ADVISORY COMMITTEE ON CRIMINAL RULES
MINUTES
May 11, 2021

Attendance and Preliminary Matters

The Advisory Committee on Criminal Rules ("Committee") met by videoconference on May 11, 2021. The following members, liaisons, and reporters were in attendance:

Judge Raymond M. Kethledge, Chair
Judge Timothy Burgess
Judge James C. Dever, III
Professor Roger A. Fairfax, Jr.
Judge Michael J. Garcia
Lisa Hay, Esq.
James N. Hatten, Esq., Clerk of Court Representative
Judge Denise P. Hood
Judge Lewis A. Kaplan
Judge Bruce J. McGiverin
Nicholas L. McQuaid, Esq., *ex officio*[1]
Judge Jacqueline H. Nguyen
Catherine M. Recker, Esq.
Susan M. Robinson, Esq.
Jonathan Wroblewski, Esq.[1]
Judge John D. Bates, Chair, Standing Committee
Judge Jesse M. Furman, Standing Committee Liaison
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Professor Catherine Struve, Reporter, Standing Committee
Professor Daniel R. Coquillette, Standing Committee Consultant

The following persons participated to support the Committee:

Brittany Bunting, Administrative Analyst, Rules Committee Staff
Shelly Cox, Management Analyst, Rules Committee Staff
Kevin Crenny, Esq., Law Clerk, Standing Committee
Bridget M. Healy, Esq., Counsel, Rules Committee Staff
Laural L. Hooper, Esq., Senior Research Associate, Federal Judicial Center
S. Scott Myers, Esq., Counsel, Rules Committee Staff
Julie Wilson, Acting Chief Counsel, Rules Committee Staff

Professor Daniel J. Capra, Reporter to the Evidence Rules Committee, was also in attendance.

[1] Mr. McQuaid and Mr. Wroblewski represented the Department of Justice.

The following persons attended as observers:

Amy Brogioli, American Association for Justice
Patrick Egan, American College of Trial Lawyers
Peter Goldberger, National Association of Criminal Defense Lawyers
John Hawkinson, a freelance journalist who expressed interest in Rule 16
Jakub Madej, Research Assistant, Yale University
Brent McKnight, Research Assistant, Duke University
Laura M.L. Wait, Assistant General Counsel, D.C. Courts

Opening Business

Judge Kethledge noted several members are leaving the Committee, specifically Judge James Dever, Judge Denise Hood, Judge Lewis Kaplan, and Mr. James Hatton. Judge Kethledge thanked each of them for their service to the Committee. He noted that Judge Dever, who chaired the Rule 62 subcommittee, and Judge Kaplan, who chaired the Cooperators Subcommittee and task force, had carried especially heavy loads. Judge Kethledge also observed that this was the first meeting for Judge Timothy Burgess of the United States District Court for the District of Alaska and for Mr. Nicholas McQuaid, Acting Assistant Attorney General for the Criminal Division in the Department of Justice (DOJ). Finally, Judge Kethledge also congratulated Professor Fairfax on his appointment as Dean of the American University Washington College of Law.

Judge Kethledge welcomed Judge Bates, Judge Furman, and Professor Struve from the Standing Committee, and Professor Capra, who is coordinating all of the emergency rules. Finally, he recognized the observers, and thanked them for their interest in the Criminal Rules.

Review and Approval of Minutes

A motion was made, seconded, and passed to approve the minutes of the Committee's November meeting as presented at Tab 1B of the agenda book.

Report of the Rules Committee Staff

In lieu of a report from the Rules Committee Staff on the materials presented in the first and second bullet points of Tab 1C of the agenda book, Judge Kethledge noted that discussion of the Standing Committee's meeting would be folded into the discussion of Rule 62 and that the report on the Judicial Conference would be presented at the end after the Committee's business was concluded.

Update on Pending Legislation

Judge Kethledge asked Ms. Wilson to provide an update on legislation currently pending in Congress. Ms. Wilson turned the Committee's attention to Tab 1C of the agenda book, specifically to page 101, where the legislation section begins. She highlighted the Sunshine in the Court Room Act, which Senator Chuck Grassley introduced in 2021. The Committee was not made

aware of the legislation before it was introduced, but it had been made aware of a second bill Senator Grassley introduced the same day. Ms. Wilson explained that the Sunshine in the Courtroom Act would give judges discretion to allow media coverage of proceedings at both the district and appellate levels. She noted the Act would potentially impact Rule 53. However, she continued, the Act would instruct the Judicial Conference to promulgate guidelines for how the Act would operate, allowing leeway to protect Rule 53.

Judge Kethledge asked whether the Act would be offered as an amendment to any other legislation already moving through the legislative process. Ms. Wilson replied that, so far, the Administrative Office had no indication that this would happen. She further noted the possibility of discussing the Act with Senator Grassley, given his correspondence with the Administrative Office about other legislation.

Discussion of Public Comments Received for the Text of Rule 16

Judge Kethledge asked Professor Beale to guide the Committee through a discussion of the comments received in response to the publication of the draft amendments to Rule 16, which the Committee had been working on for more than three years. Professor Beale directed the Committee to page 107 in Tab 2 of the agenda book, which contains the reporters' memorandum on the public comments and the Rule 16 subcommittee's discussion of them. Professor Beale explained that the Committee received six public comments, each of which the subcommittee evaluated in a telephone meeting. The subcommittee concluded that no changes to the version of the rule approved in April were warranted, but it agreed on one minor change to the committee note. The change to the committee note is discussed in the following section. Before proceeding further, Professor Beale reminded the Committee that the action before them was consideration of the comments and consideration of whether to send the proposed rule to the Standing Committee with a recommendation that it approve the rule and forward it to the Judicial Conference (and ultimately the Supreme Court and Congress). This meeting would be the Committee's last chance to make changes, and to be sure it fully endorsed the amendment.

The discussion of Rule 16 at points encompassed various topics. For the sake of clarity, these minutes present the discussion topically, rather than in chronological order.

A. Overview of Rule 16 Process

Professor Beale began by giving the Committee a brief overview of the need for a Rule 16 amendment and the process undertaken to date. The idea behind Rule 16 was that some changes were needed to move criminal pretrial discovery of expert witnesses closer to civil discovery of experts. The aim was to achieve earlier and more complete disclosure. The subcommittee began by holding an extremely useful miniconference to gather information and get feedback from practitioners. Given that judges are not ordinarily involved in cases during the pretrial disclosure period, getting the views of both prosecutors and defense lawyers was critical. The miniconference revealed two problems. First, pretrial disclosure related to expert witnesses was insufficiently complete to allow parties to adequately prepare for trial. Second, parties needed an enforceable deadline for disclosure because advocates could not properly meet expert testimony that they had

heard about only a few days before trial. Because Rule 16 lacked a deadline, there was no breach of the rules when disclosures were made at the last minute, even if this created problems for litigants. To solve these problems, the subcommittee attempted to ensure the rule would adequately specify what should be disclosed, and it created an enforceable deadline schedule.

B. Proposals for a Default Deadline

The public comments were very supportive of the idea of amending Rule 16, but four comments suggested changes. Professor Beale explained that three of the comments centered on whether the rule should provide a default deadline, as many state rules do. But the comments varied significantly on what the default deadline should be. When the subcommittee considered these proposals, it concluded there was no single default deadline that would be appropriate in every case. Instead of creating a default rule and asking parties to go to court to seek case-specific changes, the subcommittee concluded it was preferable to adhere to the Committee's position of creating a functional deadline: sufficiently in advance of trial to allow parties to prepare adequately. The judge must set the deadline in individual cases, or districts can create district-wide local rules. The Federal Magistrate Judges Association's ("FMJA") comment argued this latter aspect of the functional approach would create a problem because people would not read the local rules. But the new rule explicitly mentions local rules, and the subcommittee concluded this was sufficient to put parties on notice to consult the local rules. In sum, the subcommittee recommended staying with the Committee's flexible, functional deadline.

Judge Kethledge invited comments related to these proposals but noted that both the subcommittee and Committee had already considered the issue at some length. Hearing no comments on the issue, the Committee declined to add a default deadline.

C. Proposal to Delete "Complete" in "Complete Statement"

Professor Beale then moved to the next issue raised by the public comments, which focused on the rule's requirement that the expert give a "complete statement." Professor Beale observed the Committee deliberately chose to import parts of the civil rules to show that more complete disclosure is required. One comment argued that the phrase "complete statement" could be misleading, and the Committee should omit the word "complete." Professor Beale explained that completeness was a core idea animating the changes to Rule 16, and the subcommittee was unanimous in recommending retention of the "complete statement" language. Judge Kethledge then invited comments related to this suggestion. Hearing none, the Committee declined to omit the word "complete."

D. Proposal to Enlarge Disclosures Required by Rule 16

The next comment the Committee considered was from the National Association of Criminal Defense Lawyers ("NACDL"), which asked the Committee to enlarge the disclosures the rule required. Rather than require only the disclosure of the list of cases in which the expert has previously testified, NACDL proposed also requiring disclosure of any transcripts of testimony in the government's possession. It also proposed adding required disclosure of any information in the

government's possession favorable to the defense on the subject of the expert's testimony or opinion, or any information casting doubt on the opinion or conclusions. NACDL further proposed that these requirements apply to preliminary matters as well as pretrial, trial, and sentencing proceedings. Essentially, the proposal would bring within Rule 16's ambit material that the prosecution is already required to disclose under *Brady v. Maryland*, 373 U.S. 83 (1963). However, in its proposal, NACDL recognized that this suggestion could run afoul of the Jencks Act and Rule 26.2.

Professor Beale explained that accepting the NACDL proposal would be a major change and a substantive enlargement of draft Rule 16, requiring republication and a new public comment period. Further, the subcommittee also worried these changes would undermine the unanimous support enjoyed by the current targeted Rule 16 amendments.

Judge Kethledge commented on the importance of the Rule 16 amendment's support. Rule 16 has proved difficult to amend in the past, and there have been two or three attempts that failed after moving a significant way through the process. Judge Kethledge noted that amending Rule 16 is a delicate undertaking, and it is only through the good faith of both the DOJ and the defense bar that the Committee had made it this far over the last three and a half years. The current proposed amendments represent a delicate compromise, and Judge Kethledge urged that it should take a very good reason before the Committee moves to adjust the terms of that compromise.

Professor Beale added that the question for the Committee was whether this proposal would make a real improvement or whether, without it, the rule would be so incomplete that a larger, bolder proposal is necessary. The subcommittee's view was that a targeted, narrower approach was the right step, even if the Committee returns to Rule 16 to consider other changes in the future.

Judge Kethledge then invited comments on the NACDL proposal. A member questioned whether, if an expert witness's statement already implicates *Brady*, that statement would automatically be a part of the process of parties exchanging information. Judge Kethledge thought that was correct in light of the *Brady* obligation being totally independent of Rule 16 and the new *Brady* notification rule under the Due Process Protection Act. Professor Beale agreed that Rule 16 in no way limits the prosecution's *Brady* obligations. To the extent parties and the government are well aware of *Brady* obligations, that would be a part of the on-going disclosure process. Rule 16 is simply one piece of that process that focuses on what must be disclosed regarding experts. But if the government must go further than Rule 16 to meet *Brady*, then of course it must do so. Professor Beale also noted that the FMJA comments proposed that the Note reflect some interaction with *Brady* and Rule 26.2. The subcommittee did not think anyone would conclude that Rule 16 could somehow restrict, or would be intended to restrict, *Brady* obligations.

E. Cross-Reference Issue

Judge Bates noted that on page 115 of the agenda book, at line 19, the reference in the rule should be to (b)(1)(C)(i), not (C)(ii), because (C)(i) is the actual duty to disclose, not the timing of the disclosure. Specifically, the reference should be to the second of two bullet points under (b)(1)(C)(i). After the cross-reference was checked, there was a motion to amend the reference on

line 19 to amend "(ii)" to refer to the correct provision. A judge member seconded the motion, and it passed unanimously.

Later in the meeting, Professor Beale said she had heard from the style consultants on how to address the issue of cross-referencing to bullet points. The language could say: "the second bullet point in item (b)(1)(C)(i)." Suggestions were made and accepted to remove the word "item." A judge member moved to adopt this change. Two members seconded, and the motion passed unanimously.

F. Discussion of Asymmetrical Language in (a)(1)(G)(i)

Judge Bates raised a concern over (a)(1)(G)(i), on pages 114–15 of the agenda book. He noted that the provision contains two sentences. The first sentence describes the government's general disclosure obligation, which says it must disclose information it intends to use at trial "during its case-in-chief, or during its rebuttal to counter testimony that the defendant has timely disclosed . . . ." The second sentence, which is a more specific disclosure obligation related to evidence the government intends to offer regarding the defendant's mental condition, only references evidence the government "intends to use . . . at trial." This second sentence makes no specific mention of rebuttal evidence. Judge Bates asked whether the two sentences should be made parallel by adding language about the rebuttal to the second sentence. He suggested that the more specific provision regarding evidence of the defendant's mental condition should not be narrower than the general disclosure provision. Could the difference in the language cause problems?

Professor Beale said this point warranted discussion because the Committee had not previously focused on this language. Insanity defenses are relatively infrequent in the federal system. Normally, the insanity defense is raised by the defense during its case-in-chief, and then the government addresses it on rebuttal. The question for the Committee was whether the general disclosure sentence and the specific sentence on evidence relating to mental condition should be parallel so that the second sentence explicitly mentions rebuttal evidence. This made the issue potentially relevant for a defendant's surrebuttal.

A member pointed to an additional difference between the two sentences. The first sentence refers to testimony, but not to evidence. In contrast, the second sentence says: "testimony the government intends to use *as evidence* at trial" (emphasis added). "Testimony" in the first sentence, without the "as evidence" language, is arguably broader because it could potentially include impeachment evidence. This member thought that leaving "at trial" in the second sentence was helpful because it also could include impeachment. Her question thus centered on clarifying what role "as evidence" played in the sentence. Judge Kethledge responded the words "as evidence" referred to the particular species of evidence to which the particular disclosure reference applies—namely, evidence as to mental condition. Professor Beale observed that this difference between the two sentences preexisted the current proposed Rule 16 amendments. She thought Federal Rules of Evidence 702, 703, and 705 would cover evidence, and so the Committee could have deleted "as evidence" in the second sentence on lines 26–27 to make it parallel. She noted the Committee should not change any more than necessary to effect the desired changes. Even so,

the phrase "as evidence" appears to be redundant if the evidence is already being used under Federal Rules of Evidence 702, 703, and 705. Professor King reminded the Committee that the reporters and subcommittee had not previously discussed or focused on this portion of (a)(1)(G)(i).

Professor Struve commented that Judge Bates's earlier point about the erroneous cross-reference could be helpful to this discussion. The cross-reference to (b)(1)(C)(ii) is in the existing rule. And the provision to which it points will become the second bullet point under (b)(1)(C)(i), not (C)(i) in its entirety. It is about giving notice of intent to present expert testimony as to the defendant's mental condition under Rule 12.2. So maybe that would be a built-in limitation on when the scenario in the second sentence of (a)(1)(G)(i) arises.

Turning back to the linguistic difference between the two sentences in (a)(1)(G)(i), Professor Beale noted that the general disclosure obligation on lines 14–15 is currently limited to evidence the government intends to introduce in its case in chief, and the amendment broadens it to include rebuttal of evidence the defendant has timely disclosed. The second sentence, lines 17–28, refers to disclosures regarding the defendant's mental condition. Rule 12.2 imposes a special discovery obligation when the defendant's mental condition is going to be at issue. Professor Beale noted her opinion that the current draft language was adequate and that the two sentences do not need to be parallel. The language "at trial" on line 27 includes the case-in-chief and rebuttal. Judge Bates agreed about the breadth of the language "at trial." But if that is true for the second sentence, it would be true for the first sentence. So why have the two be different? Professor Beale noted that the present text already distinguishes general disclosure from disclosures regarding the defendant's mental condition, and as to the latter "at trial" could include surrebuttal. The Committee decided not to include surrebuttal in the general disclosure provision. And the government's obligation to disclose rebuttal evidence is applicable only for evidence the defendant has timely disclosed. The second sentence is very targeted at a species of evidence regarding the defendant's mental condition that has its own discovery schedule under Rule 12.2. This was a reason the rule distinguished initially, and it is not too jarring to have a difference between the two sentences.

A subcommittee member agreed with Professor Beale on the background of the rule. He added that at the miniconference, a number of defense lawyers expressed frustration that they had been sandbagged with disclosures in connection with rebuttal. That point of emphasis motivated the addition of the obligation to disclose rebuttal evidence to the general provision. The member then suggested a change to make the two sentences more parallel by deleting "as evidence at trial" and then inserting "at trial" after "the government intends to use" in line 24 of the draft rule. This would make them parallel in form, while retaining the language about rebuttal in the general provision.

Professor King noted one consideration to support the deletion of "as evidence" is that the committee note for the 2002 amendments states the Committee took "introduced as evidence" out and substituted it with "used," illustrating this kind of change had been made before. Professor King noted she would prefer removing "as evidence" rather than adding language about rebuttal to the second sentence of (a)(1)(G)(i). Judge Kethledge added that he also disfavored adding language about rebuttal to the second sentence because that would change the scope of the

government's obligation. The Committee had not thought about such a change with respect to mental condition, and he thought it would be unwise to make changes on the fly. Professor Beale also noted that no comments came in about mental condition cases. The phrase "at trial" has been in the rule for a substantial period of time and has caused no problems. In contrast, the limitation to evidence the government intended to present in its case in chief was causing problems, which the amendment addressed with precision, covering only rebuttal to evidence the defendant had timely disclosed. The current amendment was narrowly focused and balanced. But Judge Dever's suggestion described in the previous paragraph would bring greater clarity.

Judge Bates added that the last full paragraph of the committee note on page 123 of the agenda book says the provisions in (a)(1)(G) refer to the case-in-chief and rebuttal. The Note thus seems to apply to both the general and mental capacity provisions without recognizing a distinction between them, despite the textual differences in the rule.

A member moved to insert "at trial" after "to use" on line 24 of the draft rule and to delete "as evidence at trial" on lines 26–27. Two members seconded, and the motion passed unanimously.

G. Possible Different Meanings of the Term "the Disclosure"

Judge Bates noted that in several places, the term "the disclosure" is used, but that the term is used to mean different things. For example, in (a)(1)(G)(ii) the disclosure refers to the entirety of what the government is doing—that is, referencing all of the government's disclosures, even if they are many—but in (iii), the term is used differently to refer to a specific disclosure with respect to a specific witness. Because the government may have more than one disclosure in some cases, this inconsistent usage of a single term could create confusion. Judge Bates illustrated the point by raising a hypothetical scenario. Say that in the last four years the government made a disclosure including an expert report, but then the defendant pleaded guilty, and the case never went to trial. As a result, the expert never testified. Judge Bates asked whether that would be a publication that would then need to be disclosed in a later case involving the same expert. The original report was never made generally available to the public because of the plea, and there was no testimony. Should there be disclosure of the report, and, if so, does the rule capture that? Judge Bates observed that the earlier-disclosed report might not be a publication, and the case might not have to be listed in the Rule 16 disclosure in a later case because the expert never testified.

Professor Beale responded that the hypothetical and Judge Bates's observation about the outcome were accurate. The report was not a publication, there was no testimony, and there would be no disclosure under the amendment. But if the report somehow contained *Brady* material, then it would have to be disclosed. She noted this was not necessarily a bad outcome. The rule only requires listing the cases in which the witness testified but does not require providing the testimony. Judge Bates responded that nothing here would made the defendant aware of the report. Professor Beale agreed, and noted she thought the civil rules have the same phrase and would reach the same result. If Judge Bates believed the report should be disclosed, that would require a major change in the proposed rule.

Judge Kethledge asked the reporters whether the committee note should specify that prior reports are not publications, or whether it was obvious enough as is. Professor King replied that the additional change to the committee note already before the Committee would likely address that concern. Later in the meeting, the Committee discussed Note language intended to address that issue.

Turning back to Judge Bates' concern about the different uses of the term disclosure, Professor King noted the rule is structured so that it sets up the duty to disclose "any testimony" for each expert. From that point on, the rule refers to disclosures for that individual expert. The same language appears in the sections outlining the disclosure obligations of the government and the defense. Professor King asked Judge Bates whether, in light of the rule's structure, he read the rule as talking about multiple disclosures and then moving to a single disclosure, or whether the structure component in conjunction with the "any testimony" language addressed his concern.

Judge Bates responded that his concern was one of style. The term "the disclosure," whether it is in the headings or in the body of the text, refers to two slightly different things. The language to which Professor King pointed does not refer to different things. The rule says, "the disclosure," but multiple disclosures can happen in any given case. He noted language like "any disclosure" or "each disclosure" would work well in many places, but it was ultimately a style concern.

Professor Beale suggested one possibility would be to delete "the" in lines 29 and 32, and to do the same for the parallel provision for the defendant. But she thought this was only a style issue that can be taken up again with the style consultants, asking them whether it is preferable to delete the article or to make some other adjustment.

The Committee agreed to pass the issue along to the style consultants for further consideration.

H. Specifying the Identity of the Witness at the Eve of Trial

A member raised a question regarding circumstances where the government does not know the identity of the witness until the eve of trial. She noted that Rule 16 strikes a balance between identifying and correcting deficiencies in the current rule, but that it must create flexibility for all kinds of situations during criminal cases. One of the differences in the new rule is that the witness has to sign the disclosure. But there are circumstances where the government may know the content of the expert testimony at the time of the disclosure deadline, but it may not know the identity of the expert witness. This would most often arise with forensic experts, such as fingerprint experts. Usually, the government is only able to give a more generalized disclosure until closer to trial, and then the disclosure becomes more specific.

Professor King replied that the government need not have the witness sign if the government can provide a reason why, through reasonable effort, no signature is available. This would arise if the witness is adverse or if it is impossible to identify the witness at that point in time. Professor Beale added that this point had been discussed in connection with forensic firearms

experts because often the government does not know until closer to trial who the particular expert would be. But under the amended Rule 16, the government will have to disclose the content of the testimony, even if the witness remains unidentified.

The member who raised the issue followed up to confirm that the government can meet the generalized disclosure at the deadline set by the judge, and then give more specific information on the eve of trial. Professor Beale said that was essentially the balance the rule strikes. But at some point, the government must ask the court to limit the required discovery. If the government does not know what it will do as the trial date approaches, the question is whether the defense can adequately prepare on the eve of trial. It is a problem if the defense does not yet have the information at such a late stage in its preparations. Professor King pointed the Committee to page 125 of the agenda book, where the committee note discusses this particular scenario, at least when the expert's identity is not critical to the opposing party's ability to prepare. In that circumstance, the disclosing party may provide a statement of the witness's opinions without specifying the witness's identity. To give such a disclosure, the party wishing to call the expert would seek an order under Rule 16(d) to modify discovery. Professor Beale added that the party would, in effect, be asking the judge for the ability to wait until closer to trial to provide information on the witness's identity but to disclose the content now. The central issue then becomes whether the identity of the witness is critical to the opposing party's trial preparation, and that will depend on the nature of the testimony. Professor Beale also noted that Judge Furman had previously raised this issue, and the note language was the result of that discussion. A party may leave out parts that may not be critical to preparation but must do so under an order allowing it to restrict discovery in that way.

At the close of the discussion of Rule 16's text, a member moved to accept the text with the changes discussed during the meeting as well as the authority to address the style issue of how to cross-reference the bullet points in (b)(1)(C)(i).[2] Mr. McQuaid seconded.

The motion passed unanimously. Judge Kethledge thanked the subcommittee and the reporters for their work on Rule 16. He also thanked the DOJ and the defense bar for their notable good faith, understanding, and input throughout the process.

Discussion of Public Comments to Rule 16's Committee Note

Judge Kethledge turned the Committee's attention to the public comments received regarding the committee note to Rule 16. He asked Professor Beale to guide the Committee in a discussion of those comments.

A. Proposals from FMJA and NACDL

Professor Beale explained that the FMJA suggested making clear in the committee note that the rule does not change anything about the government's obligation under *Brady* and the Jencks Act. She reported that the subcommittee did not think this was a serious concern. The rules,

[2] As noted, *supra* page 6, this issue was resolved during the meeting with the assistance of the style consultants.

by default, cannot change constitutional or statutory requirements, and the Committee does not usually provide a disclaimer to that effect in the committee notes.

Further, Professor Beale explained NACDL's proposal to go into more depth about what information is required in the disclosure. Specifically, NACDL proposed that the committee note state the rule should not be read as requiring disclosure sufficient to withstand a challenge under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). The NACDL proposal also asked for an explicit reference to a Tenth Circuit decision on this issue. The subcommittee, relying on the Committee's practice not to cite cases in the committee notes, declined to pursue this suggestion. Professor Beale further noted that the Committee has already cut back on any kind of in-depth language about how this rule could be distinguished from civil cases, and adding the suggested material would be inconsistent with that decision.

Judge Kethledge asked for comments on either of these two proposals. Hearing none, the Committee declined to take up either of them.

B. Proposed Language Excluding Internal Government Documents from the Definition of "Publications"

The DOJ proposed adding language to the committee note. Although this provision was considered during the discussion of Rule 16's text, the discussion is reflected here in order to present together all aspects of the discussion of the committee note.

Prior to the meeting, Mr. Wroblewski had relayed a concern from the Drug Enforcement Agency ("DEA") regarding the requirement that the parties disclose "a list of all publications authored in the previous 10 years" by the expert. The details of that concern are presented in pages 111–12 of the agenda book. The outcome was that the subcommittee decided to revise the committee note to add: "The rule provides that the disclosure regarding the witness's qualifications include a list of all publications the witness authored in the previous 10 years. The term 'publications' does not include internal government documents."

Responding to this new language, a member stated he did not fully understand DEA's concern, because the ordinary understanding of "publication" does not include internal government documents. Thus, if you add the proposed language to the committee note, it suggests the word "publications" is broader than people normally understand it to be, hence the need for a carve out. The member questioned whether the Committee should further explain the term, given the implication of the additional language. Judge Kethledge observed that as an interpretive matter, ordinary meaning is the way the text of a rule or statute is often understood. He gave an example of an opinion in which the positive meaning of the scope of a provision was dictated by the exceptions. The exceptions defined the sphere of the rule. If the new language to the committee note is representative of what is *not* a publication, it implies some other things *are* publications. That could raise concerns.

Judge Kethledge asked the DOJ representatives for input. Mr. Wroblewski thought the concerns just raised were legitimate. He noted DEA had a couple of specific examples of cases they wanted to bring to the Committee's attention that would be implicated by the rule. Mr. Wroblewski did not think adding the language to the committee note was a pivotal provision from the DOJ's perspective, though it addressed something that concerned DEA. He reiterated that the concerns were legitimate, and he was now on the fence about the new language. Judge Kethledge wondered if it might be necessary to include a positive definition of publication if the Note included this language. Mr. Wroblewski explained the positive definition of "publication" the DOJ had also offered. There is very little caselaw on the meaning of that word. If the Committee were to define it, the definition would focus on whether the document had been made available to the public. For instance, there was a case where a doctor spoke at a conference and that was considered a publication. Mr. Wroblewski noted he was unsure whether it would be more helpful to define "publications" or to remove the suggested language from the committee note.

Judge Kethledge observed that the proposed addition could create more problems for the government than it solved. Internally, the government calls some things "publications" that ordinary people would not think of that way.

A member commented that it seemed too difficult to define "publications," and doing so would be a much broader undertaking than the concern that prompted the new language. She also added that this discussion implicated Judge Bates' hypothetical about expert reports developed and produced to the other side for an expert that does not testify. In the member's view, that disclosed report is not an internal government document and thus could be subject to production depending on what the document says. That example, she concluded, puts the Committee in a difficult zone if it were to try to define what is and is not an internal government document.

A subcommittee member stated that when the subcommittee discussed this issue, the discussion centered on *deliberative* internal documentation. But the language proposed for the committee note was broader. Disclosures between agents in the government could arguably be discoverable if they covered the exact topic to which the expert would testify. The language "internal documents" goes further than the deliberative process documents that the member had understood to be the original concern. She also commented that in the civil rules, parties only receive notice of prior deposition or trial testimony. The criminal rule would mirror that. But reports that never saw the light of day through testimony are not subject to being identified as prior testimony, unless the topic of the report implicated the Jencks Act. The member saw no need to change the current proposed rule with regard to disclosing prior reports.

A judge member observed that references to "publications" have been in the civil rules for a long time. The committee notes accompanying those rules do not define it either negatively or positively, which supported the point that including the DOJ's suggested language could create confusion. This judge stated his preference for the committee note without the added language. And if *Brady* or the Jencks Act are implicated by a report, the government will have to comply. He added that if the DOJ is now on the fence about the added language, it might be worth taking it out and not changing the committee note.

Professor Dan Coquillette, who described himself as a note fanatic, strongly urged the Committee not to add the proposed language to the committee note.

A member moved to reject the addition to the committee note, and there was a second. The motion passed unanimously.

C. Discussion of the Committee Note's Language Concerning the (a)(1)(G)(i) Disclosures

As explained above, Judge Bates raised the issue that even though the text of the general provision and the specific provision about mental conditions in (a)(1)(G)(i) are intended to mean different things, the committee note appears to treat them the same way. The Committee returned to this issue during its discussion of the committee note. Judge Bates observed that there was nothing wrong with the language of the committee note, so long as its meaning is what the Committee intended. Professor Beale suggested that in light of the insanity provisions in Rule 12.2, the interlocking discovery rules, and the fact that the government ordinarily presents mental capacity evidence during rebuttal, the committee note was fine as written.

Professor Beale also suggested adding the word "general" to the paragraph to specify that it applied only to the general provision in (a)(1)(G)(i). Judge Bates replied that then the committee note could be read as implicitly saying there is no disclosure obligation in rebuttal for evidence related to mental capacity, which is not the Committee's intent.

The Committee decided to make no changes to that paragraph of the committee note.

There was a motion to transmit the committee note to the Standing Committee. The motion was seconded, and it passed unanimously.

Discussion of the Text of Draft Rule 62

Judge Kethledge turned the Committee's attention to the draft of new Rule 62. He then turned the discussion over to Judge Dever, the Rule 62 subcommittee chair. Judge Dever thanked the members of the subcommittee and the reporters for their work on the new rule. He noted the goal was to approve a draft for public comment. He asked Professor Beale to guide the Committee through the memorandum in Tab 3A of the agenda book.

The discussion of new Rule 62 at points covered a variety of topics. For the sake of clarity, these minutes present the discussion topically, rather than in the chronological order in which each point was raised.

A. Discussion of Subsections (a) and (b)

Professor Beale noted that the changes were to the text of the uniform provisions in subsections (a) and (b) resulted from negotiations between the various Committees and the style consultants. The subcommittee was not seeking to make any adjustments for the conditions of an emergency or how an emergency should be declared. Professor Beale asked Professor Capra if he

had anything to add. He mentioned that subsections (a) and (b) are now essentially uniform across the emergency rules to the extent the Standing Committee wanted them to be. Any variations for the criminal rules have been approved after extensive discussion in the Standing Committee. There is one variance in the civil rules that has yet to be explained to the Standing Committee, but from the criminal perspective, uniformity is established to the extent the Standing Committee wanted it.

Professor Beale further explained that the "no feasible alternative" language has been retained. That is one difference from the other committees' rules, and the other committees do not object to there being a difference in light of the different policy and constitutional implications inherent in the criminal rules. It is important to have this separate, hard check to ensure the criminal rules are not relaxed or modified when they do not need to be. Professor Beale said that outside of this, a few words were deleted as being unnecessary. Otherwise there were no other changes for the Committee to review in subsection (a).

Subsection (b) provides for declarations of emergency. Subsection (b)(1) had no changes. Professor Beale reminded the Committee of its earlier discussion about whether the language should be "court or courts" or should say "locations," which the Bankruptcy Rules Committee had suggested. That language has now been standardized to refer to the court or courts affected. All the committees agreed that 90 days would be the maximum stated period. Earlier, the Committee had wanted mandatory language stating that the Judicial Conference must terminate the declaration for one or more courts before the termination date if the emergency conditions cease to exist. This Committee and the Standing Committee both discussed this issue extensively, especially noting the undesirability of saying the Judicial Conference *must* do something. Who would enforce that? The Judicial Conference has discretion to act, so is there really any reason to have a mandatory obligation? Thus, the language now reflects the uniform decision across the committees that this language should be discretionary, reflecting trust in the Judicial Conference. Professor Capra added that the Judicial Conference has discretion to declare any emergency in the first place. But they do not have to. That same discretion is thus retained in the power to terminate it early. Professor Beale noted that even if some members felt it was preferable for the language to be mandatory, a lot of thought had gone into it, and the direction from the Standing Committee and the other committees was very strong on this point.

Further, this Committee and the Standing Committee were concerned that any additions, extensions, or expansions to a declaration of emergency must meet all the requirements in subsections (a) and (b). At one point we had cross references to both (a) and (b), but after review by the style consultants, the language reads "may issue additional declarations under this rule." "Under this rule" includes both subsections (a) and (b). There is no possibility of using a different standard.

Framing the remaining discussion, Judge Dever emphasized that the subcommittee started with the premise that the rules safeguard critical rights as originally drafted. The Committee has a mandate under the CARES Act to create emergency rules. The subcommittee used a bottom-up process, and it worked to address fundamental issues in subsections (a) and (b) before getting into the details of the emergency procedures.

B. Discussion of the "Soft Landing" Provision

Professor Beale noted the subcommittee had extensive discussion about the "soft landing" provision, subsection (c), which reflects the notion that in certain cases, it might be important and desirable to use the emergency rules to complete a particular proceeding that is already underway once the emergency declaration terminates, when it would be too difficult to resume compliance with the non-emergency rules for the rest of the proceeding. The language, Professor Beale noted, is intended to restrict this fairly narrowly.

Professor Capra added that other committees do not have independent "soft landing" provisions. The appellate rules already include a provision to suspend the rules. And the Bankruptcy and Civil Rules Committees tied the soft landing to extending time limits, within the particular provisions. In contrast, draft Rule 62 has a freestanding provision, and it is important for that to be so in light of public trial and other constitutional rights attendant to criminal proceedings. Professor Beale added that if the emergency ends, the emergency procedures can continue only with the defendant's consent. Why should a defendant be forced to proceed with what he might consider an inferior process if he could revert to more robust procedures?

Professor King relayed how the subcommittee discussed the costs of insisting on the defendant's consent and the costs of not requiring that consent. It concluded that the soft landing provision would not be invoked very often. First, most proceedings for which video and telephone conferencing are authorized under the rule will not be multi-day proceedings that would trigger this provision. Trial is not included. Second, the 90-day termination date for a declaration will be well known to judges. As a result, judges could avoid scheduling multi-day proceedings on the cusp of a potential termination. Further, it is not likely that the defendant would refuse to consent, and would instead insist that a proceeding be delayed until live witnesses were brought into the courtroom, or that the courtroom would have to be opened for in-person presence. And if a defendant did not consent to finishing under emergency procedures, it would not take all that long to resume normal procedures after a declaration terminates if indeed the emergency no longer substantially impairs the ability to function under the existing rules. Accordingly, the subcommittee thought it was important to insist that the defendant consent to the continuation of the use of emergency procedures after the emergency declaration is terminated, in order to address any constitutional concerns raised by the continued use of emergency procedures beyond the termination of the declaration.

Professor King went on to explain there had been three changes to section (c) of the rule since the Committee last saw it. First, it was moved to a different position in the rule because of confusion about the language "these rules" when it had been placed after a long list of emergency provisions. Moving it up in the rule helps clear up that confusion. Second, the consent requirement was added. And finally, the language "resuming compliance" was added to emphasize that the rule is talking about resuming compliance with the regular, existing rules.

A member asked how this would play out practically. First, there has to be a finding, based on a fairly high threshold, that it is not feasible and would work an injustice to resume compliance with the rules. Then, the judge must get the defendant's consent. But in subsection (e), the court

already had the defendant's consent for the substantive provisions in (e)(2), (3), and (4), so it would not affect (e) at all. Thus, the new consent is focused on subsection (d). Subsection (d)(2) already requires the defendant's consent by signature. That leaves public access and alternate jurors and Rule 35. For alternates, what if you've impaneled more than six, and you're going forward, and now you're down to one or two? Do you have to dismiss alternates at that point if you don't get the defendant's consent? The member expressed concern about the practical effect of the defendant's consent under (c) to continue the proceedings after termination of the emergency declaration, when that consent only seems to affect two provisions.

Professor King responded that the subcommittee considered the premise that the prior consent for the emergency procedures would be the same as the consent required here. However, it believed that consent to emergency procedures when a declaration is in place does not necessarily include consent to the continued use of emergency procedures after the declaration ends. There were different views on this, but there was enough concern that the calculus of the defense would be sufficiently different once a declaration ends that an additional consent requirement was not redundant. Professor King stated that the subcommittee did not talk about the alternate jurors scenario presented and suggested the Committee might want to discuss that further. As for public access, the defendant's consent would not address any first amendment problem with the public access provision in the emergency rule, which is in subsection (d)(1). But the subcommittee decided that there would be no serious constitutional concern if public access continues under the emergency rules for a procedure that began under those rules, so long as a reasonable, contemporaneous mode of alternative access is provided.

A member noted that, for a video conference, consent is required for each proceeding. He assumed the defendant must give consent proceeding by proceeding. Professor Beale responded that the question is whether, if a defendant consented to the emergency procedure with the understanding the emergency was continuing, but then the situation changes significantly, the defendant must reconsent under those new circumstances for the proceeding to continue under the emergency rule. Of course, the parties could structure the original written consent to include both situations. But if they did not, the subcommittee's view was that when conditions changed that much, a new consent should be required.

Judge Dever posed a hypothetical scenario. Although multi-day sentencing hearings do not happen often, they do occur. Consider the situation where there is a multi-day sentencing hearing. The first day of the proceeding is during a period of time when an emergency declaration is in effect, and the defendant consents to use Rule 62 emergency procedures. The proceeding goes ahead, and considerable evidence comes into the record. Then, under Rule 32(h), the judge informs the parties he is contemplating a variance from the Guidelines. Suppose, pursuant to *Irizarry v. United States*, 553 U.S. 708 (2008), that the defendant then asks for a continuance. The judge grants it, but he has another trial already scheduled so that it takes another two weeks or a month for the sentencing to resume. If the resumed sentencing hearing was then outside the period of the emergency declaration, the defendant would then need to consent under (c) to continue the sentencing hearing under the emergency procedures. Judge Dever further explained he did not envision defendants needing to consent each day of a multi-day video-conference sentencing hearing when all of those days fall under the time period of an emergency declaration. But if a

delay puts the continuation of the hearing outside the time period of that declaration, the defendant should have the option to insist on being in the court room, in person, with the judge and his family members present, and not consent to continuing the sentence by videoconference. Judge Kethledge thanked the member who had raised the issue for that very helpful exchange.

The Committee returned to section (c) later in the meeting. For coherence, that later discussion has been placed here.

A member raised a further question about the interaction of the "soft landing" provision section (c) with the impaneling of alternate jurors. Subsection (c) refers to continuing the proceeding after the emergency has ended. The consent in subsection (c) is the consent to continue the proceeding, not the particular departure. The member pointed out that a trial cannot be done remotely. Judge Dever agreed. The member responded it could be a problem for an in-person trial in which extra alternates have been impaneled under the emergency rule and the declaration terminates before the end of the trial. What if a defendant does not consent for the proceeding to continue, even though the departure—namely, impaneling an extra alternate juror—happened before? If the defendant does not like how the trial is going, he could say "I don't consent to continuing this proceeding." The member stated that it was worth considering that this could raise a Double Jeopardy issue because jeopardy has attached.

Professor King observed that if the extra alternate could be dismissed when the declaration ended, "resuming compliance" would be feasible. But if the trial was two weeks along and you've used all the additional alternates, and they have taken the place of jurors that have left, then resuming compliance is not feasible. Must the defendant consent in that scenario?

Judge Dever replied that this might also be a question to send out for public comment. His sense was, as a practical matter, that if a court uses all the alternates and they are already in the box, then they have become the twelve jurors prior to the emergency ending. Once the alternates are there, they are impaneled, and a defendant could not remove consent to block alternates from being placed on a jury that dropped below the requisite number. The member who had raised the concern responded that the difficulty is whether that "proceeding," namely the trial, can continue if the alternates are already being used.

Professor King suggested that rather than make any change to subsection (c), the Committee might reconsider the alternate juror provision in subsection (d)(3). Judge Kethledge responded that if jurors are getting sick on a rapid basis during an emergency, the authority to impanel alternates quickly is important. Judge Dever noted a recent trial in front of another judge where six jurors were lost. He added that attendees at the miniconference discussed the need for additional alternative jurors, which is an important concern.

A member stated she thought the alternate juror issue was not as big as it seems. Once the jurors are impaneled, the departure from the rules has already been completed. After the emergency ends, the court would not go back and revisit what already occurred. The rule is clear that authority exists to impanel them. Once that happens, it's done. The defendant's consent is not needed after the initial decision to impanel. It is not a decision to continue to allow them staying on the jury.

As long as the Committee agrees with that reading of it, then the action is completed once the impaneling occurs.

A second member agreed that this reading of the alternate juror provision was the most natural one. If the defendant is unwilling to waive his speedy trial rights, then the rule needs to give district judges the tools to evaluate emergency conditions, get alternate jurors, and ensure that trials can go forward. It is particularly important to have a specific provision in here allowing the district judge—who is in the best position to evaluate the emergency conditions—to impanel ten or twelve alternate jurors, if necessary. The district court can then troubleshoot problems as they arise. If we are three weeks into a six week trial, the district judge can figure that out. The second member concluded it is important to strike the balance in favor of impaneling jurors at the outset.

The Standing Committee liaison stated his strenuous opposition to removing the alternate juror provision. He had conducted a number of trials during the pandemic and having enough jurors had been a challenge. But, he said, he had been persuaded there is an issue because of the language in subsection (c). There is at least an argument that once the declaration terminates, the proceeding cannot be completed without the defendant's consent. Because there is a textual basis for that argument, and the Committee does not intend that result, the Committee should be clear about it. The liaison suggested adding language to the committee note that it doesn't affect an ongoing trial, but if there is ambiguity, it may be better to clear it up in the rule. One option would be to change "may be completed" language to reference departures already adopted and say that those departures can continue. Alternatively, he also suggested adding an additional sentence specific to jurors, saying that any trial that has begun under the authority of this rule may be completed notwithstanding the termination of the declaration.

Professor Capra responded that this should be dealt with in the committee note. He did not think the ambiguity was that dramatic. When the proceeding of empanelment is finished, then it is finished. And this should be stated in the committee note. The member who had raised the concern expressed his support for having the note specify that the procedure is the empanelment, not the trial. Professor Beale suggested that adding something about this in the committee note's discussion of subsection (c) could be difficult, especially because the language in the rule is "proceeding" not "procedure." The member who had raised the issue replied that if the rule is read to mean that the proceeding is the empanelment, not the trial, then that would clear up the issue. Judge Kethledge added that in subsection (c), the rule is saying that the proceeding may continue. But what the Committee is really saying is that the non-compliance under the emergency rules can go forward with the defendant's consent. The Committee is assuming the proceeding will move forward either way.

Professor Coquillette agreed with Professor Capra that the committee note is the proper place to address this. Also, this is an area where the Committee should learn a lot during publication.

Judge Kethledge suggested that the reporters work on language for the note that could be reviewed after lunch or circulated by email for approval after the meeting if necessary. During the lunch break, a working group including the reporters, Judge Kethledge, Judge Dever, and Professor

Capra, worked out draft language for the committee note on this issue. After lunch, Professor King reported back to the Committee the change suggested by the lunchtime working group on this issue.

The suggestion was to add to line 77 of the Note: "It does not terminate, however, the court's authority to complete an ongoing trial with alternate jurors who have been impaneled under (d)(3)." This language is targeted at the specific problem, and preferred by the working group over other language that would have been broader. Judge Kethledge added that the next sentence would start with "In addition," to make sure this is a separate point, and would convey that the suggested language clarifies that the termination does not affect this authority of the district judge and that subsection (c) is doing something different, carving out things that otherwise would have been affected by the termination.

Judge Dever asked for reactions to this proposal, specifically whether any of the members objected to it. No one did. Professor Beale asked whether the new language should explicitly refer to jurors who have "previously been" or "already been" impaneled, to drive home the idea this has already been done, but she noted that the sentence is already in the past tense. Judge Dever agreed that the additional language was unnecessary given that it already refers to jurors "who have been" impaneled. Judge Kethledge added that it referenced (d)(3) which is something that happened in the past. And Professor Beale added that it was referring to an ongoing trial so it would be clear that this happened in the past. Judge Kethledge said that adding this to the committee note was the way to go because it would be a misinterpretation of the rule to read it to mean something else, so there is no need to amend the rule itself. But this addition would help avoid the possibility of misinterpretation.

C. Discussion of the Emergency Departures from the Rules Authorized by the Declaration

Professor King then turned the Committee's attention to subsection (d). The reporters' memorandum outlines the changes that responded to the concerns from the Standing Committee and other issues that had arisen since the previous Committee meeting. Professor King explained that in subsection (d)(1), focusing on public access, two changes were made. First, on line 33 of the draft rule the term "preclude" was changed to "substantially impair." This change was intended to ensure that the court provide reasonable alternative access even if emergency conditions provide for some public attendance, but not all. If there was a partial closure caused by the emergency conditions, the court must provide reasonable alternative access. Second, the language "contemporaneous if feasible" was added to line 35. The subcommittee thought it was important that public access would be contemporaneous, if feasible, not a transcript or recording provided after the fact. This additional language reflects that intent.

Professor King explained that the only other change other than deleting the bench trial provision, was to subsection (d)(2), which is the signature provision. This provides an alternative way to secure the defendant's signature for the court when it is difficult to get a signature because of the emergency conditions. Language was changed on lines 36–37 to say: "any rule, including this rule." This was prompted by a concern that (e)(3)(B) requires a request from the defendant in writing. Just as (d)(2) allows for an alternative process for getting a writing under the existing

rules, it also should apply to the writing designated in (e)(3)(B). As a result, the language on lines 36–37 was changed to explicitly reference "any rule, including this rule."

Mr. Wroblewski asked how the affidavit requirement in (d)(2) is triggered. Professor King responded that if the defendant is live before the judge on a video conference, and the judge can see and hear the defendant's consent, then the defense counsel can sign on the defendant's behalf. The judge can be fairly sure the defendant is actually giving consent. Lines 41–42 with the affidavit address the situation where the defendant is not in front of the judge. The judge may not be able to see or hear the defendant, but defense counsel is nonetheless signing for the defendant. This suggested procedure came from the miniconference, at which lawyers and judges talked about how they were managing difficulties during the pandemic. Using affidavits was how they were managing it, and there were no real concerns arising from that practice.

Judge Bates offered two observations. First, he noted his agreement with the Committee's decision to delete the bench trial provision, which was a change in response to concerns from the Standing Committee. Second, Judge Bates asked whether line 49 of the draft rule should include the word "any" to make it the same as Rule 45(b)(2) to mimic the provision Rule 35 which includes the words "any action." Professor Beale noted that it was probably edited out by the style consultants because they would think "an action" is "any action," making the "any" redundant. But that was a guess. The Committee was unsure whether "any" was edited out or had never been in the rule to begin with. Mr. Wroblewski responded that he didn't think there was an intent to limit anything.

The Standing Committee liaison agreed with Judge Bates on deleting the bench trial provision. He asked whether a letter could not suffice instead of an affidavit. Is having all the formal trappings of an affidavit or a declaration really necessary here? A member suggested "affidavit" be modified to say "declaration." A formal document is good, but a declaration is easier because you don't have to go find somebody to notarize it, the lawyer can attest to it herself, and it would be less formal. The Standing Committee liaison replied there is a statute saying a declaration essentially means the same thing as an affidavit. Where an affidavit is required, a party can file a declaration and vice versa. But he was not sure whether the rules elsewhere say something different. He reiterated that his question was more about whether the Committee wanted to require something very formal, or whether the letter would suffice.

A judicial member commented that she felt strongly that the writing should be formal. Declarations and affidavits get filed and put into the record. A letter might not. She said it could be a document that the lawyer could attest to, but it should at least have the formality of a declaration. Professor King agreed, noting that there are two reasons for the requirement, not only to make sure that the defendant actually consents, but also to ensure the document is filed in the record. Having that record going forward is important. Judge Kethledge added that if the issue of consent went up on appeal, the appellate court must look at the closed universe of the record. If it was less formal and didn't make it into the record and there was litigation about consent that would be an awkward situation. Professor Beale noted that the rules use "affidavit" a number of times, but not "declaration." The Standing Committee liaison noted that in his district letters are filed on

the docket, but if that is not the case elsewhere, he agreed that the document should be a part of the docket, and if it takes saying "affidavit" to accomplish that, then so be it.

Another member noted 28 U. S. C.§ 1746 already equates declarations with affidavits, and agreed the declaration is simpler. Judge Dever agreed § 1746 makes the terms interchangeable. A lawyer could file a declaration, but the rules use "affidavit" in light of what the statute says. He said he thought lawyers would know this. He often receives declarations where the rules use "affidavit." It would create a style consistency issue if the Committee used "declaration" here where all the other instances in the rules say "affidavit."

Judge Bates suggested the Committee could change the language to "a written confirmation of the defendant's consent." This would allow something other than an affidavit or declaration, but it would be something that has to be filed on the record. Judge Dever asked for discussion of this suggestion. He pointed out that circumstances vary significantly across districts. In his district, it is highly unusual to have a letter filed on the docket, but not an affidavit. The original language was intended to stress the importance and significance of the defendant's consent. A member noted that in her district, if a party wants to use an affidavit or declaration, they can file it electronically. In theory, they could electronically file a letter, but they aren't commonly put on the docket. A letter sent through U.S. mail may not get to the court quickly, and it might not arrive before the proceeding it was intended to support. Professor Capra noted that the conversation seemed to be a dispute over what happens on the ground. That is a matter for public comment. He suggested the Committee publish the rule with the "affidavit" language and hope for or invite public comment on it. Judge Dever expressed agreement with that idea.

Judge Dever then invited any other discussion of subsection (d). Hearing none, Professor King moved on to subsection (e).

D. Discussion of the Subsection (e) Teleconferencing Provisions

Professor King began with the recommended changes listed on pages 133–34 of the agenda book. The first change was in subsection (e)(2) on line 70 of the draft rule. The word "preclude" was changed to "substantially impair." Professor King highlighted a similar change discussed earlier. The idea behind the change was to give district judges more flexibility to use emergency procedures when their ability to hold in-person proceedings is impaired by emergency conditions, not only when in-person attendance is precluded entirely. In this part of the rule, the chief judge makes a finding for the whole district. Second, there was a minor change to subsection (e)(3) on line 82 to specify a reference to (e)(2)(B) as well as (A). Third, the chief judge parenthetical was removed. Fourth, line 84 was amended to say "substantially impair" instead of "preclude." Fifth, in line 86, the phrase "within a reasonable time" was added. The subcommittee originally preferred including that phrase, but it had inadvertently been left out of the draft.

Several additional changes were made to subsection (e)(4). Earlier, members had wondered why a finding of serious harm or injustice was not required before pleas and sentences could be conducted by teleconference, and why written consent was not required. The changes to (e)(4) were intended to address those concerns. Subsection (e)(4) now separates out into subdivision (A)

the command that every requirement for videoconferencing must be met before teleconferencing can be authorized. This is in lines 94–97 of the draft rule. Further, in lines 99–100, the phrase "particular proceeding" was added to make it clear that the required findings are proceeding specific and that they cannot be made for the whole case or for multiple cases.

The "reasonably available" language in (e)(4)(B)(i) is new and is explained in the committee note. The concern was that other language, such as "cannot be provided for within a reasonable time," would not address all the reasons judges might use teleconferencing instead of video, including the situation where the video shuts off during a videoconference and the parties want to finish on the telephone rather than start over at a later date. Professor King added that the rest of subsection (e)(4) is the same, with new lettering and numbering to account for separating out the requirement that is now (e)(4)(A).

Judge Bates raised two concerns about subsection (e)(4). First, the paragraph says that the requirements under "this rule" have to be met. But for (e)(1), it is not only the requirements of "this rule" that apply. Rather, it is the requirements of Rules 5, 10, 40, and 43(b)(2) that matter. For Rules 5, 10, 40, the only requirement is consent. For Rule 43(b)(2), the case must involve a misdemeanor and there must be written consent. Judge Bates wondered whether saying "this rule" on line 45 in subsection (e)(4) was broad enough to include the requirement that these other rules must also be satisfied.

Professor King said that the subcommittee had considered this issue. Its conclusion was that the language in subsection (e)(1) sufficiently refers to the requirements of Rules 5, 10, 40, and 43(b)(2) so as to dispense with an express reference to those rules in (e)(4). At one point, the draft rule contained brackets listing the other rules. The subcommittee removed the bracketed language, thinking what is now lines 53–62 was sufficient incorporation of the requirements in the other rules to dispense with expressly stating them elsewhere. Judge Bates stated he understood the other rules had to be met under (e)(4), but he wondered whether the language of that provision was sufficient to encompass that.

Judge Kethledge added that Judge Bates' technical point was probably accurate. If a Rule 5 proceeding was held with videoconferencing in violation of Rule 5, you could say there was a violation of Rule 5 but would not say there was an independent violation of (e)(1). There is a reference in (e)(1) but not an incorporation. Judge Kethledge suggested saying "these rules" instead of "this rule." Professor King responded that the problem with using the phrase "these rules" is that the first paragraph of the committee note makes clear that "these rules" refers to all the rules *except* for Rule 62. So any change would have to use some other language or add some other requirement on lines 95–97 to get to Rules 5, 10, 40, and 43(b)(2).

Judge Dever questioned whether the subcommittee had already dealt with this issue in lines 164–74 of the committee note, or at least tried to address it. He thought we clarified this issue in the note.

Professor Beale noted that in in (d)(2), which deals with rules requiring the defendant's signature or written consent the Committee used the phrase "any rule, including this rule." The

Committee could use the same phrase in (e)(4)(A) to specify requirements under which proceedings for video conferencing have been met. It is not elegant, but it is exactly what the Committee did where both Rule 62 and other rules require something to be in writing. That would be one way to make it explicit here.

Judge Bates added that in the committee note for subsection (e)(4), specifically line 255, the Committee could add a sentence that would take care of this issue and leave the language of the rule the same. Adding something there would be a sufficient way to take care of it. But, Judge Bates emphasized, it should be a part of the committee note on (e)(4)(A), not a part of the committee note on (e)(1). Professor King responded that a change to the rule's text might be preferable given that people sometimes do not read the committee notes, but that the language that Professor Beale suggested could go on lines 255 and 256 of the note: All the conditions for conducting a proceeding by videoconferencing under any rule, including this rule, must be met.

Judge Kethledge agreed with Judge Bates that (e)(4)(A) does not bring the other requirements of the other rules into Rule 62. He expressed support for putting "any rule, including this rule" into the text of (e)(4)(A), so that people don't have to hunt around in a long note. Professor Beale similarly noted her preference for putting that language in the rule itself, or even adding back the bracketed language that had been removed that specified Rules 5, 10, 40, and 43(b)(2) so that parties would not be left to guess what other rules would have some limits. Judge Kethledge suggested that adding "any rule including this rule" is cleaner, and the specific rules could be added to the committee note. Judges Dever and Bates both expressed agreement with both adding this language to line 95 of the text and putting something more specific in the committee note. Judge Dever observed it would make it similar to line 37. Judge Kethledge said without that phrase, if he were interpreting this rule he would assume that the drafters knew how to say that and chose not to do so. Judge Dever agreed that making the text more similar to line 37 would ensure people would not look at the rule and wonder whether there was a difference between what the two provisions require.

Judge Bates' second point concerned his experience when conducting remote proceedings in which someone has a technological issue and needs to continue by telephone. Sometimes it was the defendant in jail, other times it was the government or the defense counsel, if the latter was not co-located with the defendant. Judge Bates said he has normally allowed that one person to continue by phone, with the defendant's consent, while everyone else remains on video. He questioned whether the proceeding would at that point be a proceeding "conducted by teleconferencing" under Rule 62. If so, would the requirements of the teleconferencing rules kick in, so that the defendant has to have an opportunity to consult with counsel, which may mean you have to have a separate telephone call, if they are in the jail, because they are in the jail and other people would see or hear it? This is a fairly common occurrence with remote proceedings.

Professor King noted the subcommittee did not consider the requirements to apply differently depending on who loses visual contact and has to revert to audio only. The subcommittee was thinking more about the judge, defendant, defense counsel, or a witness under oath dropping off the video, not just anyone who might happen to be on the video call. But she agreed that this was not clear from the rule, and if the Committee was going to limit those to whom

the requirements would apply to if they lost video contact, it might be very difficult to agree on that list.

Mr. Wroblewski added he thought the subcommittee was thinking that if *anyone* loses video, then the proceeding becomes a teleconference. He thought Judge Bates' example had been raised at the miniconference and otherwise and that this was the conclusion. Professor King thought Judge Bates' question was about whether anyone, even a minor participant, lost visual contact, the additional teleconferencing procedures applied. She thought the subcommittee did assume these would apply to anybody who dropped off video, but that Judge Bates was questioning whether this was good policy.

Judge Bates clarified that he only meant that this situation comes up regularly, and clarity would be helpful so that judges know whether they have to stop the proceeding, allow the defendant to consult with counsel, and get the defendant's consent before going forward. He emphasized the need to send a clear message to judges for what they have to do in this common situation.

Judge Dever suggested clarifying this issue in the committee note. Judge Bates agreed that it could go in the committee note and suggested that putting something in the rule's text could overcomplicate it. Professors Beale and King suggested "all participants" or "one or more participants" as being options that could be added to lines 264–67 of the draft committee note. This would trigger the expectation that everybody should be on video, or else you have to go through the teleconferencing requirements. Judge Kethledge asked whether anything in the rules defines "participants" to be limited to only parties and counsel, or whether it includes family members, a victim that will allocute, or some other broader set of people on the call. Professor King replied that nothing defines the group.

The Standing Committee liaison noted that the suggested language in the committee note would not solve the issue that Judge Bates flagged because it is still subject to the rule requiring defense consent *after* consultation with counsel. He suggested that when one person is not able to connect it should be clear that the judge does not have to stop, require consultation, and start over. And this is definitely a commonplace problem. It happens not only in the middle of proceedings, but also at the beginning, when someone cannot get on in the first place, and after much waiting somebody says, "why don't we proceed with me only on audio?" He thought in those circumstances the defendant can consult with counsel before it starts. Professor Beale asked the Standing Committee liaison what he thought the ideal policy should be, less formality before moving to teleconferencing. He responded that he typically tells the defendant if you want to speak with your lawyer at any point, we will make that work. So, in these circumstances he would assume that if the lawyer or client wanted to consult with one another before deciding whether to continue, they would say that, and otherwise continuing with the defendant's consent would suffice without putting them in a breakout room. In his view, confirming consent to continue the proceeding without everyone being on video would be sufficient, even if the defendant did not want to consult with counsel.

Judge Bates added that he thought the importance of getting the defendant's consent to continue could vary depending on who had dropped off the video call. If the defendant can only continue by telephone, then consent is essential. If the defendant's counsel could only participate by telephone, then consent would be a good idea. But if it is the government that can only proceed by telephone, then consent may not be a big issue. If it was the judge at a sentencing hearing, the defendant's consent would again be very important. So, it is going to vary, which makes it complicated to write into the rule. The Standing Committee liaison replied he did not think there was any harm in requiring the defendant's consent in all of these cases. Presumably if it is the prosecutor, it is hard to imagine the defendant not consenting. Mr. Wroblewski thought the defendant's consent was required in all those circumstances. He noted that for the video conference, even before a circumstance needing a teleconference, consent is required. The only additional requirement for the teleconference is that the defendant has an opportunity to consult with his lawyer to decide whether to withdraw consent at the point someone becomes unavailable to continue by video. Judge Bates agreed that consent would be required in all of those circumstances, if you view anyone participating by teleconference to be a proceeding conducted by teleconferencing. Mr. Wroblewski noted that even if you called it a videoconference, you would still need the defendant's consent.

The Standing Committee liaison suggested amending subsection (e)(4)(C) to say the defendant consents after being given an *opportunity* to consult with counsel. The other rules require consultation with counsel anyway. That would mean that in the middle of the proceeding you would say would you like to speak with counsel, let me know. Professor King noted that several places in Rule 62 require consent *after* consultation, and asked if the suggestion was to make (e)(4)(C) the only one requiring consent with simply an opportunity for consultation rather than actually requiring the consultation to occur. Judge Dever noted that the subcommittee changed "opportunity to consult" to "consult" at Judge Kaplan's suggestion because the subcommittee wanted actual consultation.

Professor King asked whether it would be undesirable if the Committee made no change and simply said that any proceeding with even a single audio participant is a teleconference. It just requires the defendant to consult with counsel and consent. The Standing Committee liaison asked whether that meant a court would have to halt an on-going proceeding when one person loses video, provide an opportunity to consult, and then get consent. He noted there is a strong argument that the current text requires that, if we are construing teleconference to be anytime one participant is on audio. But the technological problem often occurs during the middle of the proceeding.

Judge Kethledge noted that the rule is trying to deal with two quite different situations. The first when, before the proceeding commences, the defendant decides to conduct the whole proceeding by teleconference. The second is when someone drops off during what people had hoped would be a video conference. Judge Kethledge suggested that a small group could work on this issue during the lunch break and then report a suggestion back to the Committee.

After lunch, Professor King reported back to the Committee the change suggested by the lunchtime working group as a solution to the consent-after-consultation issue, which she said was based on a suggestion to make it explicit that the defendant only needs an opportunity to consult

with counsel if the interruption in the video feed happens during a proceeding. On line 105 of the rule text, the group suggested breaking (e)(4)(C) into two subdivisions. The proposal would change the text to say:

> (C) the defendant consents—
> (i) after consulting with counsel, or
> (ii) if the proceeding started as a video conference and has not been completed, after being given the opportunity to consult with counsel.

Professor Beale noted that this change was to respond to the concern that when video breaks down in the middle of a proceeding, it is too cumbersome to stop everything, allow separate consultation with counsel, then come back. The group thought in the separate situation where everybody is planning on a telephone only proceeding that has not yet started, there should be advance consultation with counsel about such a dramatically different format.

Professor King further explained that the group also suggested changing line 94 to insert the phrase "in whole or in part" after "proceeding" so it would read: "A court may conduct a proceeding, in whole or in part, by teleconferencing if …"

In addition, the group suggested, in line 95, to replace "this rule" in (e)(4)(A) with the phrase "any rule, including this rule" so that the first requirement for teleconferencing would read "the requirements under any rule, including this rule, for conducting the proceeding by videoconferencing have been met . . . "

Finally, the group put forward the proposal that line 99 include the phrase "all participants in the proceeding" instead of merely saying "the proceeding" so that it would read "the court finds that: (i) videoconferencing is not reasonably available for all participants in the proceeding . . ."

Judge Dever explained that this was an attempt to address a number of the issues raised by Judges Bates and the Standing Committee liaison, including the common occurrence of when one person falls off the video conference during the middle of the proceeding. It also addresses the process for obtaining the defendant's consent when the proceeding has already started and then the issue arises, namely that the judge at that point gives an opportunity to consult with counsel.

Mr. Wroblewski asked about the phrase "in whole or in part" on line 94, whether "in whole" means that everyone is on the teleconference and "in part" means some people are on teleconference and some people are on video. Judge Dever said that was correct. Mr. Wroblewski thought that was not obvious. Professor Beale said she thought that it meant as well that a court could do a part of the proceeding by video and part by audio. Professor King said she had not assumed "in whole or in part" meant some not all participants, but that "in whole or in part" was getting at the preference for the entire proceeding to be by video. The issue of less than all participants was addressed by the changes to lines 99–100. So if a proceeding was going to be partially by teleconference, the court must still go through the (e)(4) consent procedures. Professor King said that if that is not clear, different language may be needed.

A member suggested changing line 94 to say: "a court may conduct a proceeding, or a part of a proceeding, by teleconferencing if . . ." Judge Dever and Mr. Wroblewski both expressed support for this change.

Professor King asked Mr. Wroblewski if the change on lines 99–100 — "videoconferencing for all participants in a proceeding"—reflects what he thought the policy should be. Mr. Wroblewski said yes, the point is to provide an avenue for the proceedings to continue when someone drops off. A member asked for clarification on whether this means it is an all or nothing proposition—either everyone participates by video or everyone participates by phone. Professor King replied that as drafted, the rule says that if anyone needs to participate by phone, then the requirements in (e)(4) kick in. Professor Beale suggested that perhaps it should say "any" and not "all." Professor Capra agreed.

Another member asked for further clarification of what happens when a participant drops off video. If, in the middle of a videoconference, the AUSA drops off, does the defendant get another opportunity to weigh in, object, or consent? Or can the judge just proceed? Does the judge have to make an additional finding that video is not reasonably available for that AUSA after giving him another chance to sign on? Which subparts are triggered in terms of new finding and new consent? Professor King responded that, as drafted, the requirements in (e)(4)(B)—findings that videoconferencing is not reasonably available, and defendant will be able to consult confidentially—kick in whenever there is *anyone* participating by teleconference. On consent, the suggestion is to have a different rule for consent depending on whether the need for telephone occurs before the proceeding begins or after the proceeding started as a video conference. If it started as a videoconference and is not completed at the time the technological problem occurs, all the judge has to do is ask the defendant and counsel if they need an opportunity to consult about consent. So, when a single person drops off, and that person needs to participate by telephone, the defendant must consent. That is how the rule reads. Professor Beale said that is the policy we were asked to draft, so one question is whether this captures that policy. Another is whether that is the right policy.

The Standing Committee liaison stated that he liked the suggested language in (e)(4)(C) on the consent issue. He went on to note that in addressing the situation where the proceeding is a videoconference, but one or more participants can only connect via audio, the rule as drafted could allow a judge, with the defendant's consent, to do the whole proceeding by phone because one person cannot be on video. That might not be the policy the Committee wants. The Committee might prefer that the proceeding goes forward with as many people on video as possible, only allowing telephone participation for the one person that has to be on the phone. It now allows the judge to conduct the entire proceeding by phone if just one participant cannot participate by video. Judge Kethledge responded that he thought the "in whole or in part" language spoke to that, but after hearing the discussion, he was no longer sure. Judge Dever and Professor Beale reiterated they understood the Committee's preference, as a policy matter, was that everyone be on video who can be, even if some participants can only participate by telephone.

Professor Struve suggested solving the problem by changing the language in (e)(4)(B)(i) to say: "the court finds that: videoconferencing is not reasonably available as to the participants

who will participate by teleconference." She thought the Committee was attempting to permit teleconferencing for the one person for whom videoconferencing was not reasonably available. Judge Kethledge agreed this suggestion would narrow it that way. Professor King suggested change "as to" to "for." The Standing Committee liaison suggested changing "the participants" to "any participant." Several members thought "would" makes more sense than "will" or "can only" or "could" because it would suggest the decision has not been made yet. Professor Capra said "participant" should be "person" to avoid "participant who would participate." After changes, the substitute language for (B)(i) at lines 104-106 read: "videoconferencing is not reasonably available for any person who would participate by teleconference."

Circling back to the introductory language in (e)(4)(A), Professor Struve also suggested that it should say "all rules including" instead of "any rules including" this rule. Even though the phrase "any rules including" replicated language in lines 36–37, Professor Struve observed that (e)(4)(A) is structurally different than those lines. Lines 36–37 say "any rules" because Rule 62 has multiple rules that require the defendant's consent. And for any rule that has that requirement, it should be followed. But in (e)(4)(A), the point is that *all* the rules for videoconferencing must be met, in addition to the teleconferencing rules in (e)(4). As a result, "all" might be more appropriate. She suggested that if (e)(4)(A) said "any," it could be misinterpreted to require a court to comply with only one of the videoconferencing requirements. A court must comply with all of them before then also complying with (e)(4) if the proceeding will be by teleconference. Judge Kethledge said he thought that here "any" means "all," and he thought it was unlikely that there would be an issue when more than one rule would prescribe requirements for a particular proceeding. It could create confusion as to which other rules are implicated. Later in the meeting, a participant observed that for this addition to be parallel to its earlier appearance in the rule, the words "including this rule" should be set off by commas.

Going back to the new language on lines 104–06 regarding the finding about the availability of videoconferencing, Mr. Wroblewski raised the concern about how the rule would apply if the defendant doesn't want it to be half teleconference and half video. For example, the defendant may want everyone on teleconference if the defendant has to be on audio, and he doesn't want the victim and prosecution would to be on video while he is on audio. He could refuse to consent to half and half, but the rule does not appear to allow the judge to have it all by teleconference under those circumstances. Judge Kethledge replied that the Committee could leave this to the discretion of district judges instead of proscribing an outcome that most judges will not pursue anyway. Most judges will not automatically switch to doing the entire proceeding by telephone unless there is a good reason. Professor King wondered if this provision should be built around the defendant's choice of who should be on the phone and who cannot; it should be up to the judge, and the defendant consents. The policy preferred by the subcommittee is that participants should be on video when they can be, and the judge should not be able to shift to phone without these findings.

Judge Kethledge added that the provision is trying to accomplish a lot. It is trying to deal with premeditated teleconferenced proceedings, and also with people falling off and coming and going in videoconferencing. At some point, he said, the Committee has to trust the district judge to react appropriately to what is happening in the courtroom. Professor Beale added she thought

earlier they may have to bifurcate the procedures for the premeditated teleconferencing from the on-the-fly situations, then one of the judges mentioned that sometimes a person who thought he could get on the video from the outset is unable to. So there are these middle cases, where you think you have a premeditated situation, but it does not work out as planned. Judge Kethledge observed that the Committee might need to go back to the language about videoconferencing not being reasonably available for all participants. The language might leave a small gap for someone to do something crazy, but a district judge probably isn't going to do something crazy.

A member stated her view that to accomplish the policy goals, a clearer, shorter rule would be helpful to make the point that teleconferencing is not ideal, but the court can adopt it if it is necessary in some way and the defendant consents. She noted that the rule now has a lot of clauses and subparts, but something simpler could be better. She liked interpreting "in whole or in part" as meaning both a proceeding that starts out on the telephone and a proceeding that starts out as video. Now it sounds as if the court cannot choose to start a proceeding where one party is by the phone. In her district the federal prosecutors were never on video because they weren't allowed to use that on their computers for months. So they came in by phone, and the defendants were consenting to video. No one asked the defendants "Do you care if the prosecutor is by phone?" Or "Do you care if the court reporter is not visible?" She didn't think we want to list all the people who have to be on video. Going back to the judge's discretion, she proposed substituting: "A court may conduct a proceeding, in whole or in part, by teleconferencing, if the requirements under these rules have been met for videoconference, and a party is not able to participate by videoconference." If the requirements under these rules for videoconferencing have been met, then the defendant has consented. Judge Kethledge said he understood "in whole or in part," to speak to both a segment of the proceeding and to different participants.

Professor King asked how this proposal would handle a situation where a judge drops off the videoconference in the middle of sentencing. The member replied that at that point, the whole proceeding stops until the judge gets back on by phone. The court would likely ask the defendant if he wants to continue this way, and the defense counsel would likely have advice for the defendant on how to handle that situation. She doubted the sentencing would continue if the judge could not see the defendant. That would be a pretty big break from the usual procedure. Professor King responded that her question was geared towards understanding how the suggested provision would operate without the requirements in (e)(4)(B) (findings that video is not reasonably available, and that defendant will be able to consult confidentially with counsel). Absent those requirements, Professor King continued, if the judge or even the defendant dropped off the video, the judge could decide to continue the sentencing by telephone if the requirements of videoconferencing had been met, without those additional findings. She concluded that the policy question is whether the Committee wants to restrict in that way the options available to those who some on the Committee have in the past termed "the weaker players."

The member responded that the question was whether during a teleconference the defendant will have the opportunity to consult confidentially with counsel by phone. She thought usually that was not true, they do not have the opportunity to consult very easily.

Judge Kethledge wondered if the rule should require only (B)(i) and the defendant's consent under (C). Professor Beale thought it was important to the subcommittee that the defendant be able to talk confidentially with counsel, and it recognized that could be difficult if there is only one phone line. That led to the requirement in (ii).

A judge member suggested the rule should leave to the judge's discretion what must happen if the judge drops off video. She noted she had dropped off during a plea proceeding once. That is a situation where it is very important for the defendant to see her. In her view, unless something extraordinary occurred, the video would have had to be restarted. In the proceeding where she dropped off, she told the parties to wait a few minutes while she got back into the video conference. But perhaps a proceeding is nearly finished, she continued, and it is in the defendant's advantage to wrap it up then and there. In many instances, that would not be the case, but it should be more open in that situation.

Professor Beale observed that these cases differ in multiple ways. The problem may arise at different times in the proceeding, such as the beginning, middle, or the very end. Beyond that, there is the issue of which parties are not able to continue by video. Professor Beale questioned whether the Committee should return to the guiding principles. The Committee had said that as much should be done by video as possible, but the Committee also wants the defendant to be in the driver's seat. It might be to the defendant's advantage to do the whole thing by teleconference sometimes, or in other instances the defendant would not consent if the person who would participate by phone is really critical. Professor Beale thought the Committee agreed these limits apply when even one person drops off, and only that person participates by phone, but was unsure the rule as modified by the suggested language addressed that. Judge Kethledge thought that the language suggested by Professor Struve for (e)(4)(B)(i) —"not reasonably available for any person who would participate by teleconference"—addressed it.

The member who had proposed simplifying (e)(4)(B) then suggested different language for the Committee to consider:

> A court may conduct a proceeding, in whole or in part, by teleconferencing, if the requirements of this rule for videoconferencing have been met but the use of videoconferencing is not readily available to one or more participants, the defendant will have the opportunity to consult confidentially with counsel during the proceeding, and the defendant consents.

Judge Dever replied that something like this language could be helpful because the rule needs to prepare courts for the next emergency. The rule needs elasticity, and the Committee should be able to trust the discretion of district judges within the framework of the rule.

The member who had proposed this language said she suggested "this rule" instead of "any rule, including this rule" because that allows the videoconferencing under Rule 5 to have been met then allow you to switch to teleconferencing. It should be this rule because it allows for videoconferencing after consent after consulting with counsel.

Professor King noted the differences between the proposed language and the current draft. The first part is what had been suggested before, the court may conduct a proceeding, in whole or in part, by teleconferencing, if the requirements for videoconferencing have been met – assuming agreement on whether it should be "this rule" or "any rule, including this rule." The second requirement is that videoconferencing not be reasonably available for one or more participants, which is (B)(i) rephrased. The other requirement is the defendant will have the opportunity to consult confidentially with counsel during the proceeding, which is (B)(ii). But the proposal removes the need for the judge to make findings as to these requirements. And it includes the defendant's consent, which is in (C). Essentially, the proposal modifies the structure somewhat, rephrases some wording, and omits the addition to the consent provision that was added in response to the Standing Committee liaison's suggestion that if the proceedings started as a video conference the defendant needs only to be offered an opportunity to consult with counsel in advance of consent.

On the consent wording, Judge Kethledge agreed that the suggestion elides the consulting with counsel requirement in (e)(4)(C), which had addressed the Standing Committee liaison's concern, but Judge Kethledge said it was another matter whether it overshoots that concern. However, he also thought this could be an example of how the rules can trust the district judge to make on-the-ground decisions to give the defendant an opportunity to consult with counsel. He thought nearly all judges would at least ask the defendant if he wanted to talk to his lawyer in situations like this.

The member who had proposed the new language commented that saying a defendant "will have" the opportunity to consult confidentially with counsel suggests that you are planning to use teleconferencing and know the attorney or defendant will be by phone, but it doesn't require the defendant's consent in advance if somebody drops off. The lawyer should be able to ask the defendant, "This is a new proceeding, do you mind?" They could do that on the record, with everyone present, or could consult confidentially. But it does not require the defendant and his counsel to have talked about it in advance. It does not answer what happens if the judge wants to appear by teleconferencing when video is not readily available for the judge. Mr. Wroblewski observed that this still allows the defendant to not consent to that. It allows more flexibility for the judge about who is going to participate by audio or video, and it allows a little more flexibility about the opportunity to consult. That is the advantage and it simplifies the whole thing.

Several members agreed that the language the member had proposed must be modified to read: "the use of videoconferencing is not *reasonably* available to one or more participants" instead of "readily" available.

The Committee then returned to whether (e)(4)(A) should say "this rule," "these rules," or "any rule, including this rule." After some discussion, the Committee affirmed its earlier decision to say, "any rule, including this rule." The member who proposed the new language thought if you complied with (e)(1) and (e)(4) you could use teleconferencing under Rule 5. Judge Kethledge said you need the additional language "any rule including this rule" to say what the Committee intends. Professor Beale noted that the Committee had decided earlier that the requirements for videoconferencing in Rule 5, 10, 40 and 43(b)(2) existed outside Rule 62 and must be met as well.

Professor Beale also suggested that maybe the rule should just say "requirements for conducting the proceeding by videoconferencing have been met" and leave it at that. Judge Kethledge pointed out that this is the second time in the call the Committee is talking about this same point. He suggested keeping the language on the screen and moving forward. [On the screen at that time was the language, "the requirements under any rule, including this rule, for conducting the proceeding by videoconferencing."] And if there were lingering doubts, Judge Kethledge added, the language still has to go to the Standing Committee and the style consultants, and it could be worthwhile to let them have a pass at this language. Judge Dever agreed.

Professor Struve noted an alternative phrasing in the meeting chat that specifically listed the several rules with requirements for videoconferencing, in the text of (e)(4). Professor King responded that this enumeration would be much clearer, but it might create problems in the future because if one of the other rules were changed, it might also require an amendment to this rule.

Judge Dever suggested that considering the member's proposed language had brought the Committee back almost to where it had started. Considering the text of what we have right now on the screen, would probably be the most straightforward thing, then sending that out for public comment, after it is reviewed by the style consultants. It attempts to address the situation where the prosecutor drops off and couldn't be on videoconference, and the defendant's consent is the most critical part.

Discussion continued regarding whether the draft on the screen should be modified as the member had proposed. Judge Dever noted that the proposed alternative did not set off the requirement in (e)(4)(A) as a separate gate to pass through, and setting it out separately was important to the subcommittee.

Judge Kethledge then suggested modifying the draft on the screen, at line 96, to say "in whole or in part" on line 96, earlier instead of "or part of a proceeding," which would restore (e)(4)(A) as it was earlier. He suggested revising the member's proposed language of (e)(4)(B) to say:

> The court finds that:
>
> (i) videoconferencing is not reasonably available for one or more participants; and
>
> (ii) the defendant will have an opportunity to consult confidentially with counsel before and during the proceeding.

Finally, Judge Kethledge suggested that (e)(4)(C) simply say "the defendant consents," as the member had proposed. Professor Beale noted this would replace the new language suggested after lunch, which had created two subdivisions in (C).

The Standing Committee liaison commented that where one or more participants cannot participate by video, these changes would still leave room for someone to construe this as allowing the whole proceeding by phone, instead of keeping on video those who could be by video. The

Standing Committee liaison said he thought that was fine, but it deviates from the policy preference for keeping people on video.

Professor Beale suggested the issue could be clarified in the committee note as an explanation for the language "in whole or in part" on line 96. Possibly the note could say if some of the participants could proceed by video, the prosecutor could proceed by phone only, for example. In the note, she said, the Committee could make the point that it should be done only to the extent it needs to be done. Mr. McQuaid added that the Committee could trust the district courts to ensure proceedings were fair, and allowing some leeway in the rule was an acceptable risk from the DOJ's perspective. However, he stressed the DOJ's preference for language in the committee note making clear the policy favors videoconferencing.

The Committee briefly considered then declined Professor Beale's suggestion to add introductory language on line 95 that would say: "Though video conferencing is preferred a court may . . ." after Judge Kethledge noted that the criminal rules do not typically use hortatory language. There was a suggestion that this is the sort of thing that goes in the note.

Judge Kethledge then suggested that to address the Standing Committee liaison's point that this language would allow courts to conduct the whole proceeding by phone, instead of keeping on video those who could be by video, the language "persons who would participate by telephone" could be restored. As to the concern about the defendant not consenting if the prosecution cannot be on video, Judge Kethledge wondered whether that issue would ever arise. If the defendant has requested in writing that this proceeding happen remotely, and now to some extent it has to proceed by teleconference, how often would the defendant say "No, not if the prosecutor can't be on video"? It may be a null set scenario here. If we want to follow the policy, we stated earlier that we should limit teleconferences. We could restore the language we had earlier, that Professor Struve suggested for (4)(B)(i). This language, he said, would make it clear you ought to keep teleconferencing to a minimum, and then leave it to the judge's discretion. After some attempt to specify exactly what that language was, Professor Beale stated that the original language to be added back in to (B)(i) was "for any persons who would participate by teleconference."

A member asked for clarification on the scope of the parties this covered. He asked whether the rule covers victims and others present. Professor Beale said that the rule would cover the victim speaking at sentencing. Professor King added that even if the victim was merely observing, the rule would cover that person. It covers anyone on the video call. Judge Kethledge replied that the word "participate" means the person must have a role in the proceedings. Professor King did not think the rule said that and suggested the Committee define "participate" if it intends a more specific definition. Does it include someone with a right to speak even if they don't plan to? Professor Beale did not think this was an issue. Judge Dever added that the issue again goes to the judge's discretion. If there were a large number of victims, a judge might switch to telephone rather than stopping the proceeding. He emphasized that the "may" at the beginning of (e)(4) does a lot of work. A judge doesn't have to do this.

Judge Kethledge stated that what is on the screen at that point reflects the policy view of the Committee, and Judge Dever agreed. At that point (B)(i) read "videoconferencing is not

reasonably available for any persons who would participate by telephone conference." Judge Kethledge suggested it was time to decide about sending this out for comment.

Professor King turned the Committee's attention to a member's earlier question why the colloquy requirement in the committee note is not in the rule itself to ensure that there is consent and there is something in the record in case the defendant later challenges whether the defendant ever discussed this with counsel. Professor King noted that the subcommittee thought it was better to leave it to the judge to decide how to ensure the defendant's consent is voluntary and knowing. The subcommittee did consider including it in the rule, but ultimately decided in favor of the judge having discretion as to what would constitute true consent. The member had also raised other questions about the consent provisions earlier in the meeting, but she said further discussion was not needed at this point.

Judge Dever then suggested the committee decide whether it agreed with the Rule text, with the changes to part (4) to be sent out for public comment.

The member who had proposed a shorter simpler text asked whether there was any interest in having the rule presented as a paragraph, not broken out into various subparts. Judge Kethledge noted that the subcommittee thought it was important to have (e)(4)(A) broken out as a separate component, because we had such confusion on that point and that clears it up. He also noted, and Professor Beale agreed, that even if the Committee voted on it as a paragraph, the style consultants would likely break it up again anyway.

A member then moved to have the language on the screen to be adopted as the Committee's draft and sent forward, and there was a second. The motion passed with one member voting in opposition.[3]

Discussion of the Draft Committee Note for Rule 62

Professor King guided the Committee through various changes to the committee note accompanying Rule 62. After running through several corrections to cross references in the version of the Note that appeared in the agenda book, Professor King explained the various changes to the Note described in the reporters' memorandum on pages 134–35 of the agenda book.

In response to the language added to lines 4–6 of the note, a member pointed out instances on lines 168 and 209 where "new rule" had not been changed to "this rule" or "this emergency rule." These were corrected. There were no additional comments from the Committee about the changes reviewed in the memo.

[3] The initial vote on the text had no opposition. However, later in the meeting, when the Committee considered a motion to approve the note language as revised, Ms. Hay expressed her opposition to adopting any emergency rule, and her statement is included in the minutes at that point. Judge Kethledge responded that in light of Ms. Hay's position, she should be shown as voting against the adoption of the text as well as the Note, and she agreed, stating she meant to oppose both text and note.

Professor King then explained changes to the note suggested or raised after the memorandum had been submitted for the agenda book. On line 26, Judge Bates suggested adding the word "even" between "that" and "if" so that it would read "that even if the Judicial Conference determines . . . ." In lines 31–32, Judge Bates suggested "period" be changed to "periods" and Professor Struve suggested substituting "extensive" for "substantial." Judge Bates also suggested that line 89 use the word "term" instead of "phrase," thinking that was more apt. There were no objections to these changes. Professor Struve had also suggested taking out the language about whether the chief judge is unavailable leaving only the reference to the U.S. Code, given the chief judge's availability is implicit in the statutory reference. Professor King noted the Committee had already considered and voted on changes to lines 76–78 regarding alternate jurors, and noted that new language would be drafted in lines 270–75 to explain the changes to (e)(4).

A member suggested that line 112 should say "the defendant's consent" not "defense consent." The defense is about the whole team, but the focus of that provision is on the defendant. That change was accepted.

The Committee discussed the addition to lines 141–43 regarding Rule 35. A member expressed concern that the second clause after the comma in that sentence may not have been approved by the subcommittee and is a point contested by defense attorneys. It said that Rule 35 was "intended to be very narrow and to extend only to those cases in which an obvious error and mistake has occurred." She urged that we should not have a statement in this Note about the scope of Rule 35. If Rule 35 is to be interpreted narrowly or broadly, it should be in the note to Rule 35. This note, she suggested, could just say "Nothing in this provision is intended to expand the authority to correct a sentence under Rule 35." Professor Beale asked whether that line only referred to Rule 35(a), the clear error provision, which is the only thing covered by Rule 45(b)(1). The member said that even so, if this line was about the scope of Rule 35, she did not think it was needed. Mr. Wroblewski commented that he thought he had copied that line directly from the existing committee note in Rule 35. Professor King confirmed that the language is, in fact, in the Rule 35 Note. The member who had raised the issue reiterated that if the Rule 35 Note already includes this information, then there was no reason to repeat it in the Rule 62 Note. Judge Kethledge said that if the sentence is deleted as the member suggested, then the Note is talking about Rule 62. The disputed clause is about Rule 35, and that seems gratuitous. Professor Beale noted that she supported deleting the sentence.

Another member agreed with the concern that had been raised, and she suggested adding "under Rule 35(b)(1)" to fix a missing the parallel reference. Earlier in the same paragraph, the committee note referenced Rule 35(a)'s fourteen-day limitation. The material in question here referred to Rule 35(b)(1)'s one-year limitation. Adding the reference made the two parts of the paragraph parallel. Judge Dever and Professor Beale agreed. The member who had initially raised the issue replied that the sentence still might be unnecessary given the previous sentence is about time periods. Judge Kethledge thought having the sentence was helpful to disabuse anyone from trying to use a creative interpretation to bypass Rule 35's restrictions. Judge Dever then suggested: "Nothing is intended to expand the authority to correct or reduce a sentence under Rule 35." That would capture both Rule 35(a) and (b), and would delete the additional clause that was causing

concern. Both the DOJ and the objecting member agreed to that change, and Judge Dever's suggestion was accepted.

Finally, Professor Beale commented that Judge Bates had suggested adding references to Rules 5, 10, 40, and 43(b)(2) on lines 255–59. Because other changes would already have to be made to that part of the Note, Professors Beale and King agreed to consider the issue in the new draft discussing the changes in (e)(4), which they would circulate to the Committee.

There was a motion to approve the committee note with the changes adopted during the meeting and with the recognition that the Committee would still need to approve additional language regarding (e)(4).

Ms. Hay stated that she appreciated all the work that has gone into the rule and wanted to explain why she would vote against it. In her view, an emergency rule is not needed. Through many emergencies the courts have managed without an emergency rule. Congress was able to pass the CARES Act fairly quickly, it is a deliberative, representative body. In addition to being unnecessary, an emergency rule creates a dangerous precedent. The emergency procedures become the new norm against which later incursions on rights will be measured. These emergency measures will become measures of convenience, she warned, and we will start to treat rights less seriously because we've seen how they can be encroached upon. Last, she objected to having the judiciary declare its own emergency. These are very important rights we are protecting in the rules, she said, and the people's representatives in Congress should be the ones to determine whether there is an emergency that should change the legal process. The judiciary itself should not declare the emergency that causes us to limit some of the rights these rules protect. For all those reasons—which she set out a letter that is in the record[4]—she said she was going to vote against the rule and the note. She also said, however, that if we are going to have an emergency rule, this reflects the best protection of rights that we could have wanted. Judge Kethledge then noted that Ms. Hay's no vote would be shown for the text as well as the note, and she agreed. The motion to approve the note was seconded, and it passed, with Ms. Hay voting against the motion.

Judges Dever and Kethledge expressed their gratitude to the incredibly hard work of the subcommittee members and the reporters on this effort.

Later in the meeting, Judge Kethledge recalled that the Committee's discussion of Rule 62 had not considered the reporter's memorandum regarding whether there should be emergency rules for cases arising under §§ 2254 and 2255. No members suggested that the Committee pursue such rules.

Report of Rule 6 Subcommittee

After completing its work on Rules 16 and 62, Judge Kethledge asked Judge Garcia to report on the miniconference conducted on April 13 by the Rule 6 subcommittee.

[4] Ms. Hay's objections appear following page 193 in the Committee's November 2020 agenda book. https://www.uscourts.gov/sites/default/files/2020-11_criminal_rules_agenda_book.pdf.

Judge Garcia turned the Committee's attention to the memorandum in Tab 4. He noted the Committee had now received several proposals related to the release of grand jury materials of historical or public interest. Although the Committee declined to act on a similar proposal in 2012, subsequent events have raised the issue again. Circuit decisions in *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019) and *Pitch v. United States*, 953 F.3d 1226 (11th Cir. 2020) (en banc), had spurred the Committee to seek a broad range of opinions on the subject. The subcommittee hosted a full-day miniconference with four panels considering the various proposals, including both an exception to grand jury secrecy for materials of public or historical interest, and a proposal from the DOJ about delayed notice. The speakers included former prosecutors, representatives from the DOJ, academics, representatives from the Public Citizen Litigation Group and the reporters Committee for Freedom of the Press. There was also a speaker who had experienced the effects of improperly leaked grand jury information.

The miniconference provided perspectives on a number of issues, such as whether a rule amendment should set a floor, such as 20 or 30 years, below which material cannot be released.

Judge Garcia also commented that after the miniconference the Committee received a new proposal from the petitioners in *Pitch* that the subcommittee would also consider. Judge Garcia concluded that he hoped the subcommittee could provide recommendations on all the proposals at the Committee's meeting in the fall. Professor Beale commented that the subcommittee would have a great deal of work to do, and the reporters would be circulating materials, including the most recent proposal.

Discussion of New Suggestions

The reporters guided the Committee through a discussion of each of the new suggestions submitted to the committee.

A. Authority to Release Redacted Versions of Grand Jury–Related Judicial Decisions (Rule 6)

Judge Kethledge asked Professor Beale to discuss this suggestion from Chief Judge Howell. Professor Beale explained that Chief Judge Beryl Howell and Senior Judge Royce C. Lamberth of the U.S. District Court for the District of Columbia suggested consideration of an amendment allowing judges to release redacted versions of grand jury-related judicial decisions. Their concern, in light of the D.C. Circuit's decision in *McKeever*, was that their established practice of publishing redacted judicial decisions discussing grand jury materials could constitute a Rule 6 violation. The judges stated that so far *McKeever* has not led to any case in which there was a problem, but it could arise.

Professor Beale noted this proposal was related to the work the Rule 6 subcommittee was already doing to explore amending the rule in light of *McKeever* and *Pitch*. Judge Kethledge noted that this is a significant issue, concerning at least a potential conflict between Rule 6 and established judicial practices. The suggestion was assigned to the Rule 6 subcommittee for further consideration.

B. Authority to Excuse Grand Jurors Temporarily (Rule 16)

Judge Kethledge explained that the second suggestion came from former Committee chair Judge Donald Molloy to allow grand jury forepersons to excuse grand jurors on a temporary basis. Professor Beale added that this arose because of a surprisingly wide range of practices across the Ninth Circuit. Judge Molloy had assisted the reporters in gaining information about these practices. She suggested that if the Committee has the capacity to handle the suggestion, it might be worth considering. The lack of uniformity and the idea that forepersons were temporarily excusing people without knowing how that would affect the quorum made it an issue worth exploring. But, she noted, the issue might look very different if districts were facing very different problems.

Judge Garcia thought that it would be appropriate for his subcommittee to take the suggestion up, and it was assigned to the Rule 6 subcommittee for further consideration.

C. Requiring Courts to Inform Prosecutors of Their Brady *Obligations (Rule 16)*

Judge Kethledge noted that the third suggestion came from Judge Donald Molloy and lawyer John Siffert. As Professor King explained, they proposed that instead of allowing each district to promulgate a model order as required by the Due Process Protection Act's amendment to Rule 5, the Committee should adopt a uniform order regarding *Brady* obligations and locate it within Rule 16. Page 180 of the agenda book stated their proposed language for the model order.

Professor King noted that the question was whether to assign the proposal to a subcommittee for further consideration, but that the Committee also had another option of putting it on the "study agenda" rather than deciding one way or another at this meeting. She thought it could be helpful to ask the Rules Law Clerk to gather more information about the orders around the country as they are promulgated and then revisit the issue at a future date. Professor Beale added that there likely would not be enough information to revisit it at the November meeting. The timeline would likely be longer to see how everything would play out in local districts and then in the circuits.

Judge Bates added that the language Judge Molloy and Mr. Siffert were proposing was largely drawn from the local rule in the District of Columbia. Judge Bates noted that local rule was the product of a hotly contested multi-year process. And further, the orders required under the Due Process Protection Act are much shorter, and in fact, the District of Columbia was using the shorter orders to comply with the local rule. Some of the additional language in this proposal was drawn from Judge Emmet Sullivan's rule, which no other judge in that district employs.

Judge Bates further observed that if the Committee does consider this issue, it should be very careful to look at the Due Process Protection Act's language. The Act gives responsibility to the Judicial Council in each circuit to promulgate a model order, but then each individual court in the circuit may use the model order as it determines is appropriate. The Act allows for significant discretion and variety. Judge Bates urged care as to whether the Committee has the authority to embark upon a different course than the Act charts.

Judge Kethledge added that there is potentially a conflict between this Committee prescribing an order to be used nationwide and Congress's approach. He recommended putting the proposal on the study agenda for at least one year to see how everything unfolds and to consider further whether the Committee even has the authority to depart from the dispersion of decisionmaking Congress specified in the Act.

D. Suggestion Regarding Closing Arguments (Rule 29.1)

Judge Kethledge moved the discussion to the fourth suggestion, which suggested disallowing the government's rebuttal during closing arguments. Professor King explained that Mr. Ryan Kerzetski submitted the proposal based on a law review article by John Mitchell. The idea is that the defense should have the last word during closing arguments. The prosecution would speak, then the defense, and that would be it. To effectuate the suggestion would require the Committee to amend Rule 29.1 to eliminate subsection (c). Professor King stated her view that this likely did not warrant the Committee's attention at this time, in part because more than half the circuits have held that the government cannot bring up new topics on rebuttal. As a result, there should not be any new arguments the defense would need to rebut. Further, if the government does bring new information, some judges have allowed defendants an opportunity to respond to it.

Judge Bates suggested there was not a clear difference between this proposal and also getting rid of reply briefs and reply arguments on appeal and in civil cases. He did not see it being a viable proposal. Mr. McQuaid observed that given the structure of trials and the burden of proof, there are good reasons to give the government the opportunity to speak at the end and to rebut arguments raised by the defense. He recommended the Committee not pursue this proposal further. Additionally, a member noted that from the perspective of defendants, the proposal is an interesting idea. But she agreed that there are likely other topics on which the Committee should be focusing at this juncture that would also be protective of defendants' rights.

The Committee decided not to have a subcommittee pursue this proposal.

E. Pleas of Not Guilty by Reason of Insanity (Rule 11)

Judge Kethledge turned the Committee's attention to the final new suggestion, which concerned having a provision in the rules about pleading not guilty by reason of insanity (NGRI). Professor King elaborated that the proposal came from Mr. Gerald Gleeson, a lawyer who recently had a case where both the prosecution and the defense agreed that the defendant should be found not guilty by reason of insanity. However, Rule 11 does not provide for this type of plea, though some states do. Professor King reported that the Rules Law Clerk had researched this issue and found that seven circuits have at least implicitly endorsed a different procedure in these cases where both parties agree that an NGRI verdict is warranted but wish to avoid a jury trial. That different procedure is to have a bench trial at which all the facts are stipulated in advance. This satisfies the verdict requirement in the NGRI statute without using the Rule 11 plea procedure. The Federal Judicial Center and the DOJ had no internal training or other materials on this situation

or the procedure. She invited comments as to whether this was a problem warranting an amendment, or if the stipulated bench trial was adequate.

A member stated that the reason Rule 11 does not account for an NGRI verdict is that it would be difficult for defense counsel to meet Rule 11's requirements. The defendant, because of his mental state, may be unable to appreciate his role in the offense or to enter a plea knowingly and voluntarily. Instead, the alternate procedure is based on 18 U.S.C. § 4242, which allows a special verdict of NGRI at a bench trial. The parties can agree to the facts without the defendant's consent, and then the judge can find the verdict. Of course, there are some cases where the defendant is not competent at the time of the crime and then regains some competency. But the member would not support having Rule 11 contain an NGRI plea provision instead of requiring the current statutory procedure.

Mr. Wroblewski noted that the DOJ did look into this. Several lawyers in the criminal chief's working group had experience with this type of case. The workaround procedure of a bench trial on stipulated facts can be a bit cumbersome but is doable. He thought it could be worth exploring the issue further to see if the current alternative is the best way to handle these cases, or whether there might be another option.

Judge Kethledge asked the reporters if they had any thoughts on this proposal from the institutional perspective of the Committee's history. Professor King observed that the Committee's response over the years has been not to meddle with provisions that are not causing problems. To warrant devoting the resources of the Committee to a given issue, there is some burden to show that the status quo is really causing harm in some way. Is this proposal just an interesting question, or is there a problem that needs solving? Professor King further noted that there could be alternatives to a rule amendment that could similarly solve the problem. For example, the Committee has in the past recommended that the Federal Judicial Center add something to the Bench Book.

Professor Beale added that she was more interested in this idea for reasons similar to those Mr. Wroblewski mentioned. The current alternative seems cumbersome. Professor Beale thought there was a possibility of doing something with a negotiated factual basis for a plea while still ensuring the court could be confident that the defendant had sufficient mental competence. She also thought it was unlikely the government would too easily agree to such pleas. The question here is whether this is a high enough priority where an alternative already exists and even has some advantages (such as creating a better record). She noted the issue did not seem urgent.

Judge Kethledge asked whether the Rules Law Clerk could look at this issue empirically to see what was happening across the country in these cases. Professor Beale noted that Mr. Crenny has already done some work on this issue but was primarily focused on appellate cases. She and Judge Kethledge agreed to get a fuller memorandum on the issue for the fall meeting.

Report on the Meeting of the District Judge Representatives to the Judicial Conference

Judge Kethledge noted that Judge Bates presented to the meeting of the district judge representatives following the Judicial Conference meeting in March. Judge Kethledge asked Judge Bates to talk about feedback he received concerning remote proceedings.

Judge Bates explained that he was asked to address the question of further use of remote proceedings once the emergency proceedings used during the pandemic were no longer applicable. He gave them some history of the Committee's view on this issue. His takeaway from that meeting was that there are many judges who have liked the remote proceedings. They are comfortable with it, think it works, and think doing remote proceedings works no diminishment of the defendant's rights. There may be a little disconnect between the Committee's views and those of at least these district judges. Similar views have also been expressed in task forces and other contexts, but he could not say how strong or prevalent these views are. Judge Bates observed that the Committee might receive comments about this when the draft Rule 62 goes out for public comment. He urged that judges should be encouraged to bring these suggestions to the Committee and not to take the issue to Congress or try to accomplish it by some other method.

Judge Kethledge noted that multiple suggestions along these lines have come in over time. They usually come from judges, not litigants, and the Committee has always adamantly opposed them. The Committee is a steward not of judicial convenience but of the transcendent interests that are protected and made real by the criminal rules. Some of those are constitutional interests, or penumbras of constitutional interests, but they are interests critically important to the fairness and accuracy of the most important proceedings in federal court, especially ones where people lose their liberty. Acknowledging that he had personally never sentenced anyone, Judge Kethledge emphasized his view that sentencing is the most solemn procedure in federal court, and it is one of, if not the most, important days in a defendant's life. Often, the defendant's family members are present. The victims have the right to allocute in court, and often do so. Seeing all of this at one time in three dimensions, seeing the body language of the participants, and assessing the sincerity of the defendant during allocution are all part of one the most important decisions district judges make. And that decision is largely insulated from appellate review.

The Committee has held the line on this, but it welcomes suggestions, and more judges have now done remote proceedings and thought they went well. The Committee is here to listen and to consider any suggestions that come in. But institutionally, Judge Kethledge thought it was his duty to explain where the Committee has come down on these issues in the past.

Judge Kethledge thanked everyone for their contributions to the meeting. The meeting was adjourned.