COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

TO: Committee on Rules of Practice and Procedure

FROM: Catherine T. Struve, Reporter
Committee on Rules of Practice and Procedure

Daniel J. Capra, Reporter
Advisory Committee on Evidence Rules

RE: CARES Act Project Regarding Emergency Rules

DATE: June 1, 2021

This memo summarizes the continuing collaboration of the advisory committees in drafting rules to govern emergencies. It provides an update on the coordinated work of the advisory committees to develop rules for extreme situations that substantially impair the courts' ability to function in compliance with the existing rules of procedure, and to make those rules as uniform as possible. This report recounts the efforts of the advisory committees to adapt their proposals in light of the extremely helpful guidance provided by the Standing Committee at its January 2021 meeting.

As you know, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act, or "CARES Act,"[1] which among other things addresses the use of videoconferences and telephone

[1] Pub. L. No. 116-136, March 27, 2020, 134 Stat 281.

conferences in criminal cases during the period of the current national emergency relating to COVID-19.

In addition to addressing these criminal-procedure issues for purposes of the current emergency, Section 15002 of the CARES Act also assigns a broader project to the Judicial Conference and the Supreme Court for consideration within the Rules Enabling Act framework:

> The Judicial Conference of the United States and the Supreme Court of the United States shall consider rule amendments under chapter 131 of title 28, United States Code (commonly known as the "Rules Enabling Act"), that address emergency measures that may be taken by the Federal courts when the President declares a national emergency under the National Emergencies Act (50 U.S.C. 1601 et seq.).

CARES Act § 15002(b)(6).

As this provision indicates, the scope of the project is not limited to pandemics, but extends to other possible types of emergencies that might affect the courts. The advisory committees have invested hundreds of hours of work on this project. We have now reached the point where the advisory committees on Appellate, Bankruptcy, Civil, and Criminal Rules are seeking the Standing Committee's approval to release proposed emergency rules for public comment. These proposals are on track to take effect in December 2023 (if they are approved at each stage of the Enabling Act process and if Congress takes no contrary action).

This memo provides an overview of the collective work of the advisory committees to date. Each advisory committee is also filing a report to the Standing Committee on issues particular to that committee.[2] Here, we focus on the work that has been done to incorporate the suggestions made by Standing Committee members at the last meeting, and on the continuing efforts to propose rules that are uniform to the extent possible.[3]

I. Who Declares an Emergency?

At the time of the last meeting, the advisory committee proposals diverged on the question of who could declare a rules emergency. Each rule gave authority to the Judicial Conference to do so, but some rules also allowed certain courts and judges to do so as well. The consensus at the Standing Committee meeting was that the authority to declare a rules emergency should be left solely in the hands of the Judicial Conference. Consequently all of the proposed rules now leave authority solely with the Judicial Conference to declare a rules emergency.

[2] Those advisory committee reports are attached to this report.

[3] In our December 2020 memo, we discussed questions that a member of the Appellate Rules Committee had raised concerning the appropriateness of the role that the emergency rules would assign to the Judicial Conference. At the Appellate Rules Committee's spring meeting, that member stated that his concerns had been alleviated by the fact that the Judicial Conference will not be engaged in rulemaking but only in declaring a rules emergency. In light of this, and in light of the full airing this topic received during the Standing Committee's January 2021 meeting, we do not discuss it in this memo.

II. Definition of a Rules Emergency

The basic definition of a rules emergency is uniform in the four sets of rules. A rules emergency is found when:

> extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules.

In addition to the uniform basic definition of "rules emergency" set forth above, the Criminal Rule adds the requirement that "no feasible alternative measures would sufficiently address the impairment within a reasonable time." The other advisory committees found no reason to impose this extra requirement, given the very strict standards set forth in the basic definition of a rules emergency. The consensus at the Standing Committee meeting was that it is appropriate to place this language in the Criminal Rules alone, given the importance of the Criminal Rules that would be affected in a rules emergency, including rules designed to protect constitutional rights. Accordingly, this divergence has been retained.

III. The Less-Detailed Appellate Rule

The emergency Appellate Rule that was reviewed at the last Standing Committee meeting set few limits on the range of Appellate Rules that are subject to suspension in a rules emergency; nor did it state what the substitute rule (if any) would be when a rule is suspended. That version of the emergency Appellate Rule differed, in those respects, from the other three draft emergency rules. The Appellate Rules Committee justified this divergence on the ground that the emergency Appellate Rule proceeds from a different starting point than the other rules. Appellate Rule 2 already allows the court to suspend almost any rule in a particular case. Because the Appellate Rules proceed from the premise that all rules are subject to change in a case, the Appellate Rules Committee contended that it is not much different to authorize a change across a class of cases—at least in a rules emergency.

At the Standing Committee meeting, members appeared to accept the argument that the emergency Appellate Rule could be less detailed and more open-ended. But some members suggested that the Appellate Rule would be improved by including procedural requirements governing a rules declaration. Accordingly, the revised emergency Appellate Rule now submitted to the Standing Committee contains procedural features—concerning the Judicial Conference's declaration of an emergency, the content of the declaration, early termination of a declaration, and additional declarations – that largely track those in the other sets of proposed emergency rules.

IV. Subparagraph (b)(1)(B)

Other than the "no feasible alternative" language in Criminal Rule 62(a), discussed above, there is only one more disuniformity in the first two subdivisions of the Bankruptcy, Civil, and Criminal emergency rules (which we call the "uniformity provisions"). In subparagraph (b)(1)(B),

the Bankruptcy, Civil, and Criminal Rules all require the declaration of a rules emergency to specify any limitations on alteration of the rules that are listed (in later subdivisions) as subject to being changed in a rules emergency. But the language of the Civil Rule differs from the other two. The Civil Rule states that the declaration of emergency must "adopt all of the emergency rules in Rule 87(c) unless it excepts one or more of them." The Bankruptcy and Criminal Rules provide that a declaration of emergency must "state any restrictions on the authority granted in" the relevant subpart(s) of the emergency rule in question.

This difference is not dramatic. These rules end up in the same place—the emergency declaration has to specify which rules subject to change are actually going to be changed. But there is a subtle difference between requiring the declaration to adopt emergency rules subject to specific exception, and automatic applicability subject to a specified limitation. Asking the Judicial Conference to provide two different specifications, one for Civil and the other for Criminal and Bankruptcy, might strike some as unnecessarily complicated, especially given the circumstances under which by definition these declarations will be prepared. The ordinary justification for any difference in this project has been that there is more at stake for the Criminal Rules than for the other rule sets. But in this instance, the Bankruptcy and Criminal Rules are uniform.

V. Termination of Emergency Rules Order: Mandatory or Discretionary?

Each set of rules, including Appellate, provides for termination of an emergency declaration when the rules emergency conditions no longer exist. But there was a dispute about whether the rule should provide that the Judicial Conference must or may enter the termination order. This matter was discussed at the Standing Committee meeting, and referred back to the advisory committees for further discussion. At this time, the advisory committees all agree that the termination order should be discretionary. There are two rationales for that uniform determination: 1) It is problematic to impose an obligation on the Judicial Conference, and it is especially anomalous to require a termination order when the initial declaration is itself discretionary; and 2) Discretion is warranted because in many situations the end of the emergency will likely occur near the built-in termination date of the emergency declaration itself—and the Judicial Conference should have the discretion to simply allow the time to run out.

VI. Drafting for the Possibility that the Judicial Conference May Be Unable to Declare a Rules Emergency

At the January Standing Committee meeting, the Committee discussed a suggestion that the rule should address the possibility that the Judicial Conference might be so affected by the emergency that it would be unable to declare a rules emergency. The question is whether the emergency rules should provide for the possibility of the Judicial Conference being unable to act. At the meeting, most of the members who spoke about the proposal thought such a provision to be unnecessary, but some members thought it worthy of further consideration. Accordingly, further discussions of the issue occurred in spring 2021 with respect to each emergency rule. None of those discussions revealed support for drafting a 'doomsday' provision and, ultimately, each advisory committee approved the emergency rules without one. The rationales for that rejection appeared to be the following: 1) It seems highly unlikely that the Executive Committee of the

Judicial Conference would be disabled for an extended period of time from making an emergency declaration; 2) if there were a catastrophe so grave as to incapacitate virtually everyone for a lengthy period of time, there would be much more to worry about than a rules emergency; and 3) difficult policy and drafting decisions would have to be made about who would decide whether the Executive Committee was unable to act, and what would happen if decisionmakers around the country reached differing views on that question.

VII. "Soft Landing" Provision

The Bankruptcy, Civil, and Criminal Advisory Committees have spent considerable time discussing what should happen when a proceeding that has been conducted under an emergency rule continues after the emergency has terminated. The proposed Criminal Rule 62(c) provides:

> **(c) Continuing a Proceeding After a Termination.** Termination of a declaration for a court ends its authority under (d) and (e). But if a particular proceeding is already underway and resuming compliance with these rules for the rest of the proceeding would not be feasible or would work an injustice, it may be completed with the defendant's consent as if the declaration had not terminated.

The midstream change in criminal cases could cover such important issues as remote testimony and public access to criminal proceedings. In contrast, the midstream change in bankruptcy cases would affect time limits and the midstream change in civil cases would affect methods of service and deadlines for post judgment motions. It would not make sense to try to draft a single, uniform "soft landing" provision to address all of these types of issues. Accordingly, the Bankruptcy and Civil Committees decided to place "soft landing" provisions directly in each of the individual provisions that would operate during a rules emergency—each tailored to the specific interests at stake.

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MEMORANDUM

TO: Honorable John Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Honorable Jay Bybee, Chair
Advisory Committee on Appellate Rules

RE: Emergency Appellate Rule 2 and Appellate Rule 4

DATE: June 2, 2021

In accordance with the CARES Act, the Advisory Committee established a subcommittee to consider what amendments, if any, would be appropriate to deal with future emergencies. The members of that subcommittee began by reviewing every Federal Rule of Appellate Procedure to evaluate which ones might be appropriate candidates for amendment. The subcommittee ultimately concluded that the best approach for the Appellate Rules was simply an amendment to the existing Federal Rule of Appellate Procedure 2.

Existing Rule 2 provides:

Rule 2. Suspension of Rules

On its own or a party's motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these Rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).

That is, under current law, a court of appeals is empowered to suspend *any* provision of the Federal Rules of Appellate Procedure in a particular case, except those that govern the time to appeal, the time to seek permission to appeal, and the time to review administrative action. This broad suspension power is nothing new: it has been a part of the Federal Rules of Appellate Procedure from the very beginning of those Rules.

At the January 2021 meeting, the Standing Committee considered a discussion draft that would have amended Rule 2 to

- empower not only the Judicial Conference but also each court of appeals to declare a rules emergency;
- empower the chief circuit judge to act on the court's behalf; and
- permit broader suspension than current Rule 2—reaching all cases during a rules emergency and permitting the suspension of non-statutory time limits to appeal or otherwise seek review.

The Standing Committee seemed comfortable with broadening the suspension authority. However, in large part due to the importance of uniformity, the Standing Committee preferred to vest the power to declare a rules emergency in the Judicial Conference alone.

The Standing Committee also favored the inclusion of a sunset provision and was concerned that the discussion draft did not clearly state what happens once a rule is suspended.

The Advisory Committee incorporated this feedback into a proposal that it now asks for approval to publish for public comment. This proposal vests the power to declare a rules emergency solely in the Judicial Conference. It includes a sunset provision. And it makes explicit, using language from the existing Rule 2, that when a rule is suspended, the court may order proceedings as it directs.

There was no dissent in the Advisory Committee. The member of the Advisory Committee who had previously raised concerns about the authority of the Judicial Conference—concerns that were discussed at the January meeting of the Standing Committee—stated that his prior concerns about authority were largely addressed. Under this proposal, the Judicial Conference simply declares the emergency exists. The court can then fall back on its preexisting power once the rules back off.

Here is the proposal as revised after review by the style consultants and coordination with reporters for other advisory committees to achieve as much uniformity as possible:

Rule 2. Suspension of Rules

(a) **In a Particular Case.** On its own or a party's motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).

(b) In an Appellate Rules Emergency.

(1). *Conditions for an Emergency.* The Judicial Conference of the United States may declare an Appellate Rules emergency if it determines that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules.

(2) *Content.* The declaration must:

(A) designate the circuit or circuits affected; and

(B) be limited to a stated period of no more than 90 days.

(3) *Early Termination.* The Judicial Conference may terminate a declaration for one or more circuits before the termination date.

(4) Additional Declarations. Additional declarations may be made under Rule 2(b).

(5) Proceedings in a Rules Emergency. When a rules emergency is declared, the court may:

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

(B) order proceedings as it directs.

Committee Note

Flexible application of the Federal Rules of Appellate Procedure, including Rule 2, has enabled the courts of appeals to continue their operations despite the coronavirus pandemic. Future emergencies, however, may pose problems that call for broader authority to suspend provisions of the Federal Rules of Appellate Procedure. For that reason, the amendment adds a new subdivision authorizing broader suspension authority when the Judicial Conference of the United States declares an Appellate Rules emergency. The amendment is designed to add to the authority of courts of appeals; it should not be interpreted to restrict the authority previously exercised by the courts of appeals.

The circumstances warranting the declaration of an Appellate Rules emergency mirror those warranting a declaration of a Civil Rules emergency and a Bankruptcy Rules emergency: extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, that substantially impair the court's ability to perform its functions in compliance with these rules. A declaration must designate the circuit or circuits affected. It must also have a

sunset provision so that the declaration is in effect for no more than 90 days unless the Judicial Conference makes an additional declaration. The Judicial Conference may also terminate the declaration for one or more circuits before the termination date.

When a rules emergency is declared, the court of appeals may suspend in all or part of that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2). This enables the court of appeals to suspend the time to appeal or seek review set only by a rule, but it does not authorize the court of appeals to suspend jurisdictional time limits imposed by statute. Sometimes when a rule is suspended, there is no need to provide any alternative to the suspended rule. For example, if the requirement of submitting paper copies of briefs is suspended, it may be enough to rely on electronic submissions. However, to deal with situations in which an alternative is required, the amendment empowers the court to "order proceedings as it directs," the same language that existed in Rule 2—now Rule 2(a)—before this amendment.

The Advisory Committee also seeks approval to publish for public comment a proposed amendment to Appellate Rule 4. This proposed amendment is designed to make Appellate Rule 4 operate smoothly with Emergency Civil Rule 6(b)(2) if that emergency Civil Rule is ever in effect, while not making any change to the operation of Appellate Rule 4 at any other time. Long effort went into trying to craft Emergency Civil Rule 6(b)(2) in a way that did not require any changes to the Appellate Rules, but every attempt ran into considerable complexity, considerable difficulty, or both.

Some background is useful to put the problem—and the proposed solution—in context.

Certain post-judgment motions—for example, a renewed motion for judgment as a matter of law under Civil Rule 50(b) and a motion for a new trial under Civil Rule 59—may be made in the district court shortly after judgment is entered. Recognizing that it makes sense to await the district court's decision on these motions before pursuing an appeal, Appellate Rule 4(a)(4)(A) resets the time to appeal from the judgment so that it does not run until entry of an order disposing of the last such motion.

Appellate Rule 4 gives this resetting effect only to motions that are filed within the time allowed by the Civil Rules. For most of these motions, the Civil Rules require that the motion be filed within 28 days of the judgment. See Civil Rules 50(b) and (d); 52(b); and 59(b), (d), and (e). The time requirements for a Civil Rule 60(b) motion, however, are notably different. It must be filed "within a reasonable time," and for certain Civil Rule 60(b) motions, no more than a year after judgment. See Civil Rule 60(c)(1) ("A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.").

For this reason, Appellate Rule 4 does not give resetting effect to all Civil Rule 60(b) motions that are filed within the time allowed by the Civil Rules, but only to those Civil Rule 60(b) motions that are filed within 28 days of the entry of judgment. That is why most of the motions listed in Appellate Rule 4(a)(4)(A) are governed simply by the general requirement that they be

filed within the time allowed by the Civil Rules, but Appellate Rule 4(a)(4)(A)(vi) adds the requirement that a Civil Rule 60(b) motion has resetting effect only if "filed no later than 28 days after the judgment is entered."

Significantly, Civil Rule 6(b)(2) prohibits the district court from extending the time to act under Rules 50(b) and (d); 52(b); 59(b), (d), and (e); and 60(b). That means that when Appellate Rule 4 requires that a motion be filed within the time allowed by the Civil Rules, the time allowed by those Rules for motions under Rules 50(b) and (d); 52(b); and 59(b), (d), and (e) will be 28 days—matching the 28-day requirement in Appellate Rule 4(a)(4)(A)(vi) applicable to Rule 60(b) motions.

Enter proposed Emergency Civil Rule 6(b)(2). That emergency rule would authorize district courts to grant extensions that they are otherwise prohibited from granting. Under it, district courts would be able to grant extensions to file motions under Civil Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). For all these motions except Civil Rule 60(b) motions, Appellate Rule 4 would continue to work seamlessly. Appellate Rule 4 requires only that those motions be filed "within the time allowed by" the Civil Rules, and a motion filed within a properly granted extension is filed "within the time allowed by" those rules. An emergency Civil Rule is no less a Civil Rule simply because it is operative only in a Civil Rules emergency.

But if Appellate Rule 4 were not amended, Appellate Rule 4 would not work seamlessly with the Emergency Civil Rule for Rule 60(b) motions because the 28-day requirement in Rule 4(a)(4)(A)(vi) would not correspond to the extended time to file other resetting motions. For this reason, the proposed amendment to Appellate Rule 4 replaces the phrase "if the motion is filed no later than 28 days after the judgment is entered" with the phrase "within the time allowed for filing a motion under Rule 59."

Significantly, this proposed amendment to Appellate Rule 4 is not itself an emergency rule, but instead would be a regular, ordinary part of the Appellate Rules. At all times that no Civil Rules emergency has been declared, the amended Rule 4 would function exactly as it has without the proposed amendment. A Civil Rule 60(b) motion would have resetting effect only if it were filed within the time allowed for filing a motion under Civil Rule 59—which is 28 days.

When a Civil Rules emergency has been declared, however, if a district court grants an extension of time to file a Civil Rule 59 motion and a party files a Civil Rule 60(b) motion, that Civil Rule 60(b) motion has resetting effect so long as it is filed within the extended time set for filing a Civil Rule 59 motion. The Civil Rule 60(b) motion has this resetting effect even if no Civil Rule 59 motion is filed. It does this by replacing the phrase "no later than 28 days after the judgment is entered" in Rule 4(a)(4)(A)(vi) with the phrase "within the time allowed for filing a motion under Rule 59."

Here is the proposed amendment to Rule 4:

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

* * *

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure—and does so within the time allowed by those rules—the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed ~~no later than 28 days after the judgment is entered~~ within the time allowed for filing a motion under Rule 59.

Committee Note

The amendment is designed to make Rule 4 operate smoothly with Emergency Civil Rule 6(b)(2) if that emergency Civil Rule is ever in effect, while not making any change to the operation of Rule 4 at any other time. It does this by replacing the phrase "no later than 28 days after the judgment is entered" in Rule 4(a)(4)(A)(vi) with the phrase "within the time allowed for filing a motion under Rule 59."

Certain post-judgment motions—for example, a renewed motion for judgment as a matter of law under Civil Rule 50(b) and a motion for a new trial under Civil Rule 59—may be made in

the district court shortly after judgment is entered. Recognizing that it makes sense to await the district court's decision on these motions before pursuing an appeal, Rule 4(a)(4)(A) resets the time to appeal from the judgment so that it does not run until entry of an order disposing of the last such motion.

Rule 4 gives this resetting effect only to motions that are filed within the time allowed by the Civil Rules. For most of these motions, the Civil Rules require that the motion be filed within 28 days of the judgment. See Civil Rules 50(b) and (d); 52(b); 59(b), (d), and (e). The time requirements for a Civil Rule 60(b) motion, however, are notably different. It must be filed "within a reasonable time," and for certain Civil Rule 60(b) motions, no more than a year after judgment. For this reason, Rule 4 does not give resetting effect to all Civil Rule 60(b) motions that are filed within the time allowed by the Civil Rules, but only to those Civil Rule 60(b) motions that are filed within 28 days of the entry of judgment. That is why most of the motions listed in Rule 4(a)(4)(A) are governed simply by the general requirement that they be filed within the time allowed by the Civil Rules, but Rule 4(a)(4)(A)(vi) adds the requirement that a Civil Rule 60(b) motion has resetting effect only if "filed no later than 28 days after the judgment is entered."

Significantly, Civil Rule 6(b)(2) prohibits the district court from extending the time to act under Rules 50(b) and (d); 52(b); 59(b), (d), and (e); and 60(b). That means that when Rule 4 requires that a motion be filed within the time allowed by the Civil Rules, the time allowed by those Rules for motions under Rules 50(b) and (d); 52(b); and 59(b), (d), and (e) will be 28 days—matching the 28-day requirement in Rule 4(a)(4)(A)(vi) applicable to Rule 60(b) motions.

However, Emergency Civil Rule 6(b)(2)—which would be operative only if the Judicial Conference of the United States were to declare a Civil Rules emergency under Civil Rule 87—authorizes district courts to grant extensions that they are otherwise prohibited from granting. If that emergency Civil Rule is in effect, district courts may grant extensions to file motions under Civil Rules 50(b) and (d); 52(b); 59(b), (d), and (e); and 60(b). For all these motions except Civil Rule 60(b) motions, Rule 4 works seamlessly. Rule 4 requires only that those motions be filed "within the time allowed by" the Civil Rules, and a motion filed within a properly granted extension is filed "within the time allowed by" those rules. An emergency Civil Rule is no less a Civil Rule simply because it is operative only in a Civil Rules emergency.

Without amendment, Rule 4 would not work seamlessly with the Emergency Civil Rule for Rule 60(b) motions because the 28-day requirement in Rule 4(a)(4)(A)(vi) would not correspond to the extended time to file other resetting motions. For this reason, the amendment replaces the phrase "if the motion is filed no later than 28 days after the judgment is entered" with the phrase "within the time allowed for filing a motion under Rule 59."

At all times that no Civil Rules emergency has been declared, the amended Rule 4 functions exactly as it did prior to the amendment. A Civil Rule 60(b) motion has resetting effect only if it is filed within the time allowed for filing a motion under Civil Rule 59—which is 28 days.

When a Civil Rules emergency has been declared, however, if a district court grants an extension of time to file a Civil Rule 59 motion and a party files a Civil Rule 60(b) motion, that Civil Rule 60(b) motion has resetting effect so long as it is filed within the extended time set for filing a Civil Rule 59 motion. The Civil Rule 60(b) motion has this resetting effect even if no Civil Rule 59 motion is filed.

Attachment B2

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

TO: Honorable John D. Bates, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Dennis R. Dow, Chair
Advisory Committee on Bankruptcy Rules

RE: New Bankruptcy Rule 9038 (Bankruptcy Rules Emergency)

DATE: May 24, 2021

At the Advisory Committee's spring meeting, members unanimously approved for publication new Rule 9038, which would allow extensions of time limits in the Bankruptcy Rules to be granted if the Judicial Conference declared a Bankruptcy Rules emergency. The draft of the rule that was approved was the result of extensive work by a special Emergency Rule Subcommittee chaired by Judge Melvin Hoffman; consultation among the rules committees' reporters, facilitated by Professor Dan Capra; valuable feedback that the Standing Committee provided at its January 2021 meeting; stylistic suggestions offered by the style consultants; and careful deliberation and discussion by members of the Advisory Committee.

Subdivisions (a) and (b)

Much of the Advisory Committee's discussion of this rule at the April meeting was devoted to an attempt to respond to the Standing Committee's comments and to make subdivisions (a) and (b) of the rule as uniform as possible with the emergency rules being considered by the other

advisory committees. As indicated in Professor Capra's and Professor Struve's memo, the effort to achieve uniformity was largely successful. Most significantly, the Advisory Committee agreed to limit the authority to declare a rules emergency to the Judicial Conference of the United States, thereby bringing the bankruptcy rule into line with the other emergency rules. The Advisory Committee also agreed to make permissive the Judicial Conference's authority to terminate a rules emergency declaration early, and it adhered to its earlier decision not to include a "no feasible alternative" requirement in the definition of a rules emergency.

In two limited respects, Rule 9038(a) and (b) differ from one or more of the other emergency rules. All of the emergency rule drafts presented at the January Standing Committee meeting referred to emergencies in one or more "courts." In the various sets of federal rules, however, "court" usually means the judge presiding over a case. Bankruptcy Rule 9001(4), for example, provides that "court" as used in the rules means "the judicial officer before whom a case or proceeding is pending." That meaning, however, is not what is intended in the emergency rules when they refer to "the court or courts affected" by an emergency.

Following the Standing Committee's discussion of this issue in January, the advisory committees were asked to consider whether "court" should be changed to "district" in the emergency rules. The other committees concluded that there was no need to make that change because in context the meaning of the word "court" is clear. Our Advisory Committee agreed that the use of "court" does not create an ambiguity in the bankruptcy emergency rule. However, to avoid inconsistency with the Rule 9001 definition, it accepted the subcommittee's recommendation to substitute "bankruptcy court" for "court" in Rule 9038.

Professors Capra and Struve also point out that subparagraph (b)(1)(B) in the Bankruptcy and Criminal Rules differs from that subparagraph in the civil rule by requiring the emergency declaration to "state any restrictions on the authority granted," rather than stating—as the Civil Rule does—that a declaration of emergency must "adopt all of the emergency rules in Rule 87(c) unless it excepts one or more of them." Insofar as the bankruptcy emergency rule is concerned, this difference from the civil rule is appropriate because the bankruptcy rule does not create new rules in subdivision (c); it only authorizes deviation from the existing rules' time periods. It would make no sense therefore to require "adoption" of the emergency rules in (c).

Subdivision (c)

Subdivision (c) of the emergency rule is unique to bankruptcy, and there was no attempt to achieve uniformity here. Unlike some of the other emergency rules, Rule 9038 leaves up to the chief and presiding judges the decision whether to deviate from the existing rules once the Judicial Conference has declared a rules emergency. This authorization is not a backdoor attempt to retain in the bankruptcy courts some degree of authority following the decision to allow only the Judicial Conference to declare a rules emergency. Instead, it results from the underlying purpose of the rule and the Advisory Committee's determination of the type of emergency rule that is needed.

Rule 9038 is basically an expansion of existing Bankruptcy Rule 9006(b), which authorizes an individual bankruptcy judge to enlarge time periods for cause. During this pandemic, many courts have relied on this provision to grant extensions of time. The existing rule, however, does not fully meet the needs of an emergency situation. First, it has some exceptions—time limits that cannot be expanded. One of these is the time limit for holding meetings of creditors, a limitation that either caused problems for courts during the current emergency or was honored in the breach. Also, it probably does not authorize an extension order applicable to all cases in a district. Rule 9038 is intended to fill in these gaps for situations in which the Judicial Conference declares a rules emergency. The chief bankruptcy judge can grant a district-wide extension for any time periods specified in the rules, and individual judges can do the same in specific cases.

The Advisory Committee concluded that this scheme is preferable to one in which the Judicial Conference would specify which rules or deadlines could be altered. There are literally hundreds of time periods in the Bankruptcy Rules, and the Judicial Conference may not be in the best position to identify which ones need extending. Furthermore, even with a nationwide emergency, circumstances may vary from one place to another. To use the same meeting of creditors example, one district might be well positioned to immediately move to remote meetings, while another may encounter a significant delay in making that shift. As a result, the first district may be able to comply with the existing deadline, while the second one will not be able to. Judges at the local level can best assess which time periods need extending.

Except for stylistic changes, subdivision (c) remains essentially the same as it was in January. Subdivisions (c)(1) and (c)(2) grant the authority, during declared Bankruptcy Rules emergencies, to extend or toll deadlines to the chief bankruptcy judge of a district on a district- or division-wide basis or to the presiding judge in specific cases. It also applies to directives to take quick action, such as rule provisions that require action to be taken "promptly," "forthwith," "immediately," or "without delay."

Subdivision (c)(3), which addresses the termination of extensions and tolling, provides a "soft landing" upon the termination of a Bankruptcy Rules emergency. It looks to three possible dates for a time period to expire. An extended or tolled time period will terminate either 30 days after the rules-emergency declaration terminates or when the original time period would have expired, whichever is later—unless the extension or tolling itself expires sooner than 30 days after the declaration's termination. In that case, the extended expiration date will apply.

Subdivision (c)(4) allows fine tuning in individual cases of extensions of time or tollings that have been granted. And subdivision (c)(5) excepts from the authority to extend time periods any time provision imposed by statute. The Bankruptcy Rules Enabling Act, 28 U.S.C. § 2075, does not authorize the Bankruptcy Rules to supersede conflicting laws. Accordingly, a time limit in a rule that is a restatement of a deadline imposed by statute or an incorporation by reference of such a deadline may not be extended under this rule. However, if a statute merely incorporates by reference a time period imposed by a rule, that period may be extended.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Robert M. Dow, Jr., Chair
Advisory Committee on Civil Rules

RE: New Civil Rule 87 (Civil Rules Emergency)

DATE: May 21, 2021

The sustained efforts that brought a great measure of uniformity among all of the proposed rules for rules emergencies are described in the joint section of this Report. This section explains the considerations that require nonuniformity in three aspects of Rule 87.

These three areas of nonuniformity appear in rule text in this order: (1) Rule 87(b)(1)(B), which describes Judicial Conference responsibility to select which of the emergency rules to authorize by a declaration; (2) Emergency Rules 4 and 6(b)(2) themselves; and (3) the provisions for completing action authorized by an order entered under a declaration of a civil rules emergency after the declaration ends. Explaining these aspects of Rule 87 follows a different order because understanding the nature of the emergency rules and the rules for completing authorized action after a declaration ends is necessary to understand the provision for selecting which emergency rules to include in a declaration.

The Emergency Rules. Nonuniformity with other sets of rules is a given in adopting Emergency Civil Rules. The rules actually proposed were identified by reading through all Civil Rules, looking for texts that might raise obstacles to effective procedure in emergency circumstances. Each reporter and some subcommittee members undertook this task. Long initial lists were generated. Careful examination and subcommittee deliberations, however, continually reduced the list to a small set of rules. This process was influenced by reports about widespread success in developing the inherent flexibility of the rules to meet the problems arising from the Covid-19 pandemic. The decision to proceed with Emergency Rules 4 and 6(b)(2), indeed, rested on examination of the rules texts for barriers to effective action, not on reports of actual problems in practice.

Rule 87(c)(1) includes several Emergency Rules 4. Each authorizes a court to order service by a method that is reasonably calculated to give notice. A court order is required, ordinarily resting on a case-specific evaluation of the emergency circumstances; the nature of the case; and the nature of the parties--particularly the defendant, recognizing that some methods of service may be well designed to provide notice to some defendants but not others. It may be, however, that some emergency circumstances might justify a standing order that provides general authority for service by a specified means, such as by commercial carrier with confirmation of delivery. Only some parts of Rule 4 are brought within the Emergency Rules. Rules 4(e), (h)(i), (i), and (j)(2) address service on individuals'; corporations, partnerships, and other associations; the United States and its agencies, officers, and employees; and state or local governments. One part of Rule 4(g) is also included, providing for service on a minor or incompetent person in a judicial district of the United States. The omitted parts of Rule 4 all tie to service in a foreign country or service on a foreign state or its subdivision. These situations are pervasively affected by international agreements or the Foreign Sovereign Immunities Act and seemed better left out of the emergency rules.

Rule 87(c)(2) creates Emergency Rule 6(b)(2). Rule 6(b)(2) qualifies the general power in Rule 6(b)(1) to extend a time to act by an impermeable barrier: "A court must not extend the time to act under Rules 50(b), 52(b), 59(b), (d), and (e), and 60(b)." The time to act on post-judgment motions under Rules 50, 52, and 59 is set at 28 days, reflecting the powerful concern for finality that arises once judgment is entered. If the judgment is to be upset by the trial court, it should be done promptly. Whether or not the trial court grants relief, it is important to set or reset appeal time to avoid a lengthy limbo of uncertainty. Rule 60(b) covers motions for relief from judgment on grounds that are not available within the 28-day period for the more regular post-judgment motions, although motions that seek relief available under Rules 52 and 59 – perhaps even Rule 50(b) – are frequently made within 28 days and captioned under Rule 60(b). Rule 60(c)(1) sets the time for Rule 60(b) motions as "a reasonable time – and for reasons (1), (2), and (3) no more than a year after entry of the judgment." (Subdivision (1) covers mistake, inadvertence, surprise, or excusable neglect; (2) covers newly discovered evidence; and (3) covers fraud, misrepresentation, or misconduct.)

The basic purpose of Emergency Rule 6(b)(2) is to substitute "may extend" for "must not extend" the time to act. Emergency circumstances may make it extraordinarily difficult or literally impossible to prepare and file a motion within the prescribed periods. The opportunity to seek relief from the trial court is an important part of a structure that integrates trial courts with the

courts of appeals. Creating authority for the trial judge to preserve the opportunity for post-judgment relief is important for the trial court, the parties, and the court of appeals.

The clear basic purpose of Emergency Rule 6(b)(2) is made complicated, however, by the interdependence of post-judgment relief in the trial court with the rules that set appeal time. The basic framework is provided by Appellate Rule 4(a)(4)(A). A timely motion under Rules 50, 52, and 59 restarts appeal time "for all parties from the entry of the order disposing of the last such remaining motion." A special provision for Rule 60 motions, Rule 4(a)(4)(A)(vi), gives the same effect if the motion "is filed no later than 28 days after the judgment is entered." This provision reflects the prospect that in most circumstances a Rule 60(b) motion will be timely – and for that matter is likely to be needed only – after 28 days from the judgment. In the interest of securing prompt review of the judgment, a Rule 60(b) motion resets appeal time only when it is made in the time authorized for the more common Rule 50, 52, and 59 motions. After that, a timely Rule 60(b) motion supports appeal from the order that grants or denies the motion, but does not support review of the judgment itself.

Integrating Emergency Civil Rule 6(b)(2) with Appellate Rule 4(a)(4)(A) proved a challenging task. Rule 4 is read and applied with great care. The times reflected in Rule 4 are mandatory and jurisdictional. A mistake in calculating appeal time is fatal. Rule 4 has been revised more than once to provide relief from mistakes made by those not intimately familiar with its terms. Many exchanges, and more than a few missteps, were needed to craft the provisions of Emergency Rule 6(b)(2)(B) that integrate the effects of a motion to extend the time to act with Rule 4. The task was made easier by the proposal of the Appellate Rules Committee to amend Rule 4(a)(4)(A)(vi), striking the explicit provision for a Rule 60 motion made within 28 days and substituting "if the motion is filed within the time allowed for filing a motion under Rule 59." But even with that help, Rule 6(b)(2)(B) remains an inseverable whole.

Completing Acts After a Declaration Ends. The differences between the several Emergency Rules 4 and Emergency Rule 6(b)(2) account for a second area of nonuniformity. Earlier Rule 87 drafts included a common subdivision (d) that authorized completion of an act authorized by an order entered under an emergency rule but not completed when the declaration ends. The test was borrowed from the Rule 86(a)(2) provision for applying rule amendments to proceedings pending on the effective date of the amendment "unless the court determines that applying them in a particular action would be infeasible or work an injustice." The analogy never seemed precise. More importantly, further reflection showed that the same standard was not suitable for the methods of serving process as for motions for post-judgment relief. Once a motion is made under Emergency Rule 6(b)(2), it is imperative to maintain the complete system for integrating the motion with appeal time, starting with the provision that resets appeal time to run from an order denying any extension of the time to make a post-judgment motion and on through the rest. That is accomplished by Emergency Rule 6(b)(2)(C). The methods of serving process do not encounter problems similar to the need to integrate with Appellate Rule 4. If a declaration of a rules emergency ends after an order authorizes service by a method or methods not authorized by Civil Rule 4, the circumstances may make it appropriate to allow completion of service under the order, to modify the order while still allowing some specified means not authorized by Rule 4, or to withdraw the order and fall back on the ordinary methods authorized by Rule 4.

Judicial Conference Selection of Emergency Rules. The character of Emergency Rules 4 and 6(b)(2) determines the reasons to depart in Rule 87(b)(1)(B) from the formula used in Criminal Rule 62(b)(1)(B) and Bankruptcy Rule 9038(b)(1)(B): "state any restrictions on the authority granted in [(c)]."

The Emergency Rules 4 provide that a court may order service of process by a method not authorized by the corresponding subdivision of Rule 4. It makes sense to leave the Judicial Conference free to select which categories of defendants are made eligible for service by an order that depends on the particular emergency and, ordinarily, the specific circumstances of a specific case. It does not make sense to impose on the Judicial Conference the responsibility to consider and evaluate the possibility of defining more specific "restrictions" on the methods of service that may be appropriate in specific circumstances. What is appropriate is a choice of which of the Emergency Rules 4 to authorize, not some further limit.

Emergency Rule 6(b)(2) presents an even more compelling need to authorize all of the rule, without any thought of "restrictions." The intricate integration of this rule with Appellate Rule 4(a)(4)(A) cannot be severed by authorizing some parts but not others.

Are These Emergency Civil Rules Necessary? One final caution. Rule 87 is proposed for publication as part of a package with the emergency provisions to be published for the Appellate, Bankruptcy, and Criminal Rules. Much may be learned from public comments and testimony. It may be that additional Emergency Civil Rules should be added, perhaps requiring adjustments in the general provisions. Or it may be that in the end, it will seem better to abandon Rule 87, relying instead on amendments of any Civil Rules that can be revised to adjust for emergency circumstances in ways that reflect the success that most of the Civil Rules have met during the COVID-19 pandemic. Those choices can be made after completion of the publication process.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
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WASHINGTON, D.C. 20544

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Raymond M. Kethledge, Chair
Advisory Committee on Criminal Rules

RE: New Criminal Rule 62 (Criminal Rules Emergency)

DATE: June 1, 2021

This report presents the Advisory Committee's draft emergency rule—Rule 62. As noted in the Advisory Committee's December 2020 report to the Standing Committee, the draft reflects input from the bench and bar, including comments solicited from all chief judges, as well as feedback from judges and attorneys from districts hard hit by hurricanes or the pandemic at a day-long miniconference held last summer. Several principles have guided the Advisory Committee's work, namely: (1) the rules protect constitutional and statutory rights and other interests, and should not be set aside lightly;[1] (2) any new rule for emergencies must address the range of circumstances that might arise; (3) consideration of the relevant provisions of the CARES Act but is not based on them; and (4) the rule should be developed in consultation with people involved in these issues on the ground.

[1] Indeed, one member has consistently dissented from the conclusion that the Advisory Committee should draft an emergency rule at all, because among other reasons it would inevitably tend to normalize exceptions to the critical safeguards provided by the Criminal Rules.

The Advisory Committee presented a draft of Rule 62 to the Standing Committee at its last meeting. Since then, the Advisory Committee continued to revise the draft, in part to respond to input from members of the Standing Committee and others. At its May 11 meeting, the Advisory Committee approved the draft rule and note, with the understanding that language in the committee note for the last paragraph of the rule would be circulated to the Advisory Committee for approval by email. The proposal included with this report reflects the changes approved unanimously by email on May 25 along with style changes.[2] Additional changes suggested after the meeting are bracketed for consideration by the Standing Committee.

After a brief review of the uniform provisions of all of the proposed emergency rules, this report focuses on subdivisions (c), (d), and (e), which are unique to the draft emergency rule for criminal proceedings.

I. Subdivisions (a) and (b): The Uniform Provisions

With guidance from Professor Capra and assistance from the style consultants, the reporters of the various advisory committees have coordinated the language among their committees' proposed rules to make them uniform when it made sense to do so. Subdivisions (a) and (b) of the proposed Rule 62 contain these uniform provisions.[3]

As discussed at the last Standing Committee, however, the proposed Criminal Rule contains a second provision that the other rules do not. That provision is (a)(2), which now requires a determination that "no feasible alternative measures would sufficiently address the impairment within a reasonable time." This provision ensures that the emergency provisions in subdivisions (d) and (e) would be invoked only as a last resort, given the critical interests protected by the existing rules of criminal procedure.

The current language of (a)(2) incorporates a suggestion made at the last Standing Committee meeting. There a member suggested that the Advisory Committee revise (a)(2) to require that any feasible alternative could "sufficiently address" rather than "eliminate" the impairment creating an emergency. The Advisory Committee agreed with that suggestion.

The committee note for paragraph (a)(2) explains:

> [P]aragraph (a)(2) requires that even if the Judicial Conference determines the extraordinary circumstances defined in (a)(1), it cannot declare a Criminal

[2] Several minor corrections involving grammar, punctuation, and capitalization were made to the committee note as well.

[3] No one noticed until after the committee's meeting that the inclusion of the phrase "from the date of the declaration" in (b)(1)(C) as approved by the Advisory Committee was not part of the uniform language the other advisory committees had adopted. After the meeting, Professor Capra pointed out that the phrase did not appear in the other rules and that the Judicial Conference should determine when the 90-day period begins. Because it was clear that the Advisory Committee had intended this provision to be uniform, the chair and the reporters agreed that the inconsistent phrase should be deleted from the version presented to the Standing Committee.

> Rules emergency unless it also determines that no feasible alternative measures would sufficiently address the impairment and allow the affected court to perform its functions in compliance with the rules within a reasonable time. For example, in the districts devastated by hurricanes Katrina and Maria, the ability of courts to function in compliance with the rules was substantially impaired for extensive periods of time. But there would have been no Criminal Rules emergency under this rule because those districts were able to remedy that impairment and function effectively in compliance with the rules by moving proceedings to other districts under 28 U.S.C. § 141. Another example might be a situation in which the judges in a district were unable to carry out their duties as a result of an emergency that rendered them unavailable, but courthouses remained safe. The unavailability of judges would substantially impair that court's ability to function in compliance with the rules, but temporary assignment of judges from other districts under 28 U.S.C. § 292(b) and (d) would eliminate that impairment.

II. Subdivision (c): Effect of Termination

Subdivision (c) provides a narrow exception for certain proceedings commenced under a declaration of emergency but not yet completed when the declaration terminates. If the court finds that it cannot complete such a proceeding in compliance with the rules, or that resuming compliance with the rules would work an injustice, the court may, with the defendant's consent, complete the proceeding using procedures authorized by the emergency rule. The rule recognizes the need for some flexibility during the transition period, while also recognizing the importance of returning promptly to compliance with the rules.

Since the Standing Committee's last meeting, the Advisory Committee has made several changes to this provision, which was then subdivision (e). The style consultants as well as others were uncertain whether the term "these rules" in this provision referred to the preceding parts of Rule 62, all the rules of criminal procedure other than Rule 62, or both. To clarify that "these rules" means rules other than Rule 62, as in (a), the Advisory Committee approved two changes in the text and added a new paragraph to the committee note. First, the provision was moved up from its former location at the end of the rule, to become subdivision (c), nearer to the other reference to "these rules" in subdivision (a). The Advisory Committee thought this positioning would make readers less likely to interpret "these rules" to refer to the provisions in (d) and (e). Second, the Advisory Committee replaced the words "complying with these rules" with "resuming compliance with these rules." Finally, the Advisory Committee added a clarifying paragraph at the beginning of the note, which reads:

> This rule defines the conditions for a Criminal Rules emergency that would support a declaration authorizing a court to depart from one or more of the other Federal Rules of Criminal Procedure. Rule 62 refers to the other, non-emergency rules—currently Rules 1-61—as "these rules." This committee note uses "these rules" or "the rules" to refer to the non-emergency rules, and uses "this rule" or "this emergency rule" to refer to new Rule 62.

The other change to the text was the addition of "with the defendant's consent." An Advisory Committee member was concerned about finishing a proceeding with emergency procedures after a declaration has ended, without the defendant's consent. The Advisory Committee agreed that, if resuming full compliance with the rules is not yet feasible for a particular proceeding despite the termination of a declaration, the court should not be permitted to continue with emergency procedures without the defendant's consent. The Advisory Committee thought this situation would seldom arise: most proceedings covered by the emergency provisions are likely to be relatively short, courts can anticipate the expiration of declarations and schedule accordingly, and defendants are unlikely to withhold consent to finishing a proceeding after a declaration has ended with emergency procedures the defendant consented to earlier. But if a defendant did insist on resuming compliance with normal procedures, the court should be able to resume those procedures relatively quickly if indeed the emergency no longer substantially impairs the court's ability to function under the existing rules. Thus, on balance, the Advisory Committee concluded that the defendant's interests in the protections provided by the rules are more important than the costs of any delay needed to resume compliance with the rules.

Finally, the Advisory Committee addressed concerns that the consent requirement would allow a defendant to halt a trial in which more than six alternates had been impaneled under (d)(3) while the declaration was in force. The Advisory Committee concluded that the consent requirement would not permit this outcome: the "proceeding" authorized by (d)(3) is simply the impanelment of additional alternates, which itself would have been completed before the declaration terminated. To clarify this point further, the Advisory Committee added the second sentence of the portion of the committee note discussing subdivision (c).

The committee note explains:

> **Subdivision (c).** In general, the termination of a declaration of emergency ends all authority to depart from the other Federal Rules of Criminal Procedure. It does not terminate, however, the court's authority to complete an ongoing trial with alternate jurors who have been impaneled under (d)(3). In addition, subdivision (c) carves out a narrow exception for certain proceedings commenced under a declaration of emergency but not completed before the declaration terminates. If it would not be feasible to conclude a proceeding commenced before a declaration terminates with procedures that comply with the rules, or if resuming compliance with the rules would work an injustice, the court may complete that proceeding using procedures authorized by this emergency rule, but only if the defendant consents to the use of emergency procedures after the declaration ends. Subdivision (c) recognizes the need for some accommodation and flexibility during the transition period, but also the importance of returning promptly to the rules to protect the defendant's rights and other interests.

III. Subdivisions (d) and (e): Authority to Depart from the Rules

After considering comments from the Standing Committee during its last meeting, the Advisory Committee voted to remove from Rule 62 provisions in the earlier draft that would have

authorized a court in certain circumstances to issue a summons instead of a warrant, and to conduct a bench trial without the government's consent.

A. Paragraph (d)(1): Public Access

This part of the rule addresses the courts' obligation to provide alternative access to public proceedings when emergency conditions substantially impair in-person attendance. For example, even if conditions would allow participants to attend in person, the rule requires that alternative access be provided if capacity limits necessary to protect health and safety would exclude in-person attendance by the public. The Advisory Committee accepted the suggestion of a member of the Standing Committee to change the condition triggering a duty to provide alternative access from "preclusion" of in-person public attendance to "substantial impairment" of such attendance. Even when emergency conditions do not entirely "preclude" the public from attending a proceeding, a failure to provide reasonably available alternative access to criminal proceedings for members of the public could risk violating the First and Sixth Amendment rights to public access.

In response to a separate concern by several members that alternative access should be contemporaneous when possible, the Advisory Committee also added "contemporaneous if feasible" at the end of this provision. Although the Advisory Committee declined to detail how such alternative access must be provided, options for providing contemporaneous alternative access were added to the committee note. Finally, ", including victims," was added after "the public" in the committee note to emphasize the importance of providing victims access to public proceedings in criminal cases.

As revised, the committee note states:

> **Paragraph (d)(1)** addresses the courts' obligation to provide alternative access when emergency conditions have substantially impaired in-person attendance by the public at public proceedings. The term "public proceeding" was intended to capture proceedings that the rules require to be conducted "in open court," proceedings to which a victim must be provided access, and proceedings that must be open to the public under the First and Sixth Amendments. The rule creates a duty to provide the public, including victims, with "reasonable alternative access," notwithstanding Rule 53's ban on the "broadcasting of judicial proceedings."
>
> The duty arises only when the substantial impairment of in-person access by the public is caused by emergency conditions. The rule does not apply when reasons other than emergency conditions restrict access. The duty arises not only when emergency conditions substantially impair the attendance of anyone, but also when conditions would allow participants but not the public to attend, as when capacity must be restricted to prevent contagion.
>
> Alternative access must be contemporaneous when feasible. For example, if public health conditions limit courtroom capacity, contemporaneous transmission to an overflow courthouse space ordinarily could be provided. In a proceeding

conducted by videoconference, a court could provide access to the audio transmission if access to the video transmission is not feasible.

B. Paragraph (d)(2): Written Consents, Waivers, and Signatures of the Defendant

This provision was prompted by the difficulty of complying with signature requirements when emergency conditions limit a defendant's ability to sign. The Advisory Committee made one change to this provision, namely to replace "these rules" with "any rule, including this rule." This change clarifies that (d)(2) applies not only to the existing rules, but also to Rule 62 (specifically, to the requirement of a written request under (e)(3)(B)).

The Advisory Committee considered but declined to change the requirement that if, the defendant cannot consent on the record, counsel providing consent for the defendant must file an affidavit. There was some support to allow something less formal than an affidavit, such as a letter. But the Advisory Committee concluded that a declaration—which is less burdensome for counsel to produce—is already permitted by 28 U.S.C. § 1746 whenever an affidavit is required. The Advisory Committee also favored keeping the requirement of an affidavit (or declaration) because a letter would not consistently be filed as part of the record. Making the defendant's consent clear in the record was essential.

Several members supported a policy that the court should have a colloquy with defendant on the issue of consent, both to ensure true consent and a complete record. But the Advisory Committee thought the subject of a colloquy was more appropriate for the committee note than the rule text. As amended, the note now provides:

> **Paragraph (d)(2)** recognizes that emergency conditions may disrupt compliance with a rule that requires the defendant's signature, written consent, or written waiver. If emergency situations limit the defendant's ability to sign, (d)(2) provides an alternative, allowing defense counsel to sign if the defendant consents. To ensure that there is a record of the defendant's consent to this procedure, the amendment provides two options: (1) defense counsel may sign for the defendant if the defendant consents on the record, or, (2) without the defendant's consent on the record, defense counsel must file an affidavit attesting to the defendant's consent to the procedure. The defendant's oral agreement on the record alone will not substitute for the defendant's signature. The written document signed by counsel on behalf of the defendant provides important additional evidence of the defendant's consent.
>
> The court may sign for a pro se defendant, if that defendant consents on the record. There is no provision for the court to sign for a counseled defendant, even if the defendant provides consent on the record. The Committee concluded that rules requiring the defendant's signature, written consent or written waiver protect important rights, and permitting the judge to bypass defense counsel and sign once the defendant agrees could result in a defendant perceiving pressure from the judge to sign. Requiring a writing from defense counsel is an essential

> protection when the defendant's own signature is not reasonably available because of emergency conditions.
>
> It is generally helpful for the court to conduct a colloquy with the defendant to ensure that defense counsel consulted with the defendant with regard to the substance and import of the pleading or document being signed, and that the consent to allow counsel to sign was knowing and voluntary.

C. Paragraph (d)(3): Alternate Jurors

This provision authorizes a court to empanel more than six alternate jurors, which could be particularly useful under circumstances, such as a pandemic, that increase the probability that original jurors would be unable to complete the trial. Indeed, during the meeting, several members related how alternate jurors have been used for trials conducted during the pandemic. There were no changes to this provision.

The committee note states:

> **Paragraph (d)(3)** allows the court to impanel more than six alternate jurors, creating an emergency exception to the limit imposed by Rule 24(c)(1). This flexibility may be particularly useful for a long trial conducted under emergency conditions—such as a pandemic—that increase the likelihood that jurors will be unable to complete the trial. Because it is not possible to anticipate all of the situations in which this authority might be employed, the amendment leaves to the discretion of the district court whether to impanel more alternates, and if so, how many. The same uncertainty about emergency conditions that supports flexibility in the rule for the provision of additional alternates also supports avoiding mandates for additional peremptory challenges when more than six alternates are provided. Nonetheless, if more than six alternates are impaneled and emergency conditions allow, the court should consider permitting each party one or more additional peremptory challenges, consistent with the policy in Rule 24(c)(4).

D. Paragraph (d)(4): Rule 35 Deadlines

This provision is unchanged from the earlier Rule 62. Rule 45(b)(2) bars extensions for motions to correct or reduce a sentence under Rule 35. The Advisory Committee concluded that courts should have limited authority to extend the Rule 35 deadlines "if emergency conditions provide good cause." Paragraph (d)(4) permits these extensions only as "reasonably necessary." The Advisory Committee concluded there was no need to state the obvious point that, in making a determination of good cause, courts should consider emergency situations. This point was added to the draft committee note.

The Department of Justice requested that the following sentence be added to the committee note: "Nothing in this provision is intended to expand the authority to correct a sentence, which is intended to be very narrow and to extend only to those cases in which an obvious error or mistake has occurred in the sentence." The Advisory Committee approved a modified version that did not

include the last clause, which is already part of the committee note following Rule 35. The Advisory Committee also changed the end of the sentence to read "authority to correct or reduce a sentence under Rule 35."

The committee note reads:

> **Paragraph (d)(4)** provides an emergency exception to Rule 45(b)(2), which prohibits the court from extending the time to take action under Rule 35 "except as stated in that rule." When emergency conditions provide good cause for extending the time to take action under Rule 35, the amendment allows the court to extend the time for taking action "as reasonably necessary." The amendment allows the court to extend the 14-day period for correcting a clear error in the sentence under Rule 35(a) and the one-year period for government motions for sentence reductions based on substantial assistance under Rule 35(b)(1). Nothing in this provision is intended to expand the authority to correct or reduce a sentence under Rule 35. This emergency rule does not address the extension of other time limits because Rule 45(b)(1) already provides the necessary flexibility for courts to consider emergency circumstances. It allows the court to extend the time for taking other actions on its own or on a party's motion for good cause shown.

E. Subdivision (e): Videoconferencing and Teleconferencing

1. Introduction

Subdivision (e) provides authority to use virtual conferencing technology when emergency conditions limit the physical presence of participants at criminal proceedings. The Advisory Committee concluded that, given the critical interests served by holding proceedings in-court, any authority to substitute virtual for physical presence must extend no further than necessary.

The Advisory Committee's draft rule incorporates lessons learned during recent experience with virtual proceedings. The Advisory Committee considered input from its members, reports on court operations from various sources, local orders, suggestions solicited from chief judges around the country by Judge Jim Dever, chair of the Rule 62 Subcommittee, and the valuable insights of practitioners who attended the miniconference last summer. As a result, the proposed rule differs from the CARES Act in several respects. Like the CARES Act, subdivision (e) is arranged by type of proceeding. Proceedings with the fewest restrictions on the use of conferencing technology appear first, followed by proceedings with more stringent prerequisites, again like the CARES Act. The draft rule separates proceedings into three groups, each with a different set of requirements. (This differs from the CARES Act, which provides separate requirements for only two groups of proceedings—the first consisting of an enumerated list of pre- and post-trial proceedings, and the other limited to plea and sentencing proceedings under Rules 11 and 32.)

The first paragraph addresses videoconferencing for proceedings that courts may already conduct by videoconference with the defendant's consent under existing Rules 5, 10, 40, and 43(b)(2): initial appearances, arraignments, and certain misdemeanor proceedings. The second

paragraph regulates proceedings that are defined not by an enumerated list, but instead by the more inclusive specification that the proceeding be one at which the defendant has a right to be present (other than proceedings addressed in the first and third sections, and trial). The third paragraph addresses pleas and sentencings, where use of conferencing is most restricted, as under the CARES Act. Paragraph (e)(4) addresses a court's authority to use teleconferencing generally.

The committee note introducing subdivision (e) states:

> **Subdivision (e)** provides authority for a court to use videoconferencing or teleconferencing under specified circumstances after the declaration of a Criminal Rules emergency. The term "videoconferencing" is used throughout, rather than the term "video teleconferencing" (which appears elsewhere in the rules), to more clearly distinguish conferencing with visual images from "teleconferencing" with audio only. The first three paragraphs in (e) describe a court's authority to use videoconferencing, depending upon the type of proceeding, while the last describes a court's authority to use teleconferencing when videoconferencing is not reasonably available. The defendant's consent to the use of conferencing technology is required for all proceedings addressed by subdivision (e).
>
> Subdivision (e) [applies to the use of videoconferencing and teleconferencing for the proceedings defined in paragraphs (1) through (3), for all or part of the proceeding, by one or more participants. But it][4] does not regulate the use of video and teleconferencing technology for all possible proceedings in a criminal case. It does not speak to or prohibit the use of videoconferencing or teleconferencing for proceedings, such as scheduling conferences, at which the defendant has no right to be present. Instead, it addresses three groups of proceedings: (1) proceedings for which the rules already authorize videoconferencing; (2) certain other proceedings at which a defendant has the right to be present, excluding felony trials; and (3) felony pleas and sentencings. The new rule does not address the use of technology to maintain communication with a defendant who has been removed from a proceeding for misconduct.

2. Paragraph (e)(1): Videoconferencing for Proceedings Under Rules 5, 10, 40, and 43(b)(2)

This provision clarifies that the new rule does not change the court's existing authority to use videoconferencing for these proceedings, with one exception. Namely, when emergency conditions significantly impair the defendant's opportunity to consult confidentially with counsel, the court must ensure that the defendant will have that opportunity before and during videoconference proceedings under Rules 5, 10, 40, and 43(b)(2).

The committee note explains:

> **Paragraph (e)(1)** addresses first appearances, arraignments, and certain misdemeanor proceedings under Rules 5, 10, 40, and 43(b)(2), where the rules

[4] We recommend returning to this bracketed language after considering the changes to the teleconferencing provisions discussed *supra* page 15, where the explanation for this addition appears.

already provide for videoconferencing if the defendant consents. *See* Rules 5(f), 10(c), 40(d), and 43(b)(2) (written consent). This paragraph was included to eliminate any confusion about the interaction between existing videoconferencing authority and this rule. It clarifies that this rule does not change the court's existing authority to use videoconferencing for these proceedings, except that it requires the court to address emergency conditions that significantly impair the defendant's opportunity to consult with counsel. In that situation, the court must ensure that the defendant will have an adequate opportunity for confidential consultation before and during videoconference proceedings under Rules 5, 10, 40, and 43(b)(2). Paragraphs (e)(2) through (4) apply this requirement to all emergency video and teleconferencing authority granted by the rule after a declaration.

The requirement is based upon experience during the COVID-19 pandemic, when conditions dramatically limited the ability of counsel to meet or even speak with clients. The Committee believed it was essential to include this prerequisite for conferencing under Rules 5, 10, 40, and 43(b)(2), as well as conferencing authorized only during a declaration by paragraphs (e)(2), (3), and (4), in order to safeguard the defendant's constitutional right to counsel. The rule does not specify any particular means of providing an adequate opportunity for private communication.

3. Paragraph (e)(2): Videoconferencing for Certain Proceedings at Which the Defendant has a Right to be Present

Paragraph (e)(2) addresses videoconferencing authority for proceedings "at which a defendant has a right to be present," other than trial and the proceedings under (e)(1) and (3). The draft note adds that this right to presence might be based on the Constitution, statute, or rule, and lists a few examples: revocations of release under Rule 32.1, preliminary hearings under Rule 5.1, and waivers of indictment under Rule 7(b).[5]

During a criminal rules emergency, an affected court may use videoconferencing for these proceedings only if three criteria are met. First, subparagraph (e)(2)(A) restricts videoconferencing authority to districts in which the chief judge has found that emergency conditions "substantially impair a court's ability to hold" proceedings in person within a reasonable time. Second, the court must find the defendant will have an adequate opportunity for confidential consultation with

[5] The rule leaves it to courts to decide whether the defendant has a right to be present at certain proceedings if and when such issues arise. The Advisory Committee had three reasons for using the defendant's right to be present to define the second category of proceedings. First, the primary concern raised by conferencing technology was its impact on the defendant's right to be physically present. There was no need to address the use of conferencing technology at proceedings such as scheduling conferences, where the defendant had no right to be present in the first place. Second, this definition should provide guidance on the use of conferencing technology during certain proceedings that were not included in the enumerated list in the CARES Act, such as suppression hearings. Third, any attempt to enumerate the proceedings in which a defendant has a right to be present would have been complicated, because the constitutional analysis of that right might depend upon the circumstances of a particular proceeding. Thus, it made more sense to define this middle category by referencing the right to presence itself.

counsel before and during the proceeding. Third, the defendant must consent after consulting with counsel. The only substantive change to this part of the rule since the Standing Committee last saw it is that "substantially impair" replaced "preclude."

The committee note states:

> **Paragraph (e)(2)** addresses videoconferencing authority for proceedings "at which a defendant has a right to be present" under the Constitution, statute, or rule, excluding felony trials and proceedings addressed in either (e)(1) or (e)(3). Such proceedings include, for example, revocations of release under Rule 32.1, preliminary hearings under Rule 5.1, and waivers of indictment under Rule 7(b). During a declaration, an affected court may use videoconferencing for these proceedings, but only if the three circumstances are met.
>
> First, subparagraph (e)(2)(A) restricts videoconferencing authority to affected districts in which the chief judge (or alternate under 28 U.S.C. § 136(e)) has found that emergency conditions substantially impair a court's ability to hold proceedings in person within a reasonable time. Recognizing that important policy concerns animate existing limitations in Rule 43 on virtual proceedings, even with the defendant's consent, this district-wide finding is not an invitation to substitute virtual conferencing for in-person proceedings without regard to conditions in a particular division, courthouse, or case. If a proceeding can be conducted safely in-person within a reasonable time, a court should hold it in person.
>
> Second, subparagraph (e)(2)(B) conditions videoconferencing upon the court's finding that the defendant will have an adequate opportunity to consult confidentially with counsel before and during the proceeding. If emergency conditions prevent the defendant's presence, and videoconferencing is employed as a substitute, counsel will not have the usual physical proximity to the defendant during the proceeding and may not have ordinary access to the defendant before and after the proceeding.
>
> Third, subparagraph (e)(2)(C) requires that the defendant consent to videoconferencing after consulting with counsel. Insisting on consultation with counsel before consent assures that the defendant will be informed of the potential disadvantages and risks of virtual proceedings. It also provides some protection against potential pressure to consent, from the government or the judge.
>
> The Committee declined to provide authority in this rule to conduct felony trials without the physical presence of the defendant, even if the defendant wishes to appear at trial by videoconference during an emergency declaration. And this rule does not address the use of technology to maintain communication with a defendant who has been removed from a proceeding for misconduct. Nor does it address if or when trial participants other than the defendant may appear by videoconferencing.

4. Paragraph (e)(3): Videoconferencing for Pleas and Sentencings

Like the CARES Act, this rule imposes more restrictions on the use of videoconferencing at pleas and sentencings than on its use at other proceedings. The chief judge of the district (or alternate under 28 U.S.C. § 136(e)) must make a district-wide finding that emergency conditions substantially impair a court's ability to hold felony pleas and sentencings in person in that district. In addition, the defendant must affirmatively request—in writing—videoconferencing for a plea or sentencing proceeding. And the court must find "that further delay in that particular case would cause serious harm to the interests of justice." This requirement is quite similar to the finding required by the CARES Act, which requires that "the district judge in a particular case finds for specific reasons that the plea or sentencing in that case cannot be further delayed without serious harm to the interests of justice." Anecdotal accounts suggest that under this language district courts are generally limiting the use of videoconferencing in pleas or sentences to the types of cases suggested in the committee note.

Since the last Standing Committee review, the Advisory Committee approved multiple refinements to this provision, none of them particularly controversial. To ensure that both (2)(A) and (B) are met for videoconferencing a plea or sentence, "and (B)" was added. The parenthetical on chief judge succession was deleted as in (e)(2). The term "substantially impair" took the place of "preclude." And "within a reasonable time" was added to be consistent with the standard in (2)(A). The Advisory Committee also added to the note some language about ensuring the defendant's consent was knowing and voluntary.

The committee note now reads:

> **Paragraph (e)(3)** addresses the use of videoconferencing for a third set of proceedings: felony pleas and sentencings under Rules 11 and 32. The physical presence of the defendant together in the courtroom with the judge and counsel is a critical part of any plea or sentencing proceeding. Other than trial itself, in no other context does the communication between the judge and the defendant consistently carry such profound consequences. The importance of defendant's physical presence at plea and sentence is reflected in Rules 11 and 32. The Committee's intent was to carve out emergency authority to substitute virtual presence for physical presence at a felony plea or sentence only as a last resort, in cases where the defendant would likely be harmed by further delay. Accordingly, the prerequisites for using videoconferencing for a felony plea or sentence include three circumstances in addition to those required for the use of videoconferencing under (e)(2).
>
> Subparagraph (e)(3)(A) requires that the chief judge of the district (or alternate under 28 U.S.C. § 136(e)) make a district-wide finding that emergency conditions substantially impair a court's ability to hold felony pleas and sentencings in person in that district within a reasonable time. This finding serves as assurance that videoconferencing may be necessary and that individual judges cannot on their own authorize virtual pleas and sentencings when in-person proceedings might be manageable with patience or adaptation. Although the finding serves as assurance

that videoconferencing might be necessary in the district, as under (e)(2), individual courts within the district may not conduct virtual plea and sentencing proceedings in individual cases unless they find the remaining criteria of (e)(3) and (4) are satisfied.

Subparagraph (e)(3)(B) states that the defendant must request in writing that the proceeding be conducted by videoconferencing, after consultation with counsel. The substitution of "request" for "consent" was deliberate, as an additional protection against undue pressure to waive physical presence. This requirement of writing is, like other requirements of writing in the rules, subject to the emergency provisions in (d)(2), unless the relevant emergency declaration excludes the authority in (d)(2). To ensure that the defendant consulted with counsel with regard to this decision, and that the defendant's consent was knowing and voluntary, the court may need to conduct a colloquy with the defendant before accepting the written request.

Subparagraph (e)(3)(C) requires that before a court may conduct a plea or sentencing proceeding by videoconference, it must find that the proceeding in that particular case cannot be further delayed without serious harm to the interests of justice. Examples may include some pleas and sentencings that would allow transfer to a facility preferred by the defense, or result in immediate release, home confinement, probation, or a sentence shorter than the time expected before conditions would allow in-person proceedings. A judge might also conclude that under certain emergency conditions, delaying certain guilty pleas under Rule 11(c)(1)(C), even those calling for longer sentences, may result in serious harm to the interests of justice.

5. Paragraph (e)(4): Teleconferencing by One or More Participants

Paragraph (e)(4) regulates the use of teleconferencing for proceedings that a court could conduct by videoconference. The Advisory Committee concluded that the rule should carefully limit a court's authority to allow audio-only participation, given the patent superiority of video proceedings. The four requirements for the use of teleconferencing reflect this policy. Those requirements are generally the same as those in the version of the draft rule reviewed by the Standing Committee at its last meeting, namely: fulfillment of the requirements for *video*conferencing for the proceeding; a finding regarding the unavailability of videoconferencing; some assurance that the defendant and defense counsel will have an adequate opportunity to consult confidentially; and the defendant's consent. But the Advisory Committee made several changes in response to questions raised by Standing Committee members, the style consultants, and other readers.

a. Scope: Audio-Only for One or All

The Advisory Committee revised the text of the rule and the note to clarify the provision's scope. The Advisory Committee agreed that the conditions for teleconferencing should apply not only when a court decides in advance that everyone will participate by phone, but also when one

or more participants do so in proceeding otherwise conducted by videoconference. Frequently during the pandemic, at least one participant in a proceeding held by videoconference would be unable to either connect or continue by video, and would have to resort to audio-only participation. The Advisory Committee concluded that the protections in (e)(4) were essential for this situation as well as those where all participants will participate by telephone.

To that end, the Advisory Committee revised both the text and the note. In introducing the enumerated requirements, it added "A court may conduct a proceeding, in whole or in part, by teleconferencing if . . . ." The introductory section of the note includes the policy that underlies the provisions on teleconferencing: "Videoconferencing is always a better option than an audio-only conference because it allows participants to see as well as hear each other. To ensure that participants communicate through audio alone only when videoconferencing is not feasible, (e)(4) sets out four prerequisites."

The Advisory Committee also revised, as noted below, the requirement in (e)(4)(B)(i) that videoconferencing for the proceeding not be reasonably available "for any person who would participate by teleconference."

A third change was made after the Advisory Committee meeting, responding to the style consultants' review of the draft rule text. They pointed out that the caption of (e)(4) might not fully describe its contents, as it could be read as applying only to proceedings conducted entirely by phone, as opposed to proceedings where only some participants are audio-only. To clarify this point, the caption of (e)(4) was changed from "Teleconferencing" to "Teleconferencing by One or More Participants." The style consultants approved this change.

An addition to the committee note on this point is also bracketed for consideration by the Standing Committee on lines 562-67, in the paragraph introducing (e)(4). The suggested addition explains the "in whole or in part" language, and emphasizes that the provision regulates individual audio-only participation in videoconferences as well as proceedings conducted by phone from start to finish. It reads: "Because the rule applies to teleconferencing 'in whole or in part,' it mandates these prerequisites whenever the entire proceeding is held by teleconference from start to finish, or when one or more participants in the proceeding are connected by audio only, for part or all of a proceeding." Although this addition drafted in response to the expressed by the style consultants and has never been reviewed by Advisory Committee members, the reporters and the chairs of both the Advisory Committee and the Rule 62 Subcommittee believe it would be helpful.

The word "participate" is important in all of these additions. The Advisory Committee intended to limit the scope of the provision to those who "participate" in the proceeding in some way, and to clarify that observers and others who are not "participating" in the proceeding may connect by audio-only without the judge having to satisfy the requirements in (e)(4). Indeed, the earlier inclusion in Rule 62 of paragraph (d)(1) recognizes the constitutional mandate to provide observers access to public proceedings, and the Advisory Committee anticipated that this access might be provided as audio-only connection to a videoconference. The Advisory Committee chose not to attempt to define who is a participant in these proceedings, concluding that the word is self-explanatory as used here. The word would clearly include the judge, any defendant, the parties'

attorneys, and any witnesses. But it would not include observers or court personnel who may be on the call but do not speak on the record.

Finally, the reporters and chair have included the bracketed language on lines 402-05 as a possible addition to the committee note introducing the videoconferencing provisions. After the Advisory Committee concluded its review of the draft rule and note, the reporters and chair recognized that, although the Advisory Committee had added language clarifying that the teleconferencing requirements apply whenever one or more person participates by audio-only, for all or part of the proceeding, no similar language appeared in the videoconferencing provisions. This might suggest that the Advisory Committee did not intend the videoconferencing provisions to apply to only part of a proceeding or less than all of its participants. If the Standing Committee agrees with that concern, one option to remove any ambiguity for those who will review the videoconferencing provisions during the comment period would be to add the bracketed language to the note.

b. Prerequisites for Teleconferencing: (e)(4)(A)—Cumulative to Videoconferencing Requirements

The first prerequisite for teleconferencing—that the requirements for videoconference for the particular proceeding must have been met—was a point lost on some readers of earlier versions. Several readers did not realize that the requirements for videoconferencing for pleas and sentencings applied, for example, when a felony plea or sentencing proceeding involved teleconferencing. To clarify this point, the language about requirements for videoconferencing was placed in its own separate subparagraph (A).

The Advisory Committee also added the language "any rule, including" before "this rule" to recognize that not only Rule 62(e)(1) through (3), but also Rules 5, 10, 40, and 43(b)(2) imposed requirements for videoconferencing that must be met before teleconferencing is authorized. The subcommittee had assumed that, by addressing these proceedings in (e)(1), readers of the rule would know that the requirements in Rules 5, 10, 40, and 43(b)(2) were incorporated into the term "this rule." The Advisory Committee disagreed with that assumption. A reference to "this rule" in (e)(4) would not, in the view of many members, incorporate the requirements for videoconferencing imposed by rules other than Rule 62. After debating how best to make this clear, the Advisory Committee decided not to enumerate Rules 5, 10, 40, and 43(b)(2) in the text of (e)(4)(A). Instead the Advisory Committee employed a generic reference "any rule, including this rule[,]" which replicated the language used earlier in (d)(2). This approach also avoids the need to amend the rule later if additional requirements for videoconferencing are added to any of the existing rules. For the same reason, the Advisory Committee considered and rejected a suggestion to list Rules 5, 10, 40, and 43(b)(2) in the note. A further addition to the committee note focused on the example of a proceeding under Rule 43(b)(2), which is the only rule among those addressed by (e)(1) that has a requirement for videoconferencing other than defendant's consent.

Finally, following the Advisory Committee meeting, Judge Bates raised a concern that the language "any rule" does not literally mean any rule, because different rules have different requirements for videoconferencing. For example, Rule 5 requires only the defendant's consent,

but Rule 43(b)(2) requires that the proceeding involve a misdemeanor punishable by fine or by imprisonment for not more than one year, or both, and that the defendant consent in writing. Judge Bates suggested that the Advisory Committee meant only an "applicable" rule. To clarify this point, "applicable" appears in brackets as an addition for the Standing Committee consideration. The style consultants reviewed and did not object to this addition and the reporters, the subcommittee chair, and the Advisory Committee chair all agree it is a helpful change.

The committee note for (e)(4)(A) includes further explanation:

> [A]ll of the conditions for the use of videoconferencing for the proceeding must be met before a court may conduct a proceeding, in whole or in part, by audio-only. For example, videoconferencing for a sentencing under Rule 32 requires compliance with (e)(3)(A), (B), and (C). No part of a felony sentencing proceeding may be held by teleconference, nor may any person participate in such a proceeding by audio only, unless those videoconferencing requirements have been met. Likewise, for a misdemeanor proceeding, teleconferencing requires compliance with (e)(1) and Rule 43(b)(2).

c. Prerequisites for Teleconferencing: (e)(4)(B)(i)—Videoconferencing Unavailable

The second of the four prerequisites for teleconferencing is a finding by the judge that "videoconferencing is not reasonably available for any person who would participate by teleconference."

The "not reasonably available" standard was suggested by a member of the Standing Committee. The Advisory Committee agreed and substituted it for "not available within a reasonable time." It provides flexibility and has proven workable in some districts during the pandemic.

To clarify the application of the provision in situations where not all participants are by phone, the Advisory Committee added a requirement that the court find that videoconferencing for the proceeding "is not reasonably available <u>for any person who would participate by teleconference</u>[.]" This was the subject of considerable discussion. As noted earlier, the language in the draft was intended to provide guidance and flexibility for substituting audio for video access at any stage or by any participant, while at the same time mandating a finding of video unavailability for any participants who would be audio-only. Various simpler alternatives (e.g., "for any participant," "for all participants," "for one or more participants") were rejected. Those alternatives did not focus the finding of unavailability on any person(s) who are unable to connect by video and would participate by phone instead. Members were also concerned that one person's inability to connect by video should not mean that everyone should participate by telephone. The Advisory Committee was committed to the principle that teleconferencing was a far inferior option that should be used only to the extent necessary. But it also did not want to suggest that teleconferencing for some participants would be authorized only when *everyone* cannot use video.

The note further explains:

> [Item] (e)(4)(B)(i) requires the court to find that videoconferencing for all or part of the proceeding is not reasonably available before allowing participation by audio only. Because it focuses on what is "reasonably available," this requirement is flexible. It is intended to allow courts to use audio only connections when necessary, but not otherwise. For example, it precludes the use of teleconferencing alone if videoconferencing—though generally limited—is available for all participants in a particular proceeding. But it permits the use of teleconferencing in other circumstances. For example, if only an audio connection with a defendant were feasible because of security concerns at the facility where the defendant is housed, a court could find that videoconferencing for that defendant in the particular proceeding is not reasonably available. Or, if the video connection fails for one or more participants during a proceeding started by videoconference and audio is the only option for completing that proceeding expeditiously, this rule permits the affected participants to use audio technology to finish the proceeding.

d. Prerequisites for Teleconferencing: (e)(4)(B)(ii)—Finding of Adequate Opportunity for Confidential Consultation

Item (e)(4)(B)(ii) requires the judge to find that the defendant will have an adequate opportunity to consult confidentially with counsel before and during a proceeding involving teleconferencing. The Advisory Committee recognized that, even though (e)(4)(A) requires a finding that confidential consultation would have been possible if the proceeding had been conducted by videoconference, additional accommodations might be necessary to assure confidential consultation for a telephone conference. For example, when the video fails and the only telephone line available to the defendant or defense counsel is the line required for teleconferencing, the court must take additional steps to provide the opportunity for confidential consultation. This was a major concern of the judges and practitioners who discussed their experiences at the miniconference.

The version approved by the Advisory Committee at the meeting did not include the words "an adequate" before "opportunity." Instead of "have an adequate opportunity to consult," the version the Advisory Committee approved read "have the opportunity to consult." This change appears to have been an unintentional error. No one at the meeting noticed or mentioned, much less discussed, the inconsistency with other portions of the rule that required "an adequate opportunity" to consult counsel. There was some discussion about simplifying (e)(4) generally, and a specific discussion about simplifying the subparagraph (C) on consent that followed, but a review of the meeting by the reporters revealed that no one noticed the change that had been made here. There is no basis for phrasing this point differently here than elsewhere.[6] We have not revisited this issue with the full Advisory Committee, so the words "an adequate" are in brackets in the draft presented for Standing Committee's consideration.

[6] Moreover, because the reporters had not yet realized that "an adequate" had been deleted, they included these words in the version purporting to be what the Advisory Committee adopted at the meeting, which they circulated to the Advisory Committee along with the note changes to (e)(4). No one responding raised this issue.

The committee note reads:

> [Item] (e)(4)(B)(ii) provides that the court must find the defendant will have an adequate opportunity to consult confidentially with counsel before and during the teleconferenced proceeding. Opportunities for confidential consultation may be more limited with teleconferencing than they are with videoconferencing as when a defendant or a defense attorney has only one telephone line to use to call into the conference, and there are no "break out rooms" for private conversations like those videoconferencing platforms provide. This situation may arise not only when a proceeding is held entirely by phone, but also when, in the midst of a videoconference, video communication fails for either the defendant or defense counsel. Attorney or client may have to call into the conference using the devices they had previously been using for confidential communication. Experiences like these prompted this requirement that the court specifically find that an alternative opportunity for confidential consultation is in place before permitting teleconferencing in whole or in part.

e. Prerequisites for Teleconferencing: (e)(4)C)—Consent by the Defendant

The last requirement for permitting teleconferencing by one or more participants is the defendant's consent. The Advisory Committee concluded that prior consent or written request for *video*conferencing does not necessarily suffice as consent for *tele*conferencing. It discussed several examples of situations where a defendant might very well consent to videoconference but not to a proceeding in which at least some participants must appear by audio only. These examples included situations when the defendant has no video connection but others do, when the judge's video fails in a sentencing, and when defense counsel's video is unavailable during a plea proceeding. The Advisory Committee also considered alternatives for modifying this provision so that it did not require that the court insist on consultation with counsel before accepting the defendant's consent when the need for reverting to audio-only arose in the midst of a videoconference (for example, providing for "the opportunity" to consult instead). Ultimately, the Advisory Committee decided to remove the words "after consultation with counsel" from this particular provision.

The committee note explains:

> Finally, recognizing the differences between videoconferencing and teleconferencing, subparagraph (e)(4)(C) provides that the defendant must consent to teleconferencing for the proceeding, even if the defendant previously requested or consented to videoconferencing. A defendant who is willing to be sentenced with a videoconference connection with the judge may balk, understandably, at being sentenced over the phone. Subparagraph (e)(4)(C) does not require that consent to teleconferencing be given only after consultation with counsel. By requiring only "consent," it recognizes that the defendant would have already met the consent requirements for videoconferencing for that proceeding, and it allows the court more flexibility to address varied situations. To give one example, if the video but

not audio feed drops for the defendant or another participant near the very end of a videoconference, and the judge asks the defendant, "do you want to talk to your lawyer about finishing this now without the video?," an answer "No, I'm ok, we can finish now" would be sufficient consent under (e)(4)(C).

IV. 2254 and 2255 Rules

After consulting experienced petitioners' counsel, states' attorneys, and the Department of Justice, and reviewing research by the reporters and the Rules Law Clerk, the Rule 62 Subcommittee recommended that an emergency rule was not needed for the rules used in Section 2254 and Section 2255 proceedings. At its May meeting, the Advisory Committee agreed unanimously with the subcommittee's recommendation.