MANAGEMENT OF CONSUMER DEBT CASES: A PROPOSAL FOR A COHERENT AND COMPREHENSIVE APPROACH FOR STATE COURTS 7* (2020) (describing factually and legally deficient judgments in consumer-debt litigation); Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. CHI. L. REV. 145, 150 (2020) (documenting that “very few tenants

1 with meritorious warrant of habitability claims” in eviction litigation “actually benefited from the
 2 law”). The mismatch between litigant realities and adversarialism’s premises has prompted calls
 3 for judicial involvement in the development and assessment of records necessary to support legally
 4 supportable judgments. Steinberg, *Adversary Breakdown*, supra, at 947; Anna E. Carpenter, *Active*
 5 *Judging and Access to Justice*, 93 NOTRE DAME L. REV. 647, 649-650 (2017).

6 The principles advanced in this Section also reflect evolving due-process norms. In *Turner*
 7 *v. Rogers*, the U.S. Supreme Court held that, if a court does not offer a self-represented litigant facing
 8 a significant deprivation certain “procedural safeguards,” the judgment violates the litigant’s due-
 9 process rights. These safeguards, the Court suggested, include affirmative efforts by courts to elicit
 10 sufficient information to ensure that judgments are substantively warranted. 564 U.S. 431, 448
 11 (2011); see also JOHN M. GRAECAN & MICHAEL HOULBERG, ENSURING THE RIGHT TO BE HEARD:
 12 GUIDANCE FOR TRIAL JUDGES IN CASES INVOLVING SELF-REPRESENTED LITIGANTS 12 (2019)
 13 (discussing *Turner v. Rogers*); Jessica K. Steinberg, *Demand Side Reform in the Poor People’s*
 14 *Court*, 47 CONN. L. REV. 741, 798-802 (2015). Some courts have concluded that due process imposes
 15 an affirmative obligation on adjudicators in mass adjudicatory agencies, especially when cases
 16 involve unrepresented parties, to develop a substantively sufficient record to support a judgment.
 17 E.g., *United States v. Vargas-Molina*, 392 F. Supp. 3d 809, 819 (E.D. Mich. 2019) (immigration
 18 adjudication); *Graham v. Apfel*, 129 F.3d 1420, 1423 (11th Cir. 1997) (social security). But cf.
 19 *Serrano-Alberto v. Attorney General U.S.*, 859 F.3d 208, 224 n.8 (3d Cir. 2017) (discussing other
 20 circuits’ views but noting that the Third Circuit has not made this due process determination).

21 Finally, this Section builds on recommendations for the proper adjudication of debt-
 22 collection cases made by the Uniform Law Commission, the Conferences of Chief Justices, and
 23 the Conference of State Court Administrators. See Conf. of Chief Justs. & Conf. of State Ct.
 24 Adm’rs., Resolution 4, *In Support of Rules Regarding Default Judgments in Debt Collection Cases*
 25 (Aug. 22, 2018) (“recommend[ing] that courts implement systems to ensure that final judgments
 26 be entered only after compliance with basic procedural requirements for notice, standing, and
 27 timeliness, and where the documentation is sufficient to support the relief sought”); CONF. OF
 28 CHIEF JUSTICES, CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL 30 (2016) (recommending
 29 that “[c]ourts . . . implement systems to ensure that the entry of final judgments complies with
 30 basic procedural requirements for notice, standing, timeliness, and sufficiency of documentation
 31 supporting the relief sought.”); CONSUMER DEBT DEFAULT JUDGMENTS ACT § 4: [Complaint]
 32 Requirements (recommending that a default judgment in a consumer-debt case “may be entered
 33 only if the” complaint includes detailed factual allegations demonstrating the plaintiff’s
 34 entitlement to recover, the timeliness of the lawsuit, the service of appropriate notice, and evidence
 35 demonstrating the existence of the debt).

36 Subsection (a) identifies eight determinants of a judgment’s sufficiency, ones that apply to
 37 all categories of high-volume civil adjudication. The first several involve procedural sufficiency. A
 38 judgment is valid if the court that rendered it had subject-matter jurisdiction, if the court had
 39 personal jurisdiction over the defending party, and if the defending party had adequate notice.
 40 Restatement of the Law Second, Judgments § 1 (AM. L. INST. 1982). “Adequate notice” in the high-

1 volume civil-adjudication context means proper service. See § 3.08 (Court Obligations to Ensure
 2 Proper Notice). The party seeking the judgment’s entry should thus establish each of these
 3 prerequisites, although this party may also establish that its adversary waived objections to a lack
 4 of personal jurisdiction or proper service. Restatement of the Law Second, Judgments § 1,
 5 Comment *a*. The party seeking the judgment’s entry should also establish that the case proceeds in
 6 the proper venue, although a defending party can also waive defects in venue. E.g., CAL. CIVIL
 7 CODE § 1812.10(c) (requiring plaintiffs in certain breach of contract actions to file an affidavit
 8 establishing that the case proceeds in “the proper place for the trial of the action” and providing that
 9 with this affidavit or analogous allegations in a verified complaint “no further proceedings may
 10 occur”); CAL. CODE CIV. PROC. § 396a(a) (requiring this affidavit or allegations in such cases and
 11 in eviction cases and providing for a case’s dismissal without prejudice if they are not included).

12 Consumer-debt litigation motivates subsection (a)(4)’s identification of timeliness as a
 13 determinant of procedural sufficiency. Litigation brought to collect on time-barred debt has proven
 14 sufficiently problematic to prompt numerous regulatory and legislative responses. E.g., Consumer
 15 Financial Protection Bureau, *Fair Debt Collection Practices Act (Regulation F): Time-Barred*
 16 *Debt*, 88 Fed. Reg. 26475, 26476 (2023); TEX. FINANCE CODE § 392.307(c), (e); see also Marc C.
 17 McAllister, *Ending Litigation and Financial Windfalls on Time-Barred Debt*, 75 WASH. & LEE L.
 18 REV. 449 (2018). As noted above, the Uniform Law Commission, Conference of Chief Justices,
 19 and Conference of State Court Administrators identify timeliness as a matter that plaintiffs and
 20 courts have an obligation to ensure before a judgment’s entry in consumer-debt cases. Consistent
 21 with these recommendations, several states have enacted reforms obliging plaintiffs to provide
 22 sufficient information to assess timeliness before the entry of judgment. E.g., N.Y. C.P.L.R.
 23 § 3016(j); MASS. R. CIV. P. 8.1(c); CAL. CIV. CODE § 1788.58(a). Section 4.02 builds on this
 24 evolving practice. See *id.* and Comments *d* and *e* to that Section. When a jurisdiction’s pleading
 25 and information-exchange rules require the plaintiff to show the claim is not time-barred, the court
 26 should assess the filings for this showing before entering judgment. The court should also do so in
 27 jurisdictions that permit courts to raise statute of limitations issues sua sponte, regardless of what
 28 the applicable pleading and information-exchange requirements provide. E.g., *DaimlerChrysler*
 29 *Servs. North America, LLC v. Ouimette*, 830 A.2d 38, 41 (Vt. 2003). But see *352 Legion Funding*
 30 *Assocs. v. 348 Riverdale, LLC*, 164 A.D.3d 551, 552-553 (N.Y. App. Div. 2018) (holding in a
 31 mortgage foreclosure action that a court cannot raise a statute-of-limitations defense sua sponte);
 32 *Estabrook v. Baden*, 943 P.2d 1334, 1336-1337 (Mont. 1997) (holding that a court cannot raise a
 33 statute of limitations defense sua sponte when considering whether to enter a default judgment).
 34 See also Chapter 9 (The Judicial Role).

35 Procedural sufficiency requires the plaintiff’s compliance with all pleading and
 36 information exchange obligations. See also Chapter 4 (Pleading and Information Exchange). The
 37 failure to satisfy required procedures is a well-established basis to refuse the entry of a default
 38 judgment. E.g., *Bunch v. Dollar Budget, Inc.*, 12 A.D.3d 391, 391-392 (N.Y. App. Div. 2004)
 39 (affirming a court’s refusal to enter a default judgment when the plaintiff failed to provide required
 40 notice of intent to seek the judgment). California’s Fair Debt Buying Practices Act, enacted in

2013, goes further, giving courts discretion to dismiss cases if a plaintiff requests a default judgment but has not satisfied procedural or information-exchange requirements. E.g., CAL. CIV. CODE § 1788.60(c) (“In any action on a consumer debt, if a debt buyer plaintiff seeks a default judgment and has not complied with . . . [pleading and evidentiary submission] requirements . . . , the court shall not enter a default judgment for the plaintiff and may, in its discretion, dismiss the action.”). The possibility of dismissal should incentivize compliance by plaintiffs, and it can enable courts to manage dockets and devote judicial resources to cases where plaintiffs demonstrate a genuine commitment to the litigation.

Another determinant of a judgment’s sufficiency involves a plaintiff’s substantive entitlement to the remedy sought. The recommendation in subsection (a)(6) that courts examine the plaintiff’s filings to assess substantive sufficiency builds on developments in a number of jurisdictions that oblige plaintiffs in different types of high-volume civil adjudication to support their pleadings with evidence. Numerous jurisdictions now require certain types of debt-collection plaintiffs to submit evidence attesting to chain of title and other issues affecting their right to recover. E.g., CAL. CIV. CODE § 1788.58(a), (b) (requiring allegations in the complaint, supported by documentary evidence, to establish a debt buyer’s entitlement to recover); *id.* § 1788.60 (requiring the submission of documentary evidence to establish allegations in the complaint before a default judgment can be entered); COLO. REV. STAT. § 5-16-111(3) (requiring plaintiffs in debt-collection cases to submit admissible evidence establishing the right to recover within the limitations period before default judgment can be entered); CONN. GEN. STAT. § 36a-813 (same); 32 ME. REV. STAT. § 11020(4), (5) (same); MD. CODE § 5-1203(b)(2) (same); MINN. REV. STAT. § 548.101(a) (same); N.Y. C.P.L.R. § 306-d(f), (j); N.C. GEN. STAT. § 58-70-155; OR. REV. STAT. § 646A.670(2)(a); TX. JUST. CT. RULE 508.3; REV. CODE WASH. § 19.16.260(2)(b); VT. R. CIV. P. 55(c)(7). See also ROBERT J. HOBBS ET AL., NATIONAL CONSUMER LAW CENTER, MODEL FAMILY FINANCIAL PROTECTION ACT 22 (2021) (recommending legislation that would require a plaintiff to file “evidence with the court to establish the amount and nature of the consumer debt”). Others impose analogous evidentiary obligations on landlords. E.g., ILL. SUP. CT. R. 139(b)(2) (requiring landlords to attach the lease agreement to an eviction complaint); D.C. SUPER. CT. L. & T. RULE 11(e)(1) (requiring landlords to include “ex parte proof” when they seek the entry of judgment after a post-answer default); New Jersey Judiciary, Civil Practice Division, *Landlord Case Information Statement* (requiring landlords to file a “Landlord Case Information Statement” that requests information about rent control, federal legal protections, and other matters that may bear upon the substantive entitlement to prevail).

Chapter 4 (Pleading and Information Exchange) recommends that jurisdictions adopt rules requiring parties asserting claims to include with their pleadings information that support their entitlements to the remedies they seek. See § 4.02 and Comment *d* to that Section. If a jurisdiction adopts pleading and information-exchange requirements tailored to different case types, the court’s review for substantive sufficiency will be presumptively based upon the documentation these rules require. Importantly, when such documentation is in the record, the court should not defer to factual allegations in the complaint and instead independently assess whether the evidence

1 establishes the requisite substantive sufficiency. E.g., *Kim v. Westmore Partners, Inc.*, 201 Cal.
2 App. 4th 267, 282 (2012).

3 A court may require more than the plaintiff’s factual allegations as support for a judgment’s
4 substantive sufficiency even if applicable pleading and exchange requirements do not require
5 evidentiary submissions. Cf. Tex. R. Civ. Proc. § 508.3(b) (requiring the plaintiff in a debt case to
6 attach evidence of its damages in a petition for a default judgment). In most jurisdictions, a
7 defendant who does not answer is deemed to admit all well pleaded facts alleged in the complaint.
8 E.g., *Kim v. Westmore Partners, Inc.*, 201 Cal. App. 4th 267, 281 (2012); *Henry v. Oluwole*, 108
9 F.4th 45, 55 (2d Cir. 2024); *Jones-Hospod v. Hospod*, 676 S.W.3d 709, 721 (Tex. Ct. App. 2023);
10 *Avery v. Schneider as Next Friend of Schneider*, 356 Ga. App. 304, 307 (2020); *Clark v. Sputniks*,
11 LLC, 368 S.W.3d 431, 435 (Tenn. 2012); *State of Ohio v. Jimenez*, 229 N.E.3d 1278, 1284 (Ohio
12 Ct. App. 2023). But see *Wagner v. Alford*, 34 So. 3d 1018, 1021 (La. Ct. App. 2010) (requiring
13 admissible evidence to support prima facie case before entering default judgment). But cf. *Renteria*
14 *v. Trevino*, 79 S.W.3d 240, 242 (Tex. Ct. App. 2002) (requiring evidentiary support for every
15 element of a claim if a defendant defaults after answering). But the decision whether to enter a
16 default judgment remains a discretionary one. E.g., *Riley v. Davison Constr. Co.*, 381 Mass. 432,
17 441 (1980); *Olcott v. Delaware Flood Co.*, 327 F.3d 1115, 1124 (10th Cir. 2003); *Ex parte Living*
18 *By Faith Christian Church*, 360 So. 3d 340, 346 (Ala. 2021). This greater discretionary authority
19 includes the lesser authority to require the party seeking the judgment’s entry to submit evidence
20 to support a determination of the defending party’s liability. Thus, courts have broad discretion to
21 insist upon evidentiary submissions, regardless of whether pleading rules require them, or whether
22 the defending party has appeared or answered. E.g., *Valley Hosp. Assoc., Inc. v. Brauneis*, 141
23 P.3d 726, 728 (Alaska 2006); *Hupp v. Accessory Distrib., Inc.*, 616 P.2d 233, 237 (Haw. Ct. App.
24 1980); *Heidarpour v. Empire Cap. Funding Grp. Inc.*, Civ. No. 18-250, 2018 WL 3455809, at *1
25 (N.D. Cal. July 18, 2018); *In re Zimmerman*, Br. No. 07-20889, 2008 WL 161367, at *2 (D. Conn.
26 Jan. 15, 2008). See also FED. R. CIV. P. 55(b)(2) (providing that, when the court enters a default
27 judgment, it may “conduct hearings . . . to . . . establish the truth of any allegation by evidence”);
28 Vt. R. Civ. Proc. 55(b)(3) (giving the court discretion to “require hearings” to establish the “truth
29 of any averment by evidence”); Tenn. R. Civ. Proc. 55.01 (“[I]f necessary . . . to establish the truth
30 of any averment by evidence . . . the court may conduct such hearings . . . as it deems necessary
31 and proper”).

32 Courts should refuse to credit factual allegations and exercise their discretion to require
33 appropriate evidence to establish substantive sufficiency if the pleadings are factually sparse or
34 conclusory, *Redan Shops, LLC v. FSFP Atlanta, LLC*, 366 Ga. App. 691, 696 (2023), or if any
35 other circumstances suggest the possibility of a genuine dispute of material fact. *Frater v. Teenage*
36 *Millionaire, LLC*, Civ. No. 08-7176, 2009 WL 10700007, at *2 (C.D. Cal. June 17, 2009). In high-
37 volume civil adjudication, such circumstances may include recurring and notorious problems with
38 the factual sufficiency of claims asserted by categories of litigants. E.g., Megan Wachspress,
39 Comment, *In Defense of “Free Houses”*, 125 Yale L.J. 1115, 1118-1121 (2016) (describing
40 recurring problems in the factual bases for mortgage foreclosure actions); Peter A. Holland, *The*

1 *One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in*
 2 *Debt Buyer Cases*, 6 J. BUS. & TECH. LAW 259, 259-263 (2011) (describing similar problems in
 3 consumer-debt litigation). If in a judge’s experience cases within a particular category in high-
 4 volume civil adjudication tend to suffer from particular evidentiary deficiencies, the judge should
 5 insist upon an evidentiary showing to establish the necessary factual predicate for a determination
 6 of liability. E.g., Nina Lea Oishi, *Judging Debt: How Judges’ Practices in Consumer-Credit Court*
 7 *Undermine Procedural Justice*, Yale L.J. Forum, Nov. 21, 2023, at 301 (describing a judge’s
 8 practice of requiring proof of chain of title in consumer-debt cases).

9 A demonstration of substantive sufficiency may include a preemptive response to typical
 10 defenses that a defending party for the case type at issue might raise. See § 4.02(d). Subsection (a)
 11 builds on recommendations in Chapter 4, as well as evolving due-process doctrine and litigation
 12 practice. In *Turner v. Rogers*, 564 U.S. at 448-449, the U.S. Supreme Court held that a court
 13 violated due process when it failed actively to solicit information that might have supported a self-
 14 represented litigant’s affirmative defense. Some jurisdictions place affirmative obligations on
 15 parties or courts consistent with this determination. A landlord in Baltimore, for instance, cannot
 16 obtain an eviction judgment if the property is not licensed and registered. E.g., MD. PRO BONO
 17 RESOURCE CTR., UNDERSTANDING YOUR RIGHTS AS A TENANT. These landlords must certify that
 18 their properties are registered when they bring an eviction action, even though a lack of registration
 19 or a license is typically an affirmative defense. See MONTGOMERY CNTY. DEP’T OF HOUSING AND
 20 CMTY. AFFS., EVICTIONS (describing a landlord’s obligation to certify that a property is registered
 21 when bringing an eviction action). Cf. *Margola Assocs. v. City of Seattle*, 854 P.2d 23, 38 (Wash.
 22 1993) (describing a registration requirement and failure to register as a defense to eviction);
 23 OAKLAND MUN. CODE § 8.22.360(D)(3) (same).

24 Substantive sufficiency also requires that the party seeking the entry of judgment to establish
 25 a basis for the monetary amount that this party seeks, if any. The party must submit evidence to
 26 support a damages request unless the amount is “immediately ascertainable,” such as a sum certain,
 27 confirmable by specific factual allegations, or liquidated damages. *Sass v. Cohen*, 10 Cal. 5th 861,
 28 871 (2021); see also *Frater v. Teenage Millionaire, LLC*, Civ. No. 08-7176, 2009 WL 10700007,
 29 at *2 (C.D. Cal. June 17, 2009); *Kim v. Westmore Partners, Inc.*, 201 Cal. App. 4th 267, 287 (2012);
 30 *Russell v. Martell*, 681 P.2d 1193, 1195 (Utah 1984); *Roggemann v. Boston Safe Deposit & Trust*
 31 *Co.*, 670 So. 2d 1071, 1075 (Fla. Ct. App. 1996). Cf. *Unifund CCR Partners v. Young*, 871 S.E.2d
 32 347, 390 (N.C. App. 2022) (describing a request for a specific amount of an unpaid credit-card debt,
 33 plus interest at a specified rate, as a “sum certain”). The mere allegation that a particular amount is
 34 owed, without more, should not be sufficient to excuse an evidentiary showing. *Basnight Constr.*
 35 *Co., Inc. v. Peters & White Constr. Co.*, 610 S.E.3d 469, 472 (N.C. App. 2005) (observing that “the
 36 mere demand for judgment of a specified dollar amount was not enough” to seek a “sum certain,”
 37 and insisting that a request for the judgment need more to “verify” the amount sought).

38 Yet another determinant of a judgment’s sufficiency involves a sufficient basis for an award
 39 of attorney’s fees, costs, and prejudgment interest. Judgments commonly award these collateral
 40 amounts in debt-collection and eviction litigation. E.g., JANUARY ADVISORS, OREGON DEBT

COLLECTION LAWSUITS: DATA ANALYSIS CHARTBOOK 55-66 (2024) (documenting this phenomenon in Oregon debt-collection litigation); PEW CHARITABLE TRS., HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS 17-18 (2020); Cecilia Reyes, *Tenants are being charged eviction fees even if they don't get evicted*, Business Insider, May 4, 2025. See also CAL. CODE CIV. P. § 1174.2(b) (authorizing award of attorney's fees in certain unlawful-detainer cases). Some jurisdictions limit or prohibit the award of various of these fees, interest, or costs. E.g., IOWA CODE § 537.2507 (prohibiting provisions for attorney's fees in contracts that involve "consumer credit transaction[s]"); N.Y.C.P.L.R. § 5004(a) (limiting interest in consumer-debt cases to 2 percent). Ohio, for instance, makes a contractual provision providing for attorney's fees in consumer-debt cases enforceable "only to the extent that it obligates payment of a reasonable amount." OHIO REV. CODE § 1319.02(D). The court must determine reasonableness in individual cases "based on all relevant factors." *Id.* Unless fees are fixed by contract or determined pursuant to a schedule, see, e.g., L.A. County Superior Ct. Local R. 3.214, the party seeking the entry of judgment should support a fee request with evidence. *Roggemann v. Boston Safe Deposit & Trust Co.*, 670 So. 2d 1071, 1075 (Fla. Ct. App. 1996). Likewise, the party should establish that its costs are reasonable, and that it actually incurred the costs it seeks to recover to litigate the particular case at issue. E.g., Judicial Council of California, *Request for Entry of Default (Application to Enter Default)*, Form Civ-100, Jan. 1, 2023, at 2; Superior Court of California, County of Orange, *Unlawful Detainer: Default Judgment for Possession and Monetary Recovery*, Self-Help Form Packet, Sept. 2012, at 2. An institutional plaintiff that receives a bulk discount for service-of-process costs, for instance, should only seek to recover the actual amount it paid for service in the particular case, not whatever sticker price the process server might otherwise quote.

Finally, the party seeking the entry of judgment should establish that no law would otherwise bar the judgment's entry. The most important law in this regard is the Servicemembers' Civil Relief Act (SCRA). This law prohibits the entry of default judgments against military servicemembers before they have benefited from certain procedural protections. See generally U.S. Courts, *Servicemembers' Civil Relief Act (SCRA)*, at <https://www.uscourts.gov/court-programs/bankruptcy/bankruptcy-basics/servicemembers-civil-relief-act-skra> (last visited Aug. 7, 2025). Jurisdictions thus require parties seeking the entry of judgment to file a declaration or affidavit establishing that the defending party is not covered by SCRA's protections. E.g., Va. Code § 8.01-15.2(A); Oregon Courts, *Declaration of Non-Military (Servicemembers Civil Relief Act)*, Nov. 2015.

b. The court review obligation. Given barriers to meaningful participation in high-volume civil adjudication, service, pleading, and information-exchange procedures can go underenforced unless the court has an obligation to ensure that the parties have made the necessary threshold showings of procedural and substantive sufficiency before entering judgment. E.g., Fox, *supra*, at 382-383 (documenting no instance when a defendant who appeared in a debt-collection action received the three-day notice Indiana requires before the entry of a default); Barnard, *supra*, at 30 (determining that fewer than half of reviewed cases in a sample of California debt-collection cases met required pleading and information-exchange requirements before the entry of judgment).

1 Compare MINN. STATE BAR ASSOC. ACCESS TO JUST. COMM., MINNESOTA CONSUMER DEBT
2 LITIGATION: A STATEWIDE ACCESS TO JUSTICE REPORT 30 (2023) (documenting a known
3 compliance rate of 79 percent).

4 To protect against the entry of otherwise-unwarranted judgments, the Conference of Chief
5 Justices' Civil Justice Improvement Committee recommends that a "court should review . . .
6 materials" establishing "the legitimacy of the claim" "to ensure that the plaintiff is entitled to the
7 relief sought" "[b]efore issuing a final judgment" in an "uncontested case" involving debt collection.
8 NAT'L CTR. FOR STATE COURTS CIV. JUST. IMPROVEMENTS COMM., CALL TO ACTION: ACHIEVING
9 CIVIL JUSTICE FOR ALL 36 (2016); see also HANNAFORD-AGOR & KAUFFMAN, *supra*, at 22 ("Before
10 issuing a final judgment, the court should review information regarding service and any affidavits
11 and supporting documentation to ensure that the plaintiff is entitled to the relief sought."); Conf. of
12 Chief Justs. & Conf. of State Ct. Adm'rs., Resolution 4, *In Support of Rules Regarding Default*
13 *Judgments in Debt Collection Cases* (Aug. 22, 2018). Several jurisdictions already impose this sort
14 of affirmative duty on courts in particular types of cases. ME. REV. STAT. § 11020(4) (declaring that
15 "a court may not enter judgment unless it specifically finds that . . . the plaintiff has produced
16 evidence that is admissible . . . on all required elements of its claim"); MINN. REV. STAT.
17 § 548.101(c)(2) (allowing a court to enter "an administrative default judgment without a hearing if
18 the court *determines* that the evidence" of the consumer debtor's liability establishes the plaintiff's
19 right to recover) (emphasis added); TX. JUST. CT. RULE 508.3(c) (judge must make finding).

20 A court obligation to check for procedural and substantive sufficiency also protects the
21 finality of judgments. A plaintiff's failure to meet pleading and information-exchange
22 requirements necessary to support a judgment can be grounds to vacate that judgment. E.g., *Cap.*
23 *One Bank (USA) NA v. Young*, 176 So. 3d 695, 697 (La. Ct. App. 2015).

24 All cases in high-volume civil adjudication, not just those in which defendants default,
25 should trigger this court obligation. A plaintiff's pleading and information-exchange obligations
26 do not depend upon whether the defendant formally appears or not. In jurisdictions that have
27 adopted pleading and information-exchange requirements consistent with Chapter 4 (Pleading and
28 Information Exchange), the record should include sufficient information for a court to assess a
29 judgment's evidentiary basis regardless of any default. Given the myriad ways in which barriers
30 to meaningful participation can manifest, a defendant who answers but otherwise struggles to
31 engage in meaningful merits litigation should not fare worse than a defendant who fails to answer
32 at all. Cf. *Renteria v. Trevino*, 79 S.W.3d 240, 242 (Tex. Ct. App. 2002) (holding that, when a
33 defendant defaults after answering, the plaintiff seeking the entry of judgment must prove its *prima*
34 *facie* case with admissible evidence).

35 A court obligation to confirm that the plaintiff has made a sufficient substantive showing
36 might seem to raise ethical concerns about judicial independence. E.g., Md. Jud. Ethics Comm.,
37 Opinion Request No. 2006-11 (Apr. 10, 2006) (concluding that judges should not raise statute-of-
38 limitations defenses on behalf of pro se defendants *sua sponte*). Cf. *Bias v. Moynihan*, 508 F.3d
39 1212, 1219 (9th Cir. 2007) ("A district court does not have a duty to search for evidence that would
40 create a factual dispute."). However, such objections do not reflect current wisdom, developed

1 with attention to the problems that can frustrate merits adjudication in high-volume civil-
 2 adjudication contexts. E.g., *Branham v. Varble*, 952 N.E.2d 744, 747 (Ind. 2011) (rejecting the
 3 concern that a judge obliged to identify possible exemptions a judgment debtor in a garnishment
 4 proceeding might enjoy would “becom[e] an advocate for one party rather than a neutral arbiter”
 5 as inconsistent with the needs of unrepresented parties in small claims court). Nor do such
 6 objections comport with the due-process determination in *Turner v. Rogers*, that the court erred by
 7 failing to elicit information about a potential defense the self-represented litigant might have
 8 raised. See also Chapter 9 (The Judicial Role).

9 Judges should not have to shoulder sole responsibility to assess procedural and substantive
 10 sufficiency before entering judgment. Compare 32 ME. REV. STAT. § 11020(5) (“The judge
 11 overseeing the action is responsible for entering a default and a default judgment, not the clerk of
 12 the court,” even if “the defendant has failed to plead or otherwise defend”). Any such obligation
 13 may be unrealistic given extreme docket pressures. HANNAFORD-AGOR & KAUFFMAN, *supra*, at 7
 14 (“In uncontested cases, few courts have sufficient time and resources to review documentation
 15 supporting motions for default judgment to ensure that the claims are valid.”); MINN. REPORT,
 16 *supra*, at 38 (describing the review process as “onerous”). In addition, undue reliance on judges
 17 may be undesirable, given judicial instincts toward adversarialism and impartiality and away from
 18 the sort of active judging that this principle contemplates. See Chapter 9 (The Judicial Role); see
 19 also Anna E. Carpenter et al., *Judges in Lawyerless Courts*, 110 GEO. L.J. 509, 563 (2022)
 20 (concluding that norms and assumptions about the judicial role diminish judges’ capacities to take
 21 steps to aid pro se litigants).

22 As the Conference of Chief Justices and Conference of State Court Administrators jointly
 23 recommend, courts should “implement *systems* to ensure that final judgments be entered only after
 24 compliance with” procedural and evidentiary requirements. Conf. of Chief Justs. & Conf. of State
 25 Ct. Adm’rs., Resolution 4, *In Support of Rules Regarding Default Judgments in Debt Collection*
 26 *Cases* (Aug. 22, 2018). (emphasis added). These “systems” should include “civil case management
 27 teams,” consisting of court personnel with different responsibilities and expertise. HANNAFORD-
 28 AGOR & KAUFFMAN, *supra*, at 22-23; see also Carpenter et al., *supra*, at 564 (recommending the
 29 development of “resources that help other, non-judge actors play a role in supporting a changed
 30 role for judges and better experiences for litigants”). Clerk’s office personnel or judicial assistants
 31 can handle tasks that “require attention and follow up, but do not require a high degree of
 32 specialization,” such as “confirm[ing] that required documents have been submitted.”
 33 HANNAFORD-AGOR & KAUFFMAN, *supra*, at 23; see also MINN. REPORT, *supra*, at 38 (“Having
 34 select subject matter expert staff working in this case type could increase the quality and number
 35 of cases that are reviewed for documentation.”); N.J. COMM. REPORT, *supra*, at 10 (involving court
 36 staff in substantive reviews). Given the repetitive nature of filings in high-volume civil-
 37 adjudication contexts, staff involved in these efforts would develop considerable expertise at
 38 assessing compliance with pleading and evidentiary requirements, especially if aided by checklists
 39 or other such decision aids. *Id.*; see also NAT’L CTR. FOR STATE CTS., CIVIL JUSTICE INITIATIVE: A
 40 GUIDE TO BUILDING CIVIL CASE MANAGEMENT TEAMS 8 (2017); SELLER CTR. FOR SOC. JUST.,

1 PREVENTING UNFAIR DEFAULT JUDGMENTS IN DEBT COLLECTION CASES: PROPOSALS FOR A
2 COMPLIANCE CHECKLIST 6-8 (2022). These staff can handle most of the work necessary to ensure
3 that filings support the entry of judgments, saving judicial resources for thorny or unusual issues.
4 See generally Chapter 8 (Systemic Administration).

5 The Los Angeles County Superior Court has implemented a version of the system the
6 Conferences of Chief Justices and State Court Administrators recommend for debt-collection
7 cases. Court clerks use checklists to determine if a consumer-debt plaintiff’s filing meets
8 California’s filing and information-exchange requirements for these cases. This case screening has
9 led to the dismissal of a substantial portion of screened cases. David Freeman Engstrom, Daniel
10 Bernal, & Aviv Caspi, *Compliance Courts* (working paper 2026); Eric Helland et al., RAND
11 Institute, *Debt Collection in the Los Angeles Courts: Court Congestion and Access to Justice* 21
12 (Sept. 2023) (Draft Report). These results confirm both the efficacy of this affirmative obligation
13 and the degree to which a strictly adversarial process, relying on defendant initiative, would
14 otherwise generate inaccurate and unfair judgments.

15 Many jurisdictions permit court clerks to enter default judgments when the plaintiff seeks
16 damages discernible in a ministerial fashion, without requiring the exercise of judgment. E.g., FED.
17 R. CIV. P. 55(b)(1) (permitting clerk to enter default judgment in a case for a “sum certain”); MINN.
18 CT. R. 55.01(a) (permitting the “court administrator” to enter a default judgment “[w]hen the
19 plaintiff’s claim against a defendant is upon a contract for the payment of money only, or for the
20 payment of taxes and penalties and interest thereon owing to the state”); MICH. CT. R. § 2.603
21 (B)(2)(a) (permitting clerk to enter default judgment in cases for a “sum certain” that meet additional
22 conditions); MONT. R. CIV. P. 55(b)(1) (permitting clerk to enter default judgment when the case is
23 for a “sum certain”). Any assignment of such responsibilities to court staff should be consistent with
24 the principles that govern delegation of judicial duties. See Chapter 8 (Systemic Administration).

25 *c. Dismissal for failure to meet requirements for the entry of judgment.* Subsection (c)
26 permits but does not require the court to dismiss the case if a party has failed to comply with
27 requirements for the entry of judgment. It builds upon evolving practice in several states that impose
28 pleading and information-exchange requirements on certain plaintiffs in debt-collection litigation.
29 In California, for instance, if a debt buyer has failed to meet pleading and information-exchange
30 requirements, the court “shall not enter a default judgment for the plaintiff and may, in its discretion,
31 dismiss the action.” CAL. CIV. CODE § 1788.60(c). Likewise, in the District of Columbia, “[i]f the
32 plaintiff has not complied” with pleading and information exchange requirements, “the court may
33 dismiss the case; provided, that the court shall dismiss the case with prejudice for substantial or
34 willful noncompliance.” D.C. CODE § 28-3814(t)(1). Not every jurisdiction to have imposed such
35 pleading and information-exchange requirements contemplates dismissal in instances of
36 noncompliance. E.g., MAINE REV. STAT. § 32-11019(3) (providing that the court shall withhold the
37 entry of default judgment). Subsection (c) provides for the possibility of dismissal, to provide
38 additional incentive to a plaintiff to meet these requirements. Reflecting this evolving practice,
39 subsection (c) gives courts discretion to determine when dismissal should be with or without
40 prejudice. A standard like the District of Columbia’s for a dismissal with prejudice—“substantial

or willful noncompliance”—would be appropriate. If, for instance, the court had previously denied a plaintiff’s request for the entry of a default judgment, and if the plaintiff seeks the judgment’s entry again without correcting the flaw that prompted the earlier denial, the court should dismiss with prejudice. The court should do so as well if the claim is clearly time-barred.

§ 7.04. Procedures for Motions to Stay or Vacate

(a) Courts and other rulemakers should simplify the processes by which parties against whom judgments are entered in high-volume civil adjudication can move to stay or vacate these judgments. These processes should:

- (1) simplify the steps associated with a motion to stay or vacate;**
- (2) minimize the costs associated with a motion to stay or vacate; and**
- (3) enable the party to move to stay or vacate using court-provided forms.**

(b) A judgment entered in high-volume civil adjudication should not be enforceable for a reasonable period of time after its entry, to permit a party against whom it is entered to move to stay enforcement of or vacate the judgment.

Comment:

a. Simplified processes to enable litigation after a judgment’s entry. Barriers that litigants face to their meaningful participation in high-volume civil adjudication can include paperwork and filing obligations that are unnecessarily complicated for efforts to stay, set aside, or vacate judgments. Any complications in the processes regulating those efforts should be minimized or removed unless necessary to the protection of legitimate interests or to ensure the fair and accurate resolution of disputes. See § 2.03(f). The grounds parties assert for why courts should stay or vacate judgments in high-volume civil adjudication will often recur from case to case. Courts should not need detailed filings or individualized legal arguments to assess those motions in most instances. A single form can elicit the reasons why a defending party moves to vacate. Requiring that party to complete and file a separate affidavit or declaration with the same information adds an unnecessary step. Moreover, procedures should not require a party seeking to move to stay or vacate a judgment to go through multiple steps to do so. A party moving to vacate a judgment, for instance, should not have to file a separate motion to stay the judgment except under unusual circumstances. Courts should provide forms, to be included with the notice of a judgment’s entry, that parties can use to move to stay or vacate judgments. Any costs or fees associated with motions

1 to vacate or stay judgments should be minimized, consistent with Chapter 12 (Court Funding and
2 Fees).

3 *b. Adequate time to move to stay or vacate.* A judgment in high-volume civil adjudication
4 should not be enforceable until the party against whom the court entered the judgment has had a
5 reasonable opportunity to move to stay or vacate it. This time period's length should depend upon
6 the interests at stake. A landlord's interest in the prompt recovery of the premises' repossession
7 might justify a shorter period, but a period of fewer than two weeks is presumptively unreasonable.
8 When a judgment debtor seeks to recover a monetary remedy, the interests in swift enforcement
9 lessen. A delay modeled on the 30-day automatic stay that the Federal Rules of Civil Procedure
10 require is reasonable under these circumstances unless the judgment creditor can establish that
11 delay will significantly disrupt or hinder enforcement efforts. Indeed, many jurisdictions have rules
12 governing judgment enforcement in foreclosure litigation that provide for even longer stays.

REPORTERS' NOTES

13 *a. Simplified processes to enable litigation after a judgment's entry.* Due to service problems
14 or other barriers to participation in high-volume civil adjudication, parties may not know about or
15 understand the stakes of the case against them until after the entry of judgment. E.g., *Why Civil*
16 *Courts Should Improve Defendant Notification*, PEW CHARITABLE TRS. (Mar. 3, 2023), [https://](https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2023/03/why-civil-courts-should-improve-defendant-notification)
17 [www.pewtrusts.org/en/research-and-analysis/issue-briefs/2023/03/why-civil-courts-should-](https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2023/03/why-civil-courts-should-improve-defendant-notification)
18 [improve-defendant-notification](https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2023/03/why-civil-courts-should-improve-defendant-notification). This common reality for high-volume civil adjudication makes
19 postjudgment motion practice, including motions to stay or vacate judgments, more important.

20 A motion to vacate or set aside a judgment must make a sufficient showing to entitle the
21 moving party to renewed merits litigation. The moving party will also have to request a stay of
22 enforcement long enough to allow the court to determine whether merits litigation should
23 recommence. The filings necessary for these purposes do not need to be complicated. When a
24 tenant files a motion to vacate an eviction judgment in New York, for instance, the court may issue
25 to the landlord an order to show cause why the judgment should not be vacated. The parties then
26 argue the merits of the tenant's motion at a hearing. N.Y.C. HOUSING CT., *Stopping an Eviction*,
27 <https://ww2.nycourts.gov/courts/nyc/housing/stopeviction.shtml>. Consistent with this sequence, a
28 tenant need only file a proposed order to show cause and an affidavit in support of a motion to
29 vacate. *Id.* The latter simply asks the tenant to explain why the tenant did not appear and why the
30 tenant has a meritorious defense to the lawsuit. *Id.*; see also *Stopping an Eviction After a Judgment*,
31 www.nycourts.gov. The Connecticut form motion to open judgment for small claims and evictions
32 matters is even more straightforward. It dispenses with a separate affidavit and instead simply asks
33 the defending party to describe the reasons for the motion. State of Connecticut Superior Court,
34 Motion to Open Judgment (Small Claims and Housing Matters), Form JD-CV-51, Feb. 2022.

By contrast, in California, a tenant must file the numerous documents in order to move to vacate an eviction judgment: (i) notice of motion and motion, (ii) a memorandum of points and authorities, (iii) a declaration explaining why the tenant failed to appear and why the tenant should prevail, (iv) a proposed order, (v) an ex parte application for stay of execution, (vi) a proposed answer to the landlord’s complaint, and (vii) a fee waiver. LEGAL AID FOUND. OF LOS ANGELES, UNLAWFUL DETAINER MOTION TO SET ASIDE: HOW TO GUIDE 2 (2019). The ex parte application for stay of execution itself includes (i) the ex parte application, (ii) a memorandum of points and authorities, (iii) a declaration of ex parte notice, (iv) the tenant’s declaration in support of the ex parte application, (v) and a proposed order on the ex parte application. LEGAL AID FOUND. OF LOS ANGELES, UNLAWFUL DETAINER: THREE-PART HOW TO GUIDE (2021). In sum, and excluding the fee waiver, California tenants need to file ten separate documents, several of which solicit redundant and unnecessary information, to place themselves in the same position that New York tenants achieve with two documents.

These sorts of complexities “set traps and pitfalls by way of technicalities for unwary litigants.” *Williams v. Seidenbach*, 958 F.3d 341, 355-356 (5th Cir. 2020). They are unnecessary in many instances. Litigants’ reasons for defaulting and their defenses are likely to be similar from one case to the next in high-volume civil-adjudication contexts. A court should rarely need a memorandum of points and authorities, for instance, particularly one written under significant time constraint by a self-represented litigant, to assess the strength of the litigant’s case for relief from the judgment. A party moving to vacate a judgment should be presumed also to want the judgment’s execution stayed. The party should not have to file a separate motion for a stay. A provision for an automatic stay to permit postjudgment litigation reflects this commonsense presumption. E.g., N.Y. C.P.L.R. § 5519(2) (providing for automatic stay of enforcement of a money judgment upon filing of an appeal provided the appellant provides an “undertaking”). Likewise, a defending party who files a motion to vacate should be presumed to request a hearing on that motion if the court requires hearings for such motions. A requirement that the party file either a motion requesting the hearing or one to shorten time before the hearing proceeds needlessly multiplies filing burdens and sets a trap for the unwary and inexperienced. Compare LEGAL AID FOUND. OF LOS ANGELES, UNLAWFUL DETAINER: THREE-PART HOW TO GUIDE 5 (2021) (noting that a tenant must file an ex parte application for an order to shorten time to the hearing on a motion to vacate).

Many court systems provide forms that self-represented litigants can use for postjudgment motion practice. E.g., Jud. Council California, Notice of Motion to Vacate Judgment and Declaration, Form SC-135, Jan. 1, 2007; Illinois Supreme Court, Motion to Vacate Judgment of Foreclosure, Form VD-M 916.4, Mar. 2018. New York provides a program that generates all necessary documentation for consumer debtors seeking to move to vacate. N.Y. State Unified Court System, *Vacate Judgment in a Consumer Debt Case*, <https://nycourts.gov/courthelp/DIY/consumerdebt.shtml>.

In some jurisdictions, a tenant must post a bond or otherwise bear costs in order to obtain a stay of a judgment pending a decision on a motion to vacate. E.g., Maricopa County Justice Courts, *If you want to file a motion to vacate judgment – eviction action*, June 21, 2023, at 2, at

<https://justicecourts.maricopa.gov/media/i1gpw50p/howto-motion-setaside-vacate-cv-ea-sc.pdf>;
Utah Legal Services, *Stopping an Eviction Order (Order of Restitution)*, at <https://www.utahlegal.org/node/71/stopping-eviction-order-order-restitution>. These costs should be minimized to the extent possible, consistent with the principles in Chapter 12 (Court Funding and Fees). Some jurisdictions avoid the need for these costs altogether, by requiring tenants to file motions promptly upon receiving writs of restitution or other notices of the eviction judgment, and by requiring courts to consider motions to vacate on very short timelines. E.g., Nevada Law Civil Law Self-Help Center, *Responding to a Court Order for Eviction*, at <https://www.civillawselfhelpcenter.org/self-help/evictions-housing/evictions/information-for-tenants/90-responding-to-an-order-for-eviction> (observing that courts decide motions to stay evictions within 1-2 days of filing). Cf. 17B Ariz. Rev. Stat. Rules P. Evic. Actions Rule 15(c) (requiring postjudgment motions that affect possession of property to be decided “within three court days, albeit in a state that requires the posting of a supersedeas bond”).

b. Adequate time to move to stay or vacate. The consequences of a judgment’s entry can be swift and significant. In Texas, for instance, a court can issue a writ of possession six days after the entry of judgment in an eviction case. TEX. R. CIV. P. 510.8(d)(1). Once served with the writ, a tenant has 24 hours to vacate. TEX. PROP. CODE § 24.0061(d)(1). Although tenants receive mailed notice of a default judgment, the court can send it up to 48 hours after its entry. TEX. R. CIV. P. 510.6(d); TEX. R. CIV. P. 503.1(d); TEX. PROP. CODE § 24.0061(c). A tenant who defaults, then, may have only a couple of days after learning about the judgment’s entry to take action before losing housing. In California, once a tenant’s default is entered, the court must “immediately” enter a default judgment when a landlord seeking possession requests it. Id. § 8:511; CAL. CODE CIV. P. 1169. The court must then “immediately” issue a writ of possession. Upon its service, the tenant has five days to leave the premises. CAL. CODE CIV. P. § 715.010(b)(2). Nevada’s summary eviction process gives a tenant seven days to answer after the service of a notice to pay rent or quit. If the tenant defaults, the court enters an eviction order and sends it to the sheriff or constable, who must serve it within 24 hours of receiving it. A tenant then has between 24 and 36 hours to leave. See CIV. LAW SELF-HELP CTR., *Overview of Summary Eviction Process*, <https://www.civillawselfhelpcenter.org/self-help/evictions-housing/evictions/overview-of-the-eviction-process>. In Arizona, while the writ may not issue until five days after entry of judgment, once issued, it “shall be enforced as promptly and expeditiously as possible.” ARIZ. REV. STAT. § 12-1178(C). In Iowa, execution may occur immediately or up to three days after entry of judgment. IOWA CODE § 648.22. In Florida, after the entry of judgment, the clerk issues a writ of possession to the sheriff. After the sheriff posts it on the premises, the tenant has 24 hours to vacate the property. Fla. Stat., Title VI, § 83-62(1).

Such time periods are often too short to offer meaningful opportunities for tenants to take steps to protect themselves. California’s timeline makes deadlines for filing motions to set aside judgments effectively meaningless. E.g., TERRY B. FRIEDMAN, ET AL., CALIFORNIA PRACTICE GUIDE – LANDLORD-TENANT § 8:549 (“In unlawful detainers, the statutory time limits for seeking default relief . . . are generally irrelevant because of the speed at which writs of possession are effectuated.”). In Nevada, a tenant can receive a 10-day stay of an eviction order, NEV. REV. STAT.

§ 70.010(2), but the tenant must file a motion to do so. NEV. JUST. CT. R. CIV. P. 110(a). A tenant expected to move out within 24 hours may struggle to find the time and wherewithal to complete the required forms and file the motion.

Summary procedures in eviction cases reflect landlords' interest in the prompt repossession of rental property. E.g., *Davis v. Comerford*, 137 N.E.3d 341, 356 (Mass. 2019). But tenants should have a reasonable period before enforcement to move to vacate, set aside, or stay judgments, or to take other steps to protect their interests. Without some delay between judgment and enforcement, the formal opportunity to seek vacatur or a stay becomes illusory in practice. An eviction judgment should be stayed for enough time to allow a reasonably diligent tenant to act. The two-week period that Comment *b* recommends for eviction enforcement is based on practice in New York and Vermont, where tenants have 14 days after a marshal, constable, or sheriff serves a notice of eviction before an eviction can proceed. N.Y. REAL PROP. ACTS. L. §§ 749(2)(A), 749(3); VT. STAT. title 12 §§ 4854, 4853b. Other jurisdictions provide for similar periods of postponement. In Massachusetts, a landlord cannot obtain an order of execution until the eleventh day after the clerk enters judgment, and then the sheriff must give the tenant another two days' notice. MASS. GEN. L. ch. 239 § 5(A), 9, 10. The District of Columbia gives tenants a full three weeks' notice of execution of the writ. D.C. CODE § 42-3505.01A(A)-(B). A modest postponement—a minimum of two weeks—should not unduly inconvenience landlords or disrupt rental markets.

Many states provide in their rules for an automatic stay of enforcement in cases involving monetary relief. E.g., ARIZ. R. CIV. P. 62(a) (15-day automatic stay); N.D. R. CIV. P. 62(a) (30-day automatic stay); MASS. R. CIV. P. 62(a) (10-day automatic stay for default judgments); UTAH R. CIV. P. 62(a) (28-day stay); COLO. R. CIV. P. 62(a) (14 days). Many states' foreclosure laws effectively provide for an automatic stay by requiring that notice of a sale of a foreclosed property be provided for a specified number of days before the sale can proceed. E.g., IND. CODE § 32-29-7-3(e) (requiring that published notice of a sheriff's sale start appear in print starting at least 30 days before the date of the sale); IOWA CODE § 626.74 (four weeks); 14 ME. REV. STAT. ANN. § 6323(2) (at least 30 days and no more than 45). Rule 62(a) of the Federal Rules was amended in 2018 to extend the federal automatic stay period from 14 days to 30 days, to ensure that a judgment would not be enforceable until after expiration of the periods for moving for a new trial, moving to alter or amend a judgment, or filing an appeal ended. FED. R. CIV. P. 62, Committee Notes on Rules (2018 Amendment). An automatic stay cannot be similarly aligned with deadlines for filing motions to vacate, as time limits for these motions often extend for months or a year and in some instances indefinitely. See, e.g., FED. R. CIV. P. 60(c)(1) (requiring that motions be made "within a reasonable time"); see also § 7.06. But the Federal Rules' 30-day period suggests that a stay for the same number of days will not fundamentally prejudice judgment creditors in most instances.

§ 7.05. Invalid Default Judgments

(a) Barring exceptional circumstances, a default judgment entered in high-volume civil adjudication should be vacated or set aside at any time if:

1 **(1) the court entering the judgment lacked jurisdiction;**

2 **(2) the party against whom judgment was entered did not receive proper**
3 **service, unless that party otherwise received adequate notice of the action; or**

4 **(3) the process leading to the judgment’s entry violated due process.**

5 **(b) Exceptional circumstances exist under subsection (a) when the party subject to the**
6 **judgment manifested an intention to treat the judgment as valid after receiving actual notice**
7 **of the judgment, and another party has a substantial interest of reliance on the judgment.**

8 **Comment:**

9 *a. The obligation to set aside invalid judgments.* A default judgment is invalid in any of
10 four circumstances. First, it is invalid if the court that entered the judgment lacked subject-matter
11 jurisdiction. Second, it is invalid if the court lacked personal jurisdiction, except in the unusual
12 event that a defending party, notwithstanding a default, consented to the court’s jurisdiction or
13 waived jurisdictional defects. Third, the judgment is invalid if the party against whom the
14 judgment was entered did not receive proper service, unless this party waived objections to
15 improper service or had adequate notice of the action. Restatement of the Law Second, Judgments
16 §§ 1, 2, 3, and 65, Comment *a*; see also *id.* § 3, Comment *d* (discussing adequacy of notice).
17 Finally, a judgment is invalid if the process leading to its entry violated due process.

18 **Illustrations:**

19 1. In a foreclosure action, the bank’s process server hands the summons and
20 complaint to the mortgagor’s 16-year-old daughter, then sends the summons and complaint
21 by first-class mail to the mortgagor’s residence. The mortgagor moves to vacate after the
22 entry of a default judgment, alleging improper service due to the daughter’s age although
23 conceding receipt of the mailed summons and complaint. The judgment is not invalid
24 because the mortgagor received adequate notice of the action, even if the mortgagor did
25 not receive proper service. Whether the court grants the motion to vacate will turn on its
26 discretionary consideration of the factors set forth in § 7.06 (Considerations in Vacating
27 Judgments on Other Grounds).

28 2. The applicable procedural rule in a jurisdiction requires that a party seeking the
29 entry of a default judgment provide notice to the party’s adversary at least three days before
30 the hearing at which the default-judgment request will be considered. The landlord knows

1 that the tenant is not at the rental premises but has contact information for the tenant and
2 can readily provide the required notice to where the tenant is located. The landlord
3 nonetheless mails notice of the default-judgment hearing to the rental premises. The entry
4 of judgment violates due process and the judgment is thus invalid.

5 Barring exceptional circumstances, invalid judgments should be vacated or set aside at any
6 time, without consideration for the diligence of the party moving to vacate, and without an
7 assessment of the merits. Restatement of the Law Second, Judgments § 65, Comments *b* and *c*;
8 Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80, 85 (1988).

9 *b. Exceptional circumstances.* The exceptional circumstances enumerated in subsection (*b*)
10 are those provided for in Restatement of the Law Second, Judgments § 66.

REPORTERS' NOTES

11 *a. The obligation to set aside invalid judgments.* Under well-established doctrine, a default
12 judgment is invalid if the court entering it lacked subject-matter jurisdiction; if it lacked personal
13 jurisdiction, unless the defendant consented to jurisdiction or waived jurisdictional defects; or if
14 the defending party did not receive proper service unless this party waived objections to improper
15 service or received adequate notice of the action. See Restatement of the Law Second, Judgments
16 §§ 2, 3, 65 (AM. L. INST. 1982). Subsection (a)(2) and Illustration 1 in Comment *a* build upon the
17 discussion of irregular notice in § 3 of the Restatement of the Law Second, Judgments, and in
18 particular Comment *d* to that Section. If a defending party receives adequate notice of the action
19 at the case's outset notwithstanding a formal defect in service, the judgment should not be
20 considered invalid, and the motion to vacate should be considered pursuant to the considerations
21 discussed in § 7.06. See *id.* § 3, Comment *d* (referring to these considerations as relevant ones for
22 the consideration of a motion to vacate brought under these circumstances). That said, in instances
23 of improper service, courts should require the party defending the judgment's validity to establish
24 the adequacy of notice of the action notwithstanding its dereliction of service requirements. Cf.
25 Asset Prot. & Sec. Servs., L.P. v. Armijo, 570 S.W.3d 377, 381-382 (Tex. Ct. App. 2019)
26 (discussing Restatement Second, Judgments § 3 and Comment *d* thereto but insisting upon the
27 rigid enforcement of service-of-process rules when considering a motion to vacate a judgment
28 based on improper service).

29 Subsection (a) embodies this black-letter law. In addition, it expands the category of
30 judgment invalidity to include judgments entered in violation of due process. This expansion
31 reflects how courts have treated matters of judgment invalidity that do not involve jurisdiction or
32 proper service. Exactly why judgments entered after improper service are invalid lacks a settled
33 answer. Historically, courts equated inadequate service with a lack of personal jurisdiction. A lack
34 of jurisdiction meant that the court entering the judgment lacked the power to do so. Restatement
35 of the Law Second, Judgments § 10, Comment *a* (AM. L. INST. 1982); Chapter 3 (Notice and

Service of Process). Any such judgment was thus considered “void ab initio.” *World Fam. Farms, Inc. v. Heartland Organic Foods, Inc.*, 661 N.W.2d 719, 725 (S.D. 2003).

Some courts continue to equate improper service with a lack of personal jurisdiction. E.g., *Buchholdt v. Nelson*, 534 P.3d 91, 93 (Alaska 2023). However, this equivalence no longer reflects best understandings of either notice or personal-jurisdiction doctrine. See Robin J. Effron, *The Lost Story of Notice and Personal Jurisdiction*, 74 N.Y.U. ANN. SURV. AM. L. 23, 55-79 (2018). Cf. Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 VA. L. REV. 1703, 1738-1740 (2020) (documenting a historical distinction between “the notice requirement” and “the requirement that a court possess lawful authority to make the defendant appear”). The better view is that “[a]n adequate basis for jurisdiction over the defendant”—the court’s power—is a “*distinct idea*” from “fair notice to the defendant.” *Anderson v. Sullivan*, No. 03CV4064, 2005 WL 1123772, at *2 (E.D.N.Y. May 9, 2005) (emphasis in original).

Decoupling proper service and its purpose from jurisdiction should not unsettle the deeply entrenched view that a judgment entered without adequate notice to the defendant is invalid. Rather, this view reflects the more basic understanding that the judgment is invalid when the proceedings that resulted in its entry violated due process. E.g., *Wright & Miller* § 2862 (observing that a judgment is invalid if “the court that rendered it . . . acted in a manner inconsistent with due process of law”); *Cornelius v. Browning*, 85 So. 3d 954, 958 (Ala. 2011); *Irvin v. Harris*, 944 F.3d 63, 68 (2d Cir. 2019). As the Restatement of the Law Second, Judgments, explains, “[w]hen the person against whom judgment was rendered did not have adequate notice, then the judgment is unjust” and can be set aside “without regard to time limits” “because there was a denial of a fair opportunity to defend the action.” *Id.* § 65(b) (AM. L. INST. 1982). Courts characterize denials of fair opportunities to defend as “in essence” a violation of due process. E.g., *State v. Jacobsen*, 244 P.3d 131, 135 (Idaho Ct. App. 2010) (making this assertion in the context of a criminal case); see also *State v. Dominguez*, 178 P.3d 834, 837 (N.M. Ct. App. 2007) (same).

A litigant can be denied a fair opportunity to be heard, and thus suffer a due-process violation, for reasons other than improper service. For instance, numerous courts have deemed judgments invalid in instances when defendants have lacked adequate notice of critical moments in cases even if properly served at the outset. E.g., *Price v. Wyeth Holdings Corp.*, 505 F.3d 624, 632 (7th Cir. 2007) (failure to provide notice of reinstatement of lawsuit after voluntary dismissal); *Gruen v. Pneumo Abex Corp.*, 163 F.3d 411, 423 (7th Cir. 1998) (judgment invalid when court failed to notify defendant of trial date); *Kerth v. Polestar Ent.*, 325 S.W.3d 373, 389 (Mo. Ct. App. 2010) (judgment invalid when defendant not provided notice of trial setting); *LBL Oil Co. v. Int’l Power Servs.*, 777 S.W.2d 390, 391 (Tex. 1989) (same); *Hudson v. Shapiro*, 917 A.2d 77, 83 (D.C. Ct. App. 2007); *Rodriguez v. Marcus*, 564 S.W.3d 216, 221 (Tex. Ct. App. 2018); *Abernathy v. Green Tree Servicing*, 54 So. 3d 422, 425 (Ala. Ct. Civ. App. 2010); *Janssen v. Luu*, 57 Cal. App. 4th 272, 279 (1997) (judgment is void if plaintiff failed to serve a declaration of relief sought). Illustration 2 is based on *Cornelius v. Browning*, 85 So. 3d 954 (Ala. 2011). Alabama law requires that, under certain circumstances, a party seeking the entry of a default judgment provide its adversary with notice of the hearing at which the judgment may be entered at least three days prior

1 to the hearing. *Id.* at 960. The *Cornelius* plaintiffs properly served a self-represented defendant,
2 then subsequently received information that the defendant was not at an address the plaintiffs had
3 on file. They nonetheless mailed notice of the default judgment hearing to this address, knowing
4 that the defendant would not receive it there. The Alabama Supreme Court held that this notice
5 effort violated due process, warranting the default judgment’s vacatur. *Id.* at 961-962.

6 Procedural defects beyond notice problems can violate due process and make a judgment
7 invalid. E.g., *Irvin v. Harris*, 944 F.3d 63, 71 (2d Cir. 2019) (invalidating a judgment on due
8 process grounds after class counsel consented to its entry when no class representative adequately
9 represented absent class members); *In re E.D.J.*, 348 P.3d 1098, 1101-1102 (Okla. Ct. App. 2015)
10 (holding that entry of a default judgment in parental rights termination case for party’s failure to
11 appear at discovery hearing violated due process). That said, not all procedural errors amount to
12 due-process violations sufficient to render a judgment invalid. E.g., *Forsyth Fin. Grp. v. Hayes*,
13 351 S.W.3d 738 (Mo. Ct. App. 2011) (determining that entry of judgment notwithstanding
14 plaintiff’s failure to meet pleading requirements does not violate due process).

15 As due-process norms evolve, the types of flaws that render the entry of judgments
16 fundamentally unfair under subsection (a)(3) may continue to diversify. The Supreme Court in
17 *Turner v. Rogers*, 564 U.S. at 447-449, held that a court violated due process when it failed to
18 elicit information from a self-represented litigant that could have supported a defense to a contempt
19 charge. Pleading and information-exchange requirements that oblige parties to make affirmative
20 showings to establish a substantive entitlement to prevail reflect the reality that some self-
21 represented litigants will assuredly be erroneously deprived of property interests if left to litigate
22 the merits themselves. Concern for the erroneous deprivation of property interests, especially when
23 such deprivations cause serious harm, motivate modern due-process doctrine. *Mathews v.*
24 *Eldridge*, 424 U.S. 319 (1976). Should such requirements evolve into due-process obligations,
25 consistent with *Turner v. Rogers*, a party’s failure to meet them may render a judgment invalid.

26 Subsection (a) reflects the position that, when a judgment is invalid, the party moving to
27 vacate it does not need to establish a meritorious defense or act by a deadline otherwise applicable
28 to a motion to vacate. E.g., Restatement of the Law Second, Judgments § 65, Comment *b* (AM. L.
29 INST. 1982); *Esgro Cap. Mgmt. v. Banks*, --- N.Y.S.3d ---, 2023 WL 8459115, at *1 (N.Y. App.
30 Div. Dec. 7, 2023); *In re Dar. C.*, 957 N.E.2d 898, 913 (Ill. 2011); *Morrison v. Prof. Billing Servs.,*
31 *Inc.*, 559 N.E.2d 366, 368 (Ind. Ct. App. 1990); *Lesowitz & Baskin v. Miller*, 579 N.E.2d 227, 228
32 (Ohio Ct. App. 1989). But cf. *In re Vista-Pro Automotive, LLC*, 109 F.4th 438, 444 (6th Cir. 2024)
33 (holding that motion to vacate based on improper service is subject to a reasonable time limitation,
34 but noting that this holding is “out of step with the majority view”).

35 *b. Exceptional circumstances.* Subsection (b) captures the limited circumstances under
36 which a motion to vacate or set aside an invalid judgment may be denied. According to the
37 Restatement of the Law Second, Judgments, such circumstances require that “the party seeking
38 relief, after having had actual notice of the judgment, manifest[] an intention to treat the judgment
39 as valid.” Restatement of the Law Second, Judgments § 66 (AM. L. INST. 1982); see also *Esgro*
40 *Cap. Mgmt.*, 2023 WL 8459115, at *1. In addition, “[g]ranted the relief [must] impair another

person's substantial interest of reliance on the judgment." Restatement of the Law Second, Judgments § 66 (AM. L. INST. 1982); see also *PNC Bank, Nat'l Ass'n v. Kusmierz*, 193 N.E.3d 1196, 1206-1208 (Ill. 2022) (recognizing a laches defense to a motion to vacate an invalid judgment). "Silence" by the party subject to the judgment "is not a manifestation of assent." Restatement of the Law Second, Judgments § 66, Comment *b* (AM. L. INST. 1982).

In certain high-volume civil-adjudication contexts, the notion of an invalid judgment, subject to vacatur at any time, may create particular problems. A landlord may have already rented a property to another tenant, for instance, or a bank may have sold a foreclosed property to an innocent third party. Such concerns may affect the right of the defendant to have the judgment vacated. E.g., *PNC Bank*, 193 N.E.3d at 1203 (discussing an Illinois statute protecting rights of third-party purchasers and declaring that foreclosure judgments void for lack of personal jurisdiction may be vacated only if the jurisdictional defect is apparent from the record). Alternatively, these concerns might require the shaping of relief from the judgment, to provide for something other than a restoration of the status quo ante. See § 7.07 (Measures to Protect Against Unnecessary Harms from the Entry and Enforcement of Judgments). Reliance interests will rarely be substantial enough in cases involving solely monetary relief to justify ongoing effect for an invalid judgment. Restatement of the Law Second, Judgments § 65, Comment *c* (AM. L. INST. 1982).

§ 7.06. Considerations in Vacating Judgments on Other Grounds

(a) When a party challenges a judgment for reasons other than those described in § 7.05 (Invalid Default Judgments), the court should exercise its discretion to promote the resolution of the case on its merits if the judgment was entered without meaningful participation by the moving party. When exercising this discretion, the court should consider the barriers to meaningful participation that the moving party faced in evaluating:

(1) the reasons why the moving party did not appear or otherwise neglected the proceedings before the judgment's entry; and

(2) whether the moving party acted with due diligence to learn of the judgment and with reasonable promptness in seeking relief.

In addition, the court should require the moving party to identify a genuine issue with the judgment that may bear upon the merits, but the moving party need not prove or otherwise establish this issue for the judgment to be vacated.

(b) The court should not exercise its discretion as described in subsection (a) if:

(1) the moving party has demonstrated an affirmative disregard for merits litigation; or

1 **(2) a party that benefits from the judgment would suffer prejudice or harm to**
2 **reliance interests that outweighs interests in renewed litigation.**

3 **(c) Rules that establish deadlines for motions to vacate judgments and their**
4 **administration in particular cases should vary based upon recurring characteristics of**
5 **different case types, including the timing of when judgments are typically enforced.**

6 **Comment:**

7 *a. Preference for outcomes on the merits.* This Section provides guidance for how courts
8 should consider motions to vacate judgments on grounds other than those specified in § 7.05.
9 Doctrine that governs the vacatur of judgments in most jurisdictions affords courts significant
10 discretion over these motions. As they exercise this discretion, courts in most jurisdictions
11 demonstrate a preference for outcomes reached after meaningful merits litigation. The preference
12 that this Section recommends builds on that general practice. It effectively recommends a thumb
13 on the scale in favor of a judgment’s vacatur if the judgment was reached without meaningful
14 participation by the moving party, except under circumstances described in subsection (b). The
15 fact that a party is taking the initiative to seek vacatur might be seen as some evidence of a need
16 to address the merits of the dispute.

17 Subsection (a) offers guidance for how courts should consider the standard factors raised in
18 a motion to vacate a judgment for reasons other than judgment invalidity. A party seeking a
19 judgment’s vacatur is generally required (i) to show a sufficient reason that the party’s neglect of
20 the proceedings that led to the entry of judgment was excusable; (ii) to show that the party acted
21 with due diligence to learn of the judgment, and with reasonable promptness to challenge it, often
22 within a set deadline; and (iii) to identify a genuine issue with the judgment upon which the
23 judgment depends. Restatement of the Law Second, Judgments § 67. As is the practice in numerous
24 jurisdictions, courts should balance these factors in favor of a judgment’s vacatur when barriers,
25 including a lack of representation, have disabled the moving party’s meaningful engagement in the
26 adversary process. First, courts should not require parties who faced barriers to have been faultless
27 in failing to appear or in neglecting the proceedings that resulted in the judgment. The term
28 “excusable neglect” may not accurately capture the circumstances of some defending parties in
29 high-volume civil adjudication, who may never have received notice of litigation against them.
30 Second, these barriers should inform courts’ assessments of a party’s timeliness in learning of and

1 moving to vacate the judgment. Finally, courts should not require parties who faced barriers to their
2 earlier engagement to do more than identify a possibly meritorious defense or other basis for why
3 a judgment is not warranted as a matter of law, as well as the factual basis for this defense or basis.
4 The moving party should not be required to establish this defense or basis on the merits to get the
5 judgment vacated. A plausible allegation that a genuine issue exists should suffice.

6 **Illustrations:**

7 1. After the entry of a default judgment in a consumer-debt case, the defendant
8 moves to vacate, arguing that she had already paid off the balance she allegedly owed before
9 the plaintiff sued. The defendant describes when she made installment payments and in what
10 amounts in her motion, but she does not attach documentation to prove that she in fact made
11 these payments. The defendant has sufficiently identified a genuine issue with the judgment.

12 2. After the entry of a default judgment in an eviction case, the tenant moves to
13 vacate. The tenant claims in conclusory fashion that he did not pay rent “because the
14 apartment was uninhabitable and the landlord refused to fix the problem.” But the motion
15 does not support this claim with any specific factual assertions. Without more, the tenant
16 has not identified a genuine issue with the judgment.

17 3. After the entry of a default judgment in a mortgage-foreclosure case, the mortgagor
18 moves to vacate. The mortgagor notes that the bank did not attach proof of ownership of title
19 to its complaint, as required by the jurisdiction’s pleading and information-exchange rules.
20 The mortgagor has identified a genuine issue with the judgment.

21 In high-volume civil adjudication, an important barrier to meaningful participation is a lack
22 of representation. A lack of representation alone is not grounds for a judgment’s vacatur. But courts
23 should not treat litigants in high-volume civil adjudication who were unrepresented
24 indistinguishably from those who had counsel or could have easily appeared or otherwise defended
25 earlier. See Chapter 9 (The Judicial Role). Coupled with a lack of representation, certain
26 circumstances, if credibly established, could excuse a party’s neglect or factor into a court’s
27 determination of due diligence or reasonable promptness. Reflecting practice in numerous
28 jurisdictions, a non-exhaustive list of these circumstances includes a party’s struggle with
29 significant personal difficulties or health problems, a party’s confusion about how to engage in
30 proceedings, a party’s inability to come to court and lack of awareness about remote options for
31 participation, and a party’s futile efforts to obtain counsel.

Illustrations:

4. A self-represented tenant fails to appear at the merits hearing in an eviction case. The tenant had gone to the wrong courthouse and, when he discovered his mistake, tried to call the clerk to alert her of his mistake. The tenant has demonstrated excusable neglect sufficient for the purposes of moving to vacate the judgment.

5. A landlord sues a tenant. The tenant, who lacks counsel, defaults. Several months later, the tenant moves to vacate the default judgment. She explains her nonappearance on grounds that she “didn’t have a lawyer” but otherwise offers no explanation for her failure to engage. Without more, the tenant has not demonstrated excusable neglect.

6. After the entry of an eviction judgment, a tenant lives for six months in his automobile. During this time the tenant, who struggles to read and write, tries unsuccessfully several times to find pro bono counsel to assist him. After seven months, the tenant finally gets assistance from a legal-aid organization and files a motion to vacate. The tenant has acted reasonably promptly to challenge the judgment.

If protections to ensure the accuracy and fairness of judgments are in place, the preference for merits outcomes that should inform courts’ administration of subsection (a)’s factors for considering a motion to vacate is unlikely to disturb the finality of judgments in any substantial aggregate sense. If adequate notice is provided before the entry of a default judgment, and if courts assess the plaintiff’s filings for their substantive and procedural sufficiency before entering judgment, these protections should significantly decrease instances when defending parties’ neglect of the proceedings is excusable, and when they can identify genuine issues with the judgment that would warrant its vacatur.

Subsection (a) applies most obviously in instances when the judgment was entered after the moving party’s default. But parties may enter an appearance and still not participate meaningfully before the entry of judgment. If, for instance, an eviction case proceeds rapidly and a self-represented tenant enters an appearance but lacks sufficient time to gather and adduce important evidence, the merits adjudication may not be meaningful. Consistent with the discretionary decisionmaking that motions to vacate typically require, courts in such instances should determine on a case-by-case basis when barriers to engagement justify the application of the motion-to-vacate factors in a manner that reflects a preference for merits outcomes.

1 *b. Affirmative disregard or prejudice.* Subsection (b) recommends that courts do not extend
2 the preference for merits resolution that subsection (a) recommends in two instances. First, a
3 moving party who affirmatively disregarded the litigation leading to the entry of judgment should
4 not benefit from this preference. A defending party’s failure to appear and the ensuing default
5 judgment entered against the defendant, on their own, are not indicators of affirmative disregard.
6 See Restatement of the Law Second, Judgments, Ch. 5, Topic 1, Title A, Introductory Note (“Until
7 the defaulting party contests the default judgment, it cannot be told whether the default was
8 attributable to a blunder, pure ignorance, or calculated defiance of the court’s authority—
9 circumstances that warrant quite different responses from the court when relief from the judgment
10 is sought.”). When the defending party lacked representation or otherwise faced barriers to
11 participation, the court should find affirmative disregard only under rare circumstances. Such
12 circumstances should include, for instance, a situation where a defaulting party took affirmative
13 steps to avoid participating in litigation, or where the defaulting party actively interfered with the
14 lawsuit’s progress.

15 A plaintiff may also affirmatively disregard litigation. When a plaintiff does so, the court
16 in most jurisdictions has the discretion to dismiss the complaint with or without prejudice. The
17 plaintiff does not need to move to vacate a judgment if the court dismisses the case without
18 prejudice. A dismissal with prejudice, by contrast, reflects a judicial determination that the plaintiff
19 should not be able to renew merits adjudication. This determination may reflect concern for the
20 plaintiff’s affirmative disregard of the case the plaintiff filed. A court considering a motion to
21 vacate a dismissal with prejudice should thus require the moving party to make a particularly
22 strong showing that it did not affirmatively disregard its own case.

23 Subsection (b) also recommends against the preference described in subsection (a) in
24 certain situations when a judgment’s vacatur would cause prejudice or disturb reliance interests.
25 A judgment’s vacatur necessarily disadvantages the party that benefits from the judgment’s entry,
26 since the party enjoys an interest in the judgment itself. Moreover, events that occur after a
27 judgment’s entry can vest third parties with reliance interests that the judgment’s vacatur would
28 disturb. Any assessment of disadvantage and reliance should be relative and compare prevailing
29 and third parties’ interests to those of the party subject to the judgment in the resolution of the case
30 on the merits. This balance should significantly favor defendants in cases involving money
31 judgments and disfavor plaintiffs against whom dismissals with prejudice have been entered. By

contrast, in eviction and foreclosure cases, the vacatur of a judgment may prejudice reliance interests of third parties who have rented or purchased the property at issue. In such instances, a preference for the resolution of the case on the merits may need to yield.

c. Time limits for motions to vacate. No single trans-substantive time limit should govern all motions to vacate. Rather, policymakers should set time limits and courts should administer them with regard to the dynamics that influence when parties file motions to vacate and when prevailing parties take action to enforce judgments. Problems with service and other circumstances mean that defendants in consumer-debt litigation may not learn that they have been sued or judgments have been entered against them until their assets or wages are garnished. This enforcement may happen years after a judgment’s entry. A short time limit for motions to vacate may prevent a reasonably diligent consumer debtor from seeking relief. By contrast, enforcement of eviction judgments tends to proceed quickly. A shorter time limit for this case type will rarely preclude meritorious motions to vacate. Another option consistent with subsection (c) makes the date the defending party received actual notice of the judgment, not the date of the judgment’s entry, relevant for purposes of setting deadlines.

REPORTERS’ NOTES

a. Preference for outcomes on the merits. A party that seeks to renew merits litigation after the entry of judgment bears the burden to establish that the judgment ought to be reopened or vacated. E.g., *McBurney v. Roszkowski*, 875 A.2d 428, 439 (R.I. 2005). If a judgment is not otherwise invalid, a court has broad discretion to determine whether to set it aside. E.g., *BYS Inc. v. Smoudi*, 269 P.3d 1197, 1201 (Ariz. Ct. App. 2012); *Northland Temporaries, Inc. v. Turpin*, 744 N.W.2d 398, 402 (Minn. Ct. App. 2008); *Branson Hills Assocs., L.P. v. Millington*, 926 S.W.2d 178, 180 (Mo. Ct. App. 1996). In most jurisdictions, a “strong preference for determining lawsuits on the merits” informs the exercise of this discretion. *Howard v. Gault*, 259 So. 3d 119, 122 (Fla. Ct. App. 2018); see also *On the Level Fence & Deck, Inc. v. Indiana Bell Tele. Co.*, 217 N.E.3d 599, 601 (Ind. Ct. App. 2023); *State ex rel. McGill v. Bassett*, 528 P.3d 739, 742 (N.M. Ct. App. 2023); *Allery v. Whitebull*, 977 N.W.2d 726, 731 (N.D. 2022); *Lovelace v. RPM Ecosystems Ithaca*, 131 A.D.3d 760, 761 (N.Y. App. Div. 2015); *Agnello v. Walker*, 306 S.W.3d 666, 673 (Mo. Ct. Ap. 2010); *Morin v. Burris*, 161 P.3d 956, 962 (Wash. 2007); *Krestschmer v. Bank of Am.*, 15 N.E.3d 595, 600 (Ind. Ct. App. 2014) (“A default judgment is not generally favored, and any doubt of its propriety must be resolved in favor of the defaulted party.”) (internal quotation omitted); *Chen v. Mah*, 457 P.3d 796, 812-813 (Haw. 2020); *Harrison v. Thurston*, 258 P.3d 665, 669 (Utah Ct. App. 2011); *Hilyer v. Fortier*, 176 So. 3d 809, 813 (Ala. 2015); *Resources Ltd., LLC v. New Trinity Coal, Inc.*, 246 W.Va. 507, 513 (2022).

Subsection (a) provides guidance for how courts should administer this preference. It recommends that courts treat the barriers that disable parties' meaningful participation in high-volume civil adjudication as grounds for the liberal consideration of motion to vacate factors. This guidance is broadly consistent with how courts in many jurisdictions evaluate motions to vacate or set aside default judgments. E.g., *Matsuura v. E.I. du Pont de Nemours & Co.*, 102 Hawaii 149, 158 (2003); *JK v. DK*, 153 Hawaii 268, 274 (2023); *Sun Mountain Sports, Inc. v. Gore*, 320 Mont. 196, 205 (2004) ("For nearly a century, this Court has noted the liberality with which default judgments should be set aside"); *Olympic Indus. Park v. P.L., Inc.*, 506 A.2d 770, 772 (N.J. App. Div. 1986) ("It is virtually axiomatic as a matter of longstanding practice and procedure in this State that a motion to vacate a default judgment must be viewed with great liberality, and every reasonable ground for indulgence is tolerated to the end that a just result is reached.") (internal quotation omitted); *Taylor v. Vitetta*, 8 So. 3d 1216, 1217 (Fla. Ct. App. 2009) ("Florida courts have a liberal policy of vacating defaults in order to decide cases on their merits."); *Westfield Ins. Co. v. Wensmann, Inc.*, 840 N.W.2d 438, 449 (Minn. Ct. App. 2013) ("Because the goal of litigation is to reach a resolution of disputes on the merits, courts should be liberal in opening default judgments.") (internal quotation omitted); *Tudor's Biscuit World of Am. v. Critchley*, 729 S.E.2d 231, 241 (W. Va. 2012) ("[C]ases should be decided on their merits, and consequently default judgments are not favored and a liberal construction should be accorded a . . . motion to vacate a default order.") (internal quotation omitted). The principle rejects the oft-stated insistence that "parties who are self-represented" receive "no special consideration" when they move to vacate judgments. *Ezell v. Lawless*, 955 A.2d 202, 207 (Me. 2008); see also *Farm Credit Bank of St. Louis v. Schwarm*, 622 N.E.2d 971, 101 (Ill. Ct. App. 1993); *Design Builders, Inc. v. Heyd-Lamb*, 635 N.W.2d 543, 549 (Neb. Ct. App. 2001); *Hull v. State Farm Bank*, 462 S.W.3d 701, 705 (Ark. Ct. App. 2015). As discussed in the Reporters' Note to Comment *b*, courts have often considered barriers to participation, including a lack of representation, when administering the motion to vacate factors. Subsection (a) reflects their attention to these barriers.

The Restatement of the Law Second, Judgments, identifies the following factors for courts to weigh when deciding motions to vacate default judgments:

[A] judgment by default may be avoided if: (1) [t]he failure to appear was the result of excusable neglect; (2) [t]he applicant for relief acted with due diligence in ascertaining that the judgment had been rendered and with reasonable promptness in seeking relief, and the application was made within the time limitation of an applicable statute or rule of court; and (3) [t]he application for relief shows there is a genuine issue upon which the judgment depends and which should be adjudicated.

Restatement of the Law Second, Judgments § 67 (AM. L. INST. 1982). Rule 60 of the Federal Rules of Civil Procedure and the rules and practices of many states basically follow the Restatement's approach. NAT'L CONSUMER LAW CTR., COLLECTION ACTIONS: DEFENDING CONSUMERS AND THEIR ASSETS 423-424 (2020). Considering these factors in light of the intersecting barriers to meaningful participation that self-represented litigants often struggle to overcome can resolve several unsettled issues that the Restatement's factors commonly implicate.

1 First, this Section’s general preference for merits outcomes is inconsistent with a standard
 2 for excusable neglect that demands that the defendant be faultless, and it counsels more generally
 3 for due regard for the totality of the barriers that disable meaningful participation. The U.S.
 4 Supreme Court has held that the defendant does not need to show that the default resulted from
 5 “circumstances beyond its control” to prevail pursuant to a rule of bankruptcy procedure equivalent
 6 to Rule 60(b) of the Federal Rules of Civil Procedure. *Pioneer Investment Servs. Co. v. Brunswick*
 7 *Assocs. Ltd. P’Ship*, 507 U.S. 380, 392 (1993). An insistence upon a lack of fault or blame is
 8 inconsistent with the meaning of “neglect.” *Id.* at 394. Compare *LEGAL AID FOUND. OF LOS*
 9 *ANGELES, UNLAWFUL DETAINER MOTION TO SET ASIDE HOW TO GUIDE 1* (2019) (advising tenants
 10 considering filing motions to set aside eviction judgments that they must “show that something
 11 *beyond [their] control* prevented” their participation in litigation before their default) (emphasis
 12 in original); *Goldsmith v. Jones*, 761 N.E.2d 471, 474 (Ind. Ct. App. 2002) (insisting that Indiana’s
 13 version of Rule 60(b) requires “extraordinary circumstances which are not the result of any fault
 14 or negligence on the part of the movant”); *Town of Stratford v. LeBlanc*, 167 A.3d 1015, 1019
 15 (Conn. App. 2017) (determining that a defendant whose failure to appear “resulted from his own
 16 negligence” could not meet an “accident, mistake, or other reasonable cause” requirement).

17 In most jurisdictions, the fact that a party lacked counsel before judgment was entered,
 18 without more, is insufficient to establish excusable neglect. E.g., *Womble v. Moore*, 386 So. 3d 9,
 19 13 (Ala. 2023); *Checkerprop Utah 199 East, LLC v. Butcher*, --- P.3d ---, 2024 WL 4096361, at *5
 20 (Utah Ct. App. Sept. 6, 2024); *Locke v. Whitehead*, 321 So. 3d 278, 281 (Fla. Ct. App. 2021);
 21 *Jedrejic v. Croatian Olympic Committee*, 190 F.R.D. 60, 77 (E.D.N.Y. 1999); *Jenkins v. LaSalle*
 22 *Southwest Corrs., Civ. No. 17-1376*, 2020 WL 2106355, at *5 (N.D. Tex. Jan. 28, 2020). Thus, for
 23 instance, if a self-represented party repeatedly failed to engage, and if the court warned the party of
 24 the consequences of doing so before entering judgment, the party cannot establish excusable neglect
 25 simply by claiming that the party misunderstood the proceedings. *Womble*, 386 So. 3d at 13.

26 But a party’s lack of representation and other barriers to participation should lower the bar
 27 to a finding of excusable neglect as the court considers whether the party had a good-faith reason
 28 for the party’s failure to engage. E.g., *Sun Mountain Sports, Inc. v. Gore*, 320 Mont. 196, 201
 29 (2004) (“This Court has set aside default judgments on grounds of excusable neglect in cases where
 30 *pro se* defendants have either misunderstood communications from the opposing attorney, where
 31 opposing counsel took advantage of *pro se* defendants, or where *pro se* defendants made errors
 32 that would not typically have been made by counsel.”); *Ade v. Batten*, 878 P.2d 813, 818 (Idaho
 33 Ct. App. 1994) (concluding that a self-represented litigant’s confusion about the courthouse
 34 location amounted to excusable neglect); *In the Matter of the Marriage of Gharst*, 525 P.3d 250,
 35 254 (Wash. Ct. App. 2023) (“[A]n unrepresented litigant’s struggles with mental illness and lack
 36 of familiarity with the legal system can support a finding of excusable neglect.”); *TCI Grp. Life*
 37 *Ins. Plan v. Knoebber*, 244 F.3d 691, 699 (9th Cir. 2001) (“[A] party unfamiliar with the legal
 38 system [who] default[s] at a time of extreme personal difficulty” acts with excusable neglect).
 39 Indeed, “[a]bsent evidence of a deliberate attempt to manipulate the legal system, a party
 40 unfamiliar with the legal system who fails to respond during a time of extreme personal difficulty

1 should not be considered culpable for purposes of the excusable neglect standard.” *Gharst*, 525
2 P.3d at 254.

3 Second, the administration of subsection (a)(2)’s “due diligence” and “reasonable
4 promptness” requirements can also account for barriers to participation. Many jurisdictions follow
5 the federal approach to the timeliness of a motion to vacate. It both requires that the moving party
6 act within “a reasonable time,” and it imposes an absolute time limit on most motions. FED. R. CIV.
7 P. 60(c)(1); see also OHIO R. CIV. P. 60(B) (same); IND. R. CIV. P. 60(B) (same). Even if a party
8 acts diligently, in other words, the party’s motion to vacate is time-barred if the party files it beyond
9 the absolute deadline. E.g., 11 Wright & Miller, *supra* § 2866 (“The concept of reasonable time
10 cannot be used to extend the one-year time limit.”). Conversely, a party may not act with
11 reasonable diligence even if the party files a motion to vacate within the absolute time limit. E.g.,
12 *id.*; *Days Inn Worldwide, Inc. v. Patel*, 445 F.3d 899, 906 (6th Cir. 2006).

13 Absolute time limits are discussed in Reporters’ Note to Comment *b*. The more open-ended
14 reasonable time or diligence requirement “depends on the circumstances of each case.” *Puckrein*
15 *v. Jenkins*, 884 A.2d 46, 58 (D.C. 2005). A party’s lack of counsel, without more, does not excuse
16 dilatory action in challenging a judgment. Thus, a litigant who did not “adequately explain” a one-
17 year delay in challenging a default judgment, “took no action at all” after failing to retain a lawyer,
18 did not seek pro bono legal assistance, and “even fail[ed to] communicat[e] with the court in any
19 way” could not get a judgment vacated simply because of the litigant lacked counsel. *Sandoval v.*
20 *Sandoval*, 915 P.2d 1222, 1224 (Ala. 1996). But barriers common to parties in high-volume civil
21 adjudication should lower the threshold to a finding of due diligence or reasonable promptness, or
22 permit a finding after a longer delay than might be acceptable for parties with counsel. A tenant
23 who waited a year to challenge a default judgment entered in an eviction action, for instance, acted
24 within a reasonable time given that, during the year, the tenant “had lost much of his property in
25 the eviction and was homeless; he was living out of his car; his ability to communicate in English
26 was limited; and despite his diligent efforts he was unable to obtain legal assistance” for most of
27 the year. *Carrasco v. Thomas D. Walsh, Inc.*, 988 A.2d 471, 476 (D.C. Ct. App. 2010). A self-
28 represented defendant likewise acted without undue delay when the defendant moved to vacate a
29 default judgment three years after a judgment’s entry, when the defendant alleged a lack of actual
30 notice of the case, had a limited education, and struggled to obtain counsel. *Provident Credit Corp.*
31 *v. Young*, 446 A.2d 257, 262-263 (Pa. Super. 1982).

32 The consideration of timeliness and diligence requirements with a preference for merits
33 outcomes would protect against rushed participation by litigants trying to retain counsel, and it
34 would ensure that defending parties who act in good faith to negotiate resolutions are not penalized
35 for doing so. See, e.g., *Carrasco*, 988 A.2d at 475-476 (determining that a tenant acted in good
36 faith in continuing to pay rent after the entry of judgment, and disagreeing that the tenant should
37 have rushed to court pro se rather than continue to look for counsel). Promptness in challenging a
38 judgment matters to a plaintiff who might be prejudiced by a defendant’s delay. Cf. Restatement
39 of the Law Second, Judgments § 74, Comment *c* (AM. L. INST. 1982) (noting that “[u]ndue delay
40 and prejudice to the judgment winner merge into each other”); *Farm Credit Bank of Baltimore v.*

Ferrera-Goitia, 316 F.3d 62, 66 (1st Cir. 2003) (considering “the prejudice (if any) associated with the granting of relief” when determining whether a motion to vacate was filed within a “reasonable time”). While prejudice may be an issue in eviction litigation, it rarely is so when institutional plaintiffs win money judgments.

If a defending party moves particularly expeditiously to get a default judgment vacated, courts should administer excusable neglect or meritorious defense requirements with particular solicitude for the moving party’s interests. E.g., ALA. R. CIV. P. 55(c) (permitting a court to set aside a default judgment for any reason if the plaintiff files a motion within 30 days of its entry); *In re Adoption of D.*, 739 N.E.2d 109, 113 (Ill. App. 2000) (contrasting motions filed within 30 days with those filed after 30 days).

Third, subsection (a) implicates the showing a party needs to make to establish a meritorious defense or “a genuine issue with the judgment that may bear on the merits.” A number of courts have held that the moving party need only plead a meritorious defense and does not need to make a prima facie evidentiary showing of this defense’s merit. E.g., *Idaho State Police v. Real Prop. Situated in the Cnty. of Cassia*, 156 P.3d 561, 564 (Idaho 2007); *Lykins Oil Co. v. Pritchard*, 169 Ohio App. 3d 194, 197-198 (2006); *TCI Grp. Life Ins. Plan v. Knoebber*, 244 F.3d 691, 700 (9th Cir. 2001); *Mechling v. Asbestos Defs.*, 29 Cal. App. 5th 1241, 1246 (2018). But cf. *LaFrance Architect v. Point Five Dev. South Burlington*, 195 Vt. 543, 554 (contrasting the “broad requirements” of notice pleading with the “detail[s]” required by “the more exacting standards of a motion to set aside a default judgment”). The authorities that require defendants to make some sort of evidentiary showing impose only a modest burden. E.g., *JK v. DK*, 153 Hawaii 268, 275 (2023) (“A meritorious defense does not mean a triumphant defense; it’s closer to a valiant defense. A favorable outcome is not something the defaulting party needs to show. Rather, the . . . movant only needs to present some factual support—bare allegations will not do—that paves the way to a different outcome.”); *Restatement of the Law Second, Judgments* § 67, Comment *e* (AM. L. INST. 1982) (“The test employed appears to be essentially the same as used in considering summary judgment, i.e., whether there is enough evidence to present an issue for submission to the trier of fact, or a showing that on the undisputed facts it is not clear that the judgment is warranted as a matter of law.”); *Bryant v. Wahl*, 502 S.W.2d 9, 14 (Mo. Ct. App. 2016) (requiring “some sworn evidence to support” a defense, but noting that the requirement is not supposed to be a “high hurdle”) (internal quotations omitted).

At a minimum, allegations sufficient to plead a meritorious defense should entitle the moving party to an evidentiary hearing. *LaFrance Architect*, 195 Vt. at 553 (“Where facts are in issue, an evidentiary hearing should precede a decision on the motion, unless the court finds that the motion is totally lacking in merit.”). Compare *Wahl*, 502 S.W.3d at 15 (refusing to require an evidentiary hearing on a motion to vacate when, in the absence of any evidence, “there is no indication” that the defendant’s allegations of a meritorious defense “are anything more than wild speculation”).

The meritorious-defense requirement should be administered consistent with other procedural protections. For instance, a defendant should necessarily establish a meritorious defense if the defendant shows that the plaintiff failed to comply with pleading and information-exchange

1 requirements before the entry of default judgment. COLLECTION ACTIONS, *supra*, at 424. Cf.
2 Michael D. Tully Co., L.P.A. v. Dollney, 537 N.E.2d 242, 245 (Ohio Ct. App. 1987) (holding that
3 a plaintiff’s failure to meet pleading requirements was grounds for vacating a default judgment).

4 *b. Affirmative disregard or prejudice.* Under subsection (b), two factors weigh against
5 renewed merits adjudication. First, a party that has shown its affirmative disregard for merits
6 adjudication should not benefit from a determination of the motion to vacate factors motivated by
7 a preference for merits outcomes. Evaluations of affirmative disregard will likely differ depending
8 upon whether a defendant or a plaintiff moves to vacate a judgment.

9 When assessing efforts by self-represented defendants to vacate or set aside a judgment,
10 courts should consider barriers to their meaningful participation when evaluating claims of
11 affirmative disregard. But the presumption may not be appropriate if the defendant demonstrated
12 a manifest disregard for litigating on the merits, beyond the simple lack of an appearance. Such
13 situations may include instances when a defendant fails to respond to numerous, repeated efforts
14 by the plaintiff to inform the defendant of the litigation and of the consequences of a failure to
15 engage. E.g., U.S. Bank Nat’l Ass’n v. Guillaume, 209 N.J. 449, 469 (2012). Manifest disregard
16 may also include instances when the defendant “stonewall[s]” or otherwise affirmatively disrupts
17 litigation before defaulting, Settineri v. Settineri, 2015 WL 3495379 (N.J. App. Div. June 4, 2015),
18 or when the defendant “intentionally made himself unavailable” between the case’s filing and his
19 default. Home Port Rentals, Inc. v. Ruben, 957 F.2d 126, 132 (4th Cir. 1992).

20 Most motions to vacate filed in high-volume civil-adjudication contexts will likely involve
21 default judgments entered against defendants. Another frequent result, particularly in debt-
22 collection litigation, are dismissals of the plaintiff’s case. E.g., MICHIGAN JUSTICE FOR ALL
23 COMM’N, *supra*, at 25-26 (documenting 11 percent of debt-collection cases end in dismissals
24 without prejudice). In the Los Angeles County Superior Court, for instance, more than 40 percent
25 of debt-collection cases are dismissed, notwithstanding defendants’ defaults, due to plaintiffs’
26 noncompliance with California filing requirements. Eric Helland et al., RAND Institute, Debt
27 Collection in the Los Angeles Courts: Court Congestion and Access to Justice 21 (Sept. 2023)
28 (Draft Report).

29 Such dismissals may be with or without prejudice, a decision left to the court’s discretion.
30 E.g., CAL. CODE CIV. P. § 1788.60(c) (providing that, “[i]n any action on a consumer debt, if a debt
31 buyer plaintiff seeks a default judgment” but has failed to meet pleading and evidentiary submission
32 requirements, “the court may, in its discretion, dismiss the action”); ALAN M. AHART, CALIFORNIA
33 PRACTICE GUIDE: ENFORCING JUDGMENTS AND DEBTS § 2:303 (2d ed. 2023) (dismissals under CAL.
34 CODE CIV. P. § 1788:60 with or without prejudice). A plaintiff does not need to move to vacate a
35 judgment dismissing a case without prejudice. By contrast, when a case is dismissed with prejudice,
36 a request for the reopening of merits litigation gets evaluated pursuant to the same standard that
37 applies when a defendant moves to vacate a default judgment. See, e.g., Synovus Bank v. Mitchell,
38 206 So. 3d 568, 571-572 (Ala. 2016) (discussing the relationship between Alabama Rule of Civil
39 Procedure 60(b) and voluntary dismissals). Thus, a dismissal of a plaintiff’s case with prejudice
40 places a plaintiff on the same footing as a defendant against whom a default judgment is entered.

1 The choice to dismiss a case with prejudice reflects a judicial determination that the
 2 plaintiff should not have an opportunity to renew merits litigation. The plaintiff’s affirmative
 3 disregard may be one reason for the dismissal with prejudice. See generally *Paul v. Marberry*, 658
 4 F.3d 702, 704 (7th Cir. 2011) (noting that dismissals for failure to prosecute should be with
 5 prejudice). If a court dismisses a case with prejudice, then the presumption in favor of the
 6 resolution of the case on the merits should not apply.

7 A second factors that weighs against a preference for the reopening of merits adjudication
 8 includes the prejudice a prevailing party or third party would suffer and the impairment of a
 9 reliance interest the prevailing party or third party enjoys. E.g., Restatement of the Law Second,
 10 Judgments § 74 (AM. L. INST. 1982) (“[R]elief from a judgment will be denied if . . . [g]ranting the
 11 relief will inequitably disturb an interest of reliance on the judgment.”). Considerations of
 12 prejudice or reliance should involve a comparative exercise, one that measures harms to prevailing
 13 parties or third parties against the potentially wrongful deprivation that the party subject to the
 14 judgment faces. E.g., *46 Downing St. LLC v. Thompson*, 41 Misc. 3d 1018, 1034 (N.Y. Civil Ct.
 15 2013) (“[T]he prejudice to [the landlord] who asserts having spent \$200,000 in renovations to the
 16 Subject Premises . . . is outweighed by the potential prejudice to the rent controlled tenant of losing
 17 the home he has occupied for most of his life”); *Stotlar Drug Co. v. Marlow*, 607 N.E.2d 346,
 18 348-349 (Ill. Ct. App. 1993).

19 The Restatement of the Law Second, Judgments, considers “the sense of repose” that the
 20 entry of a judgment creates for a plaintiff as a “protectible interest” in and of itself. Restatement
 21 of the Law Second, Judgments § 74, Comment c (AM. L. INST. 1982); see also *id.*, Comment f (“In
 22 its very nature a judgment creates reliance on the fact that the dispute involved has been legally
 23 terminated.”). Balanced against the loss of housing, wage garnishment, and other such deprivations
 24 that defendants in high-volume litigation contexts face, this interest’s impairment alone should not
 25 be sufficiently prejudicial to warrant the denial of a motion to vacate.

26 Furthermore, delay in collecting on a money judgment should rarely qualify as sufficient
 27 prejudice absent some showing that the plaintiff has a particular need for prompt payment or the
 28 defendant’s actions have imposed particular costs on the plaintiff. *Wylie v. Glencrest*, 143 A.3d
 29 73, 89 n.26 (D.C. Ct. App. 2016); *Finden v. Klaas*, 268 Minn. 268, 272 (1964) (observing that
 30 “delay and the added expense incurred by reason of the default hearing” are not enough for
 31 prejudice); *Cales v. Wills*, 569 S.E.2d 479, 489 (W. Va. 2002); *Lemoge v. U.S.*, 587 F.3d 1188,
 32 1196 (9th Cir. 2009); *Stewart v. Wachowski*, 574 F. Supp. 2d 1074, 1119 (C.D. Cal. 2005). This
 33 is especially so in debt-collection litigation, where institutional plaintiffs bring virtually all cases,
 34 and where judgments may get entered and enforced years after an alleged default. A plaintiff may
 35 establish prejudice in cases involving money judgments if the passage of time would impair its
 36 ability to litigate the merits effectively, if the judgment’s vacation would subordinate the plaintiff
 37 to other creditors, or if the judgment creditor has already expended considerable energy and
 38 expense to obtain and enforce the judgment. E.g., *Resources Ltd. v. New Trinity Coal*, 874 S.E.2d
 39 309, 316 (W. Va. 2022) (impair ability); *Newborn v. U.S. Life Credit Corp.*, 473 A.2d 389, 391
 40 (D.C. Ct. App. 1984) (subordinate position); *Armstrong v. The Cadle Co.*, 239 F.R.D. 688, 694

(S.D. Fla. 2007); *Farm Credit Bank of Baltimore v. Ferrera-Goitia*, 316 F.3d 62, 67 (1st Cir. 2003) (finding prejudice when the plaintiffs spent “eight years litigating what should have been a routine foreclosure action,” and had to “chas[e] the [defendants] from court to court” to do so).

Prejudice to the plaintiff and reliance by the plaintiff and third parties pose more complications in eviction litigation, where a new tenant may already have already moved into the apartment from which the defendant was evicted. Cf. *Carrasco*, 988 A.2d at 476 (“Prejudice to the landlord might be fairly apparent if [the already-evicted tenant] were seeking to resume his tenancy . . .”). This is also true when a third-party purchaser has already acquired the property at issue in a foreclosure, forfeiture, or other similar dispute. E.g., *Ferrera-Goitia*, 316 F.3d at 67 & n.4; *U.S. v. One Parcel of Real Prop. With Improvements Thereon*, 712 F. Supp. 525, 528 (S.D. Miss. 1988). But the prospect of prejudice to landlords is not necessarily sufficient to warrant the denial of a motion to vacate, even if another tenant has moved into the unit formerly occupied by the tenant seeking to vacate the default judgment. Even if the former tenant is permitted to renew litigation, the tenant may not prevail on the merits, and, if the tenant does prevail, “other remedies might suffice.” *Wylie*, 143 A.3d at 89. For instance, the landlord “might place [the tenant] in a different unit, or give them priority for the next available unit, or help [them] another unit within [their] budget.” *Id.*

When a court dismisses a case with prejudice after little or no merits adjudication, the determination to do so may reflect judicial concern that renewed litigation would cause “harm manifestly prejudicial to the defendant.” *Golden v. Floyd Healthcare Mgmt. Inc.*, Civ. No. 18-157, 2021 WL 3861183, at *2 (N.D. Ga. Aug. 30, 2021) (internal quotation omitted); see also *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 628 F.3d 157, 163-164 (5th Cir. 2010); *AAA Bonding Agency, Inc. v. U.S. Dep’t of Homeland Sec.*, Civ. No. 05-2159, 2015 WL 5655625, at *2 (S.D. Tex. Sept. 24, 2015) (“When a court finds that dismissal without prejudice would harm the defendant, . . . dismissal with prejudice is a possible solution.”). A court deciding a plaintiff’s motion to vacate a dismissal with prejudice should be particularly concerned for the prejudice that the defendant may suffer if the litigation recommences. A preference for the resolution of the case on the merits would be inappropriate in this instance.

c. Time limits for motions to vacate. Rule 60 of the Federal Rules of Civil Procedure imposes an absolute one-year deadline on motions to vacate filed for reasons of “mistake, inadvertence, surprise, [] excusable neglect[,]” “newly discovered evidence,” and “fraud.” FED. R. CIV. P. 60(c)(1); *Wright & Miller* § 2866. New York has the same limit when the defendant cites “excusable default” as grounds. N.Y. C.P.L.R. § 5015(a)(1). As a general matter, defendants in California face a six-month deadline. CAL. CODE CIV. P. § 473(b). See generally *Restatement of the Law Second, Judgments* § 74 (AM. L. INST. 1982) (providing that “relief from a judgment will be denied if . . . the application for relief is barred by lapse of time”).

A single, across-the-board time limit does not make sense in all instances. Rather, policymakers should set time limits for different types of cases based upon recurring characteristics germane to motions to vacate. Perhaps the most important one involves the timing of enforcement. In most states, judgment creditors in debt-collection litigation can enforce their judgments for a

long period of time and often up to 20 years. HANNAFORD-AGOR & KAUFFMAN, *supra*, at 9. Service of the complaint regularly goes awry in this litigation, meaning that defendants may not learn about the case against them until their wages are garnished or other judgment enforcement action taken. E.g., *Why Civil Courts Should Improve Defendant Notification*, PEW CHARITABLE TRS. (Mar. 3, 2023), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2023/03/why-civil-courts-should-improve-defendant-notification>. Consistent with these dynamics, California gives judgment debtors up to two years to move to vacate judgments if the service of the complaint failed to provide actual notice of the case. This period extends to six years when the judgment creditors are debt buyers. CAL. CIV. CODE § 1788.61 (providing that, in cases with debt buyer plaintiffs, a defendant has the lesser of “six years after entry of the . . . default judgment” or “one hundred eighty days of the first actual notice of the action” to move to vacate); CAL. CODE CIV. P. § 473.5 (providing that, “[w]hen service of a summons has not resulted in actual notice to a party in time to defend the action,” that party has the lesser of “two years after entry of a default judgment” or “180 days after service . . . of a written notice that the . . . default judgment has been entered”). See generally *Cal. Cap. Ins. Co. v. Hoehn*, 558 P.3d 590 (Cal. 2024) (analyzing these requirements). By contrast, since landlords tend to enforce eviction judgments quickly, a shorter time limit for motions to vacate in this context might make sense.

Another approach is to have a single across-the-board time limit, but to empower courts to allow departures from it when the interests of justice so require. New York, for instance, imposes a one-year time limit on motions to vacate on grounds of “excusable default.” But courts have an “inherent authority to vacate a judgment in the interest of justice even after the . . . one-year period has expired,” so long as the moving party demonstrates a “reasonable excuse for their delay.” *Diaz v. Wyckoff Hgts. Med. Ctr.*, 148 A.D.3d 778, 779 (2017). A lack of notice or understanding should constitute a “reasonable excuse,” up to the moment of a judgment’s enforcement or execution.

§ 7.07. Measures to Protect Against Unnecessary Harms from the Entry and Enforcement of Judgments

(a) Courts and other rulemakers should consider all reasonable steps to minimize unnecessary harms resulting from the entry of a judgment or its enforcement. These steps should enable a party against whom the judgment is enforced to invoke all applicable legal protections, including exemptions for certain wages and assets, and to avoid intrusions on the party’s rights and interests that are unnecessary to the judgment’s full satisfaction. Such steps may include:

(1) the provision of procedures for enforcement that minimize intrusion upon the defending party’s rights and interests that the judgment’s enforcement does not require;

(2) the timely and effective provision of information to the defending party about legal protections a party can invoke to protect assets or other interests not subject to execution or enforcement; and

(3) the provision of procedures to enable the use of appropriate privacy and confidentiality rules and practices.

(b) A party against whom a judgment is entered should receive:

(1) timely notice of the judgment, consistent with § 7.02 (Notice Prior to and After Entry of Judgment), as well as additional notice of enforcement and information about steps a party can take to avoid harms when significant time has passed since the judgment's entry; and

(2) a reasonable and timely opportunity to be heard, to protect rights and interests not properly subject to the judgment's enforcement.

This notice and opportunity to be heard should precede a judgment's enforcement unless pre-enforcement notice would seriously disrupt the effort of a party benefiting from the judgment to obtain what the judgment provides. In that event, the notice should come at the same time as the judgment's enforcement and execution, and the party receiving this notice should have the earliest feasible opportunity to be heard.

(c) Rules regulating the enforcement of judgments should be designed to prevent a party seeking to enforce a judgment from unreasonably delaying enforcement efforts or benefiting from such a delay.

(d) Court systems should create documents, tailored to case type, that explain in plain language what sorts of rights and interests the judgment's enforcement or execution might foreseeably impair and what steps a party can take to protect these rights and interests. Court systems should also provide forms that a defending party can use to protect these rights and interests. The notice provided before or at the time of enforcement or execution should include these forms and documents, consistent with § 7.02.

Comment:

a. Enforcement harms unnecessary to or not permitted for a judgment's full satisfaction.

This Section recommends that courts and other rulemakers take measures to mitigate, to the extent practicable, the possibility that a judgment's entry or enforcement causes harms that full

satisfaction of the judgment does not require or that an applicable law is intended to protect against. This Section does not cover all matters that judgment enforcement involves. It does not address, for instance, the court's contempt power and when it may be appropriately used, or third-party liabilities that may arise from aspects of wage or asset garnishment. Rather, this Section focuses on processes for judgment entry and enforcement.

State and federal laws protect certain assets and wages from garnishment, but those protections' formal availability often does not benefit judgment debtors who do not know about them or cannot invoke them effectively. A judgment creditor might thus garnish more of a judgment debtor's wages than applicable law permits. Likewise, a parent defending against the enforcement of a child-support order may have the right to have the order modified due to an inability to pay. But a parent who does not raise that defense may not benefit from it.

Subsection (a) provides a general principle of harm minimization, to inform both policymaking and judges' case-management practices. In addition, subsection (a) refers to three types of harms that may be caused by judgment entry and enforcement. The first, addressed in subsection (a)(1), calls for procedures for enforcement that do not inflict harm that is unnecessary to a judgment's full satisfaction.

Illustration:

1. A judgment debtor does not appear for a court-ordered debtor's examination. The court orders the judgment debtor incarcerated for contempt. This use of incarceration is inconsistent with subsection (a). An alternative process is available. The court could issue an order to show cause why the debtor should not be arrested for the purposes of being brought to court to testify. This order to show cause can ensure that the judgment debtor appears to testify while avoiding the harm of incarceration.

In turn, subsection (a)(2) references the enforcement of judgments against exempt wages or assets, or against interests that applicable law otherwise protects. It recommends that courts provide timely information about legal protections a party can invoke in a form that self-represented litigants can understand and act upon, to protect those interests. When a government agency seeks to enforce a child-support order, for instance, the parent whom the agency pursues should receive guidance as to how to seek the order's modification and about which circumstances might excuse enforcement. *Turner v. Rogers*, 564 U.S. 431 (2011).

1 Finally, subsection (a)(3) refers to harms entirely collateral to a judgment’s entry that may
2 result from a judgment’s entry on a publicly accessible court docket. Such harms include, for
3 instance, a negative credit score and other similar impacts that can result from access to court records
4 indicating judgment entry. Subsection (a)(3) recommends procedures that can readily enable self-
5 represented litigants to benefit from the sealing or expungement of judgment information when
6 applicable law permits it. See Chapter 13 (Privacy and Confidentiality Procedures).

7 *b. Notice and an opportunity to be heard.* Subsection (b) builds upon evolving due-process
8 doctrine that provides for protections to ensure that judgment enforcement does not unduly impair
9 parties’ interests. Traditionally, due-process doctrine afforded parties no procedural rights during
10 judgment enforcement, premised on the notion that the proceedings leading up to a judgment’s
11 entry afforded the party all necessary protections. More recently, the recognition of rights and
12 interests that survive a judgment’s entry—for instance, exemptions for certain wages and assets—
13 have prompted courts to recognize rights to procedural protections during judgment-enforcement
14 processes.

15 **Illustrations:**

16 2. A state law provides that notice of the entry of judgment in an eviction case must
17 advise tenants that the landlord may “dispose of” any personal property left on the premises
18 at the time of eviction. In practice, landlords tend to take this property, including property
19 that by law is exempted from judgment enforcement, and tenants have no means to recover
20 it. The notice required by the state law violates due process, as it is insufficient to advise
21 tenants of the consequences if they have not moved their personal property from the
22 premises by the time they are evicted.

23 3. A state law governing wage garnishment does not require that any notice of
24 applicable exemptions be provided to a judgment debtor. This law violates due process.

25 Subsection (b) refers to two types of notice. The first comes upon the entry of judgment
26 and should be consistent with § 7.02 (Notice Prior to and After Entry of Judgment). The second is
27 additional notice that should be provided if a significant period of time has elapsed between notice
28 immediately after a judgment’s entry and an enforcement effort. Such passages of time are
29 common in debt-collection litigation, where a judgment creditor may attempt to enforce a
30 judgment years after its entry.

1 This notice, whether provided immediately after judgment or after substantial time has
2 passed before a judgment's enforcement, should include information to enable the party against
3 whom the judgment is entered to understand the judgment's scope and thus the implications of
4 enforcement of the judgment. In addition, recurring features of case types within high-volume civil
5 adjudication mean that parties and the court can often anticipate which sorts of rights and interests
6 a judgment's enforcement may adversely affect. Garnishment efforts, to satisfy judgments in
7 consumer-debt or child-support matters, may endanger exempt wages or assets. Notice in such
8 cases should include information about those exemptions and how the judgment debtor can invoke
9 them. Eviction or foreclosure may place a tenant's or mortgagor's personal property at risk. Many
10 jurisdictions require either landlords or governments to store tenants' personal property for periods
11 of time after eviction. Notice in eviction cases should provide information about those storage
12 obligations and how tenants can take advantage of them, and more generally information about
13 tenants' continuing rights in their personal property. Parties against whom judgments are entered
14 should also have opportunities to be heard before enforcement or execution, to enable them to
15 obtain protections for rights and interests they retain.

16 In many instances, notice and an opportunity to be heard after enforcement commences
17 may be too late. A tenant cannot enjoy the right to have property stored if that property is destroyed
18 or taken during eviction. Many exemptions for wages and assets reflect concern for minimum
19 amounts necessary for judgment debtors to meet basic life necessities. Even a temporary intrusion
20 on those interests can create substantial harm. Thus, the notice and opportunity to be heard
21 contemplated by subsection (b) should come before enforcement starts unless they would
22 significantly disrupt a party's effort to satisfy a judgment. If, for instance, a judgment debtor could
23 hide assets otherwise subject to garnishment, notice before the beginning of enforcement could
24 prejudice the prevailing plaintiff's interest in obtaining satisfaction of the judgment. Under such
25 circumstances, notice may coincide with the start of enforcement efforts, but the court should
26 ensure that an opportunity to be heard comes as soon as possible thereafter.

27 *c. Timing of enforcement efforts.* Judgments, particularly in debt-collection litigation, often
28 remain enforceable for extended periods of time. Postjudgment interest can rapidly accumulate,
29 and judgment debtors may face liabilities significantly larger than the damages initially awarded.
30 Under subsection (c), a party seeking to enforce a judgment should not unreasonably delay doing
31 so. Any such unreasonable delay should justify a discount to the award of postjudgment interest,

1 to ensure that this party does not benefit unfairly from an unreasonable delay in judgment
2 execution.

3 *d. Obligations for court systems.* Subsection (d) imposes modest obligations on court
4 systems, to make available both information about the sorts of recurring rights and interests that
5 survive a judgment’s entry, and to create and provide forms that a party defending against
6 enforcement can use to protect these rights and interests. *Turner v. Rogers*, 564 U.S. 431 (2011).
7 This documentation should vary by case type. While no court-provided document can exhaustively
8 address every issue that might arise in a debt-collection, foreclosure, eviction, or government-
9 directed child-support enforcement matter, these documents should encompass those issues that
10 tend to arise. This Section reinforces the recommendation in § 7.02(b), that courts ensure that
11 appropriate notice is provided to a defending party upon a judgment’s entry. If a party benefiting
12 from the judgment has an obligation to provide these forms, a failure to do so should be considered
13 as part of a motion to vacate the judgment.

REPORTERS’ NOTES

14 *a. Enforcement harms unnecessary to or not permitted for a judgment’s full satisfaction.*
15 This Section’s principles address harms caused by a judgment’s entry or enforcement that are
16 unnecessary to the judgment’s full satisfaction, or that an applicable law is intended to protect
17 against. Eviction litigation provides an example. Tenants who do not move their possessions before
18 eviction might lose personal property or have it damaged. Enforcement procedures can increase
19 the likelihood of this loss. In Texas, for instance, the officer executing a writ of possession can do
20 so 24 hours after posting the writ on the premises. When the officer does so, the officer or the
21 landlord can place the tenant’s personal property outside, with no obligation to store or otherwise
22 move it. TEX. PROP. CODE § 24.0061(d)(2). Another example comes from consumer-debt
23 litigation. Many wage or property exemptions are not “self-executing,” meaning that a judgment
24 debtor must act affirmatively to protect exempt property. E.g., *Shrestha v. State Credit Adjustment*
25 *Bureau*, 117 F. Supp. 2d 142, 145 (D. Conn. 2000). A judgment debtor who does not take all the
26 necessary protective steps might have exempt wages, funds, or property garnished. In Nebraska,
27 for instance, a judgment creditor can garnish 25 percent of a judgment debtor’s wages, but this
28 percentage decreases to 15 percent if the judgment debtor is a “head of family.” But a judgment
29 debtor has to file a form to receive that exemption. Many who might otherwise qualify do not file
30 the form, so thousands of Nebraskans have more of their wages garnished than the law permits.
31 See Steven L. Wilborn, *Wage Garnishment: Efficiency, Fairness, and the Uniform Act*, 49 SETON
32 HALL L. REV. 847, 861-862 (2019). Finally, parents threatened with contempt for nonpayment of
33 child support can raise their inability to pay as an affirmative defense. E.g., *In re Warner*, 905 A.2d

233, 239 (D.C. Ct. App. 2006). But a parent who does not know to raise this defense may suffer a serious penalty, possibly including incarceration.

Subsection (a) provides for harm minimization as a general principle. In addition, it provides guidance for avoiding three types of harms that can be caused by judgment entry and enforcement. The first involves incarceration, perhaps the most significant harm a judgment debtor can face. See generally AM. CIV. LIBERTIES UNION, *A POUND OF FLESH: THE CRIMINALIZATION OF PRIVATE DEBT* (2018) (describing the phenomenon of judgment debtors ending up incarcerated based on judgments obtained in civil litigation); Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor*, 18 CORNELL J. L. & PUB. POL’Y 95 (2008). Congress abolished imprisonment for debt in 1833. Yet courts continue to issue arrest warrants for judgment debtors in cases involving consumer debts when judgment debtors fail to appear for a postjudgment debtor’s examination or when judgment debtors fail to comply with court-ordered payment plans. POUND OF FLESH, *supra* at 6; COLLECTION ACTIONS, *supra*, at 704-705. Likewise, noncustodial parents who fail to meet court-ordered child-support obligations may be jailed for contempt. E.g., Nat’l Conference of State Legislatures, Report, *Child Support and Incarceration*, Feb. 1, 2022. Incarceration in either context may happen notwithstanding defenses a judgment debtor has, including inability to pay. COLLECTION ACTIONS, *supra*, at 708.

Incarceration in connection with judgment enforcement implicates courts’ contempt powers more broadly, a matter beyond these Principles’ scope. In the context of high-volume civil adjudication, however, policymakers should provide processes for enforcement that make incarceration unnecessary to satisfy a judgment. Numerous jurisdictions do not allow incarceration for failure to meet a court order requiring payment to satisfy consumer-debt judgments. See Nat’l Ctr. for Access to Justice, *Consumer Debt Litigation Index*, at <https://ncaj.org/state-rankings/consumer-debt>. Instead of ordering judgment debtors to appear for debtor’s examinations and issuing arrest warrants for those who fail to appear, courts in California permit judgment debtors to file and serve financial affidavits that provide the same information that debtor’s examinations would reveal. CAL. CODE CIV. P. § 708.111. The same sorts of barriers to participation that contribute to the near ubiquity of default judgments in consumer-debt litigation also often prevent judgment debtors from appearing at a debtor’s examination. COLLECTION ACTIONS, *supra*, at 704. California’s procedure removes an unnecessary stumbling block that in other states leads to incarceration. In addition, California’s procedure authorizes a court to issue an order to show cause to determine whether an arrest warrant should issue to force a nonresponsive judgment debtor’s appearance, a means of enforcement considerably less intrusive than incarceration. Civil and Small Claims Advisory Committee of the Judicial Council of California, Report to the Judicial Council, *Civil Practice and Procedure: Rule and Forms to Implement Assembly Bill 1119*, Sept. 20, 2024, at 4. Likewise, several states operate diversion programs that redirect enforcement away from incarceration and toward programs that better enable noncustodial parents to discharge child-support arrears. Nat’l Conference of State Legislatures, *supra*.

Second, subsection (a)(2) recommends that a party facing judgment enforcement should be provided information about the rights and interests that survive the entry of judgment. The party

1 should receive a description of the substance of these rights and interests—for instance, a tenant’s
 2 right to have personal property stored, or a judgment debtor’s right to protect exempt wages—and
 3 the process the party can use to invoke these rights and interests. E.g., Fourth Judicial Circuit,
 4 Duval County, Florida, *Notice to Defendant of Right Against Garnishment of Wages, Money, and*
 5 *Other Property*; Utah Courts, *Notice of Execution and Exemptions*, Form 1403DCJ, May 21, 2018;
 6 U.S. Office of Child Support Servs., *Turner v. Rogers* Guidance, AT-12-01, June 18, 2012. Third,
 7 subsection (a)(3) recommends that courts and other rulemakers devise and use appropriate
 8 confidentiality and privacy procedures to protect against harms resulting from judgment entry that
 9 are unnecessary to the satisfaction of the judgment. Chapter 13 discusses these procedures at more
 10 length.

11 *b. Notice and an opportunity to be heard.* Over the past several decades, due-process
 12 doctrine has evolved in significant ways to require various protections for those subject to
 13 judgment enforcement. Traditionally, these parties had no such rights. In *Endicott-Johnson Corp.*
 14 *v. Encyclopedia Press*, 266 U.S. 285 (1924), the Supreme Court held that due process does not
 15 require notice and an opportunity to be heard before a judgment is enforced against a judgment
 16 debtor’s property: “The established rules of our system of jurisprudence do not require that a
 17 defendant who has been granted an opportunity to be heard and has had his day in court” before
 18 judgment was entered “should . . . have a further notice and hearing before supplemental
 19 proceedings are taken to reach his property in satisfaction of the judgment.” *Id.* at 288.

20 As numerous federal courts have held, *Endicott-Johnson* is obsolete for at least two
 21 reasons. First, due-process doctrine has evolved since 1924, and the *Mathews v. Eldridge* balancing
 22 test now determines what procedures are due. *Adkins v. Rumsfeld*, 464 F.3d 456, 471 (4th Cir.
 23 2006). Second, federal and state law protect a diverse and considerable array of assets and funds
 24 from execution. “[W]hile the judgment resolves the issue whether a debt exists, it does not address
 25 whether the creditor can seek satisfaction of the debt from [a] particular asset” when laws make
 26 certain assets immune. *Aacen v. San Juan Cnty. Sheriff’s Dep’t*, 944 F.2d 691, 695 (10th Cir.
 27 1991). These laws give individuals enduring interests in property that survive after entry of
 28 judgment and thus warrant due-process protection under *Mathews v. Eldridge*.

29 The evolution of due-process protections has had important implications for judgment
 30 enforcement in debt-collection litigation. This enforcement tends to be implemented by wage, tax
 31 refund, or property garnishment, or by a lien placed on real or personal property. E.g., MICH.
 32 JUSTICE FOR ALL COMM’N, *supra*, at 33 (78 percent of debt-collection actions that are not dismissed
 33 eventually result in garnishment actions); *Raba, supra*, at 28 (plaintiff creditors in California seek
 34 writs of execution in nearly half of debt-collection cases). Numerous courts have held that due
 35 process entitles judgment debtors to information about exemptions they may claim when subject
 36 to wage or property garnishment. E.g., *Finberg v. Sullivan*, 634 F.2d 50, 62 (3d Cir. 1980).
 37 *Distressed Holdings v. Ehrler*, 113 A.D.3d 111, 119 (N.Y. 2013); *Deary v. Guardian Loan Co.,*
 38 *Inc.*, 534 F. Supp. 1178, 1188 (S.D.N.Y. 1982); *Hutchinson v. Cox*, 784 F. Supp. 1339, 1342-1343
 39 (S.D. Ohio 1992). A straightforward application of the *Mathews v. Eldridge* balancing test explains
 40 why. Garnishment exemptions exist “to protect a debtor’s means of purchasing basic necessities,”

1 and thus judgment debtors have a compelling private interest in their property. *Finberg*, 634 F.2d
 2 at 62. The burden of providing basic information about possible exemptions is slight. Courts and
 3 other rulemakers can create a basic form providing exemption information and mandate that the
 4 judgment creditor or garnishee provide it with the notice of garnishment. *Id.* at 62; *Hutchinson*,
 5 784 F. Supp. at 1343. Finally, the risk of error without this information is considerable, since
 6 “[k]nowledge of . . . exemptions is not widespread, and a judgment debtor may not be able to
 7 consult a lawyer before the freeze on a bank account begins to cause serious hardships.” *Finberg*,
 8 634 F.2d at 62. Moreover, a judgment debtor forced into dire straits by excessive garnishment may
 9 agree under conditions of duress to some sort of postjudgment settlement that the terms of the
 10 judgment do not warrant. *Sniadach v. Fam. Fin. Corp. of Bay View*, 395 U.S. 337, 341 (1969).
 11 Similar reasoning explains why judgment debtors have a due-process right to information about
 12 the process for claiming an exemption. *Strickland v. Alexander*, 153 F. Supp. 3d 1397, 1412-1413
 13 (N.D. Ga. 2015). Courts have also recognized a due-process right to adequate notice and a hearing
 14 at which judgment debtors can challenge the garnishment of or execution against exempt funds or
 15 property. E.g., *Finberg v. Sullivan*, 634 F.2d 50, 58-62 (3d Cir. 1980).

16 The logic behind this evolutionary trajectory supports the strengthening of procedural
 17 protections beyond what due process currently requires. Most of the courts that have recognized
 18 due-process protections during execution of judgment agree that notice that comes at the same
 19 time or shortly after garnishment or execution suffices when a defendant’s money is at issue, so
 20 long as the hearing can happen promptly thereafter. E.g., *Lind v. Midland Funding, L.L.C.*, 688
 21 F.3d 402, 407-408 (8th Cir. 2012); *Patel v. City of Los Angeles*, 72 F.4th 1103, 1106 (9th Cir.
 22 2023). For instance, a Washington State law requires a judgment creditor either to mail notice of
 23 a garnishment on or before the day the creditor serves the writ of garnishment on a garnishee, or
 24 to serve personally the notice on the debtor within two days of its service on the garnishee. REV.
 25 CODE WASH. § 6.27.130(a). This law passed constitutional muster. *Yohannes v. Olympic*
 26 *Collection*, Civ. No. 17-509, 2022 WL 17832263 (W.D. Wash. Dec. 21, 2022).

27 A process that affords judgment debtors notice at the same time or immediately after
 28 garnishment, with the right to a “prompt” hearing shortly thereafter, may make sense when the
 29 judgment debtor might otherwise hide the assets subject to execution. See *Mitchell v. W.T. Grant*
 30 *Co.*, 416 U.S. 600, 608-609 (1974) (noting this possibility as a justification for postdeprivation
 31 notice and hearing in a case involving prejudgment sequestration of property); *Dahl v. Bonta*, 2023
 32 WL 4943282, at *6 (Cal. Ct. App. Aug. 3, 2023) (“[A] requirement that a non-debtor spouse
 33 receive pre-deprivation notice and hearing would increase the risk that the debtor spouse might
 34 conceal or transfer the property that is in fact subject to levy.”).

35 But when the judgment debtor does not control the assets at issue, as when the judgment
 36 creditor attempts to garnish wages or a tax refund, the judgment debtor should enjoy predeprivation
 37 notice absent unusually strong interests in immediate judgment enforcement. In *Connecticut v.*
 38 *Doehr*, 501 U.S. 1 (1991), the U.S. Supreme Court invalidated a state law permitting prejudgment
 39 attachment of real property without predeprivation notice and an opportunity for a hearing. The
 40 Court stressed that “even . . . temporary or partial impairments to property rights that attachments,

1 liens, and similar encumbrances entail are sufficient to merit due process protection.” Id. at 12. It
2 observed that the plaintiff’s “only interest in attaching the property was to ensure the availability
3 of assets to satisfy his judgment if he prevailed” But “there was no allegation that [the
4 defendant] was about to transfer or encumber [the property] or take any other action during the
5 pendency of the action that would render his [property] unavailable Absent such
6 allegations . . . the plaintiff’s interest in attaching the property [did] not justify the burdening of
7 [the defendant’s] ownership rights without a hearing” Id. at 16.

8 The postjudgment garnishment context differs in one sense from *Doehr*, as the judgment
9 creditor’s interest in the defendant’s property has fully matured. E.g., *Aacen*, 944 F.2d at 696. But
10 garnishment without predeprivation notice and hearing increases the risk of an erroneous
11 deprivation in two ways. First, many federal and state law exemptions are not self-executing,
12 meaning that the judgment debtor must affirmatively file a claim of exemption to benefit from them.
13 Garnishment, then, almost surely and routinely deprives judgment debtors of property erroneously,
14 even if only temporarily, as they await a postdeprivation hearing on a claimed exemption.

15 Second, given recurring problems with service, the ubiquity of default judgments, and
16 reasons to doubt their reliability as an accurate reflection of a defendant’s liability, many
17 defendants may have meritorious defenses to raise on a motion to vacate. Postdeprivation notice
18 would deny defendants with meritorious defenses the chance to file motions to vacate or set aside
19 before they lose wages, tax refunds, or property.

20 Furthermore, when, as in *Doehr*, the judgment debtor cannot hide the assets at issue, the
21 judgment creditor’s interests should not require immediate seizure, with notice and an opportunity
22 for a hearing to follow. A judgment debtor facing wage garnishment could not prevent garnishment
23 because employers, as garnishees, are required to send the garnished funds directly to the judgment
24 creditor or the court. The Uniform Wage Garnishment Act recognizes the exceedingly modest
25 danger that funds otherwise available to the judgment creditor would disappear if the debtor
26 receives pre-garnishment notice. It requires an employer to notify an employee when it receives a
27 pleading in a garnishment action, and it requires at least 30 days to pass from this notice before
28 garnishment begins. UNIF. WAGE GARNISHMENT ACT § 6(2)(B); id. § 7. See also N.J. CT. R. 4:59(e).

29 Predeprivation notice and an opportunity for a hearing would enable judges to respond to
30 barriers to meaningful participation that can prevent self-represented litigants from protecting their
31 rights and interests. If, for instance, a judgment debtor requests a hearing, the court should have
32 an affirmative obligation to inquire into standard exemptions that the judgment debtor might claim.
33 *Branham v. Varble*, 952 N.E.2d 744, 747-748 (Ind. 2011).

34 Finally, predeprivation notice and an opportunity for a hearing would reflect the reality
35 that, in many high-volume litigation contexts, even temporary deprivations of exempt assets may
36 cause many judgment debtors to suffer significant harm. As the Third Circuit observed in an
37 important early decision rejecting *Endicott-Johnson* and extending due-process protections to the
38 judgment-enforcement period,

39 [a] bank account may well contain the money that a person needs for food, shelter,
40 health care, and other basic requirements of life. Many people have no other

1 immediate sources of money. Additional income from a future paycheck, welfare
2 benefit, or other source may not be available for two weeks or more, and that
3 income may be insufficient to meet the person's immediate needs.

4 *Finberg*, 634 F.2d at 58. Parties who live paycheck-to-paycheck can ill-afford to have their wages
5 docked by an amount beyond what federal and state law permits. Judgment creditors' interests are
6 comparatively modest in many instances, as reflected by the fact that they often wait years to
7 enforce a debt-collection judgment and expect that many of their enforcement efforts will prove
8 fruitless. Cf. *Raba*, supra, at 29 (observing that, in 51 percent of California consumer-debt cases
9 for which data were available, writs of execution were returned as unsatisfied); COLLECTION
10 ACTIONS, supra, at 480-481 (“[T]he only burden placed on the creditor by prior notice would be a
11 minor delay in the commencement of the garnishment while the debtor is given an opportunity to
12 defend their wages . . .”).

13 Due process also protects tenants from certain harms unnecessary to the satisfaction of an
14 eviction judgment. See, e.g., *Todman v. Mayor and City Council of Baltimore*, 631 F. Supp. 3d
15 314 (D. Md. 2022); *Conner v. Alltin, LLC*, 571 F. Supp. 3d 544, 553 (N.D. Miss. 2021). Many
16 states have established protections to ensure that tenants do not lose or risk damage to their
17 personal property during the eviction process. E.g., *Todman*, 631 F. Supp. 3d at 323-324. In
18 Massachusetts, for instance, a tenant's belongings must be stored in a public warehouse for six
19 months following an eviction before they may be sold at auction. MASS. GEN. L. ch. 239 §§ 3, 4(e)
20 (requiring the storage of a tenant's property in a public warehouse for six months); see also ARIZ.
21 REV. STAT. § 13-1370(f) (requiring a landlord to hold a tenant's personal property for 14 days after
22 eviction); IND. CODE §§ 32-31-4-2(e)(e), 32-31-4-3, 32-31-4-5 (requiring a landlord to place
23 personal property in a warehouse for 90 days). The District of Columbia directs the landlord to
24 retain a tenant's personal property for seven days after eviction, excluding Sundays and federal
25 holidays. The landlord is prohibited from placing the tenant's belongings on the curb. The tenant
26 has the right to access the property and remove it from the rental premises during those seven days
27 subject to certain conditions. There is no requirement that the tenant pay rent or service fees for
28 the seven-day storage period. D.C. CODE § 42-3505.01A(a)-(d).

29 Due process should afford a tenant pre-enforcement notice, so the tenant can understand
30 how eviction might affect the tenant's interests in personal property, and what steps the tenant can
31 take to protect those interests. E.g., *Conner v. Alltin, LLC*, 571 F. Supp. 3d 544, 553 (N.D. Miss.
32 2021). A form sent to tenants advising them that they would be evicted, for instance, violated due
33 process by failing adequately to explain what would happen to their personal property if it
34 remained on the premises when the eviction commenced. *Todman v. Mayor and City Council of*
35 *Baltimore*, 104 F. 4th 479, 489-490 (4th Cir. 2024). Tenants also have a right to an opportunity to
36 be heard, to take steps to protect property threatened by an eviction, if the eviction threatens to
37 destroy or otherwise permanently deprive them of personal property. *Id.* at 492; *Davis v. Bissen*,
38 545 P.3d 557, 573-574 (Hawaii 2024).

39 The due-process calculus will not always favor pre-execution notice. As mentioned above,
40 pre-execution notice would not be required by due process if it would afford a judgment debtor a

chance to hide property otherwise subject to the judgment. Particularly strong interests in prompt garnishment may weigh heavily enough to counsel for a postgarnishment notice and hearing obligation. E.g., *COLLECTION ACTIONS*, *supra*, at 479 (suggesting this outcome when wages are garnished for child-support obligations). Compare *Revis v. Meldrum*, 489 F.3d 273, 282-284 (6th Cir. 2007) (requiring pre-enforcement notice when a judgment was executed against a defendant's real estate, effectively evicting the defendant).

Notice provided immediately after a judgment's entry, consistent with § 7.02, should be sufficient if the judgment is enforced reasonably promptly. But sometimes judgment enforcement can be delayed for years after the entry of a judgment. If more than a few months have passed since a judgment's entry, the party seeking its enforcement should provide additional notice to the judgment debtor, to ensure that the debtor remains aware of steps the debtor can take to protect rights and interests not subject to the judgment's execution.

c. Timing of enforcement efforts. Subsection (c) obliges parties seeking to enforce judgments to do so with reasonable promptness. Judgments that go unenforced for long periods of time can expand considerably due to the accumulation of interest. E.g., *Karuna Patel, Dismantling Unjust Interest Rates for Debt Collection Judgments*, *REGULATORY REV.* (Mar. 30, 2022), <https://www.theregreview.org/2022/03/30/patel-dismantling-unjust-interest-rates-for-debt-collection-judgments/>. Money judgments in many jurisdictions can be enforced for long periods of time, and in many instances this time period can be renewed. E.g., *ARIZ. REV. STAT. § 12-1551(A)* (10-year period for enforcement); *id.* § 12-1551(B) (period can be renewed for 10 years); *id.* § 12-1612(E) (providing for repeated renewals). Interest can accumulate to the extent that it exceeds, in some instances considerably, the amount of the judgment at its entry.

An unreasonable delay in enforcing a judgment should bar a judgment creditor from recovering amounts that accumulated due to that delay. See *Dennis Joslin Co., LLC v. Johnson*, 138 S.W.2d 197, 201 (Tenn. Ct. App. 2003) (affirming a laches defense because the judgment creditor had no good reason to delay enforcement, and because “the interest alone that had accrued during the delay exceeded the principal amount of the judgment”). But see *C.T. Holdings, Ltd. v. Schreiber Fam. Charitable Fdn.*, 154 A.D.3d 433, 433 (N.Y. App. Div. 2017) (rejecting a laches defense under these circumstances); *Asset Acceptance LLC v. Mack*, 825 N.E.2d 1108, 1110 (Ohio 2005) (these circumstances do not support a laches defense if the parties had actual notice of the debt owed). Imposing a penalty on a judgment creditor for an unreasonable delay in enforcement furthers the policies that motivated a number of jurisdictions to decrease the interest rate on consumer-debt judgments. E.g., *CAL. CODE CIV. P. § 685.010(a)(2)(1)* (reducing the interest rate on many medical and consumer-debt judgments from 10 percent to 5 percent); *Patel, supra* (commenting on New York's Fair Consumer Judgment Act, which reduced postjudgment interest rates in consumer-debt cases from 9 percent to 2 percent).

d. Obligations for court systems. In *Turner v. Rogers*, 564 U.S. 431 (2011), the U.S. Supreme Court held that the government must provide a form to a self-represented parent facing contempt for noncompliance with a child-support order, to elicit information about the parent's ability to pay. *Id.* at 447. Subsection (d) extends *Turner's* logic to all case types in high-volume

1 civil adjudication. Because of the recurring characteristics of different types of cases (such as
2 consumer debt, foreclosure, eviction, or child support), court systems should be able to anticipate
3 the sorts of rights and interests that survive the entry of particular type of judgment and thus to
4 provide straightforward information about these rights and interests and the steps a self-
5 represented litigant can take to protect them. Cf. VA. CODE § 8.01-512.4 (providing that no
6 garnishment summons can be served unless it includes a government-provided notice of
7 exemptions and claim for exemption form). Court-provided information and forms that judgment
8 debtors can utilize to protect exempt wages or assets are common. E.g., Virginia Court System,
9 *Notice to Judgment Debtor: How to Claim Exemptions from Garnishment and Lien*, Form DC-
10 454, July 2020; Wisconsin Court System, *Earnings Garnishment – Exemption Notice*, CV-426,
11 Nov. 2021; Utah Courts, *Notice of Execution and Exemptions*, Form 1403DCJ, May 21, 2018.
12 Such forms should include worksheets to enable self-represented litigants to calculate or determine
13 when wages, assets, or other property can be protected from enforcement. E.g., Wisconsin Court
14 System, *Garnishment Exemption Worksheet*, CV-426, Oct. 2010.

APPENDIX A

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§ 3.01. General Principles of Notice

(a) The fair, accurate, and timely resolution of disputes in high-volume civil adjudication requires effective notice. Notice is effective when it is reasonably certain to reach a party against whom a claim or defense is asserted, and when notice is provided in a form and under conditions that enable the party to take appropriate steps to participate meaningfully.

(b) Rules governing notice obligations should be tailored to particular high-volume civil-adjudication case types based upon recurring characteristics, capacities, and needs of the litigants who tend to be involved in those cases.

(c) The notice obligation is primarily one that parties should bear. In high-volume civil adjudication, however, courts and other rulemakers should also take steps to make notice as effective as reasonably possible. These steps include obligations to ensure the effectiveness of notice in individual cases and more systemic obligations, including the creation of court forms and other resources.

§ 3.02. Reasonable Diligence

(a) Rules governing service of process should require:

(1) that the party attempting service take reasonably available steps to confirm the accuracy of the identity, location, and contact information of the party to be served; and

(2) that the party attempting service use reasonably available means to rectify unsuccessful service whenever the party knows or has reason to know that an attempt at service has failed to provide actual notice.

(b) Toward these ends, courts and other rulemakers should provide proof-of-service forms tailored to case types. Such a form should require the party attempting service to document the steps, if any, the party has taken to confirm the identity, location, and contact information of the party to be served. The form should also require the party attempting service to document previous service attempts, and also to document whether the party has

reason to know if service has failed to provide actual notice and what the party has done to address the problem. The form may require the party attempting service to take a particular step appropriate to the case type, or to explain why that step is not appropriate under the circumstances.

§ 3.03. Timing of Notice

(a) Rules governing notice and service of process in high-volume civil adjudication should require that a party against whom claims are asserted have sufficient time to prepare and assert an effective response to those claims, consistent with § 4.05 (Procedural Limits on Defenses and Counterclaims).

(b) Under certain circumstances, timeliness may require prefiling notice. In determining whether to require prefiling notice and in what form for particular types of cases, courts and other rulemakers should consider:

(1) the likelihood that prefiling notice would ensure that the party against whom claims are asserted actually learns of the litigation once it commences, to enable the party to respond effectively;

(2) the potential of prefiling notice to enable the parties to resolve the dispute without commencing litigation;

(3) the likely burdens of an additional notice obligation on the party providing notice, including any legal risks that prefiling notice creates;

(4) the likely efficacy and cost of various means of providing prefiling notice other than by mail or in-person personal service; and

(5) the possibility that prefiling notice may be coercive or otherwise abusive.

(c) In no instance should a prefiling-notice obligation lessen whatever service obligation a party attempting service otherwise incurs.

§ 3.04. Preferred and Alternative Service

(a) *Personal and Supplemental Service.*

(1) Rules governing service of process in high-volume civil adjudication should make personal service the default method for most types of cases.

(2) Parties attempting personal service should use low-cost methods to supplement this service when reasonable to do so. A party's failure to supplement

personal service when reasonable to do so should factor into a court's willingness to enter a default judgment, consistent with § 3.08, or to vacate or set aside a judgment, consistent with § 3.09.

(b) *Categorical Alternatives to Personal Service.*

(1) Rules governing service of process may authorize an alternative to personal service for a given case type if the alternative is at least as effective as personal service. Such rules should account for the capacities and circumstances of the types of litigants involved, the significance of the interests at stake, and the means by which parties typically and reliably communicate in a given high-volume civil-adjudication area.

(2) Rules authorizing service by an electronic or digital method as an alternative to personal service may be appropriate for cases involving parties that have communicated reliably and successfully with each other by this method in the past. A rule authorizing such service for a given case type should require the party attempting service to provide information that the person being served has actually received the summons and complaint, such as information indicating that the person being served has opened the message, a returned acknowledgment of receipt, or some other similar assurance of actual notice.

(c) *Alternatives to the Preferred Method of Service in Particular Cases.* When personal service or an alternative to personal service is otherwise required, rules governing service of process may permit service by a different method or methods if, in a particular case, the party attempting service:

(1) shows that, after the exercise of reasonable diligence, the required method of service cannot be completed at all or without undue difficulty or expense; and

(2) offers proof that the different method of service permitted by the rule was accomplished in such a manner that the opposing party received or should have received the summons and complaint.

Such rules should require a party attempting service by a different method to provide supplemental service, when reasonable, by mail or digital means.

(d) *Contractual Provisions Regarding Service.*

(1) Service pursuant to a method provided for in a contract between the parties should not be considered proper unless this method is at least as likely to provide

actual notice to the party receiving service as the method the party attempting service would otherwise be required to use under applicable law. A party attempting service by a contracted-for method should include with its proof of service information indicating why the contracted-for method will meet this standard.

(2) Service at a location specified in a contractual provision should not be considered proper if applicable law would otherwise require service at a different location unless service at the contracted-for address or location is as likely to provide actual notice. A party providing service at such a contracted-for location should include information with its proof of service that indicates why service at this location will meet this standard.

§ 3.05. Confirmation of Service

(a) Rules governing service of process in high-volume civil adjudication should require that a party or person attempting service on the party's behalf document service attempts in detail and provide information about the number, timing, and location of the attempts made. This documentation should include:

(1) in the case of personal service, a detailed description of the person served;
and

(2) in the case of service by mail or a digital or electronic method, evidence that an adversary actually received the summons and complaint.

(b) Rules governing service of process should require a party or person attempting personal service on the party's behalf to use reasonably available, low-cost, and appropriate technological means to confirm the time and location of attempts made. Such means should confirm the location where process is served but not unduly intrude upon any person's privacy or create safety risks.

(c) Rules governing service of process should require that a party or person filing a proof of service use a standardized court-provided form. Such forms should be tailored to the particular high-volume civil-adjudication case type and elicit specific information regarding the service.

§ 3.06. Content of Notice and Court-Provided Forms and Resources

(a) Rules governing service of process in high-volume civil adjudication should require that the notice provided at the start of a case includes sufficient information for the party being served to prepare a defense and to access court-provided information about available resources that the party can utilize to help protect the party's rights and interests. In addition to the summons and the required pleadings, this notice should, to the extent practicable, include:

(1) any court-provided forms the party receiving service can use to answer or otherwise respond, when such an answer or response is required; and

(2) additional court-provided documents, as described in subsection (c), that describe or direct a responding party to potentially available resources that may enable the party to protect the party's rights and interests.

(b) A court should, to the extent practicable, provide a standardized summons form tailored to a given high-volume case type that, together with the pleadings, requires a plaintiff to describe the nature of the case; the remedy sought; and any costs, expenses, or interest sought. In addition, the summons form should describe, in plain language:

(1) the consequences of a default;

(2) the steps a responding party must take to protect the party's interests;

(3) the deadline by which a responding party must take these steps; and

(4) the means by which a party can obtain any needed extension.

(c) In addition to a standardized summons form, a court should, to the extent practicable, provide other service-related forms and documents to enable parties' meaningful participation. In particular, these court-provided forms and documents should:

(1) identify reasonably available resources that self-represented litigants can access to protect their rights and interests;

(2) include a website address or QR code that refers the served party to digital versions of court-provided forms;

(3) be available in the several languages commonly spoken in the communities the court serves;

(4) enable parties who are visually impaired or of low literacy to convert them into a format that enables them to understand the documents' content; and

(5) indicate clearly to the party being served that the case does not involve a criminal prosecution.

§ 3.07. Accessible Notice

Rules governing service of process should require a party attempting service to take reasonable steps to increase the likelihood that the party to be served receives notice in a form the party can understand. Such rules should impose this obligation when the party attempting service knows or has reason to know that the party to be served has limited English proficiency, low literacy, or a disability. Reasonable steps may include, to the extent practicable, use of court-provided forms and other resources in an appropriate language, and use of a supplemental electronic or digital service method that can be converted into a format understandable to a party with a disability.

§ 3.08. Court Obligations to Ensure Proper Notice

(a) Court-Provided Courtesy Notice.

(1) When a case is filed in high-volume civil adjudication, the court should, to the extent practicable, mail courtesy notice to the defending party at the address indicated in the proof of service. The courtesy notice should include basic information about the nature of the case and direct the party to available resources that may enable the party to protect the party's rights and interests.

(2) If this courtesy notice is returned as undelivered, the court should require the party that filed the proof of service to confirm, to the extent practicable, the accuracy of the service address. The court should also require the party to supplement service with other reasonably available means if the party has not, consistent with § 3.04, done so already.

(b) Court Review of Service Prior to Entry of Judgment.

(1) Consistent with § 7.03 (Showing of Entitlement to Judgment), a court, before entering judgment, should review the filings and the evidence in the record to determine whether the party seeking entry of judgment has provided proper service or, when appropriate, whether the defending party has waived proper service.

(2) If the party seeking entry of judgment requests that the court impose the costs of service on an adversary pursuant to a contractual provision or governing law,

the court should require the party to document these costs and certify that the amount sought does not exceed the amount the party actually paid for service on the adversary.

§ 3.09. Challenging Service

(a) Presumption of Proper Service.

(1) A presumption of proper service arises when the party attempting service files a proof of service that complies with all applicable service requirements. A party challenging service can rebut this presumption by showing by a preponderance of the evidence that service was improper. When determining whether the party challenging service has made a sufficient showing, the court should consider the following factors:

(A) the detail with which the proof of service describes the service attempt;

(B) the detail the party challenging service provides in support of the improper-service defense;

(C) the degree to which the party attempting service used reasonably available means to confirm the defending party's address or location before service;

(D) whether the party attempting service used reasonably available, low-cost, and appropriate technological means to confirm the time and location of the service attempt;

(E) whether the party attempting service supplemented service by the required method with service by other reasonably available, low-cost methods, even if such supplemental service was not required; and

(F) whether the party attempting service used a process server who has been determined to have filed false, incomplete, or otherwise deficient proofs of service in other cases.

(2) In determining whether the presumption of proper service is rebutted, the court should resolve any genuine dispute of fact by evidentiary hearing.

(b) Challenging Service Before the Entry of Judgment.

(1) If a party receives actual notice of a lawsuit before judgment is entered but believes that service was improper, the party should raise an improper-service defense as soon as practicable.

(2) If the filings and other information in the record indicate that service is improper, but a self-represented party nonetheless enters a general appearance or otherwise fails to challenge service in a first responsive pleading, the court should determine the extent to which the improper service has prejudiced or would prejudice this party. If there is no prejudice, the court should deem service defects waived. Otherwise, the court should take steps to ameliorate the prejudice, or it may dismiss the case if the prejudice cannot be ameliorated.

(c) Notice Challenges After Entry of Judgment.

(1) A party who did not receive actual notice of a lawsuit despite proper service should be able to move to vacate a default judgment on those grounds. The party should act with reasonable diligence upon discovering the default judgment.

(2) As provided for in § 7.05 (Invalid Default Judgments), a judgment obtained in a case in which service is improper is invalid unless the responding party waived an objection to improper service, or unless this party received adequate notice of the pending action.

(A) A party who did not waive an objection to improper service should be permitted to seek to set aside the judgment on these grounds at any time. This party should be able to adduce any relevant evidence in challenging service.

(B) If this party received actual notice of the lawsuit before the entry of judgment despite allegedly improper service, the court may require the party to make a more rigorous evidentiary showing to establish that service is improper. If notice is adequate, then the judgment may not be invalid, and the court should evaluate a motion to vacate or set aside the judgment pursuant to the discretionary considerations described in § 7.06 (Considerations in Vacating Judgments on Other Grounds).

(C) Except in instances of waiver, a judgment entered without proper service can continue to have effect only under extraordinary circumstances involving third-party interests and unreasonable conduct by the party who did not receive proper service.

§ 4.01. General Principles of Pleading and Information Exchange

(a) The purposes of pleading in high-volume civil adjudication are to provide notice of the subject matter of the action to the parties and the court; to serve as a vehicle for information exchange; to facilitate meaningful participation by all parties, including access to legal help; to promote effective case management by the court; to promote fair settlements; and to enable full consideration of substantive and procedural requirements by the parties and the court prior to entry of judgment. These pleading-specific purposes serve the general goals of procedure set forth in § 2.01.

(b) Fair, accurate, and effective adjudication in high-volume civil dockets may require mandatory information exchange, including disclosures, provision of supporting materials as attachments, and certifications, with only enumerated and limited discovery thereafter. Litigation stages that are distinct in other types of civil litigation—for instance, pleading and discovery—may be collapsed into a single stage in high-volume civil adjudication.

(c) Rules governing pleading and information exchange should be tailored to particular high-volume civil-adjudication case types or case features; no single approach to pleading and information exchange is likely to be effective across all areas. However, in most high-volume civil-adjudication areas, pleading-linked, form-based, mandatory disclosure should replace discovery as the primary mode of pretrial information exchange.

(d) Rules governing the content, form, and timing of pleading and information exchange should promote the use of standardized forms and digital interfaces for parties who face barriers to meaningful participation, in order to reduce the costs and strategic disadvantages that litigant-designed pleadings and discovery requests can impose on litigants with less expertise, resources, or access to legal help.

(e) Asymmetric pleading and disclosure obligations may be justified in high-volume civil-adjudication areas in which one party typically controls most discoverable information or the opposing party has limited capacity to seek discovery on its own or comply with

disclosure obligations, as when a litigation area features sharp asymmetries in expertise, resources, and representation across the parties.

§ 4.02. Content of Pleading and Information Exchange

(a) At a minimum, a party stating a claim for relief in high-volume civil adjudication should be required to provide a short and plain statement of the claim and set forth all material facts supporting the claim that are known or reasonably knowable to that party.

(b) Courts and other rulemakers may require that some or all of a party's pleading obligations, including those set forth in subsection (a), shall take the form of mandatory information exchange, including:

- (1) allegations that must be made in a complaint or answer;
- (2) materials that must be attached to a complaint or answer;
- (3) certifications that must accompany a complaint or answer; or
- (4) completion of a court-provided form or digital interface, as detailed in

§ 4.03.

(c) The information encompassed by mandatory information exchange should:

- (1) be typical in the particular case type, proportionate, and usable; and
- (2) correspond to the proof necessary to establish a claim or defense or to satisfy a procedural obligation.

(d) Subject to the limitations in subsection (c), mandatory information exchange need not be limited to information that supports a party's own claims, defenses, or procedural obligations.

(e) Rules mandating disclosure of specified information should not purport, or be interpreted, to alter the governing burden of proof.

§ 4.03. Form of Pleading and Information Exchange

(a) In most high-volume civil-litigation areas, court-provided forms or court-hosted digital interfaces that elicit allegations, information, and materials from the parties will be superior to litigant-constructed pleadings and papers.

(b) In determining whether to make the parties' use of forms or digital interfaces for pleading and information exchange mandatory or discretionary for a particular high-volume civil-adjudication case type, courts and other rulemakers should consider:

(1) the feasibility of designing a form or digital interface that reliably elicits necessary information from all party types;

(2) the feasibility of designing a form or digital interface that is accessible and usable for all party types;

(3) the risk that a mandated form or digital interface will unduly advantage or disadvantage particular party types;

(4) the risk that party-constructed pleadings or papers will confuse or overwhelm opposing parties who lack expertise, resources, or counsel; and

(5) the risk that a mandated form or digital interface, by channeling or limiting party responses, will stifle the assertion of claims or defenses or impair the elaboration of law, as set forth in § 2.05.

(c) Forms and digital interfaces for pleading and information exchange should, consistent with §§ 2.03 (Meaningful Participation) and 2.04 (Procedure and Vulnerable Parties), be designed to minimize, to the extent practicable, various barriers to understanding and accessibility, using an evidence-based approach that includes user-testing and feedback. In addition, forms and digital interfaces for pleading and information exchange should:

(1) be made available at court, online, and at sites where litigants commonly seek legal assistance;

(2) include user-friendly checklists for basic elements of claims, counterclaims, and defenses;

(3) embed information about court procedures and processes and available legal help; and

(4) include form discovery requests if discovery is available upon a showing of cause, as in § 4.06.

(d) Processes associated with forms and digital interfaces, such as attaching documents, paying fees, or seeking applicable fee waivers, should be clearly explained and easy to navigate and complete.

§ 4.04. Timing of Pleading and Information Exchange

(a) Rules governing the timing of mandatory information exchange should:

(1) require that a party make disclosures at the pleading stage, except when early disclosure would require information that is not reasonably accessible or would impose a substantial and unjustified burden on the party; and

(2) favor a single, fixed deadline for making required disclosures over staggered and rolling deadlines because of the potential of the latter to confuse less expert, less resourced, and often self-represented litigants and the additional compliance and other burdens they impose on courts.

(b) In setting deadlines for mandatory information exchange, courts and other rulemakers should take account of the capacities of the types of litigants that commonly appear in particular high-volume civil-litigation areas, including which parties have routine access to relevant information. In high-volume civil-litigation areas featuring a high number or proportion of litigants who face barriers to meaningful participation, as described in § 2.03, one side may be allotted additional time to respond to mandatory information exchange.

(c) If a party later acquires information that would have been subject to mandatory information exchange initially, the party should be required to provide the new information to the other party in a timely manner.

§ 4.05. Procedural Limits on Defenses and Counterclaims

Courts and other rulemakers should minimize procedural limits on the assertion of defenses and counterclaims in high-volume civil cases. In particular, rules governing pleading and information exchange should not:

(a) bar, limit, or bifurcate into a separate proceeding any defense or counterclaim that arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim, except when:

(1) the benefits substantially outweigh the costs; or

(2) applicable law assigns primary jurisdiction over the defense or counterclaim to a nonjudicial administrative body;

(b) condition the filing of an answer or the assertion of a defense or counterclaim on paying a court fee, posting a bond, or satisfying any other financial requirement; or

(c) impose unreasonably short time limits on the filing of a responsive pleading or the making of an appearance in order to assert a defense or counterclaim.

§ 4.06. Limits on Discovery

(a) Discovery should be presumptively limited in high-volume civil adjudication in favor of mandatory information exchange consistent with §§ 4.02 through 4.04. These limits can include outright prohibitions on discovery, limits on the quantity or type of discovery, limits on the time available for discovery, and limits on the parties or nonparties from whom discovery can be sought. Discovery beyond presumptive limits should be available to a party on a case-by-case basis only upon a showing of good cause and proportionality.

(b) In setting limits on discovery in a given high-volume civil-adjudication case type, courts and other rulemakers should weigh the need for discovery, its potential asymmetric and strategic use by litigants, and the costs and benefits of a disclosure-based approach.

(c) When discovery beyond mandatory information exchange is authorized, whether by rule or upon a party's showing consistent with subsection (a), courts and other rulemakers should provide standardized discovery templates and forms for making and responding to discovery requests.

§ 4.07. Court Access to Official Data

(a) Courts and other rulemakers may develop court-wide processes and rules pursuant to which judges or court staff can obtain reliable materials or information from official data sources when:

- (1) the materials or information are sufficiently reliable, including whether they are derived from verified or regularly maintained official data systems;
- (2) the materials or information will assist in the fair and accurate adjudication of a case, including by enabling meaningful participation by one or more of the parties;
- (3) the materials or information are not otherwise likely to be disclosed or identified by the parties; and
- (4) privacy concerns are low.

(b) Parties should have notice and an opportunity to be heard on the use of any materials or information that a court obtains from official data sources when those materials

or information will inform the resolution of any party's claim or defense. When providing such notice and an opportunity to be heard, the court should:

- (1) clearly identify the information obtained;
- (2) describe its potential relevance to the claims or defenses at issue; and
- (3) afford the parties a meaningful chance to contest, explain, or supplement the information.

(c) In all events, a court's use of materials or information obtained from official data sources should comply with relevant evidentiary rules, procedural rules, and canons of judicial conduct.

§ 4.08. Implementation of Rules Governing Pleading and Information Exchange

(a) Courts should take appropriate measures to promote compliance with rules governing pleading and information exchange in high-volume civil adjudication.

(b) An effective and administrable means of compelling compliance with pleading and information-exchange requirements in many high-volume civil-adjudication areas is to deny a noncompliant party's request for entry of judgment.

(c) Courts may take other appropriate measures in response to a party's failure to comply with pleading and information-exchange requirements, including:

- (1) imposing monetary sanctions;
- (2) ordering that facts are established;
- (3) prohibiting evidence from being introduced at a merits hearing;
- (4) striking claims or defenses;
- (5) staying the case until mandated disclosures are made; or
- (6) dismissing the case with or without prejudice.

The application of such measures should take account of limitations on a party's capacity or understanding and be structured to deter repetition of noncompliance.

(d) Measures to promote compliance with pleading and information-exchange requirements should be taken in a manner consistent with Chapter 7 (Entry and Enforcement of Judgments), including § 7.03 (Showing of Entitlement to Judgment), and Chapter 9 (The Judicial Role), including § 9.04 (Application of Procedural Rules). Nothing in this Section should be construed to conflict with those principles.

§ 5.01. Definition and Purpose of Hearings

(a) For purposes of these Principles, a hearing is defined as an event in which one or more parties and a judge or other appropriate decisionmaker meet, either in person or remotely, to resolve or address a specific issue related to a case, including but not limited to final disposition.

(b) In addition to furthering Chapter 2's general principles of procedure, hearing procedures and practices should:

- (1) permit each party a meaningful opportunity to be heard on an issue or issues;
- (2) provide a fair and accurate disposition of a particular issue or case;
- (3) foster the open and transparent development of law and public trust and confidence by clearly communicating and recording the hearing's outcome; and
- (4) be open and accessible to the public, consistent with § 5.02 (Access and Accessibility) and Chapter 13 (Privacy and Confidentiality).

§ 5.02. Access and Accessibility

Courts and other rulemakers should ensure, to the maximum extent practicable, that every party can meaningfully participate in hearings regardless of circumstances, including but not limited to financial status, access to legal representation, disability, language, or access to needed technology, as elaborated in § 5.07 (Availability of Remote Hearings). At a minimum, courts and other rulemakers should:

- (a) not condition any party's participation in a hearing on the ability to meet financial requirements without a bona fide fee-waiver system, consistent with § 4.05 (Procedural Limits on Defenses and Counterclaims) and Chapter 12 (Court Funding and Fees);
- (b) take reasonable measures to accommodate parties for whom legal-representation status, disability, language, or any other barrier would otherwise frustrate meaningful participation in the hearing, consistent with § 2.03 (Meaningful Participation);

(c) utilize flexible and user-friendly calendaring and scheduling practices to maximize parties' attendance and minimize defaults resulting from inaccessibility or litigant confusion;

(d) provide a courthouse and courtroom environment that minimizes party confusion, distraction, and discomfort; treats all parties with equal respect; and maximizes party engagement; and

(e) provide open and public access to hearings, consistent with § 2.05 (Public Development of Law) and Chapter 13 (Privacy and Confidentiality).

§ 5.03. Hearing Rights and Due Process

(a) When a hearing is required, it should offer the parties a timely and meaningful opportunity to be heard by an impartial decisionmaker, and it should proceed in a manner that is reasonably likely to result in a decision in accordance with substantive law and the facts.

(b) Due process imposes affirmative obligations on courts and other rulemakers to ensure that opportunities to be heard are meaningful for all parties and that hearings generate fair and accurate results.

§ 5.04. Conduct of Hearings

While hearings in high-volume civil adjudication may vary in format and structure given the varying geography, resources, and staffing of courts, all hearings should, at a minimum:

(a) be preceded, sufficiently in advance of the hearing to enable meaningful preparation by all parties, by a clear statement of the purpose of the hearing and the issues to be presented for decision, the consequences of failure to participate, and possible sources of legal help or information;

(b) not commence until the court or decisionmaker has confirmed that the parties have met all preliminary procedural requirements;

(c) be conducted by an impartial and qualified decisionmaker with clearly established authority to make rulings, consistent with Chapter 9 (The Judicial Role);

(d) begin with a clear statement of the purpose of the hearing in plain language and, when practicable, on the record; the issues to be presented for decision; the basic

procedures, including applicable rules of evidence, to be followed; the elements of claims or defenses raised by either party that must be established; the burden of proof or applicable evidentiary standard; and the consequences of failing to prove an element of a claim or defense;

(e) provide a meaningful opportunity for each party to present evidence and arguments and counter the opposing party's evidence and arguments, and for the decisionmaker to test the validity of each party's evidence and arguments, consistent with § 5.05 (Factual Record and Evidence) and Chapter 9 (The Judicial Role);

(f) when applicable, provide a meaningful opportunity for settlement, as described in Chapter 6 (Settlement);

(g) provide a clearly communicated statement, both orally and in writing, of any determination or outcome, consistent with § 5.06 (Court Orders), or, if the matter is taken under advisement, a clear statement of when and how a decision might be issued; and

(h) when resulting in a final disposition, provide the parties with relevant information about postjudgment proceedings, including instructions on how to challenge a judgment and steps each party can take with respect to enforcement, consistent with Chapter 7 (Entry and Enforcement of Judgments).

§ 5.05. Factual Record and Evidence

(a) Courts and other rulemakers should tailor evidentiary rules to particular high-volume civil-adjudication case types or case features and, when appropriate, simplify those rules to ensure that parties are heard, relevant and reliable evidence is introduced, and claims and defenses are fairly adjudicated. In particular, courts and other rulemakers should consider:

(1) revising evidentiary rules to focus on the weight and sufficiency of evidence rather than its admissibility;

(2) consolidating multiple evidentiary rules into a single, easily understood standard; and

(3) narrowing the scope or application of evidentiary rules to contexts or types of evidence that raise particular concerns about reliability or probative value.

However, courts and other rulemakers should exercise caution in eliminating evidence rules entirely or revising evidence rules that protect foundational rights or serve non-adjudicatory ends, such as rules governing privilege.

(b) When presiding over a hearing, a judge or other appropriate decisionmaker should take reasonable steps to ensure the creation of a factual record necessary to render a fair and accurate decision. At a minimum, a judge or other appropriate decisionmaker should:

(1) clearly communicate the evidentiary rules that will apply to particular types of evidence at the start of a hearing, consistent with § 5.04, and when evidence is introduced thereafter; and

(2) explain procedures, processes, and legal requirements, consistent with § 9.02; elicit facts and arguments, consistent with § 9.03; adjust procedures to excuse nonprejudicial failures, consistent with § 9.04; and facilitate compliance with evidentiary rules, consistent with § 9.05.

§ 5.06. Court Orders

(a) In addition to making a statement on the record at the conclusion of a hearing, as set forth in § 5.04 (Conduct of Hearings), the court should promptly furnish to the parties a written copy of any order once issued, including any separately drafted decision that the court renders. That order should convey, or include or attach a decision that provides, the legal and factual basis for the court's determination and its significance for the rights and duties of the parties and for further proceedings in the case. If the order results in the entry of judgment, it should provide or be accompanied by information that advises parties of the judgment's consequence and steps they can take to protect rights and interests, consistent with § 7.02 (Notice Prior to and After Entry of Judgment).

(b) Courts and other rulemakers should consider requiring structured, court-created forms to memorialize and communicate orders. Such forms should, consistent with § 2.03 (Meaningful Participation) and § 5.02 (Access and Accessibility), be designed to minimize, to the extent practicable, barriers to understanding and accessibility, using an evidence-based approach that includes user-testing and feedback. In addition, forms for memorializing and communicating orders should include options for the judge or other appropriate decisionmaker to tailor information to the specifics of the issue or case.

(c) The court should promptly enter any order or decision into the court record to promote easy access by the parties and the public. When a hearing concludes with a court taking the parties' arguments under submission, the court should meet the requirements of subsection (a) as soon as practicable and promptly notify the parties once the order is finalized or judgment is entered.

(d) The court should provide the parties with clear and understandable information related to how to seek any further review of an order.

§ 5.07. Availability of Remote Hearings

(a) *Definitions.* A “remote hearing” is a synchronous hearing at which at least one party appears remotely by audio or audio-visual means, such as telephone or videoconference. If all participants appear remotely, the hearing is a “fully remote hearing.” If at least one participant appears remotely and at least one participant appears in person, the hearing is a “hybrid hearing.”

(b) Availability of Remote Hearings.

(1) Courts and other rulemakers should adopt clear, accessible, and evidence-based rules for when a remote hearing, including a fully remote or hybrid hearing, can or must be held in particular cases, types of cases, or types of hearings.

(2) In formulating these rules, courts and other rulemakers should weigh available mechanisms for determining the availability of remote hearings in a given case or case type, including but not limited to:

(A) judge discretion;

(B) party consent;

(C) per se rules either mandating or prohibiting remote hearings in particular case types, hearing types, or based on other case features; or

(D) a mix of these approaches.

(3) In determining when different hearing formats are appropriate, courts and other rulemakers should consider:

(A) the effect of a hearing format on the meaningful participation of all parties and participants, including witnesses;

(B) the nature and complexity of the hearing, including whether it is evidence-intensive;

(C) whether the court, the parties, and participants, including witnesses, have access to the technological infrastructure necessary to effectively facilitate all essential components of the hearing;

(D) the competence of the court, the parties, and participants, including witnesses, in using the necessary technology;

(E) the needs of parties and participants facing barriers to access, as elaborated in § 5.02;

(F) the parties' representation status;

(G) the potential for strategic action by parties or witnesses, including the ability to talk confidentially with a legal-services provider or observe proceedings in other cases;

(H) the privacy and safety of hearing participants; and

(I) the public interest in an open hearing.

(4) These same factors should apply when a judge or other appropriate decisionmaker exercises case-by-case discretion in a jurisdiction that has adopted subsection (b)(2)(A)'s approach.

(c) Opt Out From Default Rules.

(1) If a rule requires an in-person hearing, all parties should be afforded the opportunity to opt out and appear remotely if adequate technology is available and the party would not otherwise be able to appear.

(2) If a rule requires a remote hearing, all parties, particularly those who face barriers to access, should, for good cause shown, be afforded the opportunity to opt out of a remote hearing and appear in person.

(3) If a party chooses to opt out of a required hearing format pursuant to subsection (c)(1) or (c)(2), the opposing party should be permitted, but not required, to participate in the same hearing format as the opt-out party.

§ 5.08. Conduct of Remote Hearings

(a) Courts and other rulemakers should adopt clear, accessible, and evidence-based rules for the conduct of remote hearings. Those rules should address:

- (1) procedures for requesting or opposing a remote hearing;
- (2) technological standards for remote hearings, including the infrastructure that is required for meaningful participation, cyber-security, and privacy;
- (3) rules of conduct during remote hearings, including provisions to facilitate attorney–client communications when a party is represented;
- (4) accommodations for vulnerable parties and participants, including persons with disabilities or limited language proficiency; and
- (5) public access to remote hearings.

(b) To ensure meaningful participation in a remote hearing, courts should, at a minimum, provide parties and participants with:

- (1) timely and accessible instructions for accessing and participating in a remote hearing and information about the required technological infrastructure;
- (2) information about publicly accessible venues that are equipped to support participation in a remote hearing, at the court or in partnership with other public bodies or community organizations; and
- (3) technical assistance before and, to the extent practicable, throughout the hearing.

§ 7.01. General Principles of Entry and Enforcement of Judgments

Procedures that govern the entry and enforcement of judgments in high-volume civil adjudication should:

- (a) account for barriers to meaningful participation in litigation that many parties face; and
- (b) promote case outcomes consistent with the well-settled preference for the resolution of cases on the merits.

§ 7.02. Notice Prior to and After Entry of Judgment

(a) Notice Prior to the Entry of Judgment.

(1) A party against whom claims are asserted should receive notice as part of service of the consequences of a failure to appear or to defend, consistent with § 3.06 (Content of Notice and Court-Provided Forms and Resources).

(2) In addition, a party seeking the entry of a default judgment should provide timely and effective notice to the party's adversary of any hearing, other proceeding, or court action at which a default judgment may be entered. If the defending party has not appeared or entered, the party seeking the judgment's entry should provide this notice if it can do so without undue burden. This notice should include a complete description of the relief sought and court-provided documentation indicating the steps the adversary can take before the judgment's entry to protect the adversary's rights and interests.

(b) Notice After the Entry of Judgment.

(1) Upon entry of judgment, the court should ensure that a copy of the order entering judgment is delivered to the party against whom the judgment is entered, as well as notice advising this party of:

(A) the judgment's entry and the matter or matters the judgment resolves;

(B) the remedy granted and any fees, interest, and costs awarded;

(C) likely enforcement processes and when they might commence;

(D) any additional obligations that might accrue after the judgment's entry, including postjudgment interest;

(E) steps the party can take to appeal, move to vacate or set aside the judgment, and stay or postpone the judgment's enforcement; and

(F) the rights or interests of the party that could foreseeably be adversely affected by judgment enforcement or execution in a given case type, and the steps the party can take to protect those rights and interests.

(2) This notice should be accompanied by court-provided forms that the party against whom a judgment is entered can use to respond in appropriate ways to the judgment's entry.

(c) Notice prior to and after the entry of judgment should:

- (1) be provided by reliable, inexpensive means; and**
- (2) be provided in a manner and to a location most likely to achieve effective notice, taking full account of any relevant information a party or the court has received during the pendency of the case that indicates how this notice can be most effective.**

§ 7.03. Showing of Entitlement to Judgment

(a) A party should be required to establish the procedural and substantive sufficiency of the claim for which the party seeks relief before the court can enter a judgment providing this relief or any part of it. At a minimum, the party should be required to establish the following before judgment may be entered:

- (1) proper service or, when appropriate, the defending party's waiver thereof;**
- (2) the court's jurisdiction or, when appropriate, the defending party's consent to jurisdiction or waiver of jurisdictional defects;**
- (3) proper venue or, when appropriate, the defending party's consent to venue or waiver of venue defects;**
- (4) the lawsuit's timeliness;**
- (5) compliance with all pleading and information-exchange requirements, consistent with § 4.02 (Content of Pleading and Information Exchange);**
- (6) the party's substantive entitlement to the remedy sought, as reflected in documentation filed to meet pleading and information-exchange requirements and any other evidence the court might require;**
- (7) the party's entitlement to fees, interest, and costs that the party seeks; and**
- (8) the absence of any applicable law that the judgment's entry would violate, such as a provision limiting the entry of judgments against people with the requisite military status.**

(b) Before entering judgment, the court should review the filings and evidence in the record to determine whether the party seeking the judgment's entry has made the showings required in subsection (a).

(c) A party's failure to comply with requirements for the entry of judgment may be grounds for dismissal.

§ 7.04. Procedures for Motions to Stay or Vacate

(a) Courts and other rulemakers should simplify the processes by which parties against whom judgments are entered in high-volume civil adjudication can move to stay or vacate these judgments. These processes should:

- (1) simplify the steps associated with a motion to stay or vacate;
- (2) minimize the costs associated with a motion to stay or vacate; and
- (3) enable the party to move to stay or vacate using court-provided forms.

(b) A judgment entered in high-volume civil adjudication should not be enforceable for a reasonable period of time after its entry, to permit a party against whom it is entered to move to stay enforcement of or vacate the judgment.

§ 7.05. Invalid Default Judgments

(a) Barring exceptional circumstances, a default judgment entered in high-volume civil adjudication should be vacated or set aside at any time if:

- (1) the court entering the judgment lacked jurisdiction;
- (2) the party against whom judgment was entered did not receive proper service, unless that party otherwise received adequate notice of the action; or
- (3) the process leading to the judgment's entry violated due process.

(b) Exceptional circumstances exist under subsection (a) when the party subject to the judgment manifested an intention to treat the judgment as valid after receiving actual notice of the judgment, and another party has a substantial interest of reliance on the judgment.

§ 7.06. Considerations in Vacating Judgments on Other Grounds

(a) When a party challenges a judgment for reasons other than those described in § 7.05 (Invalid Default Judgments), the court should exercise its discretion to promote the resolution of the case on its merits if the judgment was entered without meaningful participation by the moving party. When exercising this discretion, the court should consider the barriers to meaningful participation that the moving party faced in evaluating:

- (1) the reasons why the moving party did not appear or otherwise neglected the proceedings before the judgment's entry; and
- (2) whether the moving party acted with due diligence to learn of the judgment and with reasonable promptness in seeking relief.

In addition, the court should require the moving party to identify a genuine issue with the judgment that may bear upon the merits, but the moving party need not prove or otherwise establish this issue for the judgment to be vacated.

(b) The court should not exercise its discretion as described in subsection (a) if:

(1) the moving party has demonstrated an affirmative disregard for merits litigation; or

(2) a party that benefits from the judgment would suffer prejudice or harm to reliance interests that outweighs interests in renewed litigation.

(c) Rules that establish deadlines for motions to vacate judgments and their administration in particular cases should vary based upon recurring characteristics of different case types, including the timing of when judgments are typically enforced.

§ 7.07. Measures to Protect Against Unnecessary Harms from the Entry and Enforcement of Judgments

(a) Courts and other rulemakers should consider all reasonable steps to minimize unnecessary harms resulting from the entry of a judgment or its enforcement. These steps should enable a party against whom the judgment is enforced to invoke all applicable legal protections, including exemptions for certain wages and assets, and to avoid intrusions on the party's rights and interests that are unnecessary to the judgment's full satisfaction. Such steps may include:

(1) the provision of procedures for enforcement that minimize intrusion upon the defending party's rights and interests that the judgment's enforcement does not require;

(2) the timely and effective provision of information to the defending party about legal protections a party can invoke to protect assets or other interests not subject to execution or enforcement; and

(3) the provision of procedures to enable the use of appropriate privacy and confidentiality rules and practices.

(b) A party against whom a judgment is entered should receive:

(1) timely notice of the judgment, consistent with § 7.02 (Notice Prior to and After Entry of Judgment), as well as additional notice of enforcement and information

about steps a party can take to avoid harms when significant time has passed since the judgment's entry; and

(2) a reasonable and timely opportunity to be heard, to protect rights and interests not properly subject to the judgment's enforcement.

This notice and opportunity to be heard should precede a judgment's enforcement unless pre-enforcement notice would seriously disrupt the effort of a party benefiting from the judgment to obtain what the judgment provides. In that event, the notice should come at the same time as the judgment's enforcement and execution, and the party receiving this notice should have the earliest feasible opportunity to be heard.

(c) Rules regulating the enforcement of judgments should be designed to prevent a party seeking to enforce a judgment from unreasonably delaying enforcement efforts or benefiting from such a delay.

(d) Court systems should create documents, tailored to case type, that explain in plain language what sorts of rights and interests the judgment's enforcement or execution might foreseeably impair and what steps a party can take to protect these rights and interests. Court systems should also provide forms that a defending party can use to protect these rights and interests. The notice provided before or at the time of enforcement or execution should include these forms and documents, consistent with § 7.02.

**Committee on Codes of Conduct Advisory Opinion
No. 118: Ethics Considerations Related to Public Speech and Civic
Engagement by Judges**

As the role of the federal judiciary within the American system of government is often a topic of public discussion and debate, judges are rightly concerned about the appropriate ethical boundaries to be observed when they are called upon, or desire to, speak or otherwise engage publicly about a broad range of issues. This advisory opinion summarizes the Code of Conduct principles that provide guidance related to civic engagement by judges. Necessarily, each situation depends on the context, and the question of whether to participate in public discussion or other civic engagement must be decided by the conscientious judge exercising sound judgment. But the Code of Conduct, its Commentary, and several other advisory opinions provide judges with helpful guiding principles.

Canon 4 provides, broadly, that “[a] judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects.” Regarding law-related activities in particular, the Commentary to Canon 4 explains that “as a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice.” The Commentary encourages both law-related and non-law-related extrajudicial activities “to the extent that the judge’s time permits and impartiality is not compromised,” noting that “complete separation of a judge from extrajudicial activities is neither possible nor wise.”

It does not follow, however, that every activity that involves the law or the legal system is considered permissible activity. Interpreting these provisions of the Code, Advisory Opinions No. 50 (“Appearance Before a Legislative or Executive Body or Official”) and No. 93 (“Extrajudicial Activities Related to the Law”) provide important guidance regarding ethically acceptable civic engagement and judicial speech. In Advisory Opinion No. 93, the Committee explained that “to qualify as an acceptable law-related activity, the activity must be directed toward the objective of improving the law, *qua* law, or improving the legal system or administration of justice, and not merely utilizing the law or legal system as a means to achieve an underlying social, political, or civic objective.” It follows, the Committee concluded, that “permissible law-related activities are limited to the kinds of matters a judge, by virtue of the judge’s judicial experience, is uniquely qualified to address,” and that either “serve[] the interests generally of those who use the legal system, rather than the interests of any specific constituency,” or “enhance[] the prestige, efficiency or function of the legal system itself.” In addition to activities addressing the legal process, permissible law-related activities may include those that are “directed toward substantive legal issues, where the purpose is to benefit the law and legal system itself rather than any particular cause or group.” Advisory Opinion No. 93 notes that, “[w]hether an activity benefits a specific constituency or the legal system as a whole will sometimes be a close question” related

to “how closely related the substance of the activity is to the core mission of the court of delivering unbiased, effective justice to all.”

In Advisory Opinion No. 50, the Committee interpreted Canon 4A(2), which provides that “a judge may consult with. . . an executive or legislative body or official. . . to the extent that it would generally be perceived that a judge’s judicial experience provides expertise in the area.” The Committee explained that “a judge properly may appear before a legislative or executive body or official. . . with respect to matters concerning the administration of justice. Examples would be matters relating to court personnel, budget, equipment, housing, and procedures. These matters are all vital to the judiciary’s housekeeping functions and the smooth operation of the dispensation of justice generally.” The Committee cautioned, however, that “a judge may appear at a public hearing before or consult with an executive body or official relative to matters *not* concerning judicial administration only to the extent that it would generally be perceived that a judge’s judicial experience provides special expertise in that area.” Advisory Opinion No. 50 counsels that when a subject matter “falls close to the line between the permissible and impermissible categories for consultation with public bodies,” a judge should consider “the basic purpose and intent of the canon, and the likelihood that litigation relating to the subject matter will come before the judge.”

The Code and related advisory opinions confirm that judges may speak about the history and role of the federal courts in our society, their operation and governance, the importance of jury service, suggestions to improve the legal system, and related topics. This includes, for example, public statements about the need for judicial security and funding sufficient for the courts to carry out their responsibilities. Such communications are by their nature “consistent with the obligations of judicial office” under Canon 4. These ethics principles also permit judges to speak or write about the independence of the judiciary, or advocate for the rule of law in general, including why both values are crucial to our system of government.

In addition, the Commentary to Canon 4 provides that “[w]ithin the boundaries of applicable law. . . a judge may express opposition to the persecution of lawyers and judges anywhere in the world if the judge has ascertained, after reasonable inquiry, that the persecution is occasioned by conflict between the professional responsibilities of the persecuted judge or lawyer and the policies or practices of the relevant government.” Although this Commentary addresses persecution specifically, the Committee believes the Code and its previous advisory opinions leave room, in at least some circumstances, for the measured defense of judicial colleagues from illegitimate forms of criticism and attacks that risk undermining judicial independence or the rule of law, whether or not they rise to the level of persecution. See, e.g., Chief Justice’s 2024 Year End Report on the Federal Judiciary, at p.5 (noting “four areas of illegitimate activity that. . . threaten the independence of judges on which the rule of law depends: (1) violence, (2) intimidation, (3) disinformation, and (4) threats to defy lawfully entered judgments”).

The Code and related Committee guidance also suggest a range of prudent limits judges should consider with respect to their civic engagement and extrajudicial activities. Canon 4, for example, cautions judges to avoid activities that “detract from the dignity of the judge’s office, interfere with the performance of the judge’s official duties, reflect adversely on the judge’s impartiality, [or] lead to frequent disqualification.” Canon 2A counsels that “a judge should act at all times in a manner that promotes public confidence in the impartiality of the judiciary.” Canon 3A(6) provides that judges should avoid “public comment on the merits of a matter pending or impending in any court.” Canon 5 prohibits a range of specifically political activity, including making speeches for political organizations or candidates, publicly endorsing or opposing candidates for political office, or making political contributions.

These general cautions in the Code do not lend themselves well to precise definitions, and even seemingly clear limits permit a variety of exceptions. For example, restrictions on “public comment” do not limit judges from explaining the legal process in general, promoting improvements to the law, discussing court procedures, or making “scholarly presentations made for purposes of legal education.” See Canon 3A(6). Likewise, the extrajudicial activities permitted under Canon 4 are not considered to be “political activity” as defined in Canon 5, see Canon 5C, though in Advisory Opinion 93 the Committee cautioned that “because of the ethical risks associated with any politically oriented activity, we construe permissible Canon 4 activities in this context narrowly, restricted to those activities most directly related to the law and legal process.”

The Committee’s past advice on related topics also suggests that considerations of tone, context, and form should inform a judge’s assessment concerning the propriety of civic engagement and judicial speech in general—including speech not intended for public attribution to the judge. And, as noted above, the Code suggests the need for greater caution and discretion when judges choose to speak or write publicly about topics further removed from the development of the law or the core functions of the judiciary.

Regarding the tone of extrajudicial writing, for example, the Committee has advised that judges “should avoid sensationalism and comments that may result in confusion or misunderstanding of the judicial function or detract from the dignity of the office.” See Advisory Opinion No. 55 (Extrajudicial Writings and Publications). It follows that, when addressing matters of public controversy or expressing critical commentary on a legal issue, a judge should favor reasoned discourse and respectful language over demeaning rhetoric or acerbic criticism that could “detract from the dignity of judicial office.” Further, advocacy by a judge that is directed towards people who are not judges may risk lending the prestige of office to a judge’s particular cause and may lead to questions about impartiality.

Regarding the context of civic engagement, Advisory Opinion No. 93 counsels that the need to protect impartiality “may preclude a judge’s participation in law-related activities or organizations concerning highly controversial subjects.” The Committee has advised, for example, that a judge may write a letter to the editor of a newspaper

but should avoid subjects that could raise doubts about impartiality in cases that may come before the judge. Similarly, choosing to speak at an event sponsored by a group that is clearly associated with one side of a controversial issue risks creating questions about impartiality. These concerns may be amplified when a judge's public statements also seek to influence the conduct of private parties. Because of the power and stature of federal judges, communications requesting that others adopt a judge's views or act in ways a judge approves may implicate Canon 2B, which provides that a judge must not "lend the prestige of the judicial office to advance the private interests of the judge."

Judges should also consider whether the chosen form, or method, of their civic engagement may lead to the public perception that the judicial position is being exploited to advance the private interests of the judge or others. In the context of judicial writing, for example, the Committee has advised that judges should "retain a measure of control" over the promotion of their writing to avoid exploitation of the judicial position for private gain. In general, civic engagement activity over which a judge retains a measure of control will create less ethical risk, for example, than writings or public statements that have been solicited by others for their own use or purposes. With respect to some particularly controversial topics, judges should be mindful that simply addressing certain topics might be viewed as taking a partisan position or reflecting a lack of impartiality.

In summary, the Code of Conduct and relevant Committee advisory opinions affirm that judges may choose to engage in a wide range of civic engagement activities, including speaking and writing on core judiciary matters such as advocacy for the rule of law and judicial independence. At the same time, judges should always exercise caution when expressing their personal views to preserve the integrity of the judiciary and to promote public confidence in the courts. The core principle unifying this guidance is, as provided in Canon 1, that judges should "uphold the integrity and independence of the judiciary" in all their activities, both on and off the bench.

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